NO. 10-277

IN THE
SUPREME COURT OF THE UNITED STATES

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF CIVIL PROCEDURE PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

As law professors and scholars with expertise in civil procedure and class action law, *amici* are concerned about access to the courts as a crucial means of enforcing substantive law, as well as the proper interpretation of the Federal Rules of Civil Procedure to ensure the efficient adjudication of disputes.

The 31 professors who have signed on to this brief are scholars at law schools around the United States who teach and write in Civil Procedure, Complex Litigation, Employment Discrimination and related subjects. Their names and institutional affiliations are included in the Appendix.

SUMMARY OF ARGUMENT

The class action device is essential to a well-functioning system of justice because of its ability to balance the values of access to the courts and efficient adjudication of disputes. This was the vision of the drafters of Federal Rule of Civil Procedure 23. This Court can and should interpret Rule 23's text in a way that vindicates these overarching goals.

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Particularly in an adjudicative class action, the certification motion needs to be understood as a preliminary step that is complimented by motions to dismiss and summary judgment motions. The aim of class certification is not to screen out suits that fail even to allege a claim for relief (that is for motions to dismiss), nor to issue dispositive rulings on the merits (that is the purpose of summary judgment or trial). Instead, it is to determine whether the purposes of the class action rule would be served by proceeding with a collective litigation.

The district court case did not abuse its discretion in concluding that the proposed class met the requirements of Rule 23(a). In fact, the court's attention to the detailed pleadings and the extensive evidence gathered by the parties in assessing whether the named plaintiffs' claims shared common questions of law or fact with claims of absent class members showed a level of rigorous evaluation that went beyond the 23(a) threshold. Classification of the class under 23(b)(2) was also appropriate under the Federal Rules. Petitioner's contrary arguments ignore the text, purpose and history of Rule 23.

ARGUMENT

Access to the courts is a crucial means of enforcing substantive law, and the efficient adjudication of disputes is essential to the success of a well-functioning system of justice. These values of access and efficiency are sometimes couched in opposition to one another, but the class action serves both of these ends. It is an indispensible procedural device because it facilitates access to the courts for large numbers of litigants (particularly those with fairly low-value claims) and avoids costly repetition that would be required in the absence of class litigation. This was the aim of the drafters of Federal Rule of Civil Procedure 23. This Court should interpret Rule 23 in a way that vindicates these overarching goals.

In the context of highly publicized disputes such as this one, it is essential for this Court to step back from the particular facts that have garnered so much attention and to consider how Rule 23 should apply to the run of cases. This case presents several important questions about the interpretation of Rule 23 that will have implications not only in employment discrimination litigation, but more generally for the future vitality of the class action device under the Federal Rules. The Court should use this opportunity to think about the role served by Rule 23 in the full context of federal litigation.

Particularly in an adjudicative class action, in contrast to a settlement class in which litigation of the plaintiffs' claims is not contemplated, the

certification motion needs to be understood as a preliminary step that is complimented by motions to dismiss and summary judgment motions. The aim of a class certification determination is not to screen out suits that fail even to allege a claim for relief (that is for motions to dismiss), nor to issue dispositive rulings on the merits (that is the purpose of summary judgment or trial). Instead, it is only to determine whether the purposes of the class action rule would be served by proceeding with a collective litigation.

The district court did not abuse its discretion in concluding that the proposed class met the requirements of Rule 23(a). In fact, the court's attention to both the detailed pleadings and the extensive evidence gathered by the parties in assessing whether the named plaintiffs' claims shared common questions of law or fact with the claims of absent class members showed a level of rigorous evaluation that more than satisfied the 23(a) threshold. Neither did the court's classification of the class under 23(b)(2) run afoul of the Federal Rules of Civil Procedure. Petitioner's contrary arguments ignore the text, purpose and history of Rule 23.

I. THE COURT'S DETERMINATION THAT PLAINTIFFS COULD PROCEED WITH CLASS LITIGATION OF THEIR CLAIMS WAS CONSISTENT WITH THE REQUIREMENTS OF RULE 23(A).

A. The text, purpose, and history of Rule 23 require a district court to make an independent determination that the 23(a) requirements are met, but do not require a full-blown evidentiary hearing.

The role of the 23(a) requirements is to ensure a "threshold" inquiry into the suitability of the particular suit for class treatment. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997). This is made clear by the structure of the Rule, which first lays out the threshold requirements in Rule 23(a)(1)-(4) and then provides for more stringent analysis in other parts of the Rule.

The district court's responsibility is to make a determination that the plaintiff has met each of the four 23(a) requirements. While these determinations must be rigorous, in that conclusory assertions by the moving party are insufficient, they need not be definitive in the sense that they resolve disputed merits issues intended by the Federal Rules to be resolved at summary judgment or trial.

The drafters of Rule 23 envisioned this threshold inquiry as being a rather simple matter.

For example, as Professor Arthur Miller, who was present at many key moments in the drafting process, wrote early in the history of the Rule, the 23(a)(2) commonality requirement is a "simple, low level" requirement that there be either one significant common issue or several common issues. It is a standard that is "relatively easy to satisfy." Arthur R. Miller, *Overview of Class Actions: Past, Present and Future* 25 (1977). Review of the historical materials of the drafting process in the early 1960s reveals that those discussions include very little on the 23(a) requirements because they were seen as obvious and non-controversial. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L.Rev. 356, 387 (1967) (describing requirements of Rule 23(a) as a "well agreed proposition.").

