

No. 26-_____

IN THE
Supreme Court of the United States

UNITED AIRLINES, INC.

Petitioner,

v.

GENISE KINCANNON, ON THEIR OWN BEHALF AND ON
BEHALF OF ALL OTHERS SIMILARLY SITUATED,
ET AL.,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Rule 23(a) and (b)(3), a class may be certified only if there are “common” questions. This Court has explained that putative class claims must depend on a “common contention” that “is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In other words, to be certified under Rule 23, a class must “generate common *answers*,” *id.*—either “yes” or “no”—for all class members at once.

Below, the Fifth Circuit held that commonality (and as a result, predominance) was satisfied because the plaintiffs presented similar kinds of evidence the court thought a jury could accept. Yet because a jury could also reject that evidence for some class members while accepting it for others, the panel then directed the creation of a wholly novel three-stage process: (1) a “class rostering” phase to determine, person-by-person, who in the putative class satisfies a threshold, individualized merits element; (2) a liability phase on other elements and defenses; and (3) an individualized compensatory damages phase. Each phase could be litigated before a jury or juries, and backpay and punitive damages would be based upon a formula.

The question presented is:

In assessing commonality and predominance under Rule 23, is it sufficient that plaintiffs have a common theory and evidence that a jury could credit, even where rejecting that theory and evidence would not result in a classwide loss, but in individual liability determinations that differ across class members?

PARTIES TO THE PROCEEDING

Petitioner United Airlines, Inc. was the defendant in the district court and the appellant and cross-appellee in the court of appeals.

Respondents Genise Kincannon and David Sambrano were plaintiffs in the district court and appellees and cross-appellants in the court of appeals.

Respondents David Castillo, Kimberly Hamilton, Debra Jennefer Thal Jonas, Jarrad Rains, Alyse Medlin, Charles Burk, and Seth Turnbough were plaintiffs in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner United Airlines, Inc. is a wholly owned subsidiary of United Airlines Holdings, Inc., a publicly traded corporation (NASDAQ: UAL). No publicly held company owns 10% or more of United Airlines Holdings, Inc.'s stock.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

Sambrano v. United Airlines, Inc., No. 4:21-cv-01074 (June 21, 2024) (granting class certification in part and denying class certification in part)

Sambrano v. United Airlines, Inc., No. 4:21-cv-01074 (Nov. 19, 2021) (denying reconsideration of denial of preliminary injunction)

Sambrano v. United Airlines, Inc., No. 4:21-cv-01074 (Nov. 8, 2021) (denying preliminary injunction)

United States Court of Appeals (5th Cir.):

Kincannon v. United Airlines, Inc., No. 24-10708 (Mar. 9, 2026) (affirming class certification order), *reh'g denied* (Apr. 10, 2026)

Sambrano v. United Airlines, Inc., No. 24-90016 (Aug. 1, 2024) (granting Rule 23(f) interlocutory appeals)

Sambrano v. United Airlines, Inc., No. 21-11159 (Feb. 17, 2022) (reversing and remanding denial of preliminary injunction on irreparable harm element), *reh'g denied* (Aug. 18, 2022)

Sambrano v. United Airlines, Inc., No. 21-11159 (Dec. 13, 2021) (denying injunction pending appeal)

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OPINIONS BELOW

The District Court for the Northern District of Texas's order granting class certification in part and denying class certification in part is reported at 347 F.R.D. 155 and reproduced at Pet.App.57a-112a. The Fifth Circuit's opinion affirming the district court's order is reported at 168 F.4th 713 and reproduced at Pet.App.1a-50a.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on March 9, 2026, Pet.App.51a-52a, and denied rehearing and rehearing en banc on April 10, 2026, Pet.App.55a-56a. Justice Alito granted United Airlines' application to extend the time to file this petition for certiorari until August 7, 2026. No. 25A1438. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISION INVOLVED

Federal Rule of Civil Procedure 23 is reproduced at Pet.App.113a-122a.

INTRODUCTION

Under Rule 23, a class action must answer questions for everyone at once. This petition asks whether a court may instead use certification to greenlight hundreds of mini-trials, by certifying a class now and leaving the work of adjudicating indisputably individualized evidence for later. The decision below said yes. This Court's precedents say no. If left undisturbed, the decision below will destabilize class actions across the nation, from employment to mass torts to securities.

Rule 23(a)(2) requires "questions of law or fact common to the class." And Rule 23(b)(3) requires that those common questions "predominate" over individual ones. This Court has explained that a common question is one whose resolution will settle the claims of the class "in one stroke," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), resulting in a "yes" or "no" answer for everyone. So if a failure of classwide evidence would not answer the question for the class but instead "give[] rise to a need for *individualized* proof," the question is not common. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013).

The court below split from other circuits in not following those precedents. In allowing certification of the Title VII religious accommodation claims here, the Fifth Circuit diluted the commonality requirement on the front end and tried to clean up the mess on the back end. It first found commonality satisfied because the plaintiffs offered classwide evidence a jury *could* credit, even though *rejecting* that evidence would not result in a classwide loss, but in different outcomes for

different class members. That is the definition of an individualized issue under *Wal-Mart* and *Amgen*. Indeed, the panel acknowledged that individual class members' claims could come out differently once a factfinder examined the evidence individually.

But rather than apply the logic of that observation to reject the presence of commonality and predominance—as courts in other circuits do—the Fifth Circuit devised a different solution: certify the class, and direct the district court to adjudicate individualized evidence in an unprecedented “class rostering” likely to involve discovery, live testimony, and jury trials on multiple issues for nearly 1,000 class members.

That approach makes a mess out of Rule 23, defies this Court's precedents, and conflicts with other circuits' approach. Worse still, it promises to wreak havoc on the law of class certification far beyond the Title VII context. As Judge Willett observed in refusing to join the operative portion of the Fifth Circuit's decision, under the panel's approach, “no putative class would ever fail the commonality requirement.” Pet.App.44a.

It is easy to see why: a plaintiff will almost always be able to point to *some* form of classwide evidence and theory why, if everything breaks the plaintiff's way, the jury *could* rule for them. But class certification is not a predictive bet about which side will win at trial. It must analyze whether the adjudication *necessarily* will drive a classwide win or classwide loss—as opposed to split wins and losses among class members. Under the Fifth Circuit's approach, by contrast, a court concerned about individualized proof that rebuts

classwide evidence can certify and then conduct a series of mini-trials later. Left uncorrected, the decision below creates a sea-change in class action practice that will imperil statutory and constitutional rights.

This Court should grant review to stop the Fifth Circuit's aberrant approach. At minimum, it should hold this petition pending its disposition of the petition for certiorari from *Detwiler v. Mid-Columbia Medical Center*, 156 F.4th 886 (9th Cir. 2025).

