Appeal Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT/APPELLANT/CROSS-APPELLEE WAL-MART STORES, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The Chamber of Commerce of the United States has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by 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 (2003) *et seq.,* and other equal employment statutes and regulations. The Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and establishment of compensation rates and structures. These member companies devote extensive resources to developing employment practices and procedures, and developing compliance programs designed to ensure that all of their employment actions are consistent with Title VII and other applicable legal requirements.

Despite these efforts, if the district court's Order stands, the Chamber's members are likely to face exposure to billions of dollars in new claims, without any guarantee of an opportunity to present fully the evidence in their own defense.

As a result, the Order creates perverse incentives, encouraging employers both to forego defending their rights in court in favor of settlement, and to forestall these lawsuits altogether by adopting quota-like policies that are antithetical to the purposes and spirit of Title VII. The Chamber's interest in this case stems from the Order's potentially disruptive and destructive effect on the Chamber's members. All parties have consented to the filing of this brief.

ARGUMENT

I. THIS COURT SHOULD VACATE THE DISTRICT COURT'S DECISION

Amicus The Chamber of Commerce of the United States agrees with the arguments set forth in Wal-Mart's Principal Brief; namely, that the district court improperly altered or ignored substantive law in (1) concluding that the class satisfies Rule 23(a); (2) eliminating Wal-Mart's defenses and taking other steps in an attempt to ensure that the class would be manageable; and (3) concluding that the class satisfies the requirements of Rule 23(b)(2). The Chamber of Commerce submits this brief to make an important additional point: as a practical matter, the district court's class certification order, if allowed to stand, will have deeply destructive effects on the policies and practices of American employers.

Specifically, the district court's opinion leaves employers in an untenable position. It adopts both a sweeping standard for class certification and a broadly

permissive view of the kind of statistical evidence sufficient to show class-wide discrimination. These holdings virtually *guarantee* that employers will be subjected to large-scale employment discrimination class actions with billions of dollars in potential damages, even in instances where the alleged discrimination is localized in a single employment unit of a company (as opposed to permeating the thousands of employment units of a nationwide company), or where only a few individuals complain of discrete instances of disparate treatment. In short, these holdings will provide strong incentives for filing discrimination class actions that are dramatically overbroad. At the same time, the district court's Order purports to eliminate employers' fundamental employment-law right to present rebuttal evidence demonstrating that particular class members have not actually suffered from discrimination, and also purports to permit Rule 23(b)(2) plaintiffs—whose claims are supposed to be predominantly declaratory or injunctive—to seek massive amounts of monetary compensation, including punitive damages.

The implications of the decision are overwhelming: its predictable effect will be to force employers to settle these huge claims no matter what their merit, effectively depriving them of their right to trial; and to encourage employers to adopt the kinds of quota-like policies that Title VII was enacted to prevent. The district court's erroneous and destructive Order should be vacated.

A. The District Court's Order Creates Sweeping Exposure to Employment Class Actions

1. Under The District Court's Order, Virtually Any Employment Decisionmaking Structure Would Support A Finding of Commonality

According to the district court, *both* the decentralized *and* the centralized features of an employer's decisionmaking practices can contribute to a finding of commonality under Rule 23. The principal basis for the court's commonality finding was the "broad range of discretion" Wal-Mart confers on individual managers to make compensation and promotion decisions (slip op. at 15); or, as the court also termed it, the allegedly "common feature" of "excessive subjectivity" built in to Wal-Mart's compensation and promotion policies (slip op. at 10; *see also id*. at 15, 18, 20). But the court also concluded that the *centralized* features of Wal-Mart's policies supported a finding of commonality under Rule 23, finding evidence of commonality in Wal-Mart's efforts to "develo[p] and continually reinforc[e] a strong, centralized corporate culture" that "promotes and sustains uniformity of operational and personnel practices," and "constrain[s]" and "guide[s] managers in the exercise of their discretion." (Slip op. at 20-21, 23.)[1] In

[1] Plaintiffs have not submitted evidence demonstrating that the "centralized" features of Wal-Mart's policies are themselves discriminatory. (Indeed, as Wal-Mart argued to the district court, many of these centralized features affirmatively *promote* diversity. (*See* slip op. at 25.)) Nor have Plaintiffs explained how these centralized features adversely influenced the decentralized pay and promotion

short, the court concluded that Rule 23's "commonalty requirement can be met where [a] company combines [a] subjective, decentralized system of decisionmaking with personnel policies that are uniform throughout the country." (Slip. op. at 24 (invoking and summarizing *Morgan v. United Parcel Serv., Inc.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996)) (internal quotation marks omitted).)

