

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 AMICI CURIAE PUBLIC JUSTICE, P.C.,
THE NATIONAL ASSOCIATION OF CONSUMER
ADVOCATES AND THE NATIONAL CONSUMERS
LEAGUE IN SUPPORT OF RESPONDENTS**

—◆—
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**STATEMENT OF
INTEREST OF *AMICI CURIAE*¹**

Amici curiae are national public interest and membership organizations representing the interests of workers and consumers, and particularly those of modest means. *Amici* advocate for the interests of workers and consumers who often cannot safeguard their rights without access to the class action device. *Amici* submit this brief in support of Respondents to emphasize that the arguments advanced by Petitioner Wal-Mart Stores, Inc. (“Wal-Mart”) and its *amici*, if accepted by this Court, would dramatically undermine the ability of workers and consumers to vindicate their rights.

Public Justice, P.C. (“Public Justice”), is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation, and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice prosecutes cases designed to advance consumers’ and victims’ rights, civil rights and civil liberties, occupational health and employees’ rights, the preservation and improvement of the civil justice system, and the

¹ No counsel for a party wrote this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Only Cuneo Gilbert & LaDuca, LLP of Washington, DC, and *amici*, or their counsel, made a monetary contribution to this brief’s preparation and submission. The parties have filed blanket consents to *amicus* briefs.

protection of the poor and the powerless. Public Justice regularly represents both workers and consumers in class actions, and its experience is that class actions often represent the only meaningful way that individuals can vindicate important legal rights. Accordingly, Public Justice has a significant interest in the issues before this Court.

The National Association of Consumer Advocates (“NACA”) is a nationwide non-profit association of more than 1,500 members who have represented hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers’ interests. NACA members provide counsel for consumers against banks, finance companies, car dealers and others who profit from taking unfair advantage of consumers. As an organization fully committed to promoting justice for consumers, NACA’s members and their clients are actively engaged in promoting a fair and open marketplace that is based on our nation’s fundamental sense of fairness, equity and honesty, and that forcefully protects the rights of consumers, especially those with modest incomes. As an organization representative of consumers throughout the nation, NACA is vitally interested in the resolution of the class action issues before the Court in this case.

The National Consumers League (“NCL”), founded in 1899, is the nation’s oldest consumer organization.

The mission of the NCL is to protect and promote social and economic justice for consumers and workers in the United States and abroad. The NCL is a non-profit advocacy group that provides government, businesses and other organizations with the individual's perspective on concerns including, *inter alia*, child labor, workers' rights and other workplace issues. On behalf of the general public, the NCL appears before legislatures, administrative agencies and the courts on a wide range of issues, and works for the enactment and effective enforcement of laws protecting workers. For more than 100 years, the NCL has vied to promote a fair marketplace for workers and consumers. This was the reason for the NCL's founding in 1899 and still guides it into its second century.

Amici are concerned that the Court's decision in this case could have far-reaching implications for the future of class action litigation generally and, in particular, could dramatically affect consumer and employment cases that are unlikely to be brought as individual actions due to a myriad of barriers to seeking individual relief. How this Court addresses and articulates the standards for class certification under Rule 23 of the Federal Rules of Civil Procedure may affect class actions in virtually every context, from discrimination and other employment issues to consumer protection and other statutorily-authorized litigation. The issues presented in this case thus are extremely important to the constituencies that *amici* represent.



INTRODUCTION AND SUMMARY OF ARGUMENT

In the context of this case, Wal-Mart and its *amici* have launched a broad attack on the class action device. They argue for an overly restrictive interpretation of Rule 23 requirements that would gut class actions and effectively strip many workers and consumers of their ability to resolve claims collectively – which, in many cases, determines whether those claims will be asserted at all. Wal-Mart’s *amici* decry class actions as bad for business, and they falsely portray class action litigators as blackmail artists who coerce defendants into lucrative settlements. In so doing, Wal-Mart’s *amici* studiously ignore the value of class actions to providing effective redress to individuals, to the efficient resolution of multiple claims, and to the enforcement of important statutory rights where government agencies fall short. They fail to acknowledge that the mere possibility of individual actions provides no meaningful substitute for class actions, because there are often many barriers to seeking individual relief. And they repeatedly rely on hyperbole and outright falsehoods to make their case against class actions in general. The Court should reject Wal-Mart’s and its *amici*’s attempt to raise the bar for prosecuting class actions to such a height that virtually no one will be able to hurdle it.

Pursuing aggregated claims through class action litigation allows comprehensive relief for widespread harms. As one district court observed in certifying a

class action against a payday lender: “This is precisely the kind of case that class actions were designed for, with small or statutory damages brought by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant.” *Van Jackson v. Check ‘N Go of Ill., Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000). Without a class action, a defendant “might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy.” *Id.* Indeed, as recently as 2005, and consistent with this Court’s jurisprudence, Congress made the judgment that “[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.” Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(1) (2005).

