No. 10-277

In the Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *ET AL.*,
Respondents.

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

BRIEF OF ALTRIA GROUP, INC., BANK OF AMERICA CORPORATION, CIGNA CORPORATION, DEL MONTE FOODS COMPANY, DOLE FOOD COMPANY, INC., DOLLAR GENERAL CORPORATION, DUPONT COMPANY, FEDEX CORPORATION, GENERAL ELECTRIC COMPANY, HEWLETT-PACKARD COMPANY, KIMBERLY-CLARK CORPORATION, MCKESSON CORPORATION, MICROSOFT CORPORATION, NYSE EURONEXT, PEPSICO, INC., TYSON FOODS, INC., UNITEDHEALTH GROUP INCORPORATED, UNITED PARCEL SERVICE, INC., WALGREEN CO., AND THE WILLIAMS COMPANIES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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.

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INTEREST OF *AMICI CURIAE*

Amici are leading U.S. companies (listed and described in Appendix A) that employ millions of workers.[1]

[1] Pursuant to this Court's Rule 37.3(a), *amici* certify that all parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* certify that no counsel for any party authored this

Because of the size and scope of their operations, *amici* often must rely on centralized policies that leave implementation to local decisionmakers exercising an element of discretion within the bounds set by the policy. *Amici* also strive to foster a corporate culture that ensures that such decisions comply with the law and are consistent with companywide goals and values.

In the decision below, the Ninth Circuit allowed a discrimination suit to proceed as a class action based in part on Wal-Mart's centralized policies and corporate culture, even though there was no "significant proof" that those policies or culture were themselves discriminatory or caused local decisionmakers to exercise discretion in a discriminatory fashion. That ruling effectively punishes companies for adopting common organizational tools essential in the modern workplace, exposing them to increased risk of class-action certification. For that reason alone, *amici* are gravely concerned that the Ninth Circuit's decision hinders their ability to manage their workforces. Meritorious discrimination claims, of course, deserve vindication. And class-action treatment may be appropriate in certain circumstances. But, by making commonplace and wholly non-discriminatory organizational tools a basis for class certification, the Ninth Circuit's decision threatens to expand the class-action mechanism far beyond its traditional bounds.

Amici are equally concerned that the Ninth Circuit's decision may discourage even policies and cultures designed to foster the values Title VII seeks to promote. The Nation's most successful and influential firms—in-

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brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici*, its members, and its counsel made such a monetary contribution.

cluding *amici*—have made significant, public commitments to eradicating discrimination and promoting diversity in their hiring and promotion practices. Effective implementation of those private-sector initiatives often depends on companywide policies and cultures—organizational tools no different from those the Ninth Circuit relied on as a basis for class certification here. *Amici* have a strong interest in ensuring that the profound private-sector commitment to fair employment practices and diversity is not undermined by a ruling that converts the companywide policies and cultures necessary to implement that commitment into a basis for class-action liability.

SUMMARY OF ARGUMENT

Under Federal Rule of Civil Procedure 23(a), a case may not proceed as a class action unless there are sufficiently common issues among class members. In *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 159 n.15 (1982), this Court made clear that a companywide policy of vesting local managers with discretion over personnel decisions does not satisfy that standard unless there is "significant proof" that the policy was adopted as a means of discrimination. That construction properly implements Rule 23(a)'s commonality requirement while avoiding needless interference with businesses' need to structure their operations in ways that ensure a competitive and vibrant workforce.

I. A. Modern businesses regularly rely on centralized policies, delegated decisionmaking authority, and corporate culture to ensure an effective workforce. Centralized policies allow top-level managers to coordinate activities and keep the organization focused on common goals. Delegated authority allows local managers to react quickly to changing conditions. And a strong corpo-

rate culture helps ensure that individual decisions are consistent with companywide goals and values. Those organizational tools are normally beneficial and often essential to workplace management.

B. Those tools are particularly important to private-sector efforts to eradicate discrimination and promote diversity in the workforce. No less than any other aspect of firm management, diversity and antidiscrimination initiatives often require a combination of companywide policies, local discretion, and corporate culture. Those initiatives help advance Title VII's important goals.

II. *Falcon*'s "significant proof" standard properly ensures that those routine and beneficial organizational tools do not inappropriately become a basis for class-action liability.

A. In *Falcon*, this Court made clear that a discrimination lawsuit alleging excess subjectivity in employment decisions may not proceed as a class action absent "significant proof" of a "general policy of discrimination." That standard faithfully implements the text of Rule 23(a). Absent a companywide policy of discrimination linking otherwise disparate discrimination claims together, there is simply no "common" issue that would justify class treatment.

B. The Ninth Circuit disregarded that standard here. In finding class certification appropriate, the courts below relied on centralized policies as far ranging as Wal-Mart's air-conditioning and store-music policies—even though those policies have no conceivable relation to discrimination. The courts relied on Wal-Mart's strong corporate culture—even though there was no evidence that Wal-Mart fostered that culture to promote discrimination. And the courts relied on Wal-Mart's delegation of discretion to local decisionmakers—even though there

was no evidence that Wal-Mart delegated authority for discriminatory reasons. By allowing this suit to proceed as a class action based on routine organizational decisions, the court of appeals exceeded the proper bounds of the class-action mechanism.

C. Rather than apply *Falcon*'s "significant proof" standard, the Ninth Circuit relied on plaintiffs' flawed "social framework" analysis, a form of analysis that class-action plaintiffs have increasingly invoked to assert commonality. Under that analysis, an expert does not conclude that a defendant's policies actually caused the claimed instances of discrimination. Rather, the expert merely identifies characteristics of policies that research has linked with vulnerability to bias. But mere "vulnerability" to discrimination is not discrimination. And mere allegations that policies are vulnerable to discrimination is not *proof* of a common policy of discrimination that sufficiently links the claims together for purposes of Rule 23(a). Social framework analysis is thus inconsistent with *Falcon* and the "significant proof" it requires.

D. This Court should reaffirm *Falcon*'s "significant proof" standard and reject the Ninth Circuit's contrary approach. Unless reversed, the Ninth Circuit's decision will impede companies' efforts to structure their operations in the most effective manner by leaving corporate executives to speculate over what policies or cultures may support class certification. By relying simultaneously on centralized policies and delegation of discretion, moreover, the ruling places companies in an intolerable Catch-22 situation in which either too much or too little centralization may be grounds for class treatment. Finally, the Ninth Circuit's approach threatens even policies and cultures designed to promote diversity. The

court's decision thus undermines rather than advances Title VII's important goals.

ARGUMENT

Federal Rule of Civil Procedure 23(a) imposes several requirements before a class may be certified. One is that there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), this Court addressed how that requirement applies to the sorts of allegations made in this case—claims that an employer discriminated by condoning "subjective decisionmaking processes" by local managers. *Id.* at 159 n.15. The Court explained: "*Significant proof that an employer operated under a general policy of discrimination* conceivably could justify [class certification] if the discrimination manifested itself * * * through entirely subjective decisionmaking processes." *Ibid.* (emphasis added). Thus, the mere existence of a general policy of delegating discretion in hiring and firing does not justify class treatment—even if there is proof that some local managers exercised that discretion in a discriminatory fashion. Rather, the general policy that unites the claims must itself be one "of discrimination"—for example, a policy that is discriminatory on its face, or a policy adopted for the purpose of enabling discrimination. The existence of that general policy of discrimination, moreover, must be shown by "significant proof."

