No. 11-3639

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GEORGE McREYNOLDS, et al.,

Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendant-Appellee.

Interlocutory Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division, No. 05 C 6583
The Honorable Robert W. Gettleman, Judge Presiding

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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FED. R. APP. P. AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel of record for *amicus* Chamber of Commerce of the United States of America, hereby furnishes the following information in accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit:

(1) The full name of every party or *amicus* the attorney represents:

Chamber of Commerce of the United States of America.

(2) If such party or *amicus* is a corporation:

(i) Its parent corporation, if any:

None. Chamber of Commerce of the United States of America has no parent corporations.

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party:

None. No publicly held company has any ownership interest in Chamber of Commerce of the United States of America.

(3) The names of all law firms whose partners or associates have appeared for the party or *amicus* in the case or are expected to appear for the party in this Court:

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country.

A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber has filed *amicus* briefs in thousands of cases, including *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), a case at the heart of this matter. The Chamber's briefs have been described as "helpful" and "influential" by courts[1] and commentators.[2]

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[1] *See, e.g.*, *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

[2] David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019, 1026 (2009); *see also id.* (quoting Supreme Court practitioner Carter Phillips: "The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber]").

The Chamber's members operate in nearly every industry and business sector in the United States, and many are subject to Title VII of the Civil Rights Act of 1964, which is a focus of the decision below. The Chamber's members devote extensive resources to developing employment practices and programs designed to ensure compliance with Title VII and other legal requirements. The Chamber's members have an interest in the decision below to ensure that plaintiffs in Title VII class actions meet their burden of satisfying the requirements of Federal Rule of Civil Procedure 23 so that the business community is not subjected to the sort of "Trial by Formula" disapproved by the Supreme Court in *Wal-Mart*, in derogation of defendants' basic rights to due process.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' request for relief from this Court rests on the fundamentally mistaken assertion that the Supreme Court's landmark ruling in *Wal-Mart* somehow suggests that their putative class is now certifiable, when prior to *Wal-Mart* it was not. Plaintiffs' reading of *Wal-Mart* is deeply flawed. Far from supporting certification here, *Wal-Mart* rejected aggregation of precisely the same sorts of diffuse, inherently individualized Title VII claims that Plaintiffs have

[3] This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(b). No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund preparation or submission of this brief. No person, other than *Amicus Curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

brought. Importantly, *Wal-Mart* also involved disparate-impact claims, undermining Plaintiffs' premise that such claims are somehow inherently susceptible to class certification. In fact, like the *Wal-Mart* plaintiffs, Plaintiffs here rely on testimony from Dr. William Bielby, who has candidly admitted to the same flaw that unraveled his "social framework" analysis in *Wal-Mart*—namely, that he could not say whether any employment decision was the result of unlawful discrimination.

Without any way to answer this critical question on a class-wide basis, Plaintiffs cannot carry their burden to show commonality under Rule 23(a). Class certification in such circumstances therefore could not provide the efficiencies that Rule 23 was designed to achieve. Moreover, if a class were certified, the only way to avoid hundreds of mini-trials concerning the individualized circumstances of each employment decision would be to impermissibly alter the underlying substantive law of Title VII or eliminate employers' due process rights to litigate their individualized defenses.

These procedural and constitutional concerns cannot be avoided by allowing Plaintiffs to circumvent the stringent requirements of *Wal-Mart* by resort to the certification of "particular issues" under Rule 23(c)(4). The structure and history of Rule 23(c)(4) demonstrate that it is merely a "housekeeping" provision that provides no independent basis for certification separate and apart from the

requirements of Rule 23(a) and (b). This Court itself has recognized that any division of a class action into separate actions on particular issues under Rule 23(c)(4) "must carve at the joint," because the "right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . and *not reexamined by another finder of fact.*" *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1302-03 (7th Cir. 1995) (emphasis added). Rule 23(c)(4) therefore creates no basis for carving out a purported "common issue" of disparate impact or disparate treatment, which would only have to be reexamined repeatedly in hundreds of follow-on proceedings to determine whether each individual class member was actually the victim of discrimination.

Even setting aside the constitutional concerns with such an approach, the "*in terrorem* character" of such "issue" certification—heightened by the daunting litigation expense of the follow-on actions—would force numerous employers nationwide to settle even dubious claims rather than "bet the company" against classes stitched together by the thinnest of statistics. *E.g.*, *Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 678 (7th Cir. 2009). This Court should decline the invitation to override the District Court's sound exercise of its discretion here and endorse such a dangerous distortion of Rule 23.

