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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner Wal-Mart Stores, Inc.[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members operate in nearly every industry and business sector in the United States, and many are subject to Title VII of the Civil Rights Act of 1964, which is a focus of the decision below. The Chamber's members devote extensive re-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a 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. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioner and Respondent, upon timely receipt of notice of the Chamber's intent to file this brief, have consented to its filing. Petitioner and Respondent have each filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

sources to developing employment practices and compliance programs designed to ensure compliance with Title VII and other legal requirements.

The Chamber's members also have an interest in the ruling below because the Ninth Circuit's ill-considered application of Rule 23(b)(2) will likely encourage an avalanche of new class action litigation on a broad array of subject matters, beyond employment issues. If allowed to stand, the ruling thus has the potential to dramatically increase the class action exposure of the Chamber's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a 6-5 *en banc* decision with four opinions, the Ninth Circuit affirmed a district court decision that certified a massive Rule 23(b)(2) class of female Wal-Mart employees – with "little in common but their sex and this lawsuit" – who seek billions of dollars in monetary compensation. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting).

By considering plaintiffs' proposed class under the rubric of Rule 23(b)(2) – despite the enormity of their damages request – and then applying a liberal construction of Rule 23(b)(2)'s procedural requirements – in contrast to nearly every other Circuit – the courts below have issued an invitation to plaintiffs' attorneys across the country to bring their employment, antitrust, medical monitoring, consumer fraud and other class actions to the Ninth Circuit and masquerade million- and billion-dollar damages claims under the guise of requests for injunctive relief.

The Ninth Circuit's ruling badly misreads the scope of Rule 23(b)(2) and rashly sacrifices substantive law to the gods of efficiency. First, it expands the scope of Rule 23(b)(2) – which lacks the express procedural protections set forth in Rule 23(b)(3) – to include sprawling class actions that seek billions of dollars in potential damages. Second, it suggests that federal courts can certify a class pursuant to Rule 23(b)(2) in any area of the law without regard to whether doing so alters – or even eviscerates – the

defendant's substantive rights. This lawless approach violates the clear mandate of the Rules Enabling Act – and the separation-of-powers principles on which that act is premised.

The Ninth Circuit's loose approach to class certification places it in conflict with numerous other Circuits – and threatens to establish the West Coast as a haven for class actions that would be rejected in the rest of the country. If allowed to stand, the Ninth Circuit's decision will thus have deeply destructive effects on businesses nationwide, as plaintiffs will suddenly flock to its district courts with a broad array of class actions that purportedly seek "injunctive relief" against local and national companies – but are in fact damages actions in disguise. This Court should grant the petition for a writ of certiorari to ensure that the courts of the Ninth Circuit do not become the destination of choice for improper class actions that deprive our nation's critical industries of the fundamental due process right to defend themselves when they are sued.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION TAKES RULE 23(b)(2) FAR BEYOND ITS INTENDED SCOPE, CREATING GRAVE RISKS FOR AMERICAN BUSINESS.

A. This Court Should Resolve The Circuit Split On Application Of Rule 23(b)(2) – And Adopt A Standard Consistent With The Language And Intent Of That Provision.

Rule 23(b)(2) permits the certification of a class only if "the party opposing the class 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). While the Rule "is silent as to whether monetary remedies may be sought in conjunction with injunctive or declaratory relief," *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998), the Advisory Committee Notes on Rule 23 state that class certification under Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." Fed. R. Civ. P. 23 (advisory committee notes) (emphasis added).

In addressing "what monetary relief is permissible in a (b)(2) class action," courts have generally adopted the same position "taken by the advisory committee that monetary relief may be obtained in a (b)(2) class action so long as the predominant relief sought is injunctive or declaratory." *Allison*, 151 F.3d at 413 (citing *Eubanks v. Billington*, 110 F.3d 87,

92 (D.C. Cir. 1997); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 n.14 (5th Cir. 1984); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986); *In re School Asbestos Litig.*, 789 F.2d 996, 1008 (3d Cir. 1986); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1155 (11th Cir. 1983); *Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968)).

The Advisory Committee Notes do not define or explain what the concept of "predominating relief" means – instead interpreting the term literally as "controlling, dominating, [or] prevailing." Fed. R. Civ. P. 23 (advisory committee notes). But, as courts have noted, that does not "translate[] into a workable formula for comparing different types of remedies." *Allison*, 151 F.3d at 412. As a result, federal appellate courts have struggled to find a logical standard by which to assess the applicability of Rule 23(b)(2) in actions involving requests for both injunctive/declaratory and monetary relief.