STATEMENT OF THE CASE

A. United Navigates the COVID-19 Pandemic.

Like many companies in 2021, United faced a decision about how to protect the safety of its customers, employees, and operations in light of FDA approval of the COVID-19 vaccine. Following the deaths of dozens of its employees from the virus, United announced that its employees would be required to be vaccinated by late September. Pet.App.57a. But United allowed employees to request an accommodation from vaccination for religious or medical reasons. Pet.App.57a.

United granted 75% of requested accommodations and required less evidence of religious sincerity than Title VII requires—granting accommodations even to employees who emphasized secular objections to the vaccine, relied on internet-sourced third-party attestations, or used boilerplate templates. CA5.ROA.11945, 7155, 8294, 7028-73 8032-33, 9001-08.

United offered different accommodations to employees depending on the facts. For non-customer-

facing positions, like mechanics and baggage handlers, unvaccinated employees were accommodated with a masking-and-testing regime. Pet.App.4a. For ticket-and-gate agents, United accommodated them with a virtual way to interact with customers. CA5.ROA.8310-11.

Most relevant here, for pilots and flight attendants who were customer-facing (like Respondents), unvaccinated employees were put on unpaid leave until the pandemic meaningfully subsided. Pet.App.4a; Pet.App.58a. These employees, however, were also given the opportunity to apply for alternative, non-customer-facing roles at United to continue working for pay. Pet.App.4a. The number of open positions “far exceeded the number of employees placed on leave,” and employees who applied “received preferential consideration” for any position for which “they were minimally qualified.” CA5.ROA.7155-57. For example, one named plaintiff (a flight attendant) would have qualified for four open positions at her base airport that would have *increased* her average monthly salary. CA5.ROA.7157. And United offered another named plaintiff a management assignment with pay similar to his pilot role. CA5.ROA.8520-21. All employees were allowed to return to work in March 2022. Pet.App.58a.

B. The District Court Certifies a Title VII Class of Pilots and Flight Attendants.

In September 2021, employees sued United under Title VII and the Americans with Disabilities Act (ADA), alleging that United failed to reasonably accommodate their religious and medical objections to the COVID-19 vaccine. Pet.App.58a. The plaintiffs

sought certification of three classes under both Title VII and the ADA: (1) a Rule 23(b)(2) class of all United employees who requested either a religious or medical accommodation, (2) a Rule 23(b)(3) subclass for all non-customer-facing employees who had masking-and-testing requirements, and (3) a Rule 23(b)(3) subclass for all customer-facing employees who were put on unpaid leave. Pet.App.58a-59a.

The district court granted certification in part and denied it in part, while revising the class definition. It declined to certify the first two proposed classes. But it certified a third class under Rule 23(b)(3), defined as “all employees United deemed ‘customer-facing’ who received an accommodation due to a sincerely held religious belief and who were put on unpaid leave.” Pet.App.61a. The court reasoned that the religious sincerity of the class members’ beliefs was a common issue under Rule 23(a)(2) because the class members had “demonstrate[d] sincerity” through their “words and actions.” Pet.App.81a.¹

As for “words,” the court relied on the fact that each class member had received an accommodation and therefore presumably stated some religious objection to the vaccine, and also had submitted a third-party attestation to the same effect. Pet.App.79a. And for “actions,” it relied on employees accepting the unpaid leave accommodation rather than getting vaccinated. Pet.App.79a-80a. The court also concluded that the reasonableness of United’s accommodation and the undue hardship defense were common issues under

¹ The court excluded from this class all ADA claims, reasoning that whether each class member is disabled is individualized. Pet.App.83a-84a.

Rule 23(a)(2). Pet.App.84a-88a. On damages, the court accepted the plaintiffs' proposal to calculate backpay with averages. Pet.App.107a. And it agreed with calculating punitive damages by having the jury select a ratio to economic damages for the whole class and then apply it to each individual damage award. Pet.App.105a-107a.

C. The Fifth Circuit Affirms, Adopting Novel Class Rostering Procedures.

The Fifth Circuit affirmed. On religious sincerity, the panel stopped short of holding that the plaintiffs' "words and actions" evidence established that *no* reasonable jury could find certain class members insincere. Pet.App.25a-26a. Instead, it held that sincerity was a common question because *plaintiffs' evidence* was "common to all class members, meaning [it is] generalized and can be reviewed class-wide." Pet.App.25a. At the same time, however, it recognized the possibility of individualized evidence cutting against religious sincerity, given the many non-religious reasons why individuals object to taking the vaccine. Pet.App.25a-26a. It said such evidence "might be relevant," but that its relevance to class certification "is limited" and does not defeat commonality. Pet.App.25a-26a.

The panel then innovated. Because of the need to consider individualized evidence cutting against religious sincerity, the panel directed the district court to make up a procedure to do so. "[D]uring class rostering, after discovery, or whenever the district court finds it most appropriate," the court said, "United will have ongoing opportunities to present evidence demonstrating a specific employee's lack of

religious sincerity and object to his or her inclusion in the class.” Pet.App.26a. *See* Pet.App.49a (Willett Op.) (majority opinion directs district court to “adopt[] mechanisms to separate the sincere wheat from the disingenuous chaff”).

On reasonableness of accommodation and undue hardship, the Fifth Circuit rejected United’s arguments that the issues could not be assessed on a classwide basis. Pet.App.27a-30a. On damages, the Court breezily approved the plaintiffs’ formula-based approaches and chalked up United’s counterarguments as defenses “common to the claims made by all class members.” Pet.App.32a-33a. It agreed, however, that compensatory damages, such as emotional distress, implicated individualized issues and would “likely have to be separately tried.” Pet.App.33a.

Judge Willett concurred in part and concurred in the judgment, declining to join any of the Court’s opinion agreeing with certification of the unpaid-leave subclass. Pet.App.41a. Judge Willett harbored “serious reservations” about the majority’s conclusion that religious sincerity is capable of classwide resolution. Pet.App.43a. Because religious sincerity is “largely a matter of individual credibility” that ordinarily requires the factfinder to observe live testimony, he explained, it is hard to see how that issue could be resolved for the whole class “in one stroke.” Pet.App.43a (quoting *Wal-Mart*, 564 U.S. at 350).

Judge Willett also observed that one class member’s words and actions have no bearing on any other class member’s religious sincerity. Pet.App.43a-44a. So in

the end, the “words and actions” evidence the plaintiffs had presented “is not *the same* evidence” for every class member; “it is merely evidence *of the same type*.” Pet.App.43a-44a. And “[i]f that sort of independent-but-parallel proof were enough, no putative class would ever fail the commonality requirement.” Pet.App.44a.

