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 INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS – cont'd

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Statutes

TABLE OF AUTHORITIES – cont'd

Page(s)

Other Authorities

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Intel Corporation is the world's largest semiconductor manufacturer and is also a leading manufacturer of computer, networking, and communications hardware and software products. Given its size, Intel frequently is named as a defendant in litigation in which plaintiffs seek class certification, including certification under Federal Rule of Civil Procedure 23(b)(2). At present, there are nearly 100 putative class actions pending against Intel. Indeed, for the past ten years Intel has continuously been named as a defendant in one or more putative class actions.

As a result, Intel has a significant interest in maintaining proper limitations on class-action procedures. Class certification can transform an ordinary lawsuit into "bet-the-company" litigation, even for a company of Intel's size. But companies can seldom afford to make such wagers—no matter how small the odds are of an adverse judgment—so class certification almost always coerces an immediate settlement. "Blackmail settlements," as Judge

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[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. Petitioner and respondents have filed blanket letters of consent to the participation of *amici curiae*.

Friendly aptly termed such results, damage Intel, impose costs on its customers, and ultimately harm its shareholders. Furthermore, as a company headquartered in California, Intel is especially vulnerable to lawsuits filed under the extraordinarily lax standards for class certification that the Ninth Circuit adopted by a 6-5 vote in the decision below. Intel is therefore well positioned to explain why the decision reached by the majority below is deeply flawed.

SUMMARY OF ARGUMENT

Rule 23 establishes limitations and procedural requirements designed to ensure that the class-action device does not alter the parties' underlying substantive rights. In the decision below, the court of appeals jettisoned those essential protections in an attempt to shoehorn 1.5 million plaintiffs from across the country into a single class claiming a "common" employment injury inflicted by literally thousands of different individual supervisors—despite the absence of any specific employment policy that tied the plaintiffs' claims together. While Intel takes no position on the merits of the underlying Title VII claims, the court of appeals' willingness to allow this agglomeration of claims to be combined into a single class action was manifestly erroneous.

I.A. Improper class certification imposes onerous and inappropriate settlement pressure on defendants. Even in the best of circumstances—*i.e.*, when a class actually meets all of Rule 23's requirements—certification dramatically raises the stakes of a lawsuit and coerces defendants to settle instead of

risking a potentially catastrophic outcome at trial. The possibility that a single error on liability would be multiplied thousands (or, as in this case, 1.5 million) times over is almost always too much for a rational decisionmaker to bear.

B. When a class is certified *without* meeting Rule 23's fundamental requirements for representational litigation—including Rule 23(a)'s threshold conditions and Rule 23(b)(3)'s specific requirements for actions seeking monetary relief—that already coercive settlement pressure is magnified even further. If the named plaintiffs' claims are not truly representative or important individualized inquiries are overlooked, a defendant cannot predict with confidence that any liability determination would truly correspond to the underlying merits of the class members' claims. Rather, it is overwhelmingly likely that named plaintiffs would be selected precisely because they presented the strongest possible claims, concealing the weakness of other class members' claims and vastly increasing the settlement pressure that class certification imposes.

II.A. The plain text of Rule 23(b)(2) does not provide for the certification of class actions seeking monetary relief. The rule's text clearly limits its application to classes seeking injunctive and declaratory relief, and this limitation was expressly intended. The contrary view adopted by the decision below gives rise to a permissive and incoherent standard for certification of (b)(2) classes.

B. To the extent that a class seeking monetary relief may be certified under Rule 23(b)(2) at all,

such certification must be limited to monetary relief that is truly incidental to injunctive or declaratory relief. The decision below does not properly limit the reach of certification under Rule 23(b)(2). In doing so, it improperly allows the certification of an action seeking billions of dollars in individualized monetary relief without the corresponding mandatory safeguards imposed by Rule 23(b)(3), which expressly addresses such claims.

