No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, et al.,
Respondents.

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

Brief of NAACP Legal Defense and Educational Fund, Inc., National Association for the Advancement of Colored People, Leadership Conference on Civil and Human Rights, AARP, Disability Rights Education and Defense Fund, Inc., LatinoJustice PRLDEF, Asian American Justice Center, Asian Law Caucus, and Lawyers' Committee for Civil Rights Under Law As *Amici Curiae* In Support of Respondents

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
Counsel of Record
KIMBERLY LIU
RYAN DOWNER
NAACP LEGAL DEENSE &
EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200
dadegbile@naacpldf.org

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES

Page(s)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

DOCKETED CASES

TABLE OF AUTHORITIES
(continued)

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

INTEREST OF *AMICI CURIAE*[1]

Amici NAACP Legal Defense & Educational Fund, Inc., National Association for the Advancement of Colored People, Leadership Conference on Civil and Human Rights, AARP, Disability Rights Education and Defense Fund, Inc., LatinoJustice PRLDEF, Asian American Justice Center, Asian Law Caucus, and Lawyers' Committee for Civil Rights Under Law are non-profit organizations dedicated to, among other goals, eradicating workplace discrimination and addressing workplace conditions that affect racial and ethnic minorities, women, older workers, and those with disabilities.

More details about individual *amici* are included in the Addendum.

SUMMARY OF ARGUMENT

Title VII jurisprudence has consistently recognized that class treatment of claims alleging pervasive and systemwide discrimination is often the best, and sometimes the only, way to ensure effective resolution of claims of workplace civil rights violations. Taken together, Title VII and Rule 23(b)(2) provide a mechanism for the fair and efficient adjudication of claims similarly affecting

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

large classes of individuals. The statute and Rule have a long history of working in tandem to address the congressional purpose of eradication of discrimination in the workplace.

As explained in detail in Plaintiffs' brief, Wal-Mart seeks to resist class treatment by imposing a series of heightened standards on Plaintiffs' claims, above and beyond the appropriate and rigorous review conducted by the district court. Such heightened standards are inconsistent with the purposes of the Rule, and would dramatically narrow the circumstances in which the class action vehicle could be used, regardless of the extent and scope of the underlying discriminatory conduct. Considered separately, each of the proposed interpretations of Rule 23 is legally tenuous. But when viewed collectively, Wal-Mart's stance would unnecessarily constrict access to the class action as a viable vehicle for challenging broad-scale discrimination, contrary to congressional intent and well-established practice and precedent.

In this case, perhaps the most serious threat to the continued salience of the class action vehicle for employment discrimination claims is Wal-Mart's novel argument that back pay is entirely inconsistent with (b)(2) certification. Wal-Mart's reading of Rule 23 would effectively force plaintiffs to choose between maintaining a viable class action and seeking make whole relief. Significantly, this is not merely an academic exercise about the appropriate subsection of the rule under which to seek certification: Wal-Mart argues that Plaintiffs' claims cannot go forward as a class under either (b)(2) *or* (b)(3).

In this brief *amici* explain some of the important consequences of Wal-Mart's approach to class certification. First, Wal-Mart's arguments conflict with decades of precedent as to the applicability of (b)(2) certification to employment discrimination cases, including those that challenge discrimination conducted through excessively subjective decisionmaking. Indeed, hampering discrimination victims' ability to proceed on a classwide basis would gravely undermine two well-established theories of liability under Title VII—pattern-or-practice and disparate impact—both of which are essential tools in eradicating broad-scale discrimination of the sort alleged here. Both types of class actions allow plaintiffs broader access to the evidence necessary for careful judicial evaluation of systemic patterns of discrimination and, where appropriate, the remedies necessary to eradicate them.

Second, Wal-Mart's proposal to limit (b)(2) classes to those plaintiffs who request exclusively injunctive relief conflicts with decades of judicial precedent and with congressional intent. Back pay is a presumptively available remedy for victims of job discrimination, is integral to full equitable relief, and is uniformly available in (b)(2) class actions. This Court need not decide whether punitive damages are consistent with (b)(2) certification in the instant case because the Ninth Circuit vacated and remanded that issue for a factual determination by the district court in the first instance.

Finally, Wal-Mart's assertion that the question of whether injunctive relief predominates can be answered by calculating the number of former employees in the class is contrary to logic and case

law, and would create perverse incentives for employers.

This Court should reject Wal-Mart's invitation to refashion Rule 23 and affirm the Ninth Circuit's decision to certify the plaintiff class.

ARGUMENT

I. Class actions of the kind at issue here play a vital role in the enforcement of Title VII.

The "central statutory purposes" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17, are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). Private class actions play a vital role in achieving these purposes. In the instant case, Plaintiffs seek only a fair opportunity to vindicate their rights through the proper enforcement of Title VII. Class treatment is necessary for this goal to be achieved.

A. Civil rights cases are paradigmatic cases for Rule 23(b)(2) certification.

The case at bar, aimed at redressing systemic discrimination, fits comfortably within the Rule 23(b)(2) civil rights class action paradigm. The Advisory Committee's Note to Rule 23 recognizes that civil rights class actions seeking injunctive and other relief to end invidious discrimination are paradigmatic cases for (b)(2) certification. Fed. R. Civ. P. 23 advisory committee's note, *reprinted in* 39 F.R.D. 69, 102 (1966) [hereinafter Advisory

Committee Note]. The Note cites eight class action lawsuits as illustrative of the principal category of cases intended to be certified under this subsection, each of which was brought on behalf of a class of African Americans and other minorities to eradicate intentional race discrimination.[2] *See id*. Both before and after the 1966 Amendments, this Court has recognized the particular suitability of anti-discrimination suits for class action treatment. *See, e.g.*, *Amchem Prods., Inc., v. Winsdor*, 521 U.S. 591, 614 (1997) (recognizing that civil rights cases alleging class-based discrimination are "prime examples" of appropriate (b)(2) cases); *E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) ("We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."); *Rogers v. Paul*, 382 U.S. 198, 199 (1965).