That standard is a faithful interpretation of Rule 23(a). *Falcon*'s "general policy" requirement makes clear that class treatment of otherwise discrete claims of discrimination is appropriate only where those instances are united by a broader corporate policy affecting the class as a whole. The case's requirement that the policy be one "of discrimination" ensures that the policy is actually central

to the plaintiffs' claims and not merely a neutral background feature of the corporation's organizational structure. Finally, the requirement that those elements be shown by "significant proof" ensures that classes are certified only when Rule 23(a)'s requirements are actually met—and not when plaintiffs merely speculate that corporate policies and culture *might* be a conduit for discrimination.

The Ninth Circuit improperly rejected that standard here. The court cited such things as Wal-Mart's "company-wide corporate practices and policies," its delegation of "excessive subjectivity in personnel decisions" to local managers, and its "strong corporate culture." Pet. App. 51a. Nowhere, however, did the court suggest that any of those policies or culture were adopted *as a means of discrimination*. Indeed, the district court relied on policies and culture with no conceivable relation to discrimination, such as Wal-Mart's centralized "control[] [over] the temperature and music in each store throughout the country." *Id.* at 190a.

Centralized policies, corporate culture, and distributed decisionmaking are all common organizational features of modern firms. Proof of the existence of such features, together with statistical disparities, does not constitute "significant proof" of *common* discrimination uniting all class members' claims. Relying on such features threatens to distort organizational decisionmaking by discouraging firms from adopting the centralized policies or culture that best serve their business needs. And it could adversely affect the private-sector diversity efforts that often rely on such organizational tools. The Ninth Circuit's decision thus undermines the values that Title VII seeks to promote.

I. MODERN BUSINESSES REGULARLY RELY ON CENTRALIZED POLICIES, DELEGATED AUTHORITY, AND CORPORATE CULTURE TO ENSURE AN EFFECTIVE AND COMPETITIVE WORKFORCE

Falcon's "significant proof" standard prohibits plaintiffs from relying on companywide policies or culture as grounds for class certification absent proof that those policies or culture are themselves discriminatory. That standard not only properly implements Rule 23(a)'s commonality requirement. It also ensures that the common organizational tools routinely used by modern corporations do not improperly become a basis for class treatment of otherwise disparate discrimination claims.

A. Leading Companies Rely on Centralized Policies, Local Implementation, and Corporate Culture To Manage Their Workforces

Centralized policies implemented by local decisionmakers, supplemented by a guiding corporate culture, are crucial to managing a large, modern firm.

1. Much of the Nation's industrial growth in the 19th and early 20th centuries was made possible by the adoption of centralized policies. "[B]y the mid-nineteenth century * * * American businesses were formalizing their chain of command and responsibility through the vertical organizational design or chart." Frank Ostroff, *The Horizontal Organization* 5 (1999). As "manufacturing and industrial production grew more complex and involved the management of more and more workers," the use of centralized policies expanded. *Id.* at 4; see also Richard L. Daft, *Organization Theory and Design* 23 (10th ed. 2010). In many industries, such policies were essential. "[T]he construction of the railroads in the 1840s," for example, "quickly revealed a desperate need for some means of controlling and managing the work of engi-

neers, builders, schedulers, and others." Ostroff, *supra*, at 4. Companies in a variety of other industries, particularly manufacturing, likewise used centralized policies to ensure uniform quality and safety. *Id.* at 4-5.

Firms looked to early organizational theorists to discern the optimal level of centralization. Many embraced Frederick Winslow Taylor's popular theory of "scientific management," which endorsed centralized policies and minimal local discretion. See Ostroff, *supra*, at 5 (citing Frederick W. Taylor, *Principles of Scientific Management* (1911)). That philosophy "attained its status and thrived when the business landscape was relatively stable and predictable." *Id.* at 8. "So long as markets were steady, competition was primarily domestic, technology meant simple, special-purpose machines such as the typewriter, and labor was abundant and semi-skilled," such policies "worked—and worked magnificently." *Ibid.*

2. That model, however, is generally ill-adapted to the modern firm. Pure centralization "has been rendered inadequate for today's demanding competitive, technological, and workforce environments." Ostroff, *supra*, at 6. For large firms, some degree of decentralization "comes about out of sheer necessity." L. Peter Jennergren, *Decentralization in Organizations*, in 2 *Handbook of Organizational Design* 39, 42 (Nystrom & Starbuck eds., 1981). "[D]ecisions cannot be passed to the top because senior managers would be overloaded." Daft, *supra*, at 348. When senior managers are "immersed in operational decision making about day-to-day resource issues (such as hiring people and obtaining inputs)," other duties—such as "long-term strategic decision making"—get neglected. Gareth R. Jones, *Organizational Theory, Design, and Change* 104 (6th ed. 2010).

Delegation produces other benefits as well. Avoiding a lengthy chain of command for ordinary, on-the-ground decisions allows a company "to respond quickly to customers' needs or the actions of competitors." Jones, *supra*, at 123. "[A] bureaucracy weighted down by supervisory layer upon supervisory layer and its clumsy inability to coordinate efforts [is] incapable of reacting with the speed needed to meet the varied and unrelenting demands of global markets and customers." Ostroff, *supra*, at 8. A local manager with greater ownership in the end result, moreover, "may be more motivated to perform well." Jones, *supra*, at 104.

One need look no further than Wal-Mart's own history to see the value of delegated authority. While adopting central policies, the company's founder also "valued change, experimentation, and constant improvement." James C. Collins & Jerry I. Porras, *Built To Last: Successful Habits of Visionary Companies* 36 (1994). Adopting a "Store Within a Store" model, he gave department managers "authority and freedom to run each department as if it were their own business." *Ibid.* That model fostered innovation. The idea for a store greeter, for example, came from a manager in Crowley, Louisiana. *Id.* at 148. The manager "was having trouble with shoplifting" and experimented by hiring a greeter, who both "made honest people feel welcome" and "sent a message to potential shoplifters that someone would see them." *Ibid.* The greeter is now ubiquitous in Wal-Mart's stores across the country.

3. Despite the benefits of delegation, some degree of centralization is still critical. Top-level managers need to "coordinate organizational activities and keep the organization focused on goals." Jones, *supra*, at 104. "If authority is too decentralized," moreover, "managers have

so much freedom that they can pursue their own functional goals and objectives at the expense of organizational goals." *Ibid.* Centralized policies are also essential to maintain consistency of message and experience to the consumer: The customer who enters a particular retail store expects the same look, feel, and treatment whether the store is in Alabama or Alaska. And a product should be manufactured the same whether the factory is in Houston or Hickory. Finally, centralized policies help ensure that employees act consistently with the law and with the company's broader goals and values.

A "basic design challenge for all organizations," therefore, is to determine "how much to centralize or decentralize the authority to make decisions." Jones, *supra*, at 104. "Organizations may have to experiment to find the correct degree of centralization or decentralization to meet their needs." Daft, *supra*, at 93.[2] But most successful companies strike "a balance between centralization and decentralization of authority so that middle and lower managers who are at the scene of the action are allowed to make important decisions, and top managers'

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[2] A large body of scholarship addresses that issue. See, *e.g.*, Nicholas Bloom *et al.*, *Does Management Matter? Evidence from India*, (NBER Working Paper No. 16658, 2011); Jones, *supra*, at 103-106; Myong-Hun Chang & Joseph E. Harrington, Jr., *Centralization vs. Decentralization in a Multi-Unit Organization*, 46 Mgmt. Sci. 1427 (2000); Nadav Levy, *Commitment, Exchange Autonomy, and the Boundary of the Hierarchical Firm*, 24 J.L. Econ. & Org. 184 (2008); Ján Zábojník, *Centralized and Decentralized Decision Making in Organizations*, 20 J. Labor Econ. 1 (2002); Ken Kollman *et al.*, *Decentralization and the Search for Policy Solutions*, 16 J.L. Econ. & Org. 102 (2000); Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. Pol. Econ. 1 (1997); Oliver E. Williamson, *Markets and Hierarchies* 132-141, 151-154 (1975); Alfred D. Chandler, Jr., *Strategy and Structure* 261-282 (1962).

primary responsibility becomes managing long-term strategic decision making." Jones, *supra*, at 105.