ARGUMENT

Class certification has the potential to transform garden-variety lawsuits into a single action with millions of claimants and billions of dollars in claimed damages. For defendants, class certification expands the size of the potential judgment, magnifies the costs of the litigation, and actually increases the likelihood that defendants will, in fact, lose at trial. Those enhanced risks mean that defendants are likely to forgo trial altogether and settle even meritless cases. Because of class certification's dispositive effect in the vast majority of cases, courts must remain especially vigilant in applying Rule 23's requirements before certifying a proposed class.

The class here was improperly certified under Rule 23(b)(2), which authorizes certification of claims seeking only injunctive or declaratory relief. By allowing certification under (b)(2) of a class seeking billions of dollars in backpay, the court below permitted the plaintiffs to circumvent the enhanced procedural requirements that Rule 23(b)***(3)*** expressly imposes for class actions seeking monetary relief. At a minimum, if monetary relief can ever be

sought in a (b)(2) action, it must be no more than incidental to injunctive or declaratory relief—billions of dollars are not "incidental."

I. Improper Class Certification Puts Inappropriate Settlement Pressure On Defendants

Even a properly certified class action imposes significant—and potentially catastrophic—costs on defendants. Resting thousands or even millions of claims upon a single liability determination transforms ordinary lawsuits into true bet-the-company litigation. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). Even the smallest probability of losing at trial can be too much of a risk when the potential judgment is in the billions.

For that reason alone, class certification almost always leads defendants to settle. See, *e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized."). The uncertainty of trial and the

potentially disastrous consequences of a single adverse result create such pressure almost entirely without regard to the strength of the plaintiffs' case.

But the risk skyrockets—and the actual merits of the case become even less meaningful—when a class is *improperly* certified. Any increase in the size of a class action magnifies the prospect of a coerced settlement. In many instances, improper certification also allows a few named plaintiffs (typically selected for the relative strength of their claims) to "represent" the rest of the class, further increasing the likelihood that the defendants will lose at trial.

Accordingly, it is exceedingly important for class actions to remain within the limits that, with good reason, the framers of Rule 23 placed on representational litigation. If left undisturbed, the permissive example set by the Ninth Circuit will make it far easier for plaintiffs with weak cases to extract massive settlements from defendants.

A. The Prospect Of "Blackmail Settlements" Drives Companies To Settle Even The Weakest Cases

Class certification almost invariably leads to settlement. "[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount." Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008). That is principally because the size of such actions makes the risk of losing (however

remote) simply unbearable for most rational decisionmakers. For example, even a 1% possibility of losing hundreds of millions (or, as here, billions) of dollars in a single lawsuit is a wager that few can afford to make. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *Rhone-Poulenc,* 51 F.3d at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). Indeed, that possibility is one of the very reasons why Rule 23's drafters elected to permit interlocutory appeals from class certification decisions. Fed. R. Civ. P. 23(f), Advisory Committee's Notes to 1998 Amendments ("An order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

The ever-present possibility of error in assessing or determining liability exacerbates that pressure. Suppose, for example, that a defendant faces lawsuits by several thousand plaintiffs claiming a combined $5 billion in damages, but the defendant believes those claims are weak and worth no more than $10 million. If the plaintiffs' claims are litigated individually, errors in determining liability would tend to cancel each other out; the defendant would win some and lose some and eventually something approaching the expected aggregate liability would result. See *Thorogood* v. *Sears, Roebuck and Co.*, 624 F.3d 842, 849 (7th Cir. 2010). When the claims are aggregated into a class action, however, the defendant has just one "roll of the dice"

to decide the fate of thousands of claims. See *Rhone-Poulenc*, 51 F.3d at 1298. Despite the weakness of the claims, trial outcomes are never perfectly accurate and now the defendant stands to lose $5 billion *at once*. A single error would be so costly that the only rational strategy for defendants is often to settle.

The actual costs of litigating thousands of claims simultaneously also exert pressure on defendants to settle. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416-17 (2000) (discussing steep costs associated with litigating class action). Pretrial discovery, for example, is especially costly in class actions, and tends to cost defendants far more than plaintiffs. *Thorogood*, 624 F.3d at 850 ("[T]he pressure on [the defendant] to settle on terms advantageous to its opponent will mount up if class counsel's ambitious program of discovery is allowed to continue."). Defendants may settle to avoid facing such a massive outlay all at once.

