

No. 26-183

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**

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents admit United’s petition raises a clean legal question fundamental to *all class actions*: Is “a question ... common only if a reasonable decisionmaker must answer it ‘yes’ for every class member or ‘no’ for every class member”? BIO.13. They likewise agree the Fifth Circuit said no, BIO.15, and on that basis, concluded sincerity, reasonableness of accommodation, undue hardship, and damages were all “common” questions under Rule 23(a)(2). BIO.25-30. The only disagreement, then, is whether that answer conflicts with this Court’s *Wal-Mart* and *Amgen* decisions and other circuits.

It plainly does. A common question is one where “its truth or falsity will resolve an issue ... of each one of the claims in one stroke,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), such that a “failure of *common* proof” would not “give[] rise to a need for *individualized* proof,” *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013). Or as Chief Judge Sutton said for the *en banc* Sixth Circuit, “[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). Other circuits agree.

The Court should therefore grant certiorari.

ARGUMENT

I. COMMONALITY REQUIRES AN “ALL-YES OR ALL-NO VERDICT.”

The Fifth Circuit applied the rule that commonality can be satisfied “even where rejecting [plaintiffs’] theory and evidence would not result in a classwide loss, but in individual liability determinations that differ across class members.” Pet.i; *see* Pet.17. Respondents, to their credit, do not run from that holding, instead embracing the position that an issue is “common” when a jury could render a “mixed verdict.” BIO.15. That holding, however, squarely conflicts with decisions of this Court and other circuits.

A. *Wal-Mart* and *Amgen* Establish This Rule.

Respondents latch onto *Wal-Mart*’s description of an issue “capable” of class-wide resolution, as if that means only that a jury *might* decide the issue one way for the entire class rather than that classwide resolution is “guarantee[d].” BIO.13, 15. But this Court said the opposite: a contention is “capable” of classwide resolution if determining its truth or falsity “*will*” resolve an issue central to “each” member’s claim in “one stroke.” 564 U.S. at 350 (emphasis added). As a leading treatise explains, under *Wal-Mart*, “[c]ommonality thus requires a common question that necessarily requires a common answer—that can only be answered ‘yes’ or ‘no’ in one fell swoop for every class member.” 1 McLaughlin on Class Actions § 4:7 (22d ed.). So if a reasonable jury can resolve an issue differently among class members

based on their circumstances, the issue is not “common.”

Respondents assail *Wal-Mart’s* articulation of commonality as “unnecessary” dicta. BIO.15. Nonsense. Commonality was lacking in *Wal-Mart* because relevant evidence as to discrimination would “differ from store to store.” 564 U.S. at 357. That was true even if plaintiffs’ statistics showed gender disparities “in *all* of Wal-Mart’s 3,400 stores.” *Id.* Despite some classwide evidence, differences within the class could drive different verdicts.

For *Amgen*, Respondents address its reasoning on materiality but ignore reliance. BIO.14-15. This Court, however, juxtaposed materiality—where failure of classwide proof necessarily ends the case for the *entire* class—with reliance—where failure of classwide proof necessarily “gives rise to a need for *individualized* proof.” 568 U.S. at 474. Materiality is common; reliance is not. Failed classwide proof makes reliance an “[i]ndividualized” issue that *defeats* certification under Rule 23(b)(3). *Amgen’s* focus on predominance, BIO.16, does not matter: it holds a question is “[i]ndividualized”—*i.e.*, not common—when failed classwide proof requires individualized evidence. 568 U.S. at 473-74.

If Respondents’ purportedly “common” evidence of sincerity, reasonableness, undue hardship, and damages fails, the whole class does not lose; the issues become individualized for each member. These are not “common questions” under *Wal-Mart* and *Amgen*.

B. Courts Are Divided on This Pure Legal Issue.

1. Other than the Fifth Circuit, the courts of appeals articulate the right rule. *See e.g., Parsons v. Ryan*, 754 F.3d 657, 684 (9th Cir. 2014) (requiring a “‘yes’ or ‘no’ in one stroke as to the entire class”); *Speerly*, 143 F.4th at 316 (commonality fails, where a jury “may answer ‘yes’ to a question for some class members and ‘no’ for others”); Pet.12-13. These circuits require plaintiffs to “prove that common evidence *would* yield a common answer” without “ignor[ing] the individualized inquiries that might occur with respect to the allegedly ‘common’ question.” *Speerly*, 143 F.4th at 319; *see also Clippinger v. State Farm Auto. Ins. Co.*, 173 F.4th 817, 828 (6th Cir. 2026) (en banc) (explaining that, to be common, a jury “must answer [the] question for each class member in the same yes-or-no way”). Other circuits thus “read *Wal-Mart* the same way as *United*.” BIO.19. Respondents cite no decision articulating their alternative rule.