4. It is impossible, of course, to have a centralized policy for every situation. To fill that gap, successful firms often seek to instill a "corporate culture" that helps employees respond appropriately to the wide variety of situations they might confront. "Culture is the set of values, norms, guiding beliefs, and understandings that is shared by members of an organization and taught to new members as the correct way to think, feel, and behave." Daft, *supra*, at 374.

A strong corporate culture "shap[es] and guid[es] behavior so that everyone's actions are aligned with strategic priorities." Daft, *supra*, at 387. It teaches "[n]ewcomers to an organization * * * the values and norms that guide existing members' behavior and decision making." Jones, *supra*, at 185. And it permits a firm to "respond rapidly to customer needs": An employee already aware of firm expectations is better equipped to adapt to changes in the marketplace in a manner consistent with company values. Daft, *supra*, at 377. While the optimal culture depends on a company's particular circumstances, a "strong culture that encourages adaptation and change" will normally "enhance[] organizational performance by energizing and motivating employees, unifying people around shared goals and a higher mission, and shaping and guiding behavior so that everyone's actions are aligned with strategic priorities." *Id.* at 387.

B. Corporations Regularly Rely on Policies and Culture To Implement Diversity Initiatives

Although the foregoing principles are vital to corporate organization generally, they are also of particular concern to *amici* in one specific context—diversity and non-discrimination. A company that seeks an inclusive

workforce will often rely on companywide diversity and antidiscrimination policies implemented by managers exercising a necessary degree of discretion at the local level. And the company will often complement that policy by fostering a corporate culture that promotes respect, inclusion, and sensitivity.

The vast majority of large U.S. employers have policies and cultures designed to prevent discrimination and promote diversity. "By the end of the 1990s, three out of four Fortune 500 companies had launched diversity programs." Jefferson P. Marquis *et al.*, *Managing Diversity in Corporate America* 1 (2008). Companies with "larger workforces," in particular, tend to be "diversity-friendly." *Id.* at 22. In implementing those programs, firms seek to create a multicultural, diverse organization that not only benefits society at large, but also is good for business. Diversity programs serve as an "essential component of [a firm's] overall business strategy—enabling [it] to tap into diverse labor markets, compete with more innovative products and services, and market to more diverse customers." *Id.* at 14.

Like other organizational initiatives, corporate diversity programs often rely on centralized policies, decentralized implementation, and strong corporate culture to succeed. "To be effective, research suggests that diversity practices need to be implemented at all levels and in all aspects of the organization." Marquis *et al.*, *supra*, at 6. Successful firms establish a centralized, overarching "framework of broad strategic and policy guidelines" to channel hiring and promotion decisions. Michael Armstrong, *A Handbook of Human Resource Management Practice* 58 (10th ed. 2006). While "a central governing body outlin[es] the requirements of [diversity] plans," however, "individual agencies and departments hav[e]

their own plans tailored to their specific needs." Mitchell F. Rice, *Workforce Diversity in Business and Governmental Organizations*, in *Diversity and Public Administration: Theory, Issues, and Perspectives* 96, 109 (Rice ed., 2d ed. 2010). Even those local diversity plans necessarily leave an element of discretion to the managers who implement them. That combination of central policies and local discretion "reinforces a sense of ownership and ensures that managing diversity both has top-level support and is a reality throughout the organization." *Ibid.*

Promoting diversity, moreover, may require "transforming the corporate culture." Marquis *et al.*, *supra*, at 24. Just as it is impossible to have a corporate policy to address every conceivable consumer-relations decision, it is impossible to have a policy that addresses every diversity issue that may arise. A culture of respect, inclusion, and tolerance fills that gap. Accordingly, "[a]lthough leadership and management commitment are very important to the success of diversity programs, diversity should be viewed as the shared responsibility of everyone in the organization, not just top managers and human resources directors." *Ibid.* Leading companies often "[i]nterview potential candidates for 'diversity competency' to ensure that new hires will be able to support the culture of diversity in the organization." *Id.* at 6. And they "[a]dminister diversity training at all levels of the firm, from management to entry level." *Id.* at 8. Those practices help "[e]nsure that those in line for a leadership position * * * understand and have internalized the firm's diversity principles." *Id.* at 7.

Amici have been leaders in promoting diversity, often through the sort of centralized policies, local implementation, and corporate culture described above. The Altria family of companies, for example, has long had a policy of

supporting diversity and inclusiveness in its workforce. See Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Altria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav. "Three decades before civil rights became law," a subsidiary "voluntarily integrated its workforce despite subsequent boycotts in the south." Chicago United, *2009 National Bridge Award Recipient*, http://www.chicago-united.org/szymanczyk.htm.

Bank of America likewise "work[s] to foster an inclusive corporate culture and an environment free of discrimination or harassment." Bank of America, *Fact Sheets*, http://careers.bankofamerica.com/learnmore/factsheets.asp. Its initiatives rely on both centralized policies and local implementation: The company's Global Diversity and Inclusion Council, made up of senior management leaders, "guide[s] and implement[s] diversity and inclusion initiatives at the corporate level." Bank of America, *Diversity and Inclusion*, http://careers.bankofamerica.com/learnmore/diversity.asp. Further responsibility rests with decentralized Diversity and Inclusion Business and Regional Councils, which "identify issues and recommend strategies" within various business groups and regions. *Ibid.*

McKesson's diversity strategy begins "at the executive level" with the Chairman's Diversity Council and Corporate Diversity Officer. McKesson, *Diversity and Inclusion*, http://www.mckesson.com/en_us/McKesson.com/About%2BUs/Corporate%2BCitizenship/Diversity%2Band%2BInclusion.html. Its policies are then implemented through Business Unit Diversity Champions and a Diversity Advisory Board, which lead "a partnership among line leaders and corporate staff," as well as by local Diversity Councils and Site Action Teams at individual company locations. *Ibid.* McKesson also emphasizes

supplier diversity as an integral part of its "'company culture.'" McKesson, *Supplier Diversity*, http://www.mckesson.com/en_us/McKesson.com/About%2BUs/Corporate%2BCitizenship/Supplier%2BDiversity.html.

Hewlett-Packard's commitment similarly starts at the top, with senior management sharing "overall responsibility for compliance" with corporate diversity policies. HP, *Global Citizenship: Employee Diversity*, http://www.hp.com/hpinfo/globalcitizenship/society/employees/diversity.html. The firm also encourages the promotion of diversity throughout the organization, reflecting its belief that "behaviors and actions that support diversity and inclusion" should "come from the conviction of every HP employee." HP, *Diversity & Inclusion: Vision and Strategy*, http://www8.hp.com/us/en/hp-information/about-hp/diversity/vision.html. HP seeks to "create a culture of inclusion built on trust, respect and dignity for all." HP, *Diversity & Inclusion: Our Shared Values*, http://www8.hp.com/us/en/hp-information/about-hp/diversity/shared-values.html.

