No. 10-277

In the Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

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

BRIEF OF ALTRIA GROUP, INC., BANK OF AMERICA CORPORATION, CHRYSLER GROUP LLC, CIGNA CORPORATION, DEL MONTE FOODS COMPANY, DOLE FOOD COMPANY, INC., DOLLAR GENERAL CORPORATION, DUPONT COMPANY, GENERAL ELECTRIC COMPANY, HEWLETT-PACKARD COMPANY, KIMBERLY-CLARK CORPORATION, MCKESSON CORPORATION, MICROSOFT CORPORATION, PEPSICO, INC., TYSON FOODS, INC., UNITEDHEALTH GROUP INCORPORATED, UNITED PARCEL SERVICE, INC., AND THE WILLIAMS COMPANIES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In a sharply divided 6-5 decision that conflicts with many decisions of this Court and other circuits, the en banc Ninth Circuit affirmed the certification of the largest employment class action in history. This nationwide class includes every woman employed for any period of time over the past decade, in any of Wal-Mart's approximately 3,400 separately managed stores, 41 regions, and 400 districts, and who held positions in any of approximately 53 departments and 170 different job classifications. The millions of class members collectively seek billions of dollars in monetary relief under Title VII of the Civil Rights Act of 1964, claiming that tens of thousands of Wal-Mart managers inflicted monetary injury on each and every individual class member in the same manner by intentionally discriminating against them because of their sex, in violation of the company's express antidiscrimination policy.

The questions presented are:

I. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.

II. Whether the certification order conforms to the requirements of Title VII, the Due Process Clause, the Seventh Amendment, the Rules Enabling Act, and Federal Rule of Civil Procedure 23.

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INTEREST OF *AMICI CURIAE*

Amici are leading U.S. companies (listed and described in Appendix A) that employ millions of workers.[1]

[1] Pursuant to this Court's Rule 37.2(a), *amici* certify that counsel of record for all parties received timely notice of *amici*'s intent to file

Because of the size and scope of their operations, *amici* often must rely on centralized policies that leave implementation to local decisionmakers exercising an element of discretion within the bounds set by the policy. *Amici* also strive to foster a corporate culture that ensures that decisions comply with the law and are consistent with broader goals and values.

In the decision below, the Ninth Circuit allowed this discrimination suit to proceed as a class action based in part on Wal-Mart's centralized policies and corporate culture, even though there was no "significant proof" that those policies or culture were themselves discriminatory or caused the alleged discrimination by local decisionmakers exercising discretion. That ruling effectively punishes companies for adopting common organizational tools essential in the modern workplace by exposing them to increased risk of class-action claims. For that reason alone, *amici* are gravely concerned that the Ninth Circuit's decision threatens their ability to manage their workforces. Meritorious discrimination claims, of course, deserve vindication. And class-action treatment may be appropriate in certain circumstances. But the Ninth Circuit's decision threatens to expand the class-action device far beyond its traditional bounds—indeed, beyond any bounds supported by law or common sense.

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this brief, and that all parties consented to the filing of the brief. Copies of the letters granting consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, and its counsel made such a monetary contribution.

Ironically, the Ninth Circuit's decision discourages even policies and cultures designed to foster the very values Title VII seeks to promote. The Nation's most successful and influential firms—including *amici*—have made significant, public commitments to eradicating discrimination and promoting diversity in their hiring and promotion practices. Effective implementation of those private-sector initiatives often depends on companywide policies and cultures—organizational tools no different from those the Ninth Circuit relied on as a basis for class certification here. *Amici* have a strong interest in ensuring that the profound private-sector commitment to fair employment practices and diversity is not undermined by a ruling that makes the companywide policies and cultures necessary to implement that commitment a basis for class-action liability.

REASONS FOR GRANTING THE PETITION

The decision below threatens to impose the staggering costs of class-action litigation based on the routine structural decisions that large corporations must make every day. As a business grows, it must delegate decisionmaking authority to local managers. At the same time, businesses rely on centralized policies and corporate culture to guide those local decisions. Corporate leaders must make crucial decisions about how to structure central policies, allocate local discretion, and develop corporate culture to achieve a company's goals. Those goals do not merely include quality, efficiency, service, and courtesy. They also include the promotion of important social values such as antidiscrimination, diversity, and inclusion.

