No. 10-277

In the Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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

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

INTEREST OF THE *AMICUS CURIAE*[1]

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

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

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[1] The parties received timely notice of *amicus*'s intent to file this brief and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel for a party or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

its shareholders. Furthermore, as a company headquartered in California, Intel is especially vulnerable to lawsuits filed under the extraordinarily permissive standards for class certification that the Ninth Circuit adopted by a 6-5 vote in the decision below. Intel is therefore well positioned to explain the pressing need for further review of the deeply flawed decision reached by the majority below.

SUMMARY OF ARGUMENT

I.A. Improper class certification puts inappropriate settlement pressure on defendants. Defendants simply cannot risk a multi-billion-dollar jury verdict awarding damages to thousands (or millions) of members of a certified class. Improper certification gives plaintiffs unfair leverage to extract an outsized settlement from even moderately risk-averse defendants. Corporate decisionmakers must often settle even meritless cases because they cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Courts must therefore vigilantly guard against erroneous certifications.

B. The decision below exacerbates the problem of coerced settlements. It effectively reduces the requirements for certification of a class, and it permits courts to make that crucial determination before squarely resolving whether all the threshold requirements imposed by Rule 23 are met. Consequently, the majority's rule creates a loophole through which classes may be wrongly certified. Because certification often *is* the ballgame, such errors will translate to erroneous and massive liability for corporate defendants.

II.A. The plain text of Rule 23(b)(2) does not provide for the certification of class actions seeking monetary relief. Rather, that subsection permits certification only of classes seeking injunctive or declaratory relief. Wrongly authorizing the availability of money damages is bad enough; doing so when that mistake is then multiplied by thousands or even millions of plaintiffs is an error of the highest order.

B. To the extent that a class seeking monetary relief may be certified under Rule 23(b)(2) at all, such certification is limited to actions in which damages are truly incidental to injunctive or declaratory relief. The decision below misconstrues Rule 23(b)(2) and exacerbates existing, mature, and acknowledged circuit conflicts by allowing the certification of an action seeking billions of dollars in monetary relief.

III. Particularly in employment-discrimination actions, a defendant has a right (and the need) to present an individualized defense against each plaintiff. Rule 23 cannot alter that essential requirement in the name of aggregation or convenience. By denying petitioner the right to present individualized defenses, the courts below violated the Due Process Clause, the Rules Enabling Act, and Title VII itself.

ARGUMENT

"[C]lass actions are without doubt the most controversial subject in the civil process today." Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000). Much of the controversy centers on certification; indeed, class certification can transform a comparative-

ly modest case into one with millions of claimants and billions of dollars in claimed damages. Here, the order certifying the class expanded a Title VII action, brought by a variety of plaintiffs who claim to be victims of biased *subjective* decisionmaking by a handful of *different* supervisors, into a behemoth comprising 1.5 million plaintiffs and with potentially billions at stake. Pet. App. 112a (Ikuta, J., dissenting), 89a. Many scholars and observers have rightly criticized decisions that, like the majority opinion below, permit class certification without fully addressing and resolving the difficulties posed by that crucial threshold inquiry.

Intel takes no position on the merits of the underlying Title VII action but concurs with petitioner, and with Judge Ikuta in dissent, that the majority decision rests on a deeply flawed interpretation of Federal Rule of Civil Procedure 23 and this Court's precedents. Intel also agrees with petitioner that the majority opinion is in conflict with decisions of other federal appellate courts, by allowing the certification under Rule 23(b)(2) of an action in which the billions of dollars in monetary relief sought cannot be construed as incidental to injunctive or declaratory relief. This brief focuses principally on three particular reasons why it is essential to confine class certification to the precise limits set forth in Rule 23, and why this Court's review of the decision below is therefore so urgently needed.

I. Improper Class Certification Puts Inappropriate Settlement Pressure On Defendants

Even in ordinary cases, litigation can be enormously expensive for businesses. The out-of-pocket

costs alone can be massive, not to mention the distractions and lost business opportunities that frequently accompany lawsuits. The prospect of erroneous outcomes—such as a mistaken finding of liability or (as is all too common) an outsized damages award—also looms large. These costs and risks are a fact of life for businesses, and they present significant obstacles under the best of circumstances.

