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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Plaintiffs inexplicably state that "there is no circuit split presented by the *en banc* ruling." Opp. 1. But the majority *itself* acknowledged creating a three-way circuit split on the standard for certifying monetary claims under Rule 23(b)(2)—Wal-Mart's first question presented. App. 85a–88a; *id.* at 154a n.25 (Ikuta, J., dissenting). And the decision below conflicts with cases from this Court and numerous circuits on other important and recurring issues in class-action law, detailed in Wal-Mart's second question presented and in *four* dissenting opinions and *nine* amicus briefs (all of which plaintiffs ignore). There are myriad reasons to grant certiorari. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010) (manuscript at 19) ("By correcting the misstep in *Dukes,* the Supreme Court can lend much-needed clarity and consistency to the law of class certification").

I. THE CLASS CERTIFICATION ORDER WARRANTS IMMEDIATE REVIEW

Plaintiffs argue that certiorari should be denied because the class certification order is "interlocutory." Opp. 12–14. But there are compelling reasons why review is appropriate now.

First, this Court regularly grants review of interlocutory decisions that, like this one, raise important issues with widespread impact on other cases. *See, e.g., Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2775–76 (2010); *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 130 S. Ct. 2433, 2440 (2010). Few, if any, of these prior decisions could be said to have raised issues with such far-reaching importance

as this case, which has "broad implications for a variety of class actions against a host of industries, from antitrust cases to product liability actions to medical-monitoring claims." U.S. Chamber Br. 15; *see* 18 Leading Companies Br. 14; DRI Br. 1–2.

Second, it would be a tremendous waste of resources to force the parties and the district court to conduct full-blown discovery and an expensive, time-consuming trial under a plainly unlawful and unconstitutional procedure, only to have the judgment and class certification reversed when this case returns to this Court. *See* Eugene Gressman et al., *Supreme Court Practice* 282 (9th ed. 2007). The Ninth Circuit divided 6-5, and the vigorous dissents by Chief Judge Kozinski and Judges Ikuta and Kleinfeld demonstrate the importance of the issues.

Third, this Court has determined that certification orders, though by definition interlocutory, often warrant immediate appellate review because certification issues might otherwise be insulated from review. *See* Fed. R. Civ. P. 23(f); *see also* 18 Leading Companies Br. 5, 17–18; Intel Br. 7–8; DRI Br. 7–8. Rule 23(f) appeals are appropriate not only where the certification order is a "death knell" (Opp. 13), but whenever the order presents an unsettled and fundamental issue of law. *See, e.g.*, *Szabo* v. *Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). Many of the leading cases fall into this category. *See, e.g.*, *Hohider* v. *United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009); *In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

Fourth, this case is not, as plaintiffs suggest, "*sui generis*." Opp. 39. As shown in the petition and amicus briefs, the issues here recur in class actions of all kinds. Reflecting its sweeping ramifications, no

class action since the modern Rule 23 was adopted has attracted as much attention—from interest groups, academics, lawyers, judges, the media, and others—as this one. *See* App. 160a (Ikuta, J., dissenting); 18 Leading Companies Br. 2–6, 15–17; U.S. Chamber Br. 4; DRI Br. 19–20; RLC Br. 1–4. While plaintiffs imply that few similar cases exist (Opp. 38–39), "other class actions . . . have been on hold while the appellate court considered the Wal-Mart certification question." John Roemer, *Impact Fund Gets Executive Director*, Daily J., July 8, 2010 (quoting plaintiffs' lead counsel). Now that the Ninth Circuit has ruled, courts are invoking the ruling to certify (b)(2) class actions seeking monetary relief. *See, e.g.*, *Wang* v. *Chinese Daily News, Inc.*, __ F.3d __, 2010 WL 3733568, at *6 (9th Cir. Sept. 27, 2010).

Finally, plaintiffs contend that review is "premature" because the Ninth Circuit labeled any trial plan "tentative." Opp. 31. But *both* the district court's formula approach and the statistical sampling method used in *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)—and endorsed by the en banc majority—would violate the Rules Enabling Act (28 U.S.C. § 2072(b)) and due process. *See* App. 105a–110a. In fact, there is *no* way fairly and constitutionally to adjudicate the kaleidoscope of inherently individualized claims. *See id.* at 161a (Kozinski, C.J., dissenting).

