

Supreme Court of the United States.

WAL-MART STORES, INC., Petitioner,

v.

Betty DUKES, et al., Respondents.

No. 10-277.

January 20, 2011.

On Writ Of Certiorari To The United States Court Of
Appeals For The Ninth Circuit

Brief for Petitioner

[Theodore B. Olson](#)

[Mark A. Perry](#)

[Amir C. Tayrani](#)

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

[Theodore J. Boutrous, Jr.](#)

Counsel of Record

[Rachel S. Brass](#)

Theane Evangelis Kapur
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the class certification ordered under [Federal Rule of Civil Procedure 23\(b\)\(2\)](#) was consistent with [Rule 23\(a\)](#).

2. Whether claims for monetary relief can be certified under [Federal Rule of Civil Procedure 23\(b\)\(2\)](#) and, if so, under what circumstances.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption to the petition for a writ of certiorari contains the names of all parties to the proceedings below.

The corporate disclosure statement included in the petition remains accurate.

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INTRODUCTION

The Ninth Circuit's decision allowing this class action to proceed contradicts [Federal Rule of Civil Procedure 23](#), departs from this Court's precedent, and endorses an approach that would abrogate the substantive and procedural rights of both Wal-Mart and absent class members.

The certification order is flatly inconsistent with [Rule 23\(a\)](#)'s prerequisites. The class members - potentially millions of women supervised by tens of thousands of different managers and employed in thousands of different stores throughout the country - assert highly individualized, fact-intensive claims for monetary relief that are subject to individualized statutory defenses. The named plaintiffs' claims cannot conceivably be typical of the claims of the strangers they seek to represent. These intractable problems are compounded by a virtually boundless class definition that produces an across-the-board class pervaded by conflicts among its members. This kaleidoscope of claims, defenses, issues, locales, events, and individuals makes it impossible for the named plaintiffs to be adequate representatives of the absent class members.

Nor can the certification order be reconciled with the requirements of [Rule 23\(b\)\(2\)](#), which is limited by its terms to claims for "injunctive relief or corresponding declaratory relief." Plaintiffs seek billions of dollars in individual monetary relief, yet seek to evade the ad-

ditional procedures required for fair adjudication of monetary claims, including notice and opt-out rights for absent class members.

The certification order is harmful to the rights of everyone involved. It distorts basic principles of class-action and anti-discrimination law, eviscerates fundamental procedural protections for class-action defendants, and allows three class representatives to extinguish the rights of millions of absent class members without even telling them about it. The decision below should be reversed, and the class decertified.

OPINIONS BELOW

The Ninth Circuit's en banc opinion (Pet. App. 1a-161a) is published at [603 F.3d 571](#). Superseded panel opinions are reported at [509 F.3d 1168](#) and [474 F.3d 1214](#). The district court's certification order (Pet. App. 162a-283a) is published at [222 F.R.D. 137](#). A related evidentiary order is published at [222 F.R.D. 189](#).

JURISDICTION

The Ninth Circuit's judgment was entered on April 26, 2010. Justice Kennedy extended the time for filing the petition for a writ of certiorari to August 25, 2010. No. 10A19. The petition was filed on that date and granted on December 6, 2010. This Court has jurisdiction under [28 U.S.C. § 1254\(1\)](#).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Civil Rights Act of 1964 (as amended), the Rules Enabling Act, and [Rule 23](#) are reproduced in this brief's appendix.

STATEMENT

The district court certified under [Rule 23\(b\)\(2\)](#) a class of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” Pet. App. 283a. The Ninth Circuit, in a 6-5 en banc decision, affirmed in substantial part. *Id.* at 99a-102a.

1. Wal-Mart is the Nation’s largest private employer. At the time of class certification (in 2004), Wal-Mart’s U.S. retail operations comprised 7 divisions, 41 regions, 400 districts, 3,400 stores, and more than 1,000,000 employees. Pet. App. 163a; *see also id.* at 114a (Ikuta, J., dissenting). Each store employed 80 to 500 people, with hourly employees assigned to 53 departments in 170 different job classifications. *Ibid.*

Wal-Mart’s company-wide policy, then and now, expressly bars discrimination based on sex, and Wal-Mart has consistently promulgated and enforced equal opportunity policies to foster diversity, ensure fair treatment, and prohibit unlawful discrimination. Pet. App. 195a; J.A. 1576a-1596a. As the district court recognized, “Wal-Mart has earned national diversity awards and its executives discuss diversity and include it in company handbooks and trainings. The company has diversity goals, performance assessments, and penalties for EEO violations.” Pet. App. 195a (citations omitted).

When the complaint was filed in 2001, individual store managers had “substantial discretion in making salary decisions for hourly employees in their respective stores” and “promotion decisions for in-store employees.” Pet. App. 177a, 180a. Wal-Mart’s policies cabined that discretion by setting salary ranges and establishing objective standards for its local managers to apply when making these decisions. J.A. 1468a-1469a, 1498a-1511a, 1609a, 1616a; D.C. Dkt. 270-508.

*4 2. Only three of the named plaintiffs remain members of the certified class. *See* Pet. App. 115a (Ikuta, J., dissenting). They worked at different stores, at different times, in different positions, for different managers. They were promoted to (and demoted from) different jobs, disciplined for different offenses, paid different amounts for performing different jobs, applied for different management training opportunities (or not), and kept working (or not) for different reasons. J.A. 606a-624a, 743a-749a, 997a-1006a. Their testimony illustrates their differing experiences:

a. *Edith Arana* worked at the Duarte, California store from 1995 to 2001. J.A. 606a. She worked in a number of different positions and was promoted and received numerous raises. *Id.* at 606a-618a. In 2000, she approached the store manager regarding management training; on one occasion the manager “did not reply”

but “simply shrugged his shoulders and walked away,” and on another the manager “did not respond and brushed [her] off.” *Id.* at 614a. Ms. Arana concluded that the manager “was denying [her] the opportunity to advance with the Company because [she] was a woman.” *Id.* at 614a-615a. She initiated internal complaint procedures, after which a (female) supervisor advised Ms. Arana to “apply directly to the District Manager” if she had concerns with her store manager. *Id.* at 616a-617a. Ms. Arana, however, “decided against this,” and she never again applied for management training. *Id.* at 617a-623a. The following year, she was fired for failure to comply with Wal-Mart’s timekeeping policies. *Id.* at 623a; C.A. App. 337-340.

b. *Betty Dukes* was hired as a cashier at the Pittsburg, California store in 1994. J.A. 743a-745a. She sought and received a promotion to customer *5 service manager. *Id.* at 745a-748a. Ms. Dukes’s “eligibility for [further] promotion was limited,” however, by a series of disciplinary violations, which led to her demotion to cashier and then (after an unspecified injury) to greeter. *Id.* at 745a-746a. She does not deny violating company policy, but maintains that the disciplinary actions were “retaliat[ion]” (by a female supervisor) for invoking internal complaint procedures and asserts that she is “not aware of any male employees who have been disciplined for similar transactions.” *Ibid.* She also claims that two male greeters in the Pittsburg store are paid at a higher rate than she is. *Id.* at 748a-749a.

c. *Christine Kwapnoski* has “spent most of [her] adult life” working for Sam’s Club - a division of Wal-Mart - in Missouri and California. J.A. 997a. She worked in many positions and “received annual raises and merit raises upon occasion,” as well as an eventual promotion to a supervisory position. *Id.* at 999a, 1004a-1005a. She claims that a male manager “yelled at [her] frequent [ly]” and “scream[ed] at other female employees, but seldom did he scream at men.” *Id.* at 1000a-1001a. Allegedly, the same manager later “told her to ‘doll up,’ to wear some makeup, and to dress a little better.” *Id.* at 1003a.

3. The named plaintiffs seek “injunctive and declaratory relief, back pay, and punitive damages, but not traditional ‘compensatory’ damages,” on behalf of every woman employed in every Wal-Mart retail store nationwide during the relevant period. Pet. App. 5a.

With one exception (pharmacy), the class includes every job classification in every department - from part-time entry level hourly workers to salaried managers earning well above \$100,000 per year. At the time of certification, the class definition *6 “cover[ed] at least 1.5 million women ..., thus dwarfing other employment discrimination cases that have come before.” *Id.* at 165a.^[FN1]

FN1. Of those, about 500,000 were employed as of the date the complaint was filed. Pet. App. 6a n.3. Wal-Mart has employed more than three million women since then.

Plaintiffs moved for class certification, alleging (as they had in their complaint) that Wal-Mart “fosters or facilitates gender stereotyping and discrimination, ... and that this discrimination is common to all women who work or have worked in Wal-Mart stores.” Pet. App. 5a; *see also* J.A. 47a-57a, 73a-76a; D.C. Dkt. 99 at 1-4. They were unable, however, to identify “a specific discriminatory policy promulgated by Wal-Mart.” Pet. App. 59a. In “the absence of” such a policy (*ibid.*), plaintiffs premised their motion on statistics, sociology, and anecdotes.

The district court accepted plaintiffs’ theory and certified the class. The court “recognize[d] that there is a tension inherent in characterizing a system as having both excessive subjectivity at the local level and centralized control.” Pet. App. 192a. It nevertheless concluded that “in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system.” *Ibid.*

On virtually every contested issue, however, the district court declined to make findings on the ground that the “merits” of the case could not be considered at class certification. Pet. App. 166a, 169a-*7 170a, 173a, 192a-193a, 196a-198a, 208a, 211a-212a, 222a, 224a-226a.

a. *Statistics.* Plaintiffs’ theory is premised on alleged *ad hoc* discrimination by local store managers. However, plaintiffs’ statistical expert, Richard Drogin, did not identify any store-level pay differentials. Instead, he aggregated the data on a regional or national basis to justify opining that such data show pay and

promotion disparities between men and women. Pet. App. 200a-201a.

Wal-Mart's expert, Joan Haworth, explained that "more than 90% of the stores had no pay rate differences between men and women that were statistically significant" (J.A. 1344a), and Drogin submitted nothing to rebut these data.

b. *Sociology*. Plaintiffs' expert, William Bielby, opined that Wal-Mart is "vulnerable to" gender bias, although he "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." [222 F.R.D. at 192](#) (emphasis added).

c. *Anecdotes*. Plaintiffs submitted declarations from 112 current and former Wal-Mart employees, only 63 of whom remain members of the class. See J.A. 590a-624a, 632a-653a, 660a-685a, 707a-734a, 743a-749a, 772a-778a, 789a-804a, 813a-816a, 822a-826a, 844a-863a, 874a-880a, 896a-906a, 916a-919a, 934a-957a, 964a-991a, 997a-1006a, 1011a-1015a, 1022a-1047a, 1053a-1087a, 1093a-1096a, 1104a-1111a, 1131a-1135a, 1144a-1164a, 1168a-1173a, 1190a-1194a, 1215a-1221a, 1228a-1241a, 1248a-1253a, 1261a-1278a, 1302a-1305a, 1315a-1321a. These declarations depict a relative *8 handful of widely divergent, and often entirely unique, events.

