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No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") respectfully submits this brief as *amicus curiae*. AAJ is a voluntary national bar association whose members represent plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to AAJ members and to the public. AAJ members routinely represent large numbers of persons in federal courts, including in class actions in general and in civil rights class actions in particular. AAJ members have an abiding interest in the interpretation of the Federal Rules of Civil Procedure and participate in the rulemaking processes of the Judicial Conference.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like government in general, the Federal Rules of Civil Procedure, and in particular Rule 23, need "a little play in the joints"[2] if they are to meet the needs of modern litigation. That flexibility is built into the rules, with Rule 1 admonishing that they be construed to provide "just, speedy, and inexpensive" adjudications, and is reflected in the deference trial

[1] Letters of consent from the parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). (Holmes, J., for the court)

courts traditionally have been accorded in administering class actions. This court should assure that trial judges have the breathing room they need to make the system work.

No issue of Wal-Mart's liability is before the court. Wal-Mart conflates questions of whether it is liable with questions about how it is appropriate to adjudicate whether it is liable. This Court was clear in *General Telephone Co. of Southwest v. Falcon* that those inquiries are distinct. They must remain so.

The questions presented deal with how to adjudicate whether Wal-Mart is liable. The question certified for class adjudication is whether Wal-Mart's behavior—not the behavior of particular agents in particular locations—violates substantive law. Wal-Mart repeatedly refers to its size and de-centralized decisionmaking as reasons why *none* of plaintiffs' allegations can be adjudicated in one proceeding. But as big as Wal-Mart is, it is one entity, responsible for the actions of its collective parts. The allegations before the court are not, as Wal-Mart apparently wishes they were, that the fingers and toes of a juridical person misbehaved; they are that the juridical person, itself, misbehaved. Establishing, on a classwide basis, whether Wal-Mart acted in one discriminatory manner is a speedier, less expensive, and more just way to adjudicate the issue than determining that question in 500,000 individual adjudications, which would be cost-prohibitive and effectively exculpatory. If the civil justice system is to perform its constitutional role of providing quiescence by resolving disputes peaceably, the size and complexity of a juridical person cannot preclude adjudicating claims that it behaved badly.

Rule 23 traditionally has been interpreted to afford trial courts great flexibility in deciding whether and how to adjudicate claims on a classwide basis. That kind of flexibility recently has been endorsed by bench, bar, and the academy as a key factor in successful administration of the rules in general. The Advisory Committee on Civil Rules last year undertook a major retrospective on the rules. One clear lesson is that informed judges need great discretion to administer cases like this one. This Court should be slow to interfere, at this preliminary stage of adjudication, with the considered rulings of a trial judge charged with overseeing this litigation. The class certification here is a reasoned response to a knotty problem of providing justice to both a large entity assertedly guilty of misconduct and the large number of persons who make the assertion.

ARGUMENT

I. THE QUESTION OF WHETHER WAL-MART EMPLOYS A SINGLE SET OF CORPORATE WIDE DISCRIMINATORY POLICIES IS APPROPRIATELY ADJUDICATED ON A CLASSWIDE BASIS

The lower courts endorsed determining, on a classwide basis, "whether Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts)" that discriminated against them. Pet. App. 78a (emphasis in original). That question is singularly appropriate for class adjudication, resolving a dispute about whether one entity employs one policy that affects all employees in a prohibited manner.

Wal-Mart colorfully asserts that evidence supporting this determination does not bridge the "*Falcon* gap," noting that this court's decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982) held:

> that a plaintiff can potentially bridge the gap between individual and representative claims, and secure authorization to proceed on behalf of absent persons, by adducing "[s]ignificant proof that an employer operated under a general policy of discrimination" that was implemented through "entirely subjective decisionmaking processes" in a manner that affected all class members. *Falcon*, 457 U.S. at 159 n.15.

Pet'r's Br. 19. That is not quite an accurate description of either the particular statement or the overall rationale in *Falcon*. Material elided from the statement is telling. The complete language is:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class *of both applicants and employees* if the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as* through entirely subjective decisionmaking processes.