Courts have also frequently invoked the Advisory Committee's Note in holding that this subsection is suitable for class certification of Title VII cases specifically. *See, e.g., Kyriazi v. W. Elec. Co*., 647 F.2d 388, 393 (3d Cir. 1981) (explaining that a Title VII class action seeking relief for systemic discrimination is "the paradigm of a Rule 23(b)(2) class action"); *Wetzel v. Liberty Mut. Ins. Co*., 508

---

[2] Wal-Mart's contention that the Rule's citation to desegregation cases alone indicates that employment discrimination cases are disfavored for class treatment is unpersuasive. Pet. Br. 48. As Plaintiffs properly point out, the Advisory Committee's Note to Rule 23 was drafted prior to the passage of Title VII, meaning no case law existed from which to cite. Resp. Br. 51-52. As we explain above, the assertion is also contrary to experience.

F.2d 239, 250 (3d Cir. 1975) ("[A] Title VII action is particularly fit for (b)(2) treatment, and the drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion policies would be appropriately maintained under (b)(2)."); *see also* 8 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §24:81, at 315 (4th ed. 2002) ("The aptness of designating employment discrimination suits as class actions under Rule 23(b)(2) has been recognized repeatedly and definitively by courts."). Indeed, Title VII and Rule 23(b)(2) work in tandem: "[The two] should be construed so as to further the strong public policy of eradicating all vestiges of racial discrimination in employment." *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983).

In bringing suit under Title VII, "the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). This principle applies *a fortiori* when private plaintiffs pursue class actions to challenge broadly applicable policies and practices of discrimination and seek classwide relief. *See, e.g.*, Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. Pa. L. Rev. 2179, 2184 (1989) (describing the "special dependence of civil rights (and other public rights) litigation on the device of the class action"). Accordingly, class actions have led to many of the key employment discrimination precedents that invigorated enforcement of Title VII. *See, e.g.*, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson v. Fort Worth Bank & Trust,*

487 U.S. 977 (1988); *Albemarle Paper Co.*, 422 U.S. 405; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *see also* Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 Vand. L. Rev. 905, 932-47 (1978).

Congress too has continuously recognized the importance of class actions to the enforcement of Title VII.[3] For example, in 1972, when Title VII was amended by the Equal Employment Opportunity Act, proposals to abolish class actions or to restrict their scope in Title VII cases were rejected. As the Senate Report stated: "This section [706] is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII." S. Rep. No. 92-415, at 27 (1971), *reprinted in* Subcomm. on Labor of the S. Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Opportunity Act of 1972*, at 436 (1972) [hereinafter *Legislative History*].

---

[3] Title VII remedies and procedures have also been explicitly incorporated into other major federal civil rights statutes, giving the availability of Title VII class action remedies even broader significance. *See, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. §12117(a) (incorporating Title VII remedies into the Americans with Disabilities Act of 1990, which provides nondiscrimination protection to individuals with disabilities).

B. Plaintiffs' claims must proceed as a class action to allow proper judicial evaluation of, and, if appropriate, remedies for the broad-scale discrimination they allege.

Plaintiffs have alleged in great detail a broad pattern of discrimination that begins in Wal-Mart's Home Office and affects female employees in stores throughout its network. Appropriately, therefore, Plaintiffs put forth two well-established legal theories that are uniquely suited to addressing this type of broad-scale discrimination. Limiting the availability of the class action vehicle will inevitably constrain courts' ability to properly resolve allegations of the pervasive type of discrimination at issue here. Class treatment is essential in this instance to give thousands of female employees a fair opportunity for vindication of their substantive rights under Title VII.

1. The pattern-or-practice discrimination claim alleged by Plaintiffs requires class treatment for proper resolution.

Plaintiffs here allege disparate treatment on a systemic basis. For decades, this pattern-or-practice framework[4]—first established by this Court in

---

[4] Title VII explicitly empowers the Attorney General to bring a civil action whenever he or she "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice" of discrimination. 42 U.S.C. § 2000e-6. Although Title VII endows only the government with such technical "pattern-or-practice" authority, it is commonplace for courts and parties to refer to disparate treatment suits brought on a classwide basis as "pattern-or-practice" cases. *See, e.g.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876

Franks v. Bowman, 424 U.S. 747 (1976), and further developed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977)—has been recognized by courts as an essential tool in combating pervasive workplace discrimination and providing "make whole relief" to large groups of victims.[5] *See Teamsters*, 431 U.S. at 336 n.16 (observing the necessity of pattern-or-practice litigation to address discrimination that is "repeated, routine or of a generalized nature"); *see also Shell Oil Co.*, 466 U.S. at 69 (noting that the pattern-or-practice model is "essential if the purposes of Title

---

(1984); *Bell v. EPA*, 232 F.3d 546, 553 (7th Cir. 2000); Barbara T. Lindemann & Paul Grossman, 1 *Employment Discrimination Law* 104 (4th ed. 2007) [hereinafter Lindemann & Grossman].