PepsiCo's CEO and Chief Diversity Officer spearhead worldwide diversity policies through leadership of a Global Diversity and Inclusion Governance Council. PepsiCo, *Our Management*, http://www.pepsico.com/Purpose/Talent-Sustainability/Our-Management.html. Regional Diversity and Inclusion Councils implement those policies, "focusing on locally relevant diversity and inclusion strategies and plans." *Ibid.* DuPont likewise has a long-standing policy against discrimination, as well as one of the leading supplier diversity policies. See DuPont, *Diversity and Inclusion: About Diversity*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/about/about.html; DuPont, *Diversity and Inclusion: Our Programs*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/

programs/programs.html. DuPont's commitment is reflected in its principle of "'Respect for People,'" which "'has been a core value for [DuPont] for over 206 years.'" DuPont, *About Diversity*, *supra*.

Those examples are merely representative; every signatory to this brief has robust programs designed to prevent discrimination and ensure a diverse workforce. See App., *infra*, 1a-8a. Time and again, many of those programs have been recognized by leading organizations and publications for their success in fostering a diverse and inclusive workforce where individuals of all backgrounds can flourish. See *ibid.* And just like other organizational initiatives, those programs often rely on a combination of centralized policies, local implementation, and corporate culture to achieve their goals. See *ibid.* Those organizational tools are thus essential to programs designed to advance Title VII's goals.

II. *FALCON*'S "SIGNIFICANT PROOF" STANDARD IS ESSENTIAL TO ENSURE THAT ROUTINE, NON-DISCRIMINATORY ORGANIZATIONAL TOOLS DO NOT BECOME A BASIS FOR CLASS-ACTION LIABILITY

Rule 23(a)'s commonality requirement should be interpreted in a manner that recognizes that companywide policies, delegated authority, and corporate culture are routine and beneficial features of modern organizations. *Falcon*'s "significant proof" standard properly interprets the rule in that manner. *Falcon*'s standard ensures that discrimination suits proceed as class actions only where there is proof that the claimed instances of discrimination derive from a central policy that is itself discriminatory. The Ninth Circuit's approach, by contrast, threatens class treatment merely because a defendant has adopted neutral organizational structures common throughout the economy. That approach threatens to distort corpo-

rate organizational decisionmaking and undermine critical diversity initiatives. It thus not only deviates from Rule 23(a)'s text and this Court's precedents, but also disserves the values that Title VII was meant to promote.

A. *Falcon*'s "Significant Proof" Standard Is Firmly Grounded in Rule 23(a)'s Text

Federal Rule of Civil Procedure 23(a) imposes several prerequisites before a class may be certified. One is that there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Prior to this Court's decision in *Falcon*, several courts of appeals had adopted broad interpretations of that requirement. In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), for example, the Fifth Circuit held that an alleged victim of racial discrimination could maintain an "'across the board'" attack on *any* discriminatory employment practice by the employer. *Id.* at 1124. "'[T]he Damoclean threat of a racially discriminatory policy,'" it reasoned, "'hangs over the racial class [and] is a question of fact common to all members of the class.'" *Ibid.* Other courts had similarly expansive views. See, *e.g.*, *Senter* v. *Gen. Motors Corp.*, 532 F.2d 511, 524 (6th Cir. 1976) ("Race discrimination is peculiarly class discrimination," and "[t]he operative fact in an action under Title VII is that an individual has been discriminated against because he was a member of a class."); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968). Those decisions reflected a philosophy that *presumed* compliance with Rule 23—a presumption that "[c]lass actions are generally appropriate in Title VII employment discrimination cases." *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 340 (10th Cir. 1975).

In *Falcon*, this Court rejected that approach. Emphasizing that class actions are "'an exception to the usual

rule that litigation is conducted by and on behalf of the individual named parties only,'" the Court reaffirmed that class-action treatment is appropriate only where plaintiffs demonstrably meet Rule 23's requirements, including commonality. 457 U.S. at 155-156. "Conceptually," the Court noted, "there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact." *Id.* at 157. "[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." *Id.* at 161 (emphasis added).

The Court then addressed how those principles apply to the sort of allegations made in this case—claims that a policy of allowing "subjective decisionmaking processes" by local managers caused discrimination. 457 U.S. at 159 n.15. Elaborating on its ruling that an "otherwise unsupported allegation * * * [of] a policy of discrimination" is not sufficient, *id.* at 157, the Court explained: "*Significant proof that an employer operated under a general policy of discrimination* conceivably could justify [class certification] if the discrimination manifested itself * * * through entirely subjective decisionmaking processes." *Id.* at 159 n.15 (emphasis added). Although terse, that statement sets forth all the principles necessary to resolve this case. The mere existence of delegated discretion in hiring and firing does not alone justify class treatment—even if that discretion happens to be exercised in a discriminatory fashion by some local decisionmakers.

Rather, the subjective decisionmaking must stem from a "general policy" that is itself a "policy of discrimination"; and the existence of that common policy of discrimination must be shown by "[s]ignificant proof." *Ibid.*

That standard is a faithful interpretation of Rule 23(a). Class-action treatment is appropriate only when there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The mere existence of statistical disparities in a company's workforce—even if consistent with the hypothesis that some individual managers have exercised delegated discretion in a discriminatory fashion—cannot alone establish commonality. Disparities might suggest that some employees have colorable *individual* claims based on the particular facts and circumstances of their respective cases. But under *Falcon*'s "general policy" requirement, class treatment is inappropriate unless those discrete decisions are stitched together by a broader corporate policy affecting the class as a whole.

Falcon's further requirement that the companywide policy be one "of discrimination"—for example, a policy that is discriminatory on its face, or a policy adopted as a means of discrimination—is also essential. That requirement ensures that the "general policy" proffered as the "question[ ] of law or fact common to the class" is central to the plaintiffs' claims. There is nothing inherently wrong with general policies of delegating decisionmaking authority—any more than there is something wrong with general policies governing air conditioning or the music played in stores. Unless the *policy itself* is an instrument of discrimination, it cannot justify aggregating otherwise unrelated discrimination lawsuits. It may be a "common" background fact—the same way that an employee's gender or the employer's identity is a common background

fact—but it is not a common "*question[]* of * * * fact" material to resolution of the claims in the sense that Rule 23(a) requires. As the courts of appeals have correctly observed, "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). But "[n]ot every common question * * * suffices under subsection (a)(2)." *Garcia* v. *Johanns*, 444 F.3d 625, 631 (D.C. Cir. 2006).

Finally, *Falcon*'s requirement that those elements be demonstrated by "significant proof" is also a sound construction of Rule 23(a). By its terms, Rule 23(a) conditions class treatment on the *existence* of specified conditions—not the mere contention that they exist. See Fed. R. Civ. P. 23(a). Consequently, "the requirements of Rule 23 must be *met*, not just supported by some evidence." *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006) (emphasis added). As *Falcon* itself made clear, "actual, not presumed, conformance with Rule 23(a) remains * * * indispensable." 457 U.S. at 160; see also *Vega* v. *T-Mobile USA, Inc.*, 564 F.3d 1256, 1268-1270 (11th Cir. 2009) (emphasizing the "'rigorous analysis'" that Rule 23 requires); *Hohider* v. *United Parcel Serv., Inc.*, 574 F.3d 169, 196-197 (3d Cir. 2009) (same).