The decision below impairs the ability of businesses to manage their operations through an effective combination of centralized policies, local discretion, and corporate culture. It transforms those commonplace organizational

tools into a basis for class-action treatment of unrelated discrimination claims. It does so even when the company's decisions to use those tools raise no colorable Title VII concern. And it does so even when the decisions seek to promote Title VII's goals.

As this Court recognized in *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), there may be limited circumstances where a decision to allocate authority a particular way justifies a discrimination class-action. For example, where a company adopts a uniform policy of permitting local decisionmaking *in order to perpetuate discrimination*, class treatment may be appropriate. To ensure that companies are not saddled with massive class-action liability for benign decisions, however, this Court insisted on "[s]ignificant proof" that the policy was adopted as a means of discrimination. See *id.* at 159 n.15. Absent such proof, there is simply no "common" issue justifying class treatment. *Falcon*'s "significant proof" standard strikes a reasonable balance between affording businesses necessary organizational flexibility and preserving the class-action device for cases where plaintiffs can prove it is truly appropriate.

By rejecting *Falcon*'s "significant proof" standard, the Ninth Circuit upset that balance. The court allowed this case to proceed as a class action based in part on "company-wide corporate practices and policies, which include * * * excessive subjectivity in personnel decisions," even though there was *no proof* that those policies were adopted as a means of discrimination. Pet. App. 51a; see also *id.* at 53a ("company-wide policies and practices that, in part through their subjectivity, provide a *potential* conduit for discrimination" (emphasis added)). Indeed, at many points, the Ninth Circuit appeared to condemn companywide policies and culture generally, even those

having nothing to do with excessive subjectivity. See, *e.g.*, *id.* at 51a ("strong corporate culture"); *id.* at 53a ("extensive oversight of store operations * * * and a strong, centralized corporate culture").

That approach is not merely inconsistent with *Falcon*. It also defies common sense. Class-action treatment is appropriate only if the relevant issues are sufficiently common among class members. Fed. R. Civ. P. 23(a)(2). The existence of a "strong corporate culture," "company-wide policies and practices," or "subjectivity" in local decisionmaking cannot provide that commonality in a discrimination suit unless there is evidence that the common policies and culture actually *caused* the discrimination. Absent such evidence, it makes no sense to group together otherwise disparate discrimination claims.

The Ninth Circuit's decision threatens the sorts of benign organizational decisions that large corporations must make every day. Because the specter of potentially enormous class-wide liability compels defendants to settle even meritless claims, class certification decisions are often tantamount to a decision on the merits. The Ninth Circuit's decision thus threatens to deter companies from adopting the "company-wide policies" and "strong corporate culture" that, according to the Ninth Circuit, can make the difference between individual discrimination claims and a nationwide class action. The decision below thus substantially interferes with corporations' ability to manage their organizations through companywide policies and cultures.

That distortion not only harms American business. It also undermines the very interests Title VII seeks to promote. In recent decades, the Nation's leading companies have made a profound commitment to eradicating discrimination and promoting diversity. Those private-sec-

tor initiatives have been critical in promoting equal opportunity in the workplace. In implementing those initiatives, however, corporations must often rely on the same tools—centralized policies, delegated authority, and corporate culture—that they use elsewhere. By making such organizational tools a potential basis for class-action treatment of otherwise unrelated discrimination claims, the Ninth Circuit's decision impairs companies' ability to implement even initiatives that promote Title VII's important goals. The adoption of a "company-wide policy" of diversity or a "strong corporate culture" of inclusion should not come at the price of converting otherwise disparate discrimination claims into a nationwide class action. But that is what the Ninth Circuit's decision portends.

