

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 AMICUS CURIAE PUBLIC CITIZEN,
INC., IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 225,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents the interests of its members in litigation and as amicus curiae.

Public Citizen has long been concerned with protection of the due-process rights of non-named class members in class actions. Public Citizen attorneys have, in many cases (including this Court's decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)), represented class members who objected to settlement of their claims. Of particular concern to Public Citizen are cases where class counsel and defendants agree to a settlement under Rule 23(b)(1) or (b)(2) to resolve substantial damages claims while eliminating the opt-out rights of absent class members that are provided for in Rule 23(b)(3) and that, in some circumstances, are required by due process.

At the same time, Public Citizen understands that class actions are a critical tool for seeking justice where defendants have engaged in the same or similar unlawful conduct toward many people—consumers

¹ Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

and employees especially—that have resulted in injuries that are large in the aggregate, but small on a per-person basis. In that situation, individual litigation is often impossible, and class actions offer the only means for both individual redress and classwide remedies, as well as deterrence of wrongful conduct. Of special relevance here, class actions have played a vital role in civil rights cases, where Rule 23(b)(2)'s authorization of class actions seeking declaratory and injunctive relief allows discrimination victims to enforce their statutory and constitutional rights.

Protecting due process rights of individual class members and facilitating collective remedies are both important goals, and, if the right balance is struck, neither need be sacrificed to the other. However, Wal-Mart's broad arguments that monetary remedies are forbidden in Rule 23(b)(2) class actions both by Rule 23 itself and by due process concerns, and that Rule 23(b)(2) is not sufficiently flexible to provide for opt-out rights when due process demands them, would hinder the effective use of class actions that legitimately seek injunctive relief without aiding the absent class members whose rights Wal-Mart purports to be advancing.

SUMMARY OF ARGUMENT

Wal-Mart's argument that due process considerations prohibit certification of a class in this case under Federal Rule of Civil Procedure 23(b)(2) is misguided both as a matter of constitutional law and as an interpretation of Rule 23 itself. Due process is not offended either by the certification of a non-opt-out class seeking injunctive relief or by the inclusion in that class's claims for relief of some forms of monetary remedies. To the extent that due process may require opt-out

rights for some forms of relief other than the injunctive relief that permits certification under subdivision (b)(2) of the rule, Rule 23 is flexible enough to offer a number of alternatives tailored to the particular circumstances of the case.

Those alternatives include bifurcated certification (that is, the certification of different claims for relief under different subdivisions of the rule) as well as the possible provision of notice and opt-out rights to members of the (b)(2) class. Contrary to Wal-Mart's argument, Rule 23 does not implicitly forbid opt-out rights in a (b)(2) class action. The Rule *requires* opt-out rights only in a class action under subdivision (b)(3), but its terms provide ample authority to a district judge to *permit* opt-out rights, if necessary or appropriate, in classes certified under other parts of the rule.

ARGUMENT

I. Neither Rule 23 Nor the Due Process Clause Prohibits Monetary Relief in a Non-Opt-Out Class Action Under Rule 23(b)(2).

A. Due Process Does Not Require Opt-Out Rights with Respect to Claims for Injunctive Relief.

This Court held in *Phillips Petroleum Co. v. Shutts* that due process requires that absent class members be given notice and an opportunity to opt out of a class action that may resolve claims predominately for substantial money damages. 472 U.S. 797, 811-12 (1985). The Court, however, noted that due process requirements in class actions seeking injunctive and other equitable relief might differ. *Id.* at 811 n.3.

The *Shutts* due process right to opt out of class resolution of substantial individual damages claims rests largely on what the Court has referred to as the “day-in-court ideal,” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999)—that is, the interest of an individual in controlling litigation primarily affecting his or her personal financial interests. At the same time, a defendant has a relatively insubstantial interest in uniform resolution of claims of individuals who seek judgments against it for money damages: Requiring a defendant to pay damages to one plaintiff but not another imposes no inconsistent obligations on the defendant. *See, e.g., Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005).