The nature of the showing required may vary depending on the particular fact a plaintiff seeks to prove. "Sometimes the issues are plain enough from the pleadings * * * , and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Falcon*, 457 U.S. at 160. That notion reflects the more general principle—sound in both law and logic—that the quantum of evidence necessary to establish a claim varies depending on the claim's inherent credibility. See, *e.g.*, *Nixon* v. *Shrink Mo. Gov't*

PAC, 528 U.S. 377, 391 (2000). A claim that an employer adopted a centralized policy of delegating subjective decisionmaking authority for the purpose of promoting discrimination is not, in this day and age, a facially credible one. Modern corporations routinely adopt such organizational policies for entirely legitimate and beneficial reasons. See pp. 8-17, *supra*. Consequently, before certifying a class based on such a policy, courts should insist on a convincing showing—in *Falcon*'s words, "significant proof"—that the policy itself is a means of discrimination. Otherwise, courts risk granting class certification based on "common" policies with little to no relevance to the discrimination alleged.

In the years following *Falcon*, numerous courts have faithfully applied its "significant proof" standard to cases claiming subjective decisionmaking. See, *e.g.*, *Garcia*, 444 F.3d at 632; *Griffin* v. *Duggar*, 823 F.2d 1476, 1487, 1490 (11th Cir. 1987); *Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984). As those courts have explained, "[e]stablishing commonality for a [Title VII] disparate treatment class is particularly difficult where * * * multiple decisionmakers with significant local autonomy exist." *Garcia*, 444 F.3d at 632; see also *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279-280 (4th Cir. 1980). Plaintiffs must offer significant proof that "a common policy of discrimination * * * pervaded all of the employer's challenged employment decisions." *Garcia*, 444 F.3d at 632. *Falcon*'s standard has withstood the test of time and proved to be a clear and readily administrable rule. That rule is firmly grounded in the text of Rule 23(a), and the Court should reaffirm it here.

B. The Ninth Circuit's Decision Defies *Falcon*'s "Significant Proof" Standard and Rule 23(a)

In the decision below, the Ninth Circuit expressly rejected *Falcon*'s "significant proof" standard. See Pet. App. 41a-47a. Having done so, it declined to require plaintiffs to present evidence that Wal-Mart's company-wide policies, delegated discretion, and corporate culture were themselves discriminatory or adopted to effect discrimination. Instead, it allowed the case to proceed as a class action based on little more than the fact that such policies and culture *existed*.

The court of appeals noted that Wal-Mart had "company-wide corporate practices and policies, which include * * * excessive subjectivity in personnel decisions." Pet. App. 51a. It cited Wal-Mart's "strong corporate culture." *Ibid.* And it pointed to those features of Wal-Mart's organization over and over. See, *e.g.*, *id.* at 45a n.18 ("significant evidence of central control"); *id.* at 47a n.19 ("dominant corporate culture"); *id.* at 53a ("extensive oversight of store operations * * * and a strong, centralized corporate culture"); *id.* at 54a-55a ("centralized coordination, reinforced by a strong organizational culture, sustains uniformity in personnel policy and practice"); *id.* at 71a ("corporate structure and policies"); *id.* at 78a ("centralized firm-wide culture and policies").

Nowhere, however, did the court insist on any proof—much less "[s]ignificant proof"—that those companywide policies and culture reflected any "general policy *of discrimination*." *Falcon*, 457 U.S. at 159 n.15 (emphasis added). Not once, for example, did the court suggest there was any evidence that Wal-Mart decided to allow a degree of subjectivity and discretion at the local level for the purpose of facilitating discrimination. Indeed, the district court relied on policies and culture with no con-

ceivable relation to discrimination. As evidence of Wal-Mart's centralized policies, for example, it noted that Wal-Mart's Home Office "controls the temperature and music in each store throughout the country." Pet. App. 190a. And as evidence of strong corporate culture, it noted that employees "do the Wal-Mart cheer" during shift changes. *Id.* at 188a-189a. Nowhere has anyone explained why air-conditioning policies and morale-boosting exercises should make the difference between a multibillion-dollar nationwide discrimination class action and individual claims by employees with tangible grievances.

The Ninth Circuit's reliance on policies and culture with no proven connection to discrimination is inconsistent with *Falcon* and Rule 23(a). Rule 23(a) requires commonality. See Fed. R. Civ. P. 23(a)(2). Without proof that a common policy of distributing discretion was adopted *to effectuate* discrimination, or that discretion was exercised in a discriminatory fashion *because of* central policies and culture, that commonality is absent. That is true even if statistical disparities might suggest that some local decisionmakers exercised their discretion improperly (and thus that a number of persons affected by local decisions might have valid individual claims).

Companywide policies and culture normally are beneficial and implicate none of Title VII's concerns—which is why federal law requires or encourages them in a variety of contexts. See, *e.g.*, U.S.S.G. §§ 8B2.1, 8C2.5(f). Indeed, such policies and culture typically *reduce* the risk of discrimination by increasing consistency and focusing employees on relevant business considerations. But even a policy of leaving "decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). Likewise, "a decision

by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling* v. *Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996). Rather, subjectivity in employment decisions "cuts *against* any inference for class action commonality" because subjective assessments necessarily vary with the person making them. *Stastny*, 628 F.2d at 279 (emphasis added); see also *Love* v. *Johanns*, 439 F.3d 723, 730-731 (D.C. Cir. 2006) (rejecting the view that "'a common policy of discrimination exists when significantly subjective decision-making operates on a national basis with discriminatory results'" (alterations omitted)).

The most the Ninth Circuit could claim here was that Wal-Mart's policies, "in part through their subjectivity, provide[d] a *potential conduit* for discrimination." Pet. App. 53a (emphasis added). Wal-Mart's "strong corporate culture," it opined, "*may include* gender stereotyping," and its personnel policies are "*vulnerable* to gender bias." *Id.* at 54a-55a. (emphasis added). But that sort of speculation about what might be and what could be is precisely what *Falcon* forbids. Rule 23(a) conditions class certification on the *existence* of specified criteria, including commonality. See p. 21, *supra*. Speculation that a common issue *might* exist is no substitute for a finding, supported by adequate evidence, that a common issue *does* exist. As Judge Kleinfeld noted: "'Vulnerability' to sex discrimination is not sex discrimination." *Dukes* v. *Wal-Mart, Inc.*, 509 F.3d 1168, 1194 (9th Cir. 2007) (Kleinfeld, J., dissenting). Absent "significant proof" of an actual companywide policy or culture of discrimination

that gave rise to the alleged instances of discrimination, the Ninth Circuit lacked any basis for concluding that Rule 23(a)'s requirements were met. And, as *Falcon* made clear, "actual, not presumed, conformance with Rule 23(a) remains * * * indispensable." 457 U.S. at 160.

C. The Ninth Circuit's Reliance on Social Framework Analysis Is Inconsistent with *Falcon*

Much of the Ninth Circuit's flawed reasoning stems from its reliance on plaintiffs' sociology expert, Dr. William Bielby. See Pet. App. 54a-60a. Dr. Bielby asserted that Wal-Mart's policies and culture were "vulnerable to gender bias" based on a "social framework" analysis. See *ibid.* The Ninth Circuit's reliance on that analysis strays unacceptably from *Falcon* and Rule 23(a).