The effort expended defending the suit can also impose staggering secondary and tertiary costs. For starters, defendants must divert resources away from productive activities, see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-41 (1975), and potentially forgo millions of dollars in missed opportunities, see Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 374 (2009). Likewise, a class action threatens to destroy a defendant's reputation completely out of proportion to the merits of the claims. See, *e.g.*, *Abdallah* v. *Coca-Cola*

Co., 186 F.R.D. 672, 676 (N.D. Ga. 1999) (describing negative publicity resulting from class action). A nationwide class action alleging widespread wrongdoing at a major company inevitably makes headlines that corporate decisionmakers are understandably eager to avoid. See Steven B. Hantler, Victor E. Schwartz & Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial By Media*, 13 COMMLAW CONSPECTUS 7, 10 (2004). Indeed, even the highly publicized *threat* of a "mega-verdict" can cause the defendants' stock price to plummet. See Hantler, *supra*, at 31-32 (describing how an HMO company's stock price fell by 30% when plaintiffs' lawyers met with Wall Street analysts about HMO class actions, citing David Segal, *HMOs Latest to Grapple with Threat of Investor-Scaring Mega-Verdicts*, WASH. POST, Nov. 12, 1999, at A1).

It is universally recognized that these pressures allow opportunistic plaintiffs (and their counsel) to extract undeserved settlements from defendants. "[E]mpirical studies * * * confirm what most class action lawyers know to be true: almost all class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002); see also THOMAS E. WILLGING, ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 60, 179 tbl. 40 (1996) (finding, in a study of four federal districts, that "the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%"). That is so almost entirely without

regard to the underlying merits of the suit. See *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); S. REP. NO. 109-14, at 20 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21 ("a class attorney * * * can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits"); Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 370-71 (1996) ("[C]lass certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous. * * * [T]enuous claims are hard to dispose of before trial; and jury trials are risky propositions * * *."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); see also Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999) ("[T]he specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases.").

"Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions." S. REP. NO. 109-14,

at 21. Regrettably, the prophecy that even a meritless class action will settle if certified tends to be self-fulfilling: Each "blackmail settlement" that is extracted from a deep-pocketed defendant encourages the filing of still more frivolous lawsuits—particularly because it is overwhelmingly likely that the merits of the suit will never be tested. See Bone & Evans, *supra*, DUKE L.J. at 1302. Precisely because the class-certification decision is virtually determinative of liability, courts must remain especially vigilant in enforcing the proper limitations on the class-action device.

B. Classes That Do Not Meet Rule 23's Requirements Exacerbate Improper Settlement Pressure

Judge Friendly and the countless others who have decried the potential for "blackmail settlements" have generally assumed that the classes were, at least, properly certified. See, *e.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8-9 (1971) (class actions are "legalized blackmail" because they place such burdens on courts and defendants that they are virtually untriable); *Rhone-Poulenc*, 51 F.3d at 1299 (blackmail pressure is created when defendants must "stake their companies on the outcome of a single jury trial"). If a class is certified that does *not*, in fact, meet Rule 23's requirements, the opportunity for coerced settlements skyrockets. That is true with respect to both Rule 23(a)'s threshold criteria for all class actions, and (in particular) Rule 23(b)(3)'s

requirements for class actions seeking monetary relief. If those standards are incorrectly applied, defendants lose essential protections afforded by Rule 23 while plaintiffs correspondingly gain settlement leverage.

Rule 23(a) sets out the basic requirements for representational litigation: the class must be so numerous that joinder of all members is impracticable; the class must have questions of law or fact in common; the claims or defenses of the class representatives must be typical; and the class representatives must adequately protect the interests of absent class members. Fed. R. Civ. P. 23(a). By requiring the named plaintiffs to represent the whole class accurately and fairly, those requirements of commonality, typicality, and adequacy of representation help to guarantee that the class-action device does not alter the substantive rights of the plaintiffs or defendants. See *General Tel. Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 156 (1982) ("These [23(a)] requirements effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'") (quoting *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 330 (1980)); see also *Taylor* v. *Sturgell*, 553 U.S. 880, 894 (2008) (describing representational relationship in "properly conducted class actions" as being on par with "suits brought by trustees, guardians, and other fiduciaries").