The simplest approach would be to read Rule 23(b)(2) at its word – as applying only to cases seeking pure injunctive relief. Most courts have adopted a more nuanced approach, however, as best expressed by the Fifth Circuit in *Allison*, which held that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415. According to the court, "[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." *Id.* "Ideally," the court noted, "incidental

damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established." *Id*. (citing Manual for Complex Litigation (Fourth) at 348 (2004)). "Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Id*. In short, [l]iability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Id*.

Applying this test in *Allison*, the Fifth Circuit affirmed the trial court's refusal to apply Rule 23(b)(2) to a proposed Title VII class seeking injunctive relief, as well as monetary relief in the form of back pay, front pay, compensatory damages and punitive damages. *Id*. at 416. The court agreed with the district court that the relief sought "did not flow directly from proof of liability on the aspects of the plaintiffs' disparate impact or pattern or practice claims that entitled them to injunctive or declaratory relief." *Id*. Instead, "[e]ntitlement to back pay and other equitable monetary remedies [would require] separate hearings in which each class member would have to show that the discrimination caused a loss." *Id*. "Similarly, recovery of compensatory and punitive damages required particularly individualized proof of injury, including how each class member was personally affected by the discriminatory conduct." *Id*. Thus, the trial court correctly held that the proposed class could not be certified under Rule 23(b)(2).

This "incidental damages" approach has also been adopted by the Third, Sixth, Seventh and Eleventh Circuits. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 646-51 (6th Cir. 2006); *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005); *Barabin v. Aramark Corp.*, No. 02-8057, 2003 U.S. App. LEXIS 3532 (3d Cir. Jan. 24, 2003) (adopting "incidental damages" test; "whether damages are incidental depends on: (1) whether such damages are of a kind to which class members would be automatically entitled; (2) whether such damages can be computed by 'objective standards' and not standards reliant upon 'the intangible, subjective differences of each class member's circumstances;' and (3) whether such damages would require additional hearings to determine") (citation omitted); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (proposed class's "damages claim predominates over its claims for equitable relief" because "assessing damages for these inherently individual injuries compels an inquiry into each class member's individual circumstances") (citation omitted).

According to the Seventh Circuit in *In re Allstate*, "[t]he operational meaning of 'incidental' damages . . . is that the computation of damages is mechanical, 'without the need for individual calculation,' so that a separate damages suit by individual class members would be a waste of resources. 400 F.3d at 507 (quoting Manual for Complex Litigation (Fourth) § 21.221 (2004)). Thus, "just as the presence of a damages claim does not always require insisting that the case proceed under Rule 23(b)(3), so the fact that declaratory or injunctive relief is sought (and no, or only incidental, damages) should not automatically

entitle the class to proceed under Rule 23(b)(2)." *Id*. This is because "[t]here can be critical differences among class members that are independent of differences in the amount of damages." *Id*. "[W]hen, though the suit is for declaratory relief, the effect of the declaration on individual class members will vary with their particular circumstances," application of Rule 23(b)(2) is not appropriate. *Id*. at 508.

The Ninth Circuit declined to follow the incidental-damages model. Instead, it minted a new standard, fashioned from the dictionary definition of "predominant." *Dukes*, 603 F.3d at 616. Based on that definition, it determined that a request for monetary relief predominates when it is "'superior [in] strength, influence, or authority' to injunctive and declaratory relief." *Id.* (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). Under this standard, a district court apparently will consider "the objective effect of the relief sought in the litigation." *Id.* at 617 (citation and internal quotation marks omitted). "Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature – as measured by recovery per class member – raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative." *Id.*

This new standard for determining whether monetary relief predominates is insufficiently rigorous, as revealed by its application to this case. In applying the standard, the court first considered the

likely size of the class members' damages awards, explaining that the relevant inquiry involves a "comparison between the amount of monetary damages available for each plaintiff and the importance of injunctive . . . relief for each." *Id.* at 618. It offered no standards to guide such an apples-and-oranges comparison, instead resting on an unexplained conclusion that "Wal-Mart has not shown that the size of the monetary request undermines Plaintiffs' claim that injunctive and declaratory relief predominate." *Id.*[2]

The court then found that the plaintiffs' request for declaratory and injunctive relief predominated solely because – apparently as a categorical matter – "the calculation of backpay generally involves relatively uncomplicated factual determinations and few individualized issues" and because "back pay is an integral component of Title VII's 'make whole' remedial scheme." *Id.* at 619 (citation, alterations, and some internal quotation marks omitted).