[5] Congress too has recognized the particular problem of systemwide discrimination, and the difficulty of attacking it. As the House Committee reported, in considering the 1971 amendments to Title VII: "Pattern or practice discrimination is a pervasive and deeply imbedded form of discrimination. Specific acts or incidents of discrimination . . . are frequently symptomatic of a pattern or practice which Title VII seeks to eradicate." H.R. Rep. No. 92-238, at 14 (1971), *reprinted in Legislative History*, at 74. So important was this theory of liability that Congress granted the EEOC authority to prosecute such cases because "[u]nrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combating employment discrimination." *Id.*; *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) ("Congress was aware that employment discrimination was a 'complex and pervasive' problem that could be extirpated only with thoroughgoing remedies." (citation omitted)). But as the Supreme Court subsequently observed, Congress still considered the private litigant "a 'private attorney general,' whose role in enforcing the ban on discrimination is parallel to that of the Commission itself." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) (citation omitted).

VII [are] to be achieved"). It continues to be necessary for those purposes, particularly where, as here, the alleged discriminatory practices are ongoing and pervasive. *See, e.g., United States v. City of New York*, 683 F. Supp. 2d 225, 232-33 (E.D.N.Y. 2010) (finding a pattern-or-practice of discrimination in the New York City fire department).

Moreover, this Court has endorsed the use of the pattern-or-practice framework to address hiring and promotion processes based on excessively subjective criteria. *See Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 159 n.15 (1982); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301, 303 (1977). Classwide evaluation of such decisionmaking processes makes sense where, as here, an employer is structured and administered in such a fashion that the challenged employment practices are likely to have an impact throughout the class. *See Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 331-33 (4th Cir. 1983) (upholding (b)(2) certification of challenge to excessively subjective decisionmaking process); *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) (same). The class action device allows for consideration of overly subjective decisions in the aggregate, which may reveal a pattern of discrimination. *See* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 788 (2005).

In any pattern-or-practice class action, the plaintiff bears the initial burden at the liability phase of demonstrating "that unlawful discrimination has been the regular procedure or policy followed by an employer or group of

employers." *Teamsters*, 431 U.S. at 360. If the plaintiff meets this high burden, it establishes a presumption that "any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy," thus shifting the burden of persuasion to the defendant employer. *Id.* at 362. This is as it should be: "No reason appears . . . why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue."[6] *Franks*, 424 U.S. at 772 n.32.

Teamsters makes clear that because pattern-or-practice cases involve a distinct type of discrimination, the inquiry is correspondingly distinct from that in an individual case. *Teamsters*, 431 U.S. at 357. A court's chief role in a pattern-or-practice case is to determine whether discrimination is the employer's standard operating procedure, rather than to parse the motives behind individual employment decisions. *Id.* at 360 & n.46. In contrast, in an individual case, even if patterns of discrimination are shown to exist, the individual plaintiff must also prove that a particular adverse employment decision was motivated by

[6] The *Teamsters* framework is well-established law that has been endorsed and utilized by federal courts for decades. *See, e.g.*, *Bazemore v. Friday*, 478 U.S. 385, 398 (1986); *Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005); *Hall v. Alabama Ass'n of Sch. Bds.*, 326 F.3d 1157, 1171 (11th Cir. 2003); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 158 (2d. Cir. 2001); *EEOC v. United Ass'n of Journeymen*, 235 F.3d 244, 251 (6th Cir. 2000); *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir. 2000).

discriminatory intent.[7] *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). This individual method of proof is appropriate for evaluating isolated instances of bias, but is ill-suited to uncover a pattern of discrimination. The pattern-or-practice framework not only allows, but requires courts to step back and assess the universe of an employer's actions as a whole; only through this broader lens can widespread discrimination be uncovered and evaluated.

The pattern-or-practice framework is strongly tied to the class action vehicle. This Court first elucidated this important framework in the context of a (b)(2) class action, *Franks*, 424 U.S. at 747, and today, the prosecution of such claims often depends on certification of a class. Although this Court has never held that individual plaintiffs cannot utilize the *Teamsters* framework, several circuit courts have indeed so concluded. *See, e.g.*, *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 968-69 (11th Cir. 2008); *Bacon v. Honda of Am. Mfg., Inc.,* 370 F.3d 565, 575 (6th Cir. 2004); *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 & n.4 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

---

[7] "In a time when overt acts of employment discrimination are relatively rare—when discrimination takes more subtle if no less invidious forms—such a showing is extremely difficult to make." Note, *Certifying Class and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 628 (1986) [hereinafter Note].

Even evidence indicating a pattern of discrimination has been considered by some courts to be inadmissible, or of limited relevance, in a case brought by an individual plaintiff. *See, e.g., Carman v. McDonnell Douglas Corp.,* 114 F.3d 790, 792 (8th Cir. 1997). In particular, statistical evidence demonstrating an employer's discriminatory conduct toward a class of employees is considered "rarely determinative" and sometimes irrelevant when the suit is not a class action. *See* 1 Lindemann & Grossman 79; *see also Adreani v. First Colonial Bankshares Corp.,* 154 F.3d 389, 400 (7th Cir. 1998); *Robinson*, 267 F.3d at 158 n.5. By contrast, pattern-or-practice theory allows courts to take legal cognizance of the fact that statistical disparities are often indicative of institutional, pervasive, and sometimes relatively covert discrimination.[8] *See Hazelwood*, 433 U.S. at 307-08 (1977) (observing

[8] This is not to say that statistical disparities alone require the conclusion that an employer is using a discriminatory policy. Courts have rejected that view and *amici* do not press it here. *See, e.g.*, *Lopez v. Metro. Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir. 1991), *overruled on other grounds by*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Am. Fed'n of State, Cnty., & Mun. Employees v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985). Certainly, statistical disparities may exist for benign or legitimate reasons. And both the pattern-or-practice and the disparate impact evidentiary frameworks allow employers the opportunity to explain any such disproportionalities. 42 U.S.C. §2000e-2(k)(1)(A)(i) (employer has the opportunity to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"); *Hazelwood*, 433 U.S. at 308-09 (employer may challenge statistical proof offered or suggest other explanation for the apparent statistical anomaly).

that "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination"); *Teamsters*, 431 U.S. at 340 (noting that statistical evidence is often "the only available avenue of proof . . . to uncover clandestine and covert discrimination by the employer").