This standard is wildly expansive, reaching the employment policies and practices of virtually every employer. Any actual system of promotion and compensation is likely to be either completely subjective, completely objective, or—most likely—to involve a combination of centralized guidelines or criteria and reliance on the judgment of the managers who actually supervise employees. Under the court's opinion, *any* of these decisionmaking systems—subjective, objective, or something in between—would support a finding of commonality under Rule 23.

The expansiveness of the district court's holding is (ironically) demonstrated by its own attempts to distinguish *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558 (W.D. Wash. 2001), a case in which a different Ninth Circuit district court failed to

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decisions that Plaintiffs challenge. Thus, a significant basis for the district court's finding of commonality involves "common" features of Wal-Mart policy that have no causal relationship to the employment decisions at issue here. Those "common" features have no place in a proper Rule 23 analysis, which should focus only on those common policies or practices *that are relevant to the alleged discrimination*.

find Rule 23 commonality. Attempting to reconcile its holding with *Donaldson*, the court stated that "Wal-Mart's practices . . . are significantly more subjective than those described in *Donaldson*," because Microsoft—the defendant in *Donaldson*—"used a well-crafted combination of both objective and subjective measures, with features not present in Wal-Mart, such as bi-annual evaluations, advance mapping of goals and objectives, and an appeal process." (Slip. op. at 20 n.14.) On the court's own analysis, it is impossible to see why the presence of these "well-crafted . . . features" should make any difference: as described by the court, Microsoft's policies, like Wal-Mart's, "combin[e] [a] 'subjective, decentralized system of decisionmaking' with personnel policies that are 'uniform throughout the country . . . .'" (Slip op. at 24 (citation omitted).) The district court offers *no* guidance as to why Microsoft's policies would not satisfy the commonality requirement set forth in its opinion; and on their face, they do.

In short, under the standards set forth in the district court's Order, almost any set of employment practices will support a finding of commonality under Rule 23.[2]

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[2] The district court's use of the phrase "excessive subjectivity" is non-sensical, revealing a fundamental misunderstanding of the relationship between subjectivity, the standards for Title VII liability, and the commonality standards in Rule 23. As Wal-Mart emphasizes in its brief, the presence of subjectivity in an

2. The District Court's Order Essentially Excuses Plaintiffs' Burden Under Rule 23 To Demonstrate The Availability Of Classwide Proof Of Discrimination

In addition to adopting an expansive standard for commonality, the district court endorsed a disturbingly permissive view of the kind of statistical evidence sufficient to turn an allegation of discrimination into a class-wide showing of discriminatory treatment. As Wal-Mart explains in its Principal Brief, it submitted unrebutted evidence that on a store-by-store basis, there is "no statistically

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employer's decisionmaking processes does not in itself raise *any* inference of discriminatory conduct. *See* Wal-Mart Br. at 17 (citing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 992 (1988)). Thus, the notion that a decisionmaking process is suspect because it contains "too much" subjectivity makes no sense. Under *Watson*, no amount of subjectivity *per se* can be "excessive." The question, instead, is whether a particular employment practice, in operation, actually results in generalized discrimination. *See id*. at 18. The answer to that question does not turn on how much subjectivity an employment practice incorporates.

