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 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 a colossal, sprawling employment class action, the Ninth Circuit disregarded this Court's precedent 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 discrimination, products liability, insurance, securities, and antitrust. DRI's members are frequently confronted with the precise issues presented by this case, and

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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 37.3(a), *amicus curiae* certifies that counsel of record for both petitioner and respondents have consented to this filing in letters on file with the Clerk's office.

the Ninth Circuit's erroneous disposition, if affirmed, would invite hosts of unwarranted class action suits against their clients. The Court should reverse the decision below.

INTRODUCTION

The Ninth Circuit affirmed certification of a gargantuan employment class action, allowing over 1.5 million plaintiffs with factually distinct claims to proceed together as a single unit. Under no ordinary construction of Rule 23 could this result have been obtained. Rule 23(a) requires that plaintiffs demonstrate commonality, typicality, and adequacy of their representation; and Rule 23(b)(2) allows certification only if the defendant has acted "on grounds that apply generally to the class."

To satisfy these requirements, the district court applied "rough justice" (to use that court's own term). Pet. App. 254a. The court washed away all of the individualized elements and defenses of a Title VII claim, and then certified a class that would "generat[e] a 'windfall'" for some employees and simultaneously "'undercompensat[e] the genuine victims of discrimination.'" *Id.* The court thus purported to comply with Rule 23 only be redesigning the underlying cause of action. That was improper, and by affirming this feat of judicial engineering, the Ninth Circuit erred.

DRI fully supports petitioner's arguments and will not belabor them here. Instead, DRI submits this brief to emphasize how the Rules Enabling Act, 28 U.S.C. § 2072, prohibits the lower courts' novel manipulation of Rule 23. The 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). Consistent with the statutory text and legislative history, this Court has emphasized that Rule 23 "must be interpreted with fidelity to the Rules Enabling Act." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). Indeed, as this Court has stressed, particular caution must be exercised in applying Rule 23 because class certification can dramatically impact a lawsuit and parties' rights. *Id.* at 613. This caution ensures 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 class certification order under Rule 23 that distorts Title VII's requirements in direct violation of the Rules Enabling Act.

The consequences of this approach are troubling and far-reaching. Unless this Court enforces the Rules Enabling Act and Rule 23, plaintiffs will be emboldened to propose increasingly creative methods of generalized proof in order to assemble ever larger classes that should be ineligible for certification. Such class certifications exert enormous hydraulic pressure on defendants to settle cases that lack merit. To prevent these intolerable results, the Court should reverse the Ninth Circuit's decision.

ARGUMENT

I. RULE 23, CONSTRUED IN KEEPING WITH THE RULES ENABLING ACT, DOES NOT PERMIT THE CLASS CERTIFICATION.

The Rules Enabling Act prohibits the lower courts' misconstruction of Rule 23. Because the Federal Rules of Civil Procedure cannot be used to modify substantive rights, class certification was improper.

A. The Rules Enabling Act Prohibits A Construction Of Rule 23 That Modifies Substantive Rights.

1. The Rules Enabling Act empowers the Judiciary only to promulgate "general rules of practice and procedure." 28 U.S.C. § 2072(a). In enacting the statute, Congress made clear 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).

The Rules Enabling Act's clear jurisdictional limitation and constitutional underpinnings must

guide interpretation of the Federal Rules. If a court has any question whether an interpretation of a Federal Rule would stray into the legislative domain by altering substantive rights, it should avoid the potential Rules Enabling Act violation and constitutional infirmity by choosing the alternative, plausible interpretation. See, *e.g.*, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503, (2001) (rejecting an interpretation of Fed. R. Civ. P. 41(b) that "would arguably violate the jurisdictional limitation of the Rules Enabling Act"); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (adopting a "limiting construction" of Fed. R. Civ. P. 23(b)(1)(B) in order to "minimiz[e] potential conflict with the Rules Enabling Act" and "avoid[] serious constitutional concerns"); cf. *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1441-42 (2010) (if Fed. R. Civ. P. 23 "were susceptible of two meanings," the Court would have to "interpret Rule 23 in a manner that avoids overstepping its authorizing statute"); *id.* at 1452 (Stevens, J. concurring in the judgment) ("When a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result.").

