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 *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae*. The brief supports the Petitioner and urges reversal of the decision below.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively provide employment to roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*., as amended, and other federal employment-related laws and regulations. Collectively, EEAC's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all of their employment actions comport with Title VII and other applicable legal requirements.

Nevertheless, each employment transaction is a potential subject of a discrimination charge and/or lawsuit. As large employers, EEAC's members are particularly likely targets for the sort of broad-based class action at issue here. Consequently, EEAC has

an ongoing, substantial interest in the issue presented in this case regarding the proper application of Rule 23 of the Federal Rules of Civil Procedure to class actions brought under Title VII that seek substantial monetary damages, in addition to injunctive and declaratory relief.

In a sharply divided decision, the *en banc* court below ruled 6-5 to affirm certification under Rule 23(b)(2) of a class of at least half a million – and as many as 1.5 million – women currently or formerly employed by Petitioner in any one of its several thousand stores throughout the United States. Despite significant differences in each individual's particular circumstance, it determined that the district court did not commit reversible error in concluding that Respondents satisfied all of the requirements of Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure. The decision below raises serious issues likely to impact any large employer defending similar class actions. Accordingly, the issues presented to the Court are extremely important to the nationwide constituency that EEAC represents.

Since 1976, EEAC has participated in numerous cases in this Court raising substantial and procedural issues related to litigation of employment discrimination claims, including those involving questions of damages[2] and/or the proper interpretation of

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[2] *See, e.g., Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526

Rule 23.[3] Because of its experience in these matters, EEAC is well-situated to brief the Court on the concerns of the business community and the significance of this case to employers.

SUMMARY OF ARGUMENT

This Court has indicated that granting class certification status under Rule 23(b)(2) where monetary damages are sought raises constitutional and due process concerns, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), strongly suggesting that a "substantial possibility" exists that certification of such claims is never appropriate. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). The decision below, which found a massive action brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, on behalf of over one million current and former employees is maintainable under Rule 23 of the Federal Rules of Civil Procedure, magnifies those concerns and establishes a dangerous precedent for employment discrimination class actions. It is plainly inconsistent with the letter and spirit of both the Federal Rules and Title VII, and therefore should be reversed.

On its face, Rule 23(b)(2) permits class certification only where "the party opposing the class has acted or refused to act on grounds generally applicable 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). Although some courts of appeals have interpreted the advisory

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(1999); *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001).

[3] *See, e.g., East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977).

committee notes accompanying Rule 23 to permit class certification of claims for monetary damages so long as final relief does not relate "exclusively or predominately" to such damages, to the extent that such an interpretation finds no support in the text of Rule 23 itself, it should be rejected by this Court.

Respondents are seeking compensation for lost wages and punitive damages on behalf of the class of as many as 1.5 million women purportedly affected by Petitioner's alleged discriminatory employment practices. Even assuming claims for money damages are maintainable under Rule 23(b)(2) as long as they do not predominate over injunctive relief, that is not the case here. For many members of the class, particularly those who no longer work for Petitioner, the substantial back pay and punitive damages sought necessarily will be of far greater significance than any injunctive relief to which they may be entitled.

Nor is class certification proper under Rule 23(b)(3), which permits class certification only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Because Title VII requires particularized analysis of the facts and circumstances of each employment action, and of the degree of actual harm to each class member if liability is found, this case presents many individual questions of law and fact that plainly predominate over any issues common to the class as a whole. Furthermore, satisfying Rule 23(a)'s commonality and typicality requirements is virtually impossible in a proposed class of this size,

whose members worked in various positions for different supervisors across thousands of Petitioner's stores throughout the U.S.

Permitting Title VII suits seeking billions of dollars in damages to proceed as "super" class actions under Rule 23 significantly undermines Title VII's goal of prompt and speedy resolution of individual claims by encouraging aggregation as a means of pressuring corporate defendants to forgo their statutory right to put forth a defense to each claim, forced instead to settle for strategic reasons.

