Nos. 04-16688 & 04-16720

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, & EDITH ARANA,
Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,
Defendant/Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., ASIAN AMERICAN JUSTICE CENTER, LATINOJUSTICE PRLDEF, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEGAL MOMENTUM, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, AND WOMEN EMPLOYED IN SUPPORT OF PLAINTIFFS/APPELLEES/CROSS-APPELLANTS

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Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that each is a tax-exempt non-profit corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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Interest of *Amici Curiae*[1]

Amici are non-profit organizations dedicated to, among other goals, eradicating workplace discrimination affecting racial and ethnic minorities, women, and other disadvantaged groups.

The *NAACP Legal Defense & Educational Fund, Inc.*, is a non-profit corporation established to assist African Americans and other people of color in securing their civil and constitutional rights through the prosecution of lawsuits that challenge racial discrimination. For six decades, LDF attorneys have represented parties in litigation before the Supreme Court and other federal courts on matters of race discrimination in general, and employment discrimination in particular, including in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); and *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF has focused its employment discrimination work particularly upon class actions because of their effectiveness in securing systemic change.

The *Asian American Justice Center*, formerly National Asian Pacific American Legal Consortium, is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law

[1] Through an agreement between plaintiffs' counsel and defense counsel, all parties have consented to the filing of this amicus brief.

Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC and its affiliates have a long-standing interest in civil rights issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

LatinoJustice PRLDEF is an independent national not-for-profit civil rights organization which has advocated for and defended the constitutional rights and the equal protection of all Latinos under law. Founded in 1972, the organization's mission is to promote the civic participation of the pan-Latino community, to cultivate Latino community leaders, and to bring impact litigation addressing voting rights, employment opportunity, fair housing, language rights, educational access, immigrants' and migrants' rights. During its 37-year history, LatinoJustice PRLDEF has litigated numerous employment discrimination cases on behalf of Latino and Latina employees.

The *Lawyers' Committee for Civil Rights Under Law* (LCCRUL) is a nonprofit civil rights organization founded in 1963 by leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. LCCRUL has long recognized Rule 23 as an essential tool

for civil rights enforcement efforts. LCCRUL has contributed to the development of the law under Rule 23.

Founded in 1970, *Legal Momentum* (formerly NOW Legal Defense & Education Fund) is the nation's oldest legal advocacy organization dedicated to advancing the rights of women and girls. With headquarters in New York City and offices in Washington, D.C., Legal Momentum has been a leader in establishing legal, legislative, and educational strategies to secure equality and justice for women across the country. Legal Momentum litigates employment discrimination cases frequently.

The *National Association for the Advancement of Colored People* (NAACP) is a non-profit membership corporation chartered by the State of New York in 1909. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and racial discrimination. The NAACP has been at the forefront of the struggle to end employment discrimination.

The *National Partnership for Women & Families* is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant

resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeals to advance the opportunities of women and people of color in employment.

The *National Women's Law Center* (NWLC) is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964.

Women Employed is a national organization based in Chicago whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has fought to outlaw pay discrimination, pregnancy discrimination and sexual harassment and to strengthen federal equal opportunity policies and work/family benefits. Women Employed strongly believes that pay discrimination is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace and that class actions are an indispensable tool for eradicating illegal, company-wide employment discrimination.

Summary of the Argument

Wal-Mart wants this Court to change the law of class actions and hold that no class-action lawsuit may proceed under Rule 23(b)(2) if the plaintiffs seek any money damages in addition to injunctive and declaratory relief. This result would be a radical rewriting of both class certification and civil rights law, and has no support in precedent or policy.

Back pay is a presumptively available remedy for victims of job discrimination and is integral to full equitable relief. Back pay has long been uniformly available in Rule 23(b)(2) class actions, and Wal-Mart's claim of a circuit split on this question is incorrect.

In addition, punitive damages are available in a (b)(2) class under the circumstances presented here, where the punitive damages inquiry necessarily focuses on the employer's conduct and not on any individual characteristics of the plaintiffs. In amending Title VII in 1991 to provide punitive damages to victims of intentional discrimination, Congress made clear its intent to expand, not limit, the relief available in Title VII cases.

