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 RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF RETAIL LITIGATION CENTER, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Retail Litigation Center, Inc. ("RLC") is an organization comprised of the retail industry's top legal professionals. RLC works to

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

identify legal proceedings that affect the industry so that retailers can weigh in on important legal questions and highlight for courts the potential industry-wide consequences of the issues pending before them. RLC's members represent retailers that employ tens of thousands of persons in numerous states, multiple regions, and myriad stores across the nation. Because these private employers take pride in their talented and diverse workforces, they have adopted and enforce voluntary policies forbidding discrimination on the basis of race, gender, and other grounds, while also implementing policies of strict compliance with anti-discrimination laws.

The large size and national scope of many retailers make them attractive targets for putative class actions, even where the strength of the class representative's claim is questionable at best, and where class treatment of disparate individual claims is clearly inappropriate. Were the decision below and its expansive misinterpretation of the class action rules to stand, enterprising plaintiffs and their counsel could seek certification of classes that are as sprawling and gargantuan as they are unwarranted. Once certified, a class can exert tremendous leverage on the retailers to settle—particularly a class of unprecedented size such as the one here—simply because of the enormous cost of litigation. In today's fragile economy, RLC's members cannot afford to pay exorbitant settlements for class actions that should not have been certified in the first place. Nor should they have to.

SUMMARY OF ARGUMENT

In *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), this Court interpreted Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement in the context of certifying classes in cases alleging violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*. ("Title VII"). Where, as here, class representatives allege that "an employer operated under a general policy of discrimination" that had adverse consequences with respect to disparate employment practices, commonality can exist *only* if there is *both* (1) "[s]ignificant proof" of the policy and (2) evidence that "the discrimination manifested itself in [the different] practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Falcon*, 457 U.S. at 159 n.15.

The Ninth Circuit disregarded this Court's interpretation of Rule 23(a) in *Falcon* and erroneously affirmed class certification, which was based on a superficial and incorrect review of thin evidence. Moreover, its misreading of *Falcon*'s discussion of "subjective" decision-making processes will deter RLC's members from entrusting their on-site managers to make discretionary judgments to reward exemplary employees—to the detriment of employee and employer alike. Under the Ninth Circuit's view, such employment decision-making processes with both objective and subjective components could, when coupled with isolated claims of discrimination in other stores or facilities, subject the entire company to crippling class action exposure.

Notably, the United States, as a defendant in putative class actions under Title VII and other anti-discrimination laws, has interpreted *Falcon* exactly

as Wal-Mart and RLC have in this case: Rule 23(a)(2)'s commonality requirement cannot be satisfied simply because an organization has entrusted its local supervisors and managers with some measure of discretion. Thus, the Ninth Circuit's overly broad reading of Rule 23(a) also could have adverse consequences beyond the private sector.

ARGUMENT

I. *FALCON* ESTABLISHES THE STANDARD FOR "COMMONALITY" WHERE PLAINTIFFS ALLEGE A COMPANY-WIDE POLICY OF DISCRIMINATION.

A. Claims Of Company-Wide Discrimination Generally Cannot Satisfy Rule 23(a)(2) As Interpreted By *Falcon*.

"The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Falcon*, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). A plaintiff may sue as a class representative only if the prerequisites of Federal Rule of Civil Procedure 23(a) are met, including the existence of "questions of law or fact common to the class . . . ." Fed. R. Civ. P. 23(a)(2). This requirement of commonality "serve[s] as [a] guidepost[] for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and

adequately be protected in their absence." *Falcon*, 457 U.S. at 157 n.13.[2]

The Court has explained that a "rigorous analysis" is required to determine whether the requirements of Rule 23(a) have actually been met. *Falcon*, 457 U.S. at 161. Otherwise, certification will serve neither judicial economy nor the interests of the absent class members. The appropriate judicial analysis often requires probing "behind the pleadings" and examining "'considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 160 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978)). Here, the commonality inquiry requires a closer examination of the plaintiffs' allegations of discrimination in violation of Title VII.

Under Title VII, it is insufficient to show only that an employer has a *policy* of discrimination; rather, this alleged policy must be effectuated through some particular employment *practice*. *See Falcon*, 457 U.S. at 159 n.15; 42 U.S.C. § 2000e-2(a). While a single employee might support her own claim of discrimination by showing that she was denied a promotion on the basis of a statutorily prohibited criterion, such as gender, such a showing would not make her representative of every woman in her employer's workforce. Her individualized evidence of discrimination does not "justify the additional inferences" that *all* of the company's promotion decisions—or its other employment practices, such as wage-setting—have been similarly motivated by

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[2] Because Rule 23(a)'s requirements of commonality, typicality, and adequacy of representation "tend to merge," *Falcon*, 457 U.S. at 157 n.13, *amicus* has focused its discussion on the commonality requirement.

gender discrimination. *Falcon*, 457 U.S. at 158. Because one employee's claim that she was denied a promotion on discriminatory grounds says nothing about whether there exists a class of people who have suffered "the same injury," an individual employee's own evidence of discrimination does not establish "common questions of law or fact" justifying class treatment. *See id.* at 157.

