No. 22-1019

IN THE
Supreme Court of the United States

CORECIVIC, INC.,

Petitioner,

v.

SYLVESTER OWINO, ET AL., individually and on behalf of all others similarly situated,

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Matthew A. Fitzgerald
Counsel of Record
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

(additional counsel listed on inside cover)

Jennifer B. Dickey
Kevin R. Palmer*
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

*Admitted only in Massachusetts. Practicing under the supervision of members of the D.C. bar.

Counsel for the Chamber of Commerce of the United States of America

Elizabeth Milito
Rob Smith
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Suite 1001
Washington, DC 20004

Counsel for National Federation of Independent Business Small Business Legal Center, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTEREST OF *AMICI CURIAE**

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's members have a strong interest in promoting fair and predictable legal standards. They have been and continue to be defendants in putative class actions. The Chamber's members thus have a strong interest in ensuring that courts undertake the rigorous analysis required by Federal Rule of Civil Procedure 23. The Chamber has filed *amicus* briefs in several recent Rule 23 class action cases including *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146; *Comcast Corp. v. Behrend*, No. 11-864; and *Walmart Stores, Inc. v. Dukes*, No. 10-277.

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* Under Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to fund its preparation or submission. Counsel of record for all parties were timely notified under Rule 37.2 of *amici curiae*'s intent to file this brief.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is an example of an entrenched split and the Ninth Circuit holding onto an overbroad view of commonality that violates Rule 23, harms defendants' rights, and continues to ignore the rules established in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

Here, four affidavits from one facility speak for 120,000 immigration detainees in 24 facilities across 11 states. The "glue" of commonality under Rule 23 is supposedly national corporate policies. But the corporate policies here are innocuous on their face, largely drawn from government-set rules, and at most

are ambiguous about the alleged illegal corporate action.

Six judges of the Ninth Circuit (Judges VanDyke, Callahan, Bennett, R. Nelson, Bumatay, and Ikuta) correctly cried foul but could not persuade their colleagues to grant en banc review. *Amici* are concerned that the Ninth Circuit—already a haven of class actions—is staking itself out as a sanctuary for *nationwide* classes. Such classes pose special risks to business in America because they multiply financial danger while also reducing the predictability of trial. After all, the few can only speak for the many if they all *actually* share key common experiences and issues. The evidence of commonality in this case fell far short of what this Court has held Rule 23 requires. And the panel's dogged decision to ignore the criticisms of the extensive dissent from denial of rehearing en banc reflects that the Ninth Circuit's decision is intentional and neither a one-off nor an oversight buried in a broader case.

The blueprint from this case is this: a handful of affidavits from one business location, combined with amorphous nationwide policies, authorize a nationwide class. That rule is improper. *See Wal-Mart*, 564 U.S. at 353-59. It is also alarming for all businesses with a presence in the nation's largest circuit. This Court's attention and reversal is warranted.

ARGUMENT

I. Decisions certifying a class do not warrant more deference than denials of certification.

The Ninth and Second Circuits stand alone in offering more deference to grants of class certification than to denials. *E.g.*, App. 7a ("Notably, in reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification") (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010)); *see also Barrows v. Becerra*, 24 F.4th 116, 130 (2d Cir. 2022). Treatises recognize that the Ninth and Second Circuits use this unusual, lopsided standard of review. *E.g.*, 2 Joseph McLaughlin, *McLaughlin on Class Actions* § 7.15 & nn. 29-31 (19th ed. 2022).

As far as *amici* are aware, no court has ever laid out a rationale justifying friendlier review for grants than denials of class certification. The Second Circuit, which invented the idea years ago, has since questioned it. In 2017, the court noted that "this language apparently arose from a misreading of earlier Second Circuit cases," and is "out of step with recent Supreme Court authority." *In re Petrobras Securities*, 862 F.3d 250, 260 n.11 (2d Cir. 2017).

The *Petrobras* panel concluded that the "distinction [is] one that need not and ought not be drawn." *Id.* Yet even after *Petrobras*, both the Second and Ninth Circuit have persisted in applying greater deference to grants than denials of class certification.

E.g., App. 7a; *Haley v. Teachers Ins.*, 54 F.4th 115, 120 (2d Cir. 2022); *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 (9th Cir. 2023); *Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 926 (9th Cir. 2019).

