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 KWAPKNOSKI, 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 DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases raising issues of importance to its members, their clients, and the judicial system. This is just such a case. In approving certification of the largest employment class action in history, the Ninth Circuit disregarded this Court's precedent, deepened a well-recognized circuit conflict, and distorted Title VII, the Rules Enabling Act, and the Federal Rules of Civil Procedure.

The issues raised here can have considerable, and even dispositive, impact on countless class actions in virtually all contexts, including employment discrimi-

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief. Counsel of record for both parties have consented to its filing in letters on file with the Clerk's office.

nation, products liability, insurance, securities, and antitrust. DRI's members are frequently confronted with the precise issues raised by petitioner, and their clients are affected by the lack of clear, uniform rules governing class certification. This Court's review is essential to prevent unseemly and improper forum-shopping and to bring fairness, consistency, and predictability to class certification.

INTRODUCTION

In a 6-5 en banc decision, the Ninth Circuit affirmed certification of the largest employment class action in history, allowing over 1.5 million plaintiffs with factually distinct claims to proceed together as a single unit. In reaching that result, the Ninth Circuit majority widened an acknowledged circuit conflict and approved a certification order that deprives the defendant of its substantive right to defend against each individual plaintiff's claims. This Court's intervention is urgently needed.

Petitioner has persuasively demonstrated that this Court should grant review of both questions presented. In this brief, DRI does not separately address the first question but fully supports review of it because the lower courts are deeply split regarding whether, and to what extent, a class action that includes a claim for monetary relief may proceed under Rule 23(b)(2). See Pet. 10-12. The stakes of this debate are high for plaintiffs and defendants alike: Rule 23(b)(2) authorizes "mandatory" class actions, which do not require that individual plaintiffs receive notice or allow them to opt out. See Fed. R. Civ. P. 23(c)(2), (3). Further, this disagreement among the courts of appeals invites forum shopping by plaintiffs and deprives parties of the

consistency and predictability of decision-making that the Federal Rules are intended to guarantee.

DRI also supports review of the second question presented and submits this brief to highlight additional reasons why review is necessary to vindicate the protections of the Rules Enabling Act, 28 U.S.C. § 2072. That Act empowers the Judiciary to adopt rules of "practice and procedure," but expressly provides that no such rule, including Rule 23, may "abridge, enlarge or modify any substantive right." *Id.* § 2072(a), (b). The Act's legislative history and this Court's decisions make clear that the statute requires courts to exercise particular caution in applying Rule 23 because class certification can have a dramatic impact on a lawsuit and parties' rights. See *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). This caution promotes stability in the law by ensuring that rules of decision do not change just because plaintiffs filed a class action.

In the decision below, however, the Ninth Circuit majority abandoned caution and approved a certification order that negates a substantive defense of the employer, in direct violation of the Rules Enabling Act. Under Title VII and this Court's precedents, when plaintiffs allege a pattern or practice of intentional discrimination, the employer is entitled to show that any individual employment action was not discriminatory before the affected plaintiff may obtain individualized relief. *Infra* at 10-12. The lower courts rightly perceived that, in this case, individualized hearings on the employer's defense and each plaintiff's claimed injury were "not feasible." Pet. App. 251a; see also *id.* at 104a-105a. But rather than reject class certification, the Ninth Circuit allowed the district court to strip the employer's right to individualized hearings in favor of

a formula-based "'rough justice'" approach that, concededly, would "generat[e] a 'windfall'" for some employees who were not "genuine victims of discrimination." *Id.* at 254a. Unsurprisingly, this application of Rule 23—which contravenes the Rules Enabling Act by modifying Title VII's substantive provisions—conflicts with the decisions of other circuits.

