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**

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition remains accurate.

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REPLY BRIEF FOR PETITIONER

Plaintiffs' entire case is premised on the discretion afforded individual managers to make pay and promotion decisions, yet they concede that this "subjectivity" is exercised within a company-wide framework of objective standards that prohibit discrimination and require equal employment opportunities.

Discriminatory decisions made by individual managers within such an objectively nondiscriminatory system are, by definition, aberrational and unauthorized rather than "common" or "typical." Plaintiffs' own theory of the case is therefore at war with itself and the notion of a nationwide class action. Indeed, they argue that managerial discretion is simultaneously "unguided" and "guide[d]." Resp. Br. 13, 16. Even the district court recognized the "tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control." Pet. App. 192a.

Plaintiffs try to obscure this fundamental problem by relying on aggregated statistics that say nothing about whether store-level decisions were made in a common fashion that inflicted common injuries, and do not span the gaping chasm between the named plaintiffs' own allegations and the experiences of the multitude of strangers they seek to compel into this mandatory Rule 23(b)(2) class action. Plaintiffs' sociologist tried to supply the missing link by opining that individual managers might be "vulnerable" to bias, but he conceded that no one knows if any employment decisions were actually based on gender. And the handful of anecdotes proffered by plaintiffs (and contradicted by Wal-Mart) does not remotely supply "significant proof" that discrimina-

tion was the company's general policy. *Gen. Tel. Co. of the Sw.* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982).

Plaintiffs' other proposed solution—eliminating elements of their claims and Wal-Mart's defenses—would impermissibly subjugate substance to procedure, flatly violating both the Rules Enabling Act and the Due Process Clause. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999).

Simply put, "Rule 23 . . . cannot carry the large load . . . class counsel . . . and the District Court heaped upon it." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). The certification order contravenes four decades of this Court's class-action and anti-discrimination jurisprudence, and eviscerates the rights of Wal-Mart and the absent class members. It cannot stand.

I. THE CERTIFICATION ORDER IS NOT CONSISTENT WITH RULE 23(a)

Plaintiffs' claims do not satisfy Rule 23(a)'s prerequisites and could not be tried to judgment while protecting the rights of all parties. *See Taylor* v. *Sturgell*, 553 U.S. 880, 900–01 (2008). Title VII class representatives must bridge the "wide gap" between individual and class claims by adducing "[s]ignificant proof that an employer operated under a general policy of discrimination" affecting all class members. *Falcon*, 457 U.S. at 157, 159 n.15. Plaintiffs failed to bridge the gap.

A. Plaintiffs Failed To Establish The Prerequisites To Certification

1. Commonality

a. Plaintiffs' Defective Theory

1. Plaintiffs suggest that "this case is not, like *Falcon*, an 'across the board' class" because that class

was somehow "broad[er]" than the class here. Resp. Br. 26. But *Falcon* involved a class of 120 people (14 of whom recovered at trial) at a single facility. 457 U.S. at 152–53. This class includes potentially millions of former and current employees, from entry-level hourly employees to salaried managers, in hundreds of job classifications in thousands of stores; the class disallowed in *Falcon* is quaint by comparison.

Plaintiffs' fallback argument that *Falcon* applies only to classes including both job applicants and employees (Resp. Br. 24–27) is wrong. *See Cooper* v. *Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876–78 (1984). The salient point in *Falcon* was that not all class members were similarly situated. Plaintiffs seeking to certify such a class must demonstrate "significant proof" of a "general policy" of discrimination to ensure that the named plaintiffs and the absent class members "possess the same interest and suffer the same injury." *Falcon*, 457 U.S. at 156 (internal quotation marks omitted). Plaintiffs cannot satisfy this standard because Wal-Mart's "general policy" forbids discrimination and "promotes diversity." Pet. App. 195a; J.A. 1576a–1596a.

Nor have plaintiffs even tried to demonstrate that Wal-Mart's "decision-making process is entirely subjective because, as a matter of fact, it is not." *Bacon* v. *Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571–72 (6th Cir. 2004). Plaintiffs themselves acknowledge that store-level discretion is "guide[d]" by "uniform" company-wide standards that plaintiffs do not challenge as discriminatory. Resp. Br. 16–19; *see also* J.A. 271a–287a, 550a. This approach—combining objective and subjective decisionmaking standards—is common throughout the business world. *See* Leading Companies Br. 7–17; SHRM Br. 6–17. It is not

the kind of "entirely subjective" process contemplated by *Falcon*.