Rule 23(b) places additional limits on the class based on the nature of the relief sought. As explained below (see Part II, *infra*), it explicitly distinguishes between claims governed by Rule 23(b)(3), in which questions in common to the class

members "predominate over any questions affecting only individual members" and for which damage claims are appropriate, and other claims, governed by Rule 23(b)(2), for which only injunctive relief is appropriate. This fundamental distinction reflects the fact that classes seeking injunctive or declaratory relief are by definition cohesive and homogeneous. By contrast, classes seeking monetary relief tend to be heterogeneous, and "class-action treatment is not as clearly called for" in such cases. Fed. R. Civ. P. 23 Advisory Committee's Note to 1966 Amendments. Rule 23(b)(3) thus sets forth specific requirements that must be satisfied in order for damage claims to be given class action treatment. These include, among others, the "predominance" requirement, which is necessary to ensure that the heterogeneous individual issues that arise in damage claims do not predominate and, thus, that class-wide litigation is appropriate.

Any improper expansion of the class under either Rule 23(a) or Rule 23(b) only exacerbates the settlement pressures certification generates. As explained above, the sheer size of a class action significantly increases the likelihood that a defendant will settle the action without regard to its merits. The aggregation of claims beyond those authorized for class treatment by Rule 23 only adds to those already substantial pressures.

Worse still, when courts certify classes in which the Rule 23 requirements have been improperly applied, plaintiffs gain even more significant advantages. For one thing, when the named plaintiffs do not truly represent the entire class, plaintiffs'

counsel can (and, for obvious reasons, frequently do) cherry-pick the most sympathetic individuals with the strongest possible claims to serve as named plaintiffs. Because the jury sees only the class representatives, absent class members with weaker claims can piggy-back on the disproportionately stronger representatives' claims.

It is worse still when a class seeking monetary relief does not meet Rule 23(b)(3)'s predominance requirement, because individual inquiries relevant to absent class members' claims tend to evaporate. The premise of a class action is that the class representatives serve as proxies for the entire class. If the common issue does not actually predominate over other issues—that is, if questions of fact and law specific to individuals are more important than the common question—then that essential premise fails. In that way, the claims of a few plaintiffs hand picked to serve as class representatives can mask the shortcomings of the absent class members' claims, and absent class members reap rewards from settlement or judgment without the weaknesses in their cases ever seeing the light of day.

Plaintiffs' counsel may also seek to create a fictional "super-plaintiff" that combines the best attributes of the class members by alleging that certain claims run to the "class as a whole" or, as here, that a large and disparate class suffered an improbably singular injury. This pits the defendant against a fictional composite that is not necessarily like any actual member of the class. See *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) ("The apparent consequence of the Court

of Appeal's holding [that no particular plaintiff must prove the reliance element of the claim] is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action."); *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) ("The inescapable fact is that the individual claims of 2,990 persons will not be presented. Rather, the claim of a unit of 2,990 persons will be presented. Given the unevenness of the individual claims, this * * * process inevitably restates the dimensions of tort liability.").

Of course, the defendant cannot actually confront this fictional character in the courtroom. Cross-examination cannot fully expose weaknesses in the super-plaintiff's case, and the presentation of defenses that are specific to individual class members likewise suffers. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("Meineke was often forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation.").

Accordingly, class actions that do not meet the representational requirements of Rule 23 tend to be tried, if at all, in a manner that is ultimately prejudicial to the defendant. *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (condemning a fluid recovery scheme that treated the plaintiffs as a "class as a whole" as "rais[ing] serious due process concerns"); *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973) (substituting the "class as a whole" for the

individual members of the class with a fluid recovery scheme would violate Rule 23 and due process), vacated on other grounds, 417 U.S. 156 (1974); see also 3 WORKING PAPERS OF THE ADVISORY COMMITTEE ON CIVIL RULES ON PROPOSED AMENDMENTS TO CIVIL RULE 23 at 581-82 (1997) (noting that "for each plaintiff" whose claims may have arisen "in a different period of time, with different facts * * * much of the evidence would not come in [as] to that particular plaintiff"). Faced with the likelihood that they will be unable to present a complete defense, defendants often have no real choice but to settle.