2. None exists. Although Respondents attempt to factually distinguish *Thorn*, *Van*, and *Johannessohn*, each vividly illustrates the conflict with the Fifth Circuit’s rule allowing split verdicts when classwide proof fails.

In *Thorn v. Jefferson-Pilot Life Insurance Co.*, 445 F.3d 311 (4th Cir. 2006), plaintiffs had purportedly “common” evidence that could establish “none of the class members” had knowledge implicating the statute-of-limitations defense. *Id.* at 322-23. But it did not necessarily “resolve those issues *in a class-wide manner*” since the “circumstances of each class member,” including state-of-mind, might cut the other

way. *Id.* at 320, 323. The Fourth Circuit therefore held that this issue, which “focuse[d] on the contents of the plaintiff’s mind,” could not be certified because it would “require individual examination of testimony from each particular plaintiff.” *Id.* at 320. Respondents assert *Thorn* “says nothing about whether [their] challenge to a uniform employment practice necessarily fails commonality,” but they ignore that “individual mental-state [testimony and other] evidence” will be at issue for each class member (for sincerity) here, too. BIO.21.

Van v. LLR, Inc., 61 F.4th 1053 (9th Cir. 2023) is of a piece. The defendant cited evidence that some class members might lack viable claims because discounts offset overcharges. *Id.* at 1068-69. That countervailing evidence meant “class-member-by-class-member adjudication.” *Id.* Respondents claim the defendant’s evidence in *Van* was stronger than United’s. BIO.22. Not true. As Judge Willett recognized, United has raised “serious questions” about sincerity—on a limited record, no less. Pet.App.46a; *infra* at 7 n.2. More fundamental, however, is that *Van*, like the other cases, recognizes that if the failure of purportedly *common* evidence requires *individualized* determinations, the question is not “common.” 61 F.4th at 1069.

Similarly, in *Johannessohn v. Polaris Industries Inc.*, 9 F.4th 981 (8th Cir. 2021), the state-consumer-fraud statute did not require plaintiffs to prove reliance, but the defendant could present rebuttal evidence. *See id.* at 985 (citing *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008)). Because individualized facts could call reliance into question, the Eighth Circuit rejected certification. As the court

explained, although “a jury is free to reject this evidence, [the defendant] may present it. This will require individualized findings on reliance and is likely to make for multiple mini-trials within the class action.” *Id. Johannessohn* thus presents the same fact-pattern as *Amgen* when the fraud-on-the-market presumption is rebutted: Everyone does not lose; instead, the issue becomes an individualized one. So too here if the jury rejects Respondents’ “words-and-actions evidence.” Thus the Fifth Circuit’s decision creates “a square conflict” with this Court’s and other courts’ precedents. BIO.19.¹

3. Moreover, Respondents do not contest (BIO.23) that the district courts in other circuits, applying their circuit precedent, have reached the opposite conclusion from the Fifth Circuit in similar religious accommodation cases. Pet.16-17. Those courts’ reasoning and results confirm the outlier status of the Fifth Circuit’s approach, which applies well-beyond the Title VII religion context. Rather than provide any distinction, Respondents wrongly assert that anything goes under an “exercise [of] discretion.” *Infra* at 10, 12-13.

¹ Respondents say “[u]nlike those cases, the record here shows a uniform policy: a [CEO]-level initiative.” BIO.19-20. But commonality turns on “the elements of the underlying cause of action,” *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)—here, sincerity, reasonableness, undue hardship, and damages.

II. THE FIFTH CIRCUIT’S DECISION IS WRONG AND EXCEPTIONALLY IMPORTANT.

The Fifth Circuit’s approach to commonality, predominance, and class rostering will upend class certification across all areas of law. Pet.28-35. Respondents’ defense of the decision and other objections fail.

1. The Fifth Circuit erred in concluding that religious sincerity, reasonableness of accommodation, undue hardship, and damages were all common questions.

a. Religious Sincerity. As Respondents acknowledge, on this supposedly “common” issue, the Fifth Circuit agreed United can “lodge individualized challenges” to each class member’s sincerity. BIO.26; *see* Pet.App.25a. The sincerity element depends on credibility determinations for each person, Pet.19-20—a point Respondents do not (and cannot) deny. A jury could find a devout individual who has always opposed medical interventions to be more credible than a lifelong atheist who suddenly found religion. Or that someone who believes the vaccine carried serious health risks would have more incentive to feign religious conviction than someone without any other secular objection.² Under *Wal-Mart* and *Amgen*, then, one cannot conclude that a given class member’s

² To illustrate, one class member testified to believing the vaccine “causes death” and “paralysis.” CA5.ROA.7364-65. Respondents are wrong, though, that there was “extensive class discovery.” BIO.2. Only five absent class members testified and none provided written discovery. CA5.ROA.5718. And United’s CEO (BIO.2, 4) was simply “saying that employees should not lie or pretend to be religious.” CA5.ROA.7142.

sincerity “*will* resolve ... each one of the claims in *one stroke*.” *Wal-Mart*, 564 U.S. at 350 (emphases added); *cf. Amgen*, 568 U.S. at 467-68 (“[T]here is no risk whatever that a failure of proof on the common question of materiality will result in individual questions ...”).

Respondents cannot explain how any of this accords with commonality. BIO.26. Instead, they recite the Fifth Circuit’s *ipse dixit* that such “individualized challenges” somehow do not “defeat[] commonality.” BIO.26; *see* Pet.App.26a (concluding “individualized questions will be presented” yet “common evidence regarding religious sincerity unites the subclass”). So, like Schrödinger’s cat, at once “alive and dead,” each class member’s sincerity determination is at once common and individualized. That is obviously wrong.

Next, Respondents pivot to the Fifth Circuit’s “words-and-actions test.” They argue “United can try to show a jury that the words-and-actions test does not prove sincerity—and, if it succeeds, *[then] no class member* is sincere.” BIO.26 (emphasis added). That, too, is wrong. An individual plaintiff could persuade a jury that even if going on unpaid leave, submitting a third-party letter, and requesting an accommodation do not conclusively prove religious sincerity, their own personal evidence should carry the day. Missing from the commonality test adopted below is any analysis of what happens if Respondents do not prevail on their frontline “common” evidence. Pet.19-21. As *Amgen* explained, when “the failure of *common* proof gives rise to a need for *individualized* proof” a class “[can]not be certified.” 568 U.S. at 474.

b. Reasonable Accommodation. Respondents cannot explain why a jury could not reject their argument that “the *opportunity to apply* for other jobs” is inherently unreasonable and distinguish among class members. Pet.App.28a. A class member who could have earned more money by applying for and accepting an available alternative role, Pet.5, plainly could be viewed as having been reasonably accommodated by United, even if a jury rejected the view that alternative offers were reasonable for everyone.³ CA5.ROA.7156-58.

c. Undue Hardship. Respondents claim “reserve staffing differ[ences] between Wilmington and O’Hare [airports] is common evidence about [a] company-wide question,” BIO.30, echoing the Fifth Circuit’s view that United need not submit employee-specific evidence to show “substantial” burden under *Groff v. Dejoy*, Pet.App.29a.

Groff sets the benchmark United must meet to show undue hardship “on the conduct of [its] business.” 42 U.S.C. § 2000e(j); 600 U.S. 447, 469 (2023) (calling for a “substantial” rather than “more than de minimis” burden). But Respondents and the court below err because this defense applies to some class members differently than others. In an individual lawsuit by a pilot flying from Wilmington, the shortage of backup crews and system-wide ripple effects could lead a jury to conclude accommodating him was a “substantial”

³ Respondents claim class members “were ‘instantly denied’” alternative jobs “because they were unvaccinated,” or the alternative jobs required them to give up their previous positions “forever.” BIO.5-6, 29. That was *not* the Fifth Circuit’s rationale, Pet.App.28a, and is incorrect, *see* CA5.Dkt.77 at 10.

burden. The same is not necessarily true, however, for a Chicago-O'Hare based pilot. United cannot be denied its defense against the pilot flying out of Wilmington's claims just because he joined a class (just like the O'Hare pilot should not lose his claim because of facts at Wilmington).

d. Damages. Respondents do not address that a person-by-person historical average will be valid for some but not others. Pet.24-26; BIO.30-32. That is not an “attack on that formula [that] is itself ‘common to the claims made by all class members.’” BIO.32 (quoting Pet.App.32a-33a). It is the opposite.

2. Respondents' defense of the Fifth Circuit's predominance holding likewise fails. BIO.30, 32. To assess Rule 23(b)(3) predominance, courts must first identify the common and individualized issues and then balance them. An error in step one necessarily infects step two. Here, the Fifth Circuit fatally erred at step one by adopting a flawed approach to Rule 23(a) commonality. Pet.App.31a-32a. That means that, by “mak[ing] an error of law,” the district court *necessarily* abused its discretion in *both* the Rule 23(a) and Rule 23(b)(3) analyses. *United States v. Clarke*, 573 U.S. 248, 257 (2014). This petition therefore has nothing to do with whether “pick[ing] off the occasional class member here or there” defeats predominance. *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 276 (2014).

3. Respondents invoke “class rostering.” But they cite no case endorsing this ministerial procedure as a substitute for commonality or approving the Fifth Circuit's rostering-via-mini-trial approach for a key element of the claims. BIO.26-27. Rule 23(a) and (b)(3)

certification addresses these issues up front; if individualized questions on the merits could be ignored in the commonality and predominance analysis by funneling them through an unprecedented back-end “class rostering” process, no class would ever fail certification.⁴

4. Nor will applying the proper commonality standard prevent all religious-discrimination class actions. BIO.3. First, even if a particular issue (like religious sincerity) is not “common” under Rule 23(a), plaintiffs still are free to argue that other common issues exist and predominate. That, for example, may be the case if an employer treats one faith group better (or worse) than others. Second, defendants often will not dispute sincerity, such as where, unlike the COVID-19 vaccine context, secular objections are rare. There is no justification for adopting a definition of “commonality” at war with *Wal-Mart*, *Amgen*, and other circuits.

⁴ Respondents’ appeal to ascertainability also fails. BIO.27. First, the Fifth Circuit relied solely on commonality and predominance; Respondents cannot rewrite that decision. Second, Respondents’ view walks into another circuit split, and even circuits rejecting administrative feasibility as a component of ascertainability generally agree mini-trials should be avoided. See *Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2021) (discussing circuit-split); *In re Petrobras Sec.*, 862 F.3d 250, 266-67 (2d Cir. 2017) (without administrative-feasibility requirement, requiring objective criteria to avoid a “mini-hearing on the merits”).

III. THIS CASE IS AN EXCELLENT VEHICLE.

Respondents’ “vehicle” objections wrongly suggest the Court should never grant certiorari in a Rule 23 case.

1. Respondents say the petition “would require this Court to delve into case-specific details rather than announce a broadly applicable legal rule.” BIO.33. Not true. As their brief concedes, the parties are divided over a pure legal issue: whether a question is “common” under Rule 23(a) when a reasonable jury could answer “yes” for some class members and “no” for others. *Compare* BIO.15, *with* Pet.17-18.

2. Respondents label this a “provisional” concern and disregard the immense settlement pressure from improper certification. BIO.34-36. But it is indisputable that “an order granting certification may force a defendant to settle rather than run the risk of potentially ruinous liability.” *Microsoft Corp. v. Baker*, 582 U.S. 23, 41-42 (2017). That is why Rule 23(f) review is critical to “facilitat[ing] the development of the law”: few class actions ever reach final judgment. *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (Easterbrook, J.).

Indeed, nearly all modern Supreme Court class-action cases, including this one, arise from Rule 23(f) petitions. *E.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 578 (9th Cir. 2010) (en banc); *Amgen*, 568 U.S. at 464; *Behrend v. Comcast Corp.*, 655 F.3d 182, 189 (3d Cir. 2011); *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 594 U.S. 113, 121 (2021).

3. Respondents rely on the “abuse of discretion” standard of review. BIO.33. But this Court considers *de novo* legal issues underlying “whether the

certification of the plaintiff class was consistent with Federal Rule[] of Civil Procedure 23[]." *Wal-Mart*, 564 U.S. at 342. Because using the wrong legal rule is by definition an abuse of discretion, *supra* at 10, this poses no obstacle to review.

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

Respondents oppose holding the petition pending *Detwiler's* (No. 26-196) potential clarification of religious-sincerity standards. They say it is too late: "United already accepted each class member's religious sincerity." BIO.36. That is false: the Fifth Circuit acknowledged United's right to present "countervailing evidence" on sincerity. Pet.App.25a. Respondents also say United is too early: "even if *Detwiler* could sway the merits, this case is not yet there." BIO.37. But United's argument concerns class certification. Any test *Detwiler* may announce will affect whether the "words-and-actions" evidence the Fifth Circuit relied on would tie the class together, even under its mistaken view of commonality. This case is independently cert-worthy and should be granted; at minimum, it should be held for *Detwiler*.

CONCLUSION

The petition should be granted.

September 4, 2026

Respectfully submitted,

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