4. The Ninth Circuit en banc majority recognized the error in the district court's approach to contested issues (Pet. App. 52a n.20), but nevertheless affirmed the certification order in substantial part.

a. The majority agreed that plaintiffs had satisfied [Rule 23\(a\)](#)'s requirements of "commonality," "typicality," and "adequacy."

i. The court concluded that plaintiffs' evidence was sufficient "to raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of corporate policies ... that may have worked to unlawfully discriminate against them in violation of Title VII." Pet. App. 78a. Furthermore, "[e]vidence of Wal-Mart's subjective decision-making policies suggests a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory." *Ibid*.

The court thus found class treatment appropriate based not on a showing of any commonly applied policy or practice but rather on the basis of a "common question" whether female employees at Wal-Mart had experienced discrimination. Pet. App. 78a. In reaching this conclusion, the court flatly rejected, as a "hypothetical in clear dicta" (*id.* at 42a n.15), this Court's holding that a plaintiff seeking class treatment in this context must offer "[s]ignificant proof that an employer operated under a *general policy of discrimination*" that was implemented "through *entirely* subjective decisionmaking processes." [Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 159 n.15 \(1982\)](#) (emphases added).

ii. The majority declared that the claims were "sufficiently typical," "[e]ven though individual employees*9 in different stores with different managers may have received different levels of pay or may have been denied promotion or promoted at different rates, because the discrimination they claim to have suffered occurred through alleged common practices - e.g., excessively subjective decision making in a corporate culture of uniformity and gender stereotyping." Pet. App. 80a.

iii. The majority's adequacy analysis consisted of its observation that "courts need not deny certification of an employment class simply because the class includes both supervisory and non-supervisory employees." Pet. App. 82a.

b. The Ninth Circuit also found that plaintiffs' claims for billions of dollars in backpay could be certified pursuant to [Rule 23\(b\)\(2\)](#), which authorizes certification only of claims for injunctive or corresponding declaratory relief. In doing so, the majority rejected the standards previously articulated by other circuits for mandatory certification of monetary claims and announced its own newly formulated standard. Pet. App. 84a-88a. The court also remanded plaintiffs' punitive-damages claims for further consideration. *Id.* at 99a.

c. Judge Ikuta explained in the principal dissent: "Never before has such a low bar been set for certifying such a gargantuan class. The majority's ruling provides scant limits to the types of classes that can be certified. Put simply, the door is now open to Title VII lawsuits targeting national and international compa-

nies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.” Pet. App. 160a.

*10 d. Chief Judge Kozinski added in a separate dissent that the class members “have little in common but their sex and this lawsuit.” Pet. App. 161a.

SUMMARY OF ARGUMENT

[Rule 23](#)'s requirements cannot be rewritten to facilitate class certification, nor can substantive rights be abrogated or modified to certify a class. [Amchem Prods., Inc. v. Windsor](#), 521 U.S. 591, 612-13 (1997). The courts below repeatedly transgressed these important limitations. The certification order cannot stand.

I. The certification order is not consistent with [Rule 23\(a\)](#).

A. The claims asserted on behalf of millions of individuals do not remotely satisfy [Rule 23\(a\)](#)'s commonality, typicality, or adequacy requirements.

1. The *commonality* requirement ensures that the named plaintiffs' claims are sufficiently like the other class members' that they may be resolved on a collective basis.

a. This Court has recognized the “wide gap” between individualized allegations of discrimination and a company-wide practice that may be challenged in a class action. [Gen. Tel. Co. of the Sw. v. Falcon](#), 457 U.S. 147, 157 (1982). To bridge this gap, class plaintiffs must submit “[s]ignificant proof that an employer operated under a general policy of discrimination.” *Id.* at 159 n.15. But plaintiffs here did not attempt to make such a showing. They could not do so because Wal-Mart's general policies uniformly prohibit discrimination and promote diversity. Pet. App. 195a. Plaintiffs also “failed to identify a specific discriminatory policy at Wal-Mart.” *Id.* at 55a.

Moreover, plaintiffs did not offer proof that Wal-Mart implemented its policies in a discriminatory fashion common to all female employees. They have never suggested that Wal-Mart established an “entirely subjective decisionmaking process[.]” [Falcon](#), 457

[U.S. at 159 n.15](#) (emphasis added). The discretion exercised by Wal-Mart's local managers was governed not just by the company's anti-discrimination policy but also by a company-wide framework for pay and promotions. Plaintiffs have never offered significant proof that this framework was discriminatory. This precludes any inference that Wal-Mart was misusing discretionary decisionmaking - which is itself lawful ([Watson v. Fort Worth Bank & Trust](#), 487 U.S. 977, 990 (1988)) - to mask or implement a general policy of discrimination that pervaded all of the individual decisions.

The millions of discretionary decisions by tens of thousands of individual managers around the country defy common treatment under [Rule 23\(a\)](#).

b. Plaintiffs tried to bridge the “*Falcon* gap” by offering statistical, sociological, and anecdotal evidence, all of which serve only to confirm the lack of commonality.

i. Plaintiffs' liability theory turns on decisions made by individual *store* managers, but their aggregated statistical analysis, which purported to show disparities at the *national* or *regional* levels, cannot serve to establish commonality regarding the myriad decisions of local store managers or the impact of those decisions on individual class members. See [Watson](#), 487 U.S. at 992 (plurality). The un rebutted evidence established that more than 90% of the stores had no pay rate differences between men and women that were statistically significant.

ii. Plaintiffs rested much of their case on a sociologist's opinion that Wal-Mart is “vulnerable” to gender bias and stereotypes, and that the centralized control exercised by the company over certain aspects of its retail operations (such as “the temperature and music in each store”) could serve as a “conduit” for discrimination. Pet. App. 190a, 192a, 195a. The same sociologist conceded that he had no idea how often this phenomenon might occur. [222 F.R.D. at 192](#). His testimony thus defeats, rather than supports, a finding of commonality.

iii. The 63 class-member declarations submitted by plaintiffs also defeat commonality. While they purport to portray instances of unequal treatment, the unique facts and circumstances of even this small sample vary dramatically. Pet. App. 127a (Ikuta, J., dissenting).

2. The *typicality* requirement “limit[s] the class claims to those fairly encompassed by the named plaintiff’s claims.” Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 330 (1980). But the declarations of the three remaining class representatives show that their claims - and the defenses to those claims - are *atypical* of those that might be asserted by millions of absent women. Proving (or disproving) any such claim would not make it any more (or less) likely that others’ claims are cognizable (or remediable).

3. The *adequacy* requirement serves to prevent conflicts of interest among the class members. Amchem, 521 U.S. at 618, 625. The class here, however, is replete with such conflicts. For example, the class includes both managers and hourly employees - plaintiffs thus accuse *other class members* of discriminating against them. A clearer conflict of interest is difficult to imagine, and there are many more.

B. Solely in an effort to satisfy Rule 23(a), the lower courts elected to alter the rules - relieving plaintiffs of the burden of proving elements of their case, and precluding Wal-Mart from presenting otherwise available defenses. The Rules Enabling Act, which mandates that procedural rules may not alter substantive rights, forbids this. 28 U.S.C. § 2072(b).

1. The courts below erred in relieving plaintiffs of their burden of proving key substantive elements of their claims, including (a) an unlawful employment practice, and (b) discriminatory intent.

a. Plaintiffs argue that individual store managers exercised subjective discretion in a manner that uniformly disadvantaged female employees. That is a necessary component of both their disparate-impact and disparate-treatment claims, but it would require store-by-store proof that defeats commonality and typicality.

b. Equally problematic for plaintiffs - yet entirely unaddressed by the lower courts - is the intent element of their disparate-treatment claim. Intent is not subject to classwide proof where, as here, the challenged employment decisions were massively decentralized.

2. Wal-Mart’s statutory defenses also preclude commonality and typicality. Such defenses are normally

resolved at the second stage of an aggregated employment discrimination proceeding, where the employer has the right to “demonstrate that the individual ... was denied an employment opportunity for lawful reasons.” Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977). The district court, however, found that holding such individualized hearings would be “impractical,” “not feasible,” and “inconsistent with the fundamental character of the class action proceeding.” Pet. App. 245a, 251a. Rather than refusing to certify the class, the court eliminated Wal-Mart’s right to prove its defenses - once again elevating procedure over substance and depriving Wal-Mart of due process.

II. Nor is the certification order consistent with Rule 23(b)(2).

A. Rule 23(b)(2)’s text authorizes certification of claims for injunctive or corresponding declaratory relief, and is silent as to monetary relief. Monetary claims must proceed under Rule 23(b)(3), which provides additional protections for defendants, absent class members, and the judicial system.

Rule 23(b)’s mandatory provisions must conform to their historical antecedents. Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999). Intentional discrimination claims asserted on behalf of millions of disparate individuals seeking monetary relief could not be more different from the injunctive and declaratory relief challenges to *de jure* segregation on which Rule 23(b)(2) was based. And this difference is of constitutional dimension: Rule 23(b)(2) does not require notice to or permit opt-outs by absent class members, which due process requires where individual monetary relief is at stake. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985).

B. Some circuits have allowed certain monetary claims to proceed under Rule 23(b)(2), unless the relief sought “relates ... predominantly to money damages.” Advisory Committee Notes, 39 F.R.D. 69, 102 (1966). The substantial monetary awards sought by plaintiffs on behalf of millions of individuals here “predominate” over their claims for injunctive relief under the “incidental damages” standard applied in most circuits, and indeed any other standard.

The “class-action device ... [is] an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” [Califano v. Yamasaki](#), 442 U.S. 682, 700-01 (1979). Because of the dangers inherent in classwide adjudication, [Rule 23](#) imposes prerequisites to class certification designed to ensure that any ensuing trial and judgment will be consistent with the rights of all parties, including the absent class members. [Taylor v. Sturgell](#), 553 U.S. 880, 900-01 (2008); [Amchem Prods., Inc. v. Windsor](#), 521 U.S. 591, 629 (1997).

This Court adopted [Rule 23](#) pursuant to the Rules Enabling Act, which mandates that procedural rules may not “abridge, enlarge or modify any substantive right.” [28 U.S.C. § 2072\(b\)](#). This Court has emphasized that [Rule 23](#) “must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view.” [Amchem](#), 521 U.S. at 629; see [Ortiz v. Fibreboard Corp.](#), 527 U.S. 815, 845 (1999). Moreover, class actions certified under [Rule 23](#) must also comply with the Due Process Clause ([Ticor Title Ins. Co. v. Brown](#), 511 U.S. 117, 121 (1994) (per curiam)), and any uncertainties in the Rule’s application should be resolved to avoid constitutional concerns. [Ortiz](#), 527 U.S. at 845.

The district court’s certification order, as modified by the Ninth Circuit, is not consistent with [Rule 23](#). The wildly divergent claims asserted by the three named plaintiffs on behalf of millions of women cannot satisfy [Rule 23\(a\)](#)’s requirements of commonality, typicality, or adequacy without modifying the substantive elements of plaintiffs’ claims and Wal-Mart’s defenses. Moreover, mandatory certification *16 under [Rule 23\(b\)\(2\)](#) does not encompass plaintiffs’ request for billions of dollars in backpay and (potentially) punitive damages.

I. The Certification Order Is Not Consistent With [Rule 23\(a\)](#)

A “Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23\(a\)](#) have been satisfied.” [Gen. Tel. Co. of the Sw. v. Falcon](#), 457 U.S. 147, 161 (1982). These prerequisites include “questions of law or fact common to the class,” “claims or defenses of the representative parties [that] are typical of the claims or defenses of the class,” and “representative parties [who] fairly and

adequately protect the interests of the class.” [Fed. R. Civ. P. 23\(a\)](#); [Amchem](#), 521 U.S. at 613.