Plaintiffs here have demonstrated that women throughout Wal-Mart's stores were paid significantly less than men, J.A. 518a-519a, and that "a statistically significant shortfall of women [were] being promoted into each of the in-store management classifications over the entire class period," App. 212a. Only if Plaintiffs here can proceed on a classwide basis, allowing a challenge to Wal-Mart's entire system of pay and promotion, is the larger picture likely to be considered legally relevant.

Wal-Mart would eliminate this well-established method of proof, requiring instead that systemic discrimination cases be litigated for both liability and remedies on an individual-by-individual basis. Plaintiffs would be required to prove that "the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory." Pet Br. 40 (emphasis in original). This is contrary to the very essence of a pattern-or-practice claim in which the relevant question at the liability stage is whether discrimination was the employer's "standard operating procedure," *Teamsters*, 431 U.S. at 336, and "individually applicable evidence *cannot* serve as a justification for the denial of relief to the entire class." *Franks*, 424 U.S. at 772 (emphasis added);

see also Cooper, 467 U.S. at 876 (observing that in "a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking") (quoting *Teamsters*, 431 U.S. at 360 n.46). If Wal-Mart's argument is accepted, no disparate treatment class action where plaintiffs' individual claims for relief differed, even minimally, in merit or value could ever be certified, and the entire concept of the pattern-or-practice claim would be upended. Wal-Mart's position, advocating for heightened standards for certifying these claims as a class, would undermine the role of pattern-or-practice suits in the private enforcement of Title VII, as well as other laws—federal, state, and municipal—that follow Title VII precedent.

2. Wal-Mart's arguments threaten to undermine the viability of disparate impact claims in addressing systemic workplace discrimination.

Plaintiffs also allege that Wal-Mart's excessively subjective decisionmaking practices cause a disparate impact on female employees. More than twenty years ago, this Court removed any doubt that Title VII reaches this kind of practice under disparate impact theory. *Watson*, 487 U.S. at 990-91.

Disparate impact theory goes to the purpose of Title VII itself, which "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[9] *Griggs*, 401

[9] Title VII's disparate impact provisions prohibit employment practices that operate to discriminate on a prohibited basis even where such practices are not motivated

U.S. at 431. Disparate impact suits—which challenge facially-neutral policies that disproportionately disadvantage members of a protected group—"by their very nature implicate class-based claims." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998); *accord United States v. Chicago*, 549 F.2d 415, 427 (7th Cir. 1977). Indeed, the disparate impact theory of liability—first articulated by this Court, and later codified by Congress—relies exclusively on class-based inquiries. *Griggs*, 401 U.S. at 426; 42 U.S.C. 2000e-2(k). The initial showing, for example, requires statistical evidence demonstrating the disproportionate effect of an employment practice on members of a protected group as a whole. Thus *all* members of the protected group are implicated, and *no* individualized facts or decisions are considered. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Griggs*, 401 U.S. at 426. After the plaintiff meets that initial burden, the employer must show proof of business necessity. 42 U.S.C. §2000e-2(k)(1)(A)(i). Should the employer make that showing, the plaintiff may demonstrate that the employer could have used a less discriminatory alternative. *Id.* at §2000e-2(k)(1)(A)(ii). Both these

---

by discriminatory intent. *See* 42 U.S.C. 2000e-2(k); *Griggs*, 401 U.S. at 426 n.1, 433-36. Because Congress intended for Title VII to reach the *consequences* of employment practices, rather than just the motivations underlying them, the "absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as built-in headwinds" for protected groups. *Id.* at 432 (internal quotation marks omitted).

inquiries also go generally to the employer's conduct and its effect classwide.

Unsurprisingly then, use of the (b)(2) class action to bring disparate impact claims has been essential to efforts at combating widespread, institutional discrimination. *See, e.g.*, *Lewis v. City of Chicago*, 127 S. Ct. 2191 (2010); *Griggs*, 401 U.S. 426; *see also Bacon*, 370 F.3d at 576 (noting that disparate impact analysis usually arises in the class action context). Such litigation continues to be essential to the eradication of employment discrimination, particularly as obstacles to fair workplaces are often covert and thus harder to identify and resolve through disparate treatment theory. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) ("It can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market." (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)) (internal quotation marks and brackets omitted)); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2696 (2009) (Ginsburg J., dissenting) ("More subtle—and sometimes unconscious—forms of discrimination replaced once undisguised restrictions.").

Restricting the reach of 23(b)(2) class actions—by, *inter alia*, limiting their certification to instances where monetary relief is not requested—contravenes the structure and purpose of disparate impact theory, as first conceived by this Court. An individual plaintiff is not the most logical vehicle for dismantling class-based "built-in headwinds"—the goal of a disparate impact claim. When an individual brings suit under this theory, the court's focus changes from the overall impact of the practice

to the individual employment decision: The plaintiff must show not only that the employment practice in question negatively impacted a protected class as a whole, but that "the allegedly discriminatory practice directly resulted in harm to him or her."[10] *See* 1 Lindemann & Grossman 111 n.8; *accord Coe v. Yellow Freight System, Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) ("Where the disparate impact doctrine has been used by the courts in individual actions rather than class actions, a plaintiff has been required to show that he personally has been the victim of discrimination by the general practice . . . ."); *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661, 668 (7th Cir. 1996). Accordingly, courts frequently dismiss individual disparate impact cases at the liability stage despite evidence of a classwide adverse impact.[11] *See, e.g.*, *Bacon*, 370 F.3d at 577 ("Whatever the validity of [plaintiffs] disparate impact claims . . . we agree with the district court that the plaintiffs cannot show that the policies injured them personally, and therefore their claim must fail."); *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F.2d 276, 279 (11th Cir. 1989) (holding that even if the plaintiff's proof showed disparate impact,

---

[10] This inquiry is separate and apart from the "same decision" affirmative defense, which applies at the remedy phase to prohibit courts from awarding individual remedies, such as reinstatement or back pay, to plaintiffs who were subject to an adverse employment decision for reasons other than discrimination. 42 U.S.C. §2000e-(5)(g)(2)(B).