Wal-Mart's position would strip civil rights plaintiffs of remedies to which they are presumptively entitled; undermine the central tenets that motivated passage of Title VII; and defeat Congress's intent in extending, through the Civil Rights Act of 1991, the damages that are available to victims of intentional

discrimination. This Court should reject Wal-Mart's extreme position and affirm the district court's decision to certify the plaintiff class under Rule 23(b)(2).

Argument

I. Wal-Mart's proposed standard for Rule 23(b)(2) class certification is unsupported by any existing caselaw.

Rule 23(b)(2), originally added in the 1966 Amendments to the Federal Rules of Civil Procedure, permits certification of a class where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see also* Order Amending the Rules of Civil Procedure for the United States District Courts, 383 U.S. 1039, 1048 (1966). The Advisory Committee's Note makes clear that the drafters of Rule 23(b)(2) intended monetary relief to be available, in addition to injunctive and declaratory relief, so long as the appropriate final relief does not relate "exclusively or predominantly to money damages." Advisory Committee's Note to the 1966 Amendment to Rule 23, *reprinted in* 39 F.R.D. 69, 102 (1966) [hereinafter Advisory Committee's Note].

Wal-Mart's opening brief in this appeal argues that plaintiffs' back pay claim – although it "might not automatically preclude" certification under Rule 23(b)(2) – definitively "weigh[s] against" certification. Wal-Mart Br. 55, Nos. 04-16688 & 04-16720 (9th Cir. Nov. 29, 2004). Wal-Mart's petition for rehearing *en*

banc goes even further, arguing that this Court's panel decision affirming (b)(2) certification is "inexplicabl[e]" merely because of the presence of plaintiffs' back pay request. Wal-Mart Pet. for Reh'g *En Banc* 12-13, Nos. 04-16688 & 04-16720 (9th Cir. Jan. 8, 2008). Wal-Mart proposes that this Court adopt a new test under which (b)(2) certification is unavailable if Title VII plaintiffs seek "substantial monetary relief." *Id.* at 13-14.

Wal-Mart also argues that punitive damages are categorically unavailable in any (b)(2) action. *See* Wal-Mart Br. 56; Wal-Mart Pet. for Reh'g *En Banc* 12-13.

Wal-Mart's proposed standard for class certification of Title VII claims that include monetary relief is unsupported by existing caselaw and inconsistent with congressional intent.

A. Back pay remedies are central to full equitable relief and consistent with Rule 23(b)(2) certification.

Congress enacted Title VII as part of the Civil Rights Act of 1964 to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971). A central objective of the statute is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

These objectives are achieved in part through the Title VII remedial scheme, which includes – critically – back pay. 42 U.S.C. § 2000e-5(g). The Supreme Court has explained that back pay has an "obvious connection" with Title VII's central purposes:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Albermarle, 422 U.S. at 417-18 (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

For this reason, the Supreme Court has made clear that back pay is presumptively available to victims of discrimination under Title VII: "[G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421.[2]

[2] "[C]ourts have cited few circumstances that justify denying back pay other than the plaintiff's failure to mitigate damages." Barbara T. Lindemann & Paul Grossman, 2 *Employment Discrimination Law* 2757 & n.27 (4th ed. 2007); *see also Pegues v. Miss. State Employment Serv.*, 899 F.2d 1449, 1457 (5th Cir. 1990) ("[O]nce a plaintiff establishes a violation of the statute, 'the instances wherein [a back pay] award is not granted are exceedingly rare.'" (quoting *Sellers v. Delgado Cmty. Coll.*, 839 F.2d 1132, 1136 (5th Cir. 1988))).

Accordingly, federal courts have – for decades – held that back pay relief is available in (b)(2) class actions, and that the award of this monetary remedy is consistent with the requirement that declaratory and injunctive relief predominate. *See, e.g., Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1331-34 (9th Cir. 1977); *accord Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250-53 (3d Cir. 1975); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876-77 (6th Cir. 1973); *N.L. Indus.*, 479 F.2d at 378-80; *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-21 (7th Cir. 1969).

Wal-Mart's petition for rehearing argues that this Court's panel decision, affirming the availability of back pay in this case, widens a circuit split on the availability of monetary damages in (b)(2) class cases. *See* Wal-Mart Pet. for Reh'g *En Banc* 4-14. Wal-Mart's assertion of an inter-circuit conflict is incorrect.

