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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Federal Rule of Civil Procedure 23 authorize the certification of a class where the plaintiff alleges that the absence of an employment policy is itself a discriminatory policy that inflicts a "common injury" on the members of that class?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner.[1] PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of civil rights law and class action procedures which harm businesses, and stifle entrepreneurialism and job creation. *See, e.g.*, *Barber v. American Airlines*, No. 110092 (Ill. filed Mar. 18, 2010); *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301 (11th Cir. 2009). PLF participated as amicus in this case before the Ninth Circuit.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

In addition, PLF staff have published extensively on the effects of tort liability on the business community. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006). PLF believes its public policy experience will assist this Court in considering the merits of this case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below, in conflict with decisions in other circuits, and relying on an ambiguous sentence in a footnote of this Court's decision in *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982), upheld class certification despite the fact that the class members alleged a wide variety of *dissimilar* injuries resulting from the *absence* of a common employment policy. The Ninth Circuit allowed this because it was "well established" that a corporation's decision not to have a single policy, but to allow local store managers to make hiring and promotion decisions autonomously, qualified as a single policy. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 612 (9th Cir. 2010). Such a principle is *not* well established; indeed, it rests on ambiguous language in a single footnote which is so unclear as to have given rise to substantially different decisions in the courts of appeals and district courts.

The Fourth, Sixth, and D.C. Circuits have rejected this interpretation of the *Falcon* footnote, because the procedure allowed by the Ninth Circuit here would

essentially allow class plaintiffs to evade Rule 23's commonality requirement by sweeping together a broad array of diverse injuries as a single injury. In context, *Falcon* does not appear to countenance such an approach, but this Court's review is necessary to clarify this point, and set forth the circumstances in which "excessive subjectivity" can qualify as a single injury for purposes of class certification. If upheld, the precedent established below would dramatically alter class action litigation, expose virtually every employer to unforseen—and unforeseeable—liability, increase the cost of business, and hamper innovation and job creation. The enormity of the class in this case is alone enough to warrant Supreme Court review, but the legal basis for that certification is so unprecedented and its consequences so extreme that certiorari is essential.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH OTHER COURTS' APPLICATION OF *FALCON'S* "SUBJECTIVITY" DICTUM, GIVING THE GREEN LIGHT TO CASES SEEKING TO RESOLVE SOCIETAL GRIEVANCES

A. There Is Substantial Confusion Over the Meaning and Application of *Falcon*'s "Subjectivity" Dictum

Wal-Mart's decentralized corporate structure leaves decisions regarding hiring and promotion to be made at the local level, by managers who are in the best position to know the strengths and character of their employees. Wal-Mart essentially *has no* single

corporate employment policy, choosing to rely instead on the judgment of myriad autonomous managers all over the United States, rather than demanding adherence to a single authority or rulemaker. As a district court observed in similar circumstances, the class here consists "of a large number of plaintiffs spread across a number of geographically widespread facilities," and whose complaints refer to employment decisions that "are subject to local control." *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999) (denying certification).

Yet by characterizing Wal-Mart's lack of any central policy as itself a central policy—a policy of "excessive subjectivity in personnel decisions"—the Ninth Circuit swept together a scattershot of completely different injuries and circumstances into one vaguely defined "common injury." This is analogous to a case in which a defendant is alleged to have committed the tort of conversion against one plaintiff, the tort of trespass against another, the tort of defamation against a third, and the crime of murder against a fourth, and in which all the plaintiffs attempt to describe themselves as victims of the defendant's single policy of "unfair conduct." Such a legal standard would be unconstitutionally vague, *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010), and would deprive the defendant of its due process right to defend itself in court. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). Yet thanks to the Ninth Circuit's interpretation of an ambiguous footnote in *Falcon*, 457 U.S. at 159 n.15, the court below allowed something very similar: a gargantuan class consisting of countless different people complaining of countless different incidents are permitted to assert that their injuries are a common injury from an

allegedly unitary policy of unfair treatment, and thereby qualify as a class. *Dukes*, 603 F.3d at 600-13.