[11] Individual disparate impact cases may actually require *more* intrusion on an employer's prerogatives than a class-based suit, where specific decisions need not be scrutinized at the liability stage. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 1002 (1982).

that impact did not relate to this particular plaintiff who was terminated for a legitimate reason); *Coe*, 646 F.2d at 451. "In both adverse-impact and disparate-treatment cases, then, the difference between the success and the failure of a *valid* claim is often the difference between a class action and an individual suit." Note, 99 Harv. L. Rev. at 628 (emphasis added).

3. Classwide treatment of both the disparate impact and the pattern-or-practice claims alleged here is necessary for Plaintiffs to obtain a just outcome.

Both the pattern-or-practice and the disparate impact causes of action play vital roles in the enforcement of Title VII. Each type of class action is well-suited to combat institutional and ingrained discrimination in the modern workplace. Increasingly, the most serious instances of alleged employment discrimination involve large corporate entities whose reach extends across multiple states and regions.[12] Although large corporations

[12] *See, e.g.*, *Davis v. Eastman Kodak Co.*, Nos. 6:04-cv-6098, 6:07-cv-6512 (W.D.N.Y. Sept. 3, 2010) (approving class settlement on behalf of over 3,000 current and former African-American employees); *Satchell v. FedEx Corp.*, Nos. 3:03-cv-2659, 3:03-cv-2878 (N.D. Cal. Aug. 14, 2007) (approving class settlement on behalf of 20,000 African-American and Latino employees); *Gonzalez v. Abercrombie & Fitch Stores, Inc.*, Nos. 3:04-cv-2817, 3:04-cv-4730, 3:04-cv-4731 (N.D. Cal. Apr. 15, 2005) (approving consent decree settling claims of systemic discrimination against Latino, African-American, Asian-American, and female applicants and employees); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001) (approving class settlement on behalf of 2,200 current and former African-American employees); *Butler v. Home Depot, Inc.*, No. 3:94-cv-

frequently function through the operation of semi-independent branches, corporate uniformity can be imposed through the maintenance of a company-wide corporate culture and standardized workplace policies and practices. Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn From Hewlett-Packard's Pretexting Scandal?*, 77 U. Cin. L. Rev. 523, 549 (2008) (noting that some commentators urge the adoption of "mechanisms" that would encourage the creation and maintenance of a single "corporate culture across the firm"); Nancy Levitt, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367, 417 (2008) (observing that "CEOs have enormous influence" in producing and changing corporate cultures). Therefore, the core purposes of Title VII can be realized only if discriminatory company-wide policies and practices are challenged at their source. *See id*. at 417-29. Class-based claims offer significant advantages in achieving this goal.

First, class-based discrimination claims allow for the formulation of broader remedies that have a realistic chance of reforming workplace practices. In the Title VII context, a (b)(2) class provides the vehicle for a generally applicable and efficient classwide remedy, resulting in cessation of the discriminatory practice and, where appropriate, additional equitable remedies for class members. This is particularly true in cases where the harm is

---

4335 (N.D. Cal. Jan. 14, 1998) (approving consent decree on behalf of 17,000 current and former female employees and 200,000 unsuccessful applicants).

extraordinarily widespread and ingrained. In this case, Plaintiffs have introduced into evidence statistics showing that Wal-Mart's female employees are paid less than male employees in virtually *every* job category in *every* one of Wal-Mart's regions, despite the fact that female employees on average have greater seniority and higher performance scores. J.A. 518a-519a. Moreover, it is a matter of record that Wal-Mart's own Executive Vice President for People regularly reported that it lagged "significantly behind" its competitors in the advancement of women in management. J.A. 408a. If proven, these systemic harms will require a comprehensive and universal solution.

Absent class certification, courts often refrain from granting relief that extends beyond the harms suffered by the individual plaintiffs. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). In this case, where Plaintiffs have claimed pervasive and systematic gender discrimination by the nation's largest private employer, relief granted to an individual plaintiff, or even a small group of plaintiffs, would be inadequate. Class treatment empowers courts to craft relief appropriate to the extent of the identified problem. *See Albemarle Paper Co.*, 422 U.S. at 418 (1975).

The difficulty of obtaining meaningful relief as an individual is real. For example, in *Lowery v. Circuit*

City Stores, a unanimous jury found that Circuit City had engaged in a pattern or practice of racial discrimination, and the district court ordered broad injunctive relief, including the creation of new procedures to ensure nondiscriminatory promotion. 158 F.3d at 755-56. On appeal, the Fourth Circuit held that because the trial court had declined to certify a class, the *Teamsters* framework was inapplicable. The court promoted one of the named plaintiffs, but vacated all other equitable relief, including an injunction requiring the employer merely to promote employees "without regard to their race." *Id.* at 766-67. Here, the lack of class certification forced the court to disregard a finding of pervasive discrimination, thwarting the plaintiffs' effort to fully vindicate the purposes of Title VII.