Ultimately, Plaintiffs ask this Court to limit *Wal-Mart* to its facts and to circumvent its elucidation of the procedural and constitutional limitations on class certification. But the broad and transcendent principles animated by the Supreme Court's holding in *Wal-Mart* cannot be so easily swept aside. Indeed, the central question resolved in *Wal-Mart*—whether a court may certify class adjudication of inherently individualized employment discrimination claims notwithstanding a defendant's statutory and due process rights to present individual defenses—drives the outcome of this and many similar cases affecting employers across the country, and warrants affirming the denial of certification here.

ARGUMENT

I. *Wal-Mart* Rejected Certification of Disparate-Impact Claims that Provided No Common Basis For Determining Why Each Class Member Had Allegedly Been Disfavored.

In contending that they satisfy Federal Rule of Civil Procedure 23(a), Plaintiffs have premised their claim of commonality on the assertion that they are challenging two policies—Merrill Lynch's teaming and account distribution policies—that purportedly applied to all class members and caused a racially disparate discriminatory impact. Br. at 25, 31-32. However, Plaintiffs merely pay lip service to *Wal-Mart*'s articulation of the commonality requirement—the need for class claims to "depend upon a common contention . . . of such a nature that it is capable of class-wide resolution—which means that determination of its truth or

falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. Plaintiffs recite this standard but do not meaningfully apply it, and instead attempt unsuccessfully to water it down by pronouncing it satisfied simply because they have challenged discernible corporate policies. Contrary to Plaintiffs' suggestion, commonality under *Wal-Mart* is *not* automatically satisfied for a Title VII disparate-impact claim just because Plaintiffs challenge some umbrella policy under which statistical disparities amongst racial groups allegedly existed. Rather, where that "policy" is implemented through the individualized discretion of thousands of decision-makers, *Wal-Mart* holds that commonality is lacking. This is because without a "specific" policy that actually applies to all class members *uniformly* (as opposed to just applying to them in a general sense, with the actual, material application dictated by discretionary decision-making of thousands of actors), there can be no "common answer" to the crucial question of why any particular employee was actually disfavored. "Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." *Id.*[4]

[4] As one court has aptly recognized in rejecting a similar attempt to distinguish *Wal-Mart*:

[Footnote continued on next page]

A. *Wal-Mart* Requires a "Rigorous Analysis" of Plaintiffs' Disparate-Impact Claims to Determine Whether They Identify a "Uniform" and "Specific" Employment Practice.

Rather than accepting plaintiffs' characterization of their claims at face value, the Supreme Court in *Wal-Mart* conducted a "rigorous analysis" to ensure that the prerequisites of Rule 23(a) were actually satisfied. *Id.* at 2551-52. "Rigorous analysis" at class certification has long been required, and the Ninth Circuit even purported to undertake such an analysis in its now-reversed en banc opinion in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 597-98 (9th Cir. 2010) (en banc), demonstrating that some lower courts' pre-*Wal-Mart* analysis was actually not so rigorous at all. But the Supreme Court's opinion in *Wal-Mart* brings into sharper relief and clarifies what the requisite "rigorous analysis" actually entails, because the Court probed behind the plaintiffs' allegations and

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[Footnote continued from previous page]

> [T]his argument misconstrues the role of Supreme Court precedent in our three tier system of federal jurisprudence. . . . [U]nder this system, lower courts are obligated to follow both the narrow holding announced by the Supreme Court as well as the rule applied by the Court in reaching its holding. Indeed, our system of precedent or stare decisis is . . . based on adherence to both the reasoning and result of a case, and not simply the result alone. . . . [T]he Court is bound to apply both the narrow holdings of *Dukes* as well as the reasoning, analysis, and legal rules applied in reaching its result.

Rodriguez v. Nat'l City Bank, --- F.R.D. ----, 2011 WL 4018028, at *5-6 (E.D. Pa. Sept. 8, 2011) (internal citations and quotation marks omitted).

characterizations of the record to ensure that the evidence demonstrated that "the prerequisites of Rule 23" have *actually*, and not just *presumably*, been satisfied. 131 S. Ct. at 2551 (quoting *Gen. Tel. Co.* v. *Falcon*, 457 U.S. 147, 160-61 (1982)). Under this "rigorous analysis," the inquiry into the requisite "proof of commonality" necessarily overlaps with the merits of plaintiffs' Title VII claims—the "crux" of which is "the *reason* for a particular employment decision." *Id.* at 2552 (emphasis added). Therefore, when plaintiffs seek to certify a class challenging myriad different employment decisions, "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.*

Under this rigorous analysis, plaintiffs cannot prove commonality simply by pointing to a company-wide policy, and then claiming it is a "common" question whether that policy led to a disparate impact. Rather, to carry their burden under Rule 23(a), plaintiffs must point to a policy that is sufficiently "uniform" and "specific" in its application as to provide the "glue" needed to hold their claims together, and to explain, in "one stroke," why "all members of the class" were allegedly disfavored. *Id.* at 2552, 2554-56. The requirement of such a "specific" policy flows from long-standing Title VII precedent, under which merely proving a "racial disparity is not enough" to establish a disparate-impact claim. *Id.* at 2555

(citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)). A "plaintiff establishes a prima facie disparate-impact claim by showing that the employer uses a *particular* employment practice that *causes* a disparate impact on one of the prohibited bases." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2197 (2010) (internal quotation marks omitted) (emphasis altered); *accord* 42 U.S.C. § 2000e-2; *Watson*, 487 U.S. at 986 (a plaintiff's burden includes showing statistical disparities and a specific employment practice). The Supreme Court has thus held plaintiffs "responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove*, 490 U.S. at 656, *superseded on other grounds by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (emphasis added) (quoting *Watson*, 487 U.S. at 994); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (codifying standard). And this Court has stated that "to bring a disparate impact claim, a plaintiff must show that she was personally injured by *the defendant's alleged discriminatory practice*." *Farrell v. Butler Univ.*, 421 F.3d 609, 617 (7th Cir. 2005) (emphasis added). "That is all the more necessary when a class of plaintiffs is sought to be certified." *Wal-Mart*, 131 S. Ct. at 2555.

B. *Wal-Mart* Precludes Class Certification of Disparate-Impact Claims that Challenge the Discretion of Thousands of Individual Decision-Makers Nationwide.

Neither of the policies that Plaintiffs challenge here remotely constitutes the "specific" and "uniform employment practice that would provide the commonality" needed to adjudicate their discrimination claims on a class-wide basis under *Wal-Mart*. *Id.* at 2554. To contend otherwise is to ask this Court to disregard *Wal-Mart*'s holdings and rationale. Even though it could be said as a general matter that the challenged policies themselves "*operate[d]* uniformly," *id.* at 2563 (Ginsburg, J., dissenting) (emphasis added), the fatal flaw in Plaintiffs' attempt at proving commonality is that, just as in *Wal-Mart*, neither of the challenged policies "uniform[ly]" *applied* to all employees. *See id.* at 2554 (distinguishing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971), where "all petitioners" were employed at a single facility and subjected to "aptitude tests" and education requirements that produced a disparate impact along racial lines).

Here, just as in *Wal-Mart*, the policies Plaintiffs challenge depend on the discretionary decision-making of thousands of individuals across the country, including Plaintiffs themselves and their supervisors, as well as the choices of Plaintiffs' actual and prospective customers. As to Merrill Lynch's policy of conferring benefits on "teams" of brokers who share commissions, the record reflects that financial advisors decide for themselves whether to "team" based on

highly individualized criteria (including such clearly race-neutral criteria as each other's performance), and managers have discretion to implement Merrill Lynch's race-neutral teaming guidelines in different ways. *See, e.g.*, A3-4; A20-21; A33. Similarly, as to account distributions, the impact as to any given financial advisor will depend on performance (including clients attracted and retained), whether the financial advisor elected to participate in distributions in general or to accept a particular distribution, and it will also depend on the discretion of local managers to depart from the distribution policy based on numerous factors. *See, e.g.*, A3-4; A20-21; A33.

Therefore, it is unavailing for Plaintiffs to protest that the challenged policy in *Wal-Mart* was merely that of "delegating discretion for subjective pay and promotion decisions to individual supervisors." Br. at 31 (citing *Wal-Mart*, 131 S. Ct. at 2554-56). That is no distinction at all. The discretion upon which the teaming and account distribution policies depend means that these policies are no more "uniform" in their application than the compensation and promotion policies in *Wal-Mart*, and no more able to uniformly explain the "*reasons*" for the employment decisions that constitute the "crux" of all "Title VII claim[s]." 131 S. Ct. at 2552 (emphasis added); *see also, e.g.*, *Wards Cove*, 490 U.S. at 660 (noting the plaintiff in a disparate-impact case "must prove that it was '*because of* such

individual's race, color,' etc., that he was denied a desired employment opportunity") (citing 42 U.S.C. § 2000e-2(a)) (emphasis added).

In precisely such situations, *Wal-Mart* held that "demonstrating the invalidity of one [individual's] use of discretion will do nothing to demonstrate the invalidity of another's." 131 S. Ct. at 2554. That impossibility of extrapolation is equally apparent here—there is simply no basis to infer that if a single financial advisor was excluded from a team or account on the basis of race, then each and every other decision adversely affecting a putative class member was similarly driven by race. Indeed, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action." *Falcon*, 457 U.S. at 159. Millions of discretionary decisions by tens of thousands of individual actors constitute the antithesis of a common policy that affects everyone in the same manner, and cannot bridge the "wide gap" between (1) plaintiff's own claim of discrimination, and (2) the existence of a class of persons who have suffered the same injury. *Wal-Mart*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 157). And Plaintiffs' expert testimony suffers from *precisely* the same defect as in *Wal-Mart*, as Dr. Bielby has again conceded that he could not say whether any particular class member was the victim of discrimination. *Id.* at 2554-55; D309-5 at 101, 104-105, 135-136.