Petitioner is right that this Court should clarify the standard of review on appeal for class certification decisions. As most circuits hold, courts should not tip the scales in favor of plaintiffs in appeals of class certification decisions.

II. The decision below reflects the Ninth Circuit's continued resistance to the principle set in *Wal-Mart v. Dukes*.

Wal-Mart Stores, Inc. v. Dukes was a nationwide class action brought by female employees of Wal-Mart. 564 U.S. 338 (2011). The plaintiffs alleged a uniform practice of sex discrimination in promotion practices at Wal-Mart stores nationwide. Their proffered evidence included more than one hundred individual declarations, expert sociological testimony, statistical evidence suggesting that Wal-Mart promoted fewer women than its competitors, and the company's national policy allowing broad discretion over promotions at the local level. *Id.* at 342.

The Supreme Court held that plaintiffs seeking class certification must produce "significant proof that Wal-Mart operated under a general policy of discrimination." 564 U.S. at 353. The Court then ruled that such "significant proof" was "entirely absent" in that case. *Id.*

The grounds on which this Court rejected the *Wal-Mart* plaintiffs' arguments illustrate the Ninth Circuit's continued misapplication of the commonality requirement. First, this Court rejected plaintiffs' sociological expert testimony and statistical evidence. The sociologist admitted he could not say what percentage of the decisions at Wal-Mart were based on stereotyped thinking. *Id.* at 354. Meanwhile, the statistical evidence did not show any specific employment practice across all of the Wal-Mart locations included in the nationwide class. *Id.* at 357.

Second, this Court rejected plaintiffs' anecdotal evidence of workplace conditions, which it called "too weak." *Id.* at 358. Plaintiffs had submitted 120 affidavits describing conditions at more than 200 stores. *Id.* The Court pointed out that these affidavits represented "about 1 for every 12,500 class members" and some 7 percent of the stores. *Id.* Further, class members in "14 States ha[d] no anecdotes about Wal-Mart's operations at all." *Id.* As the Court concluded, "even if every single one of these accounts is true, that would not demonstrate that the entire company operates under a general policy of discrimination." *Id.* (contrasting that case with one in which the plaintiffs offered one anecdote for every eight members of the class, and the anecdotes were "spread throughout" the company).

Third, the company's policies did not help the plaintiffs. "The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's 'policy' of *allowing discretion* by local supervisors over employment matters." *Id.* at 355.

Thus, while the Court recognized that such a policy could imaginably allow or facilitate discrimination, it did "not lead to the conclusion that every employee . . . has such a claim in common." *Id.* The Court noted that local managers would of course use different and various criteria in making their employment decisions, creating no common "answers to common questions." *Id.* at 356.

With far less evidence than the plaintiffs had in *Wal-Mart*, there is no way the plaintiffs in this case could satisfy Rule 23.

First, unlike in *Wal-Mart*, no sociological or statistical evidence has even been proffered here. App. 35a (VanDyke, J., dissenting).

Second, the anecdotal evidence is even weaker than what the Court found "too weak" in *Wal-Mart*. 564 U.S. at 358. Anecdotal evidence of being forced to clean common spaces in this case comes from the affidavits of just four detainees, all of them in one facility in California. App. 8a-9a. So here, four detainees in one facility seek to speak for the experiences of 120,000 detainees in 24 facilities across 11 states. App. 3a; App. 93a. That most facilities have no detainee anecdotes at all is very much like *Wal-Mart*—here, just 4 percent of facilities are represented, as 7 percent of stores were represented in *Wal-Mart*. And that the lead plaintiffs here represent 1 for every 30,000 detainees also parallels *Wal-Mart* and speaks to the weakness of the certification case. "If one allegation of specific [unlawful] treatment were sufficient to support an across-the-board attack, every

. . . case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Gen. Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 (1982).

Third, the company policies in this case offer no help to plaintiffs either. The Ninth Circuit panel relied heavily on "the text of CoreCivic's corporate policies," to which it devoted just three sentences of analysis. App. 9a. The panel concluded that the policies "appear to go beyond those minimal tidying responsibilities laid out in the ICE Standards," pointed out that detainees could be punished for refusing to clean their "assigned living area," and noted that the sanitation policy calls for detainees to "remove trash, wash windows, sweep and mop, 'thoroughly' scrub toilet bowls" and other cleaning tasks. App. 9a.