The United States and most lower courts have interpreted *Falcon* in precisely the same way that Wal-Mart does here. RLC Br. 3–4, 13–18 (summarizing government's position); Pet. App. 118a–124a (Ikuta, J., dissenting); *see*, *e.g.*, *Garcia* v. *Johanns*, 444 F.3d 625, 631–32 (D.C. Cir. 2006); Pet. 23–24. While plaintiffs charge Wal-Mart with seeking a "heightened standard . . . [for] challenges to subjective decision-making" (Resp. Br. 26–27), *Falcon* itself held that the same class certification standards apply to Title VII cases as all others. 475 U.S. at 161.

Contrary to plaintiffs' contention (Resp. Br. 25, 27), Wal-Mart does not argue that *Falcon* requires them to prove at the class certification stage that they will prevail on the merits. Rather, Title VII plaintiffs (like all class representatives) must satisfy the Rule 23(a) factors after the district court rigorously analyzes evidence from both sides and resolves pertinent issues. *In re IPO Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 315–16 (3d Cir. 2008); *see also Falcon*, 457 U.S. at 160–61.

2. Title VII does not recognize plaintiffs' liability theory. Nowhere do they identify the "unlawful employment *practice*" that they are challenging—an indispensable prerequisite to their disparate-treatment *and* disparate-impact claims. 42 U.S.C. § 2000e-2(a) (emphasis added).

Plaintiffs maintain that Wal-Mart has a "*policy* of subjective decision-making processes that leaves unguided discretion to managers." Resp. Br. 13 (emphasis added). But allowing local managers to make decisions is not an "unlawful employment practice."

Cf. Nat'l R.R. Passenger Corp. v. *Morgan*, 536 U.S. 101, 114 (2002) ("unlawful employment practice" generally refers to "discrete acts" of discrimination). And the Court in *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988), specifically rejected the theory that Title VII prohibits employers from delegating decisions to the local level. Such delegation "should itself raise no inference of discriminatory conduct" because it is "customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs." *Id.* at 990; *see also* RLC Br. 13.

This Court has held plaintiffs "responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities." *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 656 (1989) (superseded on other grounds by Civil Rights Act of 1991) (emphasis added) (quoting *Watson*, 487 U.S. at 994 (plurality)); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (codifying standard). It is not enough for plaintiffs to "point to [an employer's] generalized policy"; rather, they must identify a "specific test, requirement, or practice within" that policy that has an allegedly discriminatory impact. *Smith* v. *City of Jackson*, 544 U.S. 228, 241 (2005).

Despite extensive factual detail regarding Wal-Mart's criteria for guiding managerial discretion (*see* Pet. Br. 20), plaintiffs have never identified a specific mechanism that could be responsible for the alleged disparities for which they seek to hold Wal-Mart liable. Pet. App. 55a, 59a. Instead, plaintiffs persist in challenging the collective impact of Wal-Mart's pay and promotion policies *in toto*—precisely the approach this Court has forbidden. *Wards Cove*, 490

U.S. at 657 ("[A] Title VII plaintiff does not make out a case of disparate impact simply by showing that, at the bottom line, there is [gender] *imbalance* in the work force").

Plaintiffs posit that Wal-Mart knowingly maintained policies that "disadvantaged" women. Resp. Br. 9–10 (citing *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256 (1979)). But the decisionmaker must have "selected or reaffirmed a particular course of action at least in part *because of, not merely in spite of*, its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (emphasis added); *see also Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 294 (1989) (Kennedy, J., dissenting). Plaintiffs have absolutely no evidence of such an election; to the contrary, the record reflects Wal-Mart's many efforts to promote diversity in its workforce. *E.g.*, J.A. 397a–405a, 407a–413a, 1580a–1594a; R.A. 47–65. Following plaintiffs' lead "would penalize rather than commend employers for their effort and innovation in undertaking such a study [of workplace disparities]." *AFSCME* v. *Washington*, 770 F.2d 1401, 1408 (9th Cir. 1985) (Kennedy, J.); *see* Leading Companies Br. 33.