Plaintiffs here bring two types of Title VII claims: disparate impact and disparate treatment. A “plaintiff establishes a prima facie disparate-impact claim by showing that the employer uses a *particular* employment practice that causes a disparate impact on one of the prohibited bases.” [Lewis v. City of Chicago](#), 130 S. Ct. 2191, 2197 (2010) (internal quotation marks omitted) (emphasis altered); accord [42 U.S.C. § 2000e-2](#); [Watson v. Fort Worth Bank & Trust](#), 487 U.S. 977, 986 (1988) (a plaintiff’s burden includes showing statistical disparities and a specific employment practice). To maintain a disparate-treatment claim, the plaintiff is also “required to prove that the defendant had a discriminatory intent or motive.” *Id.* If the plaintiff succeeds on either type of claim, the court may award injunctive relief, backpay, “or any other equitable relief as the court deems appropriate.” [42 U.S.C. § 2000e-5\(g\)\(1\)](#). *17 Where the plaintiff proves that she is the victim of intentional discrimination, and thus has made out a disparate-treatment claim, the plaintiff may also be entitled to compensatory damages (including emotional distress). *Id.* [§ 1981a\(a\)\(1\)](#). Punitive damages may be awarded only in disparate-treatment cases, if the plaintiff proves that the employer acted “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” *Id.* [§ 1981a\(b\)\(1\)](#).

Title VII codifies certain defenses. If the employer proves that an adverse employment action concerning an individual was “for any reason other than discrimination,” the court shall not order the “hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay.” [42 U.S.C. § 2000e-5\(g\)\(2\)\(A\)](#). Even if the employee proves that the adverse employment action was motivated in part by discriminatory intent (see *id.* [§ 2000e-2\(m\)](#)), the court *cannot* award backpay or damages if the employer proves that it “would have taken the same action in the absence of the impermissible motivating factor.” *Id.* [§ 2000e-5\(g\)\(2\)\(B\)\(ii\)](#); [Costa v. Desert Palace, Inc.](#), 299 F.3d 838, 848 (9th Cir. 2002) (en banc), *aff’d*, 539 U.S. 90 (2003).

The propriety of class certification must be reviewed in light of the substantive elements of these claims and defenses, which would have to be litigated and decided in an eventual trial on the merits. [Amchem](#), 521

[U.S. at 621, 629](#). Doing so makes clear that the courts below committed multiple and manifest*18 legal errors in allowing the case to proceed as a class action.^[FN2]

FN2. A certification order is reviewed for abuse of discretion, but a district court abuses its discretion by misapplying the law. [Koon v. United States](#), 518 U.S. 81, 100 (1996). Wal-Mart's arguments in this Court turn on the *legal* errors committed by the courts below, and therefore this Court's review is *de novo*. Moreover, the district court's refusal to resolve contested issues means that its "findings" are entitled to no deference. See *In re IPO Sec. Litig.*, 471 F.3d 24, 40-41 (2d Cir. 2006).

A. The Named Plaintiffs' Interests Are Insufficiently Interrelated With The Absent Class Members' Interests

"The commonality and typicality requirements of [Rule 23\(a\)](#) tend to merge," and "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." [Falcon](#), 457 U.S. at 157 n.13. In turn, the "adequacy inquiry," which "serves to uncover conflicts of interest" among the class members, "tends to merge" with the commonality and typicality requirements. [Amchem](#), 521 U.S. at 625, 626 n.20 (internal quotation marks omitted). We address each of them in turn.

1. Commonality

A class may not be certified unless "there are questions of law or fact common to the class." [Fed. R. Civ. P. 23\(a\)\(2\)](#). This requirement ensures that the class representatives possess the same interests, and have suffered the same alleged injuries, as the absent class members and are thus qualified to bring *19 claims on behalf of the entire group. E. [Tex. Motor Freight Sys. Inc. v. Rodriguez](#), 431 U.S. 395, 403 (1977).

The plaintiff in *Falcon* challenged "subjective" promotion practices ([457 U.S. at 151 n.4](#)), and this Court held that a named plaintiff's experience of discrimi-

nation does not permit the district court simply to infer that "discriminatory treatment is typical of [the employer's employment] practices." *Id.* at 158; see [Rodriguez](#), 431 U.S. at 403-04. Indeed, "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action." [Falcon](#), 457 U.S. at 159.

Rather, in asserting a company-wide class action based on discrimination, the plaintiff must bridge the "wide gap" between (1) plaintiff's own claim of discrimination, and (2) the existence of a class of persons who have suffered the same injury as the plaintiff as a result of a company-wide discriminatory policy. [Falcon](#), 457 U.S. at 157. Plaintiffs here failed to do so.

a. Plaintiffs' Theory Fails To Bridge The *Falcon* Gap

This Court has held that a plaintiff can potentially bridge the gap between individual and representative claims, and secure authorization to proceed on behalf of absent persons, by adducing "[s]ignificant proof that an employer operated under a general policy of discrimination" that was implemented through "entirely subjective decisionmaking processes" in a manner that affected all class members. [Falcon](#), 457 U.S. at 159 n.15.

1. Plaintiffs here made no pretense of offering "significant proof" that Wal-Mart's "general policy" *20 was discriminatory, as to either pay or promotion. To the contrary, it was undisputed that Wal-Mart operates under a general policy of *anti*-discrimination. The policies actually adopted and implemented by Wal-Mart forbid discrimination and affirmatively encourage diversity. Pet. App. 195a. "Title VII prohibits employment *practices*, not an abstract policy of discrimination." [Falcon](#), 457 U.S. at 159 n.15; see also [Watson](#), 487 U.S. at 994 (plurality). Yet plaintiffs could find no such practices. Indeed, the court below acknowledged "the *absence* of a specific discriminatory policy promulgated by Wal-Mart." Pet. App. 59a (emphasis added). That should have ended the inquiry.

2. Nor did plaintiffs offer proof that Wal-Mart *implemented* its lawful policies in a discriminatory fashion common to every single female employee.

They do not, and cannot, contend that Wal-Mart maintained an "*entirely* subjective decisionmaking

process[]” ([Falcon](#), 457 U.S. at 159 n.15 (emphasis added)), because the record is undisputed that in addition to its express anti-discrimination policy, Wal-Mart set salary ranges for its employees and established standards for its local managers to apply when making both pay and promotion decisions. J.A. 1468a-1469a, 1498a-1511a, 1609a, 1616a; D.C. Dkt. 270-508; Pet. App. 176a-177a.

Plaintiffs' expert explained that “[w]ritten guidelines for promotion are not absent in the Wal-Mart Personnel System,” and that “[c]ompany guidelines specify minimum criteria based on discipline, tenure, and performance evaluations.” J.A. 550a-551a; *see also* Pet. App. 203a (“the subjective decision-making in compensation and promotions takes place within parameters and guidelines that are highly uniform”). *21 The district court found only that pay and promotion decisions are “largely subjective” (that is, discretionary), and that the “company maintains centralized corporate policies that provide some constraint on the degree of managerial discretion.” Pet. App. 192a (emphasis added).

Plaintiffs have never offered significant proof that this framework was discriminatory. Courts have recognized that similar challenges do not satisfy the commonality requirement because the existence of non-subjective criteria cuts against the inference that there was “a common policy of discrimination that pervaded all of the ... challenged ... decisions.” [Hartman v. Duffey](#), 19 F.3d 1459, 1472 (D.C. Cir. 1994); *see also, e.g., Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001).

Moreover, the mere fact that an employer delegates discretion to local managers to make pay or promotion decisions is not unlawful. [Watson](#), 487 U.S. at 990 (“an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct”). This Court has recognized that “employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify.” [Engquist v. Or. Dep't of Agric.](#), 553 U.S. 591, 604 (2008); *see also* Pet. App. 77a (“Wal-Mart is correct that discretionary decision making *by itself* is insufficient to meet Plaintiffs' burden”); *id.* at 184a (“some level of subjectivity is inherent in, and in fact a useful part of, personnel decisions”).

Millions of discretionary decisions by tens of thousands of individual managers constitute the *antithesis* of a common policy that affects everyone in *22 the same manner. *See, e.g., Cooper v. Southern Co.*, 390 F.3d 695, 715-16 (11th Cir. 2004); [Stastny v. S. Bell Tel. & Tel. Co.](#), 628 F.2d 267, 279 (4th Cir. 1980); Richard A. Epstein, [Class Actions: Aggregation, Amplification, and Distortion](#), 2003 U. Chi. Legal F. 475, 508-09 (delegation of discretion to local managers is more logically viewed as a policy that permits many different practices at the local level).

Accordingly, plaintiffs failed to present “significant proof” that Wal-Mart operated under a “general policy” of discrimination, as *Falcon* requires. On the contrary, it is undisputed that Wal-Mart's pay and promotion system includes general policies that prohibit discrimination, as well as objective pay ranges and promotion criteria that impose constraints on the exercise of discretion by individual managers. This system will not support a finding of commonality, on a company-wide basis, for purposes of [Rule 23\(a\)](#).

3. In fact, to secure class certification, plaintiffs have advanced a theory of employment discrimination that simply is not actionable under Title VII.

They have hypothesized a “fundamentally new account of discrimination” that seeks to hold Wal-Mart liable for “broader labor market” characteristics. Richard A. Nagareda, [Class Certification in the Age of Aggregate Proof](#), 84 N.Y.U. L. Rev. 97, 156-60 (2009). This novel concept, which commonly is known as “structural discrimination,” challenges widely accepted corporate structures as creating a “conduit for gender bias to potentially seep into the system.” Pet. App. 192a. This theory would remake Title VII to allow claims challenging and seeking to redesign corporate structures to address societal phenomena for which employers are not responsible *23 (Nagareda, *supra*, at 153-60), an approach this Court has strongly rejected. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (“Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it”); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality) (recognizing “Congress' unwillingness to require employers to change the very nature of their operations in response to the statute”). Courts and

commentators agree that the “structural discrimination” theory does not “stand[] as current law.” Nagera, *supra*, at 157 & n.234 (citing sources). Plaintiffs’ bid for affirmance of the class certification order thus rests on a fundamental - and quite radical - remaking of Title VII law.

b. Plaintiffs’ Evidence Fails To Bridge The *Falcon* Gap

Just as plaintiffs’ *theory* of discrimination does not suffice, the *evidence* they offered also fails to establish commonality. As shown below, the evidence, at most, indicates that Wal-Mart’s pay and promotion system *could* possibly result in individual disparities - not that it was designed to do so, was intended to do so, or would inevitably do so with respect to every single female employee around the country. Isolated instances of discrimination are not sufficient to satisfy the commonality requirement in Title VII cases. [Falcon](#), 457 U.S. at 158.

Plaintiffs point to three categories of evidence - statistics, sociology, and anecdotes - but never bridge the wide gap between their own individual assertions and the classwide claims. “Like the proverbial shell game, ... plaintiffs’ circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination,*24 no matter which shell is lifted.” Pet. App. 138a (Ikuta, J., dissenting).