Like virtually every federal decision in this contentious area of the law, the Ninth Circuit's conclusion rests heavily on one sentence in footnote 15 in *Falcon*. Lower courts have interpreted that footnote in different ways, creating substantial confusion over what standards apply to the certification of class actions in employment discrimination cases. Certiorari is warranted to clarify those standards and provide lower courts with guidance in determining when the commonality element is met in cases involving corporations that allow local managers broad discretion in making hiring and promotion decisions.

Falcon rejected the certification of a class in an employment discrimination case where the plaintiff who alleged that his employer failed to promote him because he was Mexican-American, wanted also to represent Mexican-American applicants for employment who had allegedly *not been hired* because of their race. This Court held that the fact that a plaintiff is a member of a minority group alleging one type of employment discrimination does not suffice to justify certifying a class consisting of plaintiffs alleging different types of employment discrimination. This is because there is a "wide gap" between, on one hand, the (alleged) fact that a plaintiff suffered discrimination by being denied a promotion, and, on the other hand, the conclusion that the plaintiff's injuries are of the same sort as those of purported class members who had never been hired. 457 U.S. at 157. To connect these two points required the plaintiff to prove, among other things, that the alleged discrimination "is reflected in [the defendant's]

other employment practices . . . in the same way it is manifested in the promotion practices." *Id.* at 158. Regarding any such inference as "tenuous," this Court then commented in a footnote that if an employer "operated under a general policy of discrimination," evidence to that effect "conceivably could justify" class certification "if the discrimination manifested itself . . . in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* at 159 n.15. The decision below interpreted this language as allowing a class to demonstrate commonality by showing the existence of "subjective decisionmaking processes."

This sentence was non-binding dictum, and provided no explanation of what types of "decision making processes" can and cannot be grouped together as a single source of injury. Moreover, an earlier sentence in the same footnote indicates that the presence of subjectivity is only relevant if it is an *aspect of a common policy* that gives rise to common injuries; if subjectivity, for example, is a feature of "a biased test[]" which all members of the class are required to take. *Id.* The test would then be the common injury, of which subjectivity was the allegedly discriminatory feature.

This Court applied *Falcon* consistent with this narrow approach in *Gratz v. Bollinger*, 539 U.S. 244, 267 (2003). There, the Court considered whether a class maintained by a student applying for transfer to the University of Michigan could include students who were applying for admission as freshmen. Relying on *Falcon*'s hypothetical "biased testing procedure to evaluate both applicants for employment and incumbent employees," the Court held that the class

could encompass both types of admissions candidates because the transfer policy and the freshman admissions policy were fundamentally the same. *Id.* at 267 and 266 n.16.

Circuit courts have reached different conclusions in their attempts to apply the ambiguous language of the footnote in *Falcon*. In *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006), women working at a correctional institution sought class certification to represent women who had suffered from what they called their employers' "general policy of discrimination," a designation covering alleged discrimination in promotions, denials of leave and overtime, undesirable assignments, and being replaced by men. *Id.* at 642. The Sixth Circuit reversed the certification, noting that if a class could be certified on the mere basis that an employer's general attitude was discriminatory, "every plaintiff seeking to certify a class in a Title VII action would be entitled to that certification." *Id.* at 644. The *Reeb* plaintiffs had tried to leverage *Falcon* in the same manner as the court below, arguing that "the *Falcon* case allows for a finding of commonality whenever a plaintiff asserts that an employer's decision-making with regard to all employees in the protected group manifests itself in the same general fashion." *Id.* at 644-45. But the Sixth Circuit rejected this reading of *Falcon*, holding that "this argument ignores the fact that the same general policy of discrimination can affect many different aspects of employment, such as hiring, firing, promoting, giving benefits, providing vacation time, or delegating work assignments." *Id.* at 645. Thus, "a

general policy of discrimination is not sufficient to allow a court to find commonality or typicality." *Id.* at 645.

The Fourth Circuit has also taken a narrow view of the class certification permitted under the *Falcon* decision. In *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006), the court held that "to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members," judges should take care to ensure that members of a purported class have been injured in the same way by the same challenged policy. The purported class in that case consisted of 1.4 million insurance policy holders, *id.* at 314, who asserted that the insurance company discriminated against them on the basis of race. The court found that certification was improper because to determine whether the plaintiffs' claims were brought within the statute of limitations would "generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." *Id.* at 320.