Nor would be it enough for that employee to supplement her individualized evidence with mere allegations that the company has a general policy of discriminating against women "across-the-board." *See Falcon*, 457 U.S. at 158-59. Otherwise, a single allegation of discriminatory treatment, coupled with an unsupported allegation of a company-wide policy of discrimination, could turn every Title VII case into "a potential companywide class action." *Id.* at 159. For this reason, this Court found in *Falcon* that it was improper to presume that a Mexican-American employee's individual claim of national origin discrimination had anything in common with other claims that might be brought by other Mexican-American employees. *Id.*

As interpreted in *Falcon*, Rule 23(a)(2) is not satisfied where a putative class action merely *alleges* a company-wide policy of discrimination. Rather, where, as here, class representatives allege that "an employer operated under a general policy of discrimination" that had adverse consequences with respect to disparate employment practices, commonality can exist *only* if there is *both* (1) "[s]ignificant proof" of the policy and (2) evidence that "the discrimination manifested itself in [the different] practices in the same general fashion, such as through entirely subjective decisionmaking

processes." *Falcon*, 457 U.S. at 159 n.15. Thus, just as Rule 23 creates a narrow exception to the general rule against letting one party litigate on another's behalf, *see id.* at 155, plaintiffs claiming "across-the-board" discrimination generally cannot show commonality except under the limited circumstances described by *Falcon*.

B. The Plaintiffs Have Not Met *Falcon*'s High Bar.

Certification in this case grossly disregards the Court's admonishment in *Falcon* that "[t]he mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf." *Falcon*, 457 U.S. at 159 n.15. The record shows that the only common features among the six class representatives and the 1.5 million putative class members are their gender and the fact of their past or present employment at some Wal-Mart facility.

1. "Significant proof"

The Ninth Circuit failed to apply *Falcon*'s "significant proof" standard to evaluate whether the plaintiffs had shown that Wal-Mart had a company-wide "policy" of discrimination against women. Although the Ninth Circuit's majority conceded that it cannot "shrug[] . . . off" this Court's statements in *Falcon* simply "because they were not a holding," Pet. App. 42a n.15 (internal edits and quotation marks omitted), the court essentially did just that. The majority criticized the requirement of "significant proof" as "an unusually high standard that Plaintiffs here need not meet because they did not present the distinct legal theories of recovery that the *Falcon*

plaintiffs, both employees and applicants, had pursued together in one class." *Id.* at 42a. This weak distinction hardly supports rejecting outright this Court's *only* analysis of the standard for class certification in Title VII cases where the plaintiffs allege improperly subjective employment decision-making.

Even more confusingly, the Ninth Circuit's majority later suggested that it was, in fact, applying *Falcon*'s standard, because it concluded—without any support in the record—that "Plaintiffs here have introduced 'significant proof' of Wal-Mart's policies . . . ." Pet. App. 46a. Yet the opposite is true: Wal-Mart has myriad company-wide policies forbidding discrimination and promoting diversity. *See* Pet. App. 195a; J.A. 1576a-1596a. And as the Ninth Circuit recognized, the plaintiffs' expert "failed to identify a specific discriminatory policy at Wal-Mart." Pet. App. 55a; *see also id.* at 59a. Indeed, the plaintiffs have not linked Wal-Mart's processes for making employment decisions to a discriminatory intent.

Instead, the plaintiffs attempted to infer a company-wide policy of discrimination from a hodgepodge of anecdotes, sociological theory, and questionable statistics. As explained by Judge Ikuta's dissent from the decision below, the district court's analysis of the plaintiffs' evidence was deeply flawed. A rigorous review of their evidence shows that they wholly failed to establish a company-wide policy of discrimination that affected a class of 1.5 million employees. *See* Pet. App. 124a-128a (Ikuta, J., dissenting). For example, one of the plaintiffs' experts claimed that statistical evidence suggested a trend of discrimination at Wal-Mart's stores, even though he failed to analyze data at the level of each

store, and instead drew his conclusions from data aggregated at the higher level of entire *regions* of Wal-Mart's retail operation. *Id.* at 130a-132a & n.12. The district court dismissed Wal-Mart's objections to this statistical evidence, incorrectly suggesting that Wal-Mart's concerns prematurely raised questions that went to the merits of the case. *Id.* at 128a-129a. Such a "superficial examination," *id.* at 129a, is hardly the kind of "rigorous analysis" required by *Falcon*, which recognized that the class certification analysis must often examine legal and factual issues that are "enmeshed" in merits issues. *See* 457 U.S. at 160-61.