Moreover, as Wal-Mart also explains in its brief, the presence of subjectivity as such does not "support" a finding of commonality—indeed, it cuts against it, especially given the number of different subjective decisionmakers at issue in this case. Wal-Mart Br. at 19-22. The paradigm instance of a subjective decision-making process resulting in common injury is a wholly subjective decisionmaking process that affects multiple persons *at a single facility*, so that all the affected persons are subjected to the *same* subjective decisionmakers. *See Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 151 (single facility), 159 n. 15 (wholly subjective decisionmaking process). In this case, in contrast, the putative class members were not exposed to the subjective judgments of the same decisionmaker, but rather worked under *thousands* of *different* managers, who held *different* management positions in *thousands* of *different* stores across the country. (*See* slip op. at 19; *see also, e.g.*, *Stubbs v. McDonald's Corp.*, No. 04-2164-GTV (D. Kan. Nov. 12, 2004).)

significant evidence of discrimination at the vast majority (more than 90%) of Wal-Mart stores." Wal-Mart Br. at 24. Despite the presence of this unrebutted evidence, the district court accepted Plaintiffs' nationally or regionally aggregated data as sufficient to "create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart." (Slip op. at 27.) Thus, under the district court's opinion, the mere presence of a statistical disparity at *some* level of aggregation—even if it is squarely contradicted by affirmative evidence of *non*-discrimination at the level at which decisions are actually made—is sufficient to turn a claim of discrimination into a claim of *classwide* discriminatory treatment.

The Chamber does not dispute that aggrieved plaintiffs who have suffered from discrimination should be and are entitled to seek relief, or that discriminatory policies and practices should be aggressively identified and rooted out. But the plaintiffs in employment class actions should be limited to employees who actually have claims to assert. The district court's Order, in contrast, permits an individual with virtually *any* claim of discrimination—including claims of isolated, discrete, or localized discriminatory treatment—to transform his or her claim into litigation on behalf of a huge class of employees based on the thinnest of statistical reeds. Under the district court's analysis, both a "common" employment practice and statistical evidence of the practice's discriminatory effect are startlingly easy to

find. As a result, employers are almost guaranteed to face massive, groundless discrimination class actions.

3. The District Court's Erroneous Decision To Permit Massive Monetary Claims In A Rule 23(b)(2) Class Further Increases Employers' Potential Exposure

The district court also purported to allow Plaintiffs to seek punitive damages and backpay amounting to *billions* of dollars, despite the fact that they sought certification of a Rule 23(b)(2) class. As Wal-Mart explains in its brief, this decision was flatly contrary to Rule 23(b)(2) and controlling case law. *See* Wal-Mart Br. at 50-58. It is beyond dispute that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates . . . predominantly to money damages." Fed R. Civ. P. 23, Adv. Comm. Notes to 1966 amend. In line with this principle, this Court has held that Rule 23(b)(2) certification is appropriate only where "the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195, *amended*, 273 F.3d 1266 (9th Cir. 2001). Yet, as Wal-Mart emphasizes, four of six plaintiffs in this case are no longer Wal-Mart employees, and thus *could* not seek declaratory or injunctive relief; backpay is not a form of "declaratory or injunctive" relief capable of supporting certification under Rule 23(b)(2); and determination of punitive damages is an inherently particularized inquiry not susceptible to classwide

determination. *See* Wal-Mart Br. at 52-58. Moreover, and perhaps most obviously, the massive amount of monetary compensation plaintiffs seek in this case plainly belies any claim that pecuniary claims are "incidental" to their case, or that their requests for injunctive relief are predominant.

As a *practical* matter, the inclusion of massive monetary claims, including claims for punitive damages, vastly raises the stakes for employers in the kinds of class actions permitted by the district court's Order. Under that Order, employers must contend not simply with the knowledge that they are likely to face overbroad, company-wide class actions, but also that the plaintiffs in these cases will be permitted to seek monetary relief, including potentially astronomical claims for punitive damages, without having to meet the requirements of Rule 23(b)(3).

B. The District Court's Order Would Deprive Employers of the Fundamental Right to Present Key Rebuttal Evidence

In the face of this massive exposure to potentially crippling employment discrimination class actions, the district court's opinion purports to eliminate the basic right of employers to present evidence that their employment decisions were not discriminatory. Binding Supreme Court precedent establishes that after a prima facie case of discrimination has been proffered, every employer is entitled to the opportunity to put on evidence showing that particular plaintiffs who claim they suffered from discrimination are in fact not entitled to relief, because those

particular employees 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, attendance, and others) has played a decisive role in myriad employment discrimination cases. *See, e.g., Coleman v. Quaker Oats Co.*, *232* F.3d 1271 (9th Cir. 2000); *EEOC v. Ins. Corp. of N. Am.*, 49 F.3d 1418 (9th Cir. 1995).