Plaintiffs ultimately do not seek to hold Wal-Mart accountable for any specific employment practice; rather, they advance a "structural" theory of discrimination that Title VII is neither designed, nor well-equipped, to address. *See* Samuel R. Bagenstos, *The Structural Turn and the Limits of Anti-Discrimination Law*, 94 Calif. L. Rev. 1, 13–14 (2006); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 155–57 (2009). This Court, however, has long refused to construe Title VII in this manner. *See Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978).

b. Plaintiffs' Defective Evidence

The "enormous record" that plaintiffs compiled (Resp. Br. 15) reflects "the *absence* of a specific discriminatory policy promulgated by Wal-Mart." Pet. App. 59a (emphasis added). Moreover, plaintiffs maintain that Wal-Mart exerted great "control" over certain policies (Resp. Br. 15–17), including the temperature and music in each store, yet they *sub silentio* assume that Wal-Mart's nationwide policy prohibiting unlawful discrimination while promoting diversity is entirely ineffective. Although plaintiffs assert that "an employer cannot insulate itself from liability . . . simply by promulgating a written anti-discrimination policy" (*id.* at 29), they do not argue that Wal-Mart's actual policy is a sham or pretense. That policy should therefore preclude amalgamation of nearly every woman who worked at the company into one monolithic class. *Cf. Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 537, 544–46 (1999).

Plaintiffs emphasize Wal-Mart's strong culture (Resp. Br. 16–17) and how its founder Sam Walton's "personal values . . . became core beliefs and values for the company." J.A. 532a. They do not dispute that Mr. Walton's views about fostering the success of women were clear and unambiguous. As he stated in 1992, "the industry has waked up to the fact that women make great retailers. So we at Wal-Mart . . . have to do everything we possibly can to recruit and attract women." *Id.* at 369a.

Wal-Mart's anti-discrimination policy is clear (C.A. App. 678) and taken extremely seriously. Managers or supervisors who do not afford equal opportunities to women violate company policy and are subject to termination. J.A. 1592a. Wal-Mart

quickly investigates and responds to alleged violations. *Ibid.*

"[D]iversity and [equal employment opportunity] are not just legal obligations, but an essential part of Wal-Mart culture." J.A. 1580a. "Like the proverbial shell game," plaintiffs' anecdotes, statistics, and sociology do not show "a company-wide policy of discrimination, no matter which shell is lifted." Pet. App. 138a (Ikuta, J., dissenting).

1. *Anecdotes*. The scant, divergent events plaintiffs exaggerate in trying to cast Wal-Mart in an unflattering light do not supply proof of a company-wide policy of discrimination. Indeed, plaintiffs' overreliance on this smattering of isolated incidents dating back to the 1980s disregards this Court's admonition to "be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." *Cooper*, 467 U.S. at 879–80 (internal quotation marks omitted).

One employee's vague recollection of hearing the term "Janie Q" used to refer to customers or employees does not amount to company-wide intentional discrimination. *Compare* J.A. 304a–305a, *with* U.S. Dep't of Justice, http://www.justice.gov/oarm/arm/hp/writingsample.htm ("Jane Q. Candidate"). Plaintiffs also misleadingly exaggerate a few inflammatory incidents. For example, they allege that "[n]umerous" managers admitted that they "regularly" went to "strip clubs when they attend[ed] company management meetings" (Resp. Br. 19), when in fact plaintiffs identify only four individual managers, three of whom went to such an establishment only once over the past three decades and all of whom made clear that this was far from a "regular" practice. *See*, *e.g.*,

D.C. Dkt. 100, Ex. 42 at 321, Ex. 40 at 196. Likewise, plaintiffs seek to leverage the unique into the common without any evidence, claiming that "[f]emale managers were required to attend these meetings . . . as part of the job" (Resp. Br. 19–20), while identifying just *one former class member* who left the company in 2000 and never testified that such meetings were part of the job. J.A. 924a–933a; *see also id.* at 927a–928a (similarly isolated assertion regarding a restaurant).

Although plaintiffs assert that class members offered "remarkably similar accounts" (Resp. Br. 35), the Court need only sample the declarations—which are reproduced in the joint appendix—to appreciate how highly individualized they are. *See* J.A. 578a–1321a. And the forty declarations actually cited by plaintiffs and their *amici* comprise about one-one-thousandth of one percent of the women employed since December 1998; they hardly could be said to depict the common experience of all women at Wal-Mart. *See*, *e.g.*, *id.* at 860a–862a, 938a–942a, 1084a–1086a.