The troubling consequences of the Ninth Circuit's approach to class certification militate heavily in favor of review. By sanctioning the district court's misuse of Rule 23, the Ninth Circuit's decision introduces unpredictability regarding class certification procedures and the substantive rules of decision. Plaintiffs will be emboldened to propose creative methods of generalized proof in order to assemble ever larger classes that should be ineligible for certification under Rule 23 due to substantive requirements of individualized proof. The incentives for forum shopping created by the decision below are obvious. Indeed, for cases in which plaintiffs allege that a defendant engaged in nationwide conduct, the Ninth Circuit's lenient approach to class certification will effectively become the nationwide rule as plaintiffs will naturally file suit in courts bound by the decision below. The enormous hydraulic pressure on defendants to settle cases that lack merit becomes overwhelming. To prevent these intolerable results, certiorari should be granted.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE RULES ENABLING ACT AND THIS COURT'S PRECEDENTS.

The decision below approved an unprecedented class certification that sacrifices the defendant's

substantive defense under Title VII and violates the plain terms of the Rules Enabling Act. This Court should grant review and clarify the important restraints the Act places on "'adventuresome'" uses of Rule 23. *Amchem*, 521 U.S. at 617-18.

A. The Rules Enabling Act Prohibits Courts From Construing The Federal Rules To Alter Substantive Rights.

1. The Rules Enabling Act empowers the Judiciary to promulgate "general rules of practice and procedure." 28 U.S.C. § 2072(a). But in the same breath, Congress also provided that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.* § 2072(b). Thus, to comply with the Rules Enabling Act, a Federal Rule may "affect[ ] only the process of enforcing litigants' rights, and not the rights themselves." *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 8 (1987).

The commands of the Rules Enabling Act track the Constitution's separation of powers. Congress holds "[a]ll legislative Powers," U.S. Const. art. I, § 1, and "the judicial power" is "limited to 'Cases' and 'Controversies.'" *Mistretta* v. *United States*, 488 U.S. 361, 385 (1989) (quoting *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911)); see U.S. Const. art. III, § 2. Congress may delegate rulemaking authority that is "appropriate to the central mission of the Judiciary," only if the rulemaking "do[es] not trench upon the prerogatives of another Branch." *Mistretta*, 488 U.S. at 388. The Rules Enabling Act provides such a limited delegation, authorizing the Court to make rules of "practice and procedure" only. 28 U.S.C. § 2072(a); see *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941). A broader delegation, which permitted the Court to make or modify "substantive right[s]," 28 U.S.C. § 2072(b), would impermissibly convey

legislative authority and violate the Constitution's exclusive "prescription for legislative action," *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

In light of the Rules Enabling Act's constitutional underpinnings, the principle of constitutional avoidance should guide its application. If a court has any doubt that an interpretation of a Federal Rule would stray into the legislative domain by altering substantive rights, the constitutional infirmity should be avoided by choosing the plausible interpretation that does not give rise to a serious risk of violating the Constitution. See *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

2. That restrained approach is precisely what Congress envisioned. The legislative history of the Rules Enabling Act makes clear that Congress intended the Judiciary to adhere strictly to the narrow confines of its delegation.

During the twenty-year campaign leading to enactment of the Rules Enabling Act, opponents "protested that the judiciary's rulemaking authority would usurp legislative power." Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 Minn. L. Rev. 1303, 1312 (2006); see S. Rep. No. 69-1174, at 20, 33 (1926). To meet that objection, proponents of the Act added the statement that the Court's rules could not "'abridge, enlarge, nor modify . . . substantive rights.'" Redish & Amuluru, *supra* at 1312; see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1073-80 (1982). The key Senate report explained:

> In view of the express provision inhibiting the court from affecting "the substantive rights of any litigant," any court would be astute to avoid an interpretation which would attribute to the words "practice and procedure" an intention on the part of Congress to delegate a power to deal with such substantive rights and remedies . . . .
>
> . . . .
>
> Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.

S. Rep. No. 69-1174, at 11.

Congress thus made clear that the Act did not countenance rules that modified "substantive rights and remedies." *Id.*; see also S. Rep. No. 70-440, at 16 (1928) ("Matters of jurisdiction and of substantive right are clearly within the power of the legislature. These are not to be affected. It cannot be too strongly emphasized that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine."). Pertinent here, Congress expected that, in close cases, "any doubt will surely be resolved" by selecting the construction that would not intrude the legislative domain by modifying substantive rights. S. Rep. No. 69-1174, at 11.