Falcon, 457 U.S. at 159 n.15 (emphases added).

The elided language illustrates two key points. First, subjective decisionmaking is merely an

example of one way a "general policy" of discrimination can be manifested, not a limitation on how it might be manifested. It certainly is not the evidentiary requirement Wal-Mart attempts to make it. Second, the Court is addressing primarily substantive law, and not standards under Rule 23. The elided language makes clear that the statement addresses the question on which certiorari was granted: "whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment." *Id.* at 155. The sentence to which the footnote is appended reads: "We find nothing *in the statute* to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159 (emphasis added). *Falcon* finds, as a matter of substantive law, that the claim of an employee denied promotion is different from the claim of a person denied employment. That is the *Falcon* "gap":

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. at 157.

The Court holds that, for purposes of Rule 23, the claim of denied promotion is not typical of the claim of denied employment *unless* "the discrimination manifested itself in hiring and promotion practices in the same general fashion." *Id.* at 159 n.15. *See Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867, 877 (1984) ("Falcon thus holds that the existence of a valid individual claim does not necessarily warrant the conclusion that the individual plaintiff may successfully maintain a class action.")

The court's "significant proof" statement was speculation about what might be required to establish how present employees might show that their claims were typical of, and had commonality with, persons denied employment. That issue is not present in this case, as persons denied employment are not part of the class certified here.[3] The Court made clear that "significant proof" is not a generally applicable evidentiary requirement for class certification: "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, at 160. The court made no specific evidentiary demand of the lower courts. Reversal was based on a methodological failure, not an evidentiary one, the district court's "failure to evaluate carefully the legitimacy of the named plaintiff's *plea* that he is a proper class

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[3] The Ninth Circuit remanded for consideration of whether former employees at the time the complaint was filed could be certified in a 23b(3) class. Pet. App. 118a.

representative under Rule 23(a)," *Id*. at 148 (emphasis added), and its failure to provide "rigorous *analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Id*. at 161 (emphasis added). The Court in *Falcon* noted that factual and legal issues related to the merits often are enmeshed with those related to class certification, but it did not collapse Rule 23 into a determination on the merits. With its acknowledgement of the "flexibility" trial courts necessarily are accorded in certifying classes and its refusal to judge those certifications "by hindsight," after trial evidence had been taken, it made clear that it was prescribing no particular requirement regarding evidentiary production in class certification. *Id*. at 160. *See Amchem, Inc. v. Windsor*, 521 U.S. 591, 619 & 621-22 (1997) (Permitting a certifying court to look beyond the pleadings to the parties' stipulated settlement for the limited purpose of explaining why requirements of Rule 23 were not satisfied but imposing no evidentiary requirement and precluding a court from conflating a certification decision with determinations of merits).

II. THE RULES VEST TRIAL JUDGES WITH THE DISCRETION NECESSARY TO ADJUDICATE CLASS CLAIMS INVOLVING LARGE ENTITIES AND EXERCISE OF THAT DISCRETION SHOULD BE REVIEWED DEFERENTIALLY

The *Falcon* court, along with many courts before and since, acknowledged that flexibility in administering class actions is a virtue and that trial

courts deserve deference in their exercise of it.[4] *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("[M]ost issues arising under Rule 23 . . . [are] committed in the first instance to the discretion of the district court"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (district courts have "broad power and discretion . . . with respect to matters involving the certification" of class actions).[5] Deference flows in part from recognition of the essentially factual nature of the certification inquiry and in part from recognition of the inherent power of the trial court to manage its caseload. *Maldonado v. Ochsner Clinic*

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[4] The questions presented make no direct reference to an appropriate standard of review. Wal-Mart alludes to one cryptically, in a footnote citing one case that does not quite bear the weight Wal-Mart places on it. Pet'r's Br. 18, n.2, citing *Koon* v. *United States*, 518 U.S. 81, 100 (1996). *Koon* does recite that error of law is per se an abuse of discretion, but it illustrates that point with an example of a court considering, in exercising discretion, an unpermitted factor; evidence outside the record of the case would be an example. This case is much more appropriately viewed, from the appellate level, as deferential oversight of the exercise by a trial judge of matters committed primarily to that judge, the court having noted in *Koon* that "[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Id.*