Both the Ninth Circuit and the Second Circuit have adopted a flexible case-by-case approach to determine whether proposed (b)(2) classes that involve injunctive and monetary relief are consistent with the requirement that injunctive relief predominate. *See Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2nd Cir. 2001). This Court held in *Molski* that determining predominance requires a district court to consider

all of the "specific facts and circumstances of the case," including the intent of the plaintiffs and the primacy of injunctive relief in the plaintiffs' suit. *Molski*, 318 F.3d at 950; *accord Robinson*, 267 F.3d at 164. Plaintiffs may include claims for back pay so long as such claims are "secondary to the primary claim for injunctive or declaratory relief." *Molski*, 318 F.3d at 947.

Wal-Mart argues that *Molski* and *Robinson* are inconsistent with the "bright line" test first articulated in the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). In *Allison*, the Fifth Circuit held that (b)(2) certification is appropriate only where monetary relief is "incidental to related claims for injunctive or declaratory relief." *Id.* at 425. But *Allison* recognized that Rule 23(b)(2), "by its own terms, does not preclude all claims for monetary relief. . . . Back pay, of course, had long been recognized as an equitable remedy under Title VII . . . [that] 'conflicts in no way with the limitations of Rule 23(b)(2).'" *Id.* at 415 (quoting *Pettway*, 494 F.2d at 257). And other courts applying the *Allison* "incidental damages" standard have similarly held that back pay is properly viewed as incidental to injunctive and declaratory relief, and therefore is consistent with (b)(2) certification. *See, e.g.*, *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449-50 (6th Cir. 2002).

Certification of a (b)(2) class for back pay purposes in this case is therefore consistent with both the *Molski* / *Robinson* approach and the *Allison* approach. Indeed, Wal-Mart's argument to the contrary would require ignoring not only decades of class certification decisions in the courts of appeals, but also binding Supreme Court precedent. *Albemarle* itself was a (b)(2) class action involving back pay relief. *See Albemarle*, 422 U.S. at 409, 415-22; *cf. id.* at 414 n.8 (holding that "backpay may be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members").

Wal-Mart's proposed prohibition on any "substantial" award of back pay is also inconsistent with the text of Rule 23(b)(2) and the Advisory Committee's Note, which makes clear that (b)(2) certification is proper where the final relief does not relate "exclusively or predominantly to money damages." Advisory Committee's Note, 39 F.R.D. at 102. Logic compels the conclusion that back pay can be "substantial" and still not "predominate" – as in any case challenging pervasive discrimination by a large employer, and in which injunctive relief stands to bring about significant changes in the employer's conduct.[3]

[3] As just one recent example, *amicus* NAACP Legal Defense Fund settled a Rule 23(b)(2) class-action lawsuit in 2008 for intentional race discrimination against the New York City Parks Department. *See Wright v. Stern*, 553 F. Supp. 2d 337, 344-47 (S.D.N.Y. 2008) (order approving settlement); *Wright v. Stern*, 92 Fair Empl. Prac. Cas. (BNA) 697, 704 (S.D.N.Y. 2003) (order certifying class under Rule 23(b)(2)). The settlement provided injunctive relief as well as the payment of over $20 million in monetary damages and fees. *See Wright*, 553 F.

Neither the *Molski* / *Robinson* approach nor the *Allison* approach supports Wal-Mart's proposal that (b)(2) certification be denied in every case in which back pay relief may be substantial. Back pay is a presumptively available remedy for victims of job discrimination that has uniformly been held to be consistent with (b)(2) certification. This Court should reject an application of (b)(2) certification that would deprive courts of their ability and obligation to provide "the most complete relief possible" to victims of employment discrimination. *Albemarle*, 422 U.S. at 421 (quoting 118 Cong. Rec. 7169 (1972)) (quotation marks omitted).

B. Punitive damages are available in (b)(2) classes because the relevant inquiry focuses on the employer's conduct and state of mind.

Wal-Mart also argues that punitive damages are categorically unavailable in any (b)(2) class action. *See* Wal-Mart Pet. for Reh'g *En Banc* 12. But the nature of a punitive damages award in this Title VII case – in which the plaintiffs are not seeking compensatory damages – is fully compatible with (b)(2) certification, because the punitive damages inquiry focuses on the *employer's* behavior and not on any characteristics unique to individual class members.