This defect means that Plaintiffs cannot satisfy Rule 23(a), for they have identified no "common contention" that "in one stroke" can "resolve an issue that is central to the validity of each one of [their] claims"—*i.e.*, the *reason* for each employment decision that they challenge. *Wal-Mart*, 131 S. Ct. at 2551.[5]

II. Certification In These Circumstances Would Improperly Alter The Underlying Substantive Law and Violate Employers' Basic Constitutional Rights to Due Process.

Certifying Plaintiffs' class would raise a host of serious constitutional and other concerns, separate and apart from Rule 23. Because Plaintiffs lack any "common evidence" to support extrapolating from the individual experiences of their handful of declarants, any trial based on representative testimony would amount to an impermissible "Trial by Formula" that would "abridge" employers' rights and alter the underlying substantive law in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b). It would also impermissibly abridge employers' due process right to litigate individualized defenses. *Wal-Mart*, 131 S. Ct. at 2559-61.

[5] It follows that Plaintiffs also cannot satisfy predominance under Rule 23(b)(3), which is even "more stringent" and "far more demanding" than Rule 23(a)'s commonality analysis. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). Moreover, the Chamber agrees with Merrill Lynch (and the District Court) that Plaintiffs cannot satisfy Rule 23(b)(2) because their proposed class is insufficiently cohesive, and because their demand for compensatory and punitive damages is not incidental to the requested injunctive relief. *Wal-Mart*, 131 S. Ct. at 2557-61.

A. Plaintiffs May Not Use Rule 23 to Alter Substantive Law by Engrafting a "Structural Theory" of Discrimination onto Title VII and Recovering Under Such a Hitherto Unprecedented Theory.

Because certification here would require glossing over numerous individualized inquiries concerning whether any particular employment practice actually discriminated against any particular employee, it would necessarily and fundamentally alter Title VII, in contravention of the bedrock principle that "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart*, 131 S. Ct. at 2256 (quoting 28 U.S.C. § 2072(b)).

In seeking to certify a class based solely on the notion that a "policy of discretion has produced an overall . . . disparity," *Wal-Mart*, 131 S. Ct. at 2256, without any method of determining whether the alleged disparity was *caused* by anything in particular, Plaintiffs ultimately do not challenge *any* specific employment practice, as Title VII jurisprudence has long required in disparate-impact cases. *See supra* part I.B. Rather, Plaintiffs advance a "structural theory" of discrimination that Title VII is neither designed, nor well-equipped, to address. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Anti-Discrimination Law*, 94 Calif. L. Rev. 1, 13-14 (2006). "[A] Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial imbalance in the workforce." *Wards Cove*, 490 U.S. at 657.

Plaintiffs' suggestion that liability can be premised solely on aggregated disparities, if accepted, would require employers to treat people differently despite the absence of any previous departures from legal requirements. That is contrary to Congress's express directive in Title VII that "[p]referential treatment" is "not to be granted on account of [an] existing number or percentage imbalance." 42 U.S.C. § 2000e-2(j). It is also contrary to *Wal-Mart*, 131 S. Ct. at 2555-56, and numerous Supreme Court precedents disapproving such an approach. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2674-75 (2009); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729-33 (2007) (plurality); *Watson*, 487 U.S. at 992.

Rule 23 provides no basis for altering Title VII in this manner, stripping away the "safeguards against the result that Congress clearly said it did not intend"—that is, the safeguard of requiring disparate-impact claimants to identify the "specific" employment practice they are challenging. *Watson*, 487 U.S. at 992; *see also, e.g.*, *Wal-Mart*, 131 S. Ct. at 2256; *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008) (class action procedures are "not a one-way ratchet, empowering a judge to conform the law to the proof"). To do so would "abridge" employers' substantive rights, 28 U.S.C. § 2072(b), and would "result in employers being potentially liable for 'the myriad of innocent causes that may lead

to statistical imbalances in the composition of their work forces.'" *Wards Cove*, 490 U.S. at 657 (quoting *Watson*, 487 U.S. at 992).

B. Employers Should Not Be Subjected to Trial by Formula.

Certifying classes such as Plaintiffs' would also lead inevitably to the violation of employers' basic rights under the Due Process Clause. U.S. Const. amend. XIV, cl. 1. Eliminating or altering a substantive element of the plaintiff's claim in order to further procedural goals violates due process. *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 184 (3d Cir. 2009). But that is precisely what certification of Plaintiffs' putative nationwide class would do, by relieving Plaintiffs of their burden under Title VII to prove causation and to challenge a specific employment practice. *See supra* part II.A.