Social framework analysis "denote[s] the use of general conclusions from social science research to help determine specific factual issues in a case." John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1726 (2008). Under such an analysis, "the expert uses her judgment rather than traditional empirical methods to link social science propositions to a particular case." Greg Mitchell *et al.*, *Beyond Context: Social Facts as Case-Specific Evidence*, 60 Emory L.J. (forthcoming 2011) (manuscript at 3), *available at* http://ssrn.com/abstract=1564724. "[T]he expert does not reach the conclusion that a specific decision was made with discriminatory intent; that judgment is for the fact finder." Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 Fordham L. Rev. 37, 45 (2009). Rather, the expert "offer[s] his or her knowledge of the social science research and identif[ies] the characteristics of policies challenged in the particular workplace that research

has linked with higher likelihood of bias and stereotype." *Ibid.*

Reliance on such social framework analysis as a basis for class certification has been roundly criticized—and rightly so. "'Issues of causality in the social sciences have a long and rich methodological tradition.'" Gregory Mitchell, *Good Causes and Bad Science*, 63 Vand. L. Rev. En Banc 133, 138-139 (2010). But social framework analysis dispenses with those traditional and accepted methods of proving causation. Instead, it relies on the existence of a common policy that is merely "vulnerable" to discrimination and invites the jury to *assume* that the vulnerability of that common policy caused all the individual instances of alleged discrimination. It thus "improperly treat[s] findings drawn from aggregate data as if they revealed constant effects across individuals and settings." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1735. It "ignore[s] the potential confounding and moderating variables that were statistically or experimentally controlled in the research settings but that could not be controlled in the specific case where the behavior in question occurred." *Id.* at 1735-1736. And it improperly permits experts to "make unreliable descriptive claims that are used to establish commonality, such as claims about * * * the uniformity of actual or likely bias across disparate locations that the experts have not systematically studied in any detail." Mitchell, *supra*, at 142.

As the authors of the authoritative casebook on law and social science make clear: "No field of social science of which we are aware permits its experts to speculate that a general finding, derived from group averages or ecological correlations, applies to each member of the group or applies to one specific group member but not to another." Monahan *et al.*, *Contextual Evidence*, *supra*,

at 1734; see also John Monahan & Laurens Walker, *Social Science in Law* 597-605 (7th ed. 2010); John Monahan *et al.*, *The Limits of Social Framework Evidence*, 8 Law, Probability & Risk 307, 316 n.50 (2009). Social framework analysis, however, rests on precisely that flawed methodology.

Ironically, moreover, social framework analysis suffers from the same subjectivity it assails as a conduit for discrimination. Rather than apply scientifically reliable methods, a social framework expert relies on "subjective judgments and interpretations of case-specific data to decide which general principles apply and which do not, to determine which causal hypotheses should be rejected and which should be accepted, and to decide how much weight to give conflicting pieces of possibly unrepresentative evidence within a record as assembled by the parties in the context of litigation." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1740. "One of the ironies of these cases is that the experts use subjective judgment to indict the subjective judgment of managers." Mitchell, *supra*, at 141 n.19.

Dr. Bielby's testimony in this case exemplifies all those defects. Dr. Bielby did not "conduct an audit study (in which persons of different sexes with matching qualifications pose as applicants for the same job), a controlled experiment into the effects of stereotyping on managerial decisions at Wal-Mart, or an objective observational study of conditions at Wal-Mart." Monahan *et al.*, *Contextual Evidence*, *supra*, at 1747 (footnote omitted); see also Mitchell *et al.*, *supra*, at 3 (Dr. Bielby "conducted no observational, statistical or experimental tests to determine that any particular employment practice of Wal-Mart actually contributed to any sex disparities in pay"); Mitchell, *supra*, at 138 (outlining standard scientific pro-

cedures Dr. Bielby failed to follow); Monahan *et al.*, *Limits of Social Framework Evidence*, *supra*, at 313. Rather, Dr. Bielby "simply reviewed discovery materials and judged Wal-Mart's practices to contain features that social science studies suggest *can be* associated with intergroup bias." Mitchell *et al.*, *supra*, at 3 (emphasis added).

From that review, Dr. Bielby "opined that Wal-Mart had a strong and uniform corporate culture that influenced how personnel decisions were made and that Wal-Mart's personnel and accountability systems were unduly subjective and discretionary." Mitchell, *supra*, at 136. "Given that the deposition testimony and exhibits that he relied on were the product of questioning and selection by advocates for the plaintiffs, and given that he reviewed the record using an entirely subjective analytical method after knowing the plaintiffs' statistical evidence of disparities, it is not surprising that Dr. Bielby reached conclusions supporting the plaintiffs' class claims." *Id.* at 137 (footnote omitted). "Plaintiffs at the class certification stage need experts willing to say that there are common organizational practices exposing the class members to a common risk, and that is what Dr. Bielby and the other social framework experts have been providing without a reliable basis for doing so." *Id.* at 142; see also Monahan *et al.*, *Contextual Evidence*, *supra*, at 1748 (Dr. Bielby "reli[ed] on methodologically inadequate subjective judgments").

The district court acknowledged that "Dr. Bielby's opinions have a built-in degree of conjecture." Pet. App. 195a. And it recognized that he "cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart." *Ibid.* Indeed, while Dr. Bielby criticized Wal-Mart's policies as "vulnerable" to gender bias, 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." *Dukes* v. *Wal-Mart, Inc.*, 222 F.R.D. 189, 192 (N.D. Cal. 2004). The district court nonetheless certified the class, dismissing the shortcomings of Dr. Bielby's testimony on the ground that "this is the nature of this particular field of science." Pet. App. 195a.

The appeal of Dr. Bielby's approach to class-action plaintiffs is obvious. To achieve class certification, the theory posits only the *possibility* of discrimination seeping through "vulnerable" companywide policies. It thereby leaves *proof* of any actual companywide policy of discrimination to a merits trial that—because of the hydraulic pressure to settle that class certification produces—will never occur. See pp. 31-32, *infra*. Plaintiffs, however, are not entitled to class treatment simply because it is *possible* that the alleged discrimination stems from a common policy that *might* allow discrimination to occur. They must adduce the "significant proof" of a "general policy of discrimination" that *Falcon* and Rule 23(a) require. Absent "significant proof" that a common discriminatory policy is to blame, there is simply no sufficiently common issue to justify combining otherwise disparate claims of discrimination into a nationwide class action.

D. The Ninth Circuit's Decision Distorts Organizational Decisionmaking and Threatens Corporate Diversity Initiatives

The Ninth Circuit's decision is not only wrong as a matter of law. It is also bad policy. By rejecting *Falcon*'s significant proof standard, the decision distorts how firms make basic organizational decisions necessary to manage a successful enterprise.

To compete in today's global marketplace, corporations must strike a careful balance among centralized

policies, local discretion, and corporate culture. See pp. 8-12, *supra*. Those decisions are driven by business realities—like the need to react quickly to the marketplace while also ensuring a consistent product—that have nothing to do with discrimination. Those sensitive and difficult organizational decisions can often mean the difference between a thriving business that employs thousands of workers to serve millions of customers and a corporate train wreck.

By relying on those commonplace organizational tools as grounds for class certification, the decision below distorts corporate structural decisionmaking. As this Court has recognized, class certification is usually the entire game in class-action litigation. "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).[3] "Many corporate executives are unwilling to bet

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[3] See also *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (certification imposes "'irresistible pressure to settle'"); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001) ("hydraulic pressure on defendants to settle"); *Regents of Univ. of Cal.* v. *Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) ("the back-breaking decision that places 'insurmountable pressure' on a defendant to settle"); Richard A. Nagareda, *Aggregation and Its Discontents*, 106 Colum. L. Rev. 1872, 1875 (2006); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1285-1286 & n.129 (2002); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 522, 554 (1997). Even proponents of social framework analysis acknowledge that, "after a class is certified, the pressure on the employer to settle the dispute * * * is substantial." Hart & Secunda, *supra*, at 50. Thus, "as a practical matter, class certification operates as a kind of victory on the merits." *Ibid.*

their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). The potential for "an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low." *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Certification thus imposes substantial costs "[i]rrespective of the merits." *Newton*, 259 F.3d at 167. Even luminaries such as Judge Friendly have described such settlements as "blackmail." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). It was in part that very concern—that "[a]n order granting certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"—that led to Rule 23's amendment in 1998 to permit interlocutory appeals of certification orders. See Fed. R. Civ. P. 23(f) & advisory committee note; *Blair*, 181 F.3d at 834.