[5] Recent circuit court opinions continue to endorse this kind of discretion. *See, e.g., Ervin v. OS Rest. Servs., Inc*, --- F.3d. ---, 2011 WL 135708 (7th Cir. Jan. 18, 2011) ("We review class-certification decisions deferentially, in recognition of the fact that Rule 23 gives the district courts "broad discretion to determine whether certification of a class-action lawsuit is appropriate."); *In re Pet Food Prod. Liab. Litig.*, 629 F.3d 333, 343 (3rd Cir. 2010) (endorsing discretion on certifying subclasses); *Coleman v. Estes Express Lines, Inc.,* 627 F.3d 1096, 1100 (9th Cir. 2010) (permitting interlocutory appeal of class certification order under CAFA within discretion of district court) (noting accord with First and Tenth Circuits).

Found., 493 F.3d 521, 523 (5th Cir. 2007). This case, involving the nation's largest employer, illustrates the wisdom of those positions. In the modern era, class adjudication is often the only practical means of adjusting disputes between gargantuan organizations and groups of persons harmed in the same way by them. Economic reality dictates that certain litigation "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974).[6] That statement applies more widely today than it did when made in 1974.[7] And it is true not

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[6] *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

[7] *See, e.g.,* Third Circuit Task Force Report, *Selection of Class Counsel*, 208 F.R.D. 340 (2002):

> What was thought to be true in 1966 appears to be true today: namely, that the interests of justice are well served by class actions that vindicate rights that might otherwise go unprotected and that spare courts the burden of handling numerous lawsuits, some small and some not so small, arising from a common set of facts. Over the last 35 years, the American legal system has handled a variety of class actions involving an enormous array of claims. In many situations, the class action has been successful in identifying public harms, discovering a substantial percentage of likely victims, making

only of cases, like *Eisen*, involving small individual recoveries. Individual employment claims are complex, and ones of the magnitude asserted here often are not viable if asserted individually. *See, e.g., Gentry v. Superior Court*, 165 P.3d 556, 564 (Cal. 2007) (finding that ban on class action for individual wage claims averaging $5,000-7,000 was effectively exculpatory as amounts involved were insufficient to support bringing individual claims); *Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Cal. App. 1 Dist. 2004) (rejecting assertion that individual claims as high as $37,000 rendered individualized claims viable and precluded certification of class of overtime claimants); *Scott v. Aetna Serv., Inc.,* 210 F.R.D. 261, 268 (D. Ct. 2002) ("the cost of individual litigation is prohibitive, notwithstanding the high salaries of the Systems Engineers or the sizable potential damages awards."). And a class action can dissipate legitimate fear of reprisal. "[C]urrent employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage" can be inhibited from acting individually: "Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases held up, and other more subtle forms of influence

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> the party responsible for the harm rectify much of the damage caused, and distributing damages among the injured parties.

Id. at 342; *Schnuerle v. Insight Commc'ns Co., L.P*, --- S.W.3d.--- , 2010 WL 5129850, at *5 (Ky. Dec. 16, 2010) (When cost of litigation makes individual litigation against a company impractical, "the lack of an economically viable means to bring the company into court would effectively exculpate the company from liability, allowing it to reap unjustly a substantial economic windfall.").

exerted." *N.L.R.B. v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 240 (1978); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."). *See also Smellie v. Mount Sinai Hosp.*, 2004 WL 2725124, *4 (S.D.N.Y. Nov. 29, 2004) (recognizing reprisal as significant in class certification); *Brinkerhoff v. Rockwell Int'l Corp.,* 83 F.R.D. 478, 482 (N.D. Tex. 1979) (denying precertification discovery of names of individual class members in employment gender discrimination case because of fears of retaliation and manipulation).