1. *Statistics*. Plaintiffs’ statistical expert, Richard Drogin, aggregated the data at the national or regional level to conclude that women were under-represented in management and paid less than men in comparable positions. J.A. 476a, 493a-516a. Plaintiffs’ theory of liability, however, rests on decisions made by individual managers at the store level; as a matter of law, disparities at the regional and national level are not probative of store-level discrimination. This is a failure of proof at the most basic level: Plaintiffs challenge decisions by individual store managers, but failed to adduce *any* statistical evidence of discrimination (or even disparities) at the *store* level. This is critically important because courts have uniformly recognized in multi-facility employment cases that discrimination must be shown in *each* facility or other decisionmaking unit. [Morgan v. UPS](#), 380 F.3d 459, 464 (8th Cir. 2004); *see also* [Garcia v. Johanns](#), 444 F.3d 625, 632 (D.C. Cir. 2006); [Cooper](#), 390 F.3d at

[715](#).

In response to plaintiffs’ hypothesis of discrimination by individual store managers, Wal-Mart’s expert Joan Haworth presented a store-by-store statistical analysis, which established that in more than 90% of the stores there were *no* statistically significant pay disparities between men and women. *See* J.A. 1468a-1515a; Pet. App. 202a-203a n.25. This showing was not rebutted by plaintiffs, who offered no store-by-store analysis of their own, and confirms the lack of commonality.

The district court rejected Wal-Mart’s objections that Drogin’s statistics were untethered to plaintiffs’ store-level theory of discrimination on the ground *25 that it would “engage the Court in a merits evaluation of the expert opinions.” Pet. App. 197a. In so doing, the court mistakenly concluded that [Eisen v. Carlisle & Jacquelin](#), 417 U.S. 156 (1974), barred it from making determinations that overlapped with the “merits” at the certification stage, including the appropriate level of aggregation of statistical analyses. Pet. App. 166a, 208a. Even plaintiffs do not defend this approach, recognizing that “the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” [Coopers & Lybrand v. Livesay](#), 437 U.S. 463, 469 (1978) (internal quotation marks omitted); *see also* [Falcon](#), 457 U.S. at 161.

The Ninth Circuit majority sidestepped this critical issue, erroneously opining that “[t]he disagreement” between Drogin and Haworth regarding the appropriate level of aggregation “*is* the common question.” Pet. App. 71a. But, regardless of the strength of Wal-Mart’s statistics, it is *plaintiffs’* burden to produce “significant proof” of a company-wide discriminatory policy; plaintiffs failed to meet that burden by failing to offer any proof of gender-based disparities at the store level.

In any event, as this Court held in *Falcon*, “actual, not presumed, conformance with [Rule 23\(a\)](#) remains ... indispensable.” 457 U.S. at 160. Indeed, plaintiffs concede that “district courts are required to conduct a ‘rigorous analysis’ of compliance with [Rule 23](#), even when it overlaps with the merits.” Pet. Opp. 24. And they take no issue with the “consensus among the circuits” (*ibid.*), holding that courts are not only authorized but obligated to resolve such disputes at the certification stage relating to [Rule 23](#) factors. *See, e.g.,*

^{*26}[*In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323-24 \(3d Cir. 2008\)](#); *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

With respect to commonality, the appropriate level of aggregation is not an evidentiary issue, but a legal one. [*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-55 \(1989\)](#), *superseded on other grounds by statute*, Civil Rights Act of 1991, [Pub. L. No. 102-166, § 2, 105 Stat. 1071](#), 1071. The nationally or regionally aggregated statistics presented by plaintiffs do not show, one way or the other, whether their theory of discrimination - which turns on decisions made by individual store managers - can be proved on a classwide basis. *Cf.* [*Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 388 \(2008\)](#).

Plaintiffs never identified a corporate policy or practice to which the aggregated disparities Drogin identified could be attributed. Nothing in his analysis purports to link any alleged disparities in pay or promotion to subjective decisionmaking or any other aspect of Wal-Mart's pay and promotion system. Disparities in the abstract are not actionable under Title VII. [Lewis](#), 130 S. Ct. at 2197. Plaintiffs thus failed to establish that a crucial element of their prima facie case could be proved on a classwide basis. *See ibid.*; [*Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 \(2007\)](#), *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, [Pub. L. No. 111-2, § 3, 123 Stat. 5](#), 5-6.

As Justice O'Connor observed in *Watson*, “[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.” [487 U.S. at 992](#) (plurality). “It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad^{*27} of innocent causes that may lead to statistical imbalances in the composition of their work forces.” *Ibid.*; *see also* Pet. App. 193a (noting that plaintiffs' sociology expert agreed that “there are many reasons why men and women can have different career trajectories, some of which are not generally considered discriminatory, such as differing job-related skill requirements”); *id.* at 193a n.18.

Plaintiffs' suggestion that liability can be premised on aggregated disparities, if accepted, would require employers to treat people differently despite the ab-

sence of any previous departures from legal requirements. That is contrary to Congress's express instruction in Title VII ([42 U.S.C. § 2000e-2\(j\)](#)), and this Court therefore already has rejected such an approach to Title VII. [Ricci v. DeStefano](#), 129 S. Ct. 2658, 2674-75 (2009); *see also* [Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1](#), 551 U.S. 701, 729-33 (2007) (plurality); [Watson](#), 487 U.S. at 992 (plurality).

2. *Sociology.* Plaintiffs rely heavily on the notion, propounded by their sociologist William Bielby, that Wal-Mart and other large organizations are “‘vulnerable’ to gender bias.” Pet. App. 195a. Bielby's testimony, however, defeats rather than supports a finding of commonality.

a. Bielby opined that Wal-Mart has a “strong corporate culture.” Pet. App. 54a. The district court elaborated, explaining that this is reflected by such things as the way “the Home Office controls the temperature and music in each store throughout the country.” *Id.* at 190a. And “employees at Wal-Mart stores attend a daily meeting held at shift changes, where managers discuss the company culture and employees do the Wal-Mart cheer.” *Id.* at 188a-^{*28} 189a. Bielby observed that Wal-Mart “employees achieve a common understanding of the company's way of conducting business” (J.A. 535a), but he could not say that this “way” was discriminatory or explain how this “common understanding” actually causes discrimination. Pet. App. 55a; *see* [Price Waterhouse](#), 490 U.S. at 294 & n.5 (Kennedy, J., dissenting) (explaining that “Title VII creates no independent cause of action for sex stereotyping” and questioning validity of sociologist expert testimony regarding such stereotyping).

As the Ninth Circuit acknowledged, Bielby merely “interpret[ed] and explain [ed] the facts that *suggest* that Wal-Mart has and promotes a strong corporate culture - a culture that *may* include gender stereotyping.” Pet. App. 54a (emphasis added). Bielby did not opine, however, that Wal-Mart's culture *does* include stereotyping, and the district court recognized that Bielby did not purport to opine on how often gender stereotyping *actually* occurred, let alone claim that it was common to all class members. [222 F.R.D. at 192](#); *see also* Pet. App. 195a (“Defendant rightly points out that Dr. Bielby cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart”).

The district court found that “Bielby's opinions have a built-in degree of conjecture.” Pet. App. 195a. Bielby even “conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” [222 F.R.D. at 192](#).

As the district court described it, Bielby's testimony suggests only that Wal-Mart's delegation of “a substantial range of discretion” to local managers “provides a wide enough conduit for gender bias to *potentially seep* into the system.” Pet. App. 192a *29 (emphasis added). The most that Bielby could do was critique Wal-Mart's equal employment policies and pay and promotion systems as potentially “vulnerable” to discrimination. J.A. 525a. But alleged “‘[v]ulnerability’ to sex discrimination is not sex discrimination.” [509 F.3d at 1194](#) (Kleinfeld, J., dissenting); see also [Price Waterhouse](#), 490 U.S. at 294 (Kennedy, J., dissenting) (While “[e]vidence of use by decision-makers of sex stereotypes is ... relevant to the question of discriminatory intent,” “[t]he ultimate question ... is whether discrimination caused the plaintiff's harm”); Nagareda, *supra*, at 159-60.

Bielby's hypothesis that Wal-Mart may be “vulnerable” to gender stereotypes because it (like other organizations, including government agencies) has a “strong corporate culture” does not identify *any* discriminatory practices or procedures actionable under Title VII. By Bielby's lights, one would have to examine each individual pay or promotion decision - and there are millions of them - to determine whether it was actually infected with bias. As a result, Bielby's testimony affirmatively does not support, but affirmatively defeats, any finding of commonality in this case.

b. Because Bielby conceded that he could not conclude whether sex-based animus was responsible for all of the employment decisions at Wal-Mart or none of them, it is unclear what the probative value of his testimony, with respect to the [Rule 23](#) prerequisites, could possibly be. As the authors of the seminal article on “social framework” analysis upon which Bielby purported to rely (J.A. 524a n.1) have explained, Bielby's “research into conditions and behavior at Wal-Mart did not meet the standards expected of social scientific research into stereotyping and discrimination.” John Monahan et al., Essay, *30 [Contextual Evidence of Gender Discrimination](#):

[The Ascendancy of “Social Frameworks,”](#) 94 Va. L. Rev. 1715, 1747 (2008). Moreover, “Dr. Bielby's social framework analysis fails because it lacks a reliable, scientific basis for linking general research to the corporate setting.” *Id.* at 1745 n.83. Thus, his testimony “explicitly link[ing] general research findings on gender discrimination to specific factual conclusions about Wal-Mart in particular, exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by ... ‘social framework’ evidence.” *Id.* at 1719.

The district court rejected Wal-Mart's motion to strike Bielby's opinion as unreliable and inadmissible. D.C. Dkt. 263 at 1-4; see [Gen. Elec. Co. v. Joiner](#), 522 U.S. 136, 146 (1997) (where “opinion evidence ... is connected to existing data only by the *ipse dixit* of the expert,” a “court may conclude that there is simply too great an analytical gap between the data and the opinion proffered”). In affirming this ruling, the Ninth Circuit held that [Daubert v. Merrell Dow Pharmaceuticals, Inc.](#), 509 U.S. 579 (1993), does not have “exactly the same application at the class certification stage as it does to expert testimony ... at trial.” Pet. App. 57a n.22.

But [Federal Rule of Evidence 702](#), which governs the reliability of expert testimony and implements *Daubert*, ensures that expert testimony is relevant and reliable. [Kumho Tire Co. v. Carmichael](#), 526 U.S. 137, 152 (1999). It is not limited to trial and is particularly important at the class certification stage, where the district court must “assess all of the relevant evidence admitted ... and determine whether each [Rule 23](#) requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a lawsuit.” *31 [IPO](#), 471 F.3d at 42. Expert evidence introduced to “establish a component of a [Rule 23](#) requirement” therefore must be reliable. *Ibid.* Bielby's is not.

3. *Anecdotes.* Plaintiffs also submitted declarations from 63 remaining class members to support their theory that individual store managers wielded their discretion to make pay and promotion decisions in an intentionally discriminatory manner. These anecdotes included just 126 of Wal-Mart's more than 3,400 stores; plaintiffs thus presented *no* evidence of even a single act of discrimination in the vast majority of stores, including entire States, regions, and districts. Cf. [Mooney v. Aramco Servs. Co.](#), 54 F.3d 1207, 1221

(5th Cir. 1995) (holding that ten instances of discrimination were insufficient to support a class of just 154 employees, because “[t]estimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated”).