Supp. 2d at 341-42. Although $20 million in damages and fees is "substantial," it cannot plausibly be said to "predominate" over the final injunctive relief, which required significant and meaningful changes in the employer's discriminatory practices. *See id.* (approving relief that included, *inter alia*, a permanent injunction against race discrimination and retaliation; the creation of a standing advisory committee to address internal complaints; the adoption of new interview guidelines and promotional processes; the establishment of a training program to develop future managers; and ongoing monitoring by the court and the plaintiffs).

The sole criterion for a punitive damages award here is the employer's state of mind: whether the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference" to federally protected rights. 42 U.S.C. § 1981a(b)(1). In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the Supreme Court applied § 1981a(b)(1) and stressed that "[t]he terms 'malice' and 'reckless' ultimately focus on the *actor's* state of mind." *Id.* at 535 (emphasis added). This Court has accordingly explained that evidence that an employer "was aware of anti-discrimination laws and acted in the face of this awareness" may suffice to show its reckless indifference to the federally-protected rights of plaintiffs. *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1198-99 (9th Cir. 2002).

In a pattern-or-practice case such as this, once the plaintiffs demonstrate that "discrimination was the company's standard operating procedure," the key question would be whether Wal-Mart's actions were taken despite its awareness of Title VII's prohibitions on sex discrimination. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). This inquiry would not require any investigation of Wal-Mart's state of mind regarding particular class members – rather, the focus would be on Wal-Mart's awareness that it risked violating Title VII in maintaining discrimination as its "standard operating procedure." *Id.*

Wal-Mart again raises the specter of a circuit split on the availability of punitive damages in a (b)(2) class action, but none of Wal-Mart's cited cases are on point. Wal-Mart cites *Allison* in support of its position that punitive damages are always unavailable in a (b)(2) case, but the Fifth Circuit's holding in that case is distinguishable. In *Allison*, the plaintiffs sought both punitive *and* compensatory damages, and the court's holding was specifically based on the court's belief that "recovery of punitive damages must necessarily turn on the recovery of compensatory damages." *Allison*, 151 F.3d at 407, 417-18; *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 642 (6th Cir. 2006) (claims for both compensatory and punitive damages); *Cooper*, 390 F.3d at 720 (same).

The plaintiffs in this case have sought punitive damages but *not* compensatory damages. Whatever the merits of the *Allison* holding in a case in which the plaintiffs sought compensatory damages for harms such as emotional distress, that holding has no applicability here, where the plaintiffs have *not* sought compensatory damages and where the claimed harm consists of the existence of discriminatory practices and unpaid wages. *Cf. In re Monumental Life Ins. Co.*, 365 F.3d 408, 415-20 (5th Cir. 2004) (reversing the district court's denial of (b)(2) certification in a 42 U.S.C. § 1981 case, even though the plaintiffs sought significant monetary damages that would potentially entail thousands of distinct

calculations, because the damages variables were "identifiable on a classwide basis" and therefore did not predominate over the claims for injunctive relief).

In addition, *Allison* assumed in *dictum* that back pay alone could not support an award of punitive damages, *see* 151 F.3d at 417-18; but this *dictum* has been directly superseded by subsequent Fifth Circuit authority. *See Abner v. Kansas City Southern R.R. Co.*, 513 F.3d 154, 157, 163-64 (5th Cir. 2008) (holding that an award of punitive damages need not be accompanied by, and can be determined independent of, compensatory damages).

Because the plaintiffs in this case do not seek compensatory damages, there is no basis for Wal-Mart to argue that punitive damages are unavailable in a (b)(2) class. A punitive damages award in this case would be dependent on the employer's state of mind and on incidental back pay awards, consistent with Ninth Circuit law and the law in all other circuits to have considered the question. *See Beck v. Boeing Co.*, 60 F. App'x 38, 40 (9th Cir. 2003) ("To receive punitive damages in a Title VII case, a plaintiff must have suffered some harm as a result of a defendant's illegal behavior."); *accord EEOC v. E.I. Du Pont de Nemours & Co.*, 480 F.3d 724, 733-34 & n.6 (5th Cir. 2007) ("Other courts of appeals have

uniformly . . . held that an award of wage loss alone can sustain a statutory award of punitive damages.").[4]

C. Wal-Mart's argument is inconsistent with the Civil Rights Act of 1991, which made punitive damages available in Title VII cases to provide more – not less – relief to victims of intentional discrimination.

