

No. 10-277

**In The
Supreme Court of the United States**

—◆—
WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, et al.,
Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF AMICUS CURIAE THE INSTITUTE
FOR WOMEN'S POLICY RESEARCH
IN SUPPORT OF RESPONDENTS**

—◆—
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**STATEMENT OF INTEREST
OF AMICUS CURIAE¹**

Amicus curiae, The Institute for Women's Policy Research (IWPR), is an independent, non-profit research organization that conducts rigorous research and disseminates its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. IWPR focuses on issues of poverty and welfare, employment and earnings, work and family issues, health and safety, and women's civic and political participation. IWPR is particularly concerned with identifying the causes and consequences of the persistent gender wage gap for the welfare and economic prosperity of women and their families. Economic research suggests that discrimination against women in hiring, promotions, and compensation accounts for a significant component of the gender wage gap. The gender wage gap is a major contributing factor to poverty; IWPR research finds that if women's hourly earnings rose to the level of similarly qualified men's, eliminating the gender wage gap, poverty rates among families with working women would be reduced by half. See Heidi Hartmann, et al., *Equal Pay for Working Families*:

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from IWPR, its members, and counsel made any monetary contribution towards the preparation and submission of this brief. Letters of consent from the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

National and State Data on the Pay Gap and its Costs, IWPR (1991), <http://www.iwpr.org/publications/pubs/equal-pay-for-working-families-2>.



SUMMARY OF ARGUMENT

IWPR submits this brief in support of Respondents who are seeking affirmance of the order of class certification generally, and specifically, certification under Rule 23(b)(2). Title VII is a remedial statute providing “make whole relief,” including injunctive relief, to those subjected to discrimination in the workplace. Rule 23(b)(2) allows such relief, and courts, including this one, have long recognized the importance of injunctive relief for remedying systemic employment discrimination. The injunctive relief sought by Respondents will potentially affect the lives of numerous current and future female employees.

This brief reviews social science literature and research, which demonstrates that class actions play a significant societal role in remedying systemic employment discrimination because individual discrimination lawsuits almost never result in meaningful classwide injunctive relief. Meaningful injunctive relief obtained through class action litigation includes comprehensive changes to employment policies and practices that minimize the operation of workplace biases and create a level playing field on which all workers can prosper and advance regardless of their race, sex, or color. Injunctive relief often results in

sustained change in policies and practices in companies and throughout industries. To disallow certification under Rule 23(b)(2) would make it difficult, if not impossible, for plaintiffs to obtain the comprehensive injunctive relief that is necessary to remove barriers to equal employment opportunity. It is thus critical that the class certification order in this case be affirmed in order to effectuate the purposes of Title VII.



ARGUMENT

I. CLASS CASES, WHILE RARE, ARE NECESSARY TO REMOVE BARRIERS TO EQUAL EMPLOYMENT OPPORTUNITY.

The purpose of Title VII of the Civil Rights Act is to provide equal employment opportunities for women and minorities. Recognizing that employment discrimination cannot be eradicated without focusing on the organizational practices that perpetuate gender and racial inequality, Congress has called upon employers “to modify employment practices and systems which constitute [. . .] barriers to equal employment opportunity.” 29 C.F.R. § 1608.1 (2008); *see also* 42 U.S.C. § 2000e-2 (1964); H.R. Rep. No. 92-238 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2149-50 (“Unrelenting broad-scale action against patterns or practices of discrimination is . . . critical in combating employment discrimination.”). Despite this call for employers to create equal opportunities for all individuals, the current litigation landscape suggests that self-initiated organizational intervention is rare,

making the class action litigation device a critical driving force for ensuring equal employment opportunities.

A. Class Actions Are an Important Vehicle for Obtaining Significant Injunctive Relief Unavailable in Individual Plaintiff Cases.