1. The 23(a) determination is not meant to be a mini-trial, and courts have appropriately declined to treat it as one.

In the 45 years since the modern class action rule was adopted, no court has held that 23(a) requires a determination of the merits akin to a summary judgment motion or mini-trial of the sort Petitioner demands here. This uniform interpretation is correct for several reasons.

First, the Federal Rules specifically identify a number of motions through which the parties may litigate the case on the merits and the certification

motion is not such a motion. *See* Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted); Fed. R. Civ. P. 12(c) (motion for judgment on the pleadings); Fed. R. Civ. P. 56 (a), (b) (motion for summary judgment may be made at any time until thirty days after the close of discovery). Motions to dismiss, summary judgment motions and trials on the merits are all available in the class context. If defendants believe that plaintiffs' legal theory does not hold water, they can make a motion to dismiss or for judgment on the pleadings either before certification or after. Defendants are also free to move for summary judgment.

The timing of such dispositive motions will vary with particulars of a case. Sometimes a need for more comprehensive understanding of the facts may warrant that dispositive issues be decided on a summary judgment motion, whereas in others a motion to dismiss may be the appropriate moment to make a dispositive ruling. In still other cases, disputed issues of material fact exist that require the case to continue to trial. While the parties and the district court have considerable flexibility about the timing for addressing the merits of the plaintiffs' claims, class certification is never the appropriate time.

The text of Rule 23(c)(1)(A), which states that the certification motion should be considered at "an early practicable time," demonstrates that the court may choose to hear dispositive motions prior to certification. In the previous version of Rule 23, this

provision encouraged courts to make the certification determination "as soon as practicable." Fed. R. Civ. P. 23(c)(1)(A) (1966). This 2003 change codified the prevailing practice, which permitted defendants to bring motions to dismiss and even summary judgment motions prior to certification, if appropriate. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1785.3 (3d ed. 2010).

Importantly, courts have uniformly held that determinations of fact on certification are not binding on the merits of the litigation. *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.,* 522 F.3d 6, 24 (1st Cir. 2008) ("[Some] circuits' use of the term 'findings' in this context should not be confused with binding findings on the merits. The judge's consideration of merits issues at the class certification stage pertains only to that stage."); *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 320 (3d Cir. 2008). Even those courts that have advocated a very strict certification standard agree that the district court's determinations at certification are not "findings" on the merits of the underlying claims, but "finding[s] that each of the requirements of Rule 23 has been met." *Id.*

The structure of Rule 23 itself demonstrates that 23(a) determinations are not intended to be binding. A district court is specifically empowered to alter a certification order at any time during the litigation, *see* 23(c)(1)(C), meaning the court can reevaluate its 23(a) determinations if the course of the litigation suggests that reevaluation is needed. It

is inefficient, wasteful and counterproductive to the purpose of class litigation to make a merits inquiry when the findings of fact that result will not be binding on the litigants going forward. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (noting the potential prejudice of a preliminary determination of the merits "since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.").

For these reasons, the role of the district court is best described as making a "determination" akin to the type of determination made on a joinder motion rather than a "finding" as that term is generally used in the Federal Rules of Civil Procedure. The best analogy to the type of determination at issue in a court's 23(a) evaluation is that required under Rule 19, which was revised during the same period that the modern class action rule was written. *See* Kaplan, 81 Harv. L. Rev. at 356 (describing both Rule 19 "parties required to be joined" and Rule 23 class actions under the overarching category "problems of parties"). Like the Rule 23(a) inquiry, Rule 19 does not require merits determinations with respect to the nature of the claims of the party required to be joined. 7 Wright, Miller & Kane, *Fed. Prac. & Proc.* § 1604 (determination on Rule 19 compulsory joinder made on the pleadings).

Of course, on both Rule 19 and Rule 23 motions, district courts are charged with taking a serious look at whether litigation can appropriately proceed in light of the interests of individuals not directly before the court. *See, e.g., Amchem,* 521 U.S. at 628. As this Court has recognized in the Rule 19 context, the district court's determination "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Republic of Philippines v. Pimentel,* 533 U.S. 851, 863 (2008) (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 119 (1968)). Given that the certification decision is complex and fact-intensive, like the decision whether to require Rule 19 joinder, a district court's determinations in both contexts are appropriately reviewed for abuse of discretion.

2. The 23(a) commonality inquiry is analytically distinct from the more exacting requirement that common questions "predominate" in a 23(b)(3) class action.

The provision of 23(a) most disputed in this case is the 23(a)(2) commonality inquiry. In determining commonality, district courts must ask the following question: If litigated separately, would each case require a court to consider one or more of the same questions of law or fact important to the litigation, such that the effort of different judges would be repeated? If so, the case passes the

threshold commonality requirement. This inquiry is analogous to the standard applied to the nearly identical language in Rule 20, governing permissive joinder. *See* 7 Wright, Miller & Kane, *Fed. Prac. & Proc.* § 1653 (common question requirement "read as broadly as possible whenever doing so is likely to promote judicial economy.").

If the allegations in plaintiffs' complaint are sufficiently specific and supported by facts, this determination can be made on the pleadings. Where the pleadings do not provide enough, the parties may present additional facts so that the court can make the appropriate determination. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982) ("Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiffs' claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.").

