No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITIONER

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The California Employment Law Council (CELC) respectfully submits this brief *amicus curiae*, in support of the petition for a writ of certiorari.[1]

INTEREST OF THE *AMICUS CURIAE*

CELC is an organization of approximately 50 major employers, many of them nationwide, that operate in California. CELC regularly files amicus briefs in major employment cases. CELC's objective is fair and moderate employment laws, fair to employer and employee alike.

All of CELC's members are subject to Title VII of the Civil Rights Act of 1964 (Title VII) and other employment-related statutes and regulations. All of CELC's nationwide members operate in California. Therefore, any law firm desirous of bringing a nationwide class action against any of the CELC members has the option of doing so in the Ninth Circuit, even if the bulk of the company's operations is elsewhere. As the strong dissent of Judge Ikuta to the 6-5 *en banc* decision makes clear, nationwide class certification against such employers is virtually automatic in the Ninth Circuit after the *en banc* decision since there are only three prerequisites, all easily

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1. Counsel for *amicus curiae* authored this brief in its entirety. He has been CELC's General Counsel for over 25 years. He was one of the lawyers representing Wal-Mart in the district court and was listed as one of the counsel of record on the panel but not the *en banc* appeal. No person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief. Wal-Mart is not a member of CELC. The parties have filed blanket waivers.

available in most circumstances: (1) the opinion of an expert such as Professor Bielby that white male decisionmakers, because of ingrained stereotypical views, cannot help discriminating if allowed to exercise subjective judgments; (2) a handful of uncorroborated, untestable perceptions of discrimination by class members (in the instant case one for every 12,500 class members); and (3) aggregated nationwide statistics which, based on an untestable choice of variables by the plaintiffs' expert, shows statistical significance against the class in question. (Statistical significance is based on two factors: degree of disparity and sample size. With the large sample size of any nationwide certification, the smallest of disparities shown by choice of variables will yield statistical significance.) *See* Dissent, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010) ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.") Such a rule virtually guaranteeing nationwide class certifications against any nationwide employer that operates in the Ninth Circuit puts even the most non-discriminatory of America's nationwide employers at unfair risk.

STATEMENT OF THE CASE

This brief focuses only on the principal allegation in the case, allegedly discriminatory pay decisions made in a subjective fashion at the store level by the store managers of Wal-Mart's 3,400 stores. Plaintiffs relied

on three categories of evidence in seeking a nationwide class certification: (1) the opinion of a sociologist; (2) a handful of anecdotes; and (3) statistics aggregated across region and nation. Only Wal-Mart's statistician did a store-by-store analysis.[2] The following is undisputed: 90% of Wal-Mart stores showed no statistically significant disparity with respect to male/female pay, 2.5% of the stores showed a statistical disparity *which favored women*, and 7.5% of the stores showed a statistical disparity which favored men. The dissent discussed the undisputed nature of the store-by-store analysis, with a citation to the district court opinion, at *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 630 (9th Cir. 2010). The district court certified a nationwide class for back pay, punitive damages, and injunctive relief.

On Wal-Mart's appeal, a three-judge panel, 2-1, with Judge Pregerson writing the majority opinion, affirmed in all respects, including affirming the trial court's trial plan. Under that trial plan, at Phase I, the jury would determine whether there was a pattern or practice of discrimination. If so, there would be no Phase II – based on expert opinion the total disparity in pay would be converted to a lump sum, which, along with any punitive damages awarded, would be distributed to

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2. In fact, she did two store-by-store analyses: (1) analyzing grocery departments separately (only a minority of Wal-Mart stores have grocery departments), she compared all non-grocery operations; and (2) she compared separately Wal-Mart's basic merchandising operation, and specialty operations such as opticians, hearing aids, and grocery. Plaintiffs' expert admitted starting to do a store-by-store analysis, and then abandoning the effort.

