Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING EN BANC

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RULE 35 STATEMENT

Wal-Mart Stores, Inc. respectfully seeks en banc review. The panel's initial opinion sustaining certification of the largest employment class in history accepted rulings by the district court that starkly conflicted with decisions of this Court, the Supreme Court, and numerous other Circuits. The "majority's new opinion does not solve the problems of its previous opinion" (slip op. 16248 (Kleinfeld, J., dissenting)); in fact, it has made the decisional conflicts even more pronounced. The new opinion affirms the erroneous certification order while repeatedly *rejecting* the district court's analysis or *denying* that the district court reasoned in the manner that the original opinion had defended it for doing. And the panel, *retreating* from its previous opinion, now remands this case for discovery and trial without even addressing Wal-Mart's argument that further proceedings violate the Constitution and Title VII.[1]

Among other things, the majority's incorrect conclusion that a class action seeking *billions* of dollars in punitive damages and backpay can be certified under Rule 23(b)(2), which only allows certification of injunctive or declaratory relief claims, directly conflicts with multiple cases, including *Ortiz v. Fibreboard Corp.*,

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[1] The changes between the original and new opinions are graphically demonstrated in a redlined document that Wal-Mart submitted concurrently herewith.

527 U.S. 815 (1999), *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), and *Beck v. Boeing*, 60 Fed. Appx. 38 (9th Cir. 2003).

Moreover, Wal-Mart showed that the district court's proposed trial plan for managing this gargantuan case violated Title VII, the Rules Enabling Act, and the Constitution. In its new opinion, while purporting to defer to the district court's judgment, the panel has literally excised any defense of the trial plan, permitting this unprecedented class action to proceed yet expressing "no opinion" as to the sole proposed means of managing it. And the panel's suggestion that the aberrational decision in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), might provide a means to solve the intractable manageability problems posed by the class contradicts multiple decisions, including *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Teamsters v. United States*, 431 U.S. 324 (1977).

ARGUMENT

This Title VII lawsuit was brought by a handful of plaintiffs with widely varied employment histories (*see* slip op. 16250-53 (Kleinfeld, dissenting)), on behalf of a putative nationwide class of *all* current and former female Wal-Mart employees, "from part-time entry-level hourly employees to salaried managers" in over 3,400 stores. Slip op. 16213. The district court certified that class, which was estimated to exceed 1.5 million—more than the active-duty personnel in the

Army, Navy, Air Force, Marines, and Coast Guard *combined*—and has only continued to grow. In affirming, the majority adopted a highly unusual approach that is at odds with appellate decisions elsewhere. As Judge Kleinfeld concludes in his virtually unanswered dissent: "This class certification violates the requirements of Rule 23. It sacrifices the rights of women injured by sex discrimination. And it violates Wal-Mart's constitutional rights." Slip op. 16260.

I. Certification Was Improper Under Rule 23(b)(2)

The majority's overarching error, which infects the entire opinion, is its ruling that this class, seeking billions of dollars in monetary relief on behalf of both former and current employees, is properly certifiable under Rule 23(b)(2). Rule 23(b)(2) allows certification of mandatory classes asserting *only* if "final *injunctive* relief or corresponding *declaratory* relief is appropriate respecting the class as a whole" (emphases added). Given that plain language, the Supreme Court has recognized the "substantial possibility" that actions for monetary relief cannot proceed under Rule 23(b)(2). *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994); *see Adams v. Robertson*, 520 U.S. 83, 85 (1997); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) (this remains "an open question . . . in the Supreme Court").

Class claims for monetary relief generally must proceed under Rule 23(b)(3), which requires notice to absent class members, allows opt-outs, and im-

poses strict requirements of predominance, superiority, and manageability. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-17 (1997). Plaintiffs in this case did not even request (b)(3) certification, implicitly acknowledging (as they must) that this case could never have been certified under that subsection. Instead, they invoked only (b)(2), employing what seems to have become a standard tactic in this Circuit. *See Ellis v. Costco Wholesale Corp.*, No. 07-15838; *Sepulveda v. Wal-Mart Stores, Inc.*, No. 06-56090.

This tactic contravenes the Supreme Court's recognition that Rule 23's "growing edge . . . would be the opt-out class authorized by subdivision (b)(3)," not the mandatory classes allowed under other subdivisions of the Rule. *Ortiz*, 527 U.S. at 862. The majority's erroneous approval of (b)(2) certification conflicts with decisions of this and other Circuits and warrants en banc review.