Wal-Mart's argument that punitive damages are never available in (b)(2) class actions not only is unsupported by the caselaw, but also is inconsistent with Congress's express goals in making punitive damages available to victims of intentional discrimination.

Punitive damages were originally unavailable to plaintiffs in Title VII litigation. *See Kolstad*, 527 U.S. at 533-34. In 1991, Congress amended Title VII to authorize both punitive and compensatory damages for victims of intentional discrimination. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072 (1991) (codified at 42 U.S.C. § 1981a). Wal-Mart argues that in doing so, the Civil Rights Act of 1991 rendered (b)(2) certification inapplicable in Title VII cases. *See* Wal-Mart Pet. for Reh'g *En Banc* 13-14.

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[4] *See also Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 534-35 (6th Cir. 2005); *Salitros v. Chrysler Corp.*, 306 F.3d 562, 574-75 (8th Cir. 2002); *Corti v. Storage Tech. Corp.*, 304 F.3d 336, 341-43 (4th Cir. 2002); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-59 (2d Cir. 2001); *EEOC v. W & O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000); *Provencher v. CVS Pharmacy*, 145 F.3d 5, 11-12 (1st Cir. 1998); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998).

There is no evidence whatsoever that Congress intended to *restrict* the avenues to relief for Title VII plaintiffs. To the contrary, the legislative record is clear that Congress amended Title VII in 1991 to *expand* the relief available to victims of discrimination, because of Congress's serious concern – informed, at that point, by nearly three decades of experience with Title VII – that the remedies then available to plaintiffs had not sufficiently achieved the goals of the statute.

First, Congress was centrally concerned that pre-1991 remedies – injunctive and declaratory relief plus back pay – fell short of Title VII's goal of making victims whole for the harms caused by discrimination: "All too frequently, Title VII leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid any meaningful liability." H.R. Rep. No. 102-40(I), at 68 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 606. The House Report[5] states that the amendment was intended to "strengthen existing remedies to . . . ensure compensation commensurate with the harms suffered by victims of intentional discrimination." *Id.* at 18; *see also id.* at 70 ("[P]ermitting the recovery of [monetary] damages would enhance the effectiveness of Title VII by making victims of intentional discrimination whole for their losses . . . .").

[5] The House Report was submitted in two parts – Part I is the Report of the House Committee on Education and Labor, and Part II is the Report of the House Committee on the Judiciary. *See* 1991 U.S.C.C.A.N. 549. No Senate Report was submitted with the legislation. *See id.*

The statement of purposes in the legislation itself makes clear that Congress's goal was to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. at 1071.

Second, Congress also determined that expanded monetary relief was necessary to "encourage citizens to act as private attorneys general to enforce the statute." H.R. Rep. No. 102-40(I), at 64-65. Congress was specifically concerned that the existing remedies discouraged private enforcement:

> Title VII's exclusive remedy of back pay . . . serves as a powerful disincentive for victims to seek to vindicate their rights. . . . "There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her . . . employer to treat her with the dignity she deserves and the costs of bringing her suit."

Id. at 70 (quoting *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986)); *see also* H.R. Rep. No. 102-40(II), at 25, *as reprinted in* 1991 U.S.C.C.A.N. 694, 718 ("The limitation of relief under Title VII to equitable remedies often means that . . . victims of intentional discrimination are discouraged from seeking to vindicate their civil rights.").

Finally, Congress determined that expanded monetary relief was needed to deter future discrimination by employers. "Monetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to *prevent* intentional discrimination in the

workplace before it happens." H.R. Rep. No. 102-40(I), at 65; *see also id.* at 69 ("Making employers liable for all losses – economic and otherwise – which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole."). Congress reasoned that "'if discrimination costs money, people will stop doing it.'" *Id.* at 69 (quoting congressional testimony of Dr. Heidi Hartmann, Director, Institute for Women's Policy Research)).

Congress was specifically concerned that back pay as the sole monetary remedy had not sufficiently deterred discrimination by employers since the enactment of Title VII in 1964: "[b]ack pay as the exclusive monetary remedy under Title VII has not served as an effective deterrent, and, when back pay is not available . . . there is simply no deterrent." H.R. Rep. No. 102-40(I), at 69; *see also id.* at 18 (finding that "existing protections and remedies are not adequate to deter unlawful discrimination"); Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. at 1071 (statement of findings) ("[A]dditional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."). The House Report cited an extensive record to support this concern. *See* H.R. Rep. No. 102-40(I), at 69 (noting that "[n]umerous courts,

commentators, and witnesses before the Committee underscored that Title VII's exclusive remedy is inadequate to deter [discrimination] in the workplace").

