No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, *et al.*,
Respondents.

On Petition for a 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 WAL-MART STORES, INC.

LISA S. BLATT
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5842

W. STEPHEN CANNON
Counsel of Record
SETH D. GREENSTEIN
EVAN P. SCHULTZ
CONSTANTINE CANNON LLP
1301 K Street, N.W.
Suite 1050 East
Washington, DC 20005
(202) 204-3500
scannon@
constantinecannon.com

Counsel for Amicus Curiae

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STATEMENT OF INTEREST AND INTRODUCTION[1]

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC, whose members include some of the country's largest retailers, was formed to provide courts with retail industry perspectives on significant legal issues, and highlight the potential industry-wide consequences of legal principles that may be determined in pending cases.

RLC's members employ many thousands of persons in several states, multiple regions, and myriad stores across the nation. They endeavor to honor and abide by the laws that govern their activities, including laws that prohibit discrimination on the basis of gender and other protected grounds. They have and enforce policies forbidding discrimination. And they take pride in the talented and diverse workforces they employ.

Nonetheless, RLC's members can find themselves vulnerable to unjustified class action litigation that can have debilitating effects on their businesses and reputations. The large size and national scope of many retailers make them attractive targets to aggregated suits, whatever the strength of a given

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[1] Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* states that the parties received timely notice of the intent to file this brief, and that the parties consented to its filing. Pursuant to Rule 37.6, *amicus curiae* further states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or their counsel made such a monetary contribution.

individual claim. The Ninth Circuit's misguided and expansive interpretation of the class action rules paves the way for enterprising plaintiffs and their counsel to seek and obtain certification of potentially significant class sizes with little evidence to establish a discriminatory practice by the employer. Once certified, a class can exert tremendous and unjustifiable leverage on the retailers to settle, with the resulting reputational harm. RLC's members cannot afford to pay exorbitant settlements for class actions that should not be certified in the first place. Nor should they have to.

The risk that RLC's members will suffer such harm becomes markedly higher if this Court does not correct the decision below. Many retail companies base employment decisions on subjective, as well as objective, measures that help them to identify workers whose creativity, diligence, and other intangible qualities may not show up in standardized evaluation methods. Similarly, many retail companies delegate part of their promotion and other employment decisions to on-site managers who are closest to workers, and so are also best able to identify employees whose advancement will most help the company. This Court's decisions recognize that those employment practices are entirely appropriate. RLC's members are therefore troubled by the Ninth Circuit's unprecedented certification of a class of over one million employees based on allegations that the use of subjective criteria in employment may mask discrimination in individual cases.

Specifically, the Ninth Circuit crucially erred in disregarding the standard that this Court established in *General Telephone Company of the Southwest* v. *Falcon*, 457 U.S. 147 (1982), for certifying classes in

cases alleging violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*. Under *Falcon*, the fact that one or more employees sharing a common protected trait allege discrimination does not justify class certification under Federal Rule of Civil Procedure 23. A plaintiff must provide "[s]ignificant proof that an employer operated under a general policy of discrimination." The Ninth Circuit disregarded that instruction, finding instead that "[p]laintiffs here need not meet" the "significant proof" standard. *Dukes* v. *Wal-Mart Stores, Inc.*, 603 F.3d 571, 595 (9th Cir. 2010). Instead, the Ninth Circuit affirmed the district court's superficial review of the plaintiffs' thin evidence. In so doing, the Ninth Circuit allowed a handful of plaintiffs to claim that allegations of isolated discrimination in a fraction of Wal-Mart's stores entitled them to represent roughly a million women who work or once worked at every Wal-Mart store in the country, in a wide range of positions, and at all levels of salary. RLC members are especially concerned that the Ninth Circuit ignored *Falcon*'s instruction on class actions, because this Court directed its language at precisely the sort of situation at issue in this litigation, in which an employer uses subjective standards as part of its promotion system.

Finally, with this decision, the Ninth Circuit has turned its back on the "significant proof" standard that other circuits have embraced, and therefore is in direct conflict with other circuit courts. This conflict concerns RLC's members because it opens the door for plaintiffs to bring similarly massive class actions throughout the populous Ninth Circuit against large national retailers, even where there is no "significant proof" of common elements between class members and those who claim to serve as their representatives.

Falcon warned that "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." 457 U.S. at 159. This case proves that point. Before the Ninth Circuit's decision permits massive class actions to wreak havoc on retailers, this Court should grant Wal-Mart's petition for certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT FAILED TO REQUIRE SIGNIFICANT PROOF OF A GENERAL POLICY OF DISCRIMINATION BEFORE CLASS CERTIFICATION, AS REQUIRED BY *FALCON*.