In *Teamsters*, the government proved 40 specific instances of discrimination out of a class of about 400 employees - a ratio of 1:10. *Int'l Bhd. of Teamsters v. United States* 431 U.S. 324, 338-39 (1977). Even if all of the declarations submitted by class members in this case recited actionable claims of discrimination (which they do not), plaintiffs fell far short of that kind of showing.

Plaintiffs' relative handful of declarations is, at most, evidence of nothing more than “isolated or sporadic” instances of (alleged) misconduct. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Here, the “affiants claim discrimination in different forms, at the hands of different people, in different stores, in different parts of the country, at *32 different times, and under a constellation of facts unique to each individual,” thereby undermining any claim of a common, company-wide policy. Pet. App. 127a (Ikuta, J., dissenting). Indeed, as explained in the next section, the declarations of both the named plaintiffs and the other class members demonstrate the varied and individualized nature of their claims.

Wal-Mart also submitted declarations from female employees that further refute the notion of any company-wide policy of discrimination. One such employee testified, “[w]hen I expressed interest in being promoted, various Store Managers and District Managers mentored me and assisted me in achieving my goals.” J.A. 1609a. Another explained, “[i]n my career at Wal-Mart, I have never felt that I was denied an opportunity because I am a woman.” *Id.* at 1635a. And there are many more. *See id.* at 1598a-1599a, 1615a-1616a, 1619a-1620a, 1625a-1628a, 1638a-1644a, 1650a, 1653a-1654a.

Far from establishing commonality, the declarations submitted by putative class members refute it.

2. Typicality

The named plaintiffs' claims and defenses are not “typical of the claims or defenses of the class.” *Fed. R.*

Civ. P. 23(a)(3). The typicality requirement “limit[s] the class claims to those fairly encompassed by the named plaintiff's claims.” *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 330 (1980). But the widely divergent claims of each named plaintiff “are not even typical with respect to each other, let alone with respect to the class.” 509 F.3d at 1195 (Kleinfeld, J., dissenting).

For example, Ms. Dukes has alleged both race and sex discrimination. J.A. 76a-77a; C.A. App. 29-32. Her claim turns almost entirely on her allegations*33 of *retaliation* for invoking the company's internal grievance procedures. J.A. 745a-746a. An element of such a claim is the employer's knowledge of an underlying discrimination charge or other protected activity (42 U.S.C. § 2000e-3(a)), which is incapable of classwide proof. Indeed, the district court correctly *excluded* retaliation claims from this case. Pet. App. 166a-167a n.4. Ms. Dukes's experience is decidedly not “typical.”

Similarly, if Ms. Kwapnoski could prove that her store manager was unequally abusive, and that his “yell[ing]” violated Title VII (J.A. 1000a-1001a), such proof would not establish that any other woman in any other store was the victim of intentional discrimination. The same is true with respect to Ms. Arana's contention that her store manager discouraged her from applying for management training. *Id.* at 614a-616a.

This stark atypicality is apparent from the other declarations submitted by plaintiffs. Many of them do not even arguably allege employment discrimination. *See, e.g.,* J.A. 676a-678a, 729a-734a, 822a-826a, 1059a-1063a, 1081a-1087a; *see also* 509 F.3d at 1195-96 (Kleinfeld, J., dissenting). Indeed, it is simply inconceivable that *every single* female employee suffered intentional discrimination, which is what plaintiffs' theory posits. While some of the class members still work for Wal-Mart, many more do not. *See, e.g.,* J.A. 620a-623a, 727a, 859a. Some claim retaliation, while others merely claim unequal treatment. *See, e.g., id.* at 676a-678a, 707a-715a, 822a-826a. “Some thrived while others did poorly.” Pet App. 161a (Kozinski, C.J., dissenting); *see also* J.A. 640a-644a, 947a-951a, 1030a-1034a, 1131a-1135a, 1315a-1321a.

*34 Even if the named plaintiffs could prove their individual allegations of discrimination, such proof

would not establish liability for any absent class member. “[A] class plaintiff’s attempt to prove the existence of a companywide policy, or even a consistent practice within a given department, may fail even though discrimination against one or two individuals has been proved.” [Cooper](#), 467 U.S. at 879.

In addition, Wal-Mart’s defenses to plaintiffs’ claims are not identical as to all female employees. Ms. Dukes, for example, would be subject to unique defenses based on her long and uncontroverted history of disciplinary violations: Wal-Mart cannot be held liable for employment actions taken “for any reason other than discrimination,” and in all events cannot be liable for backpay if it would have taken the same action regardless of motivation. [42 U.S.C. § 2000e-5\(g\)\(2\)](#). Yet Ms. Dukes’s repeated disciplinary issues are hardly “typical” of other employees. And proving (or failing to prove) an employee-specific defense may not make it any more or less likely that the next employee is subject to the same defense. *See Cooper*, 390 F.3d at 719.

3. Adequacy

Plaintiffs have also failed to demonstrate that the named plaintiffs “will fairly and adequately protect the interests of the class.” [Fed. R. Civ. P. 23\(a\)\(4\)](#). “The adequacy inquiry under [Rule 23\(a\)\(4\)](#) serves to uncover conflicts of interest between named parties and the class they seek to represent” and “tends to merge” with the commonality and typicality requirements. [Amchem](#), 521 U.S. at 625, 626 n.20 (internal quotation marks omitted); *see Gen. Tel. Co. of the Nw.*, 446 U.S. at 331 (“the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of *35 interest between the named plaintiff and the members of the putative class”). The class here is rife with such conflicts.

For example, the named plaintiffs waived any claim for compensatory damages, forfeiting the rights of individual class members to recover damages authorized by Congress solely in order to facilitate class treatment. It therefore is not true that, as plaintiffs have suggested, “[t]he members of the class are united in seeking the maximum possible recovery.” [Amchem](#), 521 U.S. at 610 (internal quotation marks omitted).

Moreover, the class includes both the alleged *victims*

of discrimination (hourly employees) and the alleged *perpetrators* of that same discrimination (salaried managers). Plaintiffs accuse other class members of intentionally discriminating against them. Female manager class members will be called to testify against other class members regarding their decisions as managers, and thus will be cross-examined by class counsel. A clearer conflict is difficult to imagine, since the interests of each group in establishing liability (and maximizing recovery) are diametrically opposed. *Cf. Gen. Tel. Co. of the Nw.*, 446 U.S. at 331; [Hansberry v. Lee](#), 311 U.S. 32, 44-46 (1940).

And the list goes on. The class here includes both former and present employees. Those who still work at Wal-Mart may have an interest in an injunction, but injunctive or corresponding declaratory relief cannot benefit those women who no longer work at the company and who therefore are interested *only* in individual monetary relief. [509 F.3d at 1196](#) (Kleinfeld, J., dissenting); *see also infra* Part II.B.1. Some class members (including the named plaintiffs) *36 have poor performance records and are subject to unique defenses to liability. *See* [42 U.S.C. § 2000e-5\(g\)\(2\)\(B\)\(ii\)](#). These individuals may have an interest in settlement, in part to avoid public recitation of their faults, while those who have strong performance records could have an interest in taking the case to trial. *See* [509 F.3d at 1196](#) (Kleinfeld, J., dissenting).

Another intractable conflict arises from the undisputed fact that “nonvictims might also benefit from the relief.” Pet. App. 110a n.57 (internal quotation marks omitted). The district court acknowledged that allowing the class claims to proceed would “generat[e] a windfall for some employees ... and undercompensat[e]” others. *Id.* at 254a (internal quotation marks omitted). But Title VII relief is limited to the “actual victims” of illegal discrimination. [Firefighters Local Union No. 1784 v. Stotts](#), 467 U.S. 561, 579 (1984). Allowing nonvictims to share in any recovery creates an impermissible conflict with those who may have valid claims. Far from constituting “rough justice” (Pet. App. 254a), the decisions below would work an injustice. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (the “Due Process Clause ... requires that the named plaintiff at all times adequately represent the interests of the absent class members”).

Where subsets of plaintiffs have different interests in the litigation, “the interests of those within the single class are not aligned.” [Amchem](#), 521 U.S. at 626 (adequacy not satisfied when conflicts exist regarding nature and timing of relief); see also [Rodriguez](#), 431 U.S. at 405. Inadequate representation violates the Due Process Clause as well as [Rule 23](#). [Hansberry](#), 311 U.S. at 44-45. This Court therefore has warned district courts to exercise “caution when *37 individual stakes are high and disparities among class members great.” [Amchem](#), 521 U.S. at 625. Here, the stakes could not be higher, yet the “certification in this case does not follow the counsel of caution.” *Ibid*.

In short, if plaintiffs were adequate representatives, they would not be forced to forfeit the rights of absent class members to persuade the courts to allow them to represent the class, and their desire to be class representatives would not conflict with their duty to act in the best interests of the absent class members. See [Amchem](#), 521 U.S. at 618; [Broussard v. Meineke Disc. Muffler Shops, Inc.](#), 155 F.3d 331, 337-39 (4th Cir. 1998). These conflicts are heightened because certification under [Rule 23\(b\)\(2\)](#) does not permit absent class members to opt out of the litigation. Absent class members are powerless to extricate themselves from the class even though their interests squarely conflict with those of the named plaintiffs purporting to represent them.

Plaintiffs sought to lump together in one lawsuit every female Wal-Mart employee without regard to the staggering number of differences - in jobs, performance, experience, advancement, location, and a host of other factors - that exist within that divergent group of individuals. See Pet. App. 161a (Kozinski, C.J., dissenting). This Court has condemned the practice of certifying “across-the-board” employment class actions. [Falcon](#), 457 U.S. at 157. The decision below cannot be reconciled with that directive or with the Court’s admonition against “judicial inventiveness” in class-action procedure. [Amchem](#), 521 U.S. at 620.

As this case well illustrates, “the rulemakers’ prescriptions for class actions may be endangered by *38 those who embrace [Rule 23](#) too enthusiastically just as they are by those who approach the Rule with distaste.” [Amchem](#), 521 U.S. at 629 (internal quotation marks and alterations omitted).^[FN3]

FN3. This is not to suggest that Title VII

cases cannot proceed as class actions. Rather, where (as here) an employment discrimination claim is premised on discretionary decisionmaking, the class at minimum must bear some relation to the decisionmaking unit (store, department, etc.). See [Morgan](#), 380 F.3d at 464; 42 U.S.C. § 2000e-5(f)(3).

B. Procedural Defects Cannot Be Remedied By Altering The Substantive Law

A court cannot certify a class without finding that the class claims and defenses, as certified, can be tried to judgment in a manner that protects the rights of all parties and the judicial system. [Fed. R. Civ. P. 23\(c\)\(2\)](#); see [Amchem](#), 521 U.S. at 621, 629. The [Rule 23\(a\)](#) factors are designed to ensure that only those cases that are sufficiently cohesive to permit such a trial will be certified. *Id.* at 623 (it is “class cohesion that legitimizes representative action in the first place”). A case that does not meet one or more of the [Rule 23\(a\)](#) prerequisites, in contrast, likely could not be tried consistently with due process and therefore may not be certified as a class action. Cf. [Taylor](#), 553 U.S. at 901.