Moreover, as the Supreme Court unanimously explained in *Wal-Mart*, defendants are "entitled to individualized determinations," as a matter of due process and otherwise when the substantive law calls for it, and therefore "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate" its defenses under Title VII, including the defense that the employer took an adverse employment action against a particular plaintiff "for any reason other than discrimination." 131 S. Ct. at 2560-61 (citing 42 U.S.C. § 2000e-5(g)(2)(A)). That is why the Supreme Court unanimously "disapprove[d]" of "novel project[s]" that would replace the requisite "individualized" determinations with "Trial by

Formula." *Id.* at 2561. Yet that is precisely what would occur here if Plaintiffs' class were certified solely on aggregate statistics and anecdotal testimony from which there is no meaningful way to extrapolate.[6]

Employers have a due process right not to be subjected to such proceedings. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 131 S. Ct. at 2550 (citation and quotation marks omitted). Even prior to *Wal-Mart*, the Supreme Court had outlined the contours of the due process limitations to that "exception"—contours that would be transgressed if polyglot classes like Plaintiffs' were certified. First, in *Richards v. Jefferson County*, 517 U.S. 793 (1996), the Court explained that "extreme applications" of representative actions are "inconsistent with a federal right that is fundamental in character," and emphasized the "deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 797-98.

Similarly, in *Taylor v. Sturgell*, 553 U.S. 880 (2008), the Court held that "due process limitations" require that "representative suits" rest on actual and

[6] Plaintiffs essentially concede as much, as they premise their request for certification on Rule 23(c)(4) and the prospect of individualized follow-on proceedings to determine causation and damages. Br. at 37. As discussed below, however, this solution is illusory as "issue certification" is impermissible here.

direct representation of one party by another, not merely representation that is "close enough." *Taylor* also emphasized that the "procedural protections prescribed in . . . Rule 23 [are] grounded in due process," and rejected attempts to "circumvent[]" them. *Id.* at 891, 894, 898, 901. More recently, in *Smith v. Bayer*, 131 S. Ct. 2368, 2380 (2011), the Court echoed *Taylor* and emphasized the representative character of "properly conducted" class actions, which require compliance with "Rule 23's protections."

These principles apply with equal force to defendants deprived of their day in court. *See McLaughlin*, 522 F.3d at 232 (eliminating "the right of defendants to challenge the allegations of individual plaintiffs . . . result[s] in a due process violation"); *In re Fibreboard Corp.*, 893 F.2d 706, 709-10 (5th Cir. 1990) (expressing "profound disquiet" "that due process would be denied" to defendants by their "loss of one-to-one engagement" with differently situated class members); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) ("[W]e must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation."); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 334 (4th Cir. 1998) (class action "deprived defendants of a fair trial"). Indeed, courts have long recognized that defendants have a due process "right to litigate the issues raised," which includes the right "to present every available defense." *United States v. Armour & Co.*, 402 U.S. 673, 682

(1971); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *see also Wal-Mart*, 131 S. Ct. at 2560-61.

Class certification of claims like Plaintiffs' would eviscerate these rights for countless employers nationwide, particularly in cases where employment decisions are made by numerous actors spread across the country. The right to contest whether any particular employment decision was caused by discrimination is a bedrock principle of Title VII, *e.g.*, *Wal-Mart*, 131 S. Ct. at 2560-61, but adequately affording defendants a fair opportunity, consistent with due process, to do so is impossible on the basis of statistics alone. An employer's "right to raise any individual . . . defenses it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons'" must necessarily encompass the right to put on testimony from the individual decision-makers. *Id.* at 2561 (quoting *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977)). But a class-wide adjudication in cases like this one would prevent employers from doing so and instead force them to "defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard*, 155 F.3d at 345. Denying employers a meaningful defense in this way violates the Due Process Clause.

III. Rule 23(c)(4) Does Not Solve the Due Process Problems or Create A Permissible Means of Circumventing Rule 23's Commonality and Predominance Requirements.