Finally, Judge Willett explained that “Title VII (not to mention the Seventh Amendment) gives United the right to have a jury determine its objections to individual class members’ sincerity.” Pet.App.49a. He doubted whether a constitutionally compliant procedure could be constructed that would not “undermine[] the advantages of classwide proceedings.” Pet.App.50a. Judge Willett joined the court’s judgment, however, under his view of the deferential abuse-of-discretion standard. Pet.App.48a.

The Fifth Circuit declined rehearing and rehearing en banc on April 10, 2026. Pet.App.55a-56a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit’s decision contradicts this Court’s key precedents on assessing commonality under Rule 23 and creates a circuit split with other courts faithfully applying those precedents. That departure is exceptionally important, as it promises to distort class certification across all substantive areas of law and invite further procedural adventurism.

I. UNDER THIS COURT’S DECISIONS, A COMMON QUESTION IS ONE THAT CAN BE RESOLVED “IN ONE STROKE” SO THE ENTIRE CLASS WINS OR LOSES.

As the Court observed in *Wal-Mart*, any class-action plaintiff can raise a host of questions that are “literally” common. 564 U.S. at 349. That is not what Rule 23 commonality requires. What Rule 23 requires is a question that, in light of the claims and evidence at issue, can “generate common *answers* apt to drive the resolution of the litigation.” *Id.* at 350. Or as the Court put it, a class’s claims must depend upon a “common contention” that is “capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in *one stroke*.” *Id.* (emphasis added).

The Court illustrated the “one stroke” rule in *Amgen*—particularly, in the situation where a plaintiff’s classwide proof *fails*. In *Amgen*, the Court held that common questions posed by a plaintiff’s securities-fraud claim predominated over individual questions under Rule 23(b)(3). 568 U.S. at 465-70. The defendant argued that the plaintiff had to prove the materiality of the defendant’s misrepresentations and

omissions to certify a class, but the Court disagreed. *Id.* at 466-68.

Materiality, the Court explained, involves an “objective” inquiry about “the significance of an omitted or misrepresented fact to a reasonable investor.” *Id.* at 467. And critically, for that reason, the “common proof” on materiality is the *only* proof. *Id.* at 474. So, even if the plaintiff’s classwide evidence of materiality ultimately failed, that failure would “end[] the case for the class and for all individuals alleged to compose the class.” *Id.* There was therefore no risk that future disputes about materiality would cause individualized issues to predominate, and no need for the plaintiff to prove materiality before seeking certification. *Id.* Whichever way the classwide evidence ultimately cut, it would dispose of the materiality question in one stroke for all class members.

The Court explained how other questions lack that key feature. Reliance, for example, can be shown using classwide evidence through the fraud-on-the-market presumption. *Id.* at 473-74. But where *that* classwide proof fails (say, for lack of market efficiency or publicity), *that is not the end of the claim*: a plaintiff’s claim then depends on evidence of each class member’s awareness of and reliance on the defendant’s statements. *Id.* That sort of claim “[can]not be certified” because “the failure of *common* proof gives rise to a need for *individualized* proof.” *Id.* at 474.

The upshot of *Wal-Mart* and *Amgen* is that classwide evidence does not resolve an issue “in one stroke” if the failure of that evidence would not result in a classwide loss, but individual determinations for

each class member. And issues of that sort are not “common” within the meaning of Rule 23(a)(2) or (b)(3).

II. THE FIFTH CIRCUIT’S DEPARTURE FROM THE “ONE STROKE” RULE CONFLICTS WITH OTHER CIRCUITS.

A. Other Circuits Faithfully Apply the “One Stroke” Rule to Deny Class Certification.

1. Other courts have recognized what *Wal-Mart* and *Amgen* make plain: an issue is not “common” under Rule 23(a)(2) if the evidence will not necessarily resolve an issue in either direction for the entire class. And that means that in circumstances where a failure of classwide evidence would result not in a classwide loss but in individual determinations for each class member, there is no commonality.

This is true in how other circuits both explain and apply the commonality requirement. Other circuits correctly frame the “one stroke” rule by asking if the evidence—whether ultimately accepted or rejected by a jury—would permit different answers for different class members. As Chief Judge Sutton recently put it, “[i]f a reasonable decisionmaker left with the evidence may answer ‘yes’ to a question for some class members and ‘no’ for others, the class has not shown that it is common.” *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 316 (6th Cir. 2025) (en banc); *see also In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 604 (7th Cir. 2020) (“At class certification, the issue is not whether plaintiffs will be able to prove these elements on the merits, but only whether their proof will be common for all plaintiffs, win or lose.”); *Parsons v. Ryan*, 754 F.3d 657, 684-85 (9th Cir. 2014) (“The factual and legal

questions that they present can be answered ‘yes’ or ‘no’ in one stroke as to the entire class”). That articulation forecloses commonality where, as here, a failure of classwide evidence would result in individualized determinations rather than a classwide loss.

Virtually every other circuit properly applies the “one stroke” rule by rejecting commonality where the evidence will not necessarily resolve an issue (one way or the other) for the entire class. For example, in *Davis v. Cintas Corp.*, 717 F.3d 476 (6th Cir. 2013), the plaintiff presented evidence of a company-wide discriminatory policy using expert reports containing statistical and sociological analysis. *Id.* at 488-89. Each type of classwide evidence had problems, but those defects would not necessarily result in a classwide loss: “the circumstances of discrimination” for the class would just be “highly individualized,” foreclosing commonality. *Id.* at 489; *see also Bolden v. Walsh Const. Co.*, 688 F.3d 893, 894-97 (7th Cir. 2012) (holding defects in classwide evidence would require “site-specific, perhaps worker-specific details” rather than classwide loss, foreclosing commonality).

In *Ferreras v. Am. Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019), the plaintiffs offered “a policy of not paying employees who submitted requests for overtime” as classwide evidence for their overtime claim. *Id.* at 186. That policy, however, applied at most to only a portion of the class. *Id.* So even though the policy could in theory provide evidence to resolve the merits for part of the class, “that would not drive the resolution of the litigation *on a classwide basis.*” *Id.* (emphasis added). That is, even if the plaintiffs’ evidence would drive answers for *some* members of the class (as the Fifth

Circuit appears to believe was true here for many class members as to sincerity), the fact that it would not necessarily do so for others foreclosed commonality.

In *Van v. LLR, Inc.*, 61 F.4th 1053 (9th Cir. 2023), the Ninth Circuit rejected reasoning that matches the Fifth Circuit’s here. Although the defendant had shown that some members of the class lacked viable claims, the district court reasoned that the defendant had *submitted evidence* of that fact for only a small percentage of class members at the certification stage, such that any individualized inquiries after certification would be “de minimis.” *Id.* at 1069; *cf.* Pet.App.31a (characterizing United’s counter-evidence on religious sincerity as attempting to “pick off the occasional class member here or there”).