discriminatee and non-discriminatee alike by formula. Following a petition for *en banc* hearing, which pointed out that the trial plan totally contradicted this Court's *Teamsters* line of cases (*Teamsters v. United States*, 431 U.S. 324 (1977), and the statute, particularly § 706(g) (court cannot award back pay to non-discriminatees), the panel totally withdrew their earlier opinion, totally rewrote it, and expressed no opinion on the district court's trial plan, stating that the panel was confident that the trial court could construct a trial plan which was defensible. Rehearing *en banc* was then granted, and by a 6-5 vote, the *en banc* court majority (Judges Reinhardt, Hawkins, Graber, Fisher, Paez, and Berzon) affirmed the nationwide certification, with two exceptions: It directed the trial court to reconsider for possible 23(b)(3) certification punitive damages and relief for persons who were ex-employees at the time the complaint was originally filed. Judge Ikuta and Chief Judge Kozinski filed strong dissents, joined by Judges Rymer, Silverman, and Bea. Wal-Mart filed the instant Petition for a Writ of Certiorari on August 25, 2010.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Conflicts between the Ninth Circuit's 6-5 majority and this Court's decisions, the decisions of other circuits, and the clear wording of the statute include, but are not limited to, the following:

(1) 42 U.S.C. § 705(g)(2)(A): This section (§ 706(g)(2)(A)), crucial to the passage of Title VII, prohibits a court from awarding back pay to any non-victim, a prohibition necessarily violated by any trial plan

discussed by the district court or court of appeals. Although heavily relied upon by the dissent, the majority simply ignores this clear statutory prohibition.

(2) 42 U.S.C. § 705(g)(2)(B): This mixed-motive provision, § 706(g)(2)(B), added by the 1991 Civil Rights Act, states that even if an employer has been shown to be discriminatory, it can avoid back pay by proving "a same decision" defense. Any trial plan discussed by the district court or the court of appeals would violate this prohibition.

(3) *Teamsters'* mandate of Phase I, Phase II: *Teamsters v. United States*, 431 U.S. 324 (1977), and its progeny, relying on § 706(g), held that in a Title VII class action, at Phase I plaintiffs must prove a pattern or practice of discrimination. At Phase II, individual claimants are presumed entitled to relief unless the employer can demonstrate that despite the pattern of discrimination the particular claimant was not a victim. Under any of the trial plans discussed by the district court or court of appeals, there would be no Phase II.

(4) The Rules Enabling Act: It provides that federal rules cannot abridge substantive rights. In order to create an unmanageable class action, Wal-Mart's substantive right not to pay money to non-discriminatees has been abridged.

(5) Conflict with the Second and Third Circuits on need to resolve merits issues that relate to Rule 23 requirements: Although paying lip service to the recent

decisions from the Second[3] and Third[4] Circuits that conflicts between experts must be resolved if relevant to Rule 23 issues, the *en banc* majority carved out a Title VII exception: It ruled that in Title VII cases conflicts between dueling statistical experts need not be resolved because the conflicts are simply too important: "Statistical evidence does not *overlap* with the merits, it largely *is* the merits . . . ." *Dukes*, 603 F.3d 571, 591 (emphasis in original).

(6) Aggregated statistics: The *en banc* majority is in conflict with numerous circuits, including two major decisions of the D.C. Circuit,[5] in certifying a geographically broad class based on aggregated statistics when the challenged decisions, subjective judgments by local managers, are made at the local level.

(7) Multiple-facility excess subjectivity: The *en banc* majority dismisses this Court's holding in *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982), that in order to obtain class certification of a broad across-the-board excess subjectivity case there must be "[s]ignificant proof that an employer operated under a general policy of discrimination," as *dicta*. *Id.* at 595. If significant proof of a *general* policy of discrimination is required, it is not met when the store-by-store statistics

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3. *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).

4. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008).

5. *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006).

indicate exactly the type of variance one would expect in a non-discriminatory environment.

(8) Daubert: The panel majority held that the district court was correct in not holding a Daubert hearing before relying on sociological testimony that white men can't help discriminating. This directly conflicts with a just-issued Seventh Circuit decision. *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) ("[W]hen an expert's . . . testimony is critical to class certification . . . the district court must perform a full *Daubert* analysis . . . .").