But because this case, properly analyzed, does not meet the prerequisites imposed by [Rule 23\(a\)](#), a trial on the merits would be completely unmanageable and unfair. The courts below recognized as much; but rather than denying certification, they elected to relieve plaintiffs of the burden of proving elements of their case and to preclude Wal-Mart from proving *39 elements of its defenses. This Court has repeatedly instructed the lower courts that the Rules Enabling Act prohibits elevating procedural rules over substantive rights in the class-action context. [Ortiz](#), 527 U.S. at 845 (“no reading of [Rule 23] can ignore the Act’s mandate”); [Amchem](#), 521 U.S. at 612-13. The decisions below, however, omit any substantive discussion of this crucial statute.

1. Plaintiffs’ Burden

Plaintiffs’ disparate-impact claim requires them to prove “a particular employment practice that causes a disparate impact” on a prohibited basis. 42 U.S.C. § 2000e-2(k)(1)(A)(i); [Lewis](#), 130 S. Ct. at 2197. Their disparate-treatment claim “comprises two elements: [a]n employment practice, and [b] discriminatory intent.” [Ledbetter](#), 550 U.S. at 631. Plaintiffs have failed

to demonstrate how they could establish either, much less both, on a classwide basis.

a. *No Unlawful Employment Practice.* As previously discussed, the Ninth Circuit acknowledged “the *absence* of a specific *discriminatory practice* promulgated by Wal-Mart.” Pet. App. 59a (emphases added). In the absence of such a practice, plaintiffs are forced to argue that individual store managers unilaterally exercised discretion in a common manner that disadvantaged female employees.

Because store-by-store proof would indisputably destroy commonality, the district court simply relieved plaintiffs of the burden of proving their own theory: “Because the focal point will be the practice of utilizing excess subjectivity, *rather than the facts concerning each individual decision*, the ... subjective nature of [Wal-Mart's] personnel practices does not defeat commonality in this case.” Pet. App. 187a *40 (emphasis added). By relieving plaintiffs of proving a statutory element of their case, the district court committed clear legal error. [Hohider v. UPS](#), 574 F.3d 169, 184 (3d Cir. 2009); [McLaughlin v. Am. Tobacco Co.](#), 522 F.3d 215, 223-25 (2d Cir. 2008).

If this case were to proceed to trial, and judgment, without requiring plaintiffs to prove that individual employment decisions were unlawful, then Wal-Mart could be held liable for backpay under Title VII to persons who did not suffer any actionable discrimination. The class device cannot be used to subvert the substantive law in this manner. See [Philip Morris USA Inc. v. Scott](#), 131 S. Ct. 1, 3-4 (2010) (Scalia, Circuit Justice).

b. *No Discriminatory Animus.* Moreover, the Ninth Circuit and the district court failed even to address the intent element, let alone grapple with the fact that determining whether “excess subjectivity” was exercised in an intentionally discriminatory fashion requires individualized proof. See, e. g., [Garcia](#), 444 F.3d at 632.

Where, as here, a multi-facility discrimination class action requires proof of intentional decision-making by managers in separate facilities, it cannot be certified. See [Cooper](#), 390 F.3d at 715. Indeed, under Title VII, plaintiffs would have to prove that the motive for *every single* discretionary pay and promotion decision affecting every single class member was discrimina-

tory. See [42 U.S.C. § 2000e-5\(g\)\(2\)](#). But just as it “does not follow ... that the particular supervisors to whom this discretion is delegated always act without discriminatory intent” ([Watson](#), 487 U.S. at 990), it also does not follow that each of them acted *with* discriminatory intent regarding millions of distinct pay and promotion decisions made within *41 the context of Wal-Mart's express anti-discrimination policies.

The intent element cannot be eliminated simply to achieve class certification. If holding plaintiffs to their burden of proving each element of their claim would foreclose one or more of the [Rule 23\(a\)](#) prerequisites, then the consequence is that the class may not be certified, not that the substantive element of the liability claim can be ignored. See [Hohider](#), 574 F.3d at 184; see also [Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.](#), 130 S. Ct. 1431, 1443 (2010) (plurality) (a “class action ... leaves the parties' legal rights and duties intact”).

2. Wal-Mart's Defenses

Wal-Mart has a right to present statutory defenses that would by their very nature destroy commonality and typicality (and, for that matter, adequacy). The lower courts, recognizing that allowing Wal-Mart to present the defenses ordinarily available to employers in Title VII cases would undo the cohesiveness necessary for aggregated adjudication of plaintiffs' claims, elected to deny Wal-Mart the right to defend itself. This too was error.

Aggregated disparate-treatment claims normally proceed in two stages. [Cooper](#), 467 U.S. at 876 n.9; [Teamsters](#), 431 U.S. at 336, 361-62. First, the plaintiffs must prove that “discrimination was the company's standard operating procedure.” [Teamsters](#), 431 U.S. at 336. If they carry this burden, a rebuttable presumption arises that each class member is entitled to appropriate relief. *Id.* at 361. At the second stage, “a district court must usually conduct additional proceedings ... to determine the scope of individual relief” and afford the employer the opportunity “to demonstrate that the individual ... was denied*42 an employment opportunity for lawful reasons.” *Id.* at 361-62; see also [42 U.S.C. § 2000e-5\(g\)\(2\)\(A\)](#).

Like the right to a jury trial, the second stage of a *Teamsters*-bifurcated proceeding may be dispensed

with only on the consent of both parties. Moreover, at that second stage, the court's task will "not be a simple one" because it has to "make a substantial number of individual determinations" to determine which class members "were actual victims." [*Teamsters*, 431 U.S. at 371](#); see also [*Price Waterhouse*, 490 U.S. at 266](#) (O'Connor, J., concurring in judgment). It would be totally infeasible to make such determinations in this case, as plaintiffs "implicitly concede[d]" below. Pet. App. 251a.

While the district court acknowledged that holding such individual hearings "is impractical on its face," and "not feasible here" (Pet. App. 251a), it certified the class anyway. The court's solution was simply to extinguish Wal-Mart's right to individualized hearings altogether on the theory that such hearings are "inconsistent with the fundamental character of the class action proceeding." *Id.* at 245a. By elevating procedure over substance, yet again, the district court transgressed the most critical dictate of the Rules Enabling Act - that the desire to certify a class action must not override substantive rights.

Under Title VII, Wal-Mart is entitled to prove that an individual employment action was taken for non-discriminatory reasons, [42 U.S.C. § 2000e-5\(g\)\(2\)\(A\)](#), or that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* [§ 2000e-5\(g\)\(2\)\(B\)](#). Thus, even if plaintiffs could prove actionable discrimination, Wal-Mart would be entitled to rebut the claims of each individual class member. See [*43Reeb v. Ohio Dep't of Rehab. & Corr.](#), 435 F.3d 639, 651 (6th Cir. 2006). Moreover, only injured individuals are entitled to recover backpay under Title VII. [42 U.S.C. § 2000e-5\(g\)\(2\)](#); [*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").

The Ninth Circuit expressly recognized that, as to some class members, "unequal pay or non-promotion was due to something *other* than gender discrimination," but nonetheless endorsed procedures that would let them recover anyway while barring Wal-Mart from presenting its otherwise available defenses to those claims. Pet. App. 110a n.56. The district court was equally explicit: "[Wal-Mart] is not ... entitled to circumvent or defeat the class nature of the proceeding

by litigating whether every individual store discriminated against individual class members." *Id.* at 247a. There could not be a clearer violation of the Rules Enabling Act.

The Ninth Circuit's decision also violates Wal-Mart's "right to litigate the issues raised ... guaranteed ... by the Due Process Clause" ([*United States v. Armour & Co.*, 402 U.S. 673, 682 \(1971\)](#)), which includes the right "to present every available defense." [*Lindsey v. Normet*, 405 U.S. 56, 66 \(1972\)](#) (internal quotation marks omitted). Corporations, even large ones, do not forfeit their constitutional rights when they are sued. See [*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 \(1996\)](#).

In short, in the face of this Court's admonitions that the Rules Enabling Act counsels against "adventurous application" of [Rule 23](#) ([Ortiz](#), 527 U.S. at 845), the courts below refashioned Title VII in service of the procedural class-action device. Had they [*44](#) adhered to the requirements of both governing substantive law and [Rule 23\(a\)](#), they would have reached the inescapable conclusion that this class cannot be certified.

II. The Certification Order Is Not Consistent With [Rule 23\(b\)\(2\)](#)

[Rule 23\(b\)\(2\)](#) authorizes certification only where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." In addition to injunctive and declaratory relief, plaintiffs seek backpay and punitive damages - monetary relief that, in the aggregate, would amount to billions of dollars. [Rule 23\(b\)\(2\)](#), however, does not authorize certification of any monetary claims, and certainly not individual monetary claims that predominate over the injunctive and declaratory claims, as the monetary claims here clearly do.

In the 1966 amendments to [Rule 23](#), an older set of class-action categories - "true," "hybrid," and "spurious" - was replaced, and the modern class action was born. [Amchem](#), 521 U.S. at 613. Subdivision (b)(1) captures a defined subset of cases - such as those involving riparian landowners, security holders, or claimants to a limited fund - that inherently required classwide resolution. [Fed. R. Civ. P. 23\(b\)\(1\)](#); [Ortiz](#), 527 U.S. at 833; Advisory Committee Notes, [39 F.R.D. 69, 100-01 \(1966\)](#). Subdivision (b)(2) is premised on "the absence of a claim for monetary relief and the

nature of the claim asserted.” Sosna v. Iowa, 419 U.S. 393, 398 n.4 (1975); accord Amchem, 521 U.S. at 614. And subdivision (b)(3) added a more flexible category of action to address “situations in which class action treatment is not as clearly called for as it is in *45 Rule 23(b)(1) and (b)(2),” yet is nevertheless “convenient and desirable.” *Id.* at 615 (internal quotation marks omitted).

Subdivision (b)(3) was an “‘adventuresome’ innovation” (Amchem, 521 U.S. at 614) designed to accommodate the “Rule’s growing edge.” Ortiz, 527 U.S. at 862. To prevent abuse, this subdivision was supplemented by “further protective devices” and procedural requirements not applicable to the other categories of class actions. Statement on Behalf of the Advisory Committee on Civil Rules 9 (June 10, 1965), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV06-1965.pdf>. Specifically, safeguards in the form of mandatory notice and opt-out procedures were designed for subdivision (b)(3) alone. Fed. R. Civ. P. 23(c)(2). And (b)(3) certification was deemed appropriate only where “questions of law or fact common to class members predominate over any questions affecting only individual members” and “a class action is superior to other available methods” of adjudication. Plaintiffs here cannot meet this “predominance” requirement, which is a “vital prescription” governing monetary claims that is “far more demanding” than Rule 23(a)’s commonality requirement. Amchem, 521 U.S. at 622-24.

In contrast, Rule 23(b)(2) does not require notice to absent class members, nor does it permit class members to opt out of the lawsuit. For that reason, courts considering certification under Rule 23(b)(2), like those contemplating certification under Rule 23(b)(1) (the other “mandatory” provision), must take the “prudent course” of staying “close to the historical model” and the Advisory Committee’s “traditional paradigm.” Ortiz, 527 U.S. at 842, 864; see also Amchem, 521 U.S. at 614, 625; Califano, 442 U.S. at 700-01.

