Nos. 04-16688 & 04-16720

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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

*Plaintiffs/Appellees/Cross-Appellants*,

*v.*

WAL-MART STORES, INC.,

*Defendant/Appellant/Cross-Appellee.*

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On Appeal from the United States District Court
for the Northern District of California

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# BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLANT'S PETITION FOR REHEARING EN BANC

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## STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e - 2000e-17 (2006). The Chamber's members devote extensive resources to developing employment practices and procedures, and developing compliance programs designed to ensure that their employment actions are consistent with Title VII and other legal requirements. If the panel's decision stands, it will have a potentially destructive effect on the Chamber's members, who will likely face billions of dollars in new claims, without any opportunity to present the evidence in their own defense. All parties have consented to the filing of this brief.

## ARGUMENT

The Chamber agrees with the arguments set forth in Wal-Mart's Petition for Rehearing En Banc. It submits this brief to highlight the conflict between the

panel's decision and Supreme Court precedent, the Rules Enabling Act, and the fundamental purposes of Title VII.

Put bluntly, the panel's decision eviscerates the single most important right granted to employers by Title VII, the right to present rebuttal evidence demonstrating that particular plaintiffs have not actually suffered from discrimination. That right is the mainstay of individual employment discrimination cases, providing the critical mechanism through which employers can answer a plaintiff's prima facie case of discrimination with evidence demonstrating that the plaintiff's alleged harm was not an instance of discrimination, but rather a legitimate employment decision based on the plaintiff's lack of qualifications, failure to seek a particular promotion, or some other legitimate business rationale. Stripping defendants of this right would gut the traditional Title VII analysis, reducing it to a mere exercise in establishing a prima facie case.

Yet that is precisely what the panel's decision does. The panel's decision would permit trial under one of two trial plans: the original plan proposed by the district court (which the panel has now refused either to defend or hold unlawful), and an alternate plan that would involve trial of a an as-yet undetermined number of test cases selected at random. But both plans would deny Wal-Mart the right to present rebuttal evidence in its own defense as to all or most class members.

Under the district court's plan, plaintiffs would be permitted to present a prima facie case based on statistical evidence, and then move straight to a determination of remedies, skipping *entirely* the defendant's right to present evidence in its defense. And the panel's alternate proposal would similarly deny the defendant the right to present evidence in its own defense in all but a negligible number of test cases.

Both plans thus squarely conflict with Supreme Court precedent recognizing an employer's fundamental rights under Title VII to present rebuttal evidence in its own defense as to *each* individual who seeks monetary relief, and with the Rules Enabling Act, which mandates that substantive rights cannot be truncated simply to permit claims to be tried on a class basis. Moreover, because it permits trials in which employers have no right to present rebuttal evidence in their own defense, the panel's decision will (if not overturned) have disastrous practical effects, pressuring employers to settle huge claims regardless of their merit, and forcing them to adopt the kinds of quota-like policies that Title VII was enacted to prevent. Rehearing should therefore be granted to correct the panel's decision.

## I. THE PANEL'S DECISION WOULD DEPRIVE EMPLOYERS OF THE FUNDAMENTAL RIGHT TO PRESENT KEY REBUTTAL EVIDENCE

In the face of the "largest class certified in history," slip op. 16241, the

panel's decision purports to deny Wal-Mart the right to present crucial evidence in its own defense. Under that decision, plaintiffs will (in most or all cases) be permitted to proceed directly from demonstrating a prima facie case of classwide discrimination based on statistical and anecdotal evidence to a determination of remedies, without the employer being allowed to exercise its right to submit rebuttal evidence in its own defense. That fundamental right, guaranteed both by the Due Process Clause and by Title VII, would be swept aside in the name of convenience, based on the district court's conclusion that conducting individualized hearings as to all relevant class members would be "impractical on its face." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 176 (N.D. Cal. 2004).

Convenient or not, it is well-established that every employer is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). The opportunity to present case-specific rebuttal evidence of the lawful basis for an employment action (such as job qualifications, work performance, misconduct, economic need,

or attendance) has been decisive in myriad employment discrimination cases. For example, in *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000), this Court affirmed summary judgment for an employer in an age discrimination case after the employer demonstrated that plaintiffs "were not as qualified as those employees chosen," and plaintiffs were unable to show that this justification was pretextual. *See also, e.g.*, *Lyons v. England*, 307 F.3d 1092, 1117 (9th Cir. 2002) ("whether [plaintiff was] as qualified as any of the promotion recipients is a factually intensive question best resolved by the jury"); *Bateman v. United States Postal Serv.*, 151 F. Supp. 2d 1131, 1139-40 (N.D. Cal. 2001) (plaintiff could not overcome evidence that termination was based on misconduct, not race discrimination), *aff'd*, 32 F. App'x 915 (9th Cir. 2002); *Tempesta v. Motorola, Inc.*, 92 F. Supp. 2d 973, 980 (D. Ariz. 1999) (plaintiff could not show that he had applied for any positions), *aff'd*, 21 F. App'x 915 (9th Cir. 2001).

The Supreme Court has confirmed that individualized hearings are an integral part of both individual Title VII cases and class actions, providing the employer with an opportunity to offer individualized substantive defenses to liability. In *Teamsters*, the Court explained that if plaintiffs prove that an employer has "engaged in a pattern of racial discrimination," the burden "shift[s] to the employer to prove that individuals" who claim to have suffered from

discrimination "were not in fact victims" of such discrimination. *Teamsters*, 431 U.S. at 359 (internal quotation omitted). But the fact that a plaintiff makes out a prima facie case of discrimination "d[oes] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice." *Id*. at 359 n.45. Rather, in cases where plaintiffs seek individual monetary relief, "a district court must usually conduct additional proceedings" – *i.e*., individualized hearings – at which the employer can "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id*. at 361-62. For example, "the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient." *Id*. at 369 n.53. In short, the trial court "will have to make a substantial number of *individual determinations* in deciding which of the … employees were actual victims of the company's discriminatory practices." *Id*. at 371-72 (emphasis added). *See also Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 (1984) (after pattern or practice finding "additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class"); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) ("in a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's

harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) ("The second stage of a pattern or practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiff's favor"); *Reid v. Lockheed Martin Aero. Co*., 205 F.R.D. 655, 687 n.35 (N.D. Ga. 2001) (employer has "the right to rebut the presumption that the adverse employment action was due to discrimination and to show that individual members of the class are not entitled to back pay").

The panel's decision in this case cannot be reconciled with *Teamsters*. As the panel's original opinion conceded, even if plaintiffs successfully demonstrated a general practice of discrimination via statistics and anecdotes, they would be entitled only to a "*rebuttable* presumption that they are entitled to relief." Slip op. 1369 (emphasis added). Yet both of the trial plans permitted by the panel's opinion would undermine this concession by denying Wal-Mart the opportunity to present rebuttal evidence in its own defense as to all or most class members. The district court's trial plan – which the panel characterized as potentially "viable" (slip op. at 16246-7 n. 23) and refused to either uphold or set aside – gives employers no opportunity *whatsoever* to "rebut" this presumption of entitlement to

relief. Instead, after the prima facie stage, the case would immediately proceed to a "remedy phase" to be resolved pursuant to a "formula" and without the individualized hearings required by *Teamsters*. *See* slip op. at 16242 n.16. In refusing to invalidate the district court's trial plan, the panel decision thus *flatly denies* Wal-Mart the fundamental right, affirmed in *Teamsters*, to demonstrate that it had lawful reasons for denying particular class members promotions or higher pay.[1]

The panel's alternative procedure would likewise deny Wal-Mart its fundamental rights under Title VII and *Teamsters*. In its new opinion, the panel

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[1] In its original opinion, the panel attempted to demonstrate that, notwithstanding its wholesale abrogation of Wal-Mart's right to present rebuttal evidence in its own defense, the district court's trial plan was consistent with *Teamsters*. In its new opinion, the panel abandons any attempt at such a defense, stating simply that it is expressing "no opinion regarding Wal-Mart's objections to the district court's tentative trial plan." Slip op. 16243.

In any event, that panel's original attempt to reconcile the district court's trial plan with *Teamsters* was entirely unpersuasive. In its prior opinion, the panel claimed that *Teamsters* only holds that courts must "*usually* conduct" individualized hearings to determine the scope of individual relief. Slip op. at 1369 (quoting *Teamsters*). But that is not true where, as here, the scope of any "individual relief" cannot be determined without individualized hearings. In those circumstances, *Teamsters* makes plain that individualized determinations of eligibility for relief are required. Indeed, in *Teamsters* itself, the Court rejected claims that the evidence demonstrated a classwide desire for the jobs at issue, and held instead that plaintiffs had to prove entitlement to relief "*with respect to each specific individual*, at the remedial hearings to be conducted by the District Court." 431 U.S. at 371 (emphasis added).

suggests that this case could also be tried using the unprecedented procedure discussed in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), which involved trial of a small number of test cases chosen by lottery. *See* slip op. at 16243-16246. As Wal-Mart explains in its Petition, this plan would likely be unworkable in light of the more than 1.5 *million* class members in this case (as opposed to the 10,000 at issue in *Hilao*). *See* Petition for Reh'g 15-18. But even apart from these difficulties, the *Hilao* trial plan is flatly contrary to *Teamsters*. The panel suggests that the *Hilao* plan "would allow Wal-Mart to present individual defenses in the randomly selected 'sample cases.'" Slip op. at 16246 n.22. *Teamsters*, however, requires that an employer have the right to present rebuttal evidence as to *each individual* seeking relief. *See Teamsters*, 431 U.S. at 361-62 (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer can demonstrates that the "*individual applicant*" was denied an employment opportunity for lawful reasons) (emphasis added). Under the *Hilao* plan, this requirement would be patently disregarded in all but a small number of randomly selected test cases, in violation not only Title VII and *Teamsters* but also fundamental principles of due process. *See, e.g.*, *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (due process requires that a defendant have "'an opportunity to present every available

defense'").

Further, by purporting to adopt plans that the panel itself concedes are "imperfect" in the name of convenience (slip op. 16246), the panel's opinion violates the Rules Enabling Act ("REA"), which provides that "general rules of practice and procedure . . . shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b) (2006). Under either the district court's trial plan or the *Hilao* plan, employers would face liability for employment decisions they could readily defend if the claims were brought in the context of an individual action. Either plan would thus fundamentally alter the substantive rights and burdens that would otherwise obtain in an individual action. That is impermissible under the REA.

## II. IF ALLOWED TO STAND, THE PANEL'S DECISION WILL COERCE SETTLEMENTS AND SUBVERT THE PURPOSES OF TITLE VII

In addition to being legally incorrect, the panel's decision will have at least two destructive practical effects. First, it will create strong pressures on employers to settle, even when the lawsuits they face lack merit. Courts have long recognized that class actions may unduly pressure a defendant to settle regardless of the suit's merits. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."). This pressure is

intensified when an employer has no opportunity to present evidence in its own defense.

Second, the panel decision will encourage employers to adopt the kinds of quota-like policies Title VII was adopted to prevent. If employers are denied an opportunity to present evidence demonstrating that their actions were lawful, then they can only avoid liability by making it impossible for any plaintiff to establish a prima facie case of discrimination in the first place. This can only mean ensuring there is *no* way to produce *any* kind of statistical case that their policies have a statistically disparate effect. But satisfying this standard would take employers well beyond the legitimate and necessary exercise of policing their employment policies and practices for true discrimination. As a plurality of the Supreme Court has observed,

> It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

*Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality op.) (citation omitted). Unable to avoid lawsuits by aggressively rooting out true discrimination, employers may be pressured to adopt "inappropriate prophylactic measures." As the plurality also observed,

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

*Id*. at 993. This result would be intolerable, because "[p]referential treatment and the use of quotas by public employers … can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII." *Id*. (internal quotation marks and citations omitted). Yet this intolerable result is *precisely* what the panel decision in this case will bring about. The Court should grant rehearing en banc to prevent these perverse and destructive results.

## CONCLUSION

For the reasons stated, this Court should grant Defendant-Appellant's petition for rehearing en banc.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Court Rules 29-2 and 35-4 because it contains 2,786 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point font size and Times New Roman type style.

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