Plaintiffs attempt to avoid these intractable due process problems by having it both ways, contending that class certification of certain "issues" can be coupled with individualized proceedings pursuant to Rule 23(c)(4). But Plaintiffs are wrong that "issue certification [under Rule 23(c)(4)] is proper even if the action as a whole could not meet the requirements of Rule 23." Br. at 34 (citation omitted). If Plaintiffs were correct, it would be difficult to imagine any remotely colorable request for certification that could not, with a modicum of creativity, turn Rule 23(c)(4) into the tail that wags the dog of Rule 23(a) and (b). The Supreme Court has significantly reined in such "judicial inventiveness" that essentially "rewrite[s]" the Federal Rules of Civil Procedure, *see Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832-33, 858 (1999); *Amchem*, 521 U.S. at 620, and it is impossible to reconcile the "rigorous analysis" required by *Wal-Mart*, 131 S. Ct. at 2551-52, with the essentially automatic certification that would, in the large run of cases, result from Plaintiffs' interpretation. This Court should decline to construe this subsection (c)(4) in a way that would undermine the carefully constructed structure of Rule 23 and raise a host of constitutional and other concerns. And this is particularly true here because, as explained above, Plaintiffs fail to establish even a single "common" issue under *Wal-Mart* for purposes of Rule 23(a), so it is unclear

what "particular issue" could possibly exist for purposes of (c)(4). It is also unclear what efficiency could be realized through class-wide adjudication of an *uncommon* issue, which at best would have to be revisited in the subsequent follow-on actions. What is clear though, is that (c)(4) certification would create the "*in terrorem*" effect of many class actions, heightened by the additional expense of numerous individualized proceedings. *E.g.*, *Kohen*, 571 F.3d at 678.

A. Rule 23(c)(4) Does Not Provide An Independent Basis for Class Certification.

The very structure of Rule 23 demonstrates that subsection (c)(4) was never intended to (and does not) allow an end-run around Rule 23's commonality and predominance requirements. To certify a class action, "the party seeking certification must demonstrate, *first*, that [Rule 23(a)'s requirements are met]," and "*[s]econd*, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Wal-Mart*, 131 S. Ct. at 2548 (emphases added); *see also Ortiz*, 527 U.S. at 832-33; *Amchem*, 521 U.S. at 613-14. Rule 23's structure begins with subsection (a), titled "Prerequisites," and subsection (b), titled "Types of Class Actions." The rule states that "[a] class action may be maintained *if* Rule 23(a) is satisfied *and if*" (b)(1), (2), or (3) is met. Fed R. Civ. P. 23(b) (emphases added).

Nothing in subsection (c) suggests that it functions as an independent basis for certification separate and apart from the requirements of subsection (a) and (b).

Subsection (c) has the pedestrian and unremarkable title of "Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses." Similarly, nothing in the drafting history of subsection (c) suggests that the advisory committee intended to create a freestanding means of "issue certification." *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 758 (2003). Nor is there any pre-Rule 23 historical analogue to issue certification, the absence of which is telling—"the Committee was consciously retrospective with intent to codify pre-Rule categories [of class actions]," besides (b)(3) certification, which was a new innovation. *Ortiz*, 527 U.S. at 842.[7] Indeed, as one Committee member aptly explained, Rule 23(c)(4) was an "obvious *corollary*" to the Rule 23(b)(3) action, but necessary to "confirm the power to bifurcate a class action between common and individual issues." Hines, *supra*, at 757 (emphasis added) (citation omitted). One of the Committee's most prominent members, Charles Allen Wright, expressed his reluctance at including this provision, declaring it a "'picky detail which does not require statement in the rule.'" *Id.* at 758 (citation omitted). Therefore, as the Fifth Circuit has aptly recognized, it is clear that Rule 23(c)(4) is merely a "housekeeping rule that allows courts to sever

[7] *See also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 386 (1967).

. . . common issues for a class trial." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745-46 n.21 (5th Cir. 1996). Consequently, "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)." *Id.*

The Supreme Court has repeatedly repudiated attempts at eviscerating the "vital prescription" of Rule 23's commonality and predominance requirements, which "assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623. In *Amchem*, the Court rejected plaintiffs' attempt at circumventing Rule 23(b)(3) by using Rule 23(e) (which deals with class settlement), because doing so would "strip[]" the predominance requirement "of any meaning." *Id*. Similarly, *Wal-Mart* makes clear that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" 131 S. Ct. at 2551. *Wal-Mart* would be significantly undermined if plaintiffs were allowed to identify a discrete question that fails to otherwise meet the requirements of Rule 23 and certify an "issue class" under Rule 23(c)(4). Indeed, *Wal-Mart* itself commented that "any competently crafted class complaint literally raises common 'questions,'" which can be raised "in droves." *Id.*

Plaintiffs rely to no avail on this Court's opinion in *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004), and the Second Circuit's opinion in *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006), for the proposition that a class that otherwise fails to meet the core predominance

requirements of Rule 23(b) may supposedly be certified under Rule 23(c)(4). Br. at 34. Neither case supports such a fallacious notion. *Carnegie* simply explained that certain *manageability* concerns might be redressed by deciding in a (c)(4) proceeding whether the defendant had violated RICO through a scheme to defraud, while leaving individualized issues for subsequent trials. 376 F.3d at 661. The *Carnegie* defendants were "precluded by the doctrine of judicial estoppel" from raising a predominance argument. *Id.* at 659.