2. "Entirely subjective decisionmaking processes"

The Ninth Circuit also misinterpreted the second prong of the standard established by this Court in *Falcon*. In order to meet the commonality requirement, an alleged policy of discrimination must be manifested in a way that affects all class members "in the same general fashion, such as through *entirely* subjective decisionmaking processes." 457 U.S. at 159 n.15 (emphasis added). The Ninth Circuit concluded that "'[s]ubjective decisionmaking processes' are exactly what the Plaintiffs allege here and what the Supreme Court's hypothetical expressed concern with in *Falcon*." Pet. App. 46a (quoting 457 U.S. at 159 n.15). Again, the Ninth Circuit is incorrect.

Falcon did not suggest that "subjective decision-making processes" are impermissible as a general matter. Rather, this Court has indicated that the opposite is true. "[A]n employer's policy of leaving promotion 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). Using subjective criteria is a perfectly legitimate and effective means of making employment decisions, because "employment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 604 (2008).

Thus, *Falcon* observed that "*entirely* subjective decisionmaking processes" may become problematic *where there is significant proof of a general policy of discrimination*. 457 U.S. at 159 n.15 (emphasis added). This is because an *entirely* subjective process could permit a discriminatory policy to be effected throughout the company without constraint by any objective considerations. Even if there were a company-wide policy of discrimination, commonality would not be demonstrated by decision-making processes that are only "partly" subjective.

While the record shows that Wal-Mart's individual store managers had some discretion to set wages and award promotions, *see* Pet. App. 177a-183a, the undisputed evidence also shows that this discretion was not without significant limits. The district court acknowledged that these decisions were not "made totally in isolation," because Wal-Mart's "centralized corporate policies" constrain "the degree of managerial discretion over in-store personnel decisions." Pet. App. 192a. The constraints on managerial decision-making include uniform guidelines regarding salary ranges and eligibility for bonuses and merit increases, *see, e.g.*, J.A. 1498a-1511a, as well as objective standards and guidelines for promotions to managerial and supervisory positions that rely upon an employee's discipline, tenure, and performance

history. *See, e.g.*, J.A. 373a-396a. Because Wal-Mart's wage-setting and promotion processes are not "entirely" subjective, the Ninth Circuit was wrong to suggest that the company's delegation of pay and promotion discretion may give rise to an inference of a company-wide policy of discrimination that might justify certifying a massive class of employees.

II. THE NINTH CIRCUIT'S APPROACH WOULD CHILL EMPLOYERS' LEGITIMATE AND NECESSARY USE OF PARTLY SUBJECTIVE PROCESSES TO MAKE WORKFORCE DECISIONS.

Like Wal-Mart, many private retailers set wages and promote workers after accounting for both objective and subjective considerations. A partly subjective process lets employers identify and reward employees whose creativity, diligence, ambition, and other intangible qualities are essential to the company's growth, but might otherwise go undetected through standardized methods of evaluation. *See Watson*, 487 U.S. at 999 ("It is self-evident that many jobs, for example those involving managerial responsibilities, require personal qualities that have never been considered amenable to standardized testing."). In addition, many retail companies with nationwide operations delegate these and other employment decisions to on-site managers who are closest to workers and who can best identify the most deserving employees whose advancement is also in the company's own interests.

Instead of accepting the legitimacy of partly subjective hiring procedures, the Ninth Circuit disparaged them. The majority relied on the opinions of one of the plaintiffs' experts, sociologist William

Bielby, who claimed that "substantial decision-maker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." Pet. App. 54a (internal quotation marks omitted). Yet this same expert "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) (denying motion to strike Bielby's declaration).