Confronted with the fact that many of their self-selected declarations do not even describe Title VII violations, plaintiffs argue that "[n]othing in Rule 23 or Title VII" required them to "recount[] 'actionable claims of discrimination'" that "together . . . prove the existence of a 'pattern or practice' of discrimination." Resp. Br. 35. But plaintiffs in a Title VII class action bear the burden of showing *both* individual instances of actionable discrimination *and* a company-wide pattern or practice of discrimination. *Cooper*, 467 U.S. at 875–76; *Falcon*, 457 U.S. at 157–58.

Plaintiffs also ignore the many women who have flourished at Wal-Mart thanks to their hard work and the support of their managers who embody Wal-Mart's culture of "respect for the individual" and equal opportunity. J.A. 1577a–1578a. As described in the declarations of 277 people who have served as managers in 48 different States and more than 1,100 of Wal-Mart's 3,400 stores, equal opportunity is Wal-Mart's standard operating procedure. *See*, *e.g.*, J.A. 1650a, 1653a; D.C. Dkt. 238, 245, 247, 259.

As Julie Murphy, a Senior Vice President who started in 1985 as an Assistant Manager Trainee, explained, male colleagues "provided [her] with the training and guidance to develop professionally and encouraged [her] to seek out opportunities where [she] might not have done so on [her] own." J.A. 1635a; *see also*, *e.g.*, *id.* at 1607a–1609a (Margaret Daniel, Market Manager, received numerous awards including District Manager of the Year), 1639a–1642a (Janice Tree, Sam's Club General Manager, was promoted ahead of more senior men), 1651a (Stacy Wiggins, Store Manager, explained, "I am very happy with my career at Wal-Mart, and with how I have been treated since joining the Company").

2. *Statistics*. Plaintiffs suggest that Drogin's statistical evidence was sufficient to establish commonality, but his nationwide regression assumes—rather than proves—a common process of decisionmaking for every employee in every store. J.A. 515a–516a. Plaintiffs cannot carry their burden by assuming the answer to the pertinent question. *See* Costco Br. 9 (plaintiffs' statistics "exploit the arithmetic of aggregation"); J.A. 1463a–1468a, 1516a–1526a; Pet App. 130a n.12 (Ikuta, J., dissenting).

This Court has never accepted plaintiffs' position that disparities alone can establish Title VII liability. *Wards Cove*, 490 U.S. at 656–57; *Watson*, 487 U.S. at 986 (majority); *id.* at 994 (plurality). Doing so here would radically transform Title VII into a strict liability prohibition of disparities, which Congress has forbidden. 42 U.S.C. § 2000e-2(j); *see also Ricci* v. *DeStefano*, 129 S. Ct. 2658, 2674–75 (2009).

Wal-Mart's expert Haworth conducted a store-level analysis showing that pay patterns vary widely across locations, with 90% of all stores reflecting nothing more than the pay differences one would expect as a matter of random variation. J.A. 1344a. In response, plaintiffs reiterate their baseless argument that this was "sub-unit" rather than store-based analysis, a "semantic" quibble the district court correctly rejected. Pet. App. 202a n.25. They also misleadingly point to an evidentiary order in which the district court expressly *did not* exclude Haworth's statistical analysis. 222 F.R.D. at 198.

Contrary to plaintiffs' caricature, Wal-Mart does not argue that only statistical proof "disaggregated to the store-by-store level" will support commonality. Resp. Br. 30. Rather, it is plaintiffs' novel theory—attempting to certify a nationwide class based on discretionary decisions by individual store managers—that requires such proof here. While they now assert that "relevant decisions" (*ibid.*) were not made at the store level because some decisions supposedly required higher-level "approval" (*id.* at 18), plaintiffs persuaded the district court that "[t]his limited oversight . . . still leaves individual Store Managers with substantial discretion in setting pay rates for in-store employees." Pet. App. 177a; *accord* J.A. 1657a–1658a. Plaintiffs contend that class members could not express interest in management positions (Resp.

Br. 18), but that too is belied by the record. J.A. 1381a–1382a, 1440a–1445a. The bottom line is that plaintiffs failed to adduce any statistical evidence of discrimination (or even disparities) at the store level, and they cannot escape this inherent defect in Drogin's analysis.

Plaintiffs' tactic has been to portray Wal-Mart as an outlier, but nationally "women working full time are paid only 77 percent of the salaries paid to men, on average." ACLU Br. 7; *see also* Econ. & Statistics Admin., U.S. Dep't of Commerce, *Women in America: Indicators of Social and Economic Well-Being* 32 (2011). Even according to plaintiffs' flawed certification analysis, during the period 1995–2001 women did much better at Wal-Mart. J.A. 518a (alleging that women earned 85–95% of men's wages). Plaintiffs also misleadingly suggest that women were underrepresented in management. Resp. Br. 21. In fact, in the retail stores women made up two-thirds of all employees *and* two-thirds of all managers. D.C. Dkt. 237, 265 at 21–22; *see also* J.A. 1541a–1542a. There is no meaningful disparity.