Framing the commonality inquiry in this way recognizes that in assessing whether to certify a class, a court ought to consider all of the 23(a) requirements—including commonality—in light of the policy reasons for the class action rule: enforcement of the substantive law and efficient and economical adjudication of multiple, overlapping lawsuits. *See Amchem,* 521 U.S. at 626, n.20. Where facts that may eventually go to the merits of plaintiffs' allegations are also relevant to assessing whether the 23(a) requirements have been met, a court must examine those facts. But that

consideration must remain focused on the Rule 23(a) requirements, and not the district court's assessment of the merits of the claims.

Petitioner asks this Court to impose a novel standard of proof on employment discrimination plaintiffs under Rule 23(a). *See infra* Part I.B. There is no basis for imposing this kind of heightened standard to 23(a). As discussed above, district courts' determinations on numerosity, typicality, commonality and adequacy are intended to ensure that the litigation will serve the goals of class litigation and that the interests of absent class members will be protected. These threshold questions screen putative class actions not for their likelihood of success on the merits, but for their appropriateness as aggregate litigation.

To the extent that some courts have ventured to review class certification by a stricter standard, it has uniformly been in evaluating the appropriateness of certifying a class under Rule 23(b)(3). *See, e.g., Hydrogen Peroxide,* 552 F.3d at 320 (applying a "definitive determination" by a "predominance of the evidence" standard to 23(b)(3) predominance requirement); *Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (stating that factual findings on the 23(b)(3) predominance inquiry must be based on underlying standard of proof that would be used at trial); *New Motor Vehicles*, 522 F.3d at 26 (requiring factual inquiry and determination of validity of novel legal theory for plaintiff to meet predominance requirement of Rule 23(b)(3)).

To properly interpret Rule 23, this Court and district courts evaluating class certification must maintain the analytical distinction that the Rules themselves draw between 23(a)'s commonality threshold and the predominance inquiry required for certification of a class under 23(b)(3). *See Amchem*, 521 U.S. at 615 (specifying that a "close look" standard only be applied to the 23(b)(3) inquiry). When a district court satisfies itself that each of the requirements of Rule 23 has been met, it must be vigilant that it does not expand the requirements of 23(a) in a premature evaluation of the underlying merits issues and that it does not erroneously import the predominance requirement of 23(b)(3), which is more stringent, into the 23(a) inquiry.

Applying Rule 23(a) as its text, purpose and history demand, the district court in this case properly considered whether the plaintiffs had met each of the Rule's requirements. Although the plaintiffs' complaint itself provided a robust factual basis for a commonality determination, the district court went further, permitting pre-certification discovery and hearing oral argument from the parties before concluding that plaintiffs had satisfied Rule 23(a). As discussed further below, the district court's analysis in this case does not show a lack of rigor, but rather an abundance of caution.

B. The district court did not abuse its discretion in determining that the plaintiffs had made a sufficient showing on the threshold 23(a) requirements.

The district court engaged in a careful review of both the pleadings and the range of evidence gathered during pre-certification discovery in determining that Rule 23(a) had been satisfied. The district court's detailed opinion surveyed the Rule's requirements and weighed the evidence presented by both parties against those requirements. While the court carefully—and correctly—avoided reaching conclusions about the merits of the plaintiffs' underlying claims of discrimination, its certification decision showed a measured evaluation of the appropriateness of litigating those claims in a class proceeding.

1. The district court did not abuse its discretion in evaluating the pleadings and evidence and certifying a class.

When the named plaintiffs filed their complaint in 2001, they alleged that Wal-Mart had engaged in a pattern and practice of gender discrimination in pay and promotion in stores throughout the United States. The complaint alleged that Wal-Mart enforced a uniform corporate culture through a variety of practices that tied the social environment in stores all over the country to the

expectations of central management in Bentonville, Arkansas. The complaint went on to allege that this centralized culture, combined with largely unguided discretionary authority for pay and promotion decisions, created a pattern of discrimination against female employees.

Over the course of several years of pre-certification discovery, both plaintiffs and defendant gathered information about Wal-Mart's policies; took depositions of employees and supervisors; and garnered expert reports purporting to validate or call into question the claim that pay and promotion decisions at Wal-Mart were being made in ways that shared common factual or legal issues for employees in stores around the nation.

After nearly three years of pre-certification discovery, the plaintiffs moved for certification of their proposed class. The district court permitted extensive presentation of evidence from both parties. J.A. 164a-65a. The court considered all of this evidence and wrote a lengthy and detailed opinion, explaining why, in its judgment, the proposed class could proceed to litigate the merits of their class as a class. In reaching its decision, the district court considered both plaintiffs' and defendant's expert testimony and other evidence and ultimately concluded that, in light of all of the available information, class litigation was appropriate.

This decision was not an abuse of discretion. Rule 23(a) requires the court to determine that the named plaintiffs' claims share questions of law or

fact with the claims of absent class members. As discussed above, this inquiry is a threshold question that does not require that common questions predominate, or that plaintiffs prove they will prevail on the merits as to the common questions presented.