2. The legislative history of the Rules Enabling Act confirms that Congress intended the Judiciary to adhere strictly to the narrow confines of its delegation. During the 20-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 . . . .
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> . . . .
>
> 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. 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), (3)(A). Under Rule 23(b)(2), the success or failure of the named plaintiffs becomes the success or failure of every absent plaintiff.

Rule 23's potency and potential harms have led this Court to stress that Rule 23 "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. 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. 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). A class action may proceed only if it "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assoc.,* 130 S. Ct. at 1443 (plurality).

Of course, if Rule 23 *did* permit certification of a class action that modified substantive rights, those operative provisions of Rule 23 would be invalid. The Enabling Act trumps conflicting Federal Rules, and thus independently bars such a class action. See *Amchem*, 521 U.S. at 629 ("the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically") (internal quotation marks omitted). As explained below, Rule 23 can be construed in keeping with the Enabling Act to disallow the class certification affirmed below. Regardless of whether reversal is based on Rule 23 or the Enabling Act, however, this much is certain: the class certification order cannot stand.

B. The Class Certification In This Case Violates The Rules Enabling Act By Modifying Substantive Rights Under Title VII.

Despite Congress's clear directive in the Rules Enabling Act, the Ninth Circuit affirmed a class certification order that altered the substantive Title VII cause of action and limited Wal-Mart's substantive defenses. The error warrants reversal. Plaintiffs allege that Wal-Mart 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. 279a. That provision requires proof that an

employer took an adverse employment action against the plaintiff "because of" her sex. 42 U.S.C. § 2000e-2. Title VII explicitly forecloses a plaintiff's recovery if the employer acted "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). To maintain a class action for individual relief, plaintiffs must satisfy a two-stage framework, which requires plaintiffs to demonstrate a "systemwide pattern or practice of" intentional discrimination, and permits defendants to provide individualized defenses. *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977); see *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). As explained below, the Ninth Circuit transmogrified this framework, alleviating plaintiffs' burden and depriving Wal-Mart of its right to offer individualized defenses, all in violation of the Rules Enabling Act.

1. The Class Certification Order Lowers Plaintiffs' Burden To Show They Were Victims Of A Pattern Or Practice Of Intentional Discrimination.

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." *Teamsters*, 431 U.S. at 336. A showing of "discrimination against one or two individuals" does not mean the plaintiff can necessarily "prove the existence of a companywide policy, or even a consistent practice within a given department," sufficient to sustain a class action. *Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 877-78 (1984). Instead, to satisfy Rule 23(a) and Rule 23(b)(2), plaintiffs need to produce "[s]ignificant

proof" that the employer pursued a common discriminatory policy or practice in the same manner against the entire class. *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U. S. 147, 159 n.15 (1982).

a. As in all class actions, a plaintiff "seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)." *Id.* at 156. The Rule 23(a) criteria cannot be assessed in the abstract. They must be judged in keeping with the Enabling Act's command: The questions of law and fact must be so "common," Fed. R. Civ. P. 23(a)(2), and the class representatives' claims and defenses so "typical," *id.* 23(a)(3), that adjudicating their cases could resolve each class member's case without sacrificing any party's rights. *Falcon*, 457 U.S. at 157 n.13. The adequacy of representation inquiry, Rule 23(a)(4), likewise takes account of whether "the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[2] *Id.*

The greater the degree to which the class representatives' claims vary from other class members' claims, the greater the risk that a class action will modify substantive rights. If the claims vary substantially, the absent class members may be entitled to a different judgment from the named plaintiffs. Or, the defendant may have a defense against absent class members' claims that it could

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[2] Other factors, such as "competency of class counsel and conflicts of interest," may also doom a proposed class action. *Falcon*, 457 U.S. at 157 n.13. Compliance with the Enabling Act is a necessary but not a sufficient condition for class certification.

not advance against the named plaintiffs. Because the Enabling Act prohibits those results, Rule 23(a)'s factors must be applied to limit class claims to those that are "fairly encompassed by the named plaintiff's claims." *Gen. Tel. Co. of Nw.* v. *EEOC*, 446 U.S. 318, 330 (1980). In essence, Rule 23(a) requires that the class members "possess the same interest and suffer the same injury." *Falcon*, 457 U.S. at 156 (internal quotation marks omitted).