By attaching potentially case-dispositive consequences to a corporation's decisions to adopt centralized policies, delegate implementation authority, and foster a strong corporate culture—even when those decisions have nothing to do with discrimination—the Ninth Circuit's opinion skews organizational decisionmaking. Having "company-wide policies" or a "strong corporate culture," even ones wholly unconnected to discrimination, may now mean the difference between a multibillion-dollar, *must-settle* nationwide class action and individual discrimination claims resolved *on their merits* in traditional proceedings. High-level managers seeking to structure their businesses for success now must make those decisions with an artificial thumb on the scale to avoid the specter of a potentially ruinous class certification order.

The consequences are all the more troubling because it is not even clear what corporations can do to avoid them. The Ninth Circuit faulted Wal-Mart for its "company-wide corporate practices and policies" while, in the same breath, criticizing those policies for leaving "excessive subjectivity" in the hands of local decisionmakers. Pet. App. 51a. The court thus faulted Wal-Mart for being both *too centralized* and *too decentralized* at the same time. Corporate managers making basic organizational decisions should not be forced into an impossible Catch-22 situation where virtually any organizational structure they might adopt becomes grounds for class certification.

The Ninth Circuit's decision threatens those same negative consequences for corporate diversity and antidiscrimination initiatives as well. As explained above, see pp. 12-17, *supra*, most large firms in the United States today have made strong, public commitments to eradicating discrimination and promoting diversity. To implement those initiatives, however, corporations must often rely on the same organizational tools they use in managing any other aspect of their business—centralized policies, local implementation, and corporate culture.

The Ninth Circuit's reasoning threatens to render even those important initiatives sufficient evidence of "commonality" to justify class treatment of otherwise unrelated discrimination claims. If a company's air-conditioning policy can be cited against it as evidence of commonality, as Wal-Mart's was here, there is no reason its diversity and antidiscrimination policies could not be as well. The Ninth Circuit's decision thus threatens to impede even corporate efforts to promote inclusiveness and equality of opportunity. That perverse result is yet another reason to reaffirm *Falcon* and reject the Ninth Circuit's contrary approach.

A decision that a discrimination suit should not proceed as a nationwide class action does not leave genuine victims of discrimination without a remedy. Even in the best-managed companies, there may be isolated instances where rogue managers make improper decisions. And in large firms, those instances may add up. But the law provides ample means of redress for those individual claims. Indeed, those remedies are even more expansive now than when this Court decided *Falcon*. In 1991, Congress amended Title VII to provide for compensatory and punitive damages, not just backpay or equitable relief. See Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 105 Stat. 1071, 1072-1073 (codified at 42 U.S.C. §1981a(a)(1), (b)). Even before that amendment, prevailing plaintiffs could recover their attorney's fees. See 42 U.S.C. §2000e-5(k). Those remedies ensure the vindication of meritorious individual claims without recourse to class actions. There is accordingly no reason to expand the class-action mechanism beyond its traditional bounds by converting ordinary corporate organizational decisions with no proven connection to discrimination into a basis for class certification.

The Ninth Circuit's holding is impossible to reconcile with *Falcon*'s mandate that "actual, not presumed, conformance with Rule 23(a) remains * * * indispensable" and that, in cases like this, that standard requires "[s]ignificant proof" of a "general policy of discrimination." 457 U.S. at 159 n.15, 160. The Ninth Circuit's erroneous decision threatens companies' ability to manage their workforces and impedes the private-sector diversity initiatives that play an increasingly important role in corporate America's efforts to ensure opportunity for all.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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APPENDIX A
LIST OF *AMICI CURIAE*

Altria Group, Inc., is the parent company of Philip Morris USA, U.S. Smokeless Tobacco Company, John Middleton, Ste. Michelle Wine Estates, and Philip Morris Capital Corporation. The Altria Group of companies has about 10,000 employees throughout the United States. Its award-winning diversity programs seek to provide an inclusive work environment where different perspectives are encouraged and valued. See Altria, *Diversity & Inclusion*, http://www.altria.com/en/cms/About_Altria/Our_People/Diversity_Inclusion/default.aspx?src=top_nav.

Bank of America Corporation is one of the world's largest financial institutions, serving individual consumers, small- and middle-market businesses, and large corporations with a full range of banking, investing, asset management, and other financial products and services. With approximately 284,000 employees, the company has been broadly acclaimed for its diversity initiatives. It promotes a philosophy of inclusion that draws on the strength of every associate to build an atmosphere of personal and professional growth. See Bank of America, *Diversity and Inclusion*, http://careers.bankofamerica.com/learnmore/diversity.asp.

CIGNA Corporation provides healthcare and related benefits, the majority of which are offered through the workplace. Its products and services include healthcare, disability, life, and accident insurance. The company has approximately 30,000 employees, and its diversity policies seek to educate employees about the important role diversity plays in creating a winning environment across the enterprise. CIGNA has received awards and recognition for its diversity programs from such organizations as the National Committee for Quality Assurance and the

Human Rights Campaign Foundation. See CIGNA, *Diversity: It's Who We Are*, http://careers.cigna.com/CIGNAPage.aspx?page=23.

Del Monte Foods Company is one of the country's largest and best-known producers, distributors, and marketers of premium quality, branded pet products and food products. Del Monte has a powerful portfolio of brands, and its products are found in eight out of ten U.S. households. The company employs about 15,000 individuals. It is committed to promoting and preserving a workplace environment rich in diversity—one in which individual differences are not simply tolerated or accepted, but truly appreciated. The company's commitment to diversity is respected in the industry for delivering results. See Del Monte Foods, *Workplace Diversity*, http://www.delmonte.com/careers/default.aspx?page=ca_workplacediversity.

Dole Food Company, Inc., is the world's largest producer and marketer of fresh fruit and vegetables. It does business in more than 90 countries and employs approximately 39,100 full-time employees and 36,500 part-time employees worldwide. The company practices nondiscriminatory policies and is an equal opportunity employer. See Dole, *Employees*, http://dolecsr.com/Principles/Employees/tabid/407/Default.aspx.

Dollar General Corporation is the Nation's largest small-box discount retailer. The company employs approximately 80,000 employees in 35 states. In keeping with its mission of "Serving Others," Dollar General has implemented policies designed not only to ensure compliance with antidiscrimination laws but also to foster a diverse and inclusive work environment. See Dollar Gen-

eral, *Diversity at Dollar General*, http://www.dollargeneral.com/Careers/Pages/Diversity.aspx.

DuPont Company is a science-based products and services company. Founded in 1802, DuPont puts science to work by creating sustainable solutions essential to a better, safer, healthier life for people everywhere. Operating in more than 90 countries, DuPont has more than 58,000 employees. DuPont's commitment to diversity is embodied in its vision to be a "great global company through people." That vision of inclusiveness seeks to overcome any and all cultural and structural barriers that dampen motivation, stifle creativity, and deter full participation at all levels of the company. DuPont has been recognized for its commitment to the advancement of women and minorities by several organizations. Its continuing goal is to ensure that all employees have the opportunity to grow personally and professionally during their careers with DuPont. See DuPont, *Diversity and Inclusion*, http://www2.dupont.com/Diversity_and_Inclusion/en_US/index.html.