The Ninth Circuit rejected that rationale because “Rule 23 does not demand proof of who will win or lose at trial.” *Van*, 61 F.4th at 1068-69. The fact that the defendant had provided evidence that at least some class members might not have viable claims “was sufficient to prove that an inquiry into the circumstances and motivations” for each class member “might be necessary.” *Id.* at 1069. In other words, where it is clear that a jury *could* find in the defendant’s favor for individual class members notwithstanding a plaintiff’s classwide evidence, the issue is “individualized,” not common. *Id.*

Even before *Wal-Mart* and *Amgen*, the Fourth Circuit effectively applied the “one stroke” rule to facts strikingly similar to the case at hand. In *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006), the plaintiffs presented an expert report and individual depositions to show that the class

previously lacked awareness of the facts necessary for their claims, in order to surmount the statute of limitations. *Id.* at 322-23. While those common types of evidence—most obviously, depositions—could bear on the question, the Fourth Circuit explained that the issue was still individualized: accrual for statute-of-limitations purposes “focuses on the contents of the plaintiff’s mind,” so it “is not readily susceptible to class-wide determination.” *Id.* at 320.

Even if depositions would favor the class, the ultimate determination of each class member’s state of mind would “generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it.” *Id.* And just as Judge Willett did below, the Fourth Circuit rejected the notion that commonality is satisfied simply because a jury might arrive at the same “*conclusion*” for all class members based on the same *type* of evidence (such as a deposition from each class member). *Id.* at 323. What matters is whether the evidence will resolve an issue central to the claim “*in a class-wide manner.*” *Id.* And when it comes to issues that turn on each plaintiff’s subjective mental state, classwide evidence rarely does so.

Other post-*Wal-Mart* and *Amgen* decisions are in accord. See *Stafford v. Bojangles’ Restaurants, Inc.*, 123 F.4th 671, 679-80 (4th Cir. 2024) (reversing class certification as to commonality and predominance where policy document applied to only a portion of claims); *Johannessohn v. Polaris Indus. Inc.*, 9 F.4th 981, 985 (8th Cir. 2021) (defendant’s counter-evidence made reliance individualized because “[w]hile a jury is free to reject this evidence, [the defendant] may present it”).

2. The district court decisions in these circuits, moreover, vividly illustrate the conflict the Fifth Circuit’s decision creates. Applying circuit precedent, they have *denied* class certification on facts indistinguishable from this case—other Title VII reasonable-accommodation claims challenging employers’ COVID-19 policies.

For example, district courts in the Third, Fourth, Sixth, Eighth, and Ninth Circuits have rejected class certification because juries are free to reject any particular class member’s claim of religious sincerity based on a host of individualized considerations. *See Phillips v. Rector & Visitors of the U. of Va.*, No. 3:22-cv-75, 2026 WL 1103282, at *11 (W.D. Va. Apr. 23, 2026); *Meinert v. Port Auth. of Allegheny Cnty.*, No. 2:22-cv-1736, 2025 WL 903815, at *10 (W.D. Pa. Mar. 25, 2025); *Wilhoit v. AstraZeneca Pharm., LP*, No. CV 22-1634-GBW-SRF, 2024 WL 706901, at *7 (D. Del. Feb. 21, 2024); *Williams v. Bristol-Myers Squibb Co.*, No. 22CV6097, 2023 U.S. Dist. LEXIS 226112, at *9 (D.N.J. Dec. 18, 2023); *O’Hailpin v. Hawaiian Airlines Inc.*, No. 22-532, 2023 WL 8600498, at *9 (D. Haw. Dec. 12, 2023); *Speer v. UCOR LLC*, No. 3:22-cv-426, 2023 WL 7305037, at *9 (E.D. Tenn. Nov. 6, 2023); *Ellison v. Inova Health Care Servs.*, 692 F. Supp. 3d 548, 565-66 (E.D. Va. 2023); *see also Haliye v. Celestica Corp.*, No. 06-CV-4769, 2009 WL 1653528, at *8 (D. Minn. June 10, 2009) (same, in non-COVID-19 case, involving accommodation of prayer breaks).

District courts in these circuits likewise have rejected the Fifth Circuit’s approach on the reasonableness of an accommodation and undue hardship, holding that they present questions not necessarily determinable in one stroke, since their

outcome can differ class member-by-class member. *See Phillips*, 2026 WL 1103282, at *12 (“Because resolution of the claims in the Failure-to-Accommodate Class would require a plaintiff-by-plaintiff inquiry into sincerity, reasonableness, and hardship, the Failure-to-Accommodate Class fails to satisfy Rule 23(a)(2)’s commonality requirement.”); *Meinert*, 2025 WL 903815, at *11; *O’Hailpin*, 2023 WL 8600498, at *11-12; *Williams*, 2023 U.S. Dist. LEXIS 226112, at *9; *Speer*, 2023 WL 7305037, at *9-10; *Haliye*, 2009 WL 1653528, at *8-10.

B. The Fifth Circuit’s Aberrant Approach to Commonality Conflicts with Those Decisions.

1. The Fifth Circuit’s decision flouts *Wal-Mart* and *Amgen* and splits from the circuits and district courts that properly apply the “one stroke” rule. On each disputed issue, the court found Rule 23 commonality satisfied because classwide evidence *could* result in a common answer *if* a jury ultimately credits that evidence. But on each point, a jury *could also reject* the classwide evidence. And critically, if that happens, the entire class does not lose. Instead, the jury could rule that some class members have a valid Title VII claim while others do not. Because the answers can be “yes” for some class members and “no” for others, the central issues in the case are not common.

This is not a mere error in application of law; it is a fundamental shift in class certification jurisprudence that, coupled with the Fifth Circuit’s novel “class rostering” approach, will upend class action law across nearly every substantive area. As demonstrated below, this fundamental shift infected the Fifth

Circuit’s analysis of each question that it found “common” and therefore compatible with “predominance.”

a. Religious Sincerity. The flaw in the Fifth Circuit’s approach is most vivid in its conclusion that religious sincerity was a “common” question under Rule 23(a)(2).

Title VII prohibits discrimination because of “religion,” which it defines as “all aspects of religious observance and practice, as well as belief.” 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1). While that definition is broad, it is not limitless: it does not encompass “merely a preferred practice” based on secular considerations. *Wright v. Honeywell Intl., Inc.*, 148 F.4th 779, 783 (5th Cir. 2025); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (distinguishing between religious beliefs and “purely secular considerations”).