3. *Sociology*. Bielby's testimony was the cornerstone of plaintiffs' entire "conduit" theory before the district court (Pet. App. 192a), which concluded that "Bielby's testimony raises an inference of corporate uniformity and gender stereotyping that is common to all class members." *Id.* at 196a; *see also id.* at 181a–182a, 188a–196a; D.C. Dkt. 99 (certification motion, citing Bielby 18 times). The Ninth Circuit relied equally heavily on Bielby's testimony. Pet. App. 54a–60a. But as plaintiffs concede, Bielby could opine only that there was a "risk of gender stereotyping" at Wal-Mart, and "failed to quantify how many employment decisions"—if any—"were the

product of stereotyped thinking." Resp. Br. 36; *see also* Costco Br. 17–26; Leading Companies Br. 26–30.

This concession defeats commonality. The mere "risk" of bias, without any evidence that it manifested itself in any, let alone all, employment decisions, is not sufficient to carry plaintiffs' burden as to either the substantive Title VII claims or the Rule 23 analysis. *Price Waterhouse*, 490 U.S. at 251 (plurality); *id.* at 281 (Kennedy, J., dissenting). On the contrary, Bielby's opinions establish that innumerable individual decisions would have to be examined.

2. Typicality

Typicality requires that the class claims be "fairly encompassed" by the named plaintiffs' claims. *Gen. Tel. Co. of the Nw.* v. *EEOC*, 446 U.S. 318, 330 (1980). The named plaintiffs' claims here do not even fairly encompass one another's, much less those of millions of strangers.

Plaintiffs devote four sentences to the three named plaintiffs who were employed by Wal-Mart after the complaint was filed and therefore remain members of the class (Resp. Br. 38; Pet. App. 101a), without informing the Court that their pay and promotion averments were squarely contradicted in the courts below. *See* D.C. Dkt. 603 at 3–5. Two of the three named plaintiffs committed serious disciplinary offenses. *See*, *e.g.*, J.A. 623a, 745a–746a; D.C. Dkt. 240.

If this were a single-plaintiff sex-discrimination suit, the factual allegations in plaintiffs' statement of the case (Resp. Br. 1; *see* Sup. Ct. R. 24.1(g)) would not state a plausible claim, and the case would end on a motion to dismiss. *See Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009). And even if one of them could prove a Title VII violation, it would not make it any

more (or less) likely that any other class member suffered unlawful discrimination. *Cooper*, 467 U.S. at 875–76.

3. Adequacy

Class actions pose the fundamental danger that the named plaintiffs will pursue their own interests at the expense of the absent persons they purport to represent. *Gen. Tel.*, 446 U.S. at 331. That danger materialized here, where the named plaintiffs cast overboard the compensatory damages claims of everyone but themselves. J.A. 78a; D.C. Dkt. 99 at 44. Plaintiffs rationalize this decision as increasing "the chance of certification." Resp. Br. 41. This is not a legitimate basis to forgo congressionally authorized remedies on behalf of absent persons but not the named plaintiffs. *See*, *e.g.*, *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 339 (4th Cir. 1998).

This class is riven by conflicts like those that led to decertification in *Amchem*. 521 U.S. at 625–27. Plaintiffs say that Wal-Mart has not "identif[ied] any evidence of a substantive conflict" between hourly and supervisory personnel (Resp. Br. 40), but plaintiffs' case is premised on hourly employees accusing their salaried supervisors of discriminating against them. A class that includes both victims and perpetrators fails not only Rule 23's adequacy requirement (*Amchem*, 521 U.S. at 625), but also the dictates of due process. *Hansberry* v. *Lee*, 311 U.S. 32, 44–45 (1940).

Plaintiffs assert that Wal-Mart's observation that any recovery would compensate non-victims to the detriment of other class members "ignores the findings of the district court." Resp. Br. 41. But plaintiffs conceded this point in the district court (D.C.