3. Such restraint is especially appropriate when considering Rule 23 class certifications, as this Court has warned. See, *e.g.*, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Unlike most procedural rules, which typically have little effect on a case, a class certification "dramatically affects the stakes for

defendants." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). By aggregating claims, a class certification "makes it more likely that a defendant will be found liable" and "creates insurmountable pressure on defendants to settle." *Id.*; see also *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that class certification puts defendants "under intense pressure to settle" and calling "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements'") (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Class certification also poses potential harms to absent plaintiffs that counsel in favor of restraint. Absent plaintiffs may prefer to assert their claims separately (or not at all), and yet Rule 23(b)(2) certification binds them to the class action's disposition without giving them notice or an opportunity to opt out. See Fed. R. Civ. P. 23(c)(2)(A), (c)(3)(A). Under Rule 23(b)(2), the success or failure of the named plaintiffs becomes the success or failure of every absent plaintiff. For that reason, this Court has advised that "mandatory class actions aggregating damages claims," like the action here, "implicate the due process 'principle'" that requires service of process before one is bound to a judgment *in personam*. *Ortiz*, 527 U.S. at 846; see also *Amchem*, 521 U.S. at 628 ("we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous").

In view of Rule 23's potency and potential harms, the Court has stressed that "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem*, 521 U.S. at 613; see also *Ortiz*, 527 U.S. at

845 ("no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right") (internal quotation marks omitted). Regardless of the efficiencies promised by Rule 23, a defendant cannot be subject to liability more easily just because plaintiffs choose to plead a class action. 28 U.S.C. § 2072(b); see also *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) ("federal rules of procedure, such as Rule 23, cannot be used to abridge, enlarge or modify any substantive right") (internal quotation marks omitted); *Blaz* v. *Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("A class action is merely a procedural device; it does not create new substantive rights . . . .") (internal quotation marks omitted).

Rule 23 is not an invitation to "judicial inventiveness." *Amchem*, 521 U.S. at 620. Particularly when, as here, "individual stakes are high and disparities among class members [are] great," this Court has "call[ed] for caution." *Id.* at 625. Any doubts about whether certifying a proposed class under Rule 23 would "abridge, enlarge or modify any substantive right" must be resolved by denying class certification. 28 U.S.C. § 2072(b); see *Amchem*, 521 U.S. at 621; S. Rep. No. 69-1174, at 11.

B. The Class Certification Affirmed By The Ninth Circuit Alters Substantive Rights Under Title VII In Violation Of The Rules Enabling Act.

Disregarding the Rules Enabling Act and this Court's warnings, the Ninth Circuit affirmed a class certification order that modified the substantive Title VII cause of action. In so doing, the Ninth Circuit increased the unpredictability that already plagues class certification decisions. This Court's inter-

vention is needed to correct the Ninth Circuit's alteration of substantive law.

1. The substantive law governing plaintiffs' claims is clear. Plaintiffs allege that the petitioner engaged in a pattern or practice of intentional discrimination on the basis of sex in violation of 42 U.S.C. § 2000e-2. See Pet. App. 278a. This Court has allowed pattern and practice claims to proceed as class actions under the two-stage framework developed in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). In stage one, plaintiffs must prove that the employer engaged in a "systemwide pattern or practice of" intentional discrimination—*i.e.*, that sex "discrimination was the company's standard operating procedure." *Id.* at 336. "Without any further evidence," however, plaintiffs who prevail at stage one are entitled only to "prospective relief" to the class, such as "an injunctive order against continuation of the discriminatory practice." *Id.* at 361; see also *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984).

If plaintiffs seek "individual relief," as plaintiffs do here, a second stage consisting of individualized proceedings is required. See *Teamsters*, 431 U.S. at 361 ("a district court must usually conduct additional proceedings . . . to determine the scope of individual relief"); see also *Cooper*, 467 U.S. at 876. This requirement of individualized proof follows directly from Title VII's text. The operative provision makes it unlawful for an employer "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Title VII expressly prohibits granting relief to "an individual" if the evidence shows that the adverse employment action

was taken for "any reason other than discrimination on account of . . . sex." *Id.* § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B)(ii) (court "shall not award damages or issue an order requiring . . . payment" if the employer demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor").