II. A Class Certified Under Rule 23(b)(2) Cannot Seek Monetary Relief

Rule 23(b)(2) authorizes a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final *injunctive* relief or corresponding *declaratory* relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). In approving the certification under (b)(2) of a class seeking billions of dollars in monetary relief, the majority below committed an error of the highest order.

A. Class Actions Seeking Monetary Relief Cannot Be Certified Under Rule 23(b)(2)

By its terms, (b)(2) authorizes only those actions for which "injunctive" or "declaratory" relief is sought for "the class as a whole." Fed. R. Civ. P. 23(b)(2). Conspicuously, the rule makes no mention of monetary relief, which is separately addressed by Rule 23(b)(3).

Indeed, "Rule 23(b)(2) was not originally drafted to provide a vehicle for obtaining compensatory damages and other forms of monetary relief." Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186; see also Mark A. Perry & Rachel S. Brass, *Rule 23(b)(2) Certification of Employment Class Actions: A Return to First Principles*, 65 N.Y.U. ANN. SURV. AM. L. 681, 699 (2010). Rather, the touchstone of (b)(2) "is whether the party's actions would affect all persons similarly situated so that those acts apply generally to the whole class. If they do not, then Rule 23(b)(2) cannot be properly invoked." 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1775, at 41 (3d ed. 2005) (footnote omitted); see, *e.g.*, *Monreal* v. *Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004) (affirming denial of certification "[b]ecause the variety of claims asserted in the Complaint do not lend themselves to the formulation of appropriate class-wide injunctive or declaratory relief and because it is clear from the pleadings here that the primary relief sought is monetary damages").

In recent years, some plaintiffs' counsel have "seiz[ed] on certain language in the advisory committee notes to the rule" in hopes of persuading courts that the rule permits suits for monetary relief. Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186. But, "[a]s with a statute, [the Court's] inquiry is complete if * * * the text of [a Federal] Rule [of Civil Procedure is] clear and unambiguous." *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540-41 (1991); accord *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S.

120, 123 (1989). "The Advisory Committee's insights into the proper interpretation of a Rule's text * * * have no effect on the Rule's meaning." *Krupski* v. *Costa Crociere S.p.A.*, 130 S. Ct. 2485, 2498-99 (2010) (Scalia, J., concurring in part and concurring in the judgment); see also *Black* v. *United States*, 130 S. Ct. 2963, 2970 (2010) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment) ("The Committee's view is not authoritative."); *Tome* v. *United States*, 513 U.S. 150, 167-68 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear"). It is the plaintiffs' proposed departure from the plain text of the Rule, not the defendant's adherence to the text, that is the more "radical" position in this case. See Brief in Opp. at 17.

The text of Rule 23(b)(2) is targeted for a reason. Because classes certified under (b)(2) can seek *only* injunctive or declaratory relief, the benefits and burdens of the class action properly run to the class as a whole. Rule (b)(2) classes are thus *inherently* suitable for class-wide adjudication and *naturally* protect defendants' and absent class members' rights. Accordingly, 23(b)(2) class actions do not share the extra safeguards of (b)(3) actions—namely, the predominance and superiority requirements, and the notice and opportunity to opt out that must be provided to absent class members. See Fed. R. Civ. P. 23(b)(3) & (c)(2)(B); *Coleman* v. *GMAC*, 296 F.3d 443, 447 (6th Cir. 2002) ("These procedural protections are considered unnecessary for a Rule

23(b)(2) class because its requirements are designed to permit only classes with homogenous interests.").