Plaintiffs plainly cannot satisfy Rule 23(a)'s commonality, typicality, or adequacy requirements. As certified, the class consisted of different types of employment actions (*i.e.*, unequal pay, unequal promotions) allegedly taken against 1.5 million different female employees, in 170 different job classifications, in 53 different departments, at 3,400 different stores, by thousands of different, local decision-makers. Pet. App. 114a, 163a, J.A. 745a-746a; see Pet. App. 59a (acknowledging "the absence of a specific discriminatory practice promulgated by Wal-Mart"). Theirs is a far cry from the prototypical Title VII class action in which plaintiffs identify a discrete discriminatory practice, such as "a biased testing procedure," that affected all class members in the same manner. *Falcon*, 457 U.S. at 160 n.15; see, *e.g.*, *Garcia* v. *Johanns*, 444 F.3d 625, 631-32 (D.C. Cir. 2006) (requiring a plaintiff to "make a significant showing" that "the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions") (internal quotation marks omitted). Rather, plaintiffs allege that Wal-Mart fostered a "corporate culture" of "gender stereotyping" and a corporate practice of giving store managers "excessive subjectivity" in multiple types of "personnel decisions." Pet. App. 51a.

On its own terms, this allegation of subjective decisions of varying types, by thousands of independent local store managers across the country, precludes plaintiffs from satisfying Rule 23(a)'s requirements. Indeed, a policy of "leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise *no inference* of discriminatory conduct." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (emphasis added); see*, e.g.*, *Garcia*, 444 F.3d at 632 ("[e]stablishing commonality . . . is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist"). Thus, individual class members' Title VII claims rise or fall on myriad additional facts specific to their employment situation and the particular decision-makers. In no meaningful sense do plaintiffs "possess the same interest" or have they "suffer[ed] the same injury" from a common discriminatory practice. *Falcon*, 457 U.S. at 156 (internal quotation marks omitted).

The lower courts reached the opposite conclusion only by ignoring the overwhelming differences among putative class members, focusing instead on the few issues plaintiffs claimed to be common—*i.e.*, "excessively subjective decision making in a corporate culture of uniformity and gender stereotyping." Pet. App. 80a. But defining the common practice at that high level of abstraction is meaningless. It mirrors the general claim of a "policy of discrimination" that *Falcon* rejected as insufficient to satisfy Rule 23(a). 457 U.S. at 157-58. Moreover, it fails the fundamental requirement that the class members' claims so overlap that adjudicating the named plaintiffs' claims fairly resolves each class member's claims without modifying any class member's rights

or burdens, or depriving the defendant of any defense. 28 U.S.C. § 2072(b).

Those impermissible effects are precisely what the class certification order allows. It opens the door to 1,500,000 class members—who worked in different stores around the country, under different managers—receiving a backpay award without ever having to prove actual discrimination, and merely because a jury finds that a few store managers in California treated individual employees differently under completely separate employment circumstances. See Pet. App. 4a-5a. The order also opens the door to the possibility that the class members will be forever barred from advancing legitimate discrimination claims merely because a jury finds that those particular California store managers did not discriminate against the named plaintiffs. It is hard to imagine a more egregious violation of the Enabling Act.

b. Nor can plaintiffs' claim satisfy Rule 23(b)(2), as properly construed in light of the Enabling Act. Rule 23(b)(2) allows certification if the defendant has acted "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). The "underlying premise of the (b)(2) class" is that "its members suffer from a common injury properly addressed by class-wide relief." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998).

To be certified under (b)(2), the class must be an especially "homogenous and cohesive group." *Id.*; see also*, e.g. Barnes* v. *Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (collecting cases that recognize the "cohesion" demanded by (b)(2)). Indeed, "even greater cohesiveness generally is required" for a (b)(2) class

than for a (b)(3) class, in which common issues must merely "predominate" individual issues. *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); see also, *e.g.*, *Barnes*, 161 F.3d at 142-43. This heightened need for cohesion stems both from (b)(2)'s text and the fact that (b)(2) certification binds absent class members to the class action's judgment without giving them notice or an opportunity to opt out. *Allison*, 151 F.3d at 413; see Fed. R. Civ. P. 23(c)(2)(A), (3)(A); see also *Amchem*, 521 U.S. at 620 (Rule 23 requires courts to determine whether a class certified for trial "would present intractable management problems").