Contrary to the Ninth Circuit majority's view, Pet. App. 104a-105a & n.53, this Court's decisions establish that, in the second stage, the employer is "*entitled* to prove" that individual plaintiffs were not victims of discrimination.[2] *E. Tex. Motor Freight Sys., Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (emphasis added); see also *Teamsters*, 431 U.S. at 362 (employer may "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons"); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976) (employer may show that "individuals . . . were not in fact victims of previous

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[2] This Court's decisions in *Teamsters* and *Franks* hold that the employer has the burden of proof at the second stage because plaintiffs' stage one "proof of the pattern or practice supports an inference that any particular employment decision . . . was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362; *see Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). However, this Court's subsequent decisions addressing individual disparate treatment claims (as opposed to class action pattern-or-practice disparate treatment claims) have clarified that the plaintiff always retains the ultimate burden to prove intentional discrimination. *See, e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507 (1993); *U.S. Postal Ser*v. *Bd. of Governors* v. *Aikens*, 460 U.S. 711, 716 (1983). These subsequent cases cast doubt on *Teamster*'s and *Frank*'s placement of the burden on defendants. *See Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 267 (1989) (plurality) (O'Connor, J., concurring in the judgment). Regardless of where the burden lies, however, the decision below gives the defendant *no* opportunity to present its defense in violation of the Rules Enabling Act.

hiring discrimination"). Thus, "Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 245 n.10 (1989) (plurality); *id.* at 266 (O'Connor, J., concurring in the judgment) (same).

2. Despite the plain requirements of Title VII and the Rules Enabling Act, the lower courts in this case modified the Title VII cause of action by dispensing with individualized proof solely in order to make the class action manageable.

The district court acknowledged that conducting "individual hearings" in stage two is the "norm," but found that conducting such hearings would be "impractical on its face" and "not feasible." Pet. App. 251a-252a. Given the size of the putative class and plaintiffs' theory of discrimination through "subjective criteria," the court reasoned that "it is virtually impossible" to determine "which class members were the actual victims of the defendant's discriminatory policy." *Id.* at 252a-253a. As the dissent below explained, the district court's findings "compel[ ] the conclusion that it could not certify the class at all." *Id.* at 146a.

Instead, the district court denied defendant its substantive right to mount individualized defenses. Pet. App. 247a-258a; see *id.* at 247a (Wal-Mart "is not, however, entitled to circumvent or defeat the class nature of the proceeding by litigating whether every individual store discriminated against individual class members"). The court proposed a formula-based approach to determine individual plaintiffs' relief without considering petitioner's defense to their claims. *Id.* at 251a-276a. The district court would calculate a class-wide, lump-sum backpay award, and

then use employment information from petitioner's corporate records to fashion individual awards. *Id.* This approach would preclude the petitioner from showing that a non-discriminatory reason not evident in corporate records—such as a plaintiff's inferior pre-Wal-Mart work experience, *id.* at 272a-273a & n.55—actually motivated the lower pay or non-promotion. See *id.* at 272a-276a. Even though plaintiffs allege that discrimination occurred through local store managers' subjective decisions, *id.* at 77a-78a, the defendant's ability to show that any given manager did not act "because of" a plaintiff's sex is sharply limited. This result transgresses Title VII's express provisions. 42 U.S.C. §§ 2000e-2(a), 2000e-5(g).