A. The Panel Decision Exacerbates An Existing Conflict

The Advisory Committee Notes explain that a class cannot be certified under Rule 23(b)(2) where the relief sought "relates . . . predominantly to money damages," but "[t]here is a split among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.8 (D.C. Cir. 2006). The panel majority's decision widens the split.

The position of most courts to have considered the issue is that (b)(2) certification is unavailable unless the monetary claims are "incidental" in the sense that they "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415; *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649-50 (6th Cir. 2006); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580-81 (7th Cir. 2000). Until recently, this Court also seemingly followed *Allison*. *See Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001); *Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1196 (9th Cir. 2000).

The panel majority, however, invoked *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), which expressly "refuse[d] to adopt the approach set forth in *Allison*," *id.* at 949, and instead adopted a test "focusing predominantly on the plaintiffs' intent in bringing the suit." Slip op. 16234.[2] This ruling was crucial to the panel's decision because it is undisputed that any punitive damages or backpay award

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[2] *Molski* followed the lead of *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), a decision in a line of Second Circuit cases that have since been expressly disapproved by that court. *In re IPO Sec. Litig.*, 471 F.3d 24, 35-38, 42 (2d Cir. 2006).

would necessarily flow to class members individually rather than to the class as a whole and, therefore, would not satisfy the *Allison* "incidental" standard.

The panel's perpetuation of *Molski*'s departure from the *Allison* line of cases is in and of itself sufficient reason to grant en banc review. This conflict among the Circuits is mature and acknowledged, and the resolution of that conflict is, in this case, outcome-determinative. If the en banc Court were to overrule *Molski* and adhere to the *Allison* position, then the class certification order would have to be vacated. Moreover, as discussed next, even if the Court were to retain *Molski*, the panel's implementation of Rule 23(b)(2) creates decisional conflicts on important issues that also deserve en banc review.

B. The Panel Decision Creates A Multitude Of New Conflicts

While the majority's initial opinion credited plaintiffs' self-serving declarations that their primary intent was to secure injunctive relief (slip op. 1362-63 n.12), "certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004). The panel's new decision omits any mention of plaintiffs' declarations and now appears to acknowledge that the predominance inquiry must be an *objective* one. Yet, although the panel was "satisfied" (slip op. 16237, 16240) that "in the absence of a possible monetary recovery, reasonable plaintiffs would bring [this] suit to obtain the injunctive or declaratory relief

sought" (slip op. 16234) (internal quotation marks omitted, alteration added)—a test that does not comport with Rule 23's language or structure—its attempts to justify this ruling create a string of decisional conflicts.

First, the panel's entire analysis was expressly based on a "'permissive'" view of Rule 23's requirements, which it characterized as "'minimal.'" Slip op. 16218-19. But a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). The majority's "'very limited'" and "'highly deferential'" review of the district court's decision (slip op. 16215) contradicts settled law elsewhere. *See IPO*, 471 F.3d at 41; *In re GM Pick-up Litig.*, 55 F.3d 768, 800 (3d Cir. 1995). Moreover, giving "'greater deference'" (slip op. 16215)—*i.e.*, less scrutiny—because the district court certified the class violates the Supreme Court's instruction that the standard of review does not turn on who won in the lower court. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-42 (1997).

Second, Rule 23(b)(2) may be invoked only where the defendant has acted in a manner "generally applicable to the class." But although plaintiffs' claims center on ad hoc, discretionary pay and promotion decisions made by individual managers at the store level, they presented only data aggregated at a regional or national level. Wal-Mart, by contrast, presented a store-level statistical analysis to

dispel any suggestion that it had acted in a manner generally applicable to the class. The panel said that this evidence had been rebutted "to the extent that Plaintiffs' evidence and theories remain viable at this pre-merits analysis stage" (slip op. 16235). But plaintiffs' contentions remained "viable" *only because* the district court ruled that it was precluded from resolving evidentiary conflicts and "statistical dueling" at the certification stage. 222 F.R.D. 137, 155, 159 nn.21 & 29 (N.D. Cal. 2004).[3]