Unlike most individual suits, the "impact of class suits in civil rights cases is substantial." Hon. Jack B. Weinstein et al., *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973). "Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits the judge to get to the heart of an institutional problem." *Id.* Because it broadens "the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform." Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678 (2003). This fits with the nature of employment discrimination in practice, which "is a far more complex and pervasive phenomenon" than

just "a series of isolated and distinguishable events." H.R. Rep. No. 92-238, at 8 (1971), *reprinted in Legislative History* at 68.

Second, class proceedings allow victims to obtain and present the evidence necessary to prove broad-based discrimination, either intentional patterns and practices or disparate impact. When the issue is one individual's job treatment rather than the treatment of a larger class, courts may not permit the extensive discovery and proof needed to understand how an employment system operates. Even if statistical evidence were equally probative in individual cases, the practical realities of modern litigation mean that such evidence is available only in class proceedings. An individual "is unlikely to have or make available the up-front costs needed to prosecute" a complex lawsuit requiring experts, sophisticated statistical analyses, and extensive discovery. *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006). Extensive discovery is essential to the prosecution of almost any employment discrimination claim, because evidence of an employer's practices regarding such matters as hiring, assignment, promotion, workplace conditions, and termination lies almost completely within the employer's control. *See, e.g.*, 29 C.F.R. § 1607.4.A (requiring employers subject to Title VII to maintain certain employment records). But discovery of this evidence – especially in cases involving large employers – is prohibitively expensive in individual actions, and thus the ability to spread the costs over a class is essential to obtaining redress. *See, e.g.*, *Duke v. Univ. of Texas at El Paso*, 729 F.2d 994, 996-97 (5th Cir. 1984) (reversing judgment against discrimination plaintiff

in order to permit broad discovery in support of a class certification motion, and observing that "[h]ad Duke's class claims prevailed, she would have faced a distinctively less onerous burden at the trial of her individual claim"). Class actions allow for burden sharing in order to level the playing field against sophisticated and well-resourced corporate entities. These limitations on obtaining evidence make individual cases relatively poor vehicles for rooting out institutional discrimination.

II. Wal-Mart's attempt to bar monetary relief from 23(b)(2) classes would severely hamper the effectiveness of such actions and is unsupported by legislative intent or legal precedent.

Wal-Mart's opening brief argues that Rule 23(b)(2) "does not authorize certification of any monetary claims." Pet. Br. 44. Wal-Mart also argues that punitive damages are categorically unavailable in a (b)(2) action. *See id.* at 55. Wal-Mart's proposed standard for class certification of Title VII claims that include monetary relief is unsupported by existing case law, inconsistent with congressional intent, and a harmful interpretation of Rule 23.

Wal-Mart's proposal that victims of discrimination must waive their entitlement to all but injunctive relief in order to proceed as a class would vitiate Title VII's purposes of making victims whole and eradicating discrimination. "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of

dubious legality."[13] *Albemarle*, 422 U.S. at 417. Any reading of Rule 23(b)(2) that prohibits economic remedies when victims of discrimination seek to litigate as a class denies them a remedy that is equal to their injury: "Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. . . . And where a legal injury is of an economic character, . . . 'the compensation shall be equal to the injury.'" *Id.* at 418 (quoting *Wicker v. Hoppock*, 73 U.S. 94, 99 (1867)).

Forcing plaintiffs to forgo their entitlement to full Title VII remedies in order to litigate as a class would contravene the principle that relief in Title VII cases should not frustrate the purposes of the statute.[14] *See id.* at 421.

---

[13] This theme has been consistent throughout the history of Title VII. For example, the legislative history of the Civil Rights Act of 1991, amending Title VII to, *inter alia*, include the possibility of punitive damages for victims of intentional discrimination, makes clear that Congress sought to expand, not curtail, remedial relief to such victims in order to better achieve the original purposes of the statute. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (codified at 42 U.S.C. § 1981a); *see also Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) ("In the Civil Rights Act of 1991, Congress determined that victims of employment discrimination were entitled to *additional* remedies . . . without giving any indication that it wished to curtail previously available remedies.") (emphasis in original).

[14] Significantly, Wal-Mart is not engaging the Court in an inquiry as to *which* subsection of Rule 23 is best suited for certification of this action. Wal-Mart argues that Plaintiffs' claims cannot be certified under (b)(2) *or* (b)(3). Pet. Br. 43.

A. Back pay remedies are central to full equitable relief and consistent with Rule 23(b)(2) certification.

Congress enacted Title VII as part of the Civil Rights Act of 1964 to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs*, 401 U.S. at 424. A central objective of the statute is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle*, 422 U.S. at 418.

These objectives are achieved in part through the Title VII remedial scheme, which critically includes back pay. 42 U.S.C. § 2000e-5(g). This Court has explained that back pay has an "obvious connection" to Title VII's central purposes, and is a necessary catalyst for employers to "endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albermarle*, 422 U.S. at 417-18 (internal quotation mark omitted). For this reason, this Court has made clear that back pay is presumptively available to victims of discrimination under Title VII: "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[15] *Id.* at 421.

---

[15] "[C]ourts have cited few circumstances that justify denying back pay other than the plaintiff's failure to mitigate damages." 2 Lindemann & Grossman 2757 & n.27; *see also*

Accordingly, federal courts have–for decades–held that back pay relief is available in (b)(2) class actions, and that the award of this monetary remedy is consistent with the requirement that declaratory and injunctive relief predominate. *See, e.g.*, *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 754 (9th Cir. 2010); *Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 488 (4th Cir. 1981); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1331-34 (9th Cir. 1977); *accord Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976); *Wetzel*, 508 F.2d at 250-53; *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 378-80 (8th Cir. 1973); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-21 (7th Cir. 1969).

Indeed, as the Ninth Circuit en banc correctly noted, every circuit to have addressed the issue has held that Rule 23(b)(2) allows for claims of monetary relief, and that a "request for back pay in a Title VII case is fully compatible with the certification of a 23(b)(2) class." App. 91a.