I. CENTRALIZED POLICIES, DELEGATED IMPLEMENTATION, AND STRONG CORPORATE CULTURE ARE ESSENTIAL TO MANAGING A SUCCESSFUL WORKFORCE

Centralized policies and culture are essential for large firms to survive and thrive. The customer who enters a particular retail store expects the same look, feel, and treatment whether the store is in Alabama or Alaska. And a product should be manufactured the same whether the factory is in Houston or Hickory. In the past, companies could implement those policies by making all decisions at the top of a centralized hierarchy. But that is no longer feasible. Corporations have grown, and increasingly competitive global markets demand flexibility. Businesses must now balance uniformity against flexibility by coupling general *centralized policies* with *decentralized implementation.* Companywide policies are implemented by local managers who—with their feet on the ground—necessarily exercise discretion within the bounds set by the policy. Because policies cannot cover

every scenario, moreover, corporations strive to inculcate a corporate culture in their workforce. That culture helps ensure that local decisions are consistent with the organization's broader values and strategic goals.

Those organizational tools—centralized policies, decentralized implementation, and corporate culture—are equally critical to diversity and antidiscrimination initiatives. A company that seeks to ensure an inclusive workforce will typically do so through a companywide diversity policy implemented by local managers exercising discretion in light of the facts before them. And the company will typically complement that policy by fostering a corporate culture that promotes respect and sensitivity. The decision below threatens those critical initiatives by undermining the structures necessary to effectuate them.

A. Centralized Policies Implemented by Local Decisionmakers Are Crucial to Managing a Large Company

1. Much of the Nation's industrial growth in the 19th and early 20th centuries can be traced to the adoption of centralized policies. "[B]y the mid-nineteenth century * * * American businesses were formalizing their chain of command and responsibility through the vertical organizational design or chart." Frank Ostroff, *The Horizontal Organization* 5 (1999). As "manufacturing and industrial production grew more complex and involved the management of more and more workers," the use of centralized policies expanded. *Id.* at 4; see also Richard L. Daft, *Organization Theory and Design* 23 (10th ed. 2010). In many industries, such policies were essential. "[T]he construction of the railroads in the 1840s," for example, "quickly revealed a desperate need for some means of controlling and managing the work of engi-

neers, builders, schedulers, and others." Ostroff, *supra*, at 4.

Companies looked to early organizational theorists such as Frederick Winslow Taylor, whose popular theory of "scientific management" promoted centralized policies and minimal local discretion. Ostroff, *supra*, at 5. "So long as markets were steady, competition was primarily domestic, technology meant simple, special-purpose machines such as the typewriter, and labor was abundant and semi-skilled," such policies "worked—and worked magnificently." *Id.* at 8.

2. Today, that model of absolute control is rarely realistic or desirable. Pure centralization "has been rendered inadequate for today's demanding competitive, technological, and workforce environments." Ostroff, *supra*, at 6. For large companies, some degree of decentralization "comes about out of sheer necessity." L. Peter Jennergren, *Decentralization in Organizations*, in 2 *Handbook of Organizational Design* 39, 42 (Nystrom & Starbuck eds., 1981). "[D]ecisions cannot be passed to the top because senior managers would be overloaded." Daft, *supra*, at 348.

Delegation also provides important benefits. Avoiding a lengthy chain of command for ordinary, on-the-ground decisions allows a company "to respond quickly to customers' needs or the actions of competitors." Gareth R. Jones, *Organizational Theory, Design, and Change* 123 (6th ed. 2010). And a local manager with greater ownership in the end result may be "more motivated to perform well." *Id.* at 104.

One need look no further than Wal-Mart's history to see the value of delegated authority. While adopting central policies, the company's founder also "valued change, experimentation, and constant improvement." James C.

Collins & Jerry I. Porras, *Built To Last: Successful Habits of Visionary Companies* 36 (1994). He "gave department managers the authority and freedom to run each department as if it were their own business," the famous "Store Within a Store" model. *Ibid.* That model—essentially, a corporate implementation of the genius of federalism—fosters innovation. The idea for a store greeter, for example, came from a manager in Crowley, Louisiana. *Id.* at 148. The manager "was having trouble with shoplifting" and experimented by hiring a greeter, who both "sent a message to potential shoplifters that someone would see them" and also "made honest people feel welcome." *Ibid.* That idea then spread, and the greeter is now ubiquitous across the country.