If an action is brought on behalf of not one plaintiff but thousands or millions, the stakes skyrocket. Once a class of that magnitude is certified, an action that individually might represent only a modest risk—and thus could be fully adjudicated or otherwise appropriately resolved—can instantly metastasize into a potentially catastrophic judgment worth billions of dollars. Faced with those circumstances, defendants almost invariably will settle. See, *e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, And CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1546 n.74 (2000) ("[T]hat defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits is widely recognized.").

Accordingly, careful analysis of and fidelity to the text of the rule are paramount. As Wal-Mart's petition explains and as Intel will explain further in this brief, the majority opinion below, instead of guarding against procedures that will lead to coerced settlements, throws open the barn door. If left undisturbed, the decision below will make it far more likely that plaintiffs with weak cases will nonetheless be able to extract massive settlements.

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

Certification of a class action forces a defendant to settle, even if the claim has no merit. "Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In re Rhone-Poulenc*, 51 F.3d at 1298 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). As one commentator recently explained: "[I]f class action certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount." Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 GEO. WASH. L. REV. 181, 189 (2008).

Those pressures are so overwhelming because defendants face massive exposure for the slightest miscalculation or error in determining liability. Suppose, for example, that a defendant faces lawsuits by one hundred plaintiffs claiming a combined $100

million in damages, but the defendant believes those claims are really worth no more than $10 million. If those claims are addressed individually, the defendant has good reason to believe that most of the time the correct result will be achieved and something close to the expected aggregate liability will result. Errors are likely to be few in number and evenly distributed—that is, sometimes the plaintiff will win too big, and sometimes the defendant will get off too easy. The net effect of such errors is therefore likely to be minimal, and defendants can act in accordance with their best estimate of their true liability.

In a class action, the defendant is forced to gamble all at once against thousands or even millions of opponents. Even a moderately risk-averse defendant will settle rather than face the truly disastrous consequences of an unexpected outcome. Unless one can predict the result of a jury trial with certainty—and no such thing is possible—the strength of one's case is almost irrelevant. Because the price of a single error (however remote the prospect) could be hundreds of millions (or, as here, *billions*) of dollars, the only rational strategy is to settle.

That harsh reality is no secret. As the Senate Judiciary Committee recently observed, class certification

> can give a class attorney unbounded leverage * * * * [that] can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits. * * * [W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the

> suit, even if it is meritless and has only a five percent chance of success. Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.

S. REP. NO. 109-14, at 20-21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21; see Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 370-371 (1996) ("class certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous. * * * [T]enuous claims are hard to dispose of before trial; and jury trials are risky propositions * * *."). The result is an *in terrorem* effect that compels defendants to settle claims that have no merit. See, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class * * * places pressure on the defendant to settle even unmeritorious claims."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002) ("[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of the plaintiffs' claims."); see also Linda Silberman, *The Vicissitudes of the American Class Action—With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999) ("[T]he specter of huge damage awards against defendants in a class action suit and the expense of litigating these large suits in a system without cost-shifting frequently led defendants to settle even marginal cases.").

Those concerns are grounded in real-world experience. Beginning in the late 1970s, for example, veterans of the Vietnam War filed lawsuits against chemical companies alleging that their exposure to an herbicide manufactured by the defendants caused various health problems. *In re "Agent Orange" Product Liability Litig.*, 611 F. Supp. 1223, 1228 (E.D.N.Y. 1985). The district court ultimately certified a huge, multinational class over defendants' objections. *Id.* at 1229. Facing the untenable risk of an adverse judgment, defendants settled the case for $180 million. See *In re "Agent Orange" Product Liability Litig.*, 818 F.2d 145, 151 (2d Cir. 1987). Yet the plaintiffs' claims were so weak that, when adjudicating the claims of plaintiffs who had opted out of the class, the district court eventually granted summary judgment in favor of defendants. 611 F. Supp. at 1264; see also *Regents of University of California* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) ("[C]lass certification may be the backbreaking decision that places insurmountable pressure on a defendant to settle, even where the defendant has a good chance of succeeding on the merits.") (internal quotation marks omitted).