Neither the size of modern organizations nor the number of facilities they operate should affect whether the existence of discriminatory corporate-wide policies can be adjudicated collectively. Modern business organizations are ubiquitous, large, and growing larger. As of 1801, "there were only 317 corporations in the entire country," Phillip I. Blumberg, *The Corporate Entity In An Era Of Multinational Corporations*, 15 Del. J. Corp. L. 283, 300 (1990) (footnote omitted), one for every 17,000 persons.[8] "These were almost entirely in banking, insurance, and public service areas; only a handful were manufacturing corporations. This condition began to change with the growth of the textile industry following the introduction of the power loom, the embargo laws against manufactured imports, and the War of 1812." *Id*. In response to this

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[8] U.S. population in 1800 Census was 5,308,483. *Pop Culture: 1800*, United States Census Bureau, http://www.census.gov/history/www/through_the_decades/fast_facts/1800_fast_facts.htm (last visited Feb. 25, 2011).

growth Congress ordered the Census Bureau to begin recording the economic activity of business enterprises.[9] As of the last economic census in 2002, there were 5,885,784 "employing firms" in America (business organizations that employed persons other than the owner),[10] or one for about every 50 persons.[11]

Business organizations have grown not only in number and ubiquity, but in size, stunningly so in the last half century. In 1955, the revenues of the 500 largest American corporations equaled 33 percent of gross domestic product (GDP); fifty years later, they equaled 74 percent of GDP.[12] Today one employer—Wal-Mart—employs more people than the top ten Fortune 500 companies, combined, employed in 1955. Douglas A. McIntyre, *America's Biggest Companies, Then and Now (1955 to 2010)*, Wall St.

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[9], *Economic Census*, United States Census Bureau, http://www.census.gov/history/www/programs/economic/economic_census.html (last visited Feb. 25, 2011).

[10] *Statistics about Business Size (including Small Business)*, United States Census Bureau, , http://www.census.gov/epcd/www/smallbus.html (last visited Feb. 25, 2011).

[11] U.S. population in 2000 Census was 281,421,906. *Pop Culture: 2000*, United States Census Bureau, , http://www.census.gov/history/www/through_the_decades/fast_facts/2000_new.html (last visited Feb. 25, 2011).

[12] Calculating gross revenues from AggData, *Complete List of Fortune 500/1000 Companies 1955-2010* (Aug. 2010), http://www.aggdata.com/business/fortune_500, adjusting to real dollars and deriving real-dollar GDP from *Current Dollar and "Real" Gross Domestic Product*, U.S. Bureau of Economic Analysis, http://www.bea.gov/national/xls/gdplev.xls (last visited Feb. 25, 2011).

24/7, Sept. 21, 2010, , http://247wallst.com/2010/09/21/americas-biggest-companies-then-and-now-1955-to-2010/#ixzz1DO6pBIz. Large employers are now a norm. Today, 3,500 firms employ 2,500 or more persons.[13] Those very large employers have, like Wal-Mart, many places where they do business. The eight hundred ninety firms that each employ more than 10,000 persons operate almost 600,000 facilities, or 660 facilities per firm. *Id*.

The certified class in this case is comprised of approximately 500,000 women. Pet. App. 6a, n.3; 112a. That is 0.3 percent of the 130 million people who shop at Wal-Mart regularly[14] and is less than 25 percent of Wal-Mart's workforce. Courts routinely have administered class actions involving similar percentages of the workforces of single entities. *See, e.g., Velez v. Novartis Pharm. Corp.*, 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010) (class of 6,000 women out of U.S. workforce of 20,000 (100,000 total employees, *Fortune Global 500*: *Novarits*, CNN Money, http://money.cnn.com/magazines/fortune/global500/2007/snapshots/6799.html (last visited Feb. 25, 2011), 20 percent of employees in U.S., *Novartis in the US—The Big Picture*, Novartis,

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[13] *Statistics about Business Size*, *supra* note 10.