In many cases, aggregate litigation affords the *only* effective means to compensate injured individuals and to sanction businesses engaged in misconduct. The consequences of imposing draconian standards for class certification, therefore, would be widespread and potentially disastrous to both individuals and society at large. Because individuals by themselves often lack the knowledge, incentive, or effective means to seek a recovery, widespread injuries would likely go without redress if a class cannot be certified. In both the marketplace and the workplace,

for example, individuals often do not know about or understand the ways in which their rights are being violated. They may lack education or face language barriers. They may not be able to comprehend fully the complex provisions in dozens of consumer contracts they are forced to sign, or know about systemic pay disparities between comparable men and women. Even where individuals understand that their rights are being violated, the time and resources needed to pursue a legal claim, the complexity of the legal system, possible retaliation from an employer, the relatively small size of individual recoveries, and a lack of access to lawyers all make it extremely unlikely that most individuals will seek relief by way of individual actions.

Cash-strapped government agencies and public prosecutors do not have the capacity to take on enforcement actions against all illegal corporate conduct. “[I]n practice, public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations.” Deborah H. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 69 (Rand Inst. for Civil Justice 2000). For example, in 2009, the Consumer Sentinel Network, an online database of consumer complaints made to the Federal Trade Commission (“FTC”), Better Business Bureaus, and other agencies, received more than 1.3 million consumer complaints – over 720,000 of them fraud-related. FTC, *Consumer Sentinel Network Data Book for Jan. – Dec. 2009*, at 3 & 5 (Feb. 2010), <http://www.ftc.gov/sentinel/reports/>

sentinel-annualreports/sentinelcy2009.pdf. The FTC, with its staff of only 1,100 employees, *see* FTC, *Performance and Accountability Report*, at III (2009), <http://www.ftc.gov/opp/gpra/2009parreport.pdf>, lacks the resources to investigate and respond to this volume of complaints, and depends on supplemental private enforcement. *See* FTC's Thomas B. Leary Addresses Class Action Litigation Summit (2003), <http://www.ftc.gov/opa/2003/06/learyspeech.shtm> ("The Federal Trade Commission is a relatively small agency with broad competition and consumer protection responsibilities. . . . We depend on private litigation to supplement our efforts. . . ."); *see also* Hensler, *Class Action Dilemmas*, *supra*, at 69-70 (citing examples of regulatory agencies explicitly relying on private actions to augment their efforts).

Public agencies charged with enforcing rights in the workplace are similarly challenged. The Equal Employment Opportunity Commission ("EEOC") has been plagued for years by staff shortages and budget shortfalls. *See, e.g.*, Daniel Pulliam, *Proposed EEOC Budget Cut Draws Congressional Scrutiny* (Mar. 24, 2006), <http://www.govexec.com/dailyfed/0306/032406p1.htm>. Of the more than 99,000 charges filed by individuals in 2010 alone, for example, the EEOC brought only 250 enforcement actions – an all-time low compared to the preceding 13 years. *See* EEOC, *Charge Statistics FY 1997 through FY 2010*, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>; EEOC, *Litigation Statistics FY 1997 through FY*

2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

Wal-Mart's *amici* argue that class actions should be weakened because they are expensive for businesses to litigate. Of course, they fail to acknowledge the valuable, deterrent effect that class actions have on illegal corporate behavior. In trumpeting the myth that class actions provide the means to hold corporations hostage, these *amici* ignore empirical evidence demonstrating that the settlement rate for certified class actions is similar to that of individual lawsuits. See Hensler, *Class Action Dilemmas*, *supra*, at 9, 119. Furthermore, it is simply not true that class actions are only expensive (and therefore, only coercive) for defendants. The cost of litigating a class action is at least equally borne by plaintiffs and their counsel, which makes the device hardly conducive to "strike suits." Indeed, a cursory review of employment class action settlements reveals the enormous time and resources plaintiffs can expend in pursuing a class case. Mostly, the complaints about class actions from Wal-Mart's *amici* fail to acknowledge the documented cost to individuals, and the cost to society, if businesses are allowed to continue to engage in unlawful conduct with impunity.

Courts should be careful in certifying class actions. *Amici* do not contend otherwise. That care, however, is built into Rule 23's existing requirements. Rule 23 was never intended to resolve the merits of a case – it is a procedural device, and an important one, to be used to aggregate similar claims

of similarly-situated individuals. Rule 23 is routinely and correctly applied by district courts to allow aggregate litigation to proceed, and courts are well-equipped to determine when a class should be certified, to oversee class litigation, and to determine the fairness of class settlements.

At bottom, the arguments raised by Wal-Mart and its *amici*, if accepted by this Court, threaten to deny access to the judicial system to millions of individuals nationwide who have been injured by illegal corporate conduct. If the bar for class actions is placed too high for individuals to reach, then the enforcement of statutory protections will be stifled, leaving many workers and consumers without meaningful access to justice.



ARGUMENT

I. CLASS ACTIONS ARE AN IMPORTANT AND NECESSARY DEVICE TO VINDICATE THE RIGHTS OF THOSE WHO OTHERWISE WOULD BE DENIED ACCESS TO THE COURTS.

A. Class Actions Play an Important Role in Society.

This Court has repeatedly recognized that class actions are a valuable tool for at least three reasons: they expand access to the courts, they serve judicial efficiency, and they supplement inadequate government enforcement.