As the district court correctly concluded, the plaintiffs' claims share several common questions of law and fact. First, they share the central common question as to whether a highly discretionary pay and promotion policy permitted gender stereotypes communicated through a strong corporate culture to influence pay and promotion decisions. J.A. 180a, 184a-93a. Second, they share the related question whether Wal-Mart's culture—the "Wal-Mart Way"—was in fact pervaded by stereotypes. J.A. 193a-96a. Third, a common question whether Wal-Mart's pay decisions led to impermissible, unjustifiable gender disparities. And fourth, the common question whether promotion opportunities were in fact distributed in a manner impermissibly tainted with discrimination. The district court correctly determined that each of these questions was common to the class and could be litigated on the merits in a class proceeding. J.A. 173a, 226a.[2]

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[2] In reaching this conclusion, the district court necessarily rejected Petitioner's disaggregated statistical evidence. In its lengthy evaluation of the competing statistical evidence offered by the parties, *see* J.A. 196a-225a, the district repeatedly rejected Wal-Mart's challenges to plaintiffs' statistical showing and explained why it accepted that evidence as sufficient to satisfy commonality. The court also issued a separate decision specifically considering challenges to the statistical expert

Each and every one of the claims of disparate impact advanced on behalf of each class member rests squarely on these common questions. Plaintiffs' claims of disparate treatment also require resolution of these questions, though they may involve other issues as well. If each class member's case were to proceed separately, every court in which an individual case was filed would have to decide each of these common questions. Thus certification of this case not only protects the substantive rights of plaintiffs, but also serves the efficiency and economy goals of Rule 23.

2. The Falcon *case did not create a special, heightened certification standard for employment class actions.*

Wal-Mart erroneously seeks to convert part of a single sentence in a footnote of this Court's *Falcon* decision into a novel and stringent standard for certification of Title VII class actions. It does so by omitting significant parts of the Court's language to give what remains a significance it does not, and ought not, have.

At issue in *Falcon* was certification of a class of *applicants* for employment with a class representative whose allegation was that he was denied a *promotion as an already existing employee*.

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testimony. Pet.Opp.Add. 4-15. Petitioner's claim that the court failed to evaluate that evidence is simply incorrect.

Falcon, 457 U.S. at 149. In a footnote, the Court observed that:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Id. at 159 n. 15.

Wal-Mart takes bits of this sentence out of order to alter its meaning entirely, asserting that the *Falcon* Court held "that a plaintiff seeing class treatment in this context must offer 'significant proof that an employer operated under a *general policy of discrimination*' that was implemented 'through *entirely* subjective decisionmaking processes.'" Pet. Br. 8 (quoting *Falcon*, 457 U.S. at 159 n. 15 with its own emphases added). With this acontextual revision, Wal-Mart expands *Falcon*'s meaning well beyond what the case held or even suggested about employment discrimination class litigation.

It is well settled that "all questions of law and fact need not be common to satisfy [the commonality] requirement, and the existence of shared legal issues with divergent factual predicates may be adequate." William B. Rubenstein, Alba Conte and Herbert Newberg, 8 *Newberg on Class Actions* §24.20 (4th ed. 2010). *See also Parra v. Bashas', Inc.*, 536 F.3d 975

(9th Cir. 2008); *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996) (holding that there need be only a single issue in common and that additional disparate issues may remain). *Falcon* says nothing different.

The rule challenged in *Falcon* was the Fifth Circuit's so-called "across-the-board" rule, under which "an employee complaining of one employment practice [could] represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury." *Falcon v. General Telephone Co. of Southwest*, 626 F.2d 372, 375 (5th Cir. 1980). During these early years of litigation under the modern Rule 23—and particularly in the context of Title VII claims, which were also novel at that time—courts were extremely liberal in certifying classes. *See, e.g.,* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678-79 (2003) (noting the high-water mark of class certifications under Title VII and the decline in the number of these classes in subsequent decades). A typical across-the-board case was *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). In that case, a discharged Black employee sought to represent a class of all other Black workers seeking equal employment opportunities. *Id.* at 1123. The district court concluded that the proposed class did not present any common question. *Id.* at 1124. The Fifth Circuit reversed, reasoning that the alleged underlying policy of general racial discrimination was sufficiently common to, and typical of, the claims of all members to permit

joinder of all the claims regardless of the specific practices being challenged. *Id.*

It was on this across-the-board theory that the plaintiff in *Falcon* premised his class claims. Mr. Falcon alleged that he had been denied a promotion because of his Mexican national origin. He sought to bring a class action on behalf of other Mexican Americans for discrimination in both promotions and hiring (even though his individual claim did not concern hiring discrimination). The Court held that class certification in *Falcon* was not appropriate under these circumstances for two reasons.

First, the class action device is supposed to promote conservation of judicial resources by allowing litigation of many related claims in one place at one time. The plaintiff in *Falcon* did not present the district court with any evidence that "adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans." *Falcon*, 457 U.S. at 158. Moreover, the proposed class did not advance economy and efficiency because there were different theories of proof advanced for the promotion claim (disparate treatment) and the hiring class claims (disparate impact). *Id.* at 159. Each claim was also proved by different kinds of evidence, so rather than conserving judicial resources, class litigation would needlessly complicate the action waste judicial resources.

Second, the class in *Falcon* did not meet the commonality requirement, and for the same reason the named plaintiff's discriminatory hiring claim was not typical of the class. The Court held that commonality could not be found on the mere fact that the named plaintiff and the other members of the class were of the same national origin. The limited nature of Falcon's promotion discrimination claim made him ineligible to be the class representative for those with hiring discrimination claims. The *Falcon* Court identified the inherent error in across-the-board cases as a failure to demand that plaintiff's individual claim encompass the claims of the absent class members. *Id.* at 160.