The panel's initial opinion affirmed the district court's express refusal to resolve "merits issues" on the basis of two decisions that the Second Circuit has itself "disavowed." *IPO*, 471 F.3d at 38-39, 42. In the new opinion, the panel reversed course and acknowledged that, because a district court "*must* consider evidence which goes to the requirements of Rule 23 . . . [I]f the district court had rejected Wal-Mart's arguments . . . solely because they overlapped with 'merits issues,' that would have been error." Slip op. 16219 n.2 (internal quotation marks omitted). Yet the panel *affirmed* the district court's ultimate conclusions even though they were expressly premised on the wrong legal standard. *But see Haw-*

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[3] Plaintiffs' criticisms of Wal-Mart's evidence, echoed uncritically by the panel (slip op. 16225-27), were *rejected* by the district court. 222 F.R.D. 189, 198 (N.D. Cal. 2004); 222 F.R.D. at 157 n.25.

kins v. Comparet-Cassani, 251 F.3d 1230, 1237 (9th Cir. 2001) ("A court abuses its discretion if its certification order is premised on legal error").

By uncritically accepting plaintiffs' disputed theory of systemic discrimination, the panel (like the district court) contravened numerous decisions from this and other Circuits denying certification of so-called "excess subjectivity" classes that span multiple facilities and job types. *E.g.*, *Grosz v. Boeing Co.*, 136 Fed. Appx. 960 (9th Cir. 2005); *Cooper v. S. Co.*, 390 F.3d 695, 715 (11th Cir. 2004); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004); *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723, 730-31 (D.C. Cir. 2006); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980). The panel did not distinguish any of these authorities (or the many others cited by Wal-Mart) and, to the extent the four older cases it cited (slip op. 16223 n.4) remain viable, they serve only to illustrate the conflicts that this issue has engendered. In the absence of any challenge to "a specific discriminatory policy promulgated by Wal-Mart" (slip op. 16222), plaintiffs cannot show either that Wal-Mart has acted on grounds generally applicable to the class or that the class itself is "cohesive" as required by Rule 23(b)(2). *See Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005).

Third, the panel said that the "billions of dollars" sought by plaintiffs do not predominate over their requests for injunctive relief because "such a large amount is principally a function of Wal-Mart's size." Slip op. 16235. That is obviously wrong: The amount sought is principally a function of matters uniquely within *plaintiffs'* control, including their overbroad class definition and their decision to seek massive monetary recovery. Indeed, plaintiffs' election to bring a case of this diverse scope and tremendous magnitude ensures that there will be numerous intractable conflicts—*e.g.*, between the injured and uninjured or between hourly employees and salaried managers—that are themselves sufficient to defeat certification. *Ortiz*, 527 U.S. at 857-58; slip op. 16250-53 (Kleinfeld, J., dissenting).

More than half the absent class members are *former* employees who not only would not, but *could not*, pursue this suit in the absence of any monetary relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Although the panel now concedes that former class members lack standing to seek an injunction (slip op. 16239-40)—and thus yet again recognizes that the district court committed legal error—its suggestion that former employees who were employed when the lawsuit was filed still have standing is obviously wrong. *Vasquez v. L.A. County*, 487 F.3d 1246, 1253 (9th Cir. 2007). As this Court recently made clear, a person may seek an injunction only if he or she stands to benefit from it. *Bates v. UPS*, No. 04-17295 (Dec. 28, 2007) (en banc), slip op. 16883, 16897. Because the

injunction sought by plaintiffs would not benefit the majority of the class, it is impossible to deny that their monetary relief claims "predominate."[4]

Fourth, the panel's view that plaintiffs' claim for *punitive damages* did not defeat (b)(2) certification creates yet another conflict. In response to Wal-Mart's contention that a claim for punitive damages is "'wholly inconsistent'" with (b)(2) certification, the panel majority said that this view "has not been adopted by this circuit." Slip op. 16238. The panel was wrong: This Circuit adopted *precisely* that view in *Beck v. Boeing*, holding that certifying a punitive damages class where "the beneficiaries of the punitive damages award would necessarily include those class members not affected by the alleged discriminatory policy as well as those who were . . . *may not be done.*" 60 Fed. Appx. at 40. And *every other* Cir-