In light of this crystal-clear legislative history,[6] it is incomprehensible that Wal-Mart now contends that by *expanding* relief to victims of discrimination, Congress simultaneously sought to *limit* the ability of plaintiffs to seek redress for their harms. The Supreme Court has recognized that the Civil Rights Act of 1991 was intended to expand remedial relief without reducing existing remedies. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) ("In the Civil Rights Act of 1991, Congress determined that victims of employment discrimination were entitled to *additional* remedies, . . . without giving any indication that it wished to curtail previously available remedies.").

In addition, the legislative history squarely forecloses Wal-Mart's argument that monetary relief is unavailable in class actions if the amount sought is substantial. The House Report noted:

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[6] *See, e.g.*, H.R. Rep. No. 102-40(I), at 1, 14, 18, 64-70, 73-74; H.R. Rep. No. 102-40(II) at 1-2, 24, 28-29; Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2-3, 105 Stat. at 1071.

In fact, the dissenting statements in the House Report on the Civil Rights Act of 1991 expressly recognized the continuing availability of class certification in employment discrimination cases seeking punitive damages. *See* H.R. Rep. No. 102-40 (II), at 68 ("Not only would [the statute] allow the recovery of punitive and compensatory damages in individual disparate treatment cases, it would allow recovery of such damages and jury trials for class action disparate treatment suits.") (dissenting views of Rep. Hyde et al.).

> Of course, *substantial awards* may be both necessary and appropriate in some cases in order to compensate the victim fully . . . or to ensure that the employer is deterred from engaging in future acts of discrimination. . . . [C]ourts have recognized that a higher amount may be appropriate against a particularly large or wealthy employer, to ensure effective deterrence.

H.R. Rep. No. 102-40(I), at 73 (emphasis added).

More generally, Wal-Mart's proposal that victims of discrimination must waive their entitlement to all but injunctive relief in order to proceed as a class would vitiate Title VII's purposes of making victims whole and eradicating discrimination. "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle*, 422 U.S. at 417. Any reading of Rule 23(b)(2) that prohibits economic remedies when victims of discrimination seek to litigate as a class denies them a remedy that is equal to their injury: "Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. . . . And where a legal injury is of an economic character, . . . 'the compensation shall be equal to the injury.'" *Id.* at 418 (quoting *Wicker v. Hoppock*, 6 Wall. 94, 99 (1867)).

Forcing plaintiffs to forgo their entitlement to full Title VII remedies in order to litigate as a class would contravene the principle that relief in Title VII cases should not "frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries

suffered through past discrimination." *Id.* at 421. Wal-Mart asks this Court to hold that in expanding Title VII remedies, Congress sought to frustrate its own purposes. The Court should reject Wal-Mart's argument.

II. Wal-Mart seeks to eviscerate Rule 23(b)(2) in the very cases the rule was adopted to cover.

Wal-Mart further argues that a class seeking monetary damages can only be certified – if at all – under Rule 23(b)(3) rather than 23(b)(2). *See* Wal-Mart Pet. for Reh'g *En Banc* 3-4, 14. This argument is inconsistent with the very reasons that motivated the addition of Rule 23(b)(2) to the Federal Rules.

A. Civil rights cases are paradigmatic cases for Rule 23(b)(2) certification.

As noted, Rule 23(b)(2) was originally added through the 1966 Amendments to the Federal Rules. The Advisory Committee's Note states that civil rights class actions to obtain injunctive and other relief to end invidious discrimination are paradigmatic cases for (b)(2) certification:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. . . . Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
>
> *Illustrative are various 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's Note, 39 F.R.D. at 102 (emphasis added) (citing cases).

Numerous commentators have explained that (b)(2) was added in the interest of facilitating class action litigation in civil rights cases. *See* Benjamin Kaplan,[7] *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (Part I)*, 81 Harv. L. Rev. 356, 389 (1967) (explaining that "new subdivision (b)(2) . . . build[s] on experience mainly, but not exclusively, in the civil rights field"); *see also* Wright, Miller, & Kane, 7AA *Federal Practice & Procedure* § 1775, at 71 & n.37 (3d ed. 2002 & Supp. 2009) ("[S]ubdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil-rights area.") (citing cases); 5 *Moore's Federal Practice* § 23.43[1][b] (3d ed. 1997 & Supp. 2009) ("Rule 23(b)(2) was promulgated . . . essentially as a tool for facilitating civil rights actions.") (citing cases).