*46 Here, the Ninth Circuit sanctioned a mandatory class of potentially millions of women asserting highly individualized claims for billions of dollars in backpay (and possibly punitive damages). That class finds no support in Rule 23(b)(2)’s plain language or in the provision’s historical antecedents.

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

Rule 23(b)(2) does not on its face authorize certification of any class claims seeking monetary relief. Sosna, 419 U.S. at 397 n.4. This Court has long recognized that the starting point for determining a Federal Rule’s meaning and scope is its text. Schmuck v. United States, 489 U.S. 705, 716 (1989) (interpretation “is grounded in the language and history of the Rule”); cf. Krupski v. Costa Crociere S.p.A., 130 S. Ct. 2485, 2493 (2010); Libretti v. United States, 516 U.S. 29, 38 (1995).

Rule 23(b)(2)’s text - noticeably absent from the Ninth Circuit’s analysis - is plain: Certification is appropriate if the requirements of Rule 23(a) and Rule 23(c) are met, and when “the party opposing the class has acted ... on grounds that apply generally to the class, so that *final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.*” Fed. R. Civ. P. 23(b)(2) (emphasis added). The Rule is silent as to monetary relief, or indeed any kind of equitable relief other than injunctive or corresponding declaratory relief. See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (*expressio unius est exclusio alterius*).

This Court therefore has noted the substantial probability that monetary claims cannot be certified under Rule 23(b)(2). Ticor, 511 U.S. at 121. Due *47 process *requires* an opportunity for absent class members to opt out of claims for monetary relief. Shutts, 472 U.S. at 811-12; see also S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68 (1999); Richards v. Jefferson Cnty., 517 U.S. 793, 799-802 (1996). Rule 23(b)(2)’s prohibition of opt-outs therefore admits of only two conclusions: Either this subdivision is unconstitutional, or it does not apply to monetary claims. The doctrine of constitutional avoidance requires choosing the second option, and limiting Rule 23(b)(2) to the injunctive or corresponding declaratory relief it expressly encompasses. Ortiz, 527 U.S. at 845.

Although some courts, including the district court here (Pet. App. 243a), have purported to confer opt-out rights on (b)(2) class members, Rule 23 does not authorize this procedure, and this Court has repeatedly

warned the lower courts against re-writing the Rule. *Amchem*, 521 U.S. at 620; see also *Leatherman*, 507 U.S. at 168; *Harris v. Nelson*, 394 U.S. 286, 298 (1969). Such unauthorized judicial modifications “undo the careful interplay between [Rules 23\(b\)\(2\) and \(b\)\(3\)](#)” by permitting plaintiffs to pursue substantial monetary claims without “requiring [them] to meet the rigorous [Rule 23\(b\)\(3\)](#) requirements” of predominance and superiority. *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 554 (5th Cir. 2003); see also *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000); *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 897-99 (7th Cir. 1999). If a court must amend the Rule to satisfy due process, then the Rule simply does not apply. *Ortiz*, 527 U.S. at 848.

The natural reading of [Rule 23\(b\)\(2\)](#)’s text and structure is also consistent with the historical model for [Rule 23\(b\)\(2\)](#). *Ortiz* held that pre-1966 cases on which the Advisory Committee drew when amending *48 [Rule 23](#) provided both sufficient and presumptively necessary preconditions to certification. 527 U.S. at 842; Pet. App. 148a (Ikuta, J., dissenting). Only those limited categories of cases could proceed as mandatory class actions without the additional requirements and procedural safeguards required under [Rule 23\(b\)\(3\)](#).

[Rule 23\(b\)\(2\)](#) was written to encompass “actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.” Advisory Committee Notes, 39 F.R.D. at 102; see also *Amchem*, 521 U.S. at 614. That does not mean, of course, that all “civil rights” cases, including any variety of discrimination claims under Title VII, are covered by (b)(2), as plaintiffs have suggested. Pet. Opp. 15. That position would entirely ignore the “illustrative” civil rights actions that the Advisory Committee took care to include. Advisory Committee Notes, 39 F.R.D. at 102.

Every single one of the cases on which the mandatory [Rule 23\(b\)\(2\)](#) was based involved a challenge to racial segregation. See Pet. App. 149a n.22 (Ikuta, J., dissenting) (citing cases); see also, e.g., *Bailey v. Paterson*, 369 U.S. 31, 32 (1962) (per curiam); *Evers v. Dwyer*, 358 U.S. 202, 202 (1958) (per curiam). Litigated before the Civil Rights Acts of 1964 and 1991, these cases sought neither backpay, nor compensatory or punitive damages; they were not tried before juries;

and no individual relief was sought. *Bailey*, 369 U.S. at 32; *Evers*, 358 U.S. at 203.

None of the historical antecedents allowed class resolution of monetary claims or addressed individual injury. See, e.g., *Potts v. Flax*, 313 F.2d 284, 289-90 (5th Cir. 1963) (noting in school desegregation *49 case “considerable doubt” that relief could be confined to certain children). Instead, the drafters permitted only adjudication of injunctive and declaratory claims - a distinction between remedies well-known at the time of both the 1938 and 1966 versions of [Rule 23](#).

All of the historical antecedents involved conduct (a facially discriminatory policy) that affected every class member alike and a naturally cohesive request for injunctive relief to the exclusion of individualized monetary relief. Such challenges to open segregation are a far cry from the novel claims alleged here, which are essentially tort claims for unliquidated damages (see *Price Waterhouse*, 490 U.S. at 264 (O’Connor, J., concurring in judgment)), based on individualized pay and promotion decisions, made through the exercise of discretion within a system of identified criteria governed by express anti-discrimination and diversity policies meant to foster equal treatment. To say the least, these claims are at the “growing edge” of class-action law contemplated by [Rule 23\(b\)\(3\)](#), not the well-known desegregation cases captured in [Rule 23\(b\)\(2\)](#)’s historical antecedents. *Ortiz*, 527 U.S. at 862; cf. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746-47 (5th Cir. 1996).

Fidelity to the text, structure, and historical antecedents does not prevent class-based litigation of employment cases. Rather, it simply instructs that the appropriate class certification analysis for claims for monetary relief, or for novel theories of decentralized, intentional discrimination not contemplated by the antecedents, is that described in [Rule 23\(b\)\(3\)](#). See, e.g., *Reeb*, 435 F.3d at 651. That category, with its due process protections for absent class members and defendants (including finality and security from later collateral attack), is the appropriate vehicle for *50 such cases. See *Falcon*, 457 U.S. at 161 (critiquing the “tacit assumption” that “all will be well for surely the plaintiff will win and manna will fall on all members of the class”) (internal quotation marks omitted).

B. Plaintiffs’ Monetary Claims “Predominate”

Several circuits have ruled that *some* monetary claims may proceed under [Rule 23\(b\)\(2\)](#). These decisions rest entirely on an inference drawn from the Advisory Committee's statement that a class cannot be certified under [Rule 23\(b\)\(2\)](#) where the relief sought "relates ... predominantly to money damages." Advisory Committee Notes, [39 F.R.D. at 102](#); *see also Krupski*, [130 S. Ct. at 2498-99](#) (Scalia, J., concurring) (explaining that Advisory Committee Notes cannot supersede the plain text of a Rule).

The circuits have developed three approaches for determining when monetary claims "predominate": the "incidental damages" approach articulated by the Fifth Circuit and adopted by most others, the "ad hoc" approach applied only in the Second Circuit, and the "superior-in-strength" approach announced for the first time in the decision below. Pet. 10-12. Under any of these three approaches, the billions of dollars of monetary relief sought here predominate and may not, therefore, be certified under [Rule 23\(b\)\(2\)](#).

If the Court elects to depart from [Rule 23\(b\)\(2\)](#)'s text, structure, and history, and allow some claims for monetary relief to be certified under that subdivision, it should adopt a variant of the "incidental damages" standard. That approach, followed by the majority of the circuits, provides that [Rule 23\(b\)\(2\)](#) certification is prohibited where plaintiffs seek *51 monetary relief unless the relief sought will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, [151 F.3d 402, 415](#) (5th Cir. 1998); *see also Reeb*, [435 F.3d at 649-50](#); *Thorn v. Jefferson-Pilot Life Ins. Co.*, [445 F.3d 311, 330 n.25](#) (4th Cir. 2006); *Cooper*, [390 F.3d at 720](#); *Lemon v. Int'l Union of Operating Eng'rs*, [216 F.3d 577, 580-81](#) (7th Cir. 2000).

Unlike the alternatives articulated by the Second and Ninth Circuits, the incidental damages standard comes closest to capturing the two key elements of an appropriate [Rule 23\(b\)\(2\)](#) class. First, the relief provided extends, as the Rule itself requires, to the class "as a whole." [Fed. R. Civ. P. 23\(b\)\(2\)](#). Second, when properly applied, the standard permits only those forms of monetary relief that occur automatically or naturally flow from the injunctive relief, without the necessity of further individualized hearings. The prototypical examples are attorneys' fees and costs.

See, e.g., [42 U.S.C. § 1988](#). Such relief does not necessarily undermine [Rule 23\(b\)\(2\)](#) cohesion because it benefits the class as a whole and does not require individualized entitlement determinations - and it furthers civil rights enforcement consistent with [Rule 23\(b\)\(2\)](#)'s historical antecedents.

1. The Majority Of The Class Has Standing To Seek Only Monetary Relief

[Rule 23\(b\)\(2\)](#) authorizes certification where "final injunctive or corresponding declaratory relief is appropriate *respecting the class as a whole*." [Fed. R. Civ. P. 23\(b\)\(2\)](#) (emphasis added). That is not the case here.

*52 A majority of the members of this purported class are former employees who lack standing to secure injunctive or declaratory relief. *City of Los Angeles v. Lyons*, [461 U.S. 95, 103](#) (1983); *Aetna Life Ins. Co. v. Haworth*, [300 U.S. 227, 241](#) (1937). More than half of the declarations submitted by plaintiffs are from former employees, and plaintiffs themselves have pointed to a 55.6% annual turnover rate in the retail industry. C.A. Dkt. 150 at 4 n.1 (No. 04-16688).

The Ninth Circuit purported to "solve" this problem by limiting the class to those persons who were employed on or after the date the complaint was filed. Pet. App. 100a-102a. But that arbitrary line-drawing ignores fundamental principles of constitutional law. A plaintiff who left the company the day after the complaint was filed no more has standing to obtain injunctive or declaratory relief than a person who quit the day before; each plaintiff must have standing to secure the requested relief *throughout* the lawsuit. *See, e.g., Lujan v. Defenders of Wildlife*, [504 U.S. 555, 561](#) (1992); *Deakins v. Monaghan*, [484 U.S. 193, 199-200](#) (1988); *see also Ortiz*, [527 U.S. at 831](#) ([Rule 23](#) "must be interpreted in keeping with Article III constraints") (internal quotation marks omitted); *O'Shea v. Littleton*, [414 U.S. 488, 494](#) (1974).

Because more class members are seeking *only* individual monetary relief than may seek the relief authorized by [Rule 23\(b\)\(2\)](#), the injunctive and declaratory relief requests cannot possibly predominate over the monetary relief requests under *any* standard. *Cooper*, [390 F.3d at 721](#).