The Court’s recognition in *Shutts* that actions seeking injunctive relief might involve due process entitlements different from those attaching to actions for substantial money damages reflects differences in the balance of interests of individual class members and defendants in such cases. Where a class seeks injunctive relief that necessarily will affect members of the class in the same way, individual members of the class have a reduced interest in excluding themselves from the action. An injunction regulating the defendant’s conduct toward class members would benefit class members even if they did not want to participate in the action, so opting out is not a meaningful possibility. Nor is it realistic for each class member seeking injunctive relief that would affect the entire class to expect to control litigation aimed at obtaining such relief. Put another way,

in cases for injunctive relief against institutional conduct, it is difficult to conceptualize an individual right of autonomy, even where we would

no doubt recognize an individual's ability to bring a claim in court. In such circumstances, an individual may be an exemplar of the harm visited by allegedly wrongful institutional conduct, but that same individual cannot claim an autonomous right to separate control of the outcome of the legal challenge. To give but the most obvious example, a school desegregation challenge may or may not succeed, but if it does it will establish the wrongful conduct directed across a group of affected school children. In such cases, which are formed under Rule 23(b)(2), it would be nonsensical to claim that any one child has an autonomous right to an independent outcome of the litigation. While each aggrieved child is deemed to have standing to bring a claim for wrongful deprivation of a claimed right to integrated schools, no child has an individual stake in the outcome of that litigation separate from that of the other similarly situated children.

Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1058-59 (2002).

At the same time, the defendant and the judicial system itself have very powerful interests in avoiding multiple and potentially conflicting injunctions, each purporting to tell the defendant how to conduct itself toward the same group of affected parties. Thus, unlike in a typical damages action, where it is possible (if not always practical) for each plaintiff to pursue his or her individual claim independently of others who are similarly situated, in an action seeking injunctive relief affecting a defendant's conduct toward a class, it makes little sense to recognize a due-process-based

right to opt out based on the interest of an individual class member in controlling litigation affecting her rights. For this reason, the due process right to notice and an opportunity to opt out of a class does not typically apply to claims for classwide injunctive relief.

Rule 23(b) reflects the different interests in, and effects of, the different types of claims. Thus, Rule 23(b)(2) does not require notice and an opportunity to opt out in all class actions seeking injunctive relief with respect to a class as a whole, while Rule 23(b)(3), which generally applies to money damages claims such as those at issue in *Shutts*, requires notice and an opportunity to opt out for all claims certified under its terms. Nonetheless, not all forms of injunctive relief are alike, and not all must affect a class as a whole. Thus, some cases presenting claims for injunctive relief might implicate the due process opt-out right recognized in *Shutts*. For example, relief in an action seeking specific performance of a product warranty could in some cases be tailored to apply only to consumers who did not opt out of the litigation, and a rational consumer might choose to exercise such an option if he preferred to seek some other form of available relief (such as significant damages) or otherwise thought he could do better in individual litigation than as part of the class action.

In this case, the injunction the plaintiff class seeks, which concerns corporate practices affecting all of Wal-Mart's female employees, is exactly the sort of truly unitary classwide injunctive relief for which Rule 23(b)(2) was designed. The recognition of a due-process opt-out right would make no sense here because relief affecting Wal-Mart's use of subjective criteria and its corporate-wide culture of discrimination

against female employees could not realistically be tailored to affect only women who did not opt out of the class. Such injunctive relief is also exactly the kind of remedy that a defendant, such as Wal-Mart, has a powerful interest in having determined in a single case so that the defendant is not subjected to multiple injunctions telling it different things about how to conduct itself toward the same class of female employees.

B. Monetary Relief That Is Ancillary to or Concomitant with Injunctive Relief May, Consistent with Constitutional Demands, Be Sought Through a Non-Opt-Out Class Certified Under Rule 23(b)(2).

Rule 23(b)(2) permits an action to be maintained as a class action if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” On its face, subdivision (b)(2) is not limited to *claims* for injunctive and corresponding declaratory relief. Thus, its language does not prohibit certification where the action *also* presents claims for damages or other forms of monetary relief that, if brought by themselves, could be certified only under Rule 23(b)(3), with the accompanying requirements of notice and an opportunity to opt out. Indeed, nothing in Rule 23 expressly addresses the extent to which claims for monetary relief may be included in classes certified under Rule 23(b)(2) or whether they may be certified only under Rule 23(b)(3). “Put differently, Rule 23(b)(2) does not attempt to patrol the borderline between it and Rule 23(b)(3), the rule’s non-

mandatory subdivision.” Brian Wolfman & Alan Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 U.M.K.C. L. Rev. 730, 737 (2006).