In contrast to the putative class in *Falcon*, whose only common thread was the national origin of the class members, the class here is defined not only by gender, but also the type of claims pursued—pay and promotion—and the fact that plaintiffs all allege both disparate treatment and disparate impact discrimination. Moreover, despite Wal-Mart's repeated suggestion that plaintiffs have not identified any employment practice common to the class, the complaint in fact specifies that the challenged discrimination was the result of 1) a uniform corporate culture that promoted gender stereotyping; 2) an excessive delegation of decision making authority; and 3) a failure to exercise oversight as to the consequences of that delegated authority.

In short, this is not an across-the-board case because the named plaintiffs' claims *do* encompass

the claims of the absent class members. The plaintiffs showed how their claims shared common questions of law and fact with the proposed class by offering substantial statistical evidence of gender disparities, anecdotal evidence revealing patterns of discriminatory conduct and expert testimony on social frameworks and their operation in workplace decision making. *See, e.g.,* J.A. 226a. The "across-the-board" theory that *Falcon* appropriately disavowed is simply inapplicable to this case.

In addition to being a misreading of this Court's precedent, the petitioner's proposed "significant proof" standard for certification of employment discrimination class actions inappropriately collapses a merits analysis into a certification determination. Wal-Mart repeatedly criticizes the plaintiffs for failing to prove their claims of discrimination. *See, e.g.*, Pet. Br. at 21 ("Plaintiffs have never offered significant proof that this framework was discriminatory."); *id.* at 25 ("[I]t is *plaintiffs'* burden to produce 'significant proof' of a company-wide discriminatory policy"). These criticisms expose the flaw in Petitioner's proposed standard: they are asking the wrong question for this procedural stage of the litigation.

As discussed above, the Federal Rules provide additional, more appropriate opportunities for Wal-Mart to attack plaintiffs' case. For example, if the plaintiffs do not prevail as to the common questions—that is, if the fact finder finds *either* that a discretionary policy combined with a particular corporate culture does not give rise to a claim as a

matter of law *or* that Wal-Mart does not have the type of corporate culture alleged in the complaint—then the basis for a class action will be lost. In that case, depending on the circumstances of that finding the district court will have the discretion to either enter a judgment for the defendant or alter the order for certification as permitted under Rule 23(c)(1)(C).

It is merely distracting that much of Wal-Mart's brief is devoted to the validity of plaintiffs' merits theory and the sufficiency of their proof. The district court appropriately did not require the plaintiffs to prove that all members of the class were subject to discrimination. These issues are important ones, but they are not relevant to the issue of whether this class has enough in common to pass the hurdle of Rule 23(a). Rather, the court appropriately concluded that the evidence presented by the plaintiffs fairly raised questions that were common to the class. As the Ninth Circuit correctly stated, "the disagreement *is* the common question, and deciding which side has been more persuasive is an issue for the next phase of the litigation." J.A. 71a. The question of whether plaintiffs' legal theory is in fact valid and can be proved on the facts of this dispute is one for a motion to dismiss under Rule 12 or a summary judgment motion under Rule 56.

II. A CLASS ACTION THAT SEEKS INJUNCTIVE RELIEF, AS THE CLASS CERTIFIED BELOW DOES, MAY BE CERTIFIED UNDER RULE 23(B)(2) EVEN IF IT ALSO SEEKS MONETARY RELIEF.

Wal-Mart argues that the district court erred in certifying the plaintiffs' class action as a 23(b)(2) class because they sought not only injunctive and declaratory relief but also back pay.[3] Pet. Br. 44, 46. The construction of Rule 23 proposed by Petitioner is inconsistent with the text of Rule 23(b)(2) and with the structure and purpose of the Federal Rules. In fact, the district court's certification of this class under 23(b)(2) was well within its discretion given that the plaintiffs, like many civil rights plaintiffs, are seeking injunctive and declaratory relief to remedy an employer's alleged discriminatory policies and practices.

A. The Federal Rules' text, structure, and purpose confirm that monetary relief may be sought in a 23(b)(2) class action.

As long as the requirements of Rule 23(a) are met, Rule 23(b)(2) allows certification when "the party opposing the class has acted or refused to act

[3] The plaintiffs also sought punitive damages, but that issue is not properly before this Court since the appropriateness of certifying a class for punitive damages was remanded back to the district court.

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). This language is not confined to classes that seek *only* injunctive or declaratory relief.

Thus, Wal-Mart's question presented—"whether *claims* for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)"—mischaracterizes the inquiry appropriate under Rule 23. Rule 23(b) governs whether a "class *action*" may be certified, *not* whether particular "claims" can be certified. This language choice is intentional. For example, the Rules require a court evaluating 23(a)(3) typicality to consider whether "the *claims* or defenses of the representative parties are typical of the *claims* or defenses of the class." Fed R. Civ. P. 23(a)(3) (emphasis added). And once a court concludes that a "class action may be maintained" under Rule 23(b), it proceeds under 23(c) to designate "the class *claims*, issues, or defenses." Fed. R. Civ. P. 23(c)(1)(B). The 23(b)(2) inquiry, however, does not require the court to carve up the class action on a claim-by-claim basis.[4]

The permissibility of monetary-relief claims in a 23(b)(2) class action is confirmed by the advisory committee notes to Rule 23's 1966 amendments, which state that "subdivision [(b)(2)] does not extend to cases in which the appropriate final relief relates