In *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006), the D.C. Circuit rejected class certification in a case in which a group of women farmers sued the United States Department of Agriculture for discriminating against them by denying them loans. They tried to group the various circumstances of their loan applications and denials as a single common source of injury for purposes of the commonality element in Rule 23, and asserted that this was permitted under *Falcon*. The court of appeals disagreed. The plaintiffs' allegations "differ[ed] widely, and their complaints of discrimination [were] interspersed with

nondiscriminatory evidence and innocuous explanations." *Id.* at 729. Thus while the plaintiffs had standing "to bring *individual* suits," the circumstances of their loan applications and denials differed too much for the trial court to "infer the existence of a 'common policy of discrimination.' The bald allegation that the declarants and non-declarants alike are unified by a 'common policy' of gender discrimination is insufficient to show the District Court abused its discretion under . . . *Falcon*." *Id.* at 729. Likewise, in *Hartman v. Duffey*, 19 F.3d 1459, 1472 (D.C. Cir. 1994), the court of appeals concluded that *Falcon* requires plaintiffs to "make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." By contrast, the Ninth Circuit in this case relied on *Falcon* to encompass all these disparate contentions into a single "common" claim.

B. The Decision Below Allows Plaintiffs to Sue Over General Social Grievances Instead of Actual Cases or Controversies

Jurisdictional rules like standing and the case-or-controversy requirement exist to prevent the exploitation of judicial authority by parties asserting abstract political or social grievances that are more properly addressed to the Legislature. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218-19 (1974). But the rationale adopted by the Ninth Circuit below expands the scope of potential class action lawsuits in a way that allows plaintiffs to sue businesses for the abstract "unfairness" of their

corporate structures. By allowing a class with completely different injuries under a variety of diverse circumstances to cast their claims as the result of a common "excessive subjectivity" injury, the Ninth Circuit's decision empowers plaintiffs to challenge the undesigned consequences of millions of independent transactions as if those outcomes were a single discriminatory policy. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 688 (2003) (lawsuits like this case "seek . . . organizational change" to eliminate "subtle, often unconscious bias in individuals").

As one district court observed, "'[e]xcessive subjectivity' . . . is a *criticism*, not an actual company-wide policy or *practice*. Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the requisite commonality." *Grosz v. Boeing Co.*, No. SACV-02-71-CJC, 2003 U.S. Dist. LEXIS 25341, at *16-*17 (C.D. Cal. Nov. 7, 2003), *aff'd*, 136 Fed. Appx. 960 (9th Cir. 2005) (emphasis added, citation omitted). The class action procedure does not exist to vindicate generalized social grievances, or to allow plaintiffs to sue over "a kaleidoscope" of perceived unfair practices. *Dukes*, 603 F.3d at 652 (Kozinski, C.J., dissenting).

As Professor Green explains, *supra*, at 710-11, the "excessive subjectivity" rationale is intended to "alter the specific organizational structures or institutional practices that may continue to enable ongoing discrimination," rather than to redress a concrete and particular injury; this rationale "does not depend, in other words, on influencing individual decision makers." Although Green concedes that "modern-day

organizations do not subscribe to decentralized, subjective decision-making systems to discriminate" intentionally, she contends that decentralized procedures result in disparate outcomes "because workers are influenced more subtly on a day-to-day basis by forms of cognitive and motivational bias . . . . Subjectivity in decision making in the modern workplace must be seen as part of a larger problem of organizational influence on decisions made by individuals and groups." These unconscious biases "need[] to be understood as a contextual problem that depends on cultural and structural variables that may vary from institution to institution." The "complexity" of this "problem of institutionally enabled discrimination" demands "an equally complex, contextual remedial process." *Id.* at 713-14. Whatever merit these sociological arguments may have, the very complexity and abstraction involved indicates that these concerns do not constitute "a particular injury caused by the action challenged as unlawful." *Schlesinger*, 418 U.S. at 221.