3. Businesses nonetheless still need centralized policies. Top managers must "coordinate organizational activities and keep the organization focused on goals." Jones, *supra*, at 104. Centralized policies maintain consistency of message and experience to the consumer. And they help ensure employees act consistently with the law and with the company's broader goals and values.

A "basic design challenge for all organizations" is thus to determine "how much to centralize or decentralize the authority to make decisions." Jones, *supra*, at 104. "Organizations may have to experiment to find the correct degree of centralization or decentralization to meet their needs." Daft, *supra*, at 93.[2] But most successful compa-

[2] A large body of scholarship addresses that issue. See, *e.g.*, Jones, *supra*, at 103-106; Myong-Hun Chang & Joseph E. Harrington, Jr., *Centralization vs. Decentralization in a Multi-Unit Organization*, 46 Mgmt. Sci. 1427 (2000); Nadav Levy, *Commitment, Exchange Autonomy, and the Boundary of the Hierarchical Firm*, 24 J.L. Econ. & Org. 184 (2008); Ján Zábojník, *Centralized and Decentralized Decision Making in Organizations*, 20 J. Labor Econ. 1 (2002); Ken Kollman *et al.*, *Decentralization and the Search for Policy Solu-*

nies strike "a balance between centralization and decentralization of authority so that middle and lower managers who are at the scene of the action are allowed to make important decisions, and top managers' primary responsibility becomes managing long-term strategic decision making." Jones, *supra*, at 105.

B. A Strong Corporate Culture Likewise Benefits the Firm, Its Employees, and Its Customers

While centralized policies are important, it is impossible to have a policy for every situation. Accordingly, firms seek to instill a corporate *culture* that helps employees respond appropriately to the wide variety of situations they might confront. "Culture is the set of values, norms, guiding beliefs, and understandings that is shared by members of an organization and taught to new members as the correct way to think, feel, and behave." Daft, *supra*, at 374. Corporate culture helps "integrate members so that they know how to relate to one another" and "help[s] the organization adapt to the external environment." *Id.* at 377.

A corporate culture allows employees to "learn from each other how to interpret and respond to various situations in ways that are consistent with the organization's accepted values." Jones, *supra*, at 181. It "shap[es] and guid[es] behavior so that everyone's actions are aligned with strategic priorities." Daft, *supra*, at 387. Corporate culture also allows a firm to "respond rapidly to customer needs"—an employee already aware of firm expectations is better equipped to adapt to changes in the marketplace

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tions, 16 J.L. Econ. & Org. 102 (2000); Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. Pol. Econ. 1 (1997); Oliver E. Williamson, *Markets and Hierarchies* 132-141, 151-154 (1975); Alfred D. Chandler, Jr., *Strategy and Structure* 261-282 (1962).

in a manner consistent with company values. *Id.* at 377. While the optimal culture depends on a company's needs, a "strong culture that encourages adaptation and change" will normally "enhance[] organizational performance by energizing and motivating employees, unifying people around shared goals and a higher mission, and shaping and guiding behavior so that everyone's actions are aligned with strategic priorities." *Id.* at 387.

C. Corporations Rely on Policies and Culture To Prevent Discrimination and Promote Diversity and Inclusion

For most large U.S. employers today, a commitment to antidiscrimination and diversity is a critical component of company policies and culture. "By the end of the 1990s, three out of four Fortune 500 companies had launched diversity programs." Jefferson P. Marquis *et al.*, *Managing Diversity in Corporate America* 1 (2008). Those programs seek to "creat[e] a multicultural, diverse organization" that benefits not only society at large, but also the firm, its employees, and its customers. *Ibid.*

