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

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice of the *amicus curiae's* intention to file this brief at least 10 days prior to its due date. Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Comprising potential defendants to large-scale employment class action litigation, the nationwide constituency that EEAC represents has a direct and ongoing interest in the issues presented in this case regarding the type of analysis a district court must undertake in deciding whether class certification is appropriate under Rule 23 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. The *en banc* decision below effectively rejects the "rigorous analysis" standard established by this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), for district court review of class certification motions by requiring only a minimal evidentiary showing that Respondents' claims meet the threshold requirements of Rule 23. Such a rule, if permitted to stand, would allow class certification of virtually any well-pled complaint, thus undermining the purposes of the class action tool and profoundly disadvantaging the employers having to defend such actions.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity to resolve a persistent conflict in the courts regarding the proper standards to be applied in evaluating the propriety of class certification under Rule 23 of the Federal Rules of Civil Procedure. While this Court in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), instructed courts to conduct a "rigorous analysis" in determining whether the requirements of Rule 23 have been satisfied, further clarification is desperately needed regarding the breadth of analysis contemplated under *Falcon*, as well as the standard of proof applicable to plaintiffs seeking Rule 23 class certification.

The sharply divided *en banc* court below affirmed certification of a class of at least half a million – and as many as 1.5 million – current and former female employees of Petitioner who were "employed for any period of time over the past decade, in any of [Petitioner'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." Pet. for Cert., at i. It rejected the argument that the district court failed to require Respondents to present significant

proof of a company-wide practice, which as applied to all 1.5 million purported class members resulted in them falling victim to the same type of discrimination under similar circumstances and at the hands of the same decisionmakers.

Instead, the court below found that even though individual workers "in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates," Pet. App. 30a, because Petitioners asserted that they were subjected to sex discrimination "through alleged common practices – *e.g.*, excessively subjective decisionmaking in a corporate culture of uniformity and gender stereotyping" – the district court did not commit reversible error in concluding that they established common questions of fact that are typical of the claims or defenses of the class as a whole. *Id.* Thus, while expressly acknowledging the many differences in each individual class members' circumstances, the court below nevertheless concluded that the mere allegation of a corporate culture of subjective decisionmaking was sufficient to permit the district court to find that the requirements of Rule 23 were satisfied. *Id.* at 30a-32a.

The decision below magnifies the already pronounced conflict among the lower courts regarding the role of the district courts in evaluating and ruling upon Rule 23 motions for class certification, as well as the proper evidentiary standard applicable to plaintiffs seeking Rule 23 class certification. The Second, Third, and Fifth Circuits all have held that such plaintiffs must establish, by a preponderance of the evidence, "each fact necessary to meet the requirements of Rule 23," *In re Hydrogen Peroxide*

Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008). *See also Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228-29 (5th Cir. 2009), while the Fourth, Eleventh and District of Columbia Circuits, apply different, seemingly lower standards. *See Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir.), *modified*, 2009 U.S. App. LEXIS 22224, at *8 (4th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 1720 (2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009); *Garcia v. Johanns*, 444 F.3d 625, 634 n.10 (D.C. Cir. 2006).

As one trial court observed:

> [T]he Circuit Courts in recent years have severely tightened the requirements for certifying a class under Rule 23. The First Circuit remains circumspect about "whether 'findings' regarding the class certification criteria are ever necessary," holding only that "when a Rule 23 requirement relies on a novel or complex theory as to injury . . . the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed." But other Circuits clearly require the trial judge to make factual findings by a preponderance of the evidence on all the Rule 23 criteria before certifying a Rule 23 class. . . . These decisions purport to flow from the language of Rule 23, but policy concerns (such as the make-or-break decision of certifying a huge class action) clearly drive some of the decisions.

Prescott v. Prudential Ins. Co., 2010 U.S. Dist. LEXIS 76293, at *20-*21 (D. Me. July 27, 2010) (citations omitted).