1. *Class Actions Play an Important Role in Expanding Access to the Courts for the Aggrieved.* In this case, against the world’s largest retailer, hourly class members are each seeking an annual back pay award averaging only \$1,100. (J.A. 475a.) But for the collective prosecution of these claims, it is unlikely that they would be prosecuted at all. (See Section I.A(2), below.) As this Court stated over thirty years ago and has emphasized several times since then, “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that class actions overcome problem of modest recoveries “by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. . . . [M]ost of the plaintiffs would have no realistic day in court if a class action were not available.”). The 1966 Advisory Committee notes to Rule 23 observe: “The interests of individuals in conducting separate lawsuits . . . may be theoretic rather than practical” because “the amounts at stake for individuals may be so small that separate suits would be impracticable.” Fed. R. Civ. P. 23 Advisory Committee notes, 1966 Amendment; 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 7 (Fed. Judicial Ctr. 1996), <http://ftp.resource.org/courts.gov/fjc/rule23.pdf> (“Without an aggregative procedure like the class action, the average recovery per class member or even the maximum recovery per class member seems unlikely to be enough to support individual actions in most, if not all, of the cases studied.”). The class action device, therefore, provides a practical means of redress where the cost of a lawsuit outweighs an individual recovery.

2. *Class Actions Are Uniquely Designed to Resolve Multiple Claims Efficiently and May Be Superior to Individual Actions.* Procedurally, the class action device concentrates litigation in a single forum, where it may be resolved more expeditiously and efficiently than could a series of suits. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974). “One great advantage of class action treatment,” as this Court has stated, “is the opportunity to save the enormous transaction costs of piecemeal litigation.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 (1999); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 & n.11 (1981) (“Class actions serve an important function in our system of civil justice” by addressing and disposing of common questions in a single lawsuit). Indeed, class actions may be superior to individual litigation insofar as they, unlike individual lawsuits, can afford systemic relief and court-ordered injunctions against future violations of class-wide rights. *See Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996)

(injunction providing class-wide relief requires a certified class).

3. *Class Actions Play an Important Role in the Enforcement of Federal and State Laws Where Government Agencies Fall Short.* “The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.” *Deposit Guar. Nat’l Bank*, 445 U.S. at 339. In the securities context, for example, this Court has emphasized that “private actions provide ‘a most effective weapon in the enforcement’ of the securities laws and are ‘a necessary supplement to [Securities and Exchange Commission] action.’” *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964)); see also *Ressler v. Jacobson*, 149 F.R.D. 651, 657 (M.D.Fla.1992) (“[A]ttorneys who bring class actions . . . are vital to the enforcement of the securities laws.”).

In the area of consumer protection, courts and public agencies themselves have repeatedly noted the scarce resources available for public enforcement of the law, and have espoused private enforcement as a necessary adjunct of public protection. See *Ting v. AT&T*, 182 F. Supp. 2d 902, 920 (N.D. Cal. 2002) (rejecting argument that Federal Communications Commission is forum before which class members can “effectively vindicate” right to recover damages from AT&T), *aff’d*, 319 F.3d 1126 (9th Cir. 2003); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 276 (Ill.

2006) (finding state attorney general’s authority to bring action insufficient, given office’s need to allocate “scarce resources to a variety of issues affecting consumers”); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 950 (Or. Ct. App. 2007) (noting “possibility of state action cannot reliably serve as a substitute for private actions,” given attorney general’s contention that amount of consumer fraud in state “far exceeds” government’s ability to investigate and prosecute it); *Kwikset Corp. v. Super. Ct.*, ___ Cal. Rptr. 3d ___, 51 Cal. 4th 310, 2011 WL 240278, at *11 (Cal. 2011) (“That public prosecutors can . . . sue is of limited solace, given the significant role we have recognized private consumer enforcement plays for many categories of unfair business practices.”).

Similarly, in the employment context, private enforcement is often critical to supplement the limited resources of public agencies. *See, e.g., Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 362-64 (1977) (quoting House Report acknowledging the EEOC’s “burgeoning workload,” “insufficient funds and a shortage of staff”); *Gentry v. Super. Ct.*, 165 P.3d 556, 569 (Cal. 2007) (rejecting argument that availability of enforcement by state labor commissioner is “adequate substitute” for pursuing class claims). The EEOC litigates less than 1% of all charges it receives each year. *See EEOC, Charge Statistics FY 1997 through FY 2010, supra*; *EEOC, Litigation Statistics FY 1997 through FY 2010, supra*; Linda G. Morra, U.S. Gen. Accounting Office, GAO/T-HRD-93-30, *EEOC: An Overview* 12 (1993), <http://archive.gao.gov/d45t15/149741.pdf>. In

2010, the EEOC filed a total of 250 enforcement lawsuits, with only 8% of them considered “systemic” lawsuits. EEOC, *Fiscal Year 2010 Performance and Accountability Report*, Performance Results (2010), http://www.eeoc.gov/eeoc/plan/2010par_performance.cfm. Moreover, the agency devotes far more resources to the processing of charges, than to its litigation program. In 2008, for example, the EEOC spent on litigation just 21% of its budget for private sector enforcement – where it focuses the bulk of its efforts – compared to the budget allocation of 60% on administrative charge processing. EEOC, *FY 2010 Congressional Budget Justification* 12 (2010), <http://www.eeoc.gov/eeoc/plan/upload/2010budget.pdf>. Its 2010 budget request reflected either a desire or need to allocate even less to litigation, and more to charge processing. *Id.* (outlining a budget dedicating 19% of private sector enforcement money to litigation, and 64% to the processing of charges).

B. Due to Substantial Barriers to Seeking Individual Relief, Class Actions Are Often the Only Way to Redress Wrongs and Hold Businesses Accountable.