ARGUMENT

I. THE DECISION BELOW, WHICH AFFIRMED RULE 23 CLASS CERTIFICATION OF TITLE VII CLAIMS BROUGHT ON BEHALF OF OVER ONE MILLION WOMEN CHALLENGING INDIVIDUAL EMPLOYMENT DECISIONS MADE BY A MULTIPLICITY OF MANAGERS UNDER VARIOUS CIRCUMSTANCES, DEPARTS FROM WELL-ESTABLISHED LEGAL PRINCIPLES AND THEREFORE IS ERRONEOUS AND SHOULD BE REVERSED

A. Rule 23(b)(2) Class Certification Is Impermissible In Title VII Actions That Seek Monetary Damages, In Addition To Declaratory And Injunctive Relief

Because Respondents demand substantial monetary damages, which eclipse any ancillary injunctive relief they purport to seek, this action is unsuitable for class certification under Rule 23(b)(2). Therefore, the *en banc* majority's decision below affirming certi-

fication of the class is erroneous and should be reversed.

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*., as amended, prohibits employers from discriminating against individuals because of race, color, religion, sex or national origin. To maintain multiple claims as a class action, including those involving alleged Title VII violations, plaintiffs must satisfy all four prerequisites of Fed. R. Civ. P. 23(a), and the requirements of at least one subsection of Fed. R. Civ. P. 23(b). Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(b) criteria generally look at whether conducting the case as a class action would be fair and efficient. In particular, Rule 23(b)(2) provides:

> A class action may be maintained if Rule 23(a) is satisfied, and if:
>
> * * *
>
> the party opposing the class has acted or refused to act on grounds generally applicable 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) (emphasis added). Thus, the express language of Rule 23(b)(2) indicates that remedies other than those of an injunctive or declaratory nature are not suitable for class treatment.

The advisory committee notes accompanying Rule 23 provide that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages," Fed. R. Civ. P. 23 advisory committee's note (Note to Subdivision

(b)(2)). Some courts of appeals have read this statement as suggesting that claims for monetary relief may be certified under certain circumstances. To the extent that such an interpretation is inconsistent with the actual text of Rule 23(b)(2), which makes no mention of money damages at all, *amicus* urges this Court to find in this case that "*expressio unius est exclusio alterius*" – "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary 661 (9th ed. 2009).

If this Court determines that a claim for money damages does not automatically preclude Rule 23(b)(2) class certification, it should find, as several courts of appeals have concluded, that certification is available under Rule 23(b)(2) only where claims of monetary relief are merely incidental to the injunctive relief sought. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), *overruled on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894 (7th Cir. 1999). Even under that more permissive standard, Rule 23(b)(2) class certification nevertheless was improperly granted in this case, because monetary relief unquestionably dominates over any injunctive relief being sought.

1. Back pay, even if deemed to be equitable in nature, nevertheless is a form of monetary relief, the request for which weighs heavily against Rule 23(b)(2) class certification

Respondents are seeking compensation for lost wages on behalf of a class of as many as 1.5 million

women purportedly affected by Petitioner's alleged discriminatory employment practices. Even assuming each member could only recover $100 in back pay, total class recovery would exceed one hundred million dollars, an amount far from incidental to injunctive relief.

Although Respondents seem to suggest that back pay is a form of equitable relief under Title VII that should not be considered "monetary" for purposes of Rule 23(b)(2) class certification, whether or not back pay is a form of "equitable" as opposed to "legal" restitution is far from clear. Section 706 of Title VII provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1). Interpreting similar language contained in the Employee Retirement Income Security Act ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), this Court observed in *Great-West Life & Annuity Ins. Co. v. Knudson* that "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in

the defendant's possession."[4] 534 U.S. 204, 214 (2002) (footnote omitted). There it held that "respecting Congress's choice to limit the relief available under Section 502(a)(3) to 'equitable relief' requires us to recognize the difference between legal and equitable forms of restitution. Because petitioners seek only the former, their suit is not authorized by § 502(a)(3)." *Id.* at 218 (footnote omitted).