The Ninth Circuit majority justified allowing this wayward approach on the ground that, in stage one, "the pattern and practice *has* to be proven on a group basis." Pet. App. 105 n.53. But that truism says nothing about the employer's right to contest individual plaintiffs' claims in stage two.[3] That is the

[3] On that critical point, the majority principally relied on two inapposite Ninth Circuit decisions to claim that the district court could dispense with individualized hearings. Pet. App. 105a-110a & n.53. The first case actually undermines the majority's conclusion because it properly held that a Title VII defendant could avoiding making backpayment by "proving that the applicant was unqualified or showing some other valid reason why the claimant was not, or would not have been, acceptable." *Domingo* v. *New England Fish Co.*, 727 F.2d 1429, 1445 (9th Cir. 1984). The second decision involved Alien Tort Claims Act claims, not Title VII claims, and, in any event, was based on the same flaws that plague this case. *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 768 (9th Cir. 1996); *see id.* at 788 (Rymer, J., dissenting) ("If . . . a real prove-up of causation and damages cannot be accomplished because the class is too big or to do so would take too long, then . . . the class is unmanageable and should not have been certified in the first place.").

stage when the statutorily created right to present individualized defenses is vindicated. *Teamsters*, 431 U.S. at 362. A court cannot use Rule 23 to abridge that right. 28 U.S.C. § 2072(b).

It is no answer to suggest, as the Ninth Circuit majority did, Pet. App. 110a n.56, that an employer's right could be protected by "allow[ing] Wal-Mart to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or non-promotion was due to something *other* than gender discrimination." *Id.* This "'rough justice'" approach—to use the district court's words, *id.* at 254a—does not accord with the text of Congress's enactment. Congress prohibited affording relief to "an individual" if the evidence shows that the employment action was taken against that individual for a reason other than sex discrimination. 42 U.S.C. § 2000e-5(g)(2)(A); see also *id.* § 2000e-5(g)(2)(B). Congress did not authorize "'approximat[ions]'" of aggregate liability based on "rough" statistical models, which (the district court frankly admitted) would "generat[e] a 'windfall for some employees'" who were not actual victims of discrimination. Pet. App. 254a. Nor did Congress permit district courts, in the name of judicial efficiency, to "'undercompensat[e] the genuine victims of discrimination.'" *Id.* Because the district court's approach would "enlarge" the substantive rights of uninjured plaintiffs and "abridge" the rights of any actual victims, as well as the defendant, it contravenes Title VII and the unmistakable terms of the Rules Enabling Act. 28 U.S.C. § 2072(b).

Rather than approve the district court's experiment, the Ninth Circuit should have interpreted Rule 23's requirements "with fidelity to the Rules Enabling

Act." *Amchem*, 521 U.S. at 629; see also *Ortiz*, 527 U.S. at 845. At a minimum, the district court's approach raises serious doubts about whether it has trenched upon Congress's prerogative to design Title VII, and therefore, the Ninth Circuit should have resolved doubts by reversing the class certification. See S. Rep. No. 69-1174, at 11; see also *supra* Part I.A.1. Certiorari should be granted to clarify the proper approach to class certification and foreclose any further class action inventiveness.

II. THE DECISION BELOW CONFLICTS WITH CLASS CERTIFICATION DECISIONS OF OTHER CIRCUITS.

This Court's review is all the more necessary because the Ninth Circuit's decision exacerbates confusion among the circuits regarding an employer's right to present individualized defenses to a Title VII class action and intensifies a broader conflict regarding the Rules Enabling Act's limits on class certification.

In the context of Title VII, two circuits have approved class certifications that, like the flawed certification approved here, would forgo individualized determinations required by substantive law in favor of generalized determinations. See *EEOC* v. *O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 880 & n.9 (7th Cir. 1994) (affirming certification without individualized hearings because conducting them "would have been unreasonable" and it "would be impossible to determine which specific class members would have been hired absent discrimination"); *Segar* v. *Smith*, 738 F.2d 1249, 1291-92 (D.C. Cir. 1984) (affirming certification without individualized hearings even "[t]hough Section 706(g) generally does not allow for backpay to those whom discrimination has not injured," and even though this

created a "risk that a small number of undeserving individuals might receive backpay"). In addition, the Fifth Circuit, while recognizing that "only those individuals who have suffered a loss of pay because of the illegal discrimination are entitled to compensation," has nonetheless approved a class action judgment that awarded individual relief using a formula-based approach that excluded certain undeserving plaintiffs, but did not allow the employer to present all of its individualized defenses. *Shipes* v. *Trinity Indus.*, 987 F.2d 311, 318-19 (5th Cir. 1993).