When businesses have engaged in wrongful conduct that inflicts modest damages on individual consumers or workers, a class action may be the only way to obtain meaningful relief for scores of individuals, or to hold these businesses accountable.

1. *Individuals Often Are Not Aware That They Have an Individual Claim.* Class actions “enable even the unaware to be joined in lawsuits instituted on their behalf.” Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 Penn. St. L. Rev. 1, 12 (2005). In the marketplace, consumers may find themselves unwittingly duped by schemes that cheat them out of small amounts of money that, in the aggregate, generate enormous unlawful sums for businesses. Indeed, the smaller the individual amount at stake, the “less likely [the harm is] to be recognized by those affected.” Hensler, *Class Action Dilemmas*, *supra*, at 68. As the New Jersey Supreme Court observed, “without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged.” *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006); *accord Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 747 (Wis. Ct. App. 2007).

The Washington Supreme Court made a similar observation in ruling unconscionable a consumer contract that banned class actions. In that case, a class of consumers alleged that a telecommunications company had overcharged them each between \$1 and \$45 per month in hidden and illegal charges. The Court recognized that a class action “is often the only meaningful type of redress available for small but widespread injuries and without it, “many consumers may not even realize that they have a claim.” *Scott v.*

Cingular Wireless, 161 P.3d 1000, 1007 (Wash. 2007); see also *Kinkel*, 857 N.E.2d at 268 (invalidating contract that prohibited class actions, and observing that “[t]he typical consumer may feel that such a charge is unfair, but only with the aid of an attorney will the consumer be aware that he or she may have a claim that is supported by law, and only with the aid of an attorney will such a consumer be able to make the merits of such a claim apparent in arbitration or litigation”); *Henry v. Cash Today, Inc.*, 199 F.R.D. 566, 573 (S.D. Tex. 2000) (finding class resolution superior because of “inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually”).

In the workplace, workers are often unaware of their employers’ unlawful acts or do not understand their rights. *Gentry*, 165 P.3d at 566. Standing alone, they may not be able to perceive a pattern or practice of discrimination. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (noting that companywide statistics may be the only way “to uncover clandestine and covert discrimination by the employer or union involved”). Low-wage workers, in particular, may lack higher education and sophistication and may have limited comprehension of English. These circumstances all act as barriers that prevent workers from understanding their rights are being violated and prevent them from pursuing relief individually. See *Wang v. Chinese Daily News, Inc.*, 231 F.R.D. 602, 614 (C.D. Cal. 2005) (in certifying Rule 23

class, noting the risks faced by non-English speaking immigrant class members if they had to proceed individually).

2. *Individuals Often Lack the Resources to Pursue Individual Claims.* Even if individuals are aware that their rights are being violated, they often lack the means to do anything about it. The legal system is challenging and time-consuming to navigate even for the well-educated or well-resourced. Low-income individuals in particular may have demands on their lives – rigid work schedules, burdensome overtime or second jobs, lack of childcare, or debts – that act as real-world barriers to pursuing litigation, particularly for small claims. *Reuter v. Davis*, No. 502001CA0011164, 2006 WL 3743016, at *4 (Fla. Cir. Ct. Dec. 12, 2006) (“[P]arents working from payday to payday with babysitting, transportation, and employment issues, do not necessarily think they can afford attorneys or, if they do, have difficulty keeping appointments.”); see *Ansoumana v. Gristede’s Operating Corp.*, 201 F.R.D. 81, 86 (S.D.N.Y. 2001) (due to transient nature of work, employees may lack the stability necessary to pursue claims). Thus, not surprisingly, of the nearly 25 million adults affected by consumer fraud in one year, only 8.4 percent complained to a federal, state, or local agency or Better Business Bureau, and only 2.4 percent consulted a lawyer or other professional. See FTC, *Consumer Fraud in the United States* ES-6, 80-81 (Aug. 2004), <http://www.ftc.gov/reports/consumerfraud/040805confraudrpt.pdf>. Consumers subjected to questionable practices such

as payday lending, mortgage scams, illegal billing and fee schemes, and abusive debt collection, to name but a few, have been able to vindicate their rights and force businesses to cease unlawful conduct only because they were able to aggregate their claims and pursue them collectively.

3. *Individuals May Fear Retaliation from Employers if They Pursue Individual Relief.* Workers, especially those who live paycheck to paycheck in an economy with persistent high unemployment, are understandably hesitant to challenge their employers when the result might be termination. *See, e.g., Bell v. Farmers Ins. Exch.*, 9 Cal. Rptr. 3d 544, 570 (Cal. Ct. App. 2004) (“[A] lawsuit means challenging an employer in a context that may be perceived as jeopardizing job security and prospects for promotion.”). Workers depend on their employment for their livelihood and thus legitimately fear that, if they were to sue individually, their employers would retaliate and wreak severe economic consequences on their lives. *See Does I v. The GAP Inc.*, No. CV-01-0031, 2002 WL 1000073, at *8 (D. N. Mar. I. May 10, 2002); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001). As this Court has stated, employers, “by virtue of the employment relationship, may exercise intense leverage.” *Nat’l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978). “Not only can the employer fire the employee, but job assignments can be switched, hours can be adjusted, wage and salary increases can be held up, and other more subtle forms of influence exerted.” *Id.*; *see also* David Weil &

Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 *Comp. Lab. L. & Pol'y J.* 59, 83 (Fall 2005) (discussing studies suggesting that, despite explicit retaliation protections in the law, “being fired is widely perceived to be a consequence of exercising certain workplace rights”).