The court's adherence to this rote principle – even assuming it is generally valid[3] – blinded it to the glaring distinction between this case and others

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[2] At the same time, however – again without analysis or articulation of any standard – it concluded that the potential for an award of $300,000 in punitive damages per class member "militates in favor of a finding that monetary relief predominates" as to the punitive damages claims. *Dukes*, 603 F.3d at 622.

[3] In fact, as set forth in Wal-Mart's Petition, the better-reasoned view is that backpay "weighs on the monetary side of the scale." (*See* Pet. 16 (citing App. 91a n.40).)

addressing demands for backpay – the substantial size and diversity of the class. It gives no consideration to whether the backpay claims of a class comprising at least 1.5 million women[4] and "encompassing both salaried and hourly employees in a range of positions" at over "3,400 stores across the country" would really involve only "relatively uncomplicated factual determinations." *Id.* at 598, 619. Owing to this diversity, the class is teeming with individualized facts, all of which would be directly relevant both to entitlement to relief in the first place and to the calculation of any backpay. *See, e.g.*, *id.* at 652 (Kozinski, J., dissenting) (highlighting illustrative differences within the class). The court simply swept these concerns aside, concluding that "the predominance test turns on the primary goal and nature of the litigation – not the theoretical or possible size of the total damages award." *Id.* at 618.

This analysis missed the mark, and it reveals the problem with the Ninth Circuit's novel test. The size of the class and potential damages award *does* matter – particularly when there are individualized issues within the class. As district courts have long observed in the Rule 23(b)(3) context, individualized issues make class action trials extremely difficult as a practical matter, even in cases with much smaller classes. *San Antonio Tel. Co. v. Am. Tel. & Tel. Co.*, 68 F.R.D. 435, 438 (W.D. Tex. 1975) ("Once again, the

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[4] The class included 1.5 million women over a five-year period when it was certified in 2004. Since then, the class has vastly expanded, and it is still growing, as are the potential damages. *See Dukes*, 603 F.3d at 577-78 & n.3, 598; *id.* at 628-30 (Ikuta, J., dissenting); *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142 (N.D. Cal. 2004).

fact of damage must be proved as to each individual member of the class. Such proof, in light of a class size of up to 500, makes the class action unmanageable in this respect."). And even when common issues predominate over individualized ones in Rule 23(b)(3) classes, the class size can reach a breaking point from the perspective of manageability. *Boshes v. Gen. Motors Corp.*, 59 F.R.D. 589, 599 (N.D. Ill. 1973) ("[E]ven if common questions predominate, a class action may not be a superior or, to be more exact, a feasible method of adjudication because the 'class' is simply unmanageable. It is the opinion of this court that the proposed class falls into the latter category. Although size, in and of itself, will not generally be enough to make a class unmanageable, this court is unaware of any case that certified a class of the potential size proposed in this case. The figures are nothing less than staggering.").

In sum, the Ninth Circuit's novel approach to deciding what qualifies as a (b)(2) class action is neither principled nor practical. Instead, it invites plaintiffs to "attempt to shoehorn damages actions into the Rule 23(b)(2) framework" and thereby avoid the strict procedural protections of Rule 23(b)(3), including manageability and, as discussed in the next section, predominance. *See Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000).

B. By Opening The (b)(2) Door To Claims For Damages – While Rejecting The Cohesiveness Approach Adopted By Other Courts – The Ninth Circuit Has Effectively Embraced Standard-Free Class Certification.

The Ninth Circuit's liberal view of what constitutes a Rule 23(b)(2) class is particularly problematic in light of its implicit rejection of the "cohesiveness" standard for (b)(2) certification that has been adopted by nearly every other Circuit. The result is that (b)(2) class actions can proceed in the Ninth Circuit even if common questions do not predominate.

As noted above, this is not the first case to present the question of how to categorize a class action with both injunctive relief and damages components. In attempting to deal with such "hybrid" class actions, most courts have made it clear that even where these cases qualify for Rule 23(b)(2) treatment, that does not give plaintiffs a free pass on satisfying the core requirements of Rule 23(b)(3). To the contrary, eight of the U.S. Courts of Appeals have expressly recognized that Rule 23(b)(2) incorporates a cohesiveness requirement, which, like the predominance requirement of Rule 23(b)(3), bars class treatment unless "the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000).[5] In the words of

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[5] *See also Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 n.18 (3d Cir. 1998) (stating that under Rule 23(b)(2) it is "well established that the class claims must be cohesive"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 314 (4th Cir. 2006) (recognizing that a Rule 23(b)(2) class must be "sufficiently cohesive" for the class-action device to be employed); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (holding that a Rule 23(b)(2) class cannot be certified where "individualized issues . . . overwhelm class cohesiveness") (citing *Allison*, 151 F.3d at 414); *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) ("Because unnamed members are

the U.S. Court of Appeals for the Third Circuit: Rule 23(b)(2) classes require "*more* cohesiveness than a (b)(3) class" – not less. *Barnes*, 161 F.3d at 142-43;[6] *see also Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003) ("Rule 23(b)(3) is intended to be a less stringent requirement than Rule 23(b)(1) or (b)(2)").