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[4] There is, of course, no obstacle to joining claims for monetary relief and injunctive relief under the Federal Rules. *See* Fed. R. Civ. P. 18(a).

exclusively or predominantly to money damages." Fed. R. Civ. P. 23, advisory committee notes (1966 amendment, subdivision (b)(2)) (emphasis added). This language plainly contemplates that monetary-relief claims are not categorically forbidden under Rule 23(b)(2). Thus, the advisory committee notes bolster the plain meaning of Rule 23's text: the presence of monetary-relief claims does not automatically preclude certification under 23(b)(2) where, as here, "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

This conclusion is also mandated by Federal Rule 1, which requires that Rule 23 "should be construed and administered to secure the just, speedy, inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Where a class action seeks monetary relief based on the same "act[s] or refus[als] to act" that justify certification under Rule 23(b)(2), the class action's "just, speedy, inexpensive determination" is only enhanced by allowing class members to pursue their monetary-relief claims as well. At a bare minimum, certification of the class allows common issues to be resolved with respect to the entire class before proceeding to adjudicate any individual issues that might be implicated in claims for monetary relief. This is far more manageable and cost-effective than requiring each class member to independently litigate monetary claims from start to finish. As

Judge Frank Easterbrook observed in *Allen v. International Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004), "a class proceeding for equitable relief . . . is no more complex than individual trials, yet produces benefits compared with the one-person-at-a-time paradigm." Given those benefits, when equitable claims are being pursued on a class-wide basis, "it would be prudent for the district court to reconsider whether at least some of the issues bearing on damages . . . could be treated on a class basis." *Id.*

Requiring monetary claims to be brought in separate lawsuits, on the other hand, may make them economically infeasible where litigation is likely to be costly as compared to individual recoveries. In the case at bar, for example, it is estimated that the average annual wage loss for each class members is barely more than one thousand dollars. *See* Resp. Br. 60; J.A. 475a.

These considerations were keenly on the minds of the drafters of the 1966 amendments to Rule 23, which created the three current categories in Rule 23(b). Professor Benjamin Kaplan, then the reporter for the Civil Rules Committee, wrote that "[t]he entire reconstruction of the Rule bespoke an intention to promote more vigorously than before the dual missions of the class-action device." Benjamin Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Comm. L. Rev. 497, 497 (1969). The first mission was "to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions." *Id.* The second was "to

provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," even though empowering such claims could "increase litigation overall." *Id.* Both of these objectives are best served by allowing injunctive-relief and monetary-relief claims to proceed together under Rule 23(b)(2).

B. The presence of some individualized issues does not foreclose certification under Rule 23(b)(2).

Although monetary-relief claims may require a court to consider the circumstances of individual class members, Wal-Mart's assertion that those claims must be treated as a wholly separate class proceeding under Rule 23(b)(3) rather than Rule 23(b)(2) is incorrect. Pet. Br. 49. The presence of such claims simply means that the district court will have to consider the extent to which the relevant issues should be adjudicated on a class-wide basis or, alternatively, via more individualized proceedings. This inquiry is important, of course, and it is a question that the Federal Rules leave to district court discretion regardless of which subpart of Rule 23(b) is invoked. Even in a Rule 23(b)(1) class action, class members might be required to "present individual claims after the basic class decision." Fed. R. Civ. P. 23, advisory committee notes (1966 amendment, subdivision (d)(2)) (describing need for such proceedings in "limited fund" cases).

For all class actions, therefore, the court must designate "the class claims, issues, or defenses," Fed. R. Civ. P. 23(c)(1)(B), and may decide to adjudicate on a class-wide basis only "particular issues." Fed. R. Civ. P. 23(c)(4). As well, for every class action, the court must make orders that, among other things, "determine the course of proceedings or prescribe measures to prevent undue repetition or complication." Fed. R. Civ. P. 23(d)(1). As Judge Richard Posner has explained:

> Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Carnegie v. Household International, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (internal quotation marks omitted). Moreover, in both class-action and non-class-action litigation, the Rules explicitly empower the Court to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties,

difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(2)(L).

These are fundamentally case-management issues, not ones that dictate the propriety of class certification in the first instance or that require class certification to be assessed under Rule 23(b)(3). District courts properly retain discretion to decide how best to manage the litigation in a Rule 23(b)(2) class action. Judge Easterbrook's decision in *Allen v. International Truck & Engine Corp.*, 358 F.3d 469 (7th Cir. 2004), is instructive. In reversing the district court's refusal to certify under Rule 23(b)(2) a class action seeking injunctive relief and compensatory damages, he emphasized the practical advantages of treating on a class-wide basis at least some aspects of the damages claims, given that core liability issues would be adjudicated class-wide with respect to injunctive relief. 358 F.3d at 472. In remanding that question, Judge Easterbrook wrote that "[w]hether full class treatment of damages issues would be manageable … is too fact-sensitive, and too much of a judgment call, to warrant interlocutory review in this court." *Id.*

This Court and countless appellate courts have confirmed the importance of district-court discretion in certifying and managing class actions. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) ("The certification of a nationwide class, like most issues arising under rule 23, is committed in the first instance to the discretion of the district court."); *Sacred Heart Health Sys., Inc. v. Humana*, 601 F.3d 1159, 1169 (11th Cir. 2010) ("The decision

to certify is within the broad discretion of the district court, and we review for an abuse of that discretion."). Such discretion makes perfect sense because the district court "generally has a greater familiarity and expertise with the practical and primarily factual problems of administering a lawsuit than does a court of appeals." *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993) (Wilkinson, C.J.) (citations and internal quotation marks omitted).