The decision below also adds to the disagreement among lower courts over whether actions seeking monetary damages, in addition to equitable and injunctive relief, *ever* are suitable for class certification under Rule 23(b)(2). This Court has indicated that granting class certification status under Rule 23(b)(2) where monetary damages are sought raises constitutional and due process concerns, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), strongly suggesting that a "substantial possibility" exists that certification of such claims is never appropriate. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

The persistent lack of consistency in the courts regarding the propriety of Rule 23 class certification creates substantial uncertainty in an area of law that is of great importance to the business community. This inconsistency threatens to undermine the traditional role of the courts as gatekeepers in eliminating meritless cases at the class certification stage, thereby minimizing the enormous pressure placed on defendants to settle such claims.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NECESSARY IN ORDER TO PROVIDE MUCH NEEDED CLARITY ON ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

The decision below, which held that the district court properly examined whether Respondents satisfied the strict class certification requirements of Rule 23 of the Federal Rules of Civil Procedure, establishes such a low evidentiary bar that it is difficult to imagine an employer that would not be extremely

vulnerable under that framework. It departs from decisions of other courts of appeals and, while paying lip service to this Court's admonition in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), that district courts perform a "rigorous analysis" as to whether the plaintiffs' evidence supports Rule 23 class certification, ultimately disregards that principle. Given the conflict in the lower courts on what standards apply to motions for class certification under Rule 23, review of the decision below by this Court is warranted.

A. Despite This Court's Admonition In *Falcon*, There Remains Considerable Disagreement Regarding The Proper Analysis Required Of District Courts In Evaluating Rule 23 Motions For Class Certification

In *General Telephone Co. of the Southwest v. Falcon*, this Court declared that district courts, in determining whether plaintiffs seeking class certification have met the requirements of Rule 23, must engage in a "rigorous analysis" of the facts presented in support of the request. 457 U.S. 147, 161 (1982). It noted that in doing so, it sometimes "may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 160.

Falcon appeared to dispel the misconception that the Court's earlier ruling in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), created a bright-line rule barring merits-based inquiries at the class certification stage. In *Eisen*, the Court observed that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits" when consider-

ing whether or not the requirements of Rule 23 have been met. 417 U.S. at 177. Shortly after *Eisen* was decided, the Court went on to observe that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims … [of which] typicality … adequacy … and the presence of common questions of law or fact are obvious examples." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978) (citation and internal quotation omitted). It is this overlap between the merits of plaintiffs' claims and the Rule 23 class certification standards that makes it necessary, as the Court eventually instructed in *Falcon*, to "probe behind the pleadings" and inquire into the merits of plaintiffs' allegations. *Falcon*, 457 U.S. at 160.

Because the Court in *Falcon* did not expressly reconcile the "rigorous analysis" approach with its earlier caution in *Eisen* against merits-based inquiries, lower courts have struggled in determining what level of review satisfies the "rigorous analysis" test. A number of courts, most notably the Second, Third and Seventh Circuits, hold that district courts must not refrain from examining the merits of the plaintiffs' allegations at the expense of conducting a thorough Rule 23 analysis. *See In re Initial Pub. Offering (IPO) Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001); *see also Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 522 F.3d 6, 24 (1st Cir. 2008) ("Our sister circuits agree that when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria, but how they articulate the necessary degree of inquiry

ranges along a spectrum which suggests substantial differences") (citing cases).

The Second Circuit recently clarified the proper standard for granting class certification in the context of so-called "statistical dueling" between the parties on the commonality issue, abandoning the approach it previously had adopted in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999). *In re IPO Sec. Litig.*, 471 F.3d at 39-40. In *In re IPO*, the court noted that *Caridad* condemned "statistical dueling" between experts based on the no-merits-inquiry approach taken by this Court in *Eisen*. *Id.* at 35. It observed that "*Caridad*, by the imprecision of its language, left unclear whether the merits dispute between the experts was not to be resolved at the class certification stage or whether their dispute about a class certification requirement was not to be resolved at that stage." *Id.* (footnote omitted). The court thus repudiated its prior holding in *Caridad*, concluding that judges must resolve factual disputes relevant to each Rule 23 requirement before ruling on whether to certify a class:

> With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.

Id. at 41.

The Seventh Circuit also has held that where a Rule 23 class certification issue is so closely tied to the merits of the underlying claim, the court "must

make a preliminary inquiry into the merits" in order to determine whether class certification is proper. *Szabo*, 249 F.3d at 676. Giving uncontestable weight to the plaintiffs' allegations "moves the court's discretion to the plaintiff's attorneys," and essentially permits the plaintiffs to "tie the judge's hands by making allegations relevant to both the merits and class certification." *Id.* at 677. Relying on the Seventh Circuit's rationale in *Szabo*, the Third Circuit similarly found in *In re Hydrogen Peroxide Antitrust Litigation* that district courts "must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action." 552 F.3d at 307.