[14] A 2005 Pew Research Poll found that 84 percent of Americans have shopped at Wal-Mart and that 42 percent of them do regularly. The Pew Research Center for the People & The Press, *Wal-Mart a Good Place to Shop But Some Critics Too* (Dec. 2005), http://people-press.org/report/265/wal-mart-a-good-place-to-shop-but-some-critics-too. The current population of the United States is approximately 310 million. *U.S. and World Population Clock*, United States Census Bureau (Feb. 25, 2011, 11:00 am), http://www.census.gov/main/www/popclock.html.

http://www.us.novartis.com/downloads/careers/ Novartis-in-the-US-brochure.pdf (last visited Feb. 25, 2011)); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 30 (2005) (involving virtually all of approximately 1,000 employees); Nancy Levit, *Megacases, Diversity, And The Elusive Goal Of Workplace Reform*, 49 B.C. L. Rev. 367, 387-405 (2008) (describing several large employment class actions, including *Haynes v. Shoney's, Inc.*, 1993 WL 19915, (N.D. Fla. Jan. 25, 1993), covering "200,000 current and former employees and job applicants in twenty-three states," Levit, at 388; *Butler v. Home Depot, Inc.*, 1996 WL 421436, at *1-2 (N.D. Cal. Jan. 25, 1996) (order certifying class action), involving "over 17,000 current and former employees and 200,000 unsuccessful applicants in ten western states," Levit, at 394).

The alternative to litigating the issues certified here for class adjudication is individual litigation. Even at the modest average costs the Federal Judicial Center found extant in federal civil litigation[15] the parties' costs of the alternative are

[15] Costs in federal civil cases are, in general, quite low, $15,000, on average, including attorneys' fees, for plaintiffs, and $20,000 for defendants. In a relatively small number of cases, costs are disproportionately high. Emery G. Lee, III & Thomas E. Willging, *National Case-Based Civil Rules Survey, Preliminary Report to the Federal Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, Oct. 2009), at 2, http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/ $file/dissurv1.pdf. Cases with disproportionately high costs tend to be clashes of corporate titans, particularly intellectual property disputes. Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis, Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center Mar. 2010) at 8, http://www.fjc.gov/ public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf.

$17.5 *billion*. Wal-Mart's proportional share of that $17.5 billion would be $10 billion, which is on the order of a thousand times greater than the amount Wal-Mart could be expected to pay to litigate this action. A recent survey of litigation costs of Fortune 200 companies—Wal-Mart is one—found that mean litigation expenditures for "major cases"—this would be one—were under $2 million for the period 2004-2008.[16] That is a substantial reduction in transactions costs, and case law makes clear that the costs of individual adjudication effectively would bar individual actions and potentially exculpate Wal-Mart from conduct condemned by civil rights statutes at the core of our identity as a nation.

Administering this kind of case requires flexibility traditionally granted by appellate courts and recently strongly endorsed by bench, bar, and

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These cases require disproportionate commitments of judicial resources. Federal Judicial Center*, 2003–2004 District Court Case-Weighting Study*, at 5, tbl. 1: New 2004 District Court Case Weights (2005) , *available at* http://www.fjc.gov/public/pdf.nsf/lookup/CaseWts0.pdf/$file/CaseWts0.pdf

[16] Lawyers for Civil Justice, *et al.*, *Litigation Cost Survey of Major Companies*, For Presentation to *Committee on Rules of Practice and Procedure Judicial Conference of the United States*, p. 14, Fig. (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/33A2682A2D4EF700852577190060E4B5/$File/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf?OpenElement. The survey was done on behalf of Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform and was conducted by the Searle Center at Northwestern University. The survey did not attempt to identify kinds of cases that were defined as "major" (involving costs greater than $250,000, but Federal Judicial data suggest that most of those cases are inter-corporate disputes. Lee & Willging, *Litigation Costs in Civil Cases*, *supra*, note 15.

the academy. In May of 2010 the Advisory Committee on Civil Rules gathered judges, academics, and practitioners for a conference[17] "designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation." Report of the Advisory Committee on Civil Rules to the Chief Justice of the United States, 1 (2010), *available at* http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/9286E143BF0D4651852577BB004D4450/$File/Report%20to%20the%20Chief%20Justice.pdf?OpenElement. The conference was the kind of "extensive deliberative process" the committee typically employs and that this court has endorsed, *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997), drawing "on the collective experience of bench and bar" to facilitate "the adoption of measured, practical solutions." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 609 (2009). The carefully designed conference had only one panel specifically dealing with Rule 23 and entertained only one paper on the topic.[18] Defense interests, well-represented at the conference, made

[17] 2010 Civil Litigation Conference, Duke Univ. School of Law, May 10-11, 2010 [hereinafter "Civil Lit. Conf."].