That distinction is important in the context of this case: many people in good faith decline to receive vaccines and related procedures for entirely secular reasons, including concerns over safety, efficacy, and necessity. *E.g.*, *Detwiler v. Mid-Columbia Med. Ctr.*, 156 F.4th 886, 895-96 (9th Cir. 2025) (COVID-19 tests); *Fallon v. Mercy Catholic Med. Ctr. of S.E. Pa.*, 877 F.3d 487, 492 (3d Cir. 2017) (flu vaccine); *Ellison*, 692 F. Supp. 3d at 558 (COVID-19 vaccine). And many individual suits alleging the same Title VII claim pressed here have failed on their particular facts for lack of a religious (as opposed to secular) opposition to vaccine requirements. *E.g.*, *Wilhoit*, 2024 WL 706901, at *7 (collecting cases); *Hassett v. United Airlines, Inc.*, No. 23 C 14592, 2024 WL 1556300, at *3 (N.D. Ill. Apr. 10, 2024) (same).

Here, the Fifth Circuit acknowledged that “[t]he sincerity of a person’s religious belief is a question of fact unique to each case,” and that it is “largely a matter of individual credibility.” Pet.App.22a; *see United States v. Seeger*, 380 U.S. 163, 185 (1965) (noting sincerity is a “question of fact” that “must be resolved in every case”). But it nevertheless concluded that sincerity was a common question under Rule 23(a)(2) because plaintiffs had provided evidence “common to all class members” in the form of each accommodated employee’s written accommodation request, third-party attestation, and decision to accept unpaid leave rather than get vaccinated. Pet.App.25a; *see* Pet.App.22a; Pet.App.79a-80a.

Critically, however, the Court did not hold that the evidence proved religious sincerity as a matter of law, accepting that contrary evidence could be “relevant.” Pet.App.25a. Under *Wal-Mart* and *Amgen*, that should have disposed of the “commonality” issue. If, as the Fifth Circuit effectively conceded and other courts hold, an issue like religious sincerity cannot be resolved for the entire class “in one stroke,” then it is indisputably *not* a “common” question: the jury is free to reject the plaintiffs’ purportedly classwide evidence and make individual determinations, leading some class members to win and others to lose. The Court’s error is particularly glaring because the evidence of one class member’s religious beliefs (*e.g.*, a request for religious accommodation) has no bearing on the sincerity of any other class member’s religious belief.

It is established law that sincerity is a matter of “individual credibility,” Pet.App.22a, and credibility determinations “are jury functions,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). As a

result, defendants have a right to a jury decision based on, among other things, the demeanor and consistency of each class member's live testimony, subject to cross-examination. Likewise, discovery can reveal additional evidence cutting against religious sincerity, such as statements about secular opposition to the policy at issue, copy-pasting religious attestations from other sources, and prior inconsistent conduct. *E.g., Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 453 (7th Cir. 2013); Pet.App.25a (noting relevance of these forms of evidence).

And here, as Judge Willett recognized, there are "serious questions about some class members' sincerity." Pet.App.46a. The point is not that every class member will fail to prove religious sincerity; indeed, some (perhaps even many) may succeed. The problem for commonality is that the purportedly classwide evidence may fail, and if it does, the issue of religious sincerity for the class would not be resolved in one stroke. Instead, it would "give[] rise to a need for *individualized* proof." *Amgen*, 568 U.S. at 474. That means sincerity is not a "common" question.

The Fifth Circuit's novel "class rostering" procedure effectively concedes the error. Although it upheld certification on the ground that sincerity *was* a common question, at the same time it acknowledged that "perhaps some questions regarding the sincerity of certain members' beliefs" could be resolved only through *individualized* proof. Pet.App.31a. To resolve this fundamental inconsistency, the court invented an entirely unprecedented "class rostering" process wherein the parties are, at some (unspecified) later point in the proceedings, supposed to litigate (in some undefined form) individual class members' sincerity to

determine who should be weeded out of the certified class before class notice issues. Pet.App.26a.

But that backwards workaround—an apparent attempt to create a pressure-release valve for Seventh Amendment, due process, Title VII, and Rules Enabling Act concerns—gives away the game. Rule 23 requires courts to do that work at the front end, when they determine whether questions are common in the first place. It does not permit certification just because common types of evidence *might* persuade a jury to discount individualized evidence. And it certainly does not allow courts to deem an issue *mostly* common, certify a class, and then create a new procedure on the back end to clean up the mess. A common question must allow the decisionmaker to arrive at a “yes” or “no” answer for “each one of the claims in one stroke.” *Wal-Mart*, 564 U.S. at 350. The Fifth Circuit’s approach indisputably does not do that, and so it flouts this Court’s precedents and conflicts with the approach adopted in other circuits.

b. Reasonable Accommodation. The Fifth Circuit made the same error in holding that the reasonableness of United’s accommodation was a common issue. As an alternative to unpaid leave, every pilot and flight attendant was offered the opportunity to apply for, and receive preferential placement in, alternative positions with United without being vaccinated. CA5.ROA.7155-57; Pet.App.58a. And the positions and salaries available to each employee varied based on geography and qualifications, such that members of the class had access to different alternative positions, including positions that paid the same or more than their existing roles. CA5.ROA.7157-58, 8311, 8520-21.

Indeed, two named plaintiffs were offered or had opportunities to apply for positions with similar or higher pay, yet refused to do so. *Supra* at 5.

Unquestionably, a jury could conclude that accommodation is reasonable for such named plaintiffs but not for others. After all, providing employees the “opportunity” to temporarily transfer to a different job that would “eliminate the conflict between [the employee’s] religious beliefs and his job duties” while suffering “no reduction in pay or benefits” is “a paradigm of reasonable accommodation.” *Rodriguez v. City of Chicago*, 156 F.3d 771, 775-76 (7th Cir. 1998). The fact that an employee may *prefer* to remain in his current position with a different accommodation does not make the proposed accommodation unreasonable. *Id.*; *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986). A jury therefore could find United’s accommodation reasonable for certain class members and unreasonable for others, depending on the details of each class member’s circumstance and the alternative positions available.

The Fifth Circuit resisted that conclusion by reasoning that United had not “giv[en]” class members different jobs, but had given them only “the *opportunity to apply* for other jobs.” Pet.App.28a. And that accommodation, the court thought, “was the same for every member of this class.” Pet.App.28a. But that is the same error that infected its religious sincerity holding because a jury could also *reject* that characterization. A jury could, in other words, conclude that one employee’s opportunity to apply for a job in a different location with lower pay is *unreasonable*, whereas another employee’s

opportunity to apply for a similar job with comparable pay at his home base is *reasonable*. And if the jury rejects plaintiffs' evidence and accepts United's, it does not mean that every member of the class loses; it means some can win and some can lose, depending on individualized evidence. Thus, the reasonableness of the accommodation is *not* a common question.

c. Undue Hardship. The Fifth Circuit took the same flawed approach on undue hardship. Among other things, United presented evidence that its ability to use a masking-and-testing approach with customer-facing employees varied by airport. At smaller airports, there was not enough reserve crew to staff a flight if a crew member tested positive—a result that would cause flight cancellations with cascading negative effects across United's system. CA5.ROA.365, 1676, 2118-19, 7954, 8304, 12328-29, 12376-77. In contrast, larger airports had more reserve crew available, so this problem was less acute. *See* CA5.ROA.7953. A jury could therefore conclude that masking and testing would impose an undue hardship on United with respect to, for example, pilots and flight attendants flying out of Wilmington, North Carolina, but not those flying out of a hub airport like Chicago-O'Hare.