(9) Need for a trial plan: The Third Circuit, in *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169 (3d Cir. 2009), with Justice Sandra Day O'Connor sitting by designation, unanimously held that class certification is inappropriate without an approved trial plan. But the *en banc* majority ducked the issue: "[a]t this stage we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan . . . but simply note . . . there are a range of possibilities . . . ." *Dukes*, 603 F.3d at 625. "Given the tentative nature of the district court's trial plan, we decline to address Wal-Mart's due process and manageability challenges to that plan." *Id.* at 628.

(10) (b)(2) versus (b)(3): There is a clear circuit conflict between the multiple circuits following the Fifth Circuit's approach in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) ((b)(2) certification proper only if monetary relief is incidental) and the *en banc* majority, authorizing (b)(2) certification when billions of dollars are at issue.

(11) Less rigorous review of district court decision certifying class than district court decision denying certification: The *en banc* majority, citing prior Ninth Circuit precedent, held that a district court's decision certifying a class is "subject to 'very limited' review . . . ." *Dukes*, 603 F.3d at 579. It cited a Second Circuit opinion for the proposition that "when reviewing a grant of class certification, we accord the district court noticeably more deference than when we review a denial of class certification." *Id.* Other circuits draw no such distinction.

(12) "Rigorous" versus "permissive" (a)(2) and (a)(3) analysis: The panel majority stated that commonality is "construed permissively" and that "one significant issue common to the class may be sufficient . . . ." *Id.* at 599. It held that typicality is also judged permissively. *Id.* at 614. But this Court, in *Falcon*, mandated a "rigorous analysis." 457 U.S. at 161.

We elaborate on some but not all of these reasons for granting the petition.

REASONS FOR GRANTING THE PETITON

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE RECURRING QUESTION OF WHETHER CLASSES CAN BE CERTIFIED THAT WOULD BE UNMANAGEABLE UNLESS FORMULA RELIEF WERE GRANTED TO NON-VICTIMS.

Under all trial plans discussed or proposed to make manageable a class now estimated to be approximately

3,000,000,[6] a pool of money will be calculated based on expert testimony, and distributed by formula to victim and non-victim alike. This procedure, under which Wal-Mart is precluded from proving which back-pay claimants are not discriminatees, conflicts with § 706(g)(2)(A) (court has no authority to award back pay to non-victims), as construed in at least five U.S. Supreme Court decisions, and with the Rules Enabling Act. Furthermore, it conflicts with § 706(g)(2)(B) (mixed motive; employer proved to be biased can avoid back pay by proving same decision would have been made in non-discriminatory environment).

Under any of the trial plans proposed or discussed (none of which has been approved even by the panel majority) the defendant will not be given the opportunity, at any stage of the case, to demonstrate that particular class members are not discrimination victims. Thus, numerous class members who are not discriminatees will recover back pay. That approach is incompatible with Title VII and due process.

The district court recognized, and the Ninth Circuit did not dispute, that the case was manageable as a class only if Wal-Mart was denied the right (i) to prove, at any phase of the trial, that particular persons (or groups of persons, such as employees at particular stores)[7] were

6. The panel majority's lower estimate ignores the fact that every woman hired since the year 2003, when class certification was briefed and argued, has been added to the class.

7. The parties' briefs reveal that the undisputed statistical evidence is that there is no statistically significant difference in pay between men and women at more than 90% of Wal-Mart (cont'd)

not discriminated against, and (ii) to contest the eligibility of those individuals to back pay.

Under the district court's trial plan, which the majority neither approved nor disapproved, a "formula" would be used to determine the total amount of back pay. The trial plan envisions appointing a special master to identify the potential discriminatees, using "objective" evidence captured in Wal-Mart's personnel database (which, the court acknowledged, lacks relevant information such as the principal determinant of starting pay, prior experience, ER 1213).[8]

This procedure simply and demonstrably violates § 706(g)(2)(A) of Title VII. The mode of adjudication of a Title VII class action has been established since *Teamsters v. United States*, 431 U.S. 324 (1977). In Phase I, plaintiffs carry the burden of demonstrating that a pattern or practice of discrimination generally exists. Each class member seeking monetary relief

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stores nationwide, and that at 35-40% of the stores any disparity tends to favor *women*. The undisputed statistics thus suggest that the class includes hundreds of thousands of women who work at stores where women were statistically favored and thus do not appear to be even potential discriminatees.