[18] Agenda, Civil Lit. Conf. http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_Toc/CC9D423FE4AFF65D852576510053D407/?OpenDocument; Richard Nagareda, *1938 All Over Again? Pre-Trial As Trial In Complex Litigation*, for Civil Lit. Conf., at 17-18;22-24; 28 (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/ED61ECFA8257D3198525770E004D2B11/$File/Richard%20Nagareda%2C%201938%20All%20Over%20Again.pdf?OpenElement.

no suggestions for amending Rule 23.[19] In reporting to the Chief Justice, the Committee made no mention of any need to deal directly with Rule 23, or particularly with class certification requirements under Rule 23. It did discuss extensively how to deal with issues that arise in administering large cases, in general, and found a strong consensus that close judicial management was a key to assuring that such cases could be litigated efficiently. Report to Chief Justice, at 4.[20] The panel examining empirical data relating to administration of the civil justice system concluded that "procedure should be tailored to the needs of each case early in the pretrial process, through a combination of attorney cooperation, judicial management, and case-type specific rules

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[19] *See* Lawyers for Civil Justice, *et al.*, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, for Civil Lit. Conf. (May 2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/888E977DFE7B173A8525771B007B6EB5/$File/Reshaping%20the%20Rules%20for%20the%2021st%20Century.pdf?OpenElement.

[20] Commitment to case management is not new. *See generally* Steven S. Gensler, *Judicial Case Management: Caught in the Cross-Fire*, for Civil Lit. Conf. (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/9F4D94E0D4B13E9285257713004A5AE3/$File/Steven%20S.%20Gensler%2C%20Caught%20in%20the%20Cross-Fire.pdf?OpenElement, especially p. 7, noting that "the Judicial Conference endorsed early case management as provided in Rule 16, saying '[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation.'" (quoting the Judicial Conference of the United States, *Long Range Plan of the Federal Courts* 70 (1995) (Recommendation #38))

and protocols."[21] Notably absent from the implementation steps the Advisory Committee will take are any efforts specific to Rule 23 in general or to class certification in particular. Report to the Chief Justice, at 12.

Close judicial management—what judges, courts, and scholars want—requires play in the joints. "[W]hile an action is pending in the trial court, it is a living, developing and changing entity," and too close oversight from an appellate court distant from those realities hinders the trial court's ability to manage the case in a fair manner. *Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 48-49 (E.D.N.Y. 2001) (Weinstein, J.). "Merely demonstrating that the district judge's class certification decision is questionable is insufficient procedurally, as such decisions require the application of broad and flexible legal standards to unique sets of facts that do not fit squarely within prior precedent." *Id.* at 42. This Court should assure that trial judges have it.

CONCLUSION

Class certification should be AFFIRMED.

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[21] Empirical Research Panel Part II, *Overview of Satisfaction or Dissatisfaction With the Current System and Suggestions For Change Raised By The Data*, for Civil Lit. Conf. (2010), http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/51AF4213BF9DE479852577310065B7D5/$File/Empirical%20Research%20Panel%2C%20Executive%20Summary.pdf?OpenElement.

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No. 10-277

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Petitioner,

v.

BETTY DUKES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I, John Vail, a member of the Bar of this Court, certify that the accompanying document, Brief of Amicus Curiae of The American Association For Justice In Support Of Respondents, contains 4,556 words, excluding the parts of the documents that are exempted by Supreme Court Rule 33.1(d).

/S/

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CERTIFICATE OF SERVICE

I, John Vail, a member of the Bar of this Court, hereby certify that on this 28th day of February, 2011, three copies of the Brief of Amicus Curiae The American Association For Justice In Support Of Respondents, in the above-entitled case were sent via United Parcel Service for overnight delivery, to counsel listed below. I further certify that all parties required to be served have been served.

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