*53 2. Plaintiffs' Backpay Claims "Predominate"

The fact that plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages, does not alter the conclusion that the request for monetary relief predominates.

While some lower courts have certified [Rule 23\(b\)\(2\)](#) classes seeking backpay on the basis that such claims are “equitable,” none of those courts has attempted to reconcile a backpay request with the fact that [Rule 23\(b\)\(2\)](#) is expressly limited to declaratory and injunctive relief. See, e.g., [Domingo v. New England Fish Co.](#), 727 F.2d 1429, 1445 (9th Cir. 1984) (per curiam) (citing cases); [Pettway v. Am. Cast Iron Pipe Co.](#), 494 F.2d 211, 259-60 (5th Cir. 1974). If the “Rule’s drafters had intended the Rule to extend to *all* forms of equitable relief” - rather than just to injunctive or corresponding declaratory relief - “the text of the Rule would say so.” [Thorn](#), 445 F.3d at 331. Instead, [Rule 23\(b\)\(2\)](#)’s text says “nothing whatsoever about equitable relief.” *Ibid*.

While backpay is a form of monetary relief that is sometimes characterized as equitable, it is ultimately nothing more than monetary compensation for past harm. “Congress treated backpay as equitable in Title VII only in the narrow sense that [Title VII] allowed backpay to be awarded *together with* equitable relief.” [Great-West Life & Annuity Ins. Co. v. Knudson](#), 534 U.S. 204, 218 n.4 (2002) (internal quotation marks, alteration, and citation omitted).

Moreover, the features that make backpay “an integral part of an equitable remedy, a form of restitution” ([Curtis v. Loether](#), 415 U.S. 189, 197 (1974)), are those that render it particularly ill-suited to [Rule 23\(b\)\(2\)](#) certification. That is because even after a *54 determination of liability, backpay awards are discretionary, not automatic, and therefore require an individual analysis with respect to each plaintiff to determine whether the court should exercise its discretion. [42 U.S.C. § 2000e-5\(g\)\(2\)](#); see also [Ford Motor Co. v. EEOC](#), 458 U.S. 219, 226 (1982) (confirming that “backpay is not an automatic or mandatory remedy”) (internal quotation marks omitted); [Albemarle Paper Co. v. Moody](#), 422 U.S. 405, 424 (1975) (Title VII backpay awards are discretionary in reaching “a just result in light of the circumstances peculiar to the case”) (internal quotation marks omitted); cf. [eBay Inc. v. MercExchange, L.L.C.](#), 547 U.S. 388, 391-93 (2006) (“injunctive relief is an act of equitable discretion”

that does not follow “automatically” from liability determination).

And as this Court has repeatedly made clear, Title VII bars “affirmative relief” where the employer shows that an individual suffered no injury. Compare [Price Waterhouse](#), 490 U.S. at 245 n.10 (plurality), and [Stotts](#), 467 U.S. at 579, with [Pettway](#), 494 F.3d at 257 (assuming relief need not relate to who was injured or the extent of the injury).

Although in most cases, including this one, the highly individualized nature of a backpay claim should preclude (b)(2) certification because the claim is not based on grounds generally applicable to the class, some courts have suggested that such certification *might* be appropriate where injunctive and declaratory relief predominate *despite* the presence of a request for backpay. See [Hohider](#), 574 F.3d at 202 (“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”); [Thorn](#), 445 F.3d at 331; *55 [Heffner v. Blue Cross & Blue Shield of Ala., Inc.](#), 443 F.3d 1330, 1340 (11th Cir. 2006); [Eubanks v. Billington](#), 110 F.3d 87, 95 (D.C. Cir. 1997).

But those courts would not permit certification in this case. The backpay sought here is not a “uniform group remed[y]” unrelated to the “merits of each class member’s individual case.” [Allison](#), 151 F.3d at 414; see [Lemon](#), 216 F.3d at 581. Given that it would take a trier of fact years (if not decades) to conduct additional proceedings - which nearly every court to consider the issue has required as part of the (b)(2) certification - the backpay request is anything but “incidental.” See [Shipes v. Trinity Indus.](#), 987 F.2d 311, 315 (5th Cir. 1993) (explaining that it took from 1985 to 1992 to process the backpay claims of a class of 400 employees). And awarding backpay without individualized hearings to determine each class member’s entitlement to such recovery, through a “formula” or otherwise, would violate the Rules Enabling Act and due process. [McLaughlin](#), 522 F.3d at 231-32; [In re Hotel Tel. Charges](#), 500 F.2d 86, 90 (9th Cir. 1974). Under any and all standards, therefore, the billions of dollars of backpay claims predominate - indeed, they engulf every other issue in the case.

3. Punitive Damages Will Always Predominate

No court of appeals has *ever* before suggested that punitive damages could be certified under [Rule 23\(b\)\(2\)](#). In seeking such certification, plaintiffs pursued a novel and aggressive litigation strategy; in not foreclosing that strategy, the Ninth Circuit broke ranks with every other circuit.

This Court has “admonished that ‘punitive damages pose an acute danger of arbitrary deprivation of property.’ ” *56 [State Farm Mut. Auto. Ins. Co. v. Campbell](#), 538 U.S. 408, 417 (2003) (quoting [Honda Motor Co. v. Oberg](#), 512 U.S. 415, 432 (1994)). These due process concerns are magnified in class actions. See [Allison](#), 151 F.3d at 418; [Cooper](#), 390 F.3d at 721.

The Ninth Circuit wrongly noted in passing that “this case does not require individualized punitive damages determinations.” Pet. App. 98a. In fact, *every case* litigated under Title VII requires individualized determinations before punitive damages can be awarded, because only an “aggrieved individual” can collect punitive damages. [42 U.S.C. § 1981a\(b\)\(1\)](#). And Title VII unequivocally precludes any monetary award to nonvictims. See *id.* [§ 2000e-5\(g\)\(2\)](#); [Price Waterhouse](#), 490 U.S. at 245 n.10 (plurality); [Costa](#), 299 F.3d at 857.

Moreover, due process forbids courts from “punish[ing] and deter[ing] conduct that bore no relation to the [plaintiffs’] harm.” [State Farm](#), 538 U.S. at 422. In [Philip Morris USA v. Williams](#), 549 U.S. 346 (2007), this Court squarely held that “the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present *every* available defense.” *Id.* at 353 (emphasis added) (internal quotation marks omitted). And the Seventh Amendment, which guarantees the right to a jury trial, also preserves Wal-Mart’s right to have those defenses resolved by the same jury that decided liability. See [Feltner v. Columbia Pictures Television, Inc.](#), 523 U.S. 340, 355 (1998); [Tull v. United States](#), 481 U.S. 412, 422-23 (1987).

Thus, to recover punitive damages, in addition to proving intentional discrimination, class members here must “make an *additional* ‘demonstrat[ion]’ of their eligibility for punitive damages.” *57 [Kolstad v. Am. Dental Ass’n](#), 527 U.S. 526, 534 (1999) (emphasis added; alteration in original) (citing [42 U.S.C. § 1981a\(b\)\(1\)](#)). As with plaintiffs’ backpay claims, that highly individualized proof fatally undermines the

cohesion necessary under [Rule 23\(b\)\(2\)](#). [Barnes v. Am. Tobacco Co.](#), 161 F.3d 127, 143 (3d Cir. 1998).

Class actions serve a valuable role in our civil justice system. But while some aggregation may increase efficiency without sacrificing fairness, aggregation for its own sake, especially on the excessive scale and unlimited scope presented here, is neither efficient nor fair to anyone. Courts must ensure that the substantive rights of the parties - including defendants and absent class members - are not sacrificed on the altar of procedure. [Amchem](#), 521 U.S. at 629. The courts below failed to do so.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to decertify the class.

*1A APPENDIX

[28 U.S.C. § 2072](#) provides:

[§ 2072](#). Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

[42 U.S.C. § 1981](#) provides:

[§ 1981](#). Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

***2a (b) “Make and enforce contracts” defined**

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

[42 U.S.C. § 1981a](#) provides:

[§ 1981a](#). Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [[42 U.S.C. 2000e-5](#), [2000e-16](#)] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [[42 U.S.C. 2000e-2](#), [2000e-3](#), [2000e-16](#)], and provided that the complaining party cannot recover under [section 1981](#) of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the

powers, remedies, and procedures set forth in ***3a** section 706 or 717 of the Civil Rights Act of 1964 [[42 U.S.C. 2000e-5](#), [2000e-16](#)] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 ([42 U.S.C. 12117\(a\)](#)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 ([42 U.S.C. 12112](#)), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [[42 U.S.C. 12112\(b\)\(5\)](#)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

***4a (b) Compensatory and punitive damages**

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [[42 U.S.C. 2000e-5\(g\)](#)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party -

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or ***5a** more calendar weeks in the current or preceding calendar year, \$200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, [section 1981](#) of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section -

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term “complaining party” means -

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 ([42 U.S.C. 2000e et seq.](#)); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [[42 U.S.C. 12111 et seq.](#)].

***6a** (2) Discriminatory practice

The term “discriminatory practice” means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

[42 U.S.C. § 2000e-2](#) provides in relevant part:

[§ 2000e-2](#). Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to ***7a** any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent

refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining ***8a** party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act ([21 U.S.C. 802\(6\)](#)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [[21 U.S.C. 801 et seq.](#)] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

9a **

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an

unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

[42 U.S.C. § 2000e-3](#) provides in relevant part:

[§ 2000e-3](#). Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

***10a** [42 U.S.C. § 2000e-5](#) provides in relevant part:

[§ 2000e-5](#). Enforcement provisions

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expeditious case; appointment of master

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of [sections 1404](#) and [1406 of Title 28](#), the judicial district in which the respondent has his principal office ***11a** shall in all cases be considered a district in which the action might have been brought.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused em-

ployment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or *12a national origin or in violation of [section 2000e-3\(a\)](#) of this title.

(B) On a claim in which an individual proves a violation under [section 2000e-2\(m\)](#) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court -

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under [section 2000e-2\(m\)](#) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

[Federal Rule of Civil Procedure 23](#) provides:

[Rule 23](#). Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

*13a (b) Types of Class Actions. A class action may be maintained if [Rule 23\(a\)](#) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

*14a (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under [Rule 23\(g\)](#).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under [Rule 23\(b\)\(1\) or \(b\)\(2\)](#), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under [Rule 23\(b\)\(3\)](#), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

***15a** (iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under [Rule 23\(c\)\(3\)](#).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under [Rule 23\(b\)\(1\) or \(b\)\(2\)](#), include and describe those whom the court finds to be class members; and

(B) for any class certified under [Rule 23\(b\)\(3\)](#), include and specify or describe those to whom the [Rule 23\(c\)\(2\)](#) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

***16a** (B) require--to protect class members and fairly conduct the action-- giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under [Rule 23\(d\)\(1\)](#) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) *Settlement, Voluntary Dismissal, or Compromise.* The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dis-

missal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

***17a** (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under [Rule 23\(b\)\(3\)](#), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

***18a** (iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under [Rule 23\(h\)](#); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under [Rule 23\(g\)\(1\) and \(4\)](#). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

***19a** (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

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2011 WL 201045 (U.S.) (Appellate Brief)

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