The Fifth Circuit sidestepped that logic by again assuming a jury must accept the plaintiffs' evidence. The panel quoted this Court's statement that undue hardship is shown when a burden is "substantial in the overall context of an employer's business," reasoning that language forecloses different results for different groups of employees. Pet.App.86a-88a (quoting *Groff v. DeJoy*, 600 U.S. 447, 468 (2023)). But *Groff* was entirely focused on the "substantial" aspect

of the undue hardship showing, not on whether that showing can be made as to some employees and not others. *See* 600 U.S. at 468. This Court did not silently overrule decades of precedent holding that undue hardship “requires a fact-specific, individualized inquiry.” *E.g., Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). Nothing, therefore, requires the jury to ignore how providing alternative accommodations for some portions of the class imposes far greater burdens on United than for other portions. A contrary rule would be a clear violation of the Rules Enabling Act, since in a single-plaintiff case a jury could credit those considerations. *See Wal-Mart*, 564 U.S. at 367; 28 U.S.C. § 2072(b).

d. Damages. The same error infected the Fifth Circuit’s damages analysis, which the court addressed under Rule 23(b)(3)’s predominance requirement. For backpay, the plaintiffs proposed averaging each class member’s past earnings to determine an average wage rate, “multiplied by the time each employee was on unpaid leave.” Pet.App.105a. For punitive damages, the plaintiffs proposed allowing the jury to choose “an appropriate ratio of punitive to economic damages, which can then be mechanically applied” to all members of the class. Pet.App.105a.

Both approaches assume that classwide evidence—this time, in the form of mathematical formulas—will be determinative of damages for each class member. But a jury could disagree with those formulas in some instances and, instead, rely on United’s individualized evidence showing that that damages differed across employees.

Backpay perfectly illustrates the point. As United demonstrated below, a pilot or flight attendant's salary for a period is not a fixed amount; instead, employees control their pay with a complex process through which they bid on certain flights based, in part, on how much they want to work during a particular period. CA5.ROA.7347-49. For example, one employee may, in a particular period, bid for a reduced schedule because of an illness or a changed family circumstance (the birth of a child or a loved-ones' illness). If so, that employee may have scaled back their flight preferences during the unpaid leave period. Or modifications in United's flight routes or the dynamic effects of differing seniority position could have caused any given class member to bid on fewer (or more) flights during the unpaid leave period, thereby decreasing (or increasing) their amount of backpay. CA5.ROA.7220, 7347-49.

All of this is individualized evidence that shows the plaintiffs' formulaic approach does not work. And if a jury accepted United's evidence, it does not mean that *no one* gets damages; it means that the damages differ by employee—an individualized question. Nor is this a mere theoretical possibility. United's *unrebutted* expert evidence demonstrated that plaintiffs' backpay model was inaccurate 85% of the time. CA5.ROA.11791-94.

Likewise, on punitive damages, a jury could disregard a one-size-fits-all ratio and determine appropriate amounts based on each class member's varying emotional and financial harms. Indeed, the Fifth Circuit did not even try to reconcile the plaintiffs' approach to punitive damages with its conclusion that compensatory damages must be determined

individually. Pet.App.33a. As the Fifth Circuit itself previously recognized, because “the recovery of compensatory and punitive damages in Title VII cases requires individualized and independent proof of injury to ... each class member,” claims for such relief “must therefore focus almost entirely on facts and issues specific to individuals rather than the class as a whole.” *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 419 (5th Cir. 1998) (per curiam).

Both formulaic approaches also assume that each class member adequately took steps to mitigate his damages. But a jury could reach different conclusions for different class members on that question. That possibility, too, renders both backpay and punitive damages individualized, since failure to mitigate decreases backpay, 42 U.S.C. § 2000e-5(g), and United is entitled to argue that class members who failed to mitigate should receive a lower punitives multiplier than those with more serious harms.

The Fifth Circuit brushed all these problems aside, calling them defenses “common to the claims made by all class members.” Pet.App.33a. But that repeats the court’s error on commonality: the fact that accurate assessments of lost wages, emotional harms, mitigation, and (therefore) punitive damages require facts specific to each class member is an argument that presses *individualized* defenses to *each* class member’s claims. Any one class member may have lost less wages than averaging would suggest, suffered minimal emotional harm, or engaged in less mitigation than other class members. United’s point is not that there is *no* evidence on those issues. It is that the formulas do not work across the board. And so here, again, a failure of common proof (in the form of

mathematical formulas) would create a need for “*individualized* proof.” *Amgen*, 568 U.S. at 474.

The result of ignoring that commonality problem is a “Trial by Formula” approach to damages this Court warned against in *Wal-Mart*. 564 U.S. at 367. A court cannot certify a class “on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.” *Id.* But that is exactly what the Fifth Circuit’s decision does, operating on the premise that a jury will necessarily reject all individualized evidence relevant to backpay, mitigation, and punitive damages.

2. The Fifth Circuit’s approach to commonality (and therefore predominance) also violates Title VII by including uninjured employees in the class. Section 706(g) of Title VII provides that “[n]o order of the court shall require ... payment to [any individual] of any back pay, if such individual ... was [treated as he or she was] for any reason other than discrimination.” 42 U.S.C. § 2000e-5(g)(2)(A). This Court has explained how that provision limits make-whole relief “only to those who have been actual victims of illegal discrimination.” *Firefighters Loc. Union No. 1784 v. Stotts*, 467 U.S. 561, 580 (1984).

The decision below greenlights the inclusion of employees who have *not* been “actual victims of illegal discrimination” and thus lack any Title VII injury. *Id.* Any employee whose objection to the COVID-19 vaccine is not religious or not sincere is not covered by Title VII’s protections. But as Justice Kavanaugh recently explained, “if there are members of a class that aren’t even injured, they can’t share the same injury with the other class members.” *Lab’y Corp. of*

Am. Holdings v. Davis, 605 U.S. 327, 332 (2025) (Kavanaugh, J., dissenting). It thus “does not meet [the] requirement” that “common questions of law and fact predominate.” *Id.*

* * *

On each key issue, a jury could reject the plaintiffs’ classwide evidence and side with some class members and against others. The fact that there may not (indeed, almost certainly will not) be a “yes” or “no” answer for all class members on each issue is fatal to Rule 23 commonality under *Wal-Mart* and *Amgen*. The Fifth Circuit’s opinion thus defies this Court’s precedents and directly conflicts with the approach and application of other circuits that have faithfully applied those precedents.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

1. This Court has held the line on Rule 23 commonality for good reason: the right to present a jury with individualized defenses is guaranteed by the Seventh Amendment, due process, particular causes of action, and the Rules Enabling Act. *See* Pet.App.27a; Pet.App.49a (Willett Op.); 42 U.S.C. § 1981a(c); *Wal-Mart* 564 U.S. at 367. When properly applied, Rule 23 commonality protects these rights. The Fifth Circuit’s decision erases them, across virtually all areas of law where plaintiffs seek class certification.