Likewise, the Second Circuit in *Nassau* presupposed the existence of a common issue that satisfied Rule 23(a) (which is lacking here), and *Nassau* is no longer good law for the proposition that (b)(3) could be circumvented by (c)(4) (to the extent it ever was). 461 F.3d at 226-27.[8] In fact, in *McLaughlin*, 522 F.3d at 222, the Second Circuit subsequently and correctly backed away from any such suggestion in *Nassau*, as it refused to certify the "issue" proposed by the plaintiffs,

[8] *Nassau* relied upon a prior version of Rule 23(c)(4), which stated that a class action could be brought "with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly." *Nassau* interpreted "then be construed and applied accordingly" to mean that the Rule 23(c)(4) class could be certified *first*, without the court engaging in any analysis under Rule 23(b). After the 2007 amendments, the Rule no longer includes the "and . . . then" language on which *Nassau* relied.

holding that it "would not materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages." 522 F.3d at 234.[9]

Therefore, Plaintiffs cite no authority for the proposition that the Rule 23 problems inherent in a case like this one—which also lacks a "common" issue that could "materially advance the litigation"—can be solved by a (c)(4) issue class. The plain language and structure of Rule 23 strongly suggest otherwise.

B. Certification of "Issues" Would Violate the Seventh Amendment and Article III.

Even apart from contravening the plain text and structure of Rule 23, Plaintiffs' proposed "issue classes" raise a number of constitutional concerns in a case of this sort. As discussed above, Rule 23 operates against the backdrop of the due process precept that everyone is entitled to his day in court. In particular, this includes the Seventh Amendment guarantee to litigants of the right to have factual questions decided by a single jury—a right that would be vitiated by trying one element of a claim before one jury and related issues of liability before another. Where, as here, the questions in the case are "interwoven," they must be tried at once, *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931),

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[9] Plaintiffs also rely on *Allen v. International Truck & Engine Corporation*, 358 F.3d 469 (7th Cir. 2004). Br. at 35. *Allen* similarly fails to support Plaintiffs' novel reading of (c)(4), given that this Court held that certification was proper under Rule 23(a) and (b)(2). 358 F.3d at 472.

because, as this Court has recognized, "[t]he right to a jury trial in federal civil cases . . . is a right to have juriable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact," *Rhone-Poulenc*, 51 F.3d at 1303; U.S. Const. amend. VII.

Applying these principles, this Court reversed the grant of class certification in *Rhone-Poulenc*, as did the Fifth Circuit in *Castano*, because, even though a jury could decide one element of liability (whether the defendants' conduct was negligent), subsequent juries would have to decide other requisite elements of liability (comparative negligence and proximate causation), which would require a reexamination of the original negligence verdict. *Rhone-Poulenc*, 51 F.3d at 1303; *Castano*, 84 F.3d at 751. "Comparative negligence, by definition, requires a comparison between the defendant's and the plaintiff's conduct." *Castano*, 84 F.3d at 751. Thus, "[a] second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff," even though the first jury determined that the defendant was negligent. *Id.* at 751. The severed issues did not "carve at the joint." *Rhone-Poulenc*, 51 F.3d at 1302.

The threat of unconstitutional reexamination is as pervasive here as it was in *Rhone-Poulenc* and *Castano* because liability under Title VII is interwoven with the employer's individual and affirmative defenses. Even assuming, *arguendo*,

that Plaintiffs could prove in a (c)(4) proceeding that a "specific" and "uniform" employment practice had a racially discriminatory disparate impact, juries in subsequent proceedings would have to determine whether each individual employee experienced an adverse employment action *because of* that practice, and not by virtue of some other non-racially-discriminatory reason. *See Wal-Mart*, 131 S. Ct. at 2560. This latter determination is a component of determining both the amount of damages *and* the question of liability, because there can be no liability under Title VII "if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination." *Id.* at 2560-61 (citing 42 U.S.C. § 2000e-5(g)(2)(A)). But to determine causation, the hypothetical second jury would necessarily have to take into account the nature, scope, and probable impact of the allegedly discriminatory practice—precisely the same inquiry that had already been examined by the first jury. The question whether a policy had a "disparate impact" does not "carve at the joint" from the question whether such an impact adversely affected an employee. *Rhone-Poulenc*, 51 F.3d at 1302. Particularly in the context of subjective employment decisions contingent on the discretion of numerous actors, including employees themselves, the second jury could not avoid a "comparison" between the defendant's and the plaintiff's conduct that would necessarily require it to "reevaluate the defendant's

fault," in violation of the Seventh Amendment. *Id.* at 1303; *Castano*, 84 F.3d at 751.[10]