Not only is the risk of losing at trial magnified, but so are the costs of getting there. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 416-417 (2000) (discussing increased costs associated with litigating class action). Moreover, defending a class action can do substantial damage to a defendant's reputation, because such lawsuits often attract publicity out of proportion to their merit and because the mere

aggregation of plaintiffs suggests to the public that, where there is so much smoke, there must be fire. See, *e.g.*, *Abdallah* v. *Coca-Cola Co.*, 186 F.R.D. 672, 676 (N.D. Ga. 1999) (describing negative publicity resulting from class action). And class actions are likely to be tried in a manner that is ultimately prejudicial to the defendant. "[T]he playing field changes dramatically when there is a class certified. All the rules are different." WORKING PAPERS OF THE ADVISORY COMMITTEE ON PROPOSED AMENDMENT TO CIVIL RULE 23 pt. 3, 107-108 (1997). Most significantly, "[f]or each plaintiff who may have been in a different period of time, with different facts in a single trial, much of the evidence would not come in to that particular plaintiff, that particular claim." *Ibid*; see also *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Aggregation of claims also makes it more likely that a defendant will be found liable * * *."). In the face of all that, corporate defendants typically have no choice but to settle, with little regard for the merits of the underlying claims.

What is more, every large award coerced in settlement of a dubious claim further entices other plaintiffs (and plaintiffs' lawyers) to file still more specious lawsuits. A "lack of attention to the merits make[s] the class action an attractive vehicle for frivolous suits." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1302 (2002). As one scholar has noted:

> It is surely a curious circumstance in a country committed to the rule of law to accept the propositions (1) that class certification alone creates great negotiating power, (2) that that power leads to actual settlements, sometimes

> large dollar settlements, and, simultaneously, (3) that this great negotiating power can be created without any judicial review of a claim on the merits and, in some cases, without any merit to the claim.

George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 547 (1997). In short, certification of a dubious class action not only produces a settlement that far exceeds the merits of the claim, but it also guarantees the persistent recurrence of such lawsuits.

B. The Ninth Circuit's Rule Will Exacerbate Settlement Pressure

Instead of recognizing the problems created by careless class certification and committing to a careful and thorough analysis, the decision below aggravates the problem of coerced settlements by permitting the certification of actions that are inappropriate for class treatment. Among its most glaring defects, the majority opinion does not require the district court actually to determine how a case will be tried on a class-wide basis as required by Rule 23(c)(1)(B). Instead, a class may be certified even where (as here) it does not meet the basic requirements of Rule 23(b)(2), see Part II, *infra*, and where individual hearings of the type necessary for a defendant to present individual defenses in a case seeking back pay are deemed "impractical," Pet. App. 251a; see Part III, *infra*. Certification thus will be available to classes that would *not* be certified under a correct reading of Rule 23. The net result is a system in which a class may be easily—and incorrectly—certified, at which point "plaintiffs and their counsel

* * * have in hand the means to extract a favorable settlement of what may be weak claims." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting) (citing *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974)); see also *Oscar Private Equity Invs.* v. *Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) ("We cannot ignore the in terrorem power of certification.").

Plaintiffs here seek billions of dollars in damages on behalf of 1.5 million current and former employees. Their untested allegations of discrimination should not suffice to erect a barrier to a meaningful examination of such a massive class-action complaint and the unfair burdens that allowing such a gargantuan lawsuit to proceed would impose on a defendant. Yet the courts below have "ma[de] the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir 2002).

II. The Decision Below Misconstrues Rule 23(b)(2)

Federal Rule of Civil Procedure 23(b)(2), promulgated in 1966, allows a class action to be maintained if "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." The rule mentions *only* two kinds of

relief – injunctive and declaratory. It does not mention monetary relief.

The 1966 amendments to Rule 23 "greatly augmented the volume of private litigation" through the "expanded concept of the class action." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 118. Initially, as Judge Friendly noted, there were "few grounds for serious criticism of Rule 23(b)(2)" because "[t]he relief sought is generally an injunction or decree." *Ibid.* If properly confined to injunctive or declaratory relief, the overarching goal of a (b)(2) class action was to "*prevent*[] further litigation." *Ibid.* That stands in stark contrast to class actions for money damages under Rule 23(b)(3), which coerce unwarranted settlements and thereby ignite seemingly endless additional litigation. See FRIENDLY, FEDERAL JURISDICTION, *supra*, at 119; Part I, *supra*.