The lower courts have thus generally agreed that the terms of Rule 23(b)(2) itself do not preclude certification of claims for monetary relief. They have, however, also held that the structure of the Rule—including Rule 23(b)(3)’s *requirement* that class members receive opt-out rights, which dovetails nicely with *Shutts*’s requirement of such rights where substantial money damages claims are at issue—suggests limits on the extent to which claims for money damages can be shoehorned into a Rule 23(b)(2) non-opt-out class action. As one court has stated, “[a] court should endeavor to select the most appropriate subsection, not just the first linguistically applicable one in the list. When substantial damages have been sought, the most appropriate approach is that of Rule 23(b)(3), because it allows notice and an opportunity to opt out.” *Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999).

Courts have reached different conclusions concerning the circumstances in which damages claims may be certified together with claims for injunctive relief in a non-opt-out class under Rule 23(b)(2). Borrowing a term used in the 1966 Advisory Committee Notes—but not in the text of Rule 23(b)(2)—the lower courts have framed the debate in terms of whether claims for injunctive relief “predominate” over those for money damages, but have adopted different standards for making that determination. Compare *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) (taking a narrow view of the circumstances in which monetary claims may be certified under Rule 23(b)(2)),

with Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 163-64 (2d Cir. 2001) (taking a much more permissive view).²

But all the lower courts have agreed that at least some forms of monetary relief may be certified on a non-opt-out basis consistent with both the terms of Rule 23 and the constitutional due-process principles of *Shutts*. In particular, when proof of the class's entitlement to classwide injunctive relief carries with it an entitlement to make-whole monetary relief that can be determined based on objective criteria, even courts taking a very restrictive view of Rule 23(b)(2)'s application to claims for monetary relief have permitted non-opt-out certification under subdivision (b)(2). See *Allison*, 151 F.3d. at 415; see also *In re Monumental Life Ins. Co.*, 365 F.3d 408, 418-21 (5th Cir. 2004). Back pay in a Title VII action—the form of monetary relief implicated by the certification order in this case insofar as it was affirmed by the Ninth Circuit—is the classic instance of a claim for monetary relief that satisfies the requirements of being “incidental to” or “concomitant with” the entitlement to injunctive relief, and capable of determination with regard principally to objective characteristics of class members. See *Allison*, 151 F.3d at 415; see also *Jefferson*, 195 F.3d at 896.

Due-process concerns are not strongly implicated by non-opt-out certification of back-pay claims in part

² In fact, “nothing in Rule 23 provides that one of the rule's subdivisions trumps another based on predominance,” Wolfman & Morrison, *supra*, at 737, and it appears that the Advisory Committee borrowed the term from Rule 23(b)(3), where it is used in an entirely different context.

for the same reason that non-opt-out certification of injunctive relief claims is permissible. An individual class member does not have a genuine property or autonomy interest in controlling the litigation of the injunctive claims (or at least no interest that outweighs the interest in having the entitlement to classwide injunctive relief decided in a single action). It follows that the same class member has little additional interest in controlling litigation that will determine the consequences that follow directly from the determination of the class's entitlement to injunctive relief.

To be sure, this principle has limits. If, for example, a class consisted of a relatively small group of members, each of whom had very large claims for back pay (or if a small number of such members were subsumed within a larger class), those individuals would have a greater interest in conducting litigation over their own personal claims. Depending on the circumstances, their individual interests might require that they be provided an opt-out right, at least at some point in the litigation.³

By the same token, however, in many cases most class members' claims are not large enough to support individual litigation, and that circumstance reinforces the conclusion that where monetary relief flows directly from a classwide injunction, due process does not demand a right to opt out. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661(7th Cir. 2004) (not-

³ *Cf. Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1157-58 (11th Cir. 1983) (contemplating possibility of opt-outs from proceedings to determine individual back pay awards after determination of liability and classwide injunctive relief through a non-opt-out Rule 23(b)(2) class).

ing that where unitary conduct allegedly caused small amount of damages to many people, “the *realistic* alternative to a class action” is not many individual suits, “but zero individual suits, as only a lunatic or a fanatic” sues in such circumstances). After all, it makes little sense to assert that absent class members’ right to control their own litigation exists even in circumstances where, as a practical matter, it would not be realistically possible for them to mount the sort of proof of a classwide pattern or practice of discrimination necessary to prove their entitlement to a relatively insignificant sum of back pay. “In such cases, the ‘negative value’ of any individual claim defeats the prospect for meaningful individual enforcement of even well- established, meritorious claims.” Issacharoff, *supra*, at 1059.