In short, the questions presented are important, recurring, squarely presented on a sufficient record, and ripe for immediate review.

II. THE THREE-WAY CONFLICT REGARDING RULE 23(B)(2) WARRANTS REVIEW

The en banc majority explicitly created a "three-way circuit split" regarding Rule 23(b)(2)'s applicabil-

ity to monetary claims. App. 154a n.25 (Ikuta, J., dissenting); *see Hohider*, 574 F.3d at 198 ("our sister circuits are split on [this] question"). It held that the majority rule—the "incidental damages" test exemplified by *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)—"usurps the district court's authority" and that the minority rule—the "subjective intent test" announced in *Robinson* v. *Metro-North Commuter Railroad*, 267 F.3d 147, 164 (2d Cir. 2001), and adopted in *Molski* v. *Gleich*, 318 F.3d 937, 949–50 (9th Cir. 2003)—is "fatally flawed." App. 86a–87a (quotation omitted). The majority rejected both rules and adopted a third of its own making: the "superior-in-strength" test. *Id.* at 85a–88a. Plaintiffs do not pretend that this new standard can be reconciled with the plain language of Rule 23(b)(2). *See* Opp. 17.

Plaintiffs do not dispute that "[t]his case could not have been certified under the 'incidental damages' standard." Pet. 16–17. Yet, applying its new standard (App. 88a), the majority held that "Plaintiffs' request for back pay does *not* predominate over their request for the injunctive and declaratory relief." *Id.* at 91a n.40 (emphasis added). The choice of test therefore was outcome-determinative.

Plaintiffs try to escape this acknowledged three-way split by claiming that "no circuit split exists" regarding certification of backpay claims under Rule 23(b)(2). Opp. 14. This is false: The circuits are deeply divided on this very question. The court below held that "a request for back pay in a Title VII case is fully consistent with the certification of a Rule 23(b)(2) class action." App. 92a. But numerous other circuits hold that backpay weighs *against* (b)(2) certification because it is monetary relief. *See Hohider*, 574 F.3d at 202 ("it [is] necessary . . . to de-

termine whether plaintiffs' back-pay request actually conforms with the requirements of Rule 23, including Rule 23(b)(2)'s monetary-predominance standard"); *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331–32 (4th Cir. 2006); *Robinson*, 267 F.3d at 161; *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997); *Marshall* v. *Kirkland*, 602 F.2d 1282, 1295 (8th Cir. 1979). The original panel in this case agreed. *See* 509 F.3d at 1187 ("Plaintiffs' request for back pay weighs *against* certification under Rule 23(b)(2)"). By contrast, the en banc majority held that backpay claims "conflict[ ] in no way" with Rule 23(b)(2) due to their equitable nature, thereby exacerbating this express conflict. App. 91a (quotation omitted).

Plaintiffs assert that backpay is always available under Rule 23(b)(2) because it is an "equitable" remedy, and the "[c]ivil rights cases" invoking equitable powers are "prime examples" of (b)(2) classes. Opp. 15 (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997)). But the antecedent civil rights cases involved de jure segregation claims for injunctive relief. App. 149a n.22 (Ikuta, J., dissenting). Moreover, as this Court explained, "Rule 23(b)(2) permits class actions for *declaratory or injunctive relief*"—not any available equitable remedies. *Amchem*, 521 U.S. at 614 (emphasis added); *accord Thorn*, 445 F.3d at 331 ("if the Rule's drafters had intended [23(b)(2)] to extend to all forms of equitable relief, the text of the Rule would say so").

Backpay claims—like compensatory damages claims—rarely rest "on grounds that apply generally to the class" (Fed. R. Civ. P. 23(b)(2)) because they require "separate hearings for each individual" to determine "that they were denied employment opportunities and the extent of their loss." *Allison*, 151

F.3d at 409. Here, backpay will *not* follow mechanically from an injunction, but will require extensive additional proceedings. *See Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000); *Eubanks*, 110 F.3d at 95.