Low-wage workers, who constantly face financial uncertainty and work in low-skilled jobs where employers consider them expendable, are especially vulnerable to retaliation. See Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009), http://www.unprotectedworkers.org/index.php/broken_laws/index (43% of low wage workers surveyed who complained about violations of workplace standards were retaliated against, including by being fired, suspended or threatened with cuts in their hours or pay). Undocumented workers are even more reluctant to bring legal action, for fear of not just losing their jobs, but also criminal sanction and deportation. See *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002); *Ansoumana*, 201 F.R.D. at 86; Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulations*, 105 *Colum. L. Rev.* 319, 348 (Mar. 2005) (Undocumented workers’ “fear of deportation exacerbates the usual fear of reprisals that silences many low-wage employees.”). These individuals are particularly unlikely to file individual lawsuits. Class actions help ensure that workers can nevertheless have their rights protected.

4. *Individuals Often Lack Financial Incentive to Pursue Individual Claims.* Examples abound of businesses that profit when they engage in illegal consumer practices by stealing a little bit from a lot of people.² See *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1108-09 (Cal. 2005) (“damages in consumer cases are often small and because “[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit.’”). Certainly the average consumer who loses \$1 – or even \$100 – from an unscrupulous business practice, no matter the windfall to the business, is unlikely to track down and consult a lawyer and pursue individual litigation. Without class certification, these injuries would go without redress and the businesses never held accountable. See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”); *In re Prudential Ins. Co. of Am. Sales*

² See, e.g., *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (class members’ claims for misrepresentation of credit-card rewards program implicated less than 5% of each cardholder’s credit card balance); *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 296 (E.D. Pa. 2007) (class claims for overpayments on title insurance worth less than \$200 per claim); *Dist. Cablevision Ltd. P’Ship v. Bassin*, 828 A.2d 714, 719 (D.C. 2003) (class claims for unlawful \$5 cable service late fee); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 572 (Fla. Dist. Ct. App. 1999) (wrongful \$4.50 charge on long-distance calls); *Weinberg v. Hertz Corp.*, 499 N.Y.S.2d 693, 695 (N.Y. App. Div. 1986) (average \$31 car-rental overcharge), *aff’d*, 509 N.E.2d 347 (N.Y. 1987).

Litig., 148 F.3d 283, 316 (3d Cir. 1998) (given the sheer volume of claims and the modest size of individual claims, a class action presented the “only rational avenue of redress for many class members”); *Scott*, 161 P.3d at 1006 (“Class actions are vital where the damage to any individual consumer is nominal”); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994) (“Given the relatively small amount recoverable by each potential litigant, it is unlikely that, absent the class action mechanism, any one individual would pursue his claim, or even be able to retain an attorney willing to bring the action.”); *Muhammad*, 912 A.2d at 100 (noting that “[i]n most cases that involve a small amount of damages, ‘rational’ consumers may decline to pursue individual consumer-fraud lawsuits because it may not be worth the time spent prosecuting the suit, even if competent counsel were willing to take the case”).

In the workplace, too, individuals cheated out of relatively small amounts are unlikely to be “willing to file individual lawsuits and incur the expenses of litigation for such a small award.” *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183-84 (W.D.N.Y. 2005). In wage and hour cases of low-wage workers, for example, the individual claims “tend to involve relatively small dollar figures, prohibitively small for a private attorney.”³ Juliet M. Brodie, *Post-Welfare Lawyering:*

³ Although wage and hour claims under federal law may proceed collectively by way of an “opt-in” procedure, *see* 29 U.S.C. § 216(b), state wage and hour claims have been certified

(Continued on following page)

Clinical Education and a New Poverty Law Agenda, 20 Wash. U. J.L. & Pol’y 201, 248-49 (2006); *see also Scholtisek v. The Eldre Corp.*, 229 F.R.D. 381, 394 (W.D.N.Y. 2005) (certifying a state law wage and hour class under Rule 23 and noting that “individual class members’ claims are probably relatively small, [and therefore] those persons could lack sufficient incentive to bring individual suits”).

Aggregate litigation levels the playing field by enabling plaintiffs “to exploit the ‘economies of scale’ the defendant already naturally enjoys” due to the fact that it can make a large investment in issues that are likely to arise in multiple cases, and then continue to reap the fruits from such an investment in each individual case. Bruce L. Hay & David Rosenberg, “*Sweetheart*” and “*Blackmail*” Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377, 1383 (2000); *see also Wang*, 231 F.R.D. at 614 (finding a class action “superior” to individual actions, in part because class members “would face an enormous [im]balance of resources if they were to take on the largest Chinese language newspaper in North America on an individual basis”). Because class counsel “can spread their investment over all of the claims – just as the defendant does – it becomes possible to make investments in the litigation that the plaintiffs could not make if the claims were

for class treatment under Rule 23. *See, e.g., Ervin v. OS Rest. Servs., Inc.*, No. 09-3029, 2011 WL 135708, at *1 (7th Cir. Jan. 18, 2011).

prosecuted separately.” 75 Notre Dame L. Rev. at 1380-81. Class actions thus not only allow individuals to match the resources of corporate defendants, they also make the necessary investment of time and resources into a lawsuit an economically rational choice.