Dkt. 618 at 205), which recognized that allowing the class to proceed would "generat[e] a windfall for some employees . . . and undercompensat[e]" others. Pet. App. 254a (internal quotation marks omitted); *see also id.* at 110a. This is a classic intractable conflict that precludes certification. *See Spano* v. *Boeing Co.*, __ F.3d __, 2011 WL 183974, at *11 (7th Cir. Jan. 21, 2011).

B. The Substantive Law Cannot Be Modified

This Court has squarely held that "no reading" of Rule 23 "can ignore" the "mandate" of the Rules Enabling Act, 28 U.S.C. § 2072(b). *Ortiz*, 527 U.S. at 845; DRI Br. 4–8. Yet plaintiffs mention this crucial statute just once, in passing (Resp. Br. 41), and do not seriously grapple with the distortions that this certification order wreaks on the substantive law.

Plaintiffs do not even try to defend the decision below in this respect. The Ninth Circuit, unable to approve the procedure that plaintiffs persuaded the district court to adopt, instead suggested statistical sampling methods like those used in an erroneous and aberrational foreign-despot-torture case. Pet. App. 105a–110a (discussing *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996)). Although *Hilao* comprised the Ninth Circuit's entire "answer" to Wal-Mart's due process and Rules Enabling Act challenges to the certification order, it is not even cited in the merits-stage briefing of plaintiffs or their *amici*. They have therefore conceded the obvious: The certification order is indefensible.

1. Claim Elements

Plaintiffs disregard not only the "specific employment practice" element of both their disparate-treatment and disparate-impact claims, but also in-

tent—the central element of their disparate-treatment claim. *Watson*, 487 U.S. at 986; *see also Staub* v. *Proctor Hosp.*, No. 09-400, slip op. at 5, 10 (U.S. Mar. 1, 2011). Actual proof of intent would destroy commonality, as plaintiffs (implicitly) concede by arguing that "in a pattern or practice case, the relevant question is whether there is a pattern of discriminatory decision-making, not whether the decisions of individual managers are discriminatory." Resp. Br. 31; *see also* AAJ Br. 2. Plaintiffs thus propose to hold Wal-Mart liable for class-wide *intentional* discrimination without ever proving that any authorized agent of Wal-Mart had the requisite intent. That contravenes Title VII.

Plaintiffs suggest that Wal-Mart ignores the "crucial difference" between a class action and an individual action. Resp. Br. 42 (quoting *Cooper*, 467 U.S. at 876). But it is *harder*, not easier, to prove a class claim than an individual claim. *Falcon*, 457 U.S. at 157–58. A class plaintiff must prove *both* individual instances of discrimination *and* a company-wide policy. *Cooper*, 467 U.S. at 875–76; *see Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 306, 313 (1977) (reversing pattern-or-practice finding despite 16 proven individual cases). That is because only "actual victims of illegal discrimination" are entitled to "make-whole relief." *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 580 (1984); *accord Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 360–62, 371–72 (1977). Plaintiffs' approach clashes with this principle, which was essential to Title VII's passage. *Stotts*, 467 U.S. at 579–81.

Eliminating any substantive requirement to facilitate class certification is impermissible. *Hohider* v. *UPS*, 574 F.3d 169, 183–85 (3d Cir. 2009); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 223–

25 (2d Cir. 2008); DRI Br. 8. Plaintiffs seek to distinguish *Hohider* factually and ignore *McLaughlin* (Resp. Br. 43) because they cannot answer the legal principle on which each rests.

2. Defenses

Although "a district court must usually conduct additional proceedings" at the second stage of a *Teamsters*-bifurcated trial (431 U.S. at 361), plaintiffs argue that *Teamsters* hearings may be eliminated "[w]here the defendant's practices make it impossible to recreate the employment decisions that would have been made absent discrimination." Resp. Br. 45.

But plaintiffs have not shown, and the courts below did not find, that Wal-Mart has made it "impossible to recreate the employment decisions." Resp. Br. 45. The district court acknowledged that the "advantages" of reviewing those decisions "are obvious," but felt that doing so would be "impractical on its face." Pet. App. 250a–251a. For that reason (rather than anything Wal-Mart did), the court did away with individualized hearings into the "tens of thousands of pay or promotion decisions at issue here." Resp. Br. 47.

That again is subjugating the substantive law to the procedural device, in derogation of the Rules Enabling Act's mandate that aggregated litigation must "leave[] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality).