The panel badly misstated the policies. And although *amici* have no particular interest in these specific policies, it is worth explaining here how badly the panel mangled the policies because it shows how flimsy this Rule 23 analysis was and the threat it poses to class-action defendants more broadly.

First, the policies here are modeled closely on government rules for CoreCivic and other detention facilities. For instance, the policy that detainees can be punished for refusing to clean their own private cell, App. 9a, comes verbatim from government rules. U.S. Immigration and Customs Enforcement,

Performance-Based National Detention Standards 2011 ("PBNDS") 225 (Rev. ed. 2016)[1] (listing "prohibited acts" as including "refusing to clean assigned living area"); App. 175a (warden affidavit describing the offense of "refus[ing] to clean assigned living area" as "required by ICE and ICE's PBNDS"). Similarly, government rules say that "all detainees are responsible for personal housekeeping" and list specific tasks every individual must handle, including making their own bed, organizing their own papers, and keeping the floor free of their personal clutter. PBNDS at 406.

Next, the specific cleaning tasks outlined in the policies that the panel thought "go beyond" the government rules—like scrubbing toilets—are specifically listed as "duties to be performed by detainee/inmate *workers*." App. 155a (emphasis added); App. 154a (policy stating that "detainee/inmate workers will be assigned to each area on a permanent basis to perform the daily cleaning routine of the common area"). Detainee *workers* are volunteers, all paid at least $1 a day—again, all under specific government rules. PBNDS at 406-07 (requiring that "detainees shall be provided the opportunity to participate in a voluntary work program" and stating that "compensation is at least $1.00 (USD) per day").

Last, warden affidavits from facilities in Georgia, Tennessee, Arizona, and elsewhere confirm that the policies call for meaningful cleaning jobs like

[1] Available at https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf.

toilet scrubbing to be handled by volunteer workers, not all detainees. App. 164a, 165a, 172a, 175a (warden affidavits stating that detainee workers are volunteers and that those who choose not to volunteer need not clean up common spaces or after other detainees). These affidavits should have led the panel to conclude that Plaintiffs failed to meet their burden under *Wal-Mart*.

In sum, the parallel to *Wal-Mart* is clear. These policies do not clearly call for any illegal action that would justify a strong inference that it occurred and occurred uniformly across all locations.

As the district court and the dissental agreed, the "corporate policies" are "at best ambiguous as to the misconduct claimed in those declarations." App. 34a. This Court has explained that because the *Wal-Mart* "employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 458 (2016). The same is true here for the detainees.

III. The Ninth Circuit's troubling approach is important to class action practice and warrants correction by this Court.

A. The decision represents the latest step in a conscious broadening of commonality by the Ninth Circuit.

Commonality under Rule 23(a) has never been a particularly high bar. It often even collapses into predominance under Rule 23(b)(3), because identifying *some* common issue can be straightforward. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (acknowledging that in a "humongous" asbestos-exposure class action, a question of the harmfulness of asbestos could be "a prime factor common to the class," but adding that "uncommon questions abounded" and finding no predominance under Rule 23(b)(3)). But that commonality is not always in hot dispute does not mean it has less importance in the Rule 23 analysis. In fact, for particularly large or nationwide class actions—like in *Wal-Mart* and this case—pinning down even one exact answer to a key question that every class member will have in common is an important bulwark against overreach in certifying classes. *Wal-Mart*, 564 U.S. at 353 (requiring "significant proof that [the company] operated under a general policy of [illegal action]").

The decision below is the most recent step in the Ninth Circuit's continued and conscious broadening of commonality. For instance, in both *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), and *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), the Ninth Circuit accepted simple *allegations* of universal policies to support a broad commonality finding. In *Parsons* in particular, the Ninth Circuit accepted a 33,000-member class when the evidence of a common policy and practice was severely lacking. As Judge Ikuta pointed out in dissent, the Ninth Circuit was "in defiance" of *Wal-Mart*. *Parsons v. Ryan*, 784 F.3d 571,

573 (9th Cir. 2015). This case goes even farther down that path.