5. *Individuals Often Are Unable to Attract Counsel Where Their Individual Economic Harms Are Dwarfed by the Investment Necessary to Prosecute Cases.* The inability to attract competent counsel presents yet another substantial barrier to pursuing individual claims. Even if a plaintiff wants to pursue a case, attorneys are unlikely to be motivated to take the case on an individual basis if the cost of litigation outweighs the potential recovery. As the Court noted in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974): “A critical fact . . . is that petitioner’s individual stake is only \$70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner’s suit proceed as a class action or not at all.” The claims by Wal-Mart’s *amici* about the havoc wreaked upon businesses by class actions sidesteps this reality altogether. In their world, if a claim is not big enough to be pursued individually, it should not be pursued at all. In their world, businesses would be allowed to act with impunity where the economics make it impossible for injured individuals to find attorneys to prosecute modest-value cases on an individual basis.

When individual losses are small relative to the cost of litigation, it makes little economic sense for a

competent attorney to take the case unless she can challenge the harm in the aggregate, on behalf of a class of injured persons. As one trial court explained:

It is undisputed that the lawyers who represented the plaintiffs in these cases would not have taken them if the only claim they could have pursued was the claim of the individual plaintiff. The reasons for this are not hard to see. The actual damages sought by the named plaintiffs are relatively insubstantial. . . . Consequently, it would not make economic sense for an attorney to agree to represent any of the plaintiffs in these cases in exchange for 33 1/3% or even a greater percentage of the individual's recovery. . . . Simply put, the potential reward would be insufficient to motivate private counsel to assume the risks of prosecuting the case just for an individual on a contingency basis. While retaining counsel on an hourly basis is possible, in view of the small amounts involved, it would not make economic sense for an individual to retain an attorney to handle one of these cases on an hourly basis and it is hard to see how any lawyer could advise a client to do so. The net result is that cases such as the ones listed above will not be prosecuted even if meritorious.

Ting, 182 F. Supp. 2d at 918.

Similarly, in a case challenging payday loans, another court concluded that “[t]he chance that [plaintiff] could have obtained competent counsel absent the possibility of class action status or successfully

recognized a potential claim that she could effectively pursue without benefit of counsel is *effectively zero*.” *Reuter*, 2006 WL 3743016, at *5 (emphasis added). The court emphasized that among the 66,000 or more customers who obtained payday loans with usurious annual rates exceeding 45 percent, “none has brought an individual claim.” *Id.* at *4. *See also Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 18, 21-22 (Mo. 2010) (chances of finding attorney absent class device were “virtually nil” given the “small damages at issue,” “complicated nature of the case,” and “likelihood of a heavily defended defendant”); *Kristian v. Comcast Corp.*, 446 F.3d 25, 58 (1st Cir. 2006) (expert affidavits demonstrated that “without some form of class mechanism – be it class action or class arbitration – a consumer antitrust plaintiff will not sue at all,” leading the court to conclude that it would be “completely unrealistic and impractical” for an individual plaintiff to retain expert witnesses, without whom a plaintiff’s case would be “extremely compromised, and effectively precluded”).

The outcome is no better in the context of workplace claims. In *Jarvaise v. Rand Corp.*, 212 F.R.D. 1 (D.D.C. 2002), for example, the district court certified a Rule 23 class of 260 female employees alleging discrimination. In finding certification appropriate, the court found that “a significant number of individuals [would be] deprived of their day in court because they are otherwise unable to afford independent representation.” *Id.* at 4; *see also Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (finding cost of

individual litigation “prohibitive”). The same is true for the relatively modest claims of the victims of Wal-Mart’s alleged employment discrimination: they are individually too small for an attorney to justify mounting expensive and time-consuming litigation.

The availability of court-awarded fees does not resolve the problem. Attorneys are unlikely to take cases where fees and costs are likely to dominate the recovery because there would be a substantial risk that they would not be fully compensated under fee-shifting statutes for their efforts in prosecuting the claim. See *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (“results obtained” factor an important consideration in determining attorney-fee award); *Kristian*, 446 F.3d at 59 n.21 (“In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney’s fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court.”). As the New Jersey Supreme Court observed, the “availability of attorney’s fees is illusory if it is unlikely that counsel would be willing to undertake the representation.” *Muhammad*, 912 A.2d at 100; see also *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1289 (D. Ariz. 2006) (finding “no indication” that “‘attorney fees are an adequate substitute’” for the class action mechanism); *Discover Bank*, 113 P.3d at 1109-10 (“[N]or are we persuaded by the rationale stated by some courts that the potential availability of attorney fees to the prevailing party in arbitration

or litigation ameliorates the problem posed by such class action [bans.]); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 764-65 (Mass. 2009) (availability of attorney’s fees “not sufficient to ensure that a consumer or business with a small-value claim will be able to find an attorney willing to take the case absent the ability to aggregate claims”).

In sum, if the ability to prosecute multiple claims together in a class action is overly restricted, many consumers and workers would be effectively left with no remedy – and corporations would be effectively immunized from liability for widespread violations of law.