Eliminating individualized determinations also violates due process. While plaintiffs deride the notion that Wal-Mart, like any civil defendant, has a basic right to defend itself (*see* Resp. Br. 47–48), this

Court has declared that in Title VII class actions "the company *[is] entitled to prove* at trial that the respondents [have] not been injured." *E. Tex. Motor Freight Sys. Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977) (emphasis added); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) ("every available defense" (internal quotation marks omitted)). Wal-Mart would be barred from showing that some people were not paid more or promoted because of disciplinary problems or poor people skills. *See*, *e.g.*, D.C. Dkt. 239, 240, 243, 247, 261. The Due Process Clause does not sanction a dispute in which one contestant's hands are manacled.

Moreover, Wal-Mart is expressly entitled to present a "same action" defense. 42 U.S.C. § 2000e-5(g)(2). Subparagraph (A) has been in the statute since its enactment in 1964, is not limited to mixed motive cases, and expressly prohibits make-whole relief for individuals who are not victims of discrimination. *Price Waterhouse*, 490 U.S. at 245 n.10 (plurality) ("Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect"). Furthermore, Wal-Mart would be entitled to present the subparagraph (B) defense to the jury if the evidence adduced at trial supports it. *Id.* at 247 n.12. These issues require individualized determinations.

II. THE CERTIFICATION ORDER IS NOT CONSISTENT WITH RULE 23(b)(2)

The Court granted certiorari to decide "[w]hether claims for monetary relief can be certified under" Rule 23(b)(2), and "if so, under what circumstances." Pet. i. Plaintiffs answer the former incorrectly and do not even try to answer the latter.

A. Rule 23(b)(2) Does Not Encompass Monetary Relief

This Court's observation that Rule 23(b)(2) certification turns on "*the absence of a claim for monetary relief* and the nature of the claim asserted" (*Sosna* v. *Iowa*, 419 U.S. 393, 397 n.4 (1975) (emphasis added)) ends plaintiffs' contention that "nothing in the text of the Rule places any limit on relief available in a (b)(2) class action." Resp. Br. 49. Textually, Rule 23(b)(2) authorizes *only* claims for "final injunctive relief or corresponding declaratory relief." Although some circuits have allowed monetary claims, this Court has never approved that procedure. *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam). This Court has "no warrant to ignore clear statutory language on the ground that other courts have done so." *Milner* v. *Dep't of the Navy*, No. 09-1163, slip op. at 13 (U.S. Mar. 7, 2011).

Plaintiffs' argument rests not on the Rule itself, but on a single, prohibitory sentence in the Advisory Committee Notes. *See* Resp. Br. 50–51. Yet they ignore the illustrative cases in the same Notes despite this Court's holding that such cases provide the necessary conditions for mandatory certification. *Ortiz*, 527 U.S. at 842. Plaintiffs cast aside *Ortiz* on the ground that it "did not address . . . the proper scope of Rule 23(b)(2)" (Resp. Br. 52), but of course the Court's "analysis . . . applies to all class actions." *Spano*, __ F.3d __, 2011 WL 183974, at *12 (citing *Amchem*, 521 U.S. at 619–20). Because the historical antecedents all involved injunction-only claims against facially segregationist centralized practices, and not (as here) monetary claims for decentralized and individualized decisionmaking, the *Ortiz* analysis precludes plaintiffs' bid for Rule 23(b)(2) certification.

Resolving monetary claims without providing notice and opt-out rights to absent class members violates due process. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811–12 (1985). Although Rule 23 allows courts to give "appropriate notice" to mandatory classes (Fed. R. Civ. P. 23(c)(2)(A)), such notice is "not require[d]." Resp. Br. 55. Moreover, this optional notice only allows absent class members to "come into the action" (Fed. R. Civ. P. 23(d)(1)(B)(iii)); nothing in Rule 23 authorizes courts to allow class members to opt out of Rule 23(b)(2) class actions, which is why they are called "mandatory." *Ortiz*, 527 U.S. at 833 n.13. Plaintiffs' suggestion that Rule 23 is sufficiently "flexible" to allow judicially invented opt-out rights (Resp. Br. 55) contravenes this Court's holding that "[c]ourts are not free to amend a rule outside the process Congress ordered." *Amchem*, 521 U.S. at 620.

The doctrine of constitutional avoidance requires channeling monetary claims into Rule 23(b)(3), which requires notice and opt-out rights. *Ortiz*, 527 U.S. at 833 n.13. That is the "default" certification provision for unliquidated tort claims (*see Amchem*, 521 U.S. at 614–15), of which intentional discrimination claims are a variety. *See Staub*, slip op. at 5.