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[4] Indeed, because plaintiffs do not seek to enjoin a "specific discriminatory policy" (slip op. 16221), it is far from clear that even current employees would benefit from an injunction. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007) (Title VII plaintiffs must prove a "discrete act" of intentional discrimination). Although plaintiffs' sociology expert testified that Wal-Mart is "vulnerable" to gender bias, Wal-Mart objected to this evidence's admissibility. The panel first rejected that objection, endorsing the district court's view that *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), does not apply at the certification stage (slip op. 1348-49); the panel abandoned that erroneous ruling on rehearing but reached the same result on the ground that Wal-Mart's objection went to this expert's "conclusion," rather than his "methodology." Slip op. 16221, 16222. That effort to elide the previous mistake, though, has *already* been rejected by the Supreme Court. *Joiner*, 522 U.S. at 146.

cuit to have considered the question *also* has held that a punitive damages claim is incompatible with (b)(2) certification. *Cooper*, 390 F.3d at 721; *Lemon*, 216 F.3d at 580; *Allison*, 151 F.3d at 418.

Contrary to the panel's view (slip op. 16239), the district court's proposal to provide limited notice and opt-out rights does not remedy this problem. Rule 23(b)(2) does not authorize opt-outs, and courts are not free to modify Rule 23 to facilitate class proceedings that could not proceed under the Rule as enacted. *Amchem*, 521 U.S. at 621. Such judicial modifications would "undo the careful interplay between Rules 23(b)(2) and (b)(3)" by permitting plaintiffs to pursue substantial monetary claims without "requiring [them] to meet the rigorous Rule 23(b)(3) requirements" of predominance and superiority. *McManus v. Fleetwood Enters. Inc.*, 320 F.3d 545, 554 (5th Cir. 2003); *see also Allison*, 151 F.3d at 413 (monetary relief "'predominates'" when it "suggests that the procedural safeguards of notice and opt-out are necessary"); *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005). Indeed, because it would violate due process to apply Rule 23(b)(2) as written to the substantial monetary claims of absent class members, it is "implausible" to think that such claims could be certified as a mandatory class. *Ortiz*, 527 U.S. at 844, 848.

Fifth, while now agreeing with Wal-Mart that the district court was *wrong* in ruling that plaintiffs' backpay request did not weigh against (b)(2) certification,

the majority inexplicably affirms that very certification. Slip op. 16236-37. The sole decision cited by the majority, *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997), recognized that "variations in individual class members' monetary claims [for backpay] may lead to divergences of interest that make unitary representation of a class problematic." *Id.* at 95. And "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, even if the relief is equitable in nature." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006); *see Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006).

The panel, however, thought it unlikely that Congress would have put plaintiffs to the choice "of having to settle for only a partial remedy in order to proceed as a class action or having to bear the enormous costs of an individual lawsuit in order to receive the make-whole 'injunction plus back pay' remedy authorized by Title VII." Slip op. 16237. Of course, these plaintiffs have *already* abandoned their claim for the compensatory damages authorized by Congress—precisely because such a claim is entirely inconsistent with (b)(2) certification. The panel's suggestion that precluding (b)(2) certification of Title VII claims seeking monetary relief is inconsistent with the 1966 commentary ignores the 1991 Civil Rights Act amendments, which dramatically expanded the availability of monetary relief, including punitive damages. Although (b)(2) certification might remain appropri-

ate for certain civil rights cases, Title VII plaintiffs seeking substantial monetary relief in a jury trial must proceed under (b)(3) like other plaintiffs.

II. This Class Presents Intractable Manageability Problems

Rule 23 requires courts to determine whether a class certified for trial "would present intractable management problems." *Amchem*, 521 U.S. at 620; *see also, e.g.*, *Shook v. El Paso County*, 386 F.3d 963, 972-73 (10th Cir. 2004). This one does. The majority's conclusion to the contrary warrants en banc review.

The district court's proposed trial plan expressly eliminated Wal-Mart's right to mount an individualized defense against plaintiffs' claims of liability or damages under the well-recognized *Teamsters* framework. *See* slip op. 16242 n.16. The panel originally "disagree[d]" with Wal-Mart's contention that the elimination of *Teamsters* hearings violated the Due Process Clause, the Seventh Amendment, Section 706(g)(2) of Title VII, and the Rules Enabling Act. Slip op. 1375.

The panel's new opinion simply *abandons* its defense of the trial plan: "At this pre-merits stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself)." Slip op. 16243. But it is no improvement to an erroneous ruling with a mistaken rationale to strip out the rationale and leave the ruling in place. "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they

have been met." Fed. R. Civ. P. 23, 2003 Adv. Comm. Notes. "[T]he 2003 amendments to the Rule eliminated so-called 'conditional' certifications . . . such that a trial court may not certify only a limited list of class claims or issues while explicitly delaying decision on other claims." *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 186 n.8 (3d Cir. 2006); *see also IPO*, 471 F.3d at 40.