Judge Willett explained why below. On the issue of religious sincerity, Judge Willett identified the “problem” facing the plaintiffs on commonality: because sincerity “‘is largely a matter of individual credibility,’ it ordinarily ‘demands ... the opportunity for the factfinder to observe the claimant’s demeanor

during direct and cross-examination.” Pet.App.43a. And the need for “individualized inquiries” of that sort makes it impossible to resolve sincerity for the entire class “in one stroke.” Pet.App.43a (quoting *Wal-Mart*, 564 U.S. at 350).

The majority’s solution to that problem was no solution at all. As Judge Willett noted, the fact that the class could present the same *type* of evidence for each class member—their “words and actions”—would not demonstrate religious sincerity across the board. Pet.App.43a-44a. Rather, a jury would have to evaluate “each request, attestation, and sacrifice independently.” Pet.App.44a. So in the end, all the plaintiffs presented was “independent-but-parallel proof” that would not definitively resolve sincerity for the class as a whole. Pet.App.44a.

If that kind of evidence is enough, *i.e.*, evidence that is common in type but subject to individual rebuttal, “no putative class would ever fail the commonality requirement.” Pet.App.44a. After all, plaintiffs will almost always be able to posit evidence that a jury *could* accept on a classwide basis. The Fifth Circuit’s decision thus threatens to tear down the guardrail of Rule 23 commonality across all areas of class action litigation. Specific examples illustrate the point.

a. Religious Accommodation Claims. To start, the Fifth Circuit’s decision represents a sea-change in lower courts’ approach to the particular claims at issue below—including in the Fifth Circuit itself.

In *Braidwood Management, Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023), for example, the Fifth Circuit reversed the certification of a class of employers who “oppose[d] homosexual or transgender behavior for

sincere religious reasons.” *Id.* at 934. While “a review of religious sincerity may not be demanding,” the *Braidwood* court reasoned, a “subjective” inquiry into each class member’s state of mind is required. *Id.* at 935. “This determination can be made only on a case-by-case basis,” not at a higher “level of abstraction at the class certification stage.” *Id.* Any other approach, the *Braidwood* court warned, “ignores the requirement” that the class members’ claims must “depend upon a ‘common contention.’” *Id.* That holding no longer controls in the Fifth Circuit, as the decision below relegates *Braidwood* to a requirement only that a district court must “adequately assess[]” the issue of religious sincerity. Pet.App.24a.

As explained, the Fifth Circuit’s decision splits from numerous courts in other circuits that have rejected proposed Title VII reasonable accommodation class actions in the COVID-19 context and beyond under binding circuit precedent. *Supra* at 16-17.

b. Employment Claims. The facts in *Wal-Mart* illustrate how the Fifth Circuit’s approach will affect employment litigation, far beyond cases involving COVID-19 or even religion. In *Wal-Mart*, as in many employment cases, the plaintiffs claimed to have been subject to a company-wide practice that was discriminatory—there, an alleged policy of giving local supervisors discretion over promotions. 564 U.S. at 344-45, 355. The plaintiffs also presented statistical evidence purporting to show that the company “promote[d] a lower percentage of women than its competitors” at a regional and national level. *Id.* at 356. This Court held commonality was lacking notwithstanding that purportedly classwide evidence. Even if classwide evidence had demonstrated a

discrepancy in promotions by sex across “*all*” of Walmart’s stores, that classwide evidence would still be susceptible to individualized rebuttal: “almost all [managers] will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store.” *Id.* at 357.

Wal-Mart—and cases like it—would come out differently under the Fifth Circuit’s approach. In the Fifth Circuit, because the *Wal-Mart* plaintiffs provided some measure of classwide proof of a discriminatory policy, the possibility that the proof might *fail* and result in individualized inquiries is “limited” in “relevance at the class certification stage.” Pet.App.26a. Indeed, that mirrors the position of the partially dissenting justices in *Wal-Mart*, who thought commonality was satisfied merely because the claims implicated policies alleged to affect women “adversely and globally” across Wal-Mart’s stores. 564 U.S. at 374 (Ginsburg, J., concurring in part and dissenting in part). This Court, however, rejected that position. *Id.* at 359-60.

The *Wal-Mart* fact pattern is not an outlier. Employment plaintiffs routinely seek class certification on the basis of *some* evidence of an alleged classwide practice or policy. But courts typically reject certification where that evidence is open to dispute such that the merits may boil down to individualized inquiries. *See, e.g., Bojangles’ Restaurants*, 123 F.4th at 679-80 (reversing class certification for deficient analysis of commonality and predominance where policy document applied to only a portion of claims); *Gbete v. Sampson Bladen Oil Co.*, No. 5:23-CV-355, 2026 WL 1162617, at *4-5 (E.D.N.C. Apr. 29, 2026); *McCollum v. TGI Fridays Inc.*, No. 8:22-cv-392, 2024

WL 5423064, at *14-19 (C.D. Cal. Mar. 6, 2024); *Garcia v. Central Coast Restaurants, Inc.*, No. 18-cv-2370, 2022 WL 657972, at *7-8 (N.D. Cal. Mar. 4, 2022). The decision below disrupts that consensus.

c. Fraud Claims. As *Amgen* explains, reliance is typically an individualized issue in fraud cases absent a presumption like the fraud-on-the-market theory, so courts deny certification where no such presumption applies. 568 U.S. at 473-74; *see, e.g., Tershakovec v. Ford Motor Co., Inc.*, 79 F.4th 1299, 1312-15 (11th Cir. 2023). Even where plaintiffs offer classwide evidence bearing on reliance—such as proof that representations were “pervasively disseminated”—that evidence is insufficient to establish commonality without a legal presumption of reliance. *Tershakovec*, F.4th at 1314-15. But under the Fifth Circuit’s approach, a jury’s ability to reject that evidence is no obstacle to certification, since a district court can provide future “opportunities” to sort out the truth for each class member. Pet.App.26a.

d. Mass Torts. Mass torts are often “not appropriate” for class treatment given “significant questions, not only of damages but of liability and defenses ... affecting the individuals in different ways.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). But that rule is not ironclad, *see id.*, and the Fifth Circuit’s approach threatens to transform at least some of what should be individual suits handled through the MDL process into unmanageable class actions: mass-tort plaintiffs nearly always have *some* classwide evidence of causation, such as expert reports. *E.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 145 (3d Cir. 1998). A jury is always free to give those reports less than

dispositive weight, leaving causation a matter of individualized evidence. But under the Fifth Circuit's approach, it is enough that a class provides "*the same type*" of evidence. Pet.App.43a-44a (Willett Op.).