B. The issue of punitive damages in (b)(2) classes should not be considered by this Court.

This Court need not resolve whether punitive damages may be certified under Rule 23(b)(2). The Ninth Circuit en banc vacated and remanded the punitive damages claim for the district court to decide in the first instance whether punitive

---

Pegues v. Miss. State Employment Serv., 899 F.2d 1449, 1457 (5th Cir. 1990) ("[O]nce a plaintiff establishes a violation of the statute, 'the instances wherein [a backpay] award is not granted are exceedingly rare.'" (quoting *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1136 (5th Cir. 1988))).

damages predominate over injunctive relief. Thus, the issue is not properly before this Court.

Wal-Mart attempts to manufacture a circuit split because the Ninth Circuit, in vacating the punitive damages certification, did not foreclose the possibility of certification entirely and instead ordered the district court to inquire into the particular facts of this case. Pet Br. 55 (asserting that in "not foreclosing [the possibility of certification of punitive damages under (b)(2)] the Ninth Circuit broke ranks with every other circuit"). But no such circuit split exists. Indeed, Wal-Mart's merits brief conspicuously fails to cite any case law supporting its contention that the Ninth Circuit's decision to remand because the district court had not conducted a predominance inquiry was inconsistent with other circuits. Indeed, the circuits that have declined to certify punitive damages in a (b)(2) class have recognized that this issue requires an approach tied to the individual circumstances of the case, consistent with the Ninth Circuit's decision to remand. *See Allison*, 151 F.3d at 417 (declining to certify a claim for punitive damages where the award would be dependent on compensatory damages, but explicitly allowing for the possibility that punitive damages might "be awarded on a class-wide basis, without individualized proof of injury" in an appropriate case); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (upholding district court's refusal to certify class after it found that too many individualized issues would be involved in the award of both compensatory and punitive damages in that particular case), *overruled on other grounds by*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006);

Lemon v. Int'l Union of Operating Eng'rs, 216 F.3d 577, 579 (7th Cir. 2000) (remanding for consideration of whether class for punitive damages could be certified under Rule 23(b)(2) if notice and opt-out rights were provided); *see also* Petition for Rehearing En Banc at 11-12, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (Nos. 04-16688 & 04-16720) (citing the previous three cases as representing the only other Courts of Appeals to consider this issue).

C. The fact that the class includes former employees is not an appropriate ground for denying certification under Rule 23(b)(2).

Wal-Mart argues that Plaintiffs' claims for monetary relief predominate because the "majority" of the class are former employees who lack standing to pursue injunctive relief. Pet. Br. 52. Besides failing to demonstrate that the underlying assertion is factually correct, Wal-Mart has cited no case law to support this argument, and has failed to explain how it is relevant to the modified "incidental damages" standard it proposes for determining whether monetary relief predominates.[16] *See* Pet. Br. 50-51

---

[16] Indeed, to the extent that Wal-Mart raises this, it seems to have adopted the Second Circuit's approach that the subjective intent of plaintiffs in bringing suit should be paramount. *See Robinson*, 267 F.3d at 164. This approach could logically allow for limited consideration of the proportion of the class who are former employees as an indication of the intent of the plaintiffs in seeking injunctive relief. *See id.* ("Insignificant or sham requests for injunctive relief should not

Wal-Mart cites no case law for its argument that the question of whether injunctive relief predominates can be definitively settled by calculating the proportion of the class that is former employees. Indeed, this proposition is contrary to the accepted understanding that "[a]n action or inaction is directed to a class within the meaning of [23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds, which have general application to the class." Advisory Committee Note, 39 F.R.D. at 102; *see also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate."). The appropriate question then is whether a defendants' actions are based on grounds generally applicable to the class, not whether a majority of class members will benefit from an injunction. Advisory Committee Note, 39 F.R.D. at 102.

To the extent that the number of class members who will benefit from injunctive relief is relevant to the inquiry of whether monetary relief predominates, it is only if that number is so trivial as to call into question the legitimacy of the request for injunctive relief. One appellate court has asserted that where the proportion of the class that could benefit from injunctive relief is "negligible" it may endanger (b)(2) certification because it would raise the question of whether "the class as a whole is deemed properly to be seeking injunctive relief." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th

---

provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery.").

Cir. 2004). On remand in that case, the district court found that certification was inappropriate where *fewer than 2%* of class members could possibly benefit from the requested injunctive relief. *In re Indus. Life Ins. Litig.*, No. 1371, slip op. at 4-5, 6, 9 (E.D. La. Jan 11, 2006); *see also Bolin v. Sears Roebuck & Co.,* 231 F.3d 970, 978 (5th Cir. 2000) (finding class certification was inappropriate where the "vast majority" of the class could not benefit from injunctive relief, and where the equitable relief "serve[d] only to facilitate the award of damages"). Wal-Mart has never alleged that the number of current employees in Plaintiffs' class is so insignificantly small as to be "negligible."[17] Moreover, the district court found as a matter of fact that Plaintiffs' claims for prospective relief "would achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decision nationwide that would benefit not only current class members, but all future female employees as well." App. 239a.