Falcon forecloses class certification in this case. *Falcon* held that a plaintiff could not act as a class representative for a wide-ranging "across-the-board" class action consisting of all Mexican-American persons who worked for the employer, or who had applied to work for the employer. 457 U.S. at 160-161. The Court explained that certification conflicted with the conceptually "wide gap" between the individual's claim of discrimination and a class that shares the same protected trait. *Id*. at 157. "[T]o bridge that gap," the Court held, the class representative must make a "specific presentation identifying the questions of law or fact" that the putative class representative has in common with the putative class. *Id.* at 158.

Falcon further concluded that a higher showing was necessary if the plaintiff asserts that the employer used "subjective decision-making processes." *Id.* at 159 n.15. In such situations, certification was

conceivable only if there is "[s]ignificant proof that an employer operated under a general policy of discrimination." *Id.* That heightened standard applies because "Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination." *Id.* (emphasis in original). It follows 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." *Id.*

As Judge Ikuta's dissent below points out, *Falcon* had no occasion to define with precision the "significant proof" required for class certification in these circumstances. *Dukes,* 603 F.3d at 632 (IKUTA, J., dissenting). Nonetheless, *Falcon* forecloses the Ninth Circuit's expansive and unprecedented certification in this case. *Falcon* requires courts to perform a "rigorous analysis" and "evaluate carefully" a plaintiff's claim that he is an appropriate class representative, and the decision further instructs that "it may be necessary for the court to probe behind the pleadings." *Falcon*, 457 U.S. at 160-161. As Judge Ikuta stated, *Falcon* at the very least makes clear that "[e]vidence of discrete instances of discrimination are insufficient to sustain an inference of an employer's general policy and do not rise to the level of 'significant proof.'" *Dukes*, 603 F.3d at 632 (IKUTA, J., dissenting).

Rather than conscientiously apply this standard, the Ninth Circuit disregarded it. The majority below held that a requirement of "significant proof" "is an unusually high standard that Plaintiffs here need not meet." *Dukes*, 603 F.3d at 595. The majority offered up a litany of reasons to ignore this Court's instructions: the standard is allegedly merely dicta; it is

limited to the "distinct legal theories of recovery" that the plaintiff in *Falcon* itself alleged; and it is only "a demonstrative example." *Id.* at 595-596. These do not persuade, given that *Falcon*'s "significant proof" standard is the Supreme Court's only discussion of the standard for class actions in Title VII cases, especially when plaintiffs allege excessive subjectivity in making employment decisions. Even the majority admits that it may not "shrug[] off" statements of this Court "because they were not a holding." *Dukes*, 603 F.3d at 595 n.15 (internal punctuation and citation omitted).

More important, aside from the fact that they worked for Wal-Mart, the only commonality that could justify a class here between the seven class representatives and the over one million class members is their sex. Certification here thus makes a mockery of the Court's admonishment, mentioned above, that the fact a putative class representative and members of the putative class are "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.

Perhaps because it understood the significance of this Court's instruction in *Falcon*, the majority at one point confusingly claimed that the "[p]laintiffs here *have* introduced 'significant proof.'" *Id.* at 597 (emphasis added). But they have not. As Judge Ikuta's dissent points out, the plaintiffs' evidence is deeply flawed. The purported class representatives offer disturbingly few affidavits for the size of the class they purport to represent, and their experts' findings are superficial. *Dukes*, 603 F.3d at 634-642 (IKUTA, J., dissenting). For example, one of the plaintiffs' experts claimed to have found a trend of

discrimination at Wal-Mart's stores, even though the expert failed to analyze data at the level of each store, instead looking to more generalized data that encompassed whole regions of Wal-Mart's structure. *Id.* at 636. The district court's failings were equally serious. As Judge Ikuta convincingly explained, the district court accepted the plaintiffs' evidence without conducting a sufficiently close independent examination, as required by *Falcon*. The district court also inexplicably barred Wal-Mart from challenging the plaintiffs' evidence, improperly claiming that Wal-Mart's examination concerned questions related to the merits of the case. *Ibid.* That is hardly the "rigorous analysis" required by *Falcon*.[2]

II. "SIGNIFICANT PROOF" IS REQUIRED WHERE EMPLOYERS USE SUBJECTIVE JUDGMENTS IN MAKING EMPLOYMENT DECISIONS.

The Ninth Circuit's refusal to apply *Falcon*'s "significant proof" standard is especially egregious because the plaintiffs' claims in this case involve precisely the sort of subjective decision-making that *Falcon* makes clear requires a heightened showing. As discussed above, the "significant proof" standard applies where the plaintiff claims that the employer used "subjective decisionmaking processes." *Falcon*, 457 at 159 n.15. That is unquestionably the situation

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[2] *Amicus* also fears that by disregarding the "significant proof" standard in the Title VII context, as occurred here, the Ninth Circuit may be setting a precedent that could spill over to other areas of law. If that were to occur, then plaintiffs' lawyers would have even more opportunities to force the aggregation of huge classes based on the claims of just a few individuals, even where they could not satisfy the commonality and typicality tests that Federal Rule of Civil Procedure 23 require.

here. The majority below acknowledged "the absence of a specific discriminatory policy promulgated by Wal-Mart." *Dukes*, 603 F.3d at 603. That should have prompted the majority to apply *Falcon*'s heightened standard, applicable to claims alleging excessively subjective employment practices, to hold that class certification was plainly improper.