By casting aspersions on subjective decision-making generally and ignoring that *Falcon* was concerned with *entirely* subjective determinations, the Ninth Circuit sent a clear and chilling message to RLC's members and other large nationwide employers: if they entrust their on-site managers with discretion to identify and reward promising employees, then a few isolated claims of discrimination in other stores or facilities could expose the entire company to class action liability. Such legal exposure will likely discourage companies from allowing on-site supervisors to consider subjective factors when setting wages and promoting workers. As a result, companies would be less willing to incentivize and reinforce employees with intangible traits such as loyalty, creativity, leadership, and ambition, to the detriment of employee and employer alike.[3]

[3] *Amicus*'s fears are compounded by the fact that the Ninth Circuit's disregard for *Falcon*, if left to stand, could infect other courts' consideration of Rule 23's commonality requirement in the context of other underlying causes of action.

III. THE UNITED STATES HAS EMBRACED PETITIONER'S READING OF *FALCON* WHEN OPPOSING CLASS CERTIFICATION AS A DEFENDANT IN DISCRIMINATION SUITS.

If affirmed, the Ninth Circuit's overly broad reading of Rule 23(a) also could have adverse consequences beyond the private sector. Like RLC's members, the United States is often named as a defendant in suits brought as putative class actions under Title VII and other anti-discrimination laws. The United States has made the very arguments that Wal-Mart and RLC make now: Rule 23(a)(2)'s commonality requirement cannot be satisfied simply because an organization has entrusted its local supervisors and managers with some measure of discretion.

In one putative class action alleging racial discrimination by the U.S. Department of Commerce, the United States moved to strike the class claims, in part because they did not satisfy Rule 23(a). *See* Def.'s Mot. to Dismiss at 63-83, *Howard v. Gutierrez*, 474 F. Supp. 2d 41 (D.D.C. 2007) (No. 05-CV-1968), 2006 WL 1032612. When arguing that the plaintiff's claims lacked commonality, the government noted that "there is nothing inherently suspect about the use of some subjective criteria in hiring and promotion decisions." *Id.* at 72 (citing *Watson*, 487 U.S. at 999). In a similar action against the U.S. Air Force, the government successfully opposed certification before the district court and observed on appeal that

> subjective evaluations . . . are often critical to the decision making process, and if anything, are becoming more so in our increasingly service-oriented economy . . . . It is inconceivable that Congress intended

> anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation.

Br. for Appellee at 37, *Hines v. Widnall*, 334 F.3d 1253 (11th Cir. 2003) (No. 02-13267), 2002 WL 32179880 (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1185-86 (11th Cir. 2001)) (internal quotation marks omitted).[4]

The United States has also advised this Court that subjective employment decision-making, without more, is routine, necessary, and entirely proper:

> A large proportion of personnel decisions involve . . . comparisons between individual employees (*e.g.*, who should be hired or promoted) or between an individual and a relevant group (*e.g.*, whether the employee is performing at the expected level). Personnel decisions often turn on factors that are both individualized and subjective or are based on intangible criteria that may be hard to quantify with exact precision. To maintain a functioning workplace, public employers, no less than private employers, must make distinctions among similar employees . . . .

Br. for United States as *Amicus Curiae* at 10, *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591 (2008) (No. 07-474), 2008 WL 859357.

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[4] In *Hines* and *Howard*, the courts granted the relief requested by the United States without reaching the question of whether Rule 23(a)(2) was satisfied. *Hines*, 334 F.3d at 1258 (affirming on typicality grounds); *Howard*, 474 F. Supp. 2d at 57 n.10 (striking class claims for inexcusable failure to comply with deadlines under local rules).

Two additional and related high-profile cases exemplify how the United States has asserted the same interests as private employers in delegating discretion to its local officials. In *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000), the U.S. District Court for the District of Columbia entered a consent decree settling class claims that the U.S. Department of Agriculture had long discriminated against black farmers in administering federally funded loan and benefit programs. Soon after, Hispanic and female farmers filed separate class action suits similarly alleging that the agency had discriminated against them. *See* Class Action Compl., *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (No. 00-CV-2445) (filed Oct. 13, 2000); Class Action Compl., *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (No. 00-CV-2502) (filed Oct. 19, 2000).

In *Garcia* and *Love*, the plaintiffs alleged that the Department had a policy of discrimination and that it gave its local loan officials excessive discretion in reviewing applications. The United States opposed certification, arguing in part that *Falcon* made clear that "commonality is not established simply because a decisionmaking process contains some subjective factors." Def.'s Opp'n to Pls.' Mot. for Class Certification ("Def.'s Opp'n") at 11, *Garcia v. Veneman*, 224 F.R.D. 8 (D.D.C. 2004) (No. 00-CV-2445), 2002 WL 34484128. The district court agreed, denying the certification motions; the D.C. Circuit also accepted the government's arguments when affirming the district court. *See Garcia*, 224 F.R.D. at 11-15, *aff'd*, 444 F.3d 625, 633-34 (D.C. Cir. 2006); *Love*, 224 F.R.D.