Certification of subsidiary questions would also violate Article III because an "issue class" provides no guarantee that absent class members have Article III standing. If a court certifies a narrow "issue" for certification, such as whether employment practices are "justified by business necessity," there is no guarantee

[10] Contrary to Plaintiffs' suggestion, this Court has never allowed certification of a (c)(4) "issue" that was so inextricably intertwined with the issues to be considered in the follow-on proceedings, as here. Importantly, none of the prior cases involved disparate-impact claims, let alone claims premised on a supposed common ability to sort through and explain the impacts of thousands of individual decision-makers nationwide. *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005), merely suggested (in dicta) that a single hearing might address the predominating question whether the employer affirmatively "decided" to adopt a "policy" of harassing employees eligible for severance packages in violation of ERISA. *Id.* at 508. Presumably, the hypothetical "issue" proceeding in *Allstate* would not have relied on aggregate statistical proof purporting to show a generalized disparate impact resulting from thousands of discretionary decisions, the contours of which would have to be reexamined in individual proceedings. Similarly, in *Carnegie*, 376 F.3d at 662-63, the Court merely stated (again in dicta) that "[t]he question whether RICO was violated" through the mere existence of a scheme to defraud in violation of the mail- and wire-fraud statutes "*can be separated* from the question whether particular intended victims were injured." (Emphasis added). Finally, *Mejdrech v. Met-Coil Systems Corporation*, 319 F.3d 910, 911-12 (7th Cir. 2003), was a mass-tort case where the Court determined that "the two questions that the judge . . . set for class treatment—whether there was unlawful contamination and what the geographical scope of the contamination was—[were] not especially complex" and were easily severable from the individual follow-up issues, such as "whether the class member gets his water from Lake Michigan or from a well."

that the class members actually "have suffered an 'injury in fact'" that could be "'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). They certainly have not "*all* suffered a constitutional or statutory violation warranting some relief." *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (emphasis added). Resolution of discrete issues regarding company-wide employment practices would not "*resolve*" any aspect of plaintiffs' claims "in one stroke," *Wal-Mart*, 131 S. Ct. at 2551, nor could it redress their alleged injuries. A decision by the Court on the policies at issue in the abstract would therefore run afoul of the rule against advisory opinions, which "confines federal courts to the role assigned them by Article III." *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

In short, Plaintiffs' proposed "issue class" should be rejected because it violates not only Rule 23 but also the Seventh Amendment and Article III. At a minimum, the doctrine of constitutional avoidance strongly militates in favor of rejecting Plaintiffs' reading of Rule 23(c)(4). *See Ortiz*, 527 U.S. at 842, 845-46 (construing Rule 23 in a way that "avoids serious constitutional concerns").

CONCLUSION

Employers nationwide would suffer serious violations of their constitutional rights if classes such as the one proposed by Plaintiffs and soundly rejected by the District Court were certified. The Supreme Court's on-point holding in *Wal-Mart*,

which also involved disparate-impact claims, makes clear that neither Rule 23 nor fundamental principles of due process allow the kind of aggregate proceedings suggested by Plaintiffs, contrary to their illogical, watered-down reading of the Court's opinion.

Respectfully submitted this 29th day of December, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned attorney hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(c), that the foregoing Brief for Chamber of Commerce of the United States of America as Amicus Curiae contains 6,991 words, excluding those sections excluded by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) as modified by Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Alexander K. Mircheff
Alexander K. Mircheff

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2011, I electronically filed the foregoing Motion with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on all participants in the case that are registered CM/ECF users. The following counsel will be served via email on today's date:

Jared R. Friedman, WEIL, GOTSHALL & MANGES LLP

December 29, 2011

/s/ Alexander K. Mircheff
Alexander K. Mircheff

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-3639

Short Caption: George v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gibson, Dunn & Crutcher LLP

National Chamber Litigation Center, Inc. (for Chamber of Commerce of the United States of America)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Theodore J. Boutrous Jr. Date: December 29, 2011

Attorney's Printed Name: Theodore J. Boutrous Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: /s/ Julian W. Poon Date: December 29, 2011

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Attorney's Signature: /s/ Alexander K. Mircheff Date: December 29, 2011

Attorney's Printed Name: Alexander K. Mircheff

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Robin S. Conrad Date: December 29, 2011

Attorney's Printed Name: Robin S. Conrad

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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rev. 01/08 AK

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-3639

Short Caption: George v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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None

Attorney's Signature: /s/ Shane B. Kawka Date: December 29, 2011

Attorney's Printed Name: Shane B. Kawka

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Attorney's Signature: /s/ Kate Comerford Todd Date: December 29, 2011

Attorney's Printed Name: Kate Comerford Todd

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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