A "significant proof" test that applies to cases of subjective hiring is particularly apt in light of the Court's later confirmation that "an 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 and Trust*, 487 U.S. 977, 990 (1988). Using subjective criteria is a perfectly legitimate, and effective, means of making employment decisions. "[E]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist* v. *Or. Dep't of Agric.*, 553 U.S. 591, 604 (2008). But instead of accepting the legitimacy of subjective hiring procedures, the Ninth Circuit disparaged them. The majority relied on the findings of one of the plaintiffs' experts who claimed that "substantial decisionmaker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes." *Dukes*, 603 F.3d at 601. In casting aspersions on subjective decision-making in this manner, the majority disregarded this Court's instructions in *Falcon, Watson*, and *Engquist*.

In short, this Court has made clear that subjective decision-making is valid, and that class actions alleging discrimination on that basis must meet a high threshold of "significant proof." But the major-

ity below went in the opposite direction by questioning the legitimacy of subjective decision-making and by refusing to apply the appropriate heightened standard. Because such a decision threatens to turn every subjective employment decision into a massive class action, this Court should grant review.

III. THE NINTH CIRCUIT DECISION CONFLICTS WITH MANY CIRCUITS THAT HAVE EMBRACED THE "SIGNIFICANT PROOF" STANDARD.

By refusing to follow the "significant proof" standard, the Ninth Circuit has glaringly split with other circuits. As is discussed above, the Ninth Circuit declined to rigorously apply the "significant proof" test to this case, or to facts that vary at all from what that this Court discussed in *Falcon*. Other circuits have not given this Court's statement so miserly an interpretation, and have used it to defeat class certification. Those courts' decisions include:

- **D.C. Circuit:** *Garcia* v. *Johanns*, 444 F.3d 625, 631–632 (D.C. Cir. 2006) ("Following *Falcon*, we have required a plaintiff seeking to certify a disparate treatment class under Title VII to make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the employer's challenged employment decisions." (internal quotation marks omitted)).
- **Third Circuit:** *Goodman* v. *Lukens Steel Co.*, 777 F.2d 113, 124 (3d Cir. 1985) ("The findings of the district court, which rejected some of the plaintiffs' claims, belie the existence of a 'general policy' of discrimination and plaintiffs

did not produce 'significant proof' of such a scheme.").

- **Fourth Circuit:** *Holsey* v. *Armour & Co.*, 743 F.2d 199, 216 (4th Cir. 1984) ("[W]e conclude that the significant proof for . . . class treatment required by *Falcon* is lacking in this case, and thus the plaintiffs cannot adequately represent the outside applicants for sales and supervisory positions.").
- **Fifth Circuit:** *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1200 (5th Cir. 1984) ("Footnote fifteen of *Falcon* observed that if significant proof of a general policy of discrimination was present, it would justify an across-the-board class action. Such proof was not present here.").
- **Sixth Circuit:** *Reeb* v. *Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 644 (6th Cir. 2006) ("[T]he Supreme Court's decision in [*Falcon*] requires plaintiffs requesting class certification in a case raising generalized Title VII discrimination claims to allege 'significant proof'") (some internal punctuation omitted).
- **Eleventh Circuit**: *Griffin* v. *Dugger*, 823 F.2d 1476, 1490 (11th Cir. 1987) (requiring "Significant proof that an employer makes both discriminatory hiring and promotion decisions using an entirely subjective decisionmaking process for each employment practice [which] is a manifestation of a general policy of discrimination.").

While circuit splits generally create risks for potential defendants, this one is particularly dangerous. If it stands uncorrected, the decision below will undoub-

tedly turn the Ninth Circuit into a favored forum for plaintiffs. The Ninth Circuit should not serve as a platform for massive class action suits against companies with operations across the country that do not meet the standards for certification.

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Certiorari review is appropriate when an opinion disregards this Court's decisions, and also when an opinion conflicts with the decisions of other circuit courts. See Supreme Court Rule 10. The opinion below contains both of these flaws. Under it, retailers with nationwide operations face an unwarranted risk of massive class-actions arising in Ninth Circuit courts, even where there is no "significant proof" of a general policy of discrimination. This Court should reaffirm *Falcon*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LISA S. BLATT
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5842

W. STEPHEN CANNON
Counsel of Record
SETH D. GREENSTEIN
EVAN P. SCHULTZ
CONSTANTINE CANNON LLP
1301 K Street, N.W.
Suite 1050 East
Washington, DC 20005
(202) 204-3500
scannon@
constantinecannon.com

Counsel for Amicus Curiae

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