For that reason, class actions seeking monetary relief generally cannot be certified under Rule 23(b)(2); they must instead meet the more stringent requirements imposed by Rule 23(b)(3). By certifying under the former a class seeking billions of dollars, the majority strayed from the plain text of Rule 23(b)(2). The majority's decision also adds to the widely recognized split among the circuits over the extent to which a Rule 23(b)(2) class may seek monetary relief.

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

A plain reading of Rule 23(b)(2) compels the conclusion that it cannot be used to certify class actions seeking monetary relief. Again, that rule permits certification only of classes for which "final

injunctive relief or corresponding *declaratory* relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2) (emphasis added). There is, quite conspicuously, no mention of suits for money damages.

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

It was only by "seizing on certain language in the advisory committee notes to the rule, [that] the plaintiffs' bar was successful in persuading federal courts that monetary relief should be allowed * * *." Trangsrud, *supra*, 76 GEO. WASH. L. REV. at 186. In fact, every circuit to allow such class actions under Rule 23(b)(2) has relied on a portion of the text of an Advisory Committee Note to alter—not merely to interpret—the text of Rule 23(b)(2). What is more, even those circuits cannot agree on the extent to

which money damages should be available, most likely because there is no textual basis for such relief in the first place. See Pet. 10-12. The better course would be—as this Court's cases instruct—to follow the Rule's unambiguous text, which makes Rule 23(b)(2) available only for injunctive and declaratory relief and *requires* use of Rule 23(b)(3) when monetary relief is sought.

"As with a statute, our inquiry is complete if we find the text of [a Federal] Rule [of Civil Procedure] to be clear and unambiguous." *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540-541 (1991); accord *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123 (1989). The text of Rule 23(b)(2) cannot be altered by Advisory Committee Notes. *Krupski* v. *Costa Crociere S.p.A.*, No. 09-337, slip op. at 1 (June 7, 2010) (Scalia, J., concurring in part and concurring the judgment) ("The Advisory Committee's insights into the proper interpretation of a Rule's text * * * * have no effect on the Rule's meaning. Even assuming that we and the Congress that allowed the Rule to take effect read and agreed with those intentions, it is the text of the Rule that controls."); *Black* v. *United States*, No. 08-876, slip op. at 1 (June 24, 2010) (Scalia, J., joined by Thomas, J., concurring in part and concurring the judgment) ("The Committee's view is not authoritative"); *Tome* v. *United States*, 513 U.S. 150, 167-168 (1995) (Scalia, J., concurring in part and concurring the judgment) ("the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear").

The practical effect of distorting Rule 23(b)(2) is to offer the same relief contemplated by Rule 23(b)(3), but without the latter's tight limitations. See Pet. App. 151a (Ikuta, J., dissenting) (citing *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994)). Most notably, Rule 23(b)(3) requires that a court find—before certifying a class—that common questions predominate and that a class action is the superior method of resolving the dispute. Rule 23(b)(2) contains no such protections for defendants. Rule 23(b)(3) also protects plaintiffs, requiring notice and the opportunity to opt out of the suit. See Fed. R. Civ. P. 23(c)(2)(B). Rule 23(b)(2), by its terms, is not so limited. See Fed. R. Civ. P. 23(c)(2)(A).[2] Rather, because suits under Rule 23(b)(3) can seek only injunctive or declaratory relief, the benefits and burdens of the class action properly run to the class as a whole. See *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 412-15 (5th Cir. 1998). As one judge rightly observed, courts

> risk unduly extending (b)(2) in cases with monetary claims by inviting district judges to use it and then protect claimants with individualized damage amounts either by affording them opt-out rights or certifying only the liability issue.

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[2] Some courts—including the district court and court of appeals below, Pet. App. 95a-96a; 243a—have concluded that the absence of an opt-out provision in Rule 23(b)(2) does not prevent granting opt-out rights for money damages claims sought under that provision. It would be unnecessary to invent such rights, however, if these courts had confined the rule to its proper scope to allow class actions seeking only injunctive and declaratory relief.

> Such devices strike me as a way of undermining the (b)(3) requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Parker v. *Time Warner Entertainment Co.*, 331 F.3d 13, 24 (2d Cir. 2003) (Newman, J., concurring) (quoting Fed. R. Civ. P. 23(b)(3)).