To implement those programs, companies often must rely on the same organizational structures they use in other contexts. At the top, they establish overarching "framework[s] of broad strategic and policy guidelines" to channel hiring and promotion decisions. Michael Armstrong, *A Handbook of Human Resource Management Practice* 58 (10th ed. 2006). While "a central governing body outlin[es] the requirements of [diversity] plans," however, "individual agencies and departments hav[e] their own plans tailored to their specific needs." Mitchell F. Rice, *Workforce Diversity in Business and Governmental Organizations*, in *Diversity and Public Administration: Theory, Issues, and Perspectives* 96, 109 (Rice ed., 2d ed. 2010). Even those local diversity plans neces-

sarily leave an element of discretion to the managers that implement them. That combination of central policies and local discretion "reinforces a sense of ownership and ensures that managing diversity both has top-level support and is a reality throughout the organization." *Ibid.*

Amici have been leaders in promoting those goals through centralized policies and culture. The Altria family of companies, for example, has long been committed to promoting diversity and inclusiveness in its workforce. See Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Altria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav. Altria believes its position on diversity and inclusion "fosters greater employee productivity and creativity while giving Altria's diverse businesses a competitive edge." *Ibid.* The company has repeatedly been recognized for its efforts. For example, it was recently named the fifth best company for Black employees to work for by DiversityInc, the leading publication on diversity and business. See DiversityInc, *The DiversityInc Top 10 Companies for Blacks*, http://www.diversityinc.com/article/7369/The-DiversityInc-Top-10-Companies-for-Blacks/. Noting that "[a]lmost 20 percent of [Altria's] work force is Black and 22 percent of promotions to women in management went to Black women," the publication lauded Altria's "concerted effort to recruit, retain and promote Blacks." *Ibid.*

PepsiCo has likewise been recognized as a "longtime diversity leader" that "continues to push for an inclusive work force through strong employee-resource groups and diversity training." DiversityInc, *2009 Top 50 Companies for Diversity: No. 24 PepsiCo*, http://diversityinc.com/content/1757/article/5475/?No_24_PepsiCo. Its programs "promote a culture where [its] associates feel they have an equal opportunity to contribute and succeed."

PepsiCo, *Diversity & Inclusion*, http://www.pepsico.com/Purpose/Talent-Sustainability/Diversity-and-Inclusion.html. The company's efforts have been recognized dozens of times over the past few years. See PepsiCo, *Global Diversity and Inclusion Governance Council*, http://www.pepsico.com/Download/DI-Awards-2010.pdf.

Bank of America is "considered an industry leader with a world-class supplier diversity program," receiving "numerous national and regional awards and recognition." Bank of America, *Supplier Diversity & Development*, http://www.bankofamerica.com/supplierdiversity/index.cfm?template=sddi_awards_ov.cfm. DiversityInc ranked it among the top ten companies in 2010. DiversityInc, *No. 9: Bank of America*, http://www.diversityinc.com/article/7269/. DuPont likewise has a longstanding policy against discrimination and has been recognized for its commitment to diversity by numerous organizations. See DuPont, *Diversity and Inclusion*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/about/about.html. That commitment is reflected in its principle of "'Respect for People,'" which "'has been a core value for [DuPont] for over 206 years.'" *Ibid.*

The other signatories to this brief have similarly vibrant diversity programs. See App., *infra*, 1a-7a. Time and again, many of those programs have been recognized by leading organizations and publications for their success in fostering a diverse and inclusive workforce where individuals of all backgrounds can flourish. See *ibid.* Such programs often rely on centralized policies, local implementation, and corporate culture to achieve their goals. See *ibid.*

II. THE DECISION BELOW DISTORTS ORGANIZATIONAL DECISIONMAKING AND THREATENS EVEN THOSE POLICIES THAT PROMOTE TITLE VII'S OBJECTIVES

The Ninth Circuit's decision has broad and disturbing ramifications for those common and necessary organizational tools. The Ninth Circuit relied on Wal-Mart's centralized policies, its local implementation of those policies, and its strong corporate culture to conclude that class treatment of otherwise disparate discrimination claims was appropriate—but without insisting on proof that those common features *caused* the alleged discrimination. That decision does not merely defy common sense. It also discourages companies from adopting the balance of centralized policies, local decisionmaking, and corporate culture necessary to remain competitive in the global marketplace. And it threatens to undermine policies and cultures designed to further Title VII's goals.