Where, as here, the named plaintiffs and absent class members lack cohesion and have varying claims, certification under (b)(2) creates a real possibility that absent class members' and the defendant's rights will be modified in violation of the Enabling Act. The absent class members and the defendant will be bound to the judgment obtained for the named plaintiffs based on circumstances not shared by the absent class members, potentially awarding certain members relief they did not merit, and depriving others of relief they deserved. Indeed, the district court candidly acknowledged that its class certification order would "generat[e] a 'windfall'" for some employees who were not "'genuine victims of discrimination,'" and "'undercompensat[e] the genuine victims of discrimination.'" Pet. App. 254a. This admission should have doomed any effort to apply Rule 23(b)(2) here because it flatly contravenes the Rules Enabling Act by modifying Title VII's substantive provisions.

2. The Class Certification Order Abridges Wal-Mart's Right To Present Individualized Defenses.

The class certification order also violates the Rules Enabling Act by modifying the substantive rights at stake in the second stage of the *Teamsters* framework. 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." 431 U.S. at 361; see *Cooper*, 467 U.S. at 876. 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 *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.[3] *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*, 424 U.S. at 772 (employer may show that "individuals . . . were not in fact victims of previous 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).

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[3] 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*, 424 U.S. at 772. 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 *Teamsters'* and *Franks*' placement of the burden on defendants. *See Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351-52 (2009) (holding that a plaintiff retains the burden under the Age Discrimination in Employment Act and questioning burden shifting under Title VII); *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.

The class certification order affirmed in this case, however, dispenses with individualized proof, thus modifying the Title VII cause of action, in violation of the Rules Enabling Act. 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 stripped Wal-Mart of 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 to substitute a formula-based approach that would determine individual plaintiffs' relief without considering each of Wal-Mart's defenses 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 Wal-Mart's corporate records to fashion individual awards. *Id.* This approach would preclude Wal-Mart 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 violates 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.[4] That is the 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 Wal-Mart's rights could be protected by allowing it "to present

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[4] 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) (per curiam). The second decision involved Alien Tort Statute 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, 778 (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.").

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 own 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).

II. IF AFFIRMED, THE DECISION BELOW WOULD TRIGGER AN EXPLOSION OF MERITLESS CLASS ACTIONS FILED SOLELY TO FORCE SETTLEMENTS.

The harmful consequences of the Ninth Circuit's Rule 23 analysis cannot be overstated. Its impact would not be limited to employment discrimination suits. The analysis would also affect plaintiffs' attempts to obtain class certification in many 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 individualized 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). Indeed, a critical part of a defendant's case is often to dispute causation and injury.

Cases that involve varying individual proof of causation and injury generally are not eligible for class certification, as individual issues overwhelm the common issues. Fed. R. Civ. P. 23(a); see, *e.g.*, *Amchem*, 521 U.S. at 620; *Hohider* v. *UPS, Inc.*, 574 F.3d 169, 195-96 (3d Cir. 2009); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 224-25 (2d Cir. 2008). The Ninth Circuit's decision, however, invites courts to disregard such individual issues on the theory that litigating them as a class would be "impractical" and "not feasible." Pet. App. 251a-252a. By the Ninth Circuit's logic, issues that would defeat class certification should be ignored precisely because they would defeat class certification. This transforms Rule 23 into a vehicle to aggregate disparate claims and create behemoth classes, such as the one proposed here.

The inevitable result is to intensify the pressure that a class certification order puts on a defendant to settle, making the class action procedure even more attractive for plaintiffs pursuing frivolous claims. In enacting the Class Action Fairness Act of 2005, Pub. L. No. 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 companies").

Left unchecked, the Ninth Circuit's boundless interpretation of Rule 23 will invite a wave of meritless class action filings. The Enabling Act strictly limits Rule 23 to regulate nothing more than the procedures for disposing of claims. The decision below, however, allows plaintiffs to wield Rule 23 as a substantive weapon. It should be rejected.

CONCLUSION

For these reasons, and those stated by petitioner, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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