At least four other circuits, however, have recognized that an employer has a right to show that any particular adverse employment action was not discriminatory—even though plaintiffs moved for class certification. See *Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) (reversing class certification and explaining that "whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis"); *Cooper* v. *Southern Co.*, 390 F.3d 695, 722 (11th Cir. 2004) (affirming denial of class certification and noting that even if the court found grounds for prospective injunctive relief, "it would still be *necessary* for a single jury to hear and rule on more than 2,000 individual claims for compensatory damages") (emphasis added); *Catlett* v. *Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1267 (8th Cir. 1987) (remanding class certification decision and noting that an employer "is *entitled*" to show that "individual class claimants" were "not qualified" receive a backpay award) (emphasis added); *Dillon* v. *Coles*, 746 F.2d 998, 1004 (3d Cir. 1984) ("Until the individual has demonstrated actual

injury to himself, the court may not direct individual relief. . . . [D]iscrimination in general does not entitle an individual to specific relief.").

The decision below is also at odds with cases outside the Title VII context that refuse to sanction class actions that would potentially modify the substantive cause of action in contravention of the Rules Enabling Act. For example, in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), the Fifth Circuit reversed a class certification that, like here, depended on forgoing individual determinations of causation and injury in favor of statistical analyses of general causation.[4] *Id.* at 712. The court held that, because the resulting trial plan would modify substantive law, it could not proceed consistent with the Rules Enabling Act. *Id.* (the trial plan would "treat[ ] discrete claims as fungible claims" and "lift[ ] the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury"); see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 312, 319 (5th Cir. 1998) (rejecting trial plan that would use test cases to determine liability and damages for other plaintiffs as inconsistent with the Rules Enabling Act).

Other court of appeals decisions are in accord, conflicting with the decision below. See, *e.g.*, *Sacred*

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[4] This decision is in tension with the Fifth Circuit's later decision in *Shipes*, 987 F.2d at 318-19, which, as noted, *supra* at 16, improperly approved class certification in a Title VII case. The inconsistency may be explained, however, by the fact that the defendant in *Shipes* failed to raise the Rules Enabling Act issue. *See Shipes*, 987 F.2d at 316-19. In any event, this intra-circuit conflict demonstrates the confusion surrounding these important class certification issues that warrants this Court's review.

Heart Health Sys., Inc. v. *Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1176 (11th Cir. 2010) (reversing class certification as inconsistent with the Rules Enabling Act because there likely "'was a breach of contract with some class members, but not with other class members,'" such that class-wide relief would lead to "an abridgment of the defendant's rights"); *Hohider* v. *UPS, Inc.*, 574 F.3d 169, 185-86, 196-98 (3d Cir. 2009) (reversing class certification of Americans With Disabilities Act discrimination claim because "the statutorily required inquiry into qualification is incompatible with the requirements of Rule 23," rendering certification improper under the Rules Enabling Act); *McLaughlin*, 522 F.3d at 231 (reversing class certification premised on an "aggregate determination" of damages that "would inevitably alter defendants' substantive right to pay damages reflective of their actual liability"); *Windham* v. *Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) (en banc) (affirming district court's refusal to certify an antitrust class action because "issues of injury and damages" were "strictly individualized" such that class-wide determination would "contravene the mandate of the Rules Enabling Act"); *cf. Seijas* v. *Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010) (approving Rule 23(b)(3) certification, but vacating damage award calculated on class-wide basis because the "likely inflated" award "'offends the Rules Enabling Act'"). Indeed, the decision below diverges even from the Ninth Circuit's own precedent, which has reversed class certification when "individual questions" of causation and damages would "overwhelm the common questions, unless some of the required elements or allowed defenses . . . are eliminated or impaired." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

The decision below thus creates both inter-circuit and intra-circuit conflicts, compounding the uncertainty defendants face when served with a class action complaint. This Court should grant the petition and confirm that the Rules Enabling Act fully applies in the class-action context.

III. THE DECISION BELOW WILL HAVE FAR REACHING, UNTOWARD CONSEQUENCES FOR DEFENDANTS AND IMPLICATES THIS COURT'S DUTY TO ENSURE UNIFORMITY OF FEDERAL PROCEDURES.