In the case at bar, the district court showed sensitivity to the practical considerations that ought to inform its exercise of discretion. For example, it limited class treatment of promotion claims to a subset of class members for whom objective applicant data exists. J.A. 267a. The district court's conclusion that class-wide adjudication was otherwise fair and feasible is permissible and entitled to deference.[5]

Courts adjudicating a Rule 23(b)(2) class action also have the authority to order (as the district court did in this case) that class members be notified and given the opportunity to opt out. Wal-

[5] Although Wal-Mart argues that the district court's plan for adjudicating this case violates Wal-Mart's due process rights, the Rules Enabling Act, and substantive Title VII law, *e.g.*, Pet. Br. 43, this Court specifically declined to grant certiorari on these issues. Further, the district court's proposed approach is consistent with the way numerous federal courts have handled similar Title VII claims. *See, e.g.*, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 281 (5th Cir. 2008); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Segar v. Smith*, 738 F.2d 1249, 1291 (D.C. Cir. 1984).

Mart's contention to the contrary, Pet. Br. 47, is incorrect. As for notice, Rule 23 explicitly authorizes the district court to order notice to members of a Rule 23(b)(2) class. Fed. R. Civ. P. 23(c)(2)(A).

As for opt-out rights, Rule 23 is unquestionably flexible enough to empower courts to allow members of a Rule 23(b)(2) class to opt out. *See, e.g., Eubanks v. Billington*, 110 F.3d 87, 94-95 (D.C. Cir. 1997); *Lemon v. International Union*, 216 F.3d 577, 582 (7th Cir. 2000) (noting the district court's authority to "certify the class under Rule 23(b)(2) for both monetary and equitable remedies but exercise its plenary authority . . . to provide all class members with personal notice and opportunity to opt out"). At the very least, Rule 23(c)(1)(C) authorizes the district court to alter or amend the definition of a Rule 23(b)(2) class any time before final judgment; this allows the court to exclude from the class those who opt out. *See also* Manual for Complex Litigation 4th § 21.221 & n.821 ("A court is not precluded from defining a class under Rule 23(b)(1) or (b)(2) to include only those potential class members who do not opt out of the litigation.").[6]

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[6] Accordingly, there is no need for the Court to decide here the extent to which notice and opt-out rights are required for due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985) (limiting its holding requiring notice and opt-out rights to "class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and not to "other types of class actions, such as those seeking equitable relief"). The question left open by *Shutts* is not presented in this case; nor does it need to be answered to resolve the proper scope of Rule 23(b)(2), because

For all these reasons, this Court should not endorse the unnecessary and atextual conclusion that monetary-relief claims *must* be carved away from a Rule 23(b)(2) class action and subjected to a Rule 23(b)(3) inquiry. Indeed, there is a fundamental difference between the circumstances presented here—in which claims for injunctive relief are certainly appropriate for class litigation—and the typical Rule 23(b)(3) class action that seeks only monetary relief.

The 23(b)(3) inquiry requires a court to compare adjudication by means of a class action to adjudication without a class action. *See* Fed. R. Civ. P. 23(b)(3) (is class litigation "superior to other available methods for fairly and efficiently adjudicating the controversy"). Here, however, claims for injunctive relief are already going to proceed as a class action under Rule 23(b)(2). Thus, the proper point of comparison is *not* purely individualized litigation without any class-wide adjudication. Rather, the point of comparison is a situation where a class action already exists that will be adjudicating on a class-wide basis crucial elements of the monetary-relief claims, in particular, whether Wal-Mart's policies and practices comply with Title VII.

In this scenario, forcing monetary-relief claims into the Rule 23(b)(3) box would require courts to make an inquiry that does not match

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Rule 23 empowers courts to comply with whatever due process requires in cases that, like this one, seek both monetary and injunctive relief.

reality. Instead, the Rules properly allow the court to certify the class action under (b)(2), and then to structure the litigation to adjudicate the claims in the most fair and efficient manner given the significance of these overlapping issues. Of course, it bears mentioning that a district court could well, in its discretion, determine that the class or some subset should be certified under 23(b)(3). That determination is one for the district court to make, and is part of the general discretion to manage the litigation.

C. Adjudication of monetary-relief claims in a 23(b)(2) class action should only be categorically forbidden in narrow circumstances not present here.

As set forth above, a class action may be certified under Rule 23(b)(2) even if it contains claims for monetary relief, and the district court did not abuse its discretion in finding this class action appropriate under 23(b)(2). There may, however, be some circumstances where monetary-relief claims should not be adjudicated in a Rule 23(b)(2) class action, and must independently satisfy some other prong of Rule 23(b). No such circumstances are present here, but in the interest of completeness *amici* briefly discuss below two potential limitations on the use of Rule 23(b)(2).

One situation where a Rule 23(b)(2) class action ought not to include monetary-relief claims is if they are based on conduct that is unrelated to conduct underlying the injunctive-relief claims.