The point here is not that a small claimant lacks an ownership interest in “property” entitled to due process protection when her claim is put at risk of deprivation. To the contrary, a claim, no matter how small, is property entitled to such protection. *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981); *see also Phillips v. Washington Legal Fdn.*, 524 U.S. 156, 169-70 (1988). But “‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,” and it “calls for such procedural protections as the particular situation demands.” *Gilbert v. Homar*, 520 U.S. 924, 929 (1997) (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1972) and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1961)). Thus, where (1) a class representative has stepped up and shown the willingness to finance the litigation and run the rigors of Rule 23(a)(4)’s adequacy-of-representation inquiry, (2) the monetary relief sought flows directly from the

establishment of an entitlement to classwide injunctive relief, and (3) each claimant's stake is insufficient to induce individual litigation, the process that is due is the right to ride the coattails of the court-approved class representative, subject to the district court's searching adequacy determination and the rights of participation in the case (and particularly in settlement) provided for by Rule 23. An individual opt-out is not constitutionally required in such cases.⁴

In sum, the suggestion that claims for monetary relief that flow directly from a classwide entitlement to injunctive relief cannot be joined in a non-opt-out certification under Rule 23(b)(2) fails both as a matter of constitutional law and under the terms of the Rule. With respect to claims for monetary relief, however, even in a (b)(2) class, due process may impose requirements in some cases. After establishment of liability for back pay, procedures for its computation and distribution would have to comport with due process, and the circumstances could call for notice and an opportunity for individual class members to be heard in some fashion with respect to the amounts due and possibly also for the opportunity to opt out of whatever proceedings were put in place for the determination of back pay. Moreover, if the class representatives settled a class action by trading away claims for monetary relief in return for injunctive relief of debatable value, due process might also counsel in favor of giv-

⁴ Of course, Rule 23 provides for notice and opt-out rights in Rule 23(b)(3) class actions that seek money damages even when individual claims can be characterized as "negative value" claims. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-76 (1974). That fact shows only that it is possible Rule 23(b)(3) demands *more* than due process would require in some cases.

ing absent class members the opportunity to opt out. *Cf.* Fed. R. Civ. P. 23(e)(4) (settlement of a Rule 23(b)(3) class action may be conditioned on a new opt-out opportunity). Such possibilities are not, however, sufficient to preclude certification of a litigation class seeking injunctive relief and concomitant monetary relief.

II. Rule 23 Is Flexible Enough to Accommodate Whatever Opt-Out Rights the Constitution May Require.

To whatever extent due process may require notice and opt-out rights for monetary claims made in an action that also meets the requirements for certification of injunctive claims under Rule 23(b)(2), Rule 23 provides the courts with ample means for protecting those rights. Wal-Mart’s draconian view that no certification may be made under Rule 23(b)(2) in such circumstances—even as to the claims for classwide injunctive relief—badly misreads the rule.

To begin with, Rule 23’s terms allow bifurcated certification, with some claims certified for mandatory class treatment under Rule 23(b)(2) and others certified on an opt-out basis under Rule 23(b)(3). Although Rule 23(b) speaks of the circumstances in which an “action” can be maintained as a “class action,” other parts of the Rule expressly contemplate that class certification can encompass less than all of an “action.” Thus, Rule 23(c)(4) provides: “When appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Rule 23(c)(1)(B) similarly provides that a class certification order must “define the class and the class claims, issues, or defenses”—wording that authorizes certification limited to particular claims.

If certification under one of the subdivisions of Rule 23(b) can be limited to particular claims so that an action may be a class action as to some claims or issues and an individual action as to others, as the Rule explicitly states, it follows that an action may also be a Rule 23(b)(2) class action as to some claims or issues and a Rule 23(b)(3) class action as to others. Certainly nothing in the Rule forbids that result. Not surprisingly, therefore, the lower courts have endorsed the possibility of such bifurcated certification.⁵ This Court, too, should embrace that straightforward reading of the Rule.