Of particular relevance here, the Court rejected the dissent's argument that "Congress has treated backpay, 'a type of restitution,' . . . as equitable for purposes to Title VII," *id.* at 218 n.4, noting that the cases cited for that proposition "do *not* say that *since* [back pay] is restitutionary, it is *therefore* equitable." *Id.* Indeed, it observed:

> Congress "treated backpay as equitable" in Title VII . . . only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief . . . If the referent of "other equitable relief" [in Title VII] were "back pay," it could be said, in a sense relevant here, that Congress "treated" backpay as equitable relief. In fact, however, the referent is "reinstatement or hiring of employees," which is modified by the phrase "with or without back pay."

Id.

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[4] ERISA Section 502(a)(3) permits plan participants, beneficiaries, or fiduciaries "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions" of the plan. 29 U.S.C. § 1132(a)(3).

2. The Civil Rights Act of 1991 expanded considerably the scope of monetary damages available to successful Title VII plaintiffs, thus rendering Rule 23(b)(2) class certification of such claims improper

Prior to 1991, the only statutory remedy available to Title VII litigants was back pay and injunctive and declaratory relief. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975). With the passage of the Civil Rights Act of 1991 ("CRA"), 42 U.S.C. § 1981a, however, Congress greatly expanded the remedies available under Title VII by permitting the award of compensatory and punitive damages in cases of intentional discrimination, in addition to statutory attorney's fees and costs. 42 U.S.C. § 1981a(a)(1).[5] While the CRA places a per-claim statutory cap of $300,000 on the amount of compensatory and punitive damages that may be recovered against any employer with 500 or more employees, the aggregation of such claims, especially in enormous classes such as this one, renders Rule 23(b)(2) class certification particularly inappropriate.

Respondents are seeking punitive damages on behalf of a class of over one million alleged victims of discrimination, which if class certification is allowed conceivably could result in a maximum award of over *three hundred billion* dollars in punitive damages

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[5] In addition, the 1991 amendments greatly increased the individualized nature of proof required for claims seeking monetary relief under Title VII. In particular, the CRA emphasized the need for individual remedies by limiting monetary awards to situations in which the discrimination *actually caused* an adverse employment action. 42 U.S.C. §§ 2000e-2(a), (m); 2000e-5(g)(2)(B).

alone. As they know they must under 23(b)(2), Respondents also assert an ancillary claim for injunctive relief. But since more than half of the class members are former employees, they do not stand to benefit from any programmatic or systemic changes that might be part of such an award.

There can be no doubt that the vast majority of the class members are more interested in the possibility of obtaining windfall monetary damages than they are in whether, and to what extent, Petitioner revises its employment policies. Given that so many members of the class do not stand to benefit from the injunctive relief being sought, coupled with the sheer enormity of the punitive damages award, there can be no question that monetary relief predominates, thus rendering class certification under 23(b)(2) improper.

In addition, the CRA made punitive damages available to Title VII plaintiffs only if they could prove that the defendant intentionally discriminated against them "with malice or with reckless indifference to the federally protected rights *of an aggrieved individual*." 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999). The individualized inquiry required to establish liability for punitive damages is fundamentally inconsistent with the very purpose and utility of class certification under 23(b)(2). "The underlying premise of the (b)(2) class – that its members suffer from a common injury properly addressed by class-wide relief – begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (internal quotations, cita-

tions and footnote omitted). For that reason, the Fifth Circuit in *Allison* concluded, "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." 151 F.3d at 415; *see also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898-99 (7th Cir. 1999). It explained, "[b]y incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Allison* at 415.

Respondents assert that "[b]ecause compensatory damages typically require individualized proof from class members, they present the greatest tension with the presumption of 'cohesiveness' underlying Rule 23(b)(2)." Brief in Opposition of Respondents, at 18 (citation omitted). Remarkably, they contend that "[t]his case does not present that issue, as plaintiffs have not sought compensatory damages." *Id*. (citation omitted). By forgoing a claim for compensatory damages in favor of punitive damages, Respondents appear to be hoping for "a blanket award based on a showing that [Petitioner's] conduct has caused some harm." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006) (citation omitted). The legal showing required for an award of punitive damages is much greater than that, however. As this Court observed in *Kolstad*:

> The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstration"

> of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability -- one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.