As petitioners point out, the Ninth Circuit's view of commonality represents a split from the other circuits. Pet. 19-24 (citing *Allen v. Ollie's Bargain Outlet, Inc.*, 37 F.4th 890 (3d Cir. 2022), *Ross v. Gossett*, 33 F.4th 433 (7th Cir. 2022), and *Yates v. Collier*, 868 F.3d 354 (5th Cir. 2017)).

The Ninth Circuit panel's finding of commonality based on a bare-bones assessment of the corporate policies cannot be oversight. The dissental called it out in detail. Judge VanDyke, writing for Judges Callahan, Bennett, R. Nelson, Bumatay, and Ikuta, described the policies with specificity and explained why they cannot support a class-wide inference that a hundred thousand detainees in 24 states were unlawfully forced to clean. App. 38a-39a ("the panel referenced portions of the Sanitation Policy that apply only to 'detainee workers'—without even acknowledging that the policy distinguishes between 'detainee workers' and 'all detainees'"); App. 39a (pointing out that the panel overstated the Sanitation Policy by saying it required "sundry other cleaning responsibilities," which is not what the policy says).

Tellingly, the three-judge panel modified its decision in other ways, but offered no response to the *six* dissenting judges on this point. Only the dissental provided a detailed recount of the actual corporate policies. The dissental pointed out that the panel "put decisive weight on those policies" while providing a

"frustratingly brief" analysis. App. 35a. It added that the panel opinion "ignored these serious problems" and "did not engage with the different sections of the Sanitation Policy." App. 38a. The dissental went on to analyze the policies at length, concluding that they did not unambiguously call for the alleged illegal cleaning activities by all workers. App. 37a ("Here, it is a stretch to read CoreCivic's written policies as even *permitting* the conduct complained of by the named plaintiffs"). Ultimately the dissental urged the panel that "the written policies in this case merit more discussion." App. 35a. From the panel: no response. The panel consciously chose to stick to its three-sentence analysis of the corporate policies.

The obvious conclusion is that the Ninth Circuit panel was satisfied to affirm nationwide class certification for 120,000 people based on four declarations from one facility, gluing them together with national corporate policies that do not clearly require the alleged misconduct. After all, the dissental repeatedly pointed this out, and the panel offered no rejoinder. Even the district court—in granting certification—pointed out uncertainty over the meaning of the policies, and the hot dispute between the wardens' affidavits and those of the four plaintiff detainees. As the dissental explained, the Ninth Circuit is once again, traveling "a familiar road" that sidesteps Rule 23, just as it did in *Wal-Mart* itself. App. 39a. Once again, the Ninth Circuit needs to be reversed.

B. The decision reflects the Ninth Circuit's anything-goes model of nationwide commonality.

The Ninth Circuit's message to future class action plaintiffs is that a handful of declarations from just one location, combined with corporate policies that "are at best ambiguous as to the misconduct claimed in those declarations" can suffice for commonality. App. 34a (dissent). This rule makes a mockery of the nationwide commonality requirement of Rule 23(a)(2). As the dissental observed, this rule "charts an attractive and sure-to-be-followed path for those seeking an easy class action certification." App. 34a.

The effect is that nationwide classes will be certified in district courts throughout the Ninth Circuit without real commonality. What does a detainee alleging that he was forced to clean in Otay Mesa, California, have in common with a detainee in Nashville, Tennessee, or the cleaning routine there? These situations concern different facilities, different managers, different detainees; the differences go on and on. What do the detainees have in common? On Plaintiffs' evidence here, only the ambiguous and generic language of company policy. But unless that company policy specifically *requires* the exact actions alleged to have occurred in California and alleged to violate federal law, commonality cannot arise under any reasonable interpretation of Rule 23.