II. AMICI’S HYPERBOLIC ATTACKS ON CLASS ACTIONS ARE WITHOUT MERIT.

A. A Robust Marketplace Needs Lawful Corporate Actors.

Several of Wal-Mart’s *amici* contend that class actions hurt innovative businesses. (See, e.g., Pac. Legal Found. Br. 1 (class actions “stifle entrepreneurialism and job creation”); Intel Corp. Br. 8-9 (“a class action threatens to destroy a defendant’s reputation completely out of proportion to the merits of the claims”).) In fact, the opposite is true. Class actions are a proven and effective means to encourage lawful corporate conduct. And, when one business cheats the system, it gains an unfair (and unlawful) financial advantage in the marketplace which leads to a race to the bottom in an effort for other businesses

to compete. *Amici's* insistence that allowing the lower court's decision in this case to stand would have a "deterious impact on the national economy" (see *Global Automakers' Br. 7*) is a gross distortion of reality.

Class actions "were designed not only to compensate victimized members of groups . . . , but also to deter violation of the law, especially when small individual claims are involved." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4:36, at 314 (4th ed. 2002); see also *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 546 (N.D. Cal. 2005) (same). The deterrent effect of class actions on illegal corporate behavior is proven, and significant. See, e.g., Hensler, *Class Action Dilemmas, supra*, at 9, 119. As one court recognized in addressing the legality of a consumer contract that prohibited class actions, the inability to pursue a class action potentially "gives defendant a virtual license to commit, with impunity, millions of dollars' worth of small-scale fraud." *Vasquez-Lopez*, 152 P.3d at 951; see also *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98 (Mo. Ct. App. 2008) ("Individualizing each claim absolutely and completely insulates and immunizes [the company] . . . from scrutiny and accountability for its business practices and 'also serves as a disincentive for [the company] to avoid the type of conduct that might lead to class action litigation in the first place.'"); *Coady*, 729 N.W.2d at 747 ("the prospect of class-wide relief 'ordinarily has some deterrent effect on a manufacturer or service provider'"). The inability to bring a class action not only deprives individuals of what may be their only viable

means of relief, it also eliminates incentives for businesses to comply with statutory protections for consumers and workers. Thus, the rhetoric of Wal-Mart's *amici* that class actions are not good for the economy ignores the real value that enforcement of statutory rights provides to our society.

Empirical research confirms that class action lawsuits shape corporate conduct. A study conducted by the Rand Institute for Civil Justice, for example, examined several consumer class action lawsuits and settlements involving small individual losses. *See Hensler, Class Action Dilemmas, supra*, at 527-29. Corporate representatives interviewed by researchers admitted that class actions had “played a regulatory role by causing them to review their financial and employment practices.” *Id.* at 9, 119. Moreover, “some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.” *Id.* These accounts corresponded with changes in business practices. In all six of the consumer cases studied, the litigation was associated with changes in practice, and in four of the six, “the evidence strongly suggest[ed] that the litigation, directly or indirectly, produced the change in practice.” *Id.* at 431.

Class actions thus can operate as an effective sentry over corporate misconduct. This conclusion is grounded in both economics and common sense. Class action litigation can induce compliance with the law in a way that individual litigation often cannot: a profit-seeking entity would rather pay small sums to

the few that can navigate the judicial system on their own than stop completely its unlawful practice that nets millions of dollars a year. As the California Supreme Court correctly observed in considering a class action ban in an employment agreement:

While employees may succeed under favorable circumstances in recovering unpaid overtime through a lawsuit or a wage claim filed with the Labor Commissioner, a class action may still be justified if these alternatives offer no more than the prospect of “random and fragmentary enforcement” of the employer’s legal obligation to pay overtime. . . . In other words, absent effective enforcement, the employer’s cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime.

Gentry, 165 P.3d at 567 (citations omitted). If it were not for the class action device, companies would often face little or no downside to violating the law. *See Carnegie*, 376 F.3d at 661.

B. The Prevalence of Blackmail Settlements Is a Fiction.

Wal-Mart’s *amici* suggest that class actions help greedy attorneys and plaintiffs assert meritless claims to hold businesses hostage for high payouts. (*See, e.g.*, DRI Br. 20 (class actions force corporations to settle meritless claims); Global Automakers Br. 3 (class actions are a tool for plaintiffs to “sell the rights of

absent class members for private gain”); Intel Br. 1 (“class certification almost always coerces an immediate settlement”).) These false assertions ignore the reality that class action settle no more frequently than individual litigation, and that class settlements are often won only after hard-fought, lengthy and expensive lawyering on *both* sides. Indeed, if plaintiffs’ class action lawyers were in the business of blackmail, they picked phenomenally risky, arduous, and expensive material with which to work. For example, to reach the certification decision now under review by this Court, plaintiffs and their counsel litigated for nearly nine years, *see Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 577 n.2 (9th Cir. 2010), participated in over 200 depositions, reviewed more than a million pages of documents, and prepared and filed 120 declarations from class representatives and class members. (Respondent’s Br. at 6, 10-11.)