A. The Ninth Circuit's Decision Distorts Organizational Decisionmaking

1. In *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), this Court recognized that class treatment may be appropriate where a corporation adopts a policy of delegating subjective decisionmaking authority *in order to enable discrimination.* The Court insisted, however, on "[s]ignificant proof" that the policy was adopted to achieve that end. See *id.* at 159 n.15. Absent such proof, there is simply no "common" issue justifying class treatment—even if statistical disparities might suggest the possibility that some local managers exercised delegated authority in an improper manner. Even "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory

conduct." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).

Falcon's "significant proof" standard marks a reasonable dividing line between discrimination suits that can proceed as class actions and those that must proceed individually. By restricting class certification to cases where common corporate policies or cultures were adopted for the demonstrable purpose of perpetuating discrimination, the standard ensures that discrimination claims proceed as class actions only when they truly have as their basis facts that are subject to common proof. And the standard properly reserves the draconian consequences of class certification for organizational decisions that actually implicate Title VII's important concerns.

2. The Ninth Circuit, however, expressly rejected *Falcon*'s "significant proof" standard. See Pet. App. 41a-47a. It held that this case could proceed as a class action in part because of Wal-Mart's "company-wide corporate practices and policies, which include * * * excessive subjectivity in personnel decisions," even though there was *no proof* that those policies were adopted to enable discrimination. *Id.* at 51a; see also *id.* at 53a ("company-wide policies and practices that, in part through their subjectivity, provide a *potential* conduit for discrimination" (emphasis added)). At various points, the court invoked Wal-Mart's "strong corporate culture" and "corporate policies" generically, without connecting them to the local discretion in hiring and promotion that underlies plaintiffs' claims. See, *e.g.*, *id.* at 45a n.18 ("significant evidence of central control"); *id.* at 47a n.19 ("dominant corporate culture"); *id.* at 51a ("strong corporate culture"); *id.* at 53a ("extensive oversight of store operations * * * and a strong, centralized corporate culture"); *id.* at 71a ("corporate structure and policies"); *id.* at 78a ("cen-

tralized firm-wide culture and policies"). While hardly a model of clarity, the opinion is readily susceptible to the interpretation that *any* centralized policy or corporate culture can help corroborate an allegation of "common" discrimination.

Indeed, the district court below relied on policies and culture with no conceivable relation to discrimination. As evidence of Wal-Mart's centralized policies, for example, the court noted that Wal-Mart's Home Office "controls the temperature and music in each store throughout the country." Pet. App. 190a. And as evidence of strong corporate culture, the court noted that employees "do the Wal-Mart cheer" during shift changes. *Id.* at 188a-189a. Nowhere has anyone explained why such air-conditioning policies and morale-boosting exercises should make the difference between a multibillion-dollar nationwide discrimination class action and individual claims by employees with tangible grievances.

The Ninth Circuit's decision is simply wrong as a matter of law. Rule 23 requires commonality. See Fed. R. Civ. P. 23(a)(2). Without proof that a common policy of distributing discretion was adopted *to effectuate* discrimination, or that discretion was exercised in a discriminatory fashion *because of* central policies and culture, that required commonality is absent. That is true even if statistical disparities might suggest that some local decisionmakers exercised their discretion improperly (and thus that a number of persons affected by local decisions might have valid *individual* claims). "[A] decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional

discrimination." *Sperling* v. *Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); see also *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980) (subjectivity in employment decisions "cuts against any inference for class action commonality" even though it may "bolster proof on the merits of individual claims").

The court of appeals' contrary approach has potentially disastrous consequences for basic organizational decisions necessary to manage a successful enterprise. As explained above, see pp. 7-11, *supra*, corporations must routinely adopt centralized policies that leave room for local discretion in implementation. They also must often encourage local managers to implement those policies in a manner consistent with the firm's core goals and values by inculcating a corporate culture. Those sensitive and difficult organizational decisions can mean the difference between a thriving business that employs thousands of workers to serve millions of customers and a corporate train wreck.