In contrast, the court below, joined by lower courts within its jurisdiction, evokes the "rigorous analysis" framework, while in fact applying a much less stringent standard than that adopted by other circuits striving to properly apply *Falcon*. Indeed, when the legal principles purportedly endorsed by the *en banc* court below are actually applied to the facts, it becomes abundantly clear that the district court refused to conduct any meaningful, merits-based review in determining whether the requirements of Rule 23 were satisfied.

The district court granted class certification based on evidence that Petitioner maintained a "common policy" of allowing local managers to use some discretion in making employment decisions and that its uniform corporate culture "could be" subject to gender stereotyping and, in doing so, refused to consider evidence offered by Wal-Mart undermining class certification, concluding that delving into the merits in such a manner would be improper. *Dukes*

v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004). It said:

> In *Falcon*, the Court reiterated the well-recognized precept that the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Nevertheless, we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Thus, although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage.

Id. at 144 (citations and internal quotations omitted).

Despite the district court's strained interpretation and improper application of *Falcon*, a three judge panel of the Ninth Circuit, in a 2-1 decision, nevertheless affirmed class certification. *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168 (9th Cir. 2007), *vacated and reh'g granted*, 556 F.3d 919 (9th Cir. 2009). A divided *en banc* court below, endorsing the district court's flawed approach, also affirmed. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). Stripped of its rhetoric, its decision can only be viewed as establishing the very lowest standard of rigor applicable to district courts deciding the propriety of class certification under Rule 23.

Continued inconsistency in this area of the law will have a profound effect on the business community in general, but in particular on large companies that

operate and employ staff across the United States. For instance, companies doing business within the Ninth Circuit's jurisdiction (which includes California, the nation's most populous state)[2] will be subject to Title VII class actions that might never have been certified under the more rigorous approach applied by the Second and Third Circuits – whose jurisdictions includes New York, Connecticut, Vermont, Pennsylvania, New Jersey, Delaware, and the U.S. Virgin Islands.

B. Without Definitive Guidance From This Court, The Lower Courts Will Continue To Apply Vastly Different Standards Of Proof Applicable To Plaintiffs Seeking Rule 23 Class Certification

> Although it is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met, little guidance is available on the subject of the proper standard of "proof" for class certification. The Supreme Court has described the inquiry as a "rigorous analysis" and a "close look," but it has elaborated no further.

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 315-16 (citations and footnote omitted). Indeed, left to figure it out, the lower courts have applied wide ranging standards of proof on plaintiffs seeking to proceed on a class-wide basis. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*,

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[2] U.S. Census Bureau, Annual Estimates of the Population for the United States, Regions, States and Puerto Rico: April 1, 2000 to July 1, 2009, Table 1 (July 1, 2009), *available at* http://www.census.gov/popest/states/tables/NST-EST2009-01.xls

546 F.3d 196 (2d Cir. 2008); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221 (5th Cir. 2009); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

The Second, Third, and Fifth Circuits all have held that plaintiffs seeking Rule 23 class certification must establish, by a preponderance of the evidence, "each fact necessary to meet the requirements of Rule 23." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 320; *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d at 202; *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d at 228-29. As the Second Circuit explained:

> Although we did not use the words "preponderance of the evidence" in *In re IPO* to describe the standard of proof applicable to Rule 23 issues, we in effect required the application of a cognate standard by directing district courts "to assess all of the relevant evidence admitted at the class certification stage," to "resolve[] factual disputes relevant to each Rule 23 requirement," and "[to] find[] that whatever underlying facts are relevant to a particular Rule 23 requirement have been established," notwithstanding an issue's overlap with the merits. Today, we dispel any remaining confusion and hold that the preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Teamsters, 546 F.3d at 202 (citations omitted).

By contrast, the Eleventh Circuit has suggested that plaintiffs, in order to proceed as a class, must

make "some showing" that all of the requisite Rule 23 requirements have been satisfied, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009), while the District of Columbia Circuit seems to endorse a "significant showing" proof standard. *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) (citation omitted). The Fourth Circuit in *Brown v. Nucor Corp*., recently endorsed a "facial" showing standard, 576 F.3d 149, 156 n.10 (4th Cir.), *modified*, 2009 U.S. App. LEXIS 22224, at *19 n.10 (4th Cir. 2009), *cert. denied*, __ U.S. __, 130 S. Ct. 1720 (2010), which seems to comport most closely with the "threshold showing" approach expressly rejected by both the Second and Third Circuits in *Teamsters Local 445* and *In re Hydrogen Peroxide*. As the Third Circuit explained:

> A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard.