FedEx provides customers and businesses worldwide with a broad portfolio of transportation, e-commerce, and business services. Consistently ranked among the world's most admired and trusted employers, FedEx inspires its more than 285,000 team members to remain focused on safety, ethical and professional standards, and the needs of customers and communities. FedEx embraces diversity as essential to its continued success in today's ever-changing global marketplace. The company has been honored with the Champion of Diversity Award from the New York Urban League; was ranked as one of the top 40 companies for diversity by *Black Enterprise* magazine; was recognized as one of the top 50 employers

by *Minority Engineer* magazine; and was both honored as one of the "Elite Eight," and ranked as a great place for women to work, by *Pink* magazine. At FedEx, diversity is a priority from management to the frontline. See FedEx, *Diversity*, http://about.fedex.designcdt.com/corporate_responsibility/diversity/culture.

General Electric Company is a global infrastructure, finance, and media company. It employs 300,000 people in more than 100 countries. The company implemented its first companywide equal employment opportunity policy in the 1930s and has a long history of fair employment practices, ensuring a level playing field for all. GE has been named in numerous "top employer" lists for its employment programs and practices. See GE, *Our People*, http://www.ge.com/company/culture/people.html.

Hewlett-Packard Company is the world's largest technology company. It creates technology solutions for consumers and business with a portfolio that spans printing, personal computing, software, services, and information technology infrastructure. It has approximately 304,000 employees worldwide. The company's diversity policy recognizes that creating a diverse, inclusive work environment is a process of continuous renewal. See HP, *The Diversity Value Chain*, http://www8.hp.com/us/en/hp-information/about-hp/diversity/value.html.

Kimberly-Clark Corporation provides family care, personal care, and other products to 1.3 billion consumers each day in more than 150 countries. Its well-known brands include Kleenex, Scott, and Huggies. The company has nearly 56,000 employees worldwide. Kimberly-Clark focuses on developing employee programs that retain and recruit engaged and skilled talent reflective of its customers, consumers, and communities. It believes

that promoting a culture that values and capitalizes on individual and collective talents, opinions, perspectives, and ideas makes it a more innovative company. See Kimberly-Clark, *Diversity at Kimberly-Clark*, http://www.kimberly-clark.com/aboutus/diversity.aspx.

McKesson Corporation is dedicated to delivering the vital medicines, supplies, and information technologies that enable the healthcare industry to provide patients better, safer care. The company has over 32,000 employees across the Nation and around the world. McKesson is committed to fostering a workplace environment that respects the many ways we are different from one another, and supports and acknowledges the diverse world in which we live and work. See McKesson, *Diversity and Inclusion*, http://www.mckesson.com/en_us/McKesson.com/About%2BUs/Corporate%2BCitizenship/Diversity%2Band%2BInclusion.html.

Microsoft Corporation is a worldwide leader in software, services, and solutions that help people and businesses realize their full potential. Founded in 1975, it has approximately 88,000 employees worldwide. Microsoft strongly believes that a diverse workforce brings greater perspective, knowledge, and experience, and makes the company an employer of choice for talent from around the world. Being able to attract, develop, and retain this talent enables Microsoft to be more innovative in the products it develops, the way it solves problems, and the way it serves the needs of an increasingly global and diverse customer base. See Microsoft, *Global Diversity and Inclusion*, http://www.microsoft.com/diversity.

NYSE Euronext is a leading global operator of financial markets and provider of innovative trading technologies. The company's exchanges in Europe and the Uni-

ted States, which include the New York Stock Exchange, trade equities, futures, options, fixed-income, and other products. With more than 3,000 employees, NYSE Euronext encourages the highest levels of ethics, performance, respect, and excellence throughout its organization. At NYSE Euronext, diversity means enabling people of all ages, races, genders and sexual orientations, as well as people with disabilities and different cultures, religions, and styles, to work together effectively to meet company objectives and maximize their potential. The company's U.S. Diversity Council is recognized by the Association of Diversity Councils as one of the Nation's top-performing diversity organizations. See NYSE Euronext, *Corporate Responsibility Report 2009*, http://www.nyse.com/pdfs/NYX_Corporate_Responsibility_Report.pdf.

PepsiCo, Inc., is a world leader in convenient snacks, foods, and beverages. It is home to hundreds of brands, including Pepsi-Cola, Frito-Lay, Gatorade, Tropicana, and Quaker. PepsiCo has over 285,000 employees. It approaches diversity and inclusion as fundamental business priorities and has received dozens of awards for its efforts. See PepsiCo, *Diversity & Inclusion*, http://www.pepsico.com/Purpose/Talent-Sustainability/Diversity-and-Inclusion.html.

Tyson Foods, Inc., founded in 1935, is one of the world's largest processors and marketers of chicken, beef, and pork. The company has approximately 117,000 team members employed at more than 400 facilities and offices around the world. Inclusion and valuing diversity are cornerstones that have supported the growth of its business throughout its history, especially in the past few decades. See Tyson, *2009 Sustainability Report* 18, 28-

29, http://www.tyson.com/Corporate/PressRoom/docs/2009SustainabilityReport_English.pdf.

UnitedHealth Group Incorporated is a diversified health and well-being company dedicated to helping people live healthier lives and making healthcare work better. With approximately 80,000 employees, UnitedHealth Group serves more than 75 million people worldwide through a broad spectrum of health benefit programs and health services. UnitedHealth Group embraces and encourages a culture of diversity and inclusion and knows that valuing diversity makes good business sense and helps to ensure the company's future success. The company is a member of the Select 50 Diversity Employers of Choice and has received numerous other awards and distinctions. See UnitedHealth Group, *Diversity & Inclusion*, http://diversity.unitedhealthgroup.com/.

United Parcel Service, Inc., is the world's largest package delivery company and a global leader in logistics, offering a broad range of solutions including the transportation of packages and freight, the facilitation of international trade, and the deployment of advanced technology to more efficiently manage the world of business. It has approximately 408,000 employees and serves more than 220 countries and territories worldwide. UPS has a longstanding commitment to diversity and believes that people do their best when their talents are encouraged to flourish in an environment that embraces diversity. The company has received awards and recognition for its diversity efforts from many organizations, including Hispanic Business magazine and the Women's Business Enterprise National Council. See UPS, *Diversity in Business*, http://www.responsibility.ups.com/Diversity.

Walgreen Co. operates the Nation's largest drugstore chain, Walgreens, with 244,000 employees. Diversity and inclusion at Walgreens are more than business initiatives; they are a way of life. The company's business groups are devoted to sustaining a culture of diversity and inclusion. Walgreens earned a 100 rating in the Human Rights Campaign Foundation's Human Equality Index and has been recognized as a "Best Diversity Company" by *Diversity/Careers* magazine. See Walgreens, *Diversity Fuels Future Growth*, http://www.walgreens.com/topic/sr/sr_reflecting_diversity.jsp.

The Williams Companies, Inc., is an integrated natural gas company. It produces, gathers, processes, and transports clean-burning natural gas to heat homes and power electric generation across the country, and employs approximately 5,000 people. The company's diversity mission is to foster an environment that attracts a high-performing, diverse workforce where individuals are respected and valued for their contributions and have the opportunity to achieve their maximum potential. See Williams, *2008 Corporate Responsibility Report* 26-28, http://www.williams.com/corporate_responsibility/docs/CSR_2008.pdf.