The Ninth Circuit's decision upholding class certification based on such common organizational tools distorts those decisions. Courts across the Nation recognize that certification is normally the entire game in class-action litigation. The First Circuit has noted the "irresistible pressure to settle" that follows certification. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008). The Fifth Circuit has noted that "certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle." *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007). And the Seventh Circuit has described settlement as "almost

inevitable." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).[3]

Because of that hydraulic pressure to settle, certification imposes substantial costs "[i]rrespective of the merits." *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001). The potential for "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). "Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999); see also *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001).

For that reason, even luminaries such as Judge Friendly have described such settlements as "blackmail." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); see also Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 Colum. L. Rev. 1, 8-9 (1971). It was in part that very concern—that "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of

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[3] See also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2009); *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 144-145 (4th Cir. 2001); *Prado-Steiman* v. *Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102-105 (D.C. Cir. 2002); Richard A. Nagareda, *Aggregation and Its Discontents*, 106 Colum. L. Rev. 1872, 1875 (2006); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1285-1286 & n.129 (2002); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 522, 554 (1997).

potentially ruinous liability"—that led to Rule 23's amendment in 1998 to permit interlocutory appeals of certification orders. See Fed. R. Civ. P. 23(f) & advisory committee note.

By attaching potentially case-dispositive consequences to a corporation's decisions to adopt centralized policies, delegate implementation authority, and foster a strong corporate culture—even when those decisions have nothing to do with discrimination—the Ninth Circuit's opinion threatens to skew organizational decisionmaking. Having "company-wide policies" or a "strong corporate culture," even ones wholly unconnected to any claim of discrimination, may now mean the difference between a multibillion-dollar, *must-settle* nationwide class action and individual discrimination claims resolved *on their merits* in traditional proceedings. High-level managers seeking to structure their businesses for success in the global marketplace now must make those decisions with an artificial thumb on the scale to avoid the specter of a potentially ruinous class certification order.

The consequences are all the more troubling because it is not even clear what corporations can do to avoid them. The Ninth Circuit faulted Wal-Mart for its "company-wide corporate practices and policies" but, in the same breath, faulted those policies for leaving "excessive subjectivity" in the hands of local decisionmakers. Pet. App. 51a. The court thus condemned Wal-Mart for being both *too centralized* and *too decentralized* at the same time. Even the district court acknowledged "the tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control." Pet. App. 192a. Courts should not act as "super-personnel department[s]." *Byrnie* v. *Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001). But here,

the Ninth Circuit did not even set forth a coherent standard that personnel departments could follow.

A decision that a discrimination suit should not proceed as a nationwide class action in no way denigrates the underlying claims. Even in the best-managed companies, with robust policies and cultures designed to combat discrimination, there may be isolated instances where rogue managers make improper decisions. And, if the company is big enough, those instances may add up. But the law provides ample means of redress for those individual claims. Indeed, those remedies are even more expansive now than when this Court decided cases like *Falcon*. In 1991, Congress amended Title VII to provide for compensatory and punitive damages, not just backpay or equitable relief. See Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1071, 1072-1073 (codified at 42 U.S.C. §1981a(a)(1), (b)). Even before that amendment, prevailing plaintiffs could recover their attorney's fees. See 42 U.S.C. §2000e-5(k). Those remedies amply ensure the vindication of meritorious individual claims without recourse to the class-action device. There is accordingly no reason to distort the class-action mechanism by converting ordinary corporate structural decisions with no proven connection to discrimination into a basis for class certification.

B. The Ninth Circuit's Decision Threatens Even Policies and Cultures Designed To Promote Title VII's Objectives

Ironically, the Ninth Circuit's decision poses a grave threat even to initiatives designed to promote Title VII's objectives. As explained above, see pp. 11-13, *supra*, *amici* and other leading American corporations have made a strong, public commitment to eradicating discrimination and promoting diversity. Those efforts re-

flect not only principle, but also good business sense: An organization that respects cultural differences and strives for an inclusive workforce will better serve both its employees and its customers.