But the Ninth Circuit's ruling against CoreCivic in this case is a road map for future class

actions against businesses large and small. Businesses of all kinds have national policies. Most businesses operating in multiple locations have at least *some* policies that cover all of their locations nationwide. "Centralized policies implemented by local decisionmakers, supplemented by guiding corporate culture, are crucial to managing a large, modern firm." Amicus Brief of Altria Group, Bank of America, CIGNA, Del Monte Foods, Dole Food, Dollar General, DuPont, FedEx, General Electric, Hewlett-Packard, Kimberly-Clark, McKesson, Microsoft, NYSE Euronext, PepsiCo., Tyson Foods, UnitedHealth Group, UPS, Walgreen, and the Williams Companies, *Wal-Mart Stores, Inc. v. Dukes*, 2011 WL 288908, at *8 (U.S. Jan. 27, 2011) (outlining the history of major American businesses and concluding that centralized policies, combined with significant discretion for local managers, is at the core of most large business today). Companies have employee handbooks, basic rules, and other policies to guide local decisionmakers. This is particularly true for heavily regulated businesses in any industry. Here, CoreCivic must follow a 475-page set of government rules in its operations. *See* PBNDS at i ("The PBNDS 2011 reflect ICE's ongoing effort to tailor the conditions of immigration detention to its unique purpose.").

It is easy to imagine national policies that include information relevant to employees' everyday work or customers' everyday experiences. Such policies will generally apply to all employees, but often are silent or ambiguous as to whether they forbid, allow, or require precise actions later alleged to be

unlawful. Thus, general policies alone cannot support an inference that precise actions alleged to be unlawful are repeated at all of a business's locations. But if those policies can be used, as the Ninth Circuit has held, as "the glue of commonality that *Wal-Mart* demands," then the standards for class certification have been lowered far below the threshold this Court and Rule 23 have set. *Brown v. Nucor Corp.*, 785 F.3d 895, 914 (4th Cir. 2015) (distinguishing between experiences shared at one manufacturing plant and those nationwide claimed experiences found inadequate in *Wal-Mart*).

All sorts of cases in contexts other than immigration detention could follow the road map in this case. For instance, consider a national retailer with company policies that require stores to be kept clean. If four employees at one Oregon location assert that they were forced to clean the store unlawfully off the clock, the rationale of this decision would permit a nationwide class of countless employees. It would not matter that managers in other states asserted that they did not read the national policy to require off-the-clock cleaning and did not require it. *Cf.* App. 164a, 165a, 172a, 175a (wardens in other states in this case attesting that the policies did not require all detainees to clean up after others or common spaces, and they did not require that at their facilities).

C. Nationwide classes from the Ninth Circuit warrant special attention because they put especially serious pressure on businesses.

In short, if an ambiguous and disputed company policy can serve as the glue to hold a nationwide class together, then the Ninth Circuit will see an explosion in large nationwide class actions, in contravention of this Court's precedent. *See Falcon*, 457 U.S. at 159.

The Ninth Circuit is especially important because, even before this decision, it had been the forum for many more class actions than other circuits. Analyzing Rule 23(f) petitions for appeal alone, one study concluded that between 2013 and 2017, the Ninth Circuit ruled on more than 260 class action appeal petitions. During the same time, no other circuit saw even 100. Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac. & Process 283, 310 tbl. 5 (2022). Most large businesses in this country have at least some locations within the Ninth Circuit. Thus, if the Ninth Circuit is allowed to create unique law friendly to certifying nationwide classes, huge numbers of businesses could be sued there by opportunistic plaintiffs and their counsel.

Thus, allowing the Ninth Circuit to undermine *Wal-Mart* would be a serious blow for businesses, large and small, throughout America. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 170 (2010) (arguing that "high-stakes, national-market class actions" are

the ones "in which careful certification analysis is most needed").

The pressure of litigation economics drives all class actions toward settlement, but large or nationwide classes face particularly immense pressure to settle. "Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ." Bruce Hoffman, *Remarks, Panel 7: Class Actions as an Alternative to Regulation*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (statement of Bruce Hoffman, then Deputy Director of the FTC's Bureau of Competition).