Wal-Mart's proposed rule is not only untethered to any legal basis, but it would create perverse incentives for employers and frustrate the objective of Title VII to eliminate discrimination. *Cf. Wetzel*, 508 F.2d at 247 (asserting that if a former employee could not serve as a class representative, "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit in the expectation that such employees would thereby be rendered incapable of bringing the suit as a class

[17] Indeed, Wal-Mart never raised this argument as to former employees in the district court at all.

action" (citing *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (8th Cir. 1973)); *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 637 (N.D. Cal. 2007) ("To hold that employees must continue to work in jobs where they face discrimination in order to challenge the discrimination would pervert Article III's injury-in-fact requirement."). In many cases, including the instant one, victims leave their employer because of the very discrimination challenged or as a result of retaliation for having objected to discriminatory treatment. J.A. at 1158, 1162, 1167, 1209, 1297, 1300. If a majority of victims had to remain with a discriminatory employer in order for a class to seek prospective relief, employers could manipulate their workforce in order to avoid class-wide liability. *Cf. Robinson v. Shell Oil Co*, 519 U.S. 337, 346 (1997). Wal-Mart's rule would create a constantly moving target for discrimination victims to hit in order to certify their class—a target that is entirely in the control of the defendant.

CONCLUSION

Wal-Mart proposes a version of class action law that would force plaintiffs to choose between class certification and full remedial relief.

That interpretation of the class action rule and law is at variance with Congress's intent and this Court's precedents. It would dramatically undermine Congress's stated goals of eliminating discrimination throughout the workplace and making victims of discrimination whole, and unnecessarily heighten barriers for class

certification. It should therefore be firmly rejected by this Court.

Amici respectfully request that this Court affirm the Ninth Circuit's decision affirming certification of the plaintiff class under Rule 23(b)(2).

Respectfully submitted,

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
Counsel of Record
KIMBERLY LIU
RYAN DOWNER
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200
dadegbile@naacpldf.org

March 1, 2011

ADDENDUM

The *NAACP Legal Defense & Educational Fund, Inc.*, is a non-profit corporation established to assist African Americans in securing their civil and constitutional rights through the prosecution of lawsuits that challenge racial discrimination. For six decades, LDF attorneys have represented parties in litigation before the Supreme Court and other federal courts on matters of race discrimination in general, and employment discrimination in particular, including *Lewis v. City of Chicago*, 127 S. Ct. 2191 (2010); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); LDF has focused its employment discrimination work particularly upon class actions because of their effectiveness in securing systemic change.

The *National Association for the Advancement of Colored People* (NAACP) is a non-profit corporation with membership throughout the nation. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and racial discrimination. For over a century, the NAACP has been at the forefront of ending unlawful employment discrimination. The NAACP relies on the use of class actions, inter alia, as an effective method of eliminating systemic workplace discrimination.

The *Leadership Conference on Civil and Human Rights* is a coalition charged by its diverse membership of more than 200 national organizations

to promote and protect the civil and human rights of all persons in the United States. It is the nation's premier civil and human rights coalition working to build an America that's as good as its ideals. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of the Civil Rights Acts of 1957, 1960, and 1964; the Voting Rights Act of 1965; the Fair Housing Act of 1968; and the Americans With Disabilities Act of 1990. Many of the member organizations of The Leadership Conference use the class action mechanism in their efforts to combat discrimination and advance civil and human rights.

AARP is a non-partisan, non-profit organization of people age 50 or older dedicated to addressing the needs and interests of older people. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's members are in the work force and are protected by Title VII of the Civil Rights Act of 1964, as well as other civil rights laws at the federal, state and municipal level in regard to which legislatures, courts, and enforcement agencies look to Title VII as a model. AARP attorneys also represent clients in cases concerning access to healthcare and long-term care, consumer protection and other matters of concern to older persons. In each of these areas, the

option of seeking systemic and/or broad-based relief through a class action may be and often is critical to vigorous and successful private enforcement of the rights and claims of older persons. AARP thus has a strong interest in the continued vitality of class actions as a means of serving the needs and interests of older persons, including older persons of limited means, older persons of color, older women and other vulnerable groups of older persons.

The *Disability Rights Education and Defense Fund, Inc.*, (DREDF) is a national nonprofit disability civil rights law and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary to vindicate their right to be free from discrimination. The federal Americans with Disabilities Act explicitly incorporates Title VII remedies to enforce its employment nondiscrimination protections, and thus DREDF and the disability community it represents have an interest in the Title VII issues presented by this case.

LatinoJustice PRLDEF is a national not for profit civil rights organization that has advocated for and defended the constitutional rights and the equal protection of all Latinos under law; sought to

promote the civic participation of the pan-Latino community; and to cultivate future Latina/o community leaders. Since our founding in 1972 as the Puerto Rican Legal Defense and Education Fund, we have brought precedent-setting impact litigation across the country on behalf of the Puerto Rican and the greater pan-Latino community in the areas of education, employment, fair housing, language rights, immigrants' rights, redistricting and voting rights. During its 39 year history, LATINOJUSTICE PRLDEF has litigated numerous cases of employment discrimination on behalf of Latina and Latino workers, and seeks to ensure that Latina/o workers continue to have unfettered access to the courts for full legal redress of workplace discrimination.

The *Asian American Justice Center* (AAJC) is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and to promote a fair and equitable society for all. A member of the Asian American Center for Advancing Justice, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of civil rights issues, including anti-discrimination. AAJC's longstanding interest in employment discrimination matters that impact Asian Americans and other underserved communities has resulted in the organization's participation in numerous *amicus curiae* briefs before the courts.

Founded in 1972, the *Asian Law Caucus* ("ALC") is the nation's oldest legal organization advancing the civil rights of Asian American and Pacific Islander communities. A member of the Asian

American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers and engages in broad community education and litigation on pressing civil and employment rights issues. ALC is committed to ending discrimination and unfair treatment of vulnerable workers.

The *Lawyers' Committee for Civil Rights Under Law* is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is dedicated, among other goals, to eradicating all forms of workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities and other disadvantaged populations. Since the passage of the Civil Rights Act of 1964, the Lawyers' Committee has relied on the class action mechanism and all available remedies as essential tools for combating unlawful discrimination in the workplace.