The Ninth Circuit's decision swims against this tide, implicitly rejecting the need to test the homogeneity of proposed class members as long as a court determines that Rule 23(b)(2) applies. This liberalized approach will have far-reaching implications for the treatment of class actions in Ninth Circuit courts – and likely result in the certification of cases that would be rejected nearly everywhere else in the country.

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bound by the action without the opportunity to opt out of a Rule 23(b)(2) class, even greater cohesiveness generally is required than in a Rule 23(b)(3) class.") (citation and internal quotation marks omitted); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188 (10th Cir. 2010) (noting that Rule 23(b)(2) requires "cohesiveness among class members with respect to their injuries") (internal citation and quotation marks omitted); *Holmes*, 706 F.2d 1144.

[6] The *Barnes* court identified two reasons why (b)(2) classes require greater cohesion. 161 F.3d at 143. First, unnamed class members are bound by the action without notice or an opportunity to opt out. *Id.* Therefore, it is the court's responsibility to "ensure that significant individual issues do not pervade the entire action." *Id.* (internal quotation marks omitted). Second, without this inquiry, "the suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently." *Id.* (internal citation and quotation marks omitted).

* * *

The combined effect of these two deviations from standard Rule 23 analysis threatens to turn the Ninth Circuit into a haven for class action plaintiffs and a deathtrap for American businesses. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc (forthcoming 2010) (manuscript at 19) ("If left unchecked [by the Supreme Court], . . . *Dukes* threatens to undermine the progress made in the law of class certification elsewhere among the federal appellate courts by virtually inviting certification efforts in the anomalous circuit – indeed, by doing so especially in the kinds of high-stakes, national-market class actions in which careful certification analysis is most needed.").

Employment cases are just the tip of the iceberg. As commentators have recognized, *Dukes* will have broad implications for a variety of class actions against a host of industries, from antitrust cases to product liability actions to medical-monitoring claims. *See, e.g.*, Donald Falk et al., *Dukes v. Wal-Mart Stores: Ninth Circuit Lowers the Bar for Class Certification and Creates Circuit Split in Approving Largest Class Action Ever Certified*, Antitrust Chronicle, Competition Policy International, Aug. 10, 2010 ("Because *Dukes* lowers the bar to class certification in the Ninth Circuit, businesses that may be targeted by antitrust class actions should be prepared to face more litigation there, and should be sure to preserve important issues for potential Supreme Court review."); Drug and Device Law, *Dukes v. Wal-Mart – On to the Supreme Court, We Hope*, Apr. 26, 2010 (advocating reversal of Ninth Circuit

decision); Howard M. Erichson, *En Banc Rehearing in Dukes v. Wal-Mart*, Mass Tort Litigation Blog, Feb. 19, 2009 ("OK, it's not a mass tort. But for anyone interested in mass litigation, the *Dukes* case represents an important test of the limits of Rule 23(b)(2) class actions in which significant monetary damages are sought along with injunctive relief."); *see also* Nagareda, *supra*, at 4 ("[T]he potential impact of *Dukes* on the law of class certification extends well beyond the employment discrimination context.").

These implications cannot be overstated. It has long been recognized that loose certification standards have serious repercussions for American business because they present a risk of gargantuan verdicts – and even bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*: *An expected Supreme Court case involving Wal-Mart may radically alter the American legal landscape,* 30 Regulation 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so."). "Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo.

J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases, David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN'S Product Liability Law & Strategy (Feb. 2009), and defendants faced with improvidently certified, meritless lawsuits feel "intense pressure to settle" before trial, *see In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail.") (citation omitted); Jim Copland, *These actions have no class*, San Fran. Examiner, Sept. 15, 2004 (analyzing *Dukes v. Wal-Mart* and stating: "to permit hundreds or even millions of plaintiffs to join class action suits without letting the employers address individual bias claims on their merits is . . . no more than [a] corporate shakedown[]"). That pressure will be all the greater in the Ninth Circuit because, as discussed below, its ruling not only extends welcoming arms to dubious class actions but also promises to dilute the substantive law that will apply in those cases.

II. THE NINTH CIRCUIT'S DECISION SACRIFICES SUBSTANTIVE LAW TO PROMOTE EFFICIENCY.

The Rules Enabling Act provides that a procedural rule may not "abridge, enlarge or modify any

substantive right." 28 U.S.C. § 2072(b). As numerous courts have recognized, the Act plays a particularly important role in the area of class actions, where courts may be "tempt[ed]" to sacrifice substantive law for the sake of procedural efficiency. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights are respected"); *see also Eisen*, 479 F.2d at 1014 ("Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (noting that the Rules Enabling Act "limits judicial inventiveness" with respect to Rule 23). The Ninth Circuit gave in to that temptation, stripping defendants of the right to present defenses under Title VII *that have been recognized by this Court*, simply to facilitate use of the class device.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), this Court reversed a verdict for the Government in an employment-discrimination action alleging pattern-or-practice discrimination against a class of minorities who decided not to apply for positions because they were deterred by discriminatory hiring practices. In rejecting the verdict, the Court explained that it was troubled by the possibility that some of the class members either did not want the jobs at issue – or were not qualified for them. *Id.* at 369. The Court thus concluded that the Government needed to prove that each class member was qualified and would have applied for the relevant jobs "but for" his or her knowledge of the employer's discrimi-

natory policies. *Id.* at 371 (emphasizing that this burden of proof would have to be carried "with respect to each specific individual"). To satisfy this burden, the Court held, the district court would have to conduct mini-hearings "recreat[ing] the conditions and relationships that would have been had there been no unlawful discrimination." *Id.* at 372 (citations and internal quotation marks omitted). Although the task would not be a "simple one," such mini-trials were necessary to shave off frivolous claims and to determine whether each individual class member would be entitled to relief: "[a]fter the evidentiary hearings to be conducted on remand, both the size and composition of the class of minority employees entitled to relief may be altered substantially. Until those hearings have been conducted and both the number of identifiable victims and the consequent extent of necessary relief have been determined, it is not possible to evaluate abstract claims . . . ." *Id.* at 371-76.

Despite this clear guidance, the district court's certification ruling brushed aside the need to comply with *Teamsters* on the ground that "holding individual hearings for the number of women . . . in this case is impractical on its face." *Dukes*, 222 F.R.D. at 176. "[T]hus," the court concluded, "the traditional *Teamsters* mini-hearing approach is not feasible here." *Id.* The Ninth Circuit agreed, endorsing a sampling approach, under which Wal-Mart would be allowed to "present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something *other* than gender discrimination." *Dukes*, 603 F.3d

at 627 n.56. At the end of the day, such a trial by probability could well leave Wal-Mart liable to hundreds – if not thousands – of class members who could not prove their claims in an individual trial. As Judge Ikuta noted in her dissent, "[i]t seems obvious that the district court's determination that it could not certify the class in compliance with *Teamsters* compels the conclusion that it could not certify the class at all." *Id.* at 644 (Ikuta, J., dissenting); *see also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (the "shortcut [of denying individual hearings that] was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible"). But the majority *en banc* opinion did not find this conclusion to be "obvious" at all.

Once again, the Ninth Circuit's approach was contrary to that of other Circuits – and will have broad implications for a variety of class actions against a broad swath of industries. Indeed, the "sampling" approach condoned by the court is no different from the "fluid recovery" method of proof that has been sharply condemned by other courts in consumer fraud and product liability cases. In *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 230-31 (2d Cir. 2008), for example, the plaintiffs sought to demonstrate damages through aggregate statistical proof and distribute those damages to the entire class based on a similar sampling approach to that endorsed by the Ninth Circuit. The Second Circuit said no, rejecting this approach on the ground that it would impermissibly "alter defendants' sub-

stantive right to pay damages reflective of their actual liability." *Id.* at 231.

The Ninth Circuit's apparent disregard for the Rules Enabling Act and the principles on which it rests strongly suggest that it would have reached the opposite outcome in *McLaughlin*, allowing plaintiffs to go forward with class claims even though many class members were not entitled to recovery. This implication will not be lost on plaintiffs' counsel, and absent review by this Court, it will only add to the allure of filing dubious, sprawling class actions in the Ninth Circuit that bring American companies to their knees. Such a result would undermine judicial integrity, increase the "blackmail" effect of class actions, and threaten the stability of an already-vulnerable American economy. For this reason too, the Court should grant the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, and for those stated by petitioner Wal-Mart Stores, Inc., the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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