Class actions alleging employment discrimination are extremely rare. *See* Laura Beth Nielsen, et al., *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003*, Am. Bar Found., 12-13 (Oct. 29, 2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf. “[T]he class action . . . has withered, with only fifty-one employment discrimination class actions filed in Fiscal Year . . . 1989.” John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 984, 1019 (May 1991). Requests for class action certification have remained low since then; only three percent of all employment discrimination cases filed from 1988 to 2003 request class certification. *See* Nielsen, *Contesting*, *supra*, at 12-13.

Notwithstanding the relatively small number of employment discrimination class actions that are filed, class actions “are more likely to receive favorable outcomes, non-monetary benefits, monetary relief, and changes in employment policy, all else remaining

equal.”² *Id.* at 269; see Nielsen, *Contesting*, *supra*, at iii (class actions have a 50% chance of success at trial compared with a 30% chance for individual cases); Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 660 (Dec. 2003) (“private class action lawsuits” “represent the emergence of an important . . . form of private institutional reform litigation in which plaintiffs seek organizational change that will reduce the incidence of discrimination by individuals and groups in the workplace by altering the context in which decisions are made”).

B. Certified Class Actions Achieve Meaningful Class-Wide Injunctive Relief.

Most certified employment discrimination class actions seek injunctive relief to change the organizations’ employment practices and policies, and social science research suggests that these changes generate positive results. See Green, *supra*, at 659-60, 682-724; Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev. 367, 370 (2008) (“Although the total number of

² Social science research has found that individual charges of discrimination are less likely to be successful due to employers’ advantages in legal experience and resources. C. Elizabeth Hirsh, *Settling for Less? Organizational Determinants of Discrimination-Charge Outcomes*, 42 Law & Soc’y Rev. 239, 248-49 (2008) (“employers enjoy greater resources and exclusive access to key evidence relevant to workplace discrimination claims, as compared to the typical worker”).

employment discrimination class actions may not be large . . . , their effects on corporate employment practices – even for smaller employers who pattern after the larger shops – can be immense.”); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (Apr. 2001) (detailing litigation-induced personnel policy changes that effectively solved gender inequities).

Certified employment discrimination class actions brought by plaintiffs represented by private law firms typically result in the provision of substantial injunctive relief. *See generally* Ariane Hegewisch, Cynthia Deitch & Erin V. Murphy, *Ending Sex and Race Discrimination in the Workplace: Legal Interventions that Push the Envelope*, IWPR (publication forthcoming 2011), <http://www.iwpr.org/initiatives/ending-sex-and-race-discrimination-in-the-workplace-1/view>;³ Levit, *supra*, at 385-405 (detailing changes achieved by consent decrees in several large class actions).

These remedies include requiring employers to post notices of job vacancies; provide job training and

³ This report was produced by IWPR at the conclusion of a research project that examined the injunctive relief (changes in employment policies and practices) obtained in sex and race discrimination cases. The report is based on the analysis of over 500 consent decrees that became effective between 2000 and 2008. The report includes an in-depth review of consent decrees resolving four class action sex discrimination cases.

mentoring opportunities; establish objective criteria for hiring, assignments, promotions, and terminations; diversify recruitment efforts; and appoint a monitor to ensure compliance with consent decree requirements. Hegewisch, et al., *Ending, supra*, at 35-36. These types of policy changes achieved through injunctive relief have been shown to be most effective in remedying long-term issues of workplace discrimination. *Id.*; Levit, *supra*, at 372-73, 414-24 (finding consent decrees that emphasize accountability and transparency are “absolutely critical”); Alexandra Kalev, et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589, 610-11 (Aug. 2006) (same).

Research shows that class actions are more likely than individual lawsuits to generate each of these types of systemic remedies. *Id.* (whereas 100% of class action consent decrees included some of the above provisions, only 34% of EEOC or DOJ-litigated lawsuits involving 20 or more plaintiffs provided for any such remedial measures); Laura Beth Nielsen, et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (June 2010) (finding that injunctive relief in individual lawsuits is very rare and typically limited to requests for reinstatement or retroactive promotion).