The theory applied by the Ninth Circuit in this case—which "is inevitably in tension with the class requirements of commonality and predominance"—would "permit[] sweeping challenges to company-wide practices and make[] class lawsuits more likely." Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367, 377 (2008). Plaintiffs could sue businesses for widely different, ill-defined harms, all grouped together (strategically, but without any principled likeness) as a single common source of injury.

The purpose of class action litigation is to combine identical or nearly identical claims; not to ignore the

differences between diverse claims. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (denying certification where purported class members "were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases"). The court below, however, reads the *Falcon* footnote as allowing precisely that: any number of different decisionmakers, overseeing an indefinite array of positions in myriad different geographical locales, are treated as a single employment policy and thus as a "common" source of injury for the members of this exceptionally large class. Such an interpretation of *Falcon*'s footnote 15 is not only implausible, but abusive; it allows courts to find commonality precisely in the fact that there *is no* commonality.

Such a procedure is too vague to satisfy the requirements of due process. In cases relying on the "excessive subjectivity" argument, trial lawyers generally "argue the case to a jury using broad generalities in order to get some sweeping condemnation of the 'atmosphere' of the employer," or asserting that the business had a "discriminatory culture. It is virtually impossible to defend against abstract claims of that kind." Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163, 166 (2009).

II

THE DECISION BELOW CONFLICTS WITH DECISIONS DENYING CLASS CERTIFICATION FOR PLAINTIFFS ALLEGED TO HAVE SUFFERED A VARIETY OF INJURIES FROM A VARIETY OF CAUSES

The purpose of class action lawsuits is to provide a mechanism whereby a large group of people who have suffered the same injury or similar injuries on account of the defendant's conduct to pool their right of recovery and sue, in circumstances where each person's injury is too small to make it feasible for a particular individual to sue. *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). The prototypical case is one in which a flawed product or fraudulent service is used by many people, inflicting the same, small injury on each of them. The victims would normally not invest the time and money needed to bring a lawsuit. But the class action device enables them to obtain representation together and recover for their common injuries. *See Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

Title VII does allow a plaintiff who "demonstrate[s] to the court that the elements of a [defendant's] decisionmaking process are not capable of separation for analysis" to characterize "decisionmaking process . . . as one employment practice." 42 U.S.C. § 2000e-2(k)(B)(i). But as the D.C. Circuit pointed out in *Garcia v. Johanns*, 444 F.3d 625, 633 n.10 (D.C. Cir. 2006), this statute sets forth the elements for a cause of action, and does not alter Rule 23's "commonality" requirement. *Accord*, *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 572 (6th Cir.

2004). The two must not be conflated. Rule 23 still requires a plaintiff to "show that the putative class members have something in common—they all suffered an adverse effect from *the same facially neutral policy*—and their showing must be 'significant.'" *Garcia*, 444 F.3d at 633 n.10 (emphasis added, citations omitted).

The *Garcia* court observed that it was "particularly difficult" to certify a class that alleges that it was harmed by "multiple decisionmakers with significant local autonomy." *Id.* at 632. Other Circuit Courts of Appeals have likewise refused to certify classes in which the defendant decisionmakers enjoyed broad autonomy, were geographically separated, and where the hiring and promotion decisions at issue included the assessment of many different factors. In *Bacon*, 370 F.3d at 571, the Sixth Circuit found no abuse of discretion in denying certification of a class of 800 past and present African-American employees alleging discrimination in promotions at four separate facilities of defendant over a twenty-year period. The court noted,

> Plaintiffs failed to show how hourly wage earners and salaried employees would have the same interests, especially in terms of promotion procedures in which at least some of the nonexempt employees would be competing to join the ranks of exempt management. They also did not demonstrate how differing promotion criteria for jobs as diverse as welding, accounting, and engine-building could discriminate against each African-American employee.

Id. Similarly, in *Cooper v. Southern Co.*, 390 F.3d 695, 714-15 (11th Cir. 2004), *overruled in part on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006), the Eleventh Circuit found no abuse of discretion in denying class certification where "the compensation and promotion decisions affecting each of the named plaintiffs were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements, and performance in interviews, among other factors." *See also Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 278-79 & nn.17, 19 (4th Cir. 1980) (class certification denied to employees working in twenty-four different facilities throughout the state, with a "general pattern of local autonomy").