Allowing plaintiffs to pursue claims for monetary relief under 23(b)(2) is a transparent end-run around the additional requirements and protections Rule 23(b)(3) imposes. See *Parker* v. *Time Warner Entertainment Co.*, 331 F.3d 13, 24 (2d Cir. 2003) (Newman, J., concurring) ("[U]nduly extending (b)(2) * * * strike[s] me as a way of undermining the (b)(3) requirement that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'") (quoting Fed. R. Civ. P. 23(b)(3)). This case illustrates that fact all too well: 1.5 million plaintiffs seeking billions of dollars in monetary relief were assembled into a single class that could never have met (b)(3)'s more onerous certification requirements. As a result, petitioner faces a trial in which it would have no real opportunity to present the thousands of individual defenses to which the law entitles it.

Because of this end-run around 23(b)(3), the defendant faces a potential judgment of billions of dollars in a single action against three hand-chosen plaintiffs, which it will almost certainly feel forced to settle. See Part I, *supra*. But such misuse of (b)(2) actions also harms absent class members, some of whom might have had valid claims that—if the case is (predictably) settled—will be extinguished without the mandatory notice and opt-out protections of (b)(3). Properly applying Rule 23(b)(3) to *all* actions seeking monetary relief avoids both of these results.

B. If Monetary Relief Is Ever Permissible In A (b)(2) Class Action, It Must Be No More Than Incidental To Injunctive Or Declaratory Relief

If courts stray from the plain language of Rule 23(b)(2) and certify classes seeking monetary relief, such relief must be only incidental to injunctive or declaratory relief. As Judge Ikuta recognized in dissent below, "Rule 23(b)(2) was designed for classes seeking class-wide injunctive relief to remedy a common injury to the class as a whole, not for classes seeking individual damages, back pay, or other individual relief." Pet. App. 149a (Ikuta, J., dissenting); see *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) ("Because Appellants' injunction request is illusory, their prayer for injunctive relief cannot predominate over their prayer for non-injunctive, non-declaratory equitable relief under any reasonable interpretation of Rule 23(b)(2)."); *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("The underlying premise of the (b)(2) class * * * '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.'") (quoting *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

The claims for monetary relief in this case are hardly incidental. At least two-thirds of the class members are *former* employees who lack standing even *to pursue* injunctive relief. See *Elizabeth M.* v. *Montenez*, 458 F.3d 779, 784-85 (8th Cir. 2006) (holding that the district court had abused its discretion by certifying a 23(b)(2) class including

both past and current mental health facility patients, because the former lacked Article III standing to seek injunctive relief). What is more, the multi-billion-dollar price tag plaintiffs attach to their lawsuit belies any serious contention that injunctive relief is their primary target. See *Reeb* v. *Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 641 (6th Cir. 2006) ("Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such individual claims for money damages will always predominate over requested injunctive or declaratory relief."); Sarah Kirk, *Ninth Circuit Discrimination Case Could Change The Ground Rules For Everyone*, 14 TEX. REV. L. & POL. 163, 168 (2009) ("[T]he court erred by certifying, under Rule 23(b)(2), an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.").

Moreover, the plaintiffs here seek monetary relief that is necessarily individualized, in clear conflict with the stated premise of Rule 23(b)(2) that relief must run to the "class as a whole." See *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("'incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions'") (quoting *Allison*, 151 F.3d at 415); *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) ("[T]he underlying premise of (b)(2) certification—that the class members suffer from a common injury that can be addressed by classwide relief—begins to break down when the class seeks to recover back pay or

other forms of monetary damages."). The "crux" of Rule 23(b)(2), however, is the "*indivisible* nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful *only* as to all of the class members or as to none of them." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) (emphasis added). Indeed, the backpay plaintiffs seek cannot flow to the class as a whole without defying the obligations of Title VII itself. See *Reeb*, 435 F.3d at 651 ("[I]n a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis.").

Finally, even under the misguided standard adopted by the majority below—*i.e.*, that monetary relief is permissible under (b)(2) so long as it does not "predominate," Pet. App. 85a—it is impossible to see how this case could pass muster. A significant majority of the plaintiffs are incapable of benefiting from the requested injunctive relief. Meanwhile, *all* of the class members are presumably eligible to participate in the massive cash award plaintiffs are seeking. Monetary relief could hardly be more important.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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