Courts have frequently invoked the Advisory Committee's Note in holding that Rule 23(b)(2) is especially suitable for class certification in antidiscrimination lawsuits generally, and in Title VII cases specifically. *See Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 614 (1997) (recognizing that civil rights cases alleging

[7] Professor Kaplan was reporter to the Advisory Committee on Civil Rules from 1960 to 1966. *See* Kaplan, *Continuing Work of the Civil Committee*, 81 Harv. L. Rev. at 356 n.*.

class-based discrimination are "prime examples" of appropriate (b)(2) cases); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *Wetzel*, 508 F.2d at 250.

Indeed, the Advisory Committee's Note cited eight class-action lawsuits as illustrative of the principal category of cases intended to be certified under Rule 23(b)(2), each of which was brought on behalf of a class of African Americans and other minorities to eradicate intentional race discrimination.[8] *See* Advisory Committee's Note, 39 F.R.D. at 102. The Advisory Committee's reliance on these specific cases demonstrates that (b)(2) was intended in large part to be a tool for fighting systemic discrimination. *See Reeb*, 435 F.3d at 654 (Keith, J., dissenting) (noting the Advisory Committee's citation to civil rights lawsuits and stating that "[t]hese cases demonstrate that historically Rule 23(b)(2) has been used to enjoin invidious discriminatory policies and practices").

[8] Each of the eight illustrative cases cited in the Advisory Committee's Note was a race discrimination lawsuit litigated by *amicus* NAACP Legal Defense Fund. *See* Advisory Committee's Note, 39 F.R.D. at 102 (citing *Potts v. Flax*, 313 F.2d 284, 286 (5th Cir. 1963); *Bailey v. Patterson*, 323 F.2d 201, 202 (5th Cir. 1963); *Brunson v. Bd. of Trs. of Sch. Dist. No. 1*, 311 F.2d 107, 107 (4th Cir. 1962); *Green v. Sch. Bd.*, 304 F.2d 118, 119 (4th Cir. 1962); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156, 157 (5th Cir. 1957); *Mannings v. Bd. of Pub. Instruction*, 277 F.2d 370, 371 (5th Cir. 1960); *Northcross v. Bd. of Educ.*, 302 F.2d 818, 818 (6th Cir. 1962); *Frasier v. Bd. of Trs. of Univ. of N.C.*, 134 F. Supp. 589 (M.D. N.C. 1955) (three-judge court), *aff'd sub nom. Bd. of Trs. of Univ. of N.C. v. Frasier*, 350 U.S. 979, 979 (1956)).

In light of the motivating factors behind the inclusion of Rule 23(b)(2), there is no reason to adopt Wal-Mart's argument that class actions including claims for monetary relief must proceed under subsection (b)(3). The Fifth Circuit has rejected precisely the type of categorical bar that Wal-Mart proposes, holding that "to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance." *In re Monumental Life*, 365 F.3d at 417. The Fifth Circuit noted that "subdivision (b)(2) . . . was added 'to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil rights area,'" and concluded that "Rule 23(b)(2) was adopted to facilitate the use of injunctive relief, not to compartmentalize claims for damages under rule 23(b)(3)." *Id.* at 417-18 n.16 (quoting Wright, Miller & Kane, 7A *Federal Practice & Procedure* § 1775, at 470 (2d ed. 1986)).

Wal-Mart's argument that (b)(2) certification is unavailable where plaintiffs seek monetary damages is inconsistent with the goals that motivated the adoption of Rule 23(b)(2) over forty years ago.

B. Class actions are necessary to correct and deter pervasive discrimination in the workplace, a congressional objective of the "highest priority."

Wal-Mart finally suggests that claims for monetary relief ought to be litigated as individual cases and not as class actions at all. But forcing plaintiffs

who are unwilling to abandon their statutorily-available monetary remedies to challenge employment discrimination on an individual, case-by-case basis would undermine both the purposes of (b)(2) certification and the congressional goal of redressing discrimination.

"Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority.'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978)). The plaintiffs in this action have no realistic ability to vindicate this policy except as part of a class, because the plaintiffs' lawsuit against Wal-Mart is a classic "negative-value" suit "in which class members' claims would be uneconomical to litigate individually." *In re Monumental Life*, 365 F.3d at 411-12 & n.1. The record in this action shows that the average pay disparity between hourly men and women is $1100, *see* ER 171, a meaningful amount to each woman who has suffered discrimination because of Wal-Mart's practices, but one that would not justify hiring an attorney and litigating individually.

In addition to offering the only realistic opportunity for redressing discrimination in this case, the class action offers more general advantages in addressing systematic discrimination that case-by-case adjudication cannot offer:

> Employment discrimination is particularly amenable to class treatment. Fears of retaliation, lack of witnesses

> and the difficulty of obtaining counsel may keep individual employees from bringing viable actions. The class action can provide a superior mechanism by which to prove wide scale discrimination by providing broader discovery opportunities, a more powerful litigation posture and, when applicable, tolling of the statute of limitations.

Herbert B. Newberg & Alba Conte, 8 *Newberg on Class Actions* § 24:1 (4th ed. 2003).

For example, extensive discovery is essential to the prosecution of almost any employment discrimination matter, because evidence of an employer's practices regarding such matters as hiring, assignment, promotion, workplace conditions, and termination lies almost completely within the employer's control. *See, e.g.*, 29 C.F.R. § 1607.4.A (requiring employers subject to Title VII to maintain certain employment records). But discovery of this evidence – especially in cases involving large employers – is prohibitively expensive in individual actions, and thus the ability to spread the costs over a class is essential to obtaining redress. *See, e.g., Duke v. Univ. of Texas at El Paso*, 729 F.2d 994, 996-97 (5th Cir. 1984) (reversing judgment against discrimination plaintiff in order to permit broad discovery in support of a class certification motion, and observing that "[h]ad Duke's class claims prevailed, she would have faced a distinctively less onerous burden at the trial of her individual claim").

In addition, class actions are more likely than individual litigation to achieve the congressional goals of eradicating discriminatory conduct and deterring future discrimination. Defendants may strategically preempt individual lawsuits and evade broad-scale injunctive relief by making an offer of judgment under Rule 68 before plaintiffs are able to bring to light evidence of a defendant's class-wide or institutional discrimination.[9] *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332-40 (1980) (discussing the defendant's attempt to moot a putative consumer class action by tendering the maximum recoverable amount to each individual plaintiff prior to appeal from denial of class certification); *see also Marek v. Chesny*, 473 U.S. 1, 31 (1985) (Brennan, J., dissenting) (noting that the majority's holding, which expanded the costs recoverable by defendants under Rule 68 to include attorney's fees, "will encourage defendants who know they have violated the law to make 'low-ball' offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims").

Class action litigation serves not only to vindicate individual rights and to compensate victims for their injuries, but also to further the public interest by

[9] Rule 68 provides that a defendant may serve an offer of judgment on a plaintiff more than ten days before trial begins; if the plaintiff declines the offer and then receives a judgment at trial that "is not more favorable than the unaccepted offer," the plaintiff must pay the defendant's costs incurred after the offer was made. Fed. R. Civ. P. 68(a), (d).

eliminating discrimination. *See, e.g.*, Hon. Jack B. Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, Symposium Before the Judicial Conference of the Fifth Judicial Circuit, *available at* 58 F.R.D. 299, 304 (1973) ("The impact of class actions in civil rights cases is substantial. Precedent alone never has the effect of a judgment naming a particular class of which a person is a member. Very often, a class action permits a judge to get to the heart of an institutional problem.").[10]

Conclusion

It is clear that Wal-Mart does not like the law of class actions. It proposes instead a Wal-Mart version of class-action law that would force plaintiffs to choose between class certification and full remedial relief. That version of class-action law would dramatically undermine Congress's goals of eliminating discrimination throughout the workplace, and should therefore be firmly rejected by this Court.

Amici respectfully request that this Court affirm the district court's order certifying the plaintiff class under Rule 23(b)(2).

[10] Judge Weinstein further explained that issues regarding the availability of class actions "touch[] on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens – including those deprived of human rights, consumers who overpay for products because of antitrust violations, and investors who are victimized by misleading information – or we are not." Weinstein, *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. at 305.

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Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) and 9th Cir. R. 32-1, I hereby certify that:

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