The assertion that class actions unfairly coerce businesses into unjustified settlements is flatly contradicted by empirical evidence. In a 1996 study of class action litigation in four federal district courts, and in later research as well, the Federal Judicial Center (“FJC”) found that class and nonclass settlement rates were comparable, that class actions could not successfully be deployed as strike suits because defendants generally had a reasonably prompt chance to test the merits, and that there was no objective evidence that settlements were coerced even by class certification decisions. *See Willging et al., Empirical Study, supra*, at 7-10, 32-34, 60-62, 89-90; *see also*

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 645-50 (2006). The FJC noted that defendants typically sought and, in at least a third of the cases, obtained judicial rulings on motions terminating the “litigation *without a settlement, coerced or otherwise.*” Willging et al., *Empirical Study, supra*, at 34 (emphasis added). More than two-thirds of the certified class actions examined had rulings on a motion to dismiss, motion for summary judgment, or both, leading the FJC to conclude that such dispositive motions coupled with active case management “greatly diminishes the likelihood that the certification decision itself, as opposed to the merits of the underlying claims, coerced settlements with any frequency.” Willging et al., *Empirical Study, supra*, at 61. And, in a later study in 2005, almost a quarter of cases certified for trial did not result in an approved class-wide settlement. 81 Notre Dame L. Rev. at 647. The settlement rate for certified class actions was similar to that of conventional lawsuits, with approximately 70 percent of cases filed in federal court ending in pretrial settlement. Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U.L. Rev. 1357, 1401-02 (Oct. 2003); Robert G. Bone & David S. Evans, *Class Certification and Substantive Merits*, 51 Duke L.J. 1251, 1285 n.129 (Feb. 2002).

Furthermore, even a cursory review of recent employment class action settlements demonstrates the difficulty and tremendous investment in time and

out-of-pocket costs in litigating such cases. In *Velez v. Novartis Pharm. Corp.*, No. 04CIV09194 (CM), 2010 WL 4877852 (S.D.N.Y. Nov. 30, 2010), for example, a settlement of a gender discrimination class action described by the court as “excellent” and involving over 6,000 employees was reached only after seven years of litigation and a seven-week jury trial. *Id.* at *1, 28. In approving the settlement, the court noted that “[t]he road to this Settlement was long, arduous, risky and expensive.” *Id.* at *28. In that case, plaintiffs’ counsel worked nearly 40,000 hours and spent over \$1.8 million in out-of-pocket costs. Moreover, as the court noted, the testifying witnesses “exposed themselves to professional risk and emotional upheaval, overcoming fears of possible scorn of friends and colleagues and, in some cases, the displeasure of family members.” *Id.* at *3-4.

Similarly, in *Wright v. Stern*, 553 F. Supp. 2d 337 (S.D.N.Y. 2008), the plaintiffs, alleging race-based discrimination and retaliation, achieved a settlement for a class of 3500 workers only after nearly seven years of litigation, the exchange of thousands of documents, scores of depositions, multiple expert witnesses on both sides, a summary judgment motion, and \$1 million in out-of-pocket costs expended by plaintiffs’ counsel. *Id.* at 338-41 The court approved the settlement which included “extensive and concrete equitable relief” involving the formation of an advisory committee and substantial training for employees and managers, and the payment of over \$11 million to class members. *Id.* at 339-42. The court also awarded

attorneys' fees of \$8 million which, the court noted, *excluded* approximately 2,000 hours expended by plaintiffs' counsel during the settlement process, for which they had agreed not to seek fees. *Id.* at 342. *See also Davis v. Eastman Kodak Co.*, ___ F. Supp. 2d ___, 2010 WL 5290067 (W.D.N.Y. Dec. 17, 2010) (settlement of race discrimination case, with fund of over \$21 million to over 3,000 employees and fees for over 36,000 hours of work that plaintiffs' counsel had discounted by 34 percent).

Amici supporting Wal-Mart studiously avoid any acknowledgement of the real and daunting costs to plaintiffs and their counsel of mounting a class challenge to corporate conduct. They insist that “the actual costs of litigating thousands of claims simultaneously . . . exert pressure on defendants to settle” (Intel Br. 8), but fail to acknowledge the corresponding – and indeed greater – risk to plaintiffs and their counsel who do not have a deep-pocketed corporation available to pay the costs of dozens of depositions or multiple expert witnesses. Moreover, for all of *amici*'s inflamed rhetoric, they never explain how raising the bar for class certification will “curb” the supposed blackmail, other than to force plaintiffs with class claims – meritorious or not – not to bring them at all.

Finally, the oft-repeated “blackmail settlement” moniker also does a disservice to the trial and appellate courts that regularly and rigorously review class settlements to confirm that they are fair and reasonable, as required by Rule 23. It is the settlement of individual claims that escapes any court's watch –

not the resolution of the claims of absent class members which requires court approval. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 103, 117 (2nd Cir. 2005) (reviewing trial court approval of “the largest antitrust settlement in history” and concluding that “[t]here could not be any better evidence of procedural integrity than the aggressive litigation spanning nearly a decade and the impassioned settlement negotiations that produced an agreement on the brink of trial”); *Davis*, 2010 WL 5290067, at *1 (thoroughly reviewing and approving settlement of a class action that was “unusually complex and litigated aggressively but professionally by both sides”). In other words, the Federal Rules and Rule 23 itself contain mechanisms to identify and stop abuse, and require far more judicial scrutiny of class actions than of individual actions.

Rule 23 does not permit plaintiffs and their counsel to breeze into court with a mere suggestion of unlawful conduct and obtain a “blackmail” settlement. To the contrary, class certification is by no means certain, and class litigation is by no measure inexpensive. District courts routinely and faithfully apply Rule 23 to determine when a class should be certified, oversee class litigation and determine the fairness of class settlements. This Court should reject Wal-Mart’s and its *amici*’s attacks on class actions and their attempt to raise the bar for certifying and pursuing class actions.



CONCLUSION

The class certification order should be affirmed.

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