527 U.S. at 534.

Here, Respondents, on behalf of the class, have waived a claim for compensatory damages, the entitlement to which under *Kolstad* is a first step to determining entitlement to punitive damages. Accordingly, resolution of individual punitive damages will be that much more complex, further rendering class certification improper.

B. Respondents' Action Is Not Suitable For Class Certification Under Rule 23(b)(3)

Rule 23(b)(3) permits class certification only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and . . . a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The individualized nature of proof of, and defenses to, each class member's claim prevents common questions of law or fact from predominating in this case.

The Advisory Committee notes interpreting Rule 23 conclusively state that where the "likelihood that significant questions, not only of *damages* but of *liability* and *defenses to liability*, would be present, affecting the individuals in different ways," class action certification under Rule 23(b)(3) is "not appropriate." Advisory Comm. Notes 697, *reprinted in* 39 F.R.D. 69, 103 (1966) (emphasis added). Damage

claims under Title VII require the resolution of liability, defenses to liability, and damages all at the individual level, which prevents common issues from predominating in this case. Although many factors affect whether class treatment is superior, the court ultimately must "balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996), *aff'd sub nom.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Permitting certification of a Title VII class, particularly one of this size, in which each member individually is entitled to recover up to $300,000 in punitive damages, plus back pay and attorneys' fees, does not promote judicial efficiency since, as noted above, Title VII damage claims require analysis of the facts and circumstances of each employment action, and of the degree of actual harm to each class member if liability is found. Furthermore, it unfairly deprives defendant employers of their right to assert the defenses to liability available to them under Title VII. Since certification of Respondents' claims would neither be particularly efficient nor fair, they cannot satisfy the requirements of Rule 23(b)(3).

C. The Court Below Improperly Concluded That Respondents Satisfied The Class Certification Requirements Of Rule 23(a)

Rule 23(a) permits class certification only when:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are

> typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157 (1982) (footnote omitted).

Satisfying Rule 23(a)'s commonality and typicality requirements is virtually impossible in a proposed class of this size under Title VII; this is not a products liability action in which 1.5 million consumers used – and were injured by – the same defective machine in the same way. No two employees are alike in every respect, especially in terms of job performance, skill and ability, important factors in any selection or promotion decision that later may be challenged as discriminatory under Title VII. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006) ("the same general policy of discrimination can affect many different aspects of employment, such as hiring, firing, promoting, giving benefits, providing vacation time, or delegating work assignments").

Here, Respondents have offered the sworn declarations of a number of absent class members claiming to have been discriminated against through common practices. Yet each declarant tells a different story. Some state that they actually were supervised by women in managerial positions. J.A. 645a-649a. Others say that they served in supervisory roles, but quit because they felt their opportunities for advancement were limited. One declarant concedes that, after having been counseled repeatedly regarding properly recording her time, she was discharged for, essentially, falsifying time sheets. J.A. 623a-645a.

Patricia Bebee claims that although she eventually was promoted to a Departmental Manager position, she would have preferred managing a different department; as a result of this asserted denial of equal promotional opportunities, Bebee says she felt compelled to resign her employment. J.A. 632a-639a. Lisa Boudreaux admits that she was offered a department manager position, but declined because she did not wish to relocate, although she eventually accepted a transfer and promotion elsewhere in the company. J.A. 660a-664a. Vivian Calimee suffered a work-related injury in 2000 and, as of February 2002, was still unable to work. J.A. 679a-685a. Thearsa Collier asserts that she was mistreated because of race *and* gender, and that she was retaliated against for complaining. J.A. 686a-694a.

This handful of stories offered by Respondents hardly paints a picture of class commonality and typicality; to the contrary, the highlighted declarations serve only to reinforce the impropriety of the *en banc* majority's decision below, which held despite these differences that Rule 23 had been satisfied. The court below found no error in the district court's

conclusion that evidence of Petitioner's "subjective decision-making policies suggests a common legal or factual question regarding whether [Petitioner's] policies or practices are discriminatory," thus satisfying the commonality requirement.