Where there is no transactional relationship between the claims, the values of Rule 1 are not likely to be served because the injunctive-relief class action will not be resolving issues that would be relevant to the monetary-relief claims. As a textual matter, the lack of a transactional connection between injunctive-relief and monetary-relief claims might be framed in terms of whether the claims are truly part of one "class action" for purposes of Rule 23(b).

This Court has taken an analogous approach to federal-question jurisdiction. Under *United Mine Workers v. Gibbs*, federal-law and state-law claims comprise a single "case" for purposes of Article III only when they "derive from a common nucleus of operative fact." 383 U.S. 715, 725 (1966). In the case at bar, however, the class plaintiffs' monetary-relief claims are based on the very same "act[s] or refus[als] to act" that warrant 23(b)(2) certification.

It would also be inappropriate to adjudicate monetary-relief claims in a Rule 23(b)(2) class action where reasonable plaintiffs would not be seeking injunctive relief in the absence of a possible monetary recovery, or where the injunctive or declaratory relief sought would not be reasonably necessary and appropriate even if the plaintiffs were to succeed on the merits. *See Robinson v. Metro-North*, 267 F.3d 147, 164 (2d Cir. 2001). *Robinson* reasoned that "[i]nsignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery." *Id.* at 164.

Jurisdictional principles provide a useful analogy here as well. In *Bell v. Hood*, this Court recognized that federal-question jurisdiction is not appropriate "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where the claim is wholly insubstantial and frivolous." 327 U.S. 678, 682-83 (1946). Likewise, an insignificant or sham request for injunctive relief is an inappropriate basis for Rule 23(b)(2) certification. The requests for injunctive relief in the case at bar, however, are certainly not "insignificant" or a "sham." Although Wal-Mart vigorously disputes the merits of plaintiffs' claims, there is no question that injunctive relief is appropriate if Wal-Mart's policies and practices are found to violate Title VII. *See* 42 U.S.C. § 2000e-5(g); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766 (1976) ("It can hardly be questioned that ordinarily [injunctive-type] relief will be necessary to achieve the 'make-whole' purposes of [Title VII]."). There is also no reason to believe that reasonable plaintiffs in the same position as the plaintiffs below would be seeking only monetary relief. Obtaining the injunctive relief requested is a legitimate and worthwhile objective for plaintiffs aggrieved by Wal-Mart's practices.[7]

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[7] Wal-Mart's argument that any class members who no longer work for Wal-Mart lacks standing to seek injunctive relief (Pet. Br. 52) is erroneous, as is the Ninth Circuit's narrower view that standing is lacking for class members who were not employed by Wal-Mart at the time the complaint was filed. J.A. 100a-101a. First, examining the standing of each absent class

Beyond these potential restrictions, a district court's handling of monetary-relief claims in the context of a Rule 23(b)(2) class action should generally be left to that court's discretion as a matter of case management. *See supra* Part II.B. As long as the injunctive-relief claims are genuine and not merely "cover for . . . claims that are brought essentially for monetary recovery," *Robinson*, 267 F.3d at 164, it should not be said that "the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23, advisory committee notes (1966 amendment, subdivision (b)(2)).

The analysis suggested by the Ninth Circuit is consistent with this case-management focused approach. The *en banc* decision directed district courts to consider the "effect of the relief sought on the litigation" in assessing the appropriateness of certification under 23(b)(2) where the plaintiffs seek some monetary relief in addition to injunctive and declaratory relief. J.A. 88a. In this assessment:

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member is contrary to the very idea of representative litigation. It is the named plaintiffs whose standing the court should consider. Second, as other courts have recognized, former employees are often the best (or only) plaintiffs to challenge discriminatory employment policies. *See, e.g., Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). Moreover, experience shows that many former employees of Wal-Mart will someday work for the company again. For any former employee who might one day seek a job with one of the nation's largest employers, eliminating discriminatory practices is of paramount importance.

> Factors such as whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns would all be relevant, though no single factor would be determinative.

Id. Importantly, this standard does not categorically ban monetary-relief claims in 23(b)(2) class actions. Instead, it offers guidance to district courts exercising their proper discretion in evaluating the best way to handle complex litigation.

Although some lower-court opinions have imposed other categorical obstacles to monetary-relief claims in Rule 23(b)(2) class actions, this Court should not endorse these judicial alterations to Rule 23. For example, there is no textual basis in Rule 23 for forbidding monetary-relief claims that are more than "incidental" or that "depend[] in any significant way on the intangible, subjective differences of each class member's circumstances." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-16 (5th Cir. 1998). Likewise, courts need not measure, by some uncertain metric, the "positive weight or value of the injunctive or declaratory relief sought" as compared to the monetary relief sought. *Id.* at 430 (Dennis, J.,

dissenting).[8] Rather than embrace artificial restrictions that lack any support in the text of Rule 23, this Court should endorse the more pragmatic approach urged here, which would allow courts to make optimal use of the class-action device and to best accomplish the purposes underlying Rule 23 and the entire Federal Rules of Civil Procedure.

CONCLUSION

Rule 23 was designed to give district courts discretion to balance the Federal Rules' goals of the just and efficient resolution of disputes. The district court in this case appropriately exercised this discretion in certifying the class. For all of the reasons discussed here, this Court should affirm class certification.

[8] If this Court were to require such a comparison, *amici* agree with the Ninth Circuit's conclusion that "the amount of monetary damages available *for each plaintiff* … is far more relevant to establishing predominance that the total size of a potential monetary award for the class as a whole." J.A. 89a.

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