Moreover, certifying classes seeking damages under 23(b)(2) only *magnifies* opportunities for abuse in class actions seeking predominantly money damages. As this Court has noted, "the limitations on class size associated with Rule 23(b)(3) actions do not apply" to classes certified under 23(b)(2). *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). While "a nationwide class" certified under 23(b)(2) may not necessarily be "inconsistent with principles of equity jurisprudence," *ibid.*, the same cannot be said for damages actions that typically rest on even more highly individualized inquiries. Allowing the pursuit of money damages by a Rule 23(b)(2)-certified class ignores that critical distinction and avoids the strict limitations imposed under Rule 23(b)(3) See *Coleman* v. *GMAC,* 296 F.3d 443, 447 (6th Cir. 2002) ("These procedural protections are considered unnecessary for a Rule 23(b)(2) class because its requirements are designed to permit only classes with homogenous interests."). This case perfectly illustrates that potential: Some 1.5 million plaintiffs have been aggregated under Rule 23(b)(2) and effectively seek billions of dollars in money damages, but they could not possibly do so in a single class under Rule 23(b)(3).

B. A 23(b)(2) Class Should Not Be Certified When Damages Are More Than Incidental To Injunctive Or Declaratory Relief

The court below, parsing a word that does not appear in the Rule's text but only in an Advisory Committee Note, saw its task as determining "the appropriate standard for determining when monetary relief 'predominates' over declaratory and injunctive relief and therefore precludes certification of a Rule 23(b)(2) class." Pet. App. 85a. If courts are to go down that path at all, they must remain extraordinarily vigilant that such relief is only incidental to injunctive or declaratory relief. As Judge Ikuta recognized in dissent below, "Rule 23(b)(2) was designed for classes seeking class-wide injunctive relief to remedy a common injury to the class as a whole, not for classes seeking individual damages, back pay, or other individual relief." Pet. App. 149a (Ikuta, J., dissenting); see *Thorn* v. *Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) ("Because Appellants' injunction request is illusory, their prayer for injunctive relief cannot predominate over their prayer for non-injunctive, non-declaratory equitable relief under any reasonable interpretation of Rule 23(b)(2)."); *Allison*, 151 F.3d at 413 ("The underlying premise of the (b)(2) class * * * 'begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries.'") (quoting *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997)).

The claims for monetary relief in this case "predominate"—under any meaningful standard for such an inquiry—and thus cannot be shoehorned into a Rule 23(b)(2) class action. At least two-thirds of the

class members are former employees who lack standing to pursue injunctive relief. See *Elizabeth M.* v. *Montenez*, 458 F.3d 779, 784-85 (8th Cir. 2006) (holding that that the district court had abused its discretion by certifying a 23(b)(2) class including both past and current mental health facility patients, because the former lacked Article III standing to seek injunctive relief). And the multi-billion-dollar price tag plaintiffs attach to their lawsuit belies any claim that injunctive relief is their primary target. See *Reeb* v. *Ohio Dep't of Rehab. and Corr,*, 435 F.3d 639, 641 (6th Cir. 2006) ("Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such individual claims for money damages will always predominate over requested injunctive or declaratory relief."); Sarah Kirk, *Ninth Circuit Discrimination Case Could Change The Ground Rules For Everyone*, 14 TEX. REV. L. & POL. 163, 168 (Fall 2009) ("[T]he court erred by certifying, under Rule 23(b)(2), an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.").

As Wal-Mart's petition explains, and Intel will not repeat, the circuit conflict over what it means for monetary relief to "predominate" in a Rule 23(b)(2) class action is mature, acknowledged, and implicated by this case. If that inquiry is to be pursued at all (instead of following the text of the Rule and disallowing monetary damages altogether in such actions), this case is an appropriate vehicle to resolve the conflict.

III. Rule 23 Cannot Undermine A Defendant's Right To Present An Individualized Defense

Rules of procedure may not abridge, enlarge, or modify any substantive right. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997); Rules Enabling Act, 28 U.S.C. § 2072(b). A court therefore "must ensure that its certification of a class does not affect the substantive rights of either party." Pet. App. 139a (Ikuta, J. dissenting).

The Due Process Clause "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)); *ICC* v. *Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913). Due process does not permit elimination of defenses merely because trying them would preclude fashioning a class-wide remedy. See Pet. App. 146a (Ikuta, J. dissenting).