In *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403 (D.N.J. 2006), the district court refused to certify a large class of employees in an employment discrimination case for similar reasons. Like the plaintiffs in this case, the plaintiffs in *Gutierrez*

> [did] not challenge an express policy of [the corporate defendant]. Nor do they dispute that the employment policies and practices varied widely from operating company to company. Rather, Plaintiffs' theory of commonality is that Johnson & Johnson's policy of delegating discretion to the operating companies to implement general employment guidelines resulted in excessively subjective employment practices.

Id. at 409. But this was insufficient to satisfy the commonality requirement because, under *Falcon*, "Plaintiffs must identify a specific policy or practice of

discrimination that was excessively subjective." *Id.* at 410.

Other district courts have also refused to certify classes in circumstances like this, concluding that "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling v. Hoffman-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); *see also Webb v. Merck & Co., Inc.*, 206 F.R.D. 399 (E.D. Pa. 2002); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("The 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."); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 552-53 (D.S.C. 2000) ("the true nature of the suit is a consolidation of 99 separate accounts of individualized disparate treatment"); *Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 430 (E.D. Wis. 2001) ("The decision to permit some consideration of subjective factors is not, in and of itself, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist.").

Class certification in this case conflicts with the decisions cited above because it allows Plaintiffs to satisfy the commonality requirement of Rule 23 by alleging that the employer's *lack of* a general policy *is a kind of* discriminatory policy—that is, to prove commonality by the very fact that they lack commonality. By christening their grab-bag of diverse

alleged harms as a common consequence of a single policy, the Plaintiffs are able to essentially sue Wal-Mart for having an "unfair" corporate structure, skimming over the manifold differences between each incident of alleged discrimination.

III

RULE 23'S BALANCE OF PUBLIC POLICY CONCERNS IS UNDERMINED BY THE OVERLY EXPANSIVE CLASS CERTIFIED IN THIS CASE

The class certification decision below calls for this Court's review now, rather than later, because in class action lawsuits the certification decision often qualifies as a *de facto* guilty verdict. Particularly in cases involving exceptionally large classes, defendants cannot afford the risk of an award of damages, and are essentially forced to settle the case to survive. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) ("[A]n adverse certification decision will likely have a dispositive impact on the course and outcome of the litigation."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle."). *See also* Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 300-01 (1980) ("The enormous potential damage exposure that flows

from a certification decision often pressures defense counsel into early settlements regardless of their perception of the merits of the case."); John K. Rabiej, *The Making of Class Action Rule 23: What Were We Thinking?*, 24 Miss. C. L. Rev. 323, 354 (2005) ("Even though the defendant would likely prevail if the class action went to trial, defendants often [are] not willing to accept the small risk of defeat, which might ruin their companies.").

Armed with the enormous advantage of class status, a plaintiff need not prove a case or even provide any evidence of duty, breach, causation, or damages before obtaining a windfall settlement from a business defendant that cannot afford the risk of offering even meritorious defenses and incurring the expense of litigation in addition to damages. As the Fourth Circuit observed, class treatment can hide the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). Moreover, "[i]f claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm." *Sw. Ref. Co., Inc. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000).

This abuse weakens the rule of law and drives up the costs of living for consumers. "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail." Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust*

Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971). The justice system—including class action procedures—was created to allow injured parties an opportunity for redress, not to empower profiteering plaintiffs' attorneys to enrich themselves. *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) ("That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries.").

In certifying the class here, the Ninth Circuit gave in to "well-nigh irresistible pressure to bend the normal rules." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995). Once bent, legal rules tend to stay bent, and legal rationalizations tailor-made for one context will inevitably be cited and, to a considerable extent, followed in other cases as well. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1462-63 (1995). This case should be reviewed now, before the certification order coerces Wal-Mart into a settlement that deprives this Court of the opportunity to address the important issues of Rule 23's commonality requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: September, 2010.

Respectfully submitted,

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