at 243-44, *aff'd*, 439 F.3d 723, 727-32 (D.C. Cir. 2006).[5]

In both *Garcia* and *Love*, the government emphasized that the challenged processes for determining eligibility and approving loans were not "entirely subjective," and therefore they did not fall within *Falcon*'s narrow exception to the rule against finding commonality in suits claiming across-the-board discrimination. *See* Def.'s Opp'n at 12-18, *Garcia*; Def.'s Opp'n to Pls.' Mot. for Class Certification ("Def.'s Opp'n") at 19-21, *Love v. Veneman*, 224 F.R.D. 240 (D.D.C. 2004) (No. 00-CV-2502), 2004 WL 3623698. The United States criticized courts that found that a partly subjective decision-making process was enough to establish commonality, because these courts "ignore[d] the qualifier used by the Supreme Court" in *Falcon*. Def.'s Opp'n at 13 n.2, *Garcia*; *see also* Def.'s Mot. to Dismiss at 72, *Howard* ("Plaintiffs cannot possibly show that the Department's personnel decision-making processes were *entirely* subjective.").

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[5] Certification was granted in a third related case brought by Native American farmers, but that class was certified under Rule 23(b)(2) only "for purposes of declaratory and injunctive relief," as the plaintiffs sought only equitable relief. *Keepseagle v. Veneman*, No. 99-CV-3119, 2001 WL 34676944, at *13 (D.D.C. Dec. 12, 2001). *But see In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002) (denying government's motion for interlocutory appeal of certification order, but raising question about district court's decision to "certify a (b)(2) class solely for purposes of equitable relief without first determining if plaintiffs' claims for monetary relief predominate over their equitable claims"). By contrast, the relief requested in *Garcia* and *Love* was predominantly monetary in nature. *See Garcia v. Veneman*, 211 F.R.D. 15, 23 (D.D.C. 2002) ("[I]n this case the monetary relief plaintiffs seek predominates [over equitable relief] under any applicable test."); *Love*, 224 F.R.D. at 245 ("In this case, as in the *Garcia* case, money damages are far from incidental." (citation omitted)).

The United States also rejected the suggestion that delegating some discretion to the local officials who can best assess the facts on the ground is somehow improper in and of itself:

> Some form of local decisionmaking seems inevitable in loan programs of this type, which require, *inter alia*, assessments of the likely productivity of each farm and whether that farm will generate sufficient cash flow to meet all anticipated expenses. Indeed, absent local decisionmaking, the quick turn-around on credit applications that is an absolute necessity for family farms would be impossible.

Def.'s Opp'n at 10 n.6, *Love* (citation omitted); *see also* Def.'s Mot. to Dismiss at 75, *Howard* (arguing that "the decentralization of personnel authority among Commerce's various bureaus" was analogous to other situations where courts "declined to certify class actions sought to be maintained" on behalf of workers "employed at different facilities with decentralized decision-making"). In *Garcia*, the government further noted that the plaintiffs' emphasis on local officials' decision-making power "actually confirms that there is no possible claim of commonality," because courts routinely hold that "a class may not be based on discrimination occurring in different departments, involving different decision makers." Def.'s Opp'n at 21-22 & nn.4-5, *Garcia* (internal formatting, citations, and quotation marks omitted).

In its briefing before the D.C. Circuit, the United States elaborated that where a decision-making process consists of both subjective and objective criteria, the process cannot "serve as a common issue because the existence of non-subjective criteria cuts

against the inference that there was a common policy of discrimination that pervaded all of the challenged decisions." Br. for Appellee at 29, *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006) (No. 04-5449), 2005 WL 2672961 (internal quotation marks and ellipses omitted). Thus, the government argued, even though the agency's loan regulations "were necessarily framed in general terms" to give local officials "sufficient flexibility" to account for local conditions, the regulatory criteria "plainly did *not* confer the sort of unbridled discretion, resulting in 'entirely subjective decisionmaking,' which might simply mask 'a general policy of discrimination.'" Br. for Appellee at 32-33, *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (No. 04-5448), 2005 WL 2673689 (quoting *Falcon*, 457 U.S. at 159 n.15).

Accordingly, the United States and its agencies routinely assert, as petitioner and RLC do in this case, that a properly "rigorous analysis" is necessary to determine whether a putative class action has satisfied Rule 23(a)(2). *See Falcon*, 457 U.S. at 161. The Ninth Circuit has failed to undertake that analysis, in disregard of this Court's interpretation of the commonality requirement in *Falcon*.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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