2. The Fifth Circuit's unprecedented solution to the problem it created only underscores the need for review. Recognizing that the plaintiffs' claims in fact *would* require individualized inquiries, the Fifth Circuit innovated: "during class rostering, after discovery, or whenever the district court finds it most appropriate," the court directed, "United will have ongoing opportunities to present evidence demonstrating a specific employee's lack of religious sincerity and object to his or her inclusion in the class." Pet.App.26a.

But that gets things exactly backwards. Rule 23 does not permit courts to mask individualized issues by concluding that classwide evidence *might* persuade a jury for *most* of the class, and then order precisely the inefficient mini-trials the Rule is intended to prevent in a novel and unprecedented "class rostering" process. Rule 23, rather, requires that work at the front end; it is supposed to "limit[] judicial inventiveness," not invite it. *Amchem*, 521 U.S. at 620.

The Fifth Circuit's workaround only increases the damage. It requires district courts to water down Rule 23's requirements on the premise that any individualized issues that remain can be dealt with "during class rostering" or "whenever the district court finds it most appropriate." Pet.App.26a. Moreover, as Judge Willett recognized, defendants have a Seventh Amendment right to have a jury decide merits

questions. Pet.App.49a. So in the end, the Fifth Circuit's solution will result in *less* efficiency.

The combined result of the Fifth Circuit's holdings in this case demonstrates the problem. On remand, the parties will first engage in an unprecedented "class rostering" process wherein they will adjudicate the religious sincerity for each of almost 1,000 class members, in a manner that protects United's jury rights. Pet.App.26a. After those mini-trials produce a "final roster," notice will issue and there will presumably be a class trial on the remaining aspects of liability, as well as "individualized awards" of backpay and "an appropriate multiplier for any punitive damages." Pet.App.26a; Pet.App.32a. From there, each class member will "separately tr[y]" compensatory damages. Pet.App.33a.

This is chaos. How is a jury to determine a punitive-damages multiple without knowing what, if any, compensatory damages are due (or weighing differences among the class)? Or sort through individual fact-patterns related to sincerity, reasonableness of accommodation, and undue hardship? How is a court to allocate roles between judge and jury? Or avoid Seventh Amendment violations? The answer to these questions is anyone's guess. But it is the guess required by diluting commonality and creating the individualized proceedings Rule 23 aims to avoid.

3. This Court should take up the question presented now. Rule 23(f)'s limitations on appellate review of certification decisions tend to slow percolation in the Courts of Appeals. But Rule 23 is a uniform federal standard that should apply equally

regardless of where a lawsuit is filed, and the Fifth Circuit has departed both from this Court's clear holdings and from the near-uniform practice of other circuits and district courts adjudicating these issues on the ground. And the stakes are both statutory and constitutional. *See* Pet.App.49a (Willett Op.).

Moreover, improperly certified Rule 23 class actions pressure defendants "into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Thus, it is no answer that the Fifth Circuit's novel approach might—after years of future litigation and the three phases the court contemplated—theoretically preserve a defendant's rights after legion mini-trials on multiple issues that Rule 23 is intended to avoid in the first place. This Court should step in now.

**IV. AT MINIMUM, THIS PETITION SHOULD BE HELD
FOR CONSIDERATION OF THE *DETWILER*
PETITION.**

In *Detwiler v. Mid-Columbia Medical Center*, 156 F.4th 886, the Ninth Circuit recently took the short side of a circuit split over an issue that bears on the Fifth Circuit’s decision below. Namely, the “test for determining the nature, whether religious or secular, of a belief underlying a Title VII claim.” *Id.* at 892.

The *Detwiler* plaintiff objected to COVID-19 testing using a cotton swab dipped in ethylene oxide (“EtO”) because she believes (1) EtO is a carcinogen based on “her interpretation of medical research,” and (2) harming her body violates her “belief in her body as a temple.” 156 F.4th at 895. The Ninth Circuit determined that although the plaintiff did have a sincere religious belief in her body as a temple, her objection arose from a purely secular medical belief about the safety of EtO. *Id.* at 895, 899-900.

Judge VanDyke dissented, *id.* at 901, and the court denied rehearing en banc over the dissent of eight judges, *Detwiler v. Mid-Columbia Med. Ctr.*, 172 F.4th 1072 (9th Cir. 2026). Plaintiff’s petition for certiorari is due August 13, 2026. No. 25A1336 (U.S. June 1, 2026).

If this Court grants certiorari in *Detwiler*, its resolution of that case may bear on the Fifth Circuit’s class certification decision below. If the Court sides with the Ninth Circuit in *Detwiler*, it would foreclose class certification in this case even under the Fifth Circuit’s approach. Among the “countervailing evidence discredit[ing] some [class] members’ claims,” Pet.App.25a, United presented evidence of numerous

class members whose objections were based on medical or safety objections, paired with the general allegation that their “body is a temple.” See CA5.ROA.7028-63. The Fifth Circuit reasoned that such evidence would not “definitively establish[] that any member of the class is insincere in his or her beliefs,” Pet.App.25a, but that key premise would no longer be true if the Ninth Circuit’s approach prevails. Indeed, Judge VanDyke noted that *Detwiler* created a circuit split with *Wright*, 148 F.4th 779, a decision the Fifth Circuit relied on here, Pet.App.22a; Pet.App.26a.

If, on the other hand, this Court rejects the Ninth Circuit’s approach, the plaintiffs’ “words and actions” evidence and its effect on commonality here would need to be evaluated in light of whatever this Court says about how to approach requests for religious accommodations that could sound in purely secular beliefs. Moreover, this Court’s legal test would bear on the design of the “class rostering” procedure that the Fifth Circuit conjured. Pet.App.26a.

This case should be granted in its own right, given the Fifth Circuit’s fundamental errors, disregard of this Court’s precedent, and split from other circuits. But at minimum, this Court should hold this petition to consider alongside *Detwiler*. If the Court ultimately grants review in *Detwiler* and not here, this petition should be held pending resolution of *Detwiler*.

CONCLUSION

The petition for a writ of certiorari should be granted or, at minimum, held for consideration alongside the anticipated forthcoming petition in *Detwiler*.

August 7, 2026

Respectfully submitted,

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