552 F.3d at 321.

To the extent that the decision below rejected the more robust standard of proof endorsed by most other circuit courts in favor of a lower, more nebulous one, it exacerbates a problematic conflict among the courts. Without further clarification from this Court, the lower courts will continue to apply remarkably differing standards of proof to plaintiffs seeking class certification under Rule 23, as employers subject to class litigation in multiple jurisdictions continue to face substantial uncertainty in defending such claims.

C. The Decision Below Magnifies The Conflict In The Courts Regarding Whether Rule 23(b)(2) Class Certification Is Permissible In Title VII Discrimination Cases Seeking Substantial Monetary Relief

To maintain a class action alleging violations of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, plaintiffs must satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 23. Rule 23(a) permits class certification only when "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Rule 23(b)(2), in turn, allows certification only when the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) permits certification where "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Here, the *en banc* court below affirmed class certification under Rule 23(b)(2). It found no error in the district court's analysis under Rule 23(a), agree-

ing that evidence of Petitioner's "subjective decision-making policies suggests a common legal or factual question regarding whether [Petitioner's] policies or practices are discriminatory," thus satisfying the commonality requirement. Pet. App. 78a. As for typicality, the *en banc* majority determined that even though individual workers "in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices – *e.g.*, excessively subjective decisionmaking in a corporate culture of uniformity and gender stereotyping" – the district court did not commit reversible error in concluding the claims of the class members also were sufficiently typical to satisfy Rule 23(a)(3).[3] Pet. App. 30a.

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[3] Notably, the U.S. District Court for the Northern District of Illinois recently denied class certification in a Title VII race discrimination case involving allegations and factual circumstances strikingly similar to the instant case. *McReynolds v. Merrill, Lynch, Pierce, Fenner & Smith, Inc*., 2010 U.S. Dist. LEXIS 80002 (N.D. Ill. Aug. 9, 2010). There, the plaintiffs claimed that the defendant "has a corporate culture of racial discrimination that it implements through the discretionary decisions of over 15,000 [financial advisors], over 600 branch office managers, 135 complex directors, 30 Regional Managing Directors and 5 Divisional Managers situated across the entire United States." *Id.* at *14. Rejecting the plaintiffs' motion for Rule 23(b)(2) class certification, the district court observed, "[a]fter identifying these so-called common issues, however, plaintiffs offer little to establish the 'significant proof' required by *Falcon* to establish that the asserted discriminatory culture manifested itself in the 'same general fashion' as to all putative class members." *Id.* at *13. It went on to point out:

> In fact, however, the plaintiffs' attempt to make this showing is undermined by the different experiences of the

The *en banc* majority also affirmed the district court's finding that the class is maintainable under Rule 23(b)(2). Despite the billions of dollars in back-pay and punitive damages being sought, the district court concluded that injunctive relief is the primary purpose of the litigation. It observed that while Rule 23 precludes class certification where the relief sought "relates exclusively or predominately to money damages," it does not bar plaintiffs from seeking *any* monetary damages on a class wide basis.

In deciding when monetary relief actually does predominate over injunctive relief, the *en banc* majority reviewed its prior ruling in *Molski v. Gleich*, as well as precedent in other jurisdictions, observing that courts have disagreed over the years as to whether class certification under Rule 23(b)(2) is improper unless the claim for monetary damages is merely incidental to the injunctive relief being sought. 318 F.3d 937, 949-50 (9th Cir. 2003). *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (citing cases); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645-50 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695, 720-21 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods,*

> proposed class members, in terms of length of service with the defendant, income, position levels, the people who made the relevant employment decisions, and the conflicting and unconvincing anecdotal evidence found in their declarations . . . Plaintiffs' position essentially is that all of these decisions were made by racist employees of a racist company. As numerous decisions from this district demonstrate, however, class certification should be denied when the plaintiffs' class definition implicates numerous, independent decision-makers resulting in the need for numerous individual inquiries.

Id. at *13-*15.

Inc., 546 U.S. 464 (2006); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 163-64 (2d Cir. 2001).

Molski focused on evaluating the "subjective intent" of the plaintiffs in bringing the action, while at the other end of the spectrum, the Fifth Circuit in *Allison* focused on whether the monetary claims amounted to no more than "incidental damages." 151 F.3d at 415-16. There, the Fifth Circuit examined the impact of the Civil Rights Act of 1991 on Rule 23(b)(2) class certification determinations in Title VII cases. It observed that the Civil Rights Act significantly changed the character of Title VII actions by creating a right of both parties to a jury trial and expanding statutory remedies for violations to include up to $300,000 in compensatory and punitive damages, in addition to injunctive and equitable relief. 42 U.S.C. § 1981a. The amendments emphasized the need for individual remedies, particularly in the case of punitive damages awards, which require individualized proof "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (noting that "Congress plainly sought to impose two standards of liability—one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award").