The panel acknowledges the 2003 amendments, but states that a certification can be revisited in light of "circumstances not anticipated." Slip op. 16216 n.1. But Wal-Mart's objections to class certification can hardly be termed unanticipated; to the contrary, they are fully briefed and should be decided. *See* slip op. 16256-57 (Kleinfeld, J., dissenting). If, as Wal-Mart contends, the district court's proposal is unconstitutional, unlawful, and unworkable, then it may not be implemented. Indeed, the whole point of Rule 23(f) interlocutory review is, as the Advisory Committee explained, to resolve such issues *before* the parties "incur the costs of defending a class action and run the risk of potentially ruinous liability."

In the new opinion, the panel deleted more than ten pages in which it previously attempted to counter Wal-Mart's objections to the trial plan and replaced them with almost four pages of block quotes from the 2-1 decision in *Hilao*—a foreign-despot-torture-case of an "extraordinarily unusual nature" that was wrongly decided a decade ago. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226

F.R.D. 456, 483 (S.D.N.Y. 2005). The *Hilao* class was certified under Rule 23(b)(1)(B), and the unprecedented lottery process used in that case has no applicability to cases against solvent defendants. *Ortiz*, 527 U.S. at 859-61. Moreover, Title VII explicitly prohibits monetary awards against non-victims. *See* 42 U.S.C. § 2000e-5(g)(2); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.10 (1989); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003). The *Hilao* statistical sampling procedure, which by definition will award money to non-victims, cannot be invoked to override this specific substantive limitation on plaintiffs' potential Title VII recovery.

Hilao's punitive damage analysis, in particular, has been abrogated by subsequent Supreme Court decisions. Due process mandates that a punitive damage award "have a nexus to the specific harm suffered by the plaintiff." *State Farm*, 538 U.S. at 422; *In re Simon II Litig.*, 407 F.3d 125, 139 (2d Cir. 2005) (reversing class certification due to absence of requisite nexus). Due process also forbids punishment of lawful conduct and requires that a defendant have "'an opportunity to present every available defense'" before being punished. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996). The district court's trial plan violates these constitutional requirements, as it guarantees that non-victims will share in any award of punitive damages, precludes individualized defenses, and prohibits any individualized in-

quiry into the harm (if any) suffered by those class members; use of the *Hilao* approach would only make these constitutional defects more obvious and egregious. *Hilao*, 103 F.3d at 788 (Rymer, J., dissenting) ("If due process in the form of a real prove-up of causation and damages cannot be accomplished because the class is too big or to do so would take too long, then . . . the class . . . should not have been certified in the first place"). Indeed, while *Hilao* involved an unprecedented (and since unreplicated) "trial by statistics," the 1.5 million-plus class here dwarfs the 10,000-person *Hilao* class so that anything close to a statistically reliable sample in *this* case would involve far more individualized proceedings than courts have previously allowed in (b)(2) class actions. *Allstate*, 400 F.3d at 508 (reversing certification where "more than a thousand individual hearings will be necessary").

Judge Kleinfeld has observed that this case, if it proceeds, will result in payments to non-victims and punishment of the innocent. Slip op. 16258. The majority does not dispute this; to the contrary, it concedes that the *Hilao* approach is "somewhat imperfect" (slip op. 16246). Our Constitution requires more, however, and the majority's approach would violate the Due Process Clause and Seventh Amendment. Even if the *Hilao* trial plan were constitutional, that would not address the additional requirements for *employment discrimination cases* set forth in Title VII and *Teamsters*; those requirements are no more satisfied by the *Hilao* procedure than the district court's plan, in violation of the Rules Enabling Act (28

U.S.C. § 2072(b))—discussion of which is conspicuously absent from the new opinion. *See In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("[A]llowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights . . . [and] is clearly prohibited by the [Rules] Enabling Act").

This case squarely presents numerous issues with sweeping ramifications for class action and employment law that the majority either got wrong or failed to address. The unprecedented and historic certification decision warrants en banc review.

CONCLUSION

The Court should grant en banc rehearing.

Respectfully submitted.

Dated: January 8, 2008

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Court Rules 35-4 and 40-1(a) because it contains 4,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point font size and Times New Roman type style.

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