To achieve those ideals, corporations often must rely on the same organizational tools they use in managing any other aspect of their business—they establish centralized antidiscrimination and diversity policies, provide for local implementation of those policies, and foster a corporate culture of inclusiveness and respect. A "central governing body outlin[es] the requirements of the plans, and individual agencies and departments hav[e] their own plans tailored to their specific needs." Rice, *supra*, at 109; see also Armstrong, *supra*, at 58; pp. 11-12, *supra*. That approach "reinforces a sense of ownership and ensures that managing diversity both has top-level support and is a reality throughout the organization." Rice, *supra*, at 109.

The Ninth Circuit's vague reasoning could render even those benign policies and cultures sufficient evidence of "commonality" to justify class treatment of otherwise unrelated discrimination claims. The court repeatedly referred generically to Wal-Mart's "strong corporate culture" and companywide "corporate policies" without clarifying which sorts of policies or cultures may be relevant to a finding of commonality. See pp. 15-16, *supra*. Precisely because the court's opinion is so vague, it leaves corporate executives to speculate over what policies or cultures may support class certification. The distortion that the decision portends for organizational decisionmaking generally thus applies with equal force to corporate diversity initiatives. The Ninth Circuit's decision therefore undermines, rather than advances, Title VII's important goals.

C. The Ninth Circuit's Decision Reflects Broader, Disturbing Trends in Class-Action Litigation

The decision below is emblematic of broader trends. A key component of the evidence the Ninth Circuit invoked to sustain class certification was the "social framework" analysis that, according to respondents' expert, suggested that Wal-Mart's policies were "vulnerable" to gender bias. Pet. App. 54a-55a. In a social-framework analysis, "the expert does not reach the conclusion that a specific decision was made with discriminatory intent; that judgment is for the fact finder." Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37, 45 (2009). Rather, the expert "offer[s] his or her knowledge of the social science research and identif[ies] the characteristics of policies challenged in the particular workplace that research has linked with higher likelihood of bias and stereotype." *Ibid.* Here, for example, respondents' expert criticized Wal-Mart's policies as vulnerable to gender bias even though he "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Dukes* v. *Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004).

The use of social-framework analysis in discrimination suits has greatly expanded in recent years. See John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1716-1717, 1743 n.79 (2008). Its attractiveness to class-action plaintiffs' lawyers is easy to perceive. By demonstrating only the *possibility* of discrimination, plaintiffs leave *proof* of discrimination to a merits trial that will never occur. As proponents of social-framework analysis themselves acknowledge, "after

a class is certified, the pressure on the employer to settle the dispute * * * is substantial." Hart & Secunda, *supra*, at 50. Thus, "as a practical matter, class certification operates as a kind of victory on the merits." *Ibid.*

Whatever the merits of social-framework analysis as a social-science tool, it cannot substitute for "significant proof" that various claimed instances of discrimination actually resulted from a common policy of discrimination. Plaintiffs should not obtain certification based on little more than an expert's "review[] [of] the litigation record in light of his understanding of what social science research shows about stereotyping" generally. Monahan *et al.*, *supra*, at 1747; see also Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010). As the dissent put it below: "'Vulnerability' to sex discrimination is not sex discrimination." *Dukes* v. *Wal-Mart, Inc.*, 509 F.3d 1168, 1194 (9th Cir. 2007) (Kleinfeld, J., dissenting). Allowing a discrimination class-action to proceed based on nothing more than the mere "possibility" that statistical disparities reflect a common policy of discrimination is no different from allowing a securities-fraud class action to proceed based on the mere "possibility" that a fraud caused the plaintiffs' loss. The Court granted review in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336 (2005), to put an end to that latter theory. It should grant review here to put an end to the former.

The Nation's leading corporations have made a profound commitment to eradicating discrimination and promoting diversity in the workplace. This Court should not permit either speculative social-science methods or the flawed legal reasoning of the decision below to undermine the basic organizational tools firms so often need to implement those programs successfully.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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