For that reason, the Fifth Circuit in *Allison* concluded, "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Allison*, 151 F.3d at 415; *see also Murray v. Auslander*, 244 F.3d 807, 812 (11th

Cir. 2001); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999). It explained, "[b]y incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison* at 415.

In *Robinson*, however, the Second Circuit held that claims for monetary relief do not automatically render class certification inappropriate; rather, the district court must assess on a case-by-case basis whether the monetary relief predominates, and whether class treatment would be efficient and manageable. 267 F.3d at 164. The Ninth Circuit in *Molski* adopted *Robinson's* case-by-case test, and expressly rejected the Fifth Circuit's approach in *Allison*. 318 F.3d at 949-50.

The *en banc* court below ultimately refused to endorse any of the existing standards, expressly rejecting *Molski*. It held, "to the extent *Molski* required the district court to inquire only into the intent of the plaintiffs and focus primarily on determining whether reasonable plaintiffs would bring suit to obtain injunctive or declaratory relief in the absence of a possible monetary recovery, it is overruled." Pet. App. 37a (citation omitted). It went on to articulate a different, arguably more confusing rule under which class certification will be improper where monetary relief is "predominant" over injunctive relief, as determined on a case-by-case basis by considering the objective effect the relief has on the litigation. Factors relevant to the "objective effect" determination include whether the monetary relief sought dictates what procedures are used; introduces "new and significant" legal and factual issues into the litigation; and requires individualized hearings. Pet. App.

33a. Also relevant is whether the size and the nature of the monetary relief raise due process and litigation manageability concerns.

Applying the new standard, the court below concluded that the district court did not abuse its discretion in granting certification under Rule 23(b)(2). It rejected Petitioner's argument that given the enormous size of the class – and the possibility of monetary liability amounting to several billion dollars – monetary relief necessarily predominates, making class certification improper, noting that the amount of potential damages "is principally a function of Wal-Mart's size, and the predominance test turns on the primary goal and nature of the litigation – not the theoretical or possible size of the total damages award." Pet. App. 39a.

Because the new principles established by the *en banc* court below only further perpetuate confusion over the extent to which Rule 23(b)(2) class certification *ever* is appropriate in Title VII cases seeking monetary damages, review by this Court is warranted.

II. IMPROPER CERTIFICATION OF EMPLOYMENT DISCRIMINATION CLASS ACTIONS PROFOUNDLY DISADVANTAGES EMPLOYERS, WHO OFTEN ACQUIESCE TO THE PRESSURE TO SETTLE SUCH CLAIMS, REGARDLESS OF THEIR MERIT

A district court's decision on a Rule 23 motion for class certification "is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on

the part of defendants)." *In re Hydrogen Peroxide*, 552 F.3d at 310 (citation omitted). Indeed, class certification "'may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments). Because of the importance of Rule 23 class certification determinations, courts must be able to understand and rigorously apply the rules in a manner that ensures consistency and fairness for both plaintiffs and defendants.

The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called judicial "blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). As the Eleventh Circuit has found:

> Once one understands that the issues involved in the instant case are predominantly case-specific in nature, it becomes clear that there is nothing to be gained by certifying this case as a class action; nothing, that is, except the *blackmail value* of a class certification that can aid the plaintiffs in coercing the defendant into a settlement.

Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (emphasis added).

Judge Posner also astutely has observed that when companies face millions, or in some cases, billions, of dollars in potential liability as a result of a class action, "[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citation omitted).

See also In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (quoting *Rhone-Poulenc Rorer*), *overruled on other grounds by In re IPO Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167-68 n.8 (3d Cir. 2001) (same).

Traditionally, it has been the role of the courts to act as gatekeepers in eliminating meritless cases at the certification stage, minimizing the enormous "blackmail value" of large classes. *Rutstein*, 211 F.3d at 1241 n.21. The panel majority's improper application of Rule 23's class certification requirements represents an abandonment of that role. By allowing unchallenged evidence to form the basis for class certification on the theory that the evidence will be evaluated at trial, the panel majority ignores the reality that class certification almost invariably leads to a settlement, making it likely that the evidence will never be evaluated. The decision below will make it easier to certify large class actions, increasing exponentially the pressure on employers to settle even meritless claims.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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