"[I]it is well established that every [defendant]" in an employment-discrimination suit "is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were denied an employment opportunity for lawful reasons." Kirk, *supra*, 14 TEX. REV. L. & POL. at 174. Accordingly, trial of a claim based on disparate treatment typically will require individual hearings, both in order to compensate each plaintiff for her respective injury and to permit the defendant to present individualized defenses. *Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 368 (1977).

Even though the district court here acknowledged that Wal-Mart's defenses to the various plaintiffs' claims would be individualized, Pet. App. 251a, the Ninth Circuit upheld the denial of Wal-Mart's right to individual hearings. Pet. App. 145a-146a (Ikuta, J., dissenting). Wal-Mart is thus effectively barred from explaining to the jury why individual employees were treated in a certain way, thereby nullifying Wal-Mart's basic right to "to present every available defense." *Philip Morris USA*, 549 U.S. at 353; *Teamsters*, 431 U.S. at 360-62 (an employer-defendant cannot be deprived of the right to raise individualized defenses simply because plaintiffs claim a pattern or practice of discrimination).

As the petition correctly explains, short-circuiting the defense in the name of convenience violates both the Due Process Clause and Title VII itself. Pet. 28-30. The petition also correctly notes that, under the Rules Enabling Act, Rule 23 cannot alter the substance of a claim, only the procedure by which it is vindicated. Pet. 28-30; see *Shady Grove Orthopedic Assocs., P.A.*, 130 S. Ct. at 1461 (Ginsburg, J., dissenting). Finally, the petition correctly argues that the statistical sampling method invoked in *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 786-787 (9th Cir. 1996) (allowing "a probabilistic prediction (albeit an extremely accurate one) of how many of the total claims are invalid") is no substitute for a resolution of each claim on its individual merits. Pet. 32-33.

A rule that deprives defendants of the ability to present individual defenses—particularly coupled with the enormous settlement pressures that accompany class actions, see Part I, *supra*—will allow plaintiffs who sustained no damage at all to reap

significant monetary rewards. "If a cohesive class can be created through such savvy crafting of the evidence, then there would seem to be little limit to class certification in our modern world of increasingly sophisticated aggregate proof. The law would run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply upon the say-so of one side." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 103 (2009).

It is no answer to assert—particularly in the absence of the rigorous commonality and superiority requirements imposed by Rule 23(b)(3)—that the injury is sustained not by the individual members of a class but by the "class as a whole." Courts have rightly voiced serious due process concerns about that conception of liability in lawsuits that press, at bottom, individualized claims. See, *e.g.*, *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). ("[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability" and thus offends due process); *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998) (condemning class action procedure in which defendant is "forced to defend against a fictional composite" or "a 'perfect plaintiff' pieced together for litigation"); *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2d Cir. 1992) ("[W]e must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation."); *Eisen* v. *Carlisle &*

Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973) (rejecting "fluid recovery" that would replace individual damages with relief for the "class as a whole"), *rev'd on other grounds*, 417 U.S. 156 (1974). But that is precisely what improper certification of a money-damages action under Rule 23(b)(2) would permit. While the theoretical "class as a whole" might benefit from injunctive or declaratory relief, it should have no need for money damages.

This case presents an ideal opportunity for the Court to provide much-needed guidance on the extent to which the Due Process Clause establishes minimum requirements for class-action adjudication. Despite this Court's repeated warnings that class actions cannot be employed to override fundamental elements of due process, see *Ortiz*, 527 U.S. at 845-848; *Amchem*, 521 U.S. at 620; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985), the extent to which those limits are respected in the lower courts varies widely. Compare, *e.g.*, *Wershba* v. *Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 158 (Cal. Ct. App. 2001) (California courts "are not bound to follow the certification requirements of Rule 23") with *Amchem*, 521 U.S. at 626 n.20 (noting that the due process adequacy-of-representation requirement tends to merge with the typicality and commonality requirements of Rule 23). Disagreement on such a fundamental and practically significant constitutional question should not be tolerated. At a minimum, the Ninth Circuit should not be allowed to continue its open and notorious violation of the Rules Enabling Act by allowing class procedures to alter substantive rights. See *Hilao*, 103 F.3d at 786-787; Pet. App. 105a-110a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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