This Court has limited the mandatory provisions of Rule 23 to the historical antecedents identified in 1966. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842–47, 862 (1999); DRI Br. 5–7. Plaintiffs do not even mention—let alone grapple with—*Ortiz*, which articulates the framework for applying Rule 23(b)'s mandatory provisions. Nor do they have an answer to *Amchem*, which holds that tort claims should generally be channeled through Rule 23(b)(3), with its greater procedural protections for both defendants and absent class members. *See* 521 U.S. at 614–15. Together, these two cases hold that innovative lawsuits (such as this one) "counsel . . . caution" (*id.* at 625), and *must* proceed through (b)(3) to avoid the very due process problems that plague the certification order in this case.

Under the Ninth Circuit's decision, a single named plaintiff could, using Rule 23(b)(2), hijack and extinguish the rights of millions of absent class members without even telling them about it simply because the monetary relief sought is labeled backpay, not damages. *See* App. 99a–100a. Accordingly, this case squarely presents the question whether due process permits certification of a mandatory, no-notice, no-opt-out class seeking monetary relief. *See Adams* v. *Robertson*, 520 U.S. 83 (1997) (per curiam); *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam).

III. THIS CERTIFICATION ORDER VIOLATES DUE PROCESS AND THE RULES ENABLING ACT BY ELIMINATING WAL-MART'S RIGHT TO ASSERT DEFENSES

Review is also warranted because certification of this sprawling class violates Title VII, the Rules Enabling Act, and due process. Tellingly, plaintiffs do not mention the Rules Enabling Act—nor was it applied *anywhere* in the en banc majority's opinion. This Court's precedents, however, require that *every* certification order be scrutinized through that lens. *Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 613.

Plaintiffs deride Wal-Mart for making the purportedly "novel argument" that "it has the right to insist on individual adjudication of each class member's claim." Opp. 30. But Title VII authorizes recovery by "*individual[s]*" (42 U.S.C. § 2000e-2(a)(1) (emphasis added)) and explicitly provides that "[n]o . . . court shall" afford relief where the defendant proves that an "individual . . . was refused employment or advancement . . . for any reason other than discrimination." *Id.* § 2000e-5(g)(2)(A). The district court rejected Wal-Mart's statutory right to assert this and other defenses solely to facilitate certification of this class action. According to the district court, Wal-Mart "is not . . . entitled to . . . litigat[e] whether every individual store discriminated against individual class members." App. 247a.

Plaintiffs assert that, under *Califano* v. *Yamasaki*, 442 U.S. 682, 698–701 (1979), "the use of the term 'individual' in a statute does not preclude class treatment." Opp. 32. But Wal-Mart is not arguing that *no* Title VII class could ever be certified against it. Wal-Mart *is* arguing that any class must be sufficiently circumscribed to enable it to exercise the

statutory right to prove that its pay and promotion decisions were "for [a] reason other than discrimination on account of . . . sex." 42 U.S.C. § 2000e-5(g)(2)(A). As the district court recognized, that is simply "not feasible here" given the nature of the claims and scope of the class. App. 251a. Where it is "not feasible" for a defendant to raise its statutory defenses in a class action, the appropriate solution is to decertify the class (or certify a manageable class)—not to eliminate defenses.

Plaintiffs do not dispute that uninjured class members would be allowed to recover under both the district court's and the Ninth Circuit's approach. Indeed, the Ninth Circuit expressly acknowledged that "nonvictims might also benefit from the relief" (App. 110a n.57 (quotation omitted)), and the district court recognized that this "rough justice" approach would "generat[e] a windfall for some employees . . . and undercompensat[e]" others. *Id.* at 254a (quotation omitted). Moreover, as plaintiffs admit, the certification order also relieves them of their obligation to prove the statutory element of intent. Opp. 26–27. The Ninth Circuit's elimination of Wal-Mart's right to assert statutory defenses—and plaintiffs' burden to prove intent—squarely conflicts with decisions from other circuits holding that a court may not modify the elements of a claim or a statutorily prescribed defense to facilitate certification. *See Hohider*, 574 F.3d at 184; *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 223–25 (2d Cir. 2008).