8. This means, for example, that a female meat cutter with one year of experience, hired at $15 per hour, on the same day that a male meat cutter with 20 years of experience is hired at $16 per hour, will be statistically presumed to be a discrimination victim and entitled to back pay. The potential discriminatees would receive back pay according to formula, with no opportunity for the defendant to prove the absence of discrimination.

enters Phase II with a presumption in her favor, but the employer has an opportunity to prove that, despite the finding of a pattern of discrimination, a particular claimant was not a victim and is not entitled to relief. But here there will be no Phase II.

The federal courts are not free to sacrifice substance in the name of procedure. Section 706(g) of Title VII provides, in relevant part: "No 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 . . . ."

Thirty years of Supreme Court cases have explained the origin and significance of that section. *Teamsters* made clear that mere membership in a disadvantaged class is insufficient to warrant judicial relief: "The [district] court will have to make a substantial number of individual decisions in deciding which of the minority employees were actual victims." 431 U.S. at 371. *Accord: Id.* at 361-62 ("To determine the scope of individual relief" following a pattern or practice finding, the employer may "demonstrate that the individual . . . was denied an employment opportunity for lawful reasons.").

Teamsters reaffirmed the holding of *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The Court in *Franks* (per Brennan, J.) cautioned that, even after a finding of a pattern or practice of discrimination at Phase I, the employer in the remedial phase will have the opportunity "to prove that [specific] individuals . . . were not in fact victims of . . . discrimination." *Id.* at 772.

Then, in *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977), the court of appeals had certified a class notwithstanding the district court's finding that certain persons were not qualified for the jobs they sought. This Court unanimously reversed: "Even assuming, *arguendo*, that the company's failure even to consider [plaintiffs'] applications was discriminatory, the company was entitled to prove at trial that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event." *Id.* at 404 n.9.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court again considered the issue of relief to persons not shown to be discrimination victims. The statute "provide[s] make-whole relief only to those who have been actual victims of illegal discrimination." *Id.* at 580. This Court reviewed the legislative history, noting that Title VII's opponents had sought to scuttle the bill by speculating that employers could be ordered to grant formula relief to non-discriminatees. The *Stotts* Court quoted Senator Hubert Humphrey's dispositive response in the legislative history at the time:

> [Under the proposed bill] [n]o court order can require . . . payment of back pay for anyone who was not . . . refused employment or advancement . . . by an act of discrimination forbidden by this title. This is stated expressly in [§ 706(g)] . . . .

Id. (quoting 110 Cong. Rec. 6549 (1964)) (remarks of Sen. Humphrey). *Stotts* also quoted "the authoritative" interpretative memorandum of the bill by Senators

Clark and Case, "the bipartisan 'captains' of Title VII." *Id.* at 580 n.14. Under the proposed bill, those Senators explained, "a court was not authorized to give [any relief] to nonvictims." *Id.* at 581 (quoting 110 Cong. Rec. at 7214).

Where there is a pattern or practice of discrimination, a court of course may order injunctive or other affirmative relief to put a stop to the discriminatory practice. But individual-specific monetary or equitable relief cannot be granted to non-victims, *Stotts* explained. This Court cited Title VII's bipartisan sponsors' newsletter: "[N]ot even a court, much less the [Equal Employment Opportunity] Commission, could order . . . payment of back pay for anyone who was not discriminated against in violation of this title." *Id.* at 581-82 (quoting 110 Cong. Rec. at 14465).

Thereafter, in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court considered the special problem of plaintiffs who may have been denied job benefits partly for legitimate and partly for discriminatory motives. Citing § 706(g), the Court reiterated "that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. [Citations to *Franks, Teamsters* and *Rodriguez* omitted.] These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination . . . ." *Id.* at 245. Systemic discrimination is exactly the allegation here.[9]

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9. The Civil Rights Act of 1991 codified *PriceWaterhouse* in part and modified it in part on grounds not material here. "The 1991 Act affirmed the *PriceWaterhouse* holding that mixed

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The *en banc* majority's decision here is irreconcilable with *Teamsters* and the other above-described cases of this Court construing § 706(g).[10] What has essentially been done is that substantive law (Wal-Mart's right not to pay money to non-victims) has been ignored in order to cram a particular case into the class action device.[11] The Rules Enabling Act says otherwise. 28 U.S.C.

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motive is an affirmative defense" for the employer to invoke. Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 99 & n.318 (4th ed. 2007) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)) (permitting the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor").

10. The *en banc* majority relies on the outlier case of *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), which was a class action protesting torture, summary execution and disappearance at the hands of Ferdinand Marcos, the Philippines' former President. *Id.* at 771. Even ignoring the outlier nature of *Hilao*, it was not an employment discrimination case. Thus, § 706(g) and the *Teamsters* line of Supreme Court decisions, barring relief to non-victims, were inapplicable.

11. One fallacy, not expressed in but perhaps underlying the *en banc* majority's decision, is that it must be "this class or no class," and that Wal-Mart because of its size is seeking an effective exemption from the law. Not so. More narrowly tailored litigation of course is possible. Here, as noted above, the undisputed store-by-store statistics show that only 10% of Wal-Mart stores had a statistically significant difference in pay (with one-fourth of those stores favoring women). If this Court reverses class certification, the nationwide consortium of law firms representing plaintiffs surely will bring individual store class actions at the stores where the statistics indicate that a real problem may have existed in the past. Wal-Mart stores are
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§ 2072(b). As the Supreme Court said, in discussing Rule 23:

> The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (internal quotation marks and citations omitted); *accord*: *e.g.*, *In Re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected.").

II. THE NINTH CIRCUIT'S REFUSAL TO RESOLVE THE DIRECT CONFLICT BETWEEN TWO STATISTICAL APPROACHES (AGGREGATED VERSUS STORE-BY-STORE) DIRECTLY CONFLICTS WITH THE SECOND CIRCUIT'S REPUDIATION OF THE *CARIDAD* DECISION IN *IPO* AND THE THIRD CIRCUIT'S *HYDROGEN PEROXIDE* DECISION.

There could not be a more direct conflict between the two sides' statistical experts. The lower court record reveals that Wal-Mart's statistical expert did two different store-by-store studies: (1) she compared each store's entire store operations, excluding only a

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large, and an individual store class action would average hundreds of class members, the size of a typical, manageable Title VII class action.

separate line of business, the grocery departments, for those stores that had grocery departments; and (2) she compared the core merchandising business of each store, and, separately, the specialty departments such as tires, hearing aids, optical and grocery. Each led to substantially similar findings: At 90% of Wal-Mart's 3,400 stores, there was no statistically significant difference in pay between men and women; at 30-40% of the stores women were favored, although not to a statistically significant degree. Women were favored in 2.5% of the stores to a statistically significant degree; 7.5% of the stores favored men to a statistically significant degree. Plaintiffs' expert admitted that he began a store-by-store analysis, but abandoned it. He submitted only aggregated statistics, nationwide and by region (a region includes approximately 80 stores). The district court refused to resolve the conflict, citing the now repudiated Second Circuit decision in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), for the following proposition: "The statistical dueling in which defendant sought to engage the Court was not relevant to the certification determination . . . ." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 159 n.29 (N.D. Cal. 2004) (internal quotations to *Caridad* omitted).

The Ninth Circuit majority purports to agree with the recent seminal opinions of the Second and Third Circuits in *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), *decision clarified on denial of reh'g*, 483 F.3d 70 (2d Cir. 2007), and *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008). *Dukes*, 603 F.3d at 594. *IPO* repudiated *Caridad*. Both *IPO* and *Hydrogen Peroxide* held that conflicts between experts must be resolved at the class certification stage

if relevant to Rule 23 issues even if also relevant to the merits. But the *en banc* panel majority then limits the *IPO/Hydrogen Peroxide* requirement to resolve conflicts between dueling experts to securities class actions despite the fact that *Hydrogen Peroxide* was not a securities class action, it was an antitrust case. *Id.* at 610. Then, out of whole cloth, the Ninth Circuit creates a Title VII exception to the rule that conflicts between dueling experts must be resolved when relevant to class certification issues:

> [I]n contrast to a securities class action based on a fraud-on-the-market theory, in a pattern and practice discrimination case, a plaintiff will typically not come to court in the first place without anecdotal evidence. For practical purposes . . . the plaintiff's statistical evidence does not *overlap* with the merits, it largely *is* the merits. [citations omitted] This means that disputes over whose statistics are more persuasive are often not disputes about whether the plaintiffs raise common issues or questions, but are really arguments going to proof of the merits.

Id. at 591 (emphasis in original).

The conflict between the experts could not be more critical. Plaintiffs' theory, as the dissent points out (*Id.* at 628), is purely and simply that individual store managers using subjective judgments made biased decisions. But the store-by-store statistical analysis, if accepted as the more probative for Rule 23 purposes, demonstrates a total lack of commonality and typicality.

As the dissent points out, a female class member in California, where perhaps the statistics indicate men are favored, has nothing in common with a female class member in Wyoming, where the statistics might indicate that females are favored. *Id.* at 632 (dissent).

The Second and Third Circuits laid down a rule of law applicable to all requests for Rule 23 certification: Where there is an overlap between expert testimony relevant to Rule 23 requirements and the merits, conflicts between experts must be resolved. The Ninth Circuit's refusal to allow this in Title VII cases creates the clearest possible circuit conflict.

III. IN APPROVING A MULTIPLE-FACILITY EXCESS SUBJECTIVITY NATIONWIDE CERTIFICATION BASED ON AGGREGATED STATISTICS, THE NINTH CIRCUIT HAS CREATED THE CLEAREST POSSIBLE CONFLICT WITH THE D.C. CIRCUIT.

Even without the store-by-store statistics referenced above, it is intuitively obvious that when the plaintiffs' theory is "excess subjectivity" – that managers at geographically separate locations made biased subjective judgments at the local level – the effect of these subjective judgments would differ facility-by-facility, rendering a multiple-facility excess subjectivity case, absent unusual facts, analytically impossible. There would be no commonality and typicality – every location would require a separate analysis. That is precisely what the D.C. Circuit has held.

In *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), a national origin lending discrimination case, the

allegation was that multiple-facility decisionmaking was subjective and led to discrimination. The D.C. Circuit affirmed a denial of class certification:

> Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist.

Id. at 632.

> [T]heir claims arise from multiple individual decisions . . . . [Plaintiffs did] not cite a single reversal of a district court's denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers. [numerous citations omitted]

Id. at 633. Plaintiffs argued, as do the plaintiffs in the Wal-Mart case, that excess subjectivity was both disparate treatment and disparate impact. The D.C. Circuit rejected the idea that either could be attacked on an excess subjectivity theory spread over numerous decisionmaking locations: The "subjective decisionmaking process constitutes the [allegedly] common facially neutral practice." *Id.* at 633-34. "We reject both theories and instead affirm the district court's denial of class certification because the appellants failed to show a common facially neutral . . . policy . . . ." *Id.* at 634.

In language equally applicable herein, the D.C. Circuit stated: "It does not suffice under Rule 23(a)(2) to show an ethnic imbalance . . .; rather the appellants

must show that a common facially neutral policy caused the imbalance." *Id.* at 635.

The D.C. Circuit in *Love v. Johanns*, a companion case charging sex discrimination in lending at multiple geographic locations, noted in language also equally applicable to the Wal-Mart case that if the class was certified "the outcome . . . would nevertheless turn on a series of individualized inquiries into . . . practices in more than 2,700 . . . offices across the country . . . ." *Id.* at 730. "The District Court concluded that the geographic dispersal and decentralized organization . . . 'cut[] against any inference for class action commonality.'" *Id.*

Perhaps the most extensive analysis of why an excess subjectivity multiple-facility class action cannot be certified was done in *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001). After reviewing numerous excess subjectivity multiple-facility cases, the court denied class certification because plaintiffs seemed to be contending that the employer "had a centralized policy of decentralization, which is insufficient . . . to satisfy commonality or typicality" with respect to a multi-facility class. *Id.* at 670. The court noted that this Court in *Falcon* required significant proof to justify certification of a broad class based on excess subjectivity and this is not shown by aggregated statistics.

IV. THE *EN BANC* COURT'S WILLINGNESS TO CERTIFY THIS NATIONWIDE CLASS WITHOUT AN APPROVED TRIAL PLAN DIRECTLY CONFLICTS WITH THE THIRD CIRCUIT'S RECENT DECISION IN *HOHIDER*.

Hohider v. United Parcel Service, Inc., 574 F.3d 169 (3d Cir. 2009), reversed a nationwide class certification in an employment discrimination case. Justice Sandra Day O'Connor sat on the unanimous panel by designation. The Third Circuit rejected the concept of a conditional certification, holding that a trial court must make a definitive determination that the requirements of Rule 23 have been met and cannot rely on later developments to determine whether certification is appropriate. The Third Circuit relied on the advisory committee's 2003 note to Rule 23 in holding that there must be an approved "trial plan." The Third Circuit concluded: "The court's deferral of this analysis [how the trial plan would deal with monetary relief issues] post-class certification was an abuse of discretion." *Id.* at 202.

What the Third Circuit rejected in *Hohider* is exactly what the *en banc* majority did in the instant case. The history of the efforts of the Ninth Circuit panel and later the *en banc* court to come up with a trial plan that met statutory and due process requirements is instructive. The original panel decision affirmed the trial court's trial plan, describing it as follows:

> [T]he district court reasoned that if, at the merits stage, Wal-Mart was found liable of discrimination, the court could employ a

> formula to determine the amount of back pay and punitive damages owed to the class members.

In sections of its opinion entitled "*Teamsters* does not require individualized hearings," "Title VII does not require individualized hearings," and "Statistical methods may be applied to determine relief," the original panel expressly held that this trial plan was permissible. *En banc* review was sought. The CELC amicus brief in support of *en banc* review focused on the statutory language prohibiting any back pay to non-discriminatees and the *Teamsters* line of cases, requiring a Phase II at which the employer could contest individual entitlement to monetary relief. The panel reassumed jurisdiction, gutted its original opinion, took out everything pertaining to a defense of the district court's trial plan, and merely held that it was confident that the district court could come up with some trial plan that would meet statutory and due process requirements.

The *en banc* panel majority has now done the same thing:

> At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself), but simply note that because there are a range of possibilities–which may or may not include the district court's proposed course of action-that would allow this class action to proceed in a manner that is both manageable and in

> accordance with due process, manageability concerns present no bar to class certification here.

Dukes, 603 F.3d at 625.

There is the clearest possible conflict between the Third Circuit's requirement of a manageable trial plan as a condition of class certification, and the Ninth Circuit's affirmance of a nationwide certification without an approved trial plan.

CONCLUSION

The Petition should be granted to resolve the numerous conflicts between the Ninth Circuit *en banc* decision, other circuits, the statute, and this Court's prior opinions. Only in the Ninth Circuit is, as the dissent makes clear, nationwide Title VII class certification automatic based simply on the submission of three categories of evidence: (1) the opinion of a sociologist which will not be reviewed under Daubert; (2) anecdotal claims of discrimination from 1/100th of 1% of the class which cannot be tested; and (3) aggregated nationwide statistics which are exempt from the requirement of resolving the conflict between the experts – the issue of which expert's opinion is more probative with respect to Rule 23 issues. Dissent, *Id.* at 652 ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies . . . based on nothing more than general and conclusory [expert] allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.").

Respectfully submitted,

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