No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, ET AL., on behalf of themselves and all others similarly situated,
Respondents.

On 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. ("Petitioner").[1]

STATEMENT OF INTEREST

The Chamber is the world's largest business federation, representing three hundred thousand direct members and 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 resources to developing employment practices and programs

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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 37.3, Petitioner and Respondents have each filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs.

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 will likely provoke an avalanche of new class action litigation on a broad array of subject matters, beyond employment issues. If allowed to stand, the ruling 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

Rule 23(b)(2) permits class certification where, among other things, the plaintiffs bringing suit present claims that are "typical" of those of the class, and the defendant has acted "on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(a)(3), (b)(2). Neither condition is met here. The 1.5 million class members in this action occupied various positions at more than 3,400 stores across the country, and they seek billions of dollars in monetary compensation, the entitlement to which admittedly turns on individualized considerations. In short, the only things that are "typical" of or "apply generally to the class" are the class members' "sex and this lawsuit." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) (Kozinski, J., dissenting).

Nonetheless, the court below found that these superficial links justified class treatment, simply because the class seeks "injunctive relief." That conclusion was clearly erroneous. First, the class does not satisfy Rule 23(b)(2), which authorizes certification only where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The court of appeals construed this provision to allow certification of claims seeking money damages – regardless of whether they satisfy the exacting requirements of Rule 23(b)(3) – as long as the plaintiffs also request injunctive relief that is "'superior [in] strength, influence, or authority' to" the requested monetary relief.

Id. at 616 (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). This reading elevates form over substance and ignores the individualized issues that plaintiffs' damages claims will inevitably inject into the litigation. The court should have followed the lead of eight other courts of appeals that have interpreted Rule 23(b)(2) to require "cohesiveness," particularly where plaintiffs' claims include a damages component.

Second, the class does not satisfy Rule 23(a)(3), which allows class certification "only if the claims or defenses of the representative parties are typical of the claims or defenses of the class." According to the court of appeals, the typicality requirement merely demands that a representative's claims be "reasonably coextensive" with those of the class members – a standard that is apparently satisfied even where "individual employees in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates." *Id.* at 613 (internal quotation marks and citation omitted). The typicality requirement is not so flimsy, as many other courts of appeals have long recognized. Rather, like the predominance requirement of Rule 23(b)(3), typicality bars class treatment where resolution of class members' claims would "depend[] on each individual's particular interactions." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998).

The Ninth Circuit's loose approach to certification departs dramatically from those of the other courts of appeals, with potentially devastating implications for American business. If the ruling below is

allowed to stand, it would dramatically expand the exposure of American businesses to potentially bankrupting class actions by inviting self-appointed private attorneys general to bring damages claims under Rule 23(b)(2) that would never be allowed under Rule 23(b)(3). Anyone with a claim that is "reasonably coextensive" with those of other potential plaintiffs – be it a personal-injury, consumer-fraud, or medical-monitoring claim – would now have a viable class action, as long as the class also seeks injunctive relief – for example, to stop making a product, or to change a warning. Such a result would erase decades of class-action precedents protecting defendants from unfair trials – and would bury American businesses in abusive class-action lawsuits to the detriment of consumers, the U.S. economy and the judicial system itself. This Court should reverse the Ninth Circuit's decision and prevent such a result.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING CERTIFICATION OF A NON-COHESIVE CLASS SEEKING MONETARY RELIEF UNDER RULE 23(b)(2).

The court of appeals first erred in concluding that class certification of a claim for monetary relief under Rule 23(b)(2) is appropriate as long as that claim is not "superior [in] strength" to an accompanying claim for injunctive or declaratory relief. 603 F.3d at 616 (internal quotation marks and citation omitted). As Petitioner explains in its brief on the merits, Rule 23(b)(2) was intended to apply only to a narrow group

of cases involving pure injunctive relief. *See also* Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. Ann. Surv. Am. L. 681 (2010). But even assuming plaintiffs' claims were properly considered under the Rule 23(b)(2) framework, certification should have been denied because the class is not cohesive, making it impossible to fairly resolve all of the class members' claims in a single trial.

By its terms, Rule 23(b)(2) requires the proponent of certification to show that "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) (emphases added). These terms reflect important assumptions underlying Rule 23(b)(2) – that the defendant's "actions would affect all persons similarly situated so that those acts apply generally to the whole class," 7AA Charles Alan Wright et al., *Federal Practice and Procedure* § 1775, at 41 (3d ed. 2005), and that the class members' claims "involve uniform group remedies," *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 414 (5th Cir. 1998). Succinctly stated, Rule 23(b)(2) rests on an "assumption[] of cohesiveness" within the class. *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1156 (11th Cir. 1983); *Allison*, 151 F.3d at 432 (noting same assumption and citing *Thomas v. Albright*, 139 F.3d 227, 234-35 (D.C. Cir. 1998), in support).

For this reason, almost every court of appeals has insisted on a showing that proposed (b)(2) classes are

"cohesive," a requirement that is analogous to Rule 23(b)(3)'s predominance prong. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (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, 330 (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"); *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 432-33 (6th Cir. 2009); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000); *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) ("Because unnamed members are 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.") (internal quotation marks and citation omitted); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (noting that Rule 23(b)(2) requires "cohesiveness among class members with respect to their injuries") (internal quotation marks and citation omitted); *Holmes*, 706 F.2d at 1156.

As these courts have explained, a (b)(2) class requires even "*more* cohesiveness than a (b)(3) class." *Barnes*, 161 F.3d at 142-43 (emphasis added); *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)"); *Romberio*, 385 F. App'x at 432 (cohesiveness is the "defining characteristic" of a Rule 23(b)(2) action and

mandates strict "homogeneity of the interests of the members of the class.") (internal quotation marks and citation omitted). "This is so because in [(b)(2) classes] unnamed members [can be] bound by the action without [notice or an] opportunity to opt out." *Barnes*, 161 F.3d at 142-43. As a result, if "significant individual issues . . . pervade the entire action," absent class members could find themselves bound by a judgment that is adverse to their interests. *Id.* at 143 (internal quotation marks and citation omitted). Accordingly, 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," class treatment is barred. *Lemon*, 216 F.3d at 580.

The cohesiveness requirement also serves important practical considerations. As Rule 23 recognizes with respect to actions under Rule 23(b)(3) – the "typical vehicle for a class action when compensatory damages are sought," *Butler v. Sterling, Inc.*, No. 98-3223, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000) – courts must evaluate "the likely difficulties in managing a class action" as part of the decision whether to certify, Fed. R. Civ. P. 23(b)(3)(D). The same is true under Rule 23(b)(2); a "suit could become unmanageable and little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently." *Barnes*, 161 F.3d at 143 (internal quotation marks and citation omitted); *see also Shook v. El Paso County*, 386 F.3d 963, 972-73 (10th Cir. 2004); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 n.5 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999). Cohesiveness is critical to the (b)(2) analysis because

it protects against that result. Certainly, the drafters of Rule 23 did not intend that (b)(2) class actions would be certified regardless of whether a class trial would be manageable (or fair).[2]

As other courts of appeals have recognized, claims like those here – that involve monetary relief – generally fail Rule 23(b)(2)'s cohesiveness requirement. After all, where damages are sought, relief for one is no longer relief for all. Instead, entitlement to relief will usually differ materially among individual plaintiffs because "[m]onetary remedies are more often related directly to the disparate merits of individual claims." *Allison*, 151 F.3d at 413; *accord, e.g.*, *Thorn*, 445 F.3d at 330 ("[B]ecause the goal of the damage phase is to compensate the *plaintiffs* for their *individual injuries*, the claim will generally require the court to conduct individual hearings to determine the particular amount of damages to which each plaintiff is entitled."); *Rice v. City of Philadelphia*, 66 F.R.D 17, 20 (E.D. Pa. 1974) ("[N]ot only would the calculation of the amount of damages depend upon the individual facts of each claimant's case, but virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all."); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 596 (4th Cir. 1976) ("It is a monetary judgment that the plaintiffs seek and that is obvious from the phrasing of their prayer. Such an

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[2] To the extent Rule 23(b)(2) is interpreted to lack a manageability requirement, the only explanation would be that the drafters intended it to apply only to a very narrow category of pure injunctive relief cases in which a trial would, by definition, be manageable.

action is not suitable for treatment as a class action under Rule 23(b)(2).”). For this reason, cohesiveness “‘begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.’” *Allison*, 151 F.3d at 413 (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

That is precisely the case here. Plaintiffs’ class is not cohesive – and should have been rejected – because their claims “turn[] on the defendant’s individual dealings with each plaintiff.” *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir. 2000). For example, under well-established federal law, Wal-Mart has the right to raise affirmative defenses as to each class member’s claim. *See* Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g); *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359-60 (1977). As recognized by the dissent below, the only way for Wal-Mart to assert those defenses would be to hold “individual hearings” where the “court must allow up to 1.5 million individual determinations of liability.” 603 F.3d at 629 (Ikuta, J., dissenting); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976) (indicating that “evidence that particular individuals were not in fact victims of . . . discrimination” is “material” under Title VII); *Teamsters*, 431 U.S. at 371-72 (remanding case to district court for hearings “with respect to each specific individual” to determine whether they were individually entitled to relief). Obviously, such an undertaking would be completely unmanageable – as one court has held, even 500 mini-trials would be too much. *Cf. San Antonio Tel. Co. v. AT&T Co.*, 68 F.R.D. 435, 438 (W.D. Tex. 1975) (“Once again, the

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."). But such mini-trials would be necessary to preserve Wal-Mart's due-process right "to present every available defense" at trial. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted). Thus, classwide resolution is not possible in this case, and the court of appeals erred in holding otherwise.

The Ninth Circuit's contrary conclusion was based on its apparent belief that any time a class representative adds a claim for monetary relief to a lawsuit, as long as the claim for damages is not "'superior [in] strength, influence, or authority' to" the requested injunctive relief, certification is appropriate. 603 F.3d at 616 (quoting *Merriam-Webster's Collegiate Dictionary* 978 (11th ed. 2004)). The court arrived at this conclusion by turning to the dictionary to understand the meaning of the advisory committee's notes to the 1966 amendment to Rule 23, which explain that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or *predominantly* to money damages." *See id.* (emphasis added). But the committee notes only say that Rule 23(b)(2) *is not* appropriate in cases in which "final relief relates exclusively or predominately to money damages"; they do not state that certification under Rule 23(b)(2) *is* appropriate in all other cases.

The Ninth Circuit also purported to find support for its approach in the suggestion in the advisory committee's notes that "various actions in the civil-rights field" are proper candidates for class treatment

under Rule 23(b)(2). *See* 603 F.3d at 619. But again, while the notes suggest certification *may* be appropriate in such cases, they do not state that it is *categorically* appropriate in such cases. Thus, there is no legal presumption in favor of certifying civil-rights cases. *Thorn*, 445 F.3d at 330; *see also* George Rutherglen, *Title VII Class Actions*, 47 U. Chi. L. Rev. 688, 701-02 (1980) (noting that the advisory committee's mere use of civil rights cases as an example of cases that may be suitable for (b)(2) certification is not evidence of an intent to give special treatment to civil rights cases). In fact, the lynchpin of Rule 23(b)(2) is that members of the "group" that was allegedly discriminated against are seeking a remedy that will not vary according to individual circumstances. *See Thorn*, 445 F.3d at 330 (noting that Rule 23(b)(2) is particularly suited for class actions alleging discrimination and "seeking a court order putting an end to that discrimination"); *Penson v. Terminal Transp. Co.*, 634 F.2d 989, 994 (5th Cir. Unit B Jan. 1981) (indicating that the cohesiveness of a (b)(2) class stems, in part, from the "broad character of the relief sought").

In short, even if plaintiffs' class were eligible for (b)(2) consideration in the first place, it should have been rejected because the class members' claims are not cohesive.

II. THE COURT OF APPEALS IMPROPERLY DILUTED RULE 23'S TYPICALITY REQUIREMENT.

Even if Rule 23(b)(2) did not include an implicit requirement of "cohesiveness," certification would

still have been improper because the class failed at least one requirement of Rule 23(a): typicality. According to the Ninth Circuit ruling, typicality is a low threshold, one that is satisfied any time a representative's claims are "reasonably coextensive" with those of the class members. 603 F.3d at 613 (internal quotation marks and citation omitted). The court thus found that the named plaintiffs were typical of absent class members by virtue of plaintiffs' allegation of "common practices" of discrimination. This, too, was wrong.

Certification under Rule 23(b)(2) is only available, of course, where a class also satisfies the prerequisites of Rule 23(a). Fed. R. Civ. P. 23(b) (indicating that a (b)(2) class action "may be maintained if Rule 23(a) is satisfied[.]"). This includes the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality ensures that only those plaintiffs who advance the same factual arguments – rather than "factually distinct" ones – may be grouped together as a class. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (citation omitted); *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1215 (5th Cir. 1982). "The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff[s], so go the claims of the class." *Sprague*, 133 F.3d at 399. Only when typicality is satisfied can "the rights of the *entire* class [be] vindicated" by a class remedy. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir. 1995) (noting that such a result is required by due process); *see also*

Spano v. The Boeing Co., --- F.3d ---, 2011 WL 183974, at *12 (7th Cir. Jan. 21, 2011) ("Too liberal an application of the mandatory-class device risks depriving people of one of their most important due process rights: the right to their own day in court.").

In evaluating typicality, courts must scrutinize the allegations of a class complaint to determine whether proof of one plaintiff's claim would, perforce, prove the claims of all other class members. Thus, typicality is not satisfied where the class members' claims would be based on "widely divergent facts," *Sprague*, 133 F.3d at 399, or where the experiences of the class representatives are markedly different from those of other members of the class, *see, e.g.*, *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1004 (8th Cir. 2004), and courts have refused to certify (b)(2) classes under such circumstances. *See Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 508 (D. Neb. 2007) ("The plaintiffs' putative [(b)(2)] class is diverse, both in membership and claims specific members can raise. The proposed class includes children ranging in age from newborn to nineteen[.]"); *Killo v. Bethlehem Assocs.*, 104 F.R.D. 457, 458-59 (E.D. Pa. 1985) ("[T]here are no factual averments to indicate that any other potential [class] members were similarly treated[.]").

Bigger classes are less likely to satisfy the typicality requirement, because with size often comes diversity – and diversity is the antithesis of typicality. *Cf. In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 303 (N.D. Ohio 2007) ("Given the large size of the class, the differences in defendants' conduct, and the variable working environments in which all of

the . . . plaintiffs performed, each class member's claims involve so many distinct factual questions that class certification becomes inappropriate."). This is no less true with respect to employment-discrimination claims – the bigger the class, the less likely the named plaintiff(s) can represent the mix of interests in the class. *See, e.g.*, *Hines v. Widnall*, 334 F.3d 1253, 1258 (11th Cir. 2003) (holding that typicality requirement was not met where class representatives could not "adequately represent the spectrum of . . . employees"); *Morgan v. Metro. Dist. Comm'n*, 222 F.R.D. 220, 232 (D. Conn. 2004) ("The putative class members also vary greatly in terms of their departments, supervisors, the number of years they have been employed by [the organization], and their individual circumstances. Thus, while most . . . of the named Plaintiffs and affiants allege discrimination in promotions, there is little to bind their claims together[.]"); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("[T]he purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof.").

The class here – comprising 1.5 million people – fell far short of the typicality requirement of Rule 23(a)(3). Six plaintiffs seek to represent class members who "work hourly in 53 different departments and 170 different job classifications; these positions include cashiers, associates, team leads, and department managers." 603 F.3d at 629 (Ikuta, J., dissenting). Some of the named plaintiffs are hourly-wage employees, while others are salaried employees. *Id.* And plaintiffs seek to represent class members

who worked at Wal-Mart over the course of a decade. *Id.* at 628. Although the plaintiffs offered affidavits in an attempt to show that the alleged discriminatory conduct could have affected everyone in the same way, those affidavits "describe[d] the affiants' experiences in, at most, 235 of Wal-Mart's 3,400 stores, meaning that the affidavits provide[d] no information about working conditions in over 3,100 stores." *Id.* at 634. That showing was insufficient. As the dissent explained, "[a] single affidavit from a single store in Michigan tells little about whether there is discrimination at each of the other 72 stores in Michigan, let alone the rest of the company." *Id.* Thus, "this is not a case where a named plaintiff who proved her own claim would prove anyone else's," *Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414, 425 (S.D. Ohio 2002), and typicality is therefore lacking.

The court of appeals nonetheless found the typicality requirement satisfied on the mere ground that the named plaintiffs alleged "common practices" of discrimination. 603 F.3d at 613. This conclusion was flawed for at least two reasons. First, the court applied the wrong standard for typicality. According to the court, typicality is a "permissive standard[]" that merely requires that the class representatives' claims be "reasonably coextensive" with those of the rest of the class. *Id.* (internal quotation marks and citation omitted). The court thus seemed to view typicality as akin to the commonality requirement – as long as the class members' claims have something in common with those of the class representatives, the requirement is satisfied, irrespective of their differences. *See id.* (comparing commonality and typicality).

That analysis was improper. Although the commonality and typicality requirements are sometimes examined together, they focus on different things. "[U]nder the commonality prong, a court must ask whether there are sufficient factual or legal questions *in common*." *In re Welding Fume*, 245 F.R.D. at 303 (internal quotation marks and citation omitted). Typicality, by contrast, requires a court to ask whether, "despite the presence of common questions, each class member's claim involves so many *distinct* factual or legal questions as to make class certification inappropriate." *Id.* (internal quotation marks and citation omitted).

The court of appeals was also wrong to conclude that the mere allegation of a "common" question of discrimination satisfies the typicality requirement – as though discrimination against one, if proven, would necessarily prove discrimination against 1.5 million. In fact, mere allegations of a "common practice" or "common legal theory" cannot manufacture a basis for certification "when proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006); *see also Hyatt v. United Aircraft Corp., Sikorsky Aircraft Div.*, 50 F.R.D. 242, 247 (D. Conn. 1970) (holding, in a civil-rights action against an employer, that there was no typicality where some members of a class sought back pay based on alleged discrimination whereas other members sought declaratory and injunctive relief). The fact is, "[s]ex discrimination may take such a wide variety of guises in this setting that the facts of one woman's claim may be markedly different from another's." *Merrill v. S. Methodist Univ.,* 806 F.2d 600, 608 (5th Cir. 1986).

This Court rejected precisely the sort of reasoning applied by the Ninth Circuit in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982). There, the Court held that isolated allegations of discriminatory conduct were not sufficient to show an entrenched, companywide practice of discrimination: "If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* at 159. Since *Falcon*, numerous courts have thus refused to certify "across-the-board" gender discrimination cases. *See, e.g., Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1364-65 (11th Cir. 1984); *Fleming v. Travenol Labs., Inc.*, 707 F.2d 829, 833 (5th Cir. 1983); *Stambaugh v. Kan. Dep't of Corr.*, 151 F.R.D. 664, 676-77 (D. Kan. 1993); *Price v. Cannon Mills*, 113 F.R.D. 66, 69-71 (M.D.N.C. 1986); *see also Troup v. Piper, Jaffray & Hopwood, Inc.*, No. 4-74 Civ. 166, 1975 WL 325, at *2 (D. Minn. Dec. 11, 1975) ("[T]he leveling of a single charge of discrimination by a dissatisfied former employee may expose a company to a 'full-scale inquiry' concerning discriminatory practices which may or may not have a basis in fact."). The Ninth Circuit improperly veered from this precedent. *See* Note, *Certifying Classes & Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 621-24, 630-32 (1986) (critiquing courts that have used the "across-the-board" approach post-*Falcon*).

In sum, the court of appeals erred in holding that the idiosyncratic claims of the six named plaintiffs in

this suit were typical of the 1.5 million class members they seek to represent. For this reason too, class certification should have been denied, and the decision of the Court of Appeals should be reversed.

III. THE NINTH CIRCUIT'S RULING THREATENS TO COMPROMISE THE VITALITY OF OUR NATION'S ECONOMY.

If adopted by this Court, the Ninth Circuit's loose certification standard would strike a serious blow against American businesses. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 170 (2010) ("*Dukes* threatens to undermine the progress made in the law of class certification elsewhere among the federal appellate courts by virtually inviting certification efforts . . . especially in the kinds of high-stakes, national-market class actions in which careful certification analysis is most needed.").

The Ninth Circuit's toothless Rule 23(b)(2) standard would send a strong message to plaintiffs' counsel that they can shoehorn damages actions into the Rule 23(b)(2) framework, without having to satisfy the procedural safeguards of Rule 23(b)(3). This invitation, needless to say, would be welcomed with open arms. *See Bolin*, 231 F.3d at 976 ("The incentives to do so are large. Plaintiffs' counsel effectively gathers clients – often thousands of clients – by a certification under (b)(2)."); Judy Greenwald, *In 2010, bias cases dominate employment legal landscape*, Business Insurance, Jan. 10, 2011 ("[p]laintiffs lawyers have continued to push the envelope in crafting

damages theories to expand the size of classes and the scope of recoveries") (internal quotation marks and citation omitted). Notably, plaintiffs' counsel is already using the Ninth Circuit ruling in *Dukes* as a springboard for similar "across-the-board" employment discrimination suits against other companies. *See* Wal-Mart Class Website, Home Page, *available at* http://www.walmartclass.com/public_home.html (providing a link that states "You may also be interested in the Costco gender discrimination class action lawsuit").

But employment cases are just the tip of the iceberg. As commentators have recognized, *Dukes* could pave the way 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.,* 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"); Nagareda, *supra*, at 153 ("[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. In particular, loose certification raises the stakes of litigation and the risk of gargantuan verdicts – not to mention 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 Reg. 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 Prod. Liab. L. & 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."); 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[].").

By inviting baseless class-action lawsuits, the Ninth Circuit's ruling also threatens to disrupt the free flow of commerce. Frivolous class actions have the unfortunate effects of "jeopardizing jobs and driving up prices for consumers." William Branigin, *Congress Changes Class Action Rules*, Wash. Post, Feb. 17, 2005 (quoting then-House Majority Whip Roy Blunt); *see also* Anne Freedman, *A Look at 2010 Employment-Law Cases*, The Leader Board, Jan. 6, 2011 (observing, in response to Wal-Mart's legal battles in *Dukes* and other class-action lawsuits, that it "[m]ust be getting harder to keep those prices low when they're paying those kinds of legal costs."). Moreover, as the costs of conducting business increase, baseless class actions often force companies to scale back operations or discontinue certain products or services.

If approved by this Court, the Ninth Circuit's ruling would turn back two decades of jurisprudence in federal courts around the country seeking to ensure that class certification is only available where a trial of the named plaintiffs' claims would fairly adjudicate the claims of absent class members. Such a result would encourage class-action abuse and undermine the vitality of American businesses, to the detriment of the U.S. economy and American consumers. For this reason too, the ruling should be reversed.

CONCLUSION

For the foregoing reasons, and those stated by petitioner Wal-Mart Stores, Inc., the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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