The *en banc* majority also determined that even though individual workers "in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices – e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping" . . . , Pet. App. 80a, the district court did not commit reversible error in concluding the claims of the class members also were sufficiently typical to satisfy Rule 23(a).

"Where, as here, class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes." *Cooper v. Southern Co.*, 390 F.3d 695, 715 (11th Cir. 2004), *overruled on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). As Chief Judge Kozinski, dissenting from the decision below, observed:

> Maybe there'd be no difference between 500 employees and 500,000 employees if they all had similar jobs, worked at the same half-billion square foot store and were supervised by the same managers. But the half-million members of the majority's approved class held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope

> of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment. Some thrived while others did poorly. They have little in common but their sex and this lawsuit.

Pet. App. 161a. Because Respondents failed to demonstrate the existence of bona fide questions of law or fact that are common across this sprawling class as a whole, or that their claims are typical of the claims of all the absent class members, class certification was improper.

II. ALLOWING MASSIVE TITLE VII SUITS SEEKING MULTI-BILLION DOLLAR RELIEF TO PROCEED AS RULE 23 CLASS ACTIONS WOULD FRUSTRATE THE FUNDAMENTAL AIMS AND OBJECTIVES OF THE ACT

"[Title VII]'s 'primary objective' [with respect to employment discrimination] is 'a prophylactic one,' . . . aim[ing], chiefly, 'not to provide redress but to avoid harm.'" *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999) (citations omitted). It is designed specifically to encourage resolution of disputes through voluntary means of settlement, conciliation and persuasion in lieu of protracted court litigation. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (purpose of EEOC administrative charge investigation and resolution scheme is to allow agency "to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit"). Allowing substantial monetary damages claims to be pursued on a class-wide basis, particularly in a case as large as this, operates as a serious disincentive to quick and

informal workplace dispute resolution, and will only encourage aggregation of such claims as a means of forcing settlements.

Respondents argue that they should be permitted to proceed as a class so as to enable them to obtain broad injunctive relief. They contend, "[h]ere, class litigation may be the only means of obtaining the broad injunctive relief necessary to address the allegedly discriminatory policies challenged," Brief in Opp. of Resp., at 37 (citations omitted), and that "aggregation of claims will be particularly important because the back pay awards will, in most cases, be far too small to justify individual federal lawsuits, especially against a corporate giant like Wal-Mart." *Id.* However, as discussed above, the availability under Title VII of compensatory and punitive damages, as well as statutory attorney's fees and costs, belies that assertion. "Indeed, Title VII after the 1991 amendments appears designed specifically with individual plaintiffs in mind." *Reeb*, 435 F.3d at 651 (6th Cir. 2006).

Furthermore, the U.S. Equal Employment Opportunity Commission ("EEOC") independently may pursue injunctive and other relief on behalf of victims of discrimination, as well as in the broader public interest. Its authority under Title VII includes the right "to bring a civil action against any respondent . . . named in the charge." 42 U.S.C. § 2000e-5(f)(1). Thus, under Title VII, "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific

relief." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002).

Also noteworthy is the fact that since 1972, the EEOC has had the authority under Section 706 to institute Title VII pattern or practice suits in the federal courts without having to comply with the class certification requirements of Rule 23.

> Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit.

Gen. Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 324 (1980). Therefore, despite Respondents' contentions to the contrary, meaningful efforts to eliminate broad-based discrimination from American workplaces will not come to an end if their action is not permitted to proceed as a class.

It bears repeating that the increasingly exorbitant costs associated with defending a class action create enormous pressure on any corporate defendant to settle. The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called "judicial blackmail." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). The improper certification below of this class represents an abandonment of the traditional role of the courts to act as gatekeepers in eliminating frivolous claims at the certification stage, and ignores the reality that class certification

almost invariably leads to a settlement, even in cases of questionable merit.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the *en banc* court below be reversed and class certification denied.

Respectfully submitted,

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