Plaintiffs are wrong in suggesting that the "Rule 23(b)(2) requirement that the district court determine whether injunctive relief predominates over monetary relief . . . serves essentially the same functions as the procedural safeguards mandated in (b)(3) class actions." Resp. Br. 53 (internal quotation marks omitted). Rule 23(b)(3) imposes numerous requirements—*mandatory* notice and opt-out rights, in addition to requisite findings that common questions *predominate*, and that the class device is *superior*—not found in Rule 23(b)(2). *Ortiz*, 527 U.S. at 833

n.13, 862; *Amchem*, 521 U.S. at 623; *see also* Intel Br. 18–19. These preconditions to certification exist to protect defendants and absent class members alike.

Rule 23(b)(3) captures the "growing edge" of class actions, a category into which this lawsuit surely falls. *Ortiz*, 527 U.S. at 861–62; *see Amchem*, 521 U.S. at 614. Monetary claims should be certified (or not) under that subdivision, with its enhanced procedural protections. Plaintiffs' effort to jam this case into Rule 23(b)(2) instead—depriving millions of women of the right to notice and the opportunity to choose whether to participate in the action—should not be countenanced. *See Amchem*, 521 U.S. at 614–15.

B. Plaintiffs' Monetary Claims "Predominate"

The courts of appeals have split three ways on the standard for certifying monetary claims under Rule 23(b)(2). *See* Pet. 10–12.

The district court certified the class under the minority *Robinson/Molski* standard, while the Ninth Circuit affirmed the certification under a newly announced standard. Pet. App. 85a–88a. Plaintiffs do not mention (and have therefore abandoned) these two erroneous standards, alluding instead only to the majority *Allison* "incidental damages" standard. Resp. Br. 56; *cf.* Pet. Br. 50–51. Yet, as the courts below implicitly recognized, and as plaintiffs did not deny in opposing certiorari, this class could not have been certified under the *Allison* standard. *See* Pet. 16–17.

Although plaintiffs contend that backpay "is generally available in (b)(2) actions" (Resp. Br. 56), that cannot mean that backpay claims may *always* be certified under Rule 23(b)(2). Rather, "it [is] necessary

. . . to determine whether plaintiffs' back-pay request actually conforms with the requirements of Rule 23, including Rule 23(b)(2)'s monetary-predominance standard." *Hohider*, 574 F.3d at 202. Here, where a majority of class members are former employees with no standing to seek an injunction or declaration, their monetary claims necessarily predominate.

Especially since plaintiffs do not challenge a specific employment practice, any injunctive relief would be so abstract that it might not benefit even current employees. *See* Fed. R. Civ. P. 65(d)(1). No legitimate injunction, for example, could compel Wal-Mart to eliminate the alleged "vulnerability" to bias identified by Bielby. The request for billions of dollars in backpay for millions of individuals allegedly affected by ad hoc decisionmaking cannot be deemed "incidental" in any sense of the word, and thus this case could not be certified under the *Allison* standard.

Likewise, plaintiffs have not come close to showing that Wal-Mart acted "on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). Indeed, their sociologist, Bielby, admitted that such a showing was impossible. Pet. App. 195a.

While plaintiffs maintain that "Rule 23(b)(2) remains appropriate because of the equitable nature of back pay, and the common interest of class members in obtaining back pay" (Resp. Br. 59), a "common interest" exists only where all claimants would participate *pro rata* in the recovery. Advisory Committee Notes, 39 F.R.D. 69, 101 (1966) (citing *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944)); *see also* Chamber Br. 9. All class members here would not share and share alike in any backpay award. Pet. App. 254a. Individualized assessments of class members' backpay claims, as re-

quired by Title VII (42 U.S.C. § 2000e-5(g)(2)), destroy the cohesiveness essential to Rule 23(b)(2) certification. Chamber Br. 5–12.

* * *

Plaintiffs and the lower courts "embrace[d] Rule 23 too enthusiastically" (*Amchem*, 521 U.S. at 629 (alteration omitted)), stretching it beyond the breaking point. In their strained effort to convert a very small number of highly individualized grievances into a massive class action, they have wrenched the class action mechanism far beyond its intended purpose or accepted use, unmooring it from the constraints of Rule 23, the Rules Enabling Act, Title VII, and the Due Process Clause. This Court should firmly reject this attempt to remake the substantive and procedural law.

CONCLUSION

The certification order should be reversed.

Respectfully submitted.

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