Regardless of the merits of a claim, a large certified class creates "intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (class action defendants "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."). Once "class certification is granted, defendants are often unwilling to suffer the risks of trial—even in marginal cases—and face enormous pressure to settle the case for a very substantial amount." Roger H. Trangsrud, *James F. Humphreys Complex Litigation Lecture: The Adversary System and Modern Class Action Practice*, 76 Geo. Wash. L. Rev. 181, 189 (2008). Even the committee notes under Rule 23 acknowledge this pressure. Fed. R. Civ. P. 23(f) Advisory Committee Notes, 1998 Amendments (referring to the possibility that certification "may force a defendant to settle rather than incur the costs of defending a class action

and run the risk of potentially ruinous liability"). This Court has recognized "the risk of in terrorem settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

Because of the looming settlement pressures, "certification is the whole shooting match" in most cases. David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN'S Prod. Liab. L. & Strategy (Feb. 2009). Judge Friendly described this setup as inviting "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."). That is, "certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Studies support this theory by showing that nearly all class actions settle. 2023 Carlton Fields Class Action Survey at 22 (2023)[2] (finding 73% of class actions settled in 2021); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L. J. 1251, 1292 (2002) ("Empirical studies . . . confirm what most class action lawyers know . . . almost all class actions settle.").

Meanwhile, class actions are still exceptionally expensive for American businesses. Costs reached $3.5 billion in 2022, representing a continued

[2] Available at https://ClassActionSurvey.com.

trajectory upward. 2023 Carlton Fields Class Action Survey at 4-6. And class actions take years to process, regardless of merit. This case, for instance, was filed six years ago, in May 2017—with CoreCivic thus incurring over six years of legal fees just to reach the certification stage. Class Action Complaint, *Owino v. CoreCivic, Inc.*, No. 3:17-cv-1112, Dkt. 1 (S.D. Cal. May 17, 2017).

Wrongly certified class actions are expensive and dangerous to business across all industries. When the named plaintiffs obtain certification without actually sharing common key facts with the rest of the class, the litigation becomes even less predictable, and the sheer size of the class can pressure business defendants to settle.

As an example, if the Court allows this certification decision to stand, plaintiffs' counsel will proceed to use a hand-selected class representative with an exceptional experience to purportedly speak on behalf of the nationwide class. Mr. Owino, who somehow spent nine years in ICE custody, says that he worked hard for his $1 per day, and says that non-working detainees at his facility also had to clean common areas. App. 122a; App. 129a. It is entirely unclear how his declaration matches up with that of, say, a warden in Arizona who has sworn that in his view, the company policies require only volunteer workers to do common area clean up, and that "no other detainees are assigned jobs or required to work in or clean up the common living areas." App. 184a. The fact is, both declarations could be true. Mr. Owino knows nothing of Arizona facilities, and Warden

Keeton in Arizona does not try to describe practices in California. Having one enormous class of all detainees creates the distinct possibility that a jury or factfinder will accept Mr. Owino's story, multiply it by a hundred thousand detainees, then triple the damages. Pet. 7 (noting that plaintiffs here seek treble and punitive damages). The danger to this defendant is obvious, and the same scenario could play out in any other industry just as easily.[3]

Allowing the Ninth Circuit's decision to stand would undermine *Wal-Mart v. Dukes* and a decade of efforts to make sure that named plaintiffs can fairly and reasonably speak for the uniform experiences of an entire class of people. This case is an abuse of the class action device and is dangerous to the American economy and businesses in all industries.

CONCLUSION

This Court should grant the petition and reverse.

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[3] In fact, this case may be an especially good vehicle because the detention industry is presumably funded directly by the government. See Class Action Complaint, *Owino v. CoreCivic, Inc.*, No. 3:17-cv-1112, Dkt. 1 at 7, ¶ 25 (S.D. Cal. May 17, 2017) (alleging that "CoreCivic derived 51% of its revenue from federal contracts"). Thus, seismic increases in the cost of doing business in that industry will quickly wind up on the taxpayers' bill.

Respectfully submitted,

Jennifer B. Dickey
Kevin R. Palmer*
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

*Admitted only in Massachusetts. Practicing under the supervision of members of the D.C. bar.

Counsel for the Chamber of Commerce of the United States of America

Elizabeth Milito
Rob Smith
NFIB SMALL BUSINESS
LEGAL CENTER, INC.
555 12th Street, NW
Suite 1001
Washington, DC 20004

Counsel for National Federation of Independent Business Small Business Legal Center, Inc.

Matthew A. Fitzgerald
Counsel of Record
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4716
mfitzgerald@mcguirewoods.com

Counsel for Amici Curiae

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