Rule 23 also permits the provision of notice and opt-out rights in an action certified exclusively under Rule 23(b)(2) to the extent that due process requires it as to some or all of the class and some or all of the claims asserted. Wal-Mart's contrary assertion finds no support in the Rule, which nowhere states that opt-out rights may *not* be provided under Rule 23(b)(2). That opt-out rights are *required* in Rule 23(b)(3) actions, and not required in Rule 23(b)(2) actions, does not mean that opt-out rights are *forbidden* in Rule 23(b)(2) actions. The most natural reading of Rule 23(b)(2) is that it permits but does not require an opportunity to opt-out.

Other provisions of Rule 23 reinforce this reading. First, the textual source of the requirement for opt-out rights in Rule 23(b)(3) actions is not Rule 23(b)(3) itself, but Rule 23(c)(2)(B), which states that the court in an action certified under Rule 23(b)(3) *must* pro-

⁵ See, e.g., *Jefferson*, 195 F.3d at 898; *Allison*, 151 F.3d at 434 (statement on rehearing en banc); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982).

vide notice to the class, which notice *must* state “that the court will exclude from the class any member who requests exclusion.” Fed. R. Civ. P. 23(c)(2)(B)(v). In other words, the opt-out right is framed as a component of the required notice.

The companion provision of the Rule applicable to (b)(2) actions—Rule 23(c)(2)(A)—provides that in “any action certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class” (emphasis added). The Rule says nothing about the content of that notice or when it might be “appropriate.” But when subdivisions (c)(2)(A) and (c)(2)(B) are read together, the implication is that any of the items listed in (c)(2)(B) as components of notice in a class action could, if “appropriate,” be included in a notice under (c)(2)(A)—including notice that class members may be excluded upon request. Indeed, it would be odd if the court in providing notice under (c)(2)(A) were not expected to look to Rule 23(c)(2)(B), which sets forth the rulemakers’ understanding of the components of notice under Rule 23.

Additional support for a court’s authority to order opt-out rights in Rule 23(b)(2) actions when required by due process appears in Rule 23(d)(1)(B). That subdivision provides that, in the course of an action, a court may issue orders that “require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members” informing them of “the members’ opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action.” Fed. R. Civ. P. 23(d)(1)(B)(iii). Although standing alone this provision might be insufficient authorization for an order

notifying class members of an opportunity to exclude themselves from the action, Rule 23(d)(1)(E) provides catch-all authority for the court to issue orders to “deal with similar procedural matters” to those covered by the earlier subparts of 23(d)(1). Offering notice and an opportunity to opt out is, at a minimum, “similar” to providing an opportunity to signify whether class members consider their representation fair and adequate. (Indeed, giving class members the chance to vote with their feet is perhaps the surest way of allowing them to “signify” their views about the class representatives.) Allowing an opportunity to opt out also addresses a procedural matter similar to allowing an opportunity to “come into the action.” Granting opt-out rights to class members in a Rule 23(b)(2) class action where necessary or appropriate thus falls well within a district court’s “broad authority” under Rule 23(d)(1) “to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).

Finally, permitting opt-out rights in a 23(b)(2) case when demanded by due process is part and parcel of one of the most basic obligations that the Rule imposes on a court conducting a class action: defining who is and who is not a member of the class. That requirement is so elemental that the Rule imposes it twice—first in Rule 23(c)(1)(B), which requires that a certification order “define the class,” and second in Rule 23(c)(3), which provides that any judgment in a class action must “describe those whom the court finds to be class members.” Fed. R. Civ. P. 23(c)(3)(A). The court’s authority to define the class provides an additional basis for the power, in appropriate circum-

tances, to exclude from it members who have requested exclusion.

In short, the tools that Rule 23 gives a court to manage a class action, considered together, are more than sufficient to encompass the power to provide for notice and opt-out rights even in circumstances where the Rule does not *mandate* such rights, if in a given case the provision of such rights is appropriate—such as where due process requires them. If there were any doubt on the subject, however, it should be resolved in favor of construing the Rule to be consistent with constitutional requirements. This Court has repeatedly stated that Rule 23 must be read to effectuate the due process rights of class members and avoid tensions with other constitutional requirements. *Ortiz*, 527 U.S. at 845-48; *Amchem*, 521 U.S. at 628-29; *Eisen*, 417 U.S. at 173-77; *see also Gulf Oil*, 452 U.S. at 99. Adopting an interpretation of the Rule that would forbid opt-out rights in Rule 23(b)(2) cases even where due process required them would run headlong into that imperative.

CONCLUSION

The Court should affirm the judgment of the Ninth Circuit.

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