The Ninth Circuit also departed sharply from this Court's decisions recognizing the due process right to "present every available defense." *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). While plaintiffs deem that precedent "insubstantial" (Opp. 34), this bedrock constitutional principle has been frequently

reaffirmed. *See, e.g.*, *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007); *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

It is beyond dispute that whether "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action" raises important due process questions. *Philip Morris USA Inc.* v. *Scott*, __ U.S. __, No. 10A273, slip op. at 3 (Sept. 24, 2010) (Scalia, Circuit Justice); *see also ibid.* (granting stay where lower court "eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest," the reliance element of plaintiffs' claim). The courts below ruled that an enormous and amorphous collection of claimants can seek billions of dollars, while simultaneously preventing the defendant from asserting defenses guaranteed by statute and the Constitution. Such a fundamentally unfair proceeding has no place in our civil justice system.

IV. THE EXPRESS REJECTION OF *FALCON*'S "SIGNIFICANT PROOF" STANDARD EXACERBATES A MATURE CONFLICT

Plaintiffs attempt to obscure the clear conflict on whether class actions alleging employment discrimination premised on "excess subjectivity" must meet the "significant proof" standard articulated in *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982). *See* Opp. 24–26. The Ninth Circuit declined to follow what it called "a hypothetical in clear dicta" (App. 42a n.15), without even acknowledging the numerous other courts of appeals that faithfully adhere to *Falcon*'s "significant proof" requirement. Pet. 20–21 (citing cases). This well-developed conflict—which has been percolating

for over two decades—is by now mature and ready for this Court's review. *See* Note, *Certifying Classes & Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 630–31 (1986); RLC Br. 9–10.

Plaintiffs' outright denial that this acknowledged split exists—and their attempt to distinguish the bevy of conflicting cases on their facts—is unpersuasive. *See* Opp. 24–26. Other circuits expressly require "significant proof" of a class-wide discriminatory policy before certifying a class, and these cases squarely conflict with the Ninth Circuit's decision. *See, e.g.*, *Garcia* v. *Johanns*, 444 F.3d 625, 631–32 (D.C. Cir. 2006) ("Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to make a significant showing . . . that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." (quotation omitted)); *Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 644 (6th Cir. 2006). *But see Shipes* v. *Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993).

Like the Ninth Circuit, plaintiffs attempt to dismiss this Court's "significant proof" standard as a "hypothetical." Opp. 24. But as plaintiffs themselves acknowledge, simple allegations of excess subjectivity—the only allegedly discriminatory "policy" in this case—will not suffice because this Court has held that subjectivity is not an unlawful employment policy. *Id.* at 22–23; *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *see also Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008) ("employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify"). Significant proof of an unlawful policy is therefore necessary at

class certification to establish commonality under Rule 23(a) in a Title VII excess subjectivity case because the plaintiff must "bridge the 'wide gap'" between her own discrimination and "the existence of a class that has suffered the same injury . . . as a result of a company-wide discriminatory policy." App. 119a (Ikuta, J., dissenting) (quoting *Falcon*, 457 F.3d at 157). Such proof is especially necessary where, as here, the official company-wide policy bars discrimination based on gender. *See* App. 195a; 18 Leading Companies Br. 14–15, 20–21. Thus, while the Ninth Circuit *also* failed to conduct a sufficiently rigorous analysis of the requirements of Rule 23 before certifying the class (Pet. 22–23), it committed a separate legal error when it expressly rejected *Falcon*'s "significant proof" requirement.

The Ninth Circuit acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart" (App. 59a), and plaintiffs to this day cannot point to one. Indeed, the only "policy" plaintiffs have identified to date—so-called "excess subjectivity"—is nothing more than discretionary decisionmaking, which is both lawful and the antithesis of a common policy that affects everyone in the same manner and thus cannot possibly satisfy Rule 23(a)'s commonality requirement. *See, e.g.*, *Garcia*, 444 F.3d at 632. "Like the proverbial shell game, . . . plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination, no matter which shell is lifted." App. 138a (Ikuta, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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