Even aside from the demonstrable flaws in the Ninth Circuit's decision, this Court's intervention is necessary to blunt the widespread, unfair consequences that the decision below will have on defendants and to ensure uniformity on potentially dispositive issues of class action procedure.

A. The impact of the Ninth Circuit's class certification decision will not be limited to employment discrimination suits. It will also affect plaintiffs' bids to obtain class certification in myriad other contexts, including products liability, securities, and antitrust cases. In each of these areas, plaintiffs assert claims that require proof that a defendant's conduct actually caused some injury. See, *e.g.*, *Castano*, 84 F.3d at 740 (products liability); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-42 (2005) (securities fraud); *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983) (antitrust). Thus, a critical part of a defendant's case is often to dispute causation and injury. For example, here, Wal-Mart would be entitled to show that it paid a particular plaintiff a lower wage not because of her sex, but because she was less willing to work

weekends or rotating shifts. See Pet. App. 272a-273a & n.55.

Cases that involve varying individual proof of causation and injury generally are not eligible for class certification, as individual issues overwhelm the common issues. See *Amchem*, 521 U.S. at 620; Fed. R. Civ. P. 23(a). To avoid that result, the trial court discarded the defendant's individual defenses, severely impairing the defendant's right to a fair trial. The Ninth Circuit's decision invites plaintiffs to propose novel changes to other areas of substantive law to skirt the individual issues that would otherwise preclude class treatment.

This potential for lopsided trials will intensify the pressure that any class certification order puts on a defendant to settle, making the class action procedure an even stronger magnet for frivolous claims. In enacting the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4, members of Congress expressed considerable concern that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005). "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." *Id.* On numerous occasions, DRI's members have represented defendants placed in this precise situation. Needless to say, "when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21; see also *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (explaining how the prospect of "extensive discovery" can enable "plaintiffs with weak claims to extort settlements from innocent com-

panies"). This Court should grant review and deter such abusive practices.

B. Review is also warranted because the Ninth Circuit's decision implicates this Court's duty to ensure uniformity of federal procedure across the country. The very purpose of the Rules Enabling Act (and the Federal Rules of Civil Procedure, which the Act empowers this Court to promulgate) is to create a single uniform system of procedure. See *Woods*, 480 U.S. at 5 n.3; Burbank, *supra* at 1024.

Divergent practices among federal courts on important issues of procedure, like the Rule 23 issues presented here, inevitably give rise to forum shopping. This Court has repeatedly warned "that it would be unfair for the character or result of a litigation materially to differ" merely because of where the suit is filed. *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965); see also, *e.g.*, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 404, 411 (1975). In addition to its basic unfairness, forum shopping "overburdens jurisdictions with the most plaintiff-friendly approach, tends to place the suit in a locale that is removed from the source of the contest so that the litigants' expenses are greater, and perpetuates a negative perception of the fairness of the legal system." James D. Cox et al., *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 Wis. L. Rev. 421, 452.

By affirming a class certification order that dispenses with statutorily required individualized proof, the decision below provides a strong incentive for plaintiffs to choose to litigate in courts within the Ninth Circuit. Class certification is a high-stakes issue that effectively resolves many cases before they ever reach the merits. See *supra* at 7-8, 20. Given

the central importance of class certification, plaintiffs will seek out jurisdictions with procedural rules that favor and facilitate class certification. Because defendants that operate nationwide are effectively subject to suit anywhere, plaintiffs that allege class actions arising from nationwide conduct have their pick of the circuits. In those circumstances, "a single divergent circuit stands to swallow up the stance of all others." Richard A. Nagareda, *Common Answers for Class Certification*, 64 Vand. L. Rev. En Banc, at 6 (forthcoming 2010), *available at* http://ssrn.com/abstract_id=1662620.

Unless this Court intervenes, the Ninth Circuit's errant approach to class certification will become the *de facto* nationwide approach, as plaintiffs gravitate toward the Ninth Circuit and away from the courts that follow the text of Title VII and the Rules Enabling Act.

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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