The district court's Order *flatly denies* Wal-Mart this fundamental opportunity to put on evidence in its own defense. While the district court recognizes that employers are ordinarily entitled to an opportunity to prove that class members were adversely treated for lawful reasons (*see* slip op. at 62), it goes on to suggest that "a lost pay remedy can manageably be afforded . . . through the use of a formula approach" (slip op. at 63). This astounding statement completely misses the point: the formula approach the district court adopts gives Wal-Mart *no opportunity whatsoever* to demonstrate that it had lawful reasons for denying

particular plaintiffs promotions or higher pay.

This ruling would dramatically skew the current balance created under prevailing employment law, which provides employees with legitimate discrimination claims an opportunity to have their day in court, while protecting employers from frivolous suits and permitting them to make employment decisions consistent with their business needs. Under the district court's ruling, employers would lose the opportunity for their day in court and suddenly face liability for employment decisions that they could readily defend if the claims were brought in the context of an individual action—for example, selecting a more qualified applicant for a promotion, denying a raise to an employee based on misconduct, or terminating an employee for poor attendance. The district court justifies this wholesale abandonment of fundamental principles of employment law by noting that holding individual hearings is "impractical on its face." (Slip op. at 63.) But as Wal-Mart makes clear in its Principal Brief, this decision to alter substantive rights based on manageability considerations squarely violates the Rules Enabling Act and Supreme Court precedent, and should not be tolerated. (*See* Wal-Mart Br. at 35-50.)

C. If Allowed To Stand, The District Court's Order Will Coerce Settlements And Subvert The Purposes of Title VII

The district court's Order will have two predictable effects. First, it will

create strong pressures on employers to settle, even when the lawsuits they face lack merit. The potential liability in the present suit against Wal-Mart is in the *billions* of dollars. (*See* Wal-Mart Br. at 9.) Many employers will simply not think it prudent or responsible to risk such liability by proceeding to trial. Courts have long recognized that class actions may unduly pressure a defendant to settle regardless of the suit's merits, and that the size of a class can exacerbate the coercive pressure to settle. *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."); *Dotson v. United States*, 87 F.3d 682, 686 (5th Cir. 1996). This pressure is intensified when an employer cannot count on having a full opportunity to present rebuttal evidence in its own defense. The kinds of lawsuits permitted by the Order—massive, company-wide discriminatory treatment actions, with no guarantee of full rebuttal rights—are a paradigm case of potentially coercive class actions.

Second, the district court's sweeping expansion of the standards for class certification will encourage employers to adopt the kinds of quota-like policies Title VII was adopted to prevent. Under the district court's Order, there is virtually no way that employers can structure their employment decisionmaking processes to avoid company-wide class actions—even based on alleged instances

of discrimination that are isolated or discrete. Under the same Order, employers can also expect that they will be denied a full opportunity to present evidence demonstrating that their allegedly discriminatory actions are in fact justified by legitimate reasons. Thus, companies seeking to avoid liability will need to focus on making it impossible for any plaintiff to establish a prima facie case of discrimination in the first place. Under the district court's standards, this would mean ensuring there is *no* way to produce *any* kind of statistical case—no matter how illogical, and no matter at what level of statistical aggregation—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,

> [i]t 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.) (internal quotation marks omitted). Unable to avoid lawsuits by aggressively rooting out true discrimination, employers may be pressured to adopt

"inappropriate prophylactic measures." *Id*. As the Court plurality also observed,

> [i]f 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 (internal quotation marks and citations omitted). 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 omitted). Yet this intolerable result is *precisely* what the district court's Order in this case will bring about.

Because the district court's opinion will generate perverse and destructive results, and because it is in no way authorized by law, this Court should vacate its certification order.

CONCLUSION

For the reasons stated, this Court should vacate the district court's certification order.

Respectfully submitted,

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Dated: December 8, 2004

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