These organization-wide policy changes ensure a fairer work environment for current and future

workers who were not actively involved in the underlying litigation. Hegewisch, et al., *Ending, supra*, at 7; Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 Law & Soc. Inquiry 855, 890 (2006) (finding “policy interventions that stimulate change in organizational routines appear to have significant and lasting effects on workforce diversity”). Thus, social science research has shown that systemic injunctive relief obtained in class actions can provide meaningful long term changes to discriminatory personnel practices.

II. WITHOUT CLASS ACTIONS, THERE WILL BE NO EFFECTIVE REMEDY FOR SYSTEMIC DISCRIMINATION.

A. Organizations Are Unlikely to Initiate Change Independently.

Sociologists and organizational researchers have long recognized that inertia prevents organizations from changing voluntarily. See Arthur L. Stinchcombe, *Social Structure and Organizations*, in *Handbook of Organizations*, 142 (James G. March ed. 1965); Michael T. Hannan & John Freeman, *Structural Inertia and Organizational Change*, 49 Am. Soc. Rev. 149 (Apr. 1984). Inertia is particularly acute regarding changes to personnel policies and practices. Stinchcombe, *supra*; see James N. Baron, et al., *In the Company of Women: Gender Inequality and the Logic of Bureaucracy in Start-Up Firms*, 34 Work & Occupations 35 (Feb. 2007).

Employers' propensity to resist changing personnel policies and practices perpetuates pre-existing corporate cultures and structures. As a result, organizations that had segregated the sexes into different (and unequal) jobs⁴ or failed to assign women to managerial roles in the past are unlikely to change without outside pressure. "[B]usiness as usual" in staffing patterns and intransigence of personnel policies and practices allows discriminatory cultures within organizations to endure and results in barriers for equal advancement opportunities. See Green, *supra*, at 672 ("employers are unlikely to undertake this task [of devising strategies to counteract discrimination] without some outside incentive to do so").

This tendency for organizations to resist change is exemplified by a study of Silicon Valley male-dominated high-technology start-ups, which found that organizational inertia, when combined with a start-up's male-dominated environment "had enduring negative effects, stifling gender integration." Baron, *supra*, at 54.

⁴ The segregation of the sexes into different jobs is a long standing phenomenon. See Barbara F. Reskin & Heide Hartmann, *Women's Work, Men's Work: Sex Segregation on the Job* (1986); Barbara F. Reskin, *Sex Segregation in the Workplace*, 19 Ann. Rev. Soc. 241 (1993); Ariane Hegewisch, et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap*, IWPR Briefing Paper (Sept. 2010), <http://iwpr.org/pdf/C377.pdf>.

Individual lawsuits are unlikely to create sufficient pressure to have a sustained impact on organizational practices and routines. *See* Kalev, *Enforcement, supra* (finding that although individual lawsuits increase managerial diversity, their impact is less sustained and less likely to introduce more systematic changes to organizational routines than are government compliance reviews).

On the other hand, class action litigation can act as a counterweight to the organizational inertia that prevents companies from transitioning to less discriminatory personnel practices. *See* Green, *supra*, at 678 (“The use of the class action device . . . becomes important for privately triggered institutional change; by broadening the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform.”).

One example is the class action gender discrimination lawsuit against Home Depot that spurred positive comprehensive changes in personnel policies and practices that ameliorated the discriminatory effects of an excessively subjective hiring and promotions system. Sturm, *supra*, at 511 (quoting plaintiffs’ counsel who stated, “Home Depot had brilliant managers, but until [the] lawsuit they ha[d] never put the resources and time into personnel practices . . .”).

In short, class action litigation repeatedly has been shown to serve as a catalyst for positive organizational change. *See generally* Sturm, *supra*; Hegewisch, et al., *Ending, supra*; Nielsen, *Contesting, supra*; Kalev, *Best Practices, supra*; Susan Skaggs, *Producing Change or Bagging Opportunity? The Effects of Discrimination Litigation on Women in Supermarket Management*, 113 Am. J. Soc. 1148 (Jan. 2008) (investigating the impact of 19 high profile lawsuits on the retail sector).

B. The EEOC Alone Cannot Effectuate Sufficient Injunctive Relief.

The EEOC, hampered by a lack of resources and other issues, is often limited in its powers to be an agent for meaningful structural employment changes. The EEOC's 2006 Systemic Task Force Report found that the "EEOC does not consistently and proactively identify systemic discrimination."⁵ Leslie E. Silverman, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission*, EEOC, 1 (Mar. 2006), http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf [hereinafter "EEOC Report"] ("the agency typically focuses on individual allegations raised in charges").

⁵ The EEOC defines "systemic discrimination" as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." EEOC Report at 1.

The EEOC's ability to litigate class cases is severely limited by budgetary constraints, which are controlled by Congress. Hegewisch, et al., *Ending, supra*, at 18. For example, between 2000 and 2008, the EEOC's total litigation budget was less than \$4 million in each year – less than the fees and costs incurred in many privately-litigated class action suits. *Id.*

Due to budgetary and other constraints, the EEOC does not make a finding, one way or the other, in nearly 77% of all filed complaints of discrimination. Nielsen, *Contesting, supra*, at 14. Consequently, the EEOC litigates only a small fraction of all charges of discrimination filed with it. *Id.* at 15 (intervening as plaintiff in just 3% of cases); EEOC Report, *supra*, at 18 (“over 90% of the district offices stated that workload constraints prevented devoting staff time to systemic cases”).

Even when the EEOC litigates on a class basis and obtains a consent decree, its consent decrees tend to address fewer issues and deal with smaller employers than consent decrees obtained in private party class action litigation. Hegewisch, et al., *Ending, supra*, at 27-30. For example, EEOC consent decrees tend to focus on posting notices of anti-discrimination policies and diversity training, which have been shown to be less effective than other systemic remedies in reducing workplace discrimination. *Id.*; Levit, *supra*, at 373, 420-22 (“accountability matters more than education in generating organizational change”); Kalev, *Best Practices, supra*, at 611.

Further, “EEOC decrees are less likely than other [private class action] decrees to mandate an actual revision of EEO policies or new or revised grievance and complaints procedures.” Hegewisch, et al., *Ending, supra*, at 26.

These differences between EEOC and private party class action consent decrees may stem, in part, from the EEOC’s “dual role as both the institution defining good practice and the institution responsible for litigating against bad practice.” *Id.* at 30 (quoting an EEOC regional attorney who explained, “Our office’s position is that we don’t make any recommendations . . . because we don’t want to seem to be . . . indemnifying them against any future suits . . .”). *Id.* Private attorneys litigating class actions are under no such constraints, and are therefore able to work with employers to develop robust remedies that effectively change discriminatory personnel practices. *See, e.g., id.* at 68-80 (detailing development and effects of consent decree in *Beck v. Boeing*, a gender discrimination class action).

C. Individual Cases Rarely Include Meaningful Injunctive Relief.

In many circuits, it is not possible to obtain classwide injunctive relief in individual cases. *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 963 (10th Cir. 2002) (finding injunctive relief inappropriate because “[t]he district court’s injunction was based upon evidence of only a single

instance of discriminatory behavior”); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766 (4th Cir. 1998) (in individual discrimination case, district court “inappropriately grant[ed] what amounts to class-wide relief”); *Butler v. Dowd*, 979 F.2d 661, 674 (8th Cir. 1992) (“This is not a class action. [Plaintiff], therefore, is not entitled to the injunctive relief he requests.”); *Williams v. Owens*, No. 90-5918, 1991 WL 128745, at *3 (6th Cir. July 16, 1991) (unpublished) (“the district court abused its discretion in fashioning its injunctive relief to run in favor of nonparties despite the fact that plaintiff did not bring suit as a class representative”); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989) (“Ordinarily, classwide relief, such as [an] injunction . . . which prohibits sex discrimination . . . , is appropriate only where there is a properly certified class”).

As a result, individual litigants almost always exclusively ask for monetary relief, and any injunctive relief that is sought is typically limited to individual injunctive remedies such as reinstatement, rather than requesting broader systemic changes. *See Nielsen, Individual, supra*. Given the constraints on relief available in individual lawsuits, class actions are an essential vehicle for organizational change and eradicating systemic discrimination in the workplace.

III. CLASS ACTIONS PROVIDE IMPORTANT INJUNCTIVE RELIEF BY LEADING EMPLOYERS TO ADOPT CORPORATE PERSONNEL PRACTICES THAT AMELIORATE THE EFFECT OF BIAS AGAINST WOMEN.

Decades of sociological, economic, and management research have demonstrated that certain organizational characteristics and practices, such as those identified by Respondents, allow biases to adversely affect workers on the basis of their sex. The injunctive relief obtained through class actions achieves reforms in personnel practices that, according to empirical research, enhances equal opportunity for all workers, regardless of their gender, primarily by reducing the exclusionary effects of biases emanating from subjective decision making. Title VII holds employers accountable for eliminating the use of personnel practices that serve as barriers to equal employment opportunity. In order to remove such barriers, it is particularly important that there be a commitment to equal opportunity initiatives at the very top of the company.

Personnel practices achieved through consent decrees that social science research has demonstrated increase equal access to career opportunities and rewards include: (1) making an individual or entity within the organization responsible for managing equal employment opportunity initiatives;⁶ (2) implementing human

⁶ See Susan Bisom-Rapp, Margaret S. Stockdale & Faye J. Crosby, *A Critical Look at Organizational Responses to and*
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resource management practices, such as formal job analyses, structured interviews, and validated assessment tools and procedures⁷; and (3) creating accountability structures that include (a) monitoring of personnel decisions to ensure that they are not influenced by irrelevant personal characteristics,⁸ and (b) holding decision makers accountable for making

Remedies for Sex Discrimination, in Sex Discrimination in the Workplace 280 (Faye J. Crosby, et al., eds., 2007); Fletcher A. Blanchard, *Effective Affirmative Action Programs, in Affirmative Action in Perspective* 193-208 (Fletcher A. Blanchard & Faye J. Crosby eds., 1989); Michael A. Hitt & Barbara W. Keats, *Empirical Identification of the Criteria for Effective Affirmative Action Programs*, 20 J. Applied Behav. Sci. 203 (1984); Kalev, *Best Practices, supra*; Alison M. Konrad & Frank Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 Acad. Mgmt. J. 787 (1995); Ann M. Morrison, *The New Leaders: Guidelines on Leadership Diversity in America* (1992).

⁷ These practices reduce the likelihood that subjective decision making processes will allow biases to impact employment decisions. Madeline Heilman & Michelle Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings, in Beyond Common Sense: Psychological Science in the Courtroom* 128, 135 (Eugene Borgida & Susan T. Fiske eds., 2008); Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715 (2000); Bisom-Rapp, *supra*, at 281; Michael A. Campion, Elliot D. Pursell & Barbara K. Brown, *Structured Interviewing: Raising the Psychometric Properties of the Employment Interview*, 41 Personnel Psychol. 25 (1988); Stephan J. Motowidlo, et al., *Studies of the Structured Behavioral Interview*, 77 J. Applied Psychol. 57 (1992).

⁸ See Konrad & Linnehan, *supra*; Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 18 Acad. Mgmt. J. 769 (1975); Bisom-Rapp, *supra*, at 281.

unbiased decisions. In sum, social science research has shown that making employers accountable through injunctive relief achieved in class action litigation is vital to creating equal employment opportunities.

A. Successful Equal Employment Opportunity Efforts Must Come from the Highest Levels.

Consent decrees and injunctive relief increase equal employment opportunities by holding employers accountable and requiring them to change their personnel practices. Social scientists and management experts agree that genuine and visible commitment to the organization's diversity efforts by its most senior officer is critical to the success of those efforts; "diversity programs" without substantial commitment from the highest levels are insufficient to effect change. Robert L. Dipboye & Adrienne Colella, *The Dilemmas of Workplace Discrimination, in Discrimination at Work: the Psychological and Organizational Bases* 424, 425-62 (R.L. Dipboye & A. Colella eds., 2005); Ruth G. Shaeffer & Edith F. Lynton, *Corporate Experience in Improving Women's Job Opportunities*, Report No. 755, The Conference Board (1979). As social scientists concluded based on a case study of a compensation system, the lack of accountability for decisions, the lack of a normative structure defining appropriate action, and greater the ambiguity in performance criteria, the more likely personnel decisions will be influenced by bias. Leaders must

recognize the potential for discrimination in traditional organizational practices and structures and must signal that these are not acceptable. Top leaders can discourage discrimination by implanting systems of accountability that make rewards contingent upon meeting diversity goals. Marta M. Elvira & Mary E. Graham, *Not Just a Formality: Pay System Formalization and Sex Related Earnings Effects*, 13 *Org. Sci.* 601, 614 (2002); Michele J. Gelfand, et al., *Discrimination in Organizations: An Organizational-Level Systems Perspective*, in *Discrimination at Work: The Psychological and Organizational Bases* 89-116 (R.L. Dipboye & A. Colella eds., 2005).

Top leaders' commitment to equal opportunity for all employees makes a difference because successful diversity efforts depend on top leaders conferring on a high-level manager or task force responsibility for ensuring that women have increased access to managerial jobs. As management experts and corporate leaders have long understood: a company that wants to achieve a goal puts someone in charge of executing a plan and holds him or her responsible for reaching the goal.

Social science research confirms that diversity task forces and senior managers charged with finding ways to increase women's advancement opportunities can be effective when they identify problems, develop remedies, and require accountability. See Kalev, *Best*

Practices, supra; Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 Harv. J.L. & Gender 279, 280 (2007); Frank Dobbin, et al., *Diversity Management in Corporate America*, 6 Contexts 21 (2007); Katherine C. Naff & J. Edward Kellough, *Ensuring Employment Equity: Are Federal Diversity Programs Making a Difference?*, 26 Int'l J. Pub. Admin. 1307, 1327 (2003) (case study of federal agencies successful in promoting and retaining women and African American employees).

B. Consent Decrees Often Include Human Resource Management Practices that Monitor the Potentially Biasing Effects of Subjective Decision Making.

Subjective evaluation and reward practices, similar to the practices Respondents have identified at Wal-Mart, “require[] inference because judgments are based primarily on outcomes and criteria that are open to interpretation.” Heilman, *Subjectivity, supra*, at 128. In situations in which evaluations are subjective, sex stereotypes can result in biased inferences of female workers. *Id.* at 147. This conclusion is reflected in a large body of social science research on the importance of formalization.

For example, “[o]ne of the hallmarks of [Human Resources] systems design is the establishment of objective or formalized criteria for various HR practices, which lead to the elimination of bias . . . in the

implementation of HR practices.” Gelfand, *supra*, at 100. When establishing formalized personnel practices, care must be taken to ensure that the result is not the formalization of discretion that institutionalizes unequal access to attractive work conditions and opportunities, rather than challenging patterns of inequality. Erin L. Kelly & Alexandra Kaley, *Managing Flexible Work Arrangements in US Organizations: Formalized Discretion or “A Right to Ask,”* 4 Socio-Econ. Rev. 379 (2006).

Completely subjective assessments require the use of inferences that are vulnerable to influence by irrelevant and sex-biased factors, such as whether an employee conforms to prescriptive stereotypes about how women ought to be, whether they “fit” into the work environment, or whether they resemble the decision maker or other workers on characteristics that are irrelevant to job performance.⁹ Given that

⁹ Women who engage in “self promotion” come across as less likeable than men, presumably because self promotion violates the female norm of modesty. Laurie Rudman, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. Soc. Issues 743 (2001). Being disliked negatively affects women’s performance evaluations, chance of promotion and pay raises. Madeline Heilman, et al., *Penalties for Success: Reactions to Women Who Succeed at Male Tasks*, 89 J. Applied Psychol. 416 (2004); Madeline Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 J. Soc. Issues 657 (2001); Lisa Sinclair & Ziva Kunda, *Motivated Stereotyping of Women: She’s Fine If She Praised Me But Incompetent If She Criticized Me*, 26 Personality & Soc. Psychol. Bulletin 1329 (2000). According to several case studies, performance evaluations have a weaker effect on

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biases can infiltrate with unchecked subjective decision making, the implementation of formalized criteria in personnel practices, via class action injunctive relief, can play a valuable role in creating equal employment opportunity.

C. Implementing Nondiscriminatory Human Resources Practices through Injunctive Relief

1. Employee Selection and Promotion Processes Used in Consent Decrees

Consent decrees have helped employers implement nondiscriminatory selection practices, which Respondents have identified as an issue at Wal-Mart, including its lack of a job posting system among other potentially discriminatory selection practices. These practices entail: (1) establishing clear guidelines about how positions are filled, which include specifying job requirements and objectively measurable criteria by which candidates will be assessed and compared; (2) ensuring that qualified candidates are aware of openings; (3) developing selection processes that rely

promotion for men than for women, suggesting that other criteria are more important for men. Karen Lyness & Madeline Heilman, *When Fit is Fundamental: Performance Evaluations and Promotions of Upper-Level Female and Male Managers*, 91 J. Applied Psychol. 777 (2006). Women have less access to high-level jobs if the previous incumbent was male. Lisa E. Cohen, Joseph P. Broschak & Heather A. Haveman, *And Then There Were More? The Effect of Organizational Sex Composition on the Hiring and Promotion of Managers*, 63 Am. Soc. Rev. 711 (1998).

only on specified criteria; and (4) ensuring that the selection process and outcomes are transparent and monitored, and that those charged with making a selection/reward decision are held accountable to an internal entity that has the authority to sanction decisions that depart from the organizational guidelines.

Such improvements are important because the more widely an employer communicates job openings, the more likely nontraditional employees will learn about the available positions. Conversely, filling jobs through employee networks in gender and racially homogenous organizations or departments replicates the sex and race composition of current employees. Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210 (2000) (adoption of formal sourcing practices, including job postings, leads to more women in management). Two-thirds of the class action settlements studied by IWPR mandated the open posting of job vacancies, whereas fewer than 5% of the settlements addressing discrimination involving fewer than 20 plaintiffs had the same requirement. Hegewisch, et al., *Ending*, *supra*, at 36 (Table 7).

Similarly, structured promotion interviews often implemented via consent decrees are less biased because they minimize discretionary input on the part of the interviewer and reduce the potential for subjective bias to infect the results. Winfred Arthur, Jr. & Dennis Doverspike, *Achieving Diversity and*

Reducing Discrimination in the Workplace Through Human Resource Management Practices: Implications of Research and Theory for Staffing, Training and Rewarding Performance, in Discrimination at Work: the Psychological and Organizational Bases, 313 (R.L. Dipboye & A. Colella eds., 2005).

2. Consent Decrees Can Also Help Reduce Bias in Appraising Performance.

Formulation of the performance appraisal process is significant because companies vary on how they evaluate employee performance, ranging from reliance on assessor's subjective impressions to reliance on readily observable performance or a set of uniform, pre-established criteria. An organization's position on this continuum has implications for women's access to jobs.

Evaluating persons for employment, promotions, or pay raises requires accurate, relevant, and complete information. The absence of clear criteria increases the likelihood that decision makers will select persons similar to themselves, thereby maintaining the sex composition of the workforce. Gerald R. Salancik & Jeffrey Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 Soc. Psychol. 246, 253 (1978); Cohen, et al., *supra*.

Cognitive biases, such as in-group preferences and stereotypes, can distort subjective impressions, especially of persons who differ demographically from the evaluator. James Baron & David Kreps, *Strategic*

Human Resources: Frameworks for General Managers 224 (1999) (“When the workforce is demographically diverse, the potential for bias in subjective evaluations is greater (where the biases run along race, gender, age, and disability lines).”).

Consent decrees can help employers to create less discriminatory assessment practices in several ways. Consent decrees can require that employers reduce discrimination in assessing performance by using more than one rater, having raters write justifications for their evaluations, and rewarding supervisors for accurate appraisals. Arthur, *supra*, at 319. Consent decrees can also require “objective measures of performance that may be less biased, as long as [they] are *valid* indicators of performance, whereas subjective assessments are “too susceptible to caprice and bias by the evaluator.” Baron, *supra*, at 224.

Additionally, consent decrees can require “[p]erformance management systems that involve explicit performance expectations, clear performance standards, accurate measures, and reliable performance feedback,” and the consistent application of these standards across ratees reduces the chances of discriminatory ratings. H. J. Bernardin, et al., *Effective Performance Management: A focus on precision, customers and situational constraints, in Performance Appraisal: The State of the Art in Practice* 3-48 (J.W. Smither ed., 1998).

In the IWPR study, over seven out of ten class action consent decrees required the establishment of

objective criteria for decisions related to promotions and assignments, whereas fewer than three percent of settlements in DOJ and EEOC-litigated cases of fewer than 20 plaintiffs had similar requirements. Hegwisch, *Ending, supra*, at 36 (Table 7).

D. Implementing Equal Employment Opportunity Practices through Injunctive Relief in Consent Decrees

1. Transparency of Decisions

Consent decrees and injunctive relief that require more transparency in personnel decision making can play a valuable role in increasing equal employment opportunities. Decision makers are more prone to use appropriate criteria when they are aware that others will know the nature of the decision and who made it. See Jennifer S. Lerner & Phillip E. Tetlock, *Accounting for the Effects of Accountability*, 125 Psychol. Bulletin 255 (1999). Thus, identifying the decision maker reduces reliance on social similarity by the decision maker if he expects the information to be released. Salancik & Pfeffer, *supra*, at 253.

A study of race bias in umpires' calls in minor league baseball illustrates the importance of transparency. In general, umpires showed same-race favoritism in calling strikes, but this bias disappeared when electronic scoreboards displayed where the pitch fell in the strike zone. See Christopher A. Parsons, et al., *Strike 3: Discrimination, Incentives*

and Evaluation (Feb. 2009), http://jsulaeman.cox.smu.edu/file/Papers/Parsons+Sulaeman+Yates+Hamermesh_Feb2010.pdf. Thus, increases in the transparency of decision making can increase the equality of opportunities for all employees.

2. Monitoring

The monitoring required by consent decrees can play a valuable role in reducing discrimination. Organizations that routinely monitor their demographic composition across jobs, job groups, salary bands, and divisions and reward diversity efforts are more likely to improve the status and opportunities of female employees than are those that do not.¹⁰ Without monitoring, organizations' leaders remain ignorant of any existing disparities. Monitoring ensures that a supervisor, her or his next-in-command, and the employer know whether its employment processes generate unwarranted disparities and, if so, why. It also allows employers to hold supervisors accountable for using non-exclusionary evaluation and selection criteria in promotion and pay decisions.¹¹

A case study of a corporation illustrates the importance of monitoring. When supervisors' evaluations

¹⁰ See Konrad & Linnehan, *supra*; Kerr, *supra*; Bisom-Rapp, *supra* at 281.

¹¹ Barbara F. Reskin, et al., *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 Ann. Rev. Soc. 335, 364-65 (1999).

of their subordinates were monitored at the next higher supervisory level, the evaluations were unrelated to employees' gender, but when a different set of managers whose decisions were not monitored used these evaluations to set raises, they recommended significantly higher raises for men than for women. See Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 Am. J. Soc. 1479 (2008).¹²

In the IWPR study, almost six out of ten class action consent decrees included requirements for monitoring and analysis of promotion and compensation data, but fewer than 2% of settlements in cases of fewer than 20 plaintiffs had the same requirement. Hegewisch, et al., *Ending, supra*, at 36 (Table 7). Class actions, therefore, provide an important mechanism for employer monitoring that guards against discrimination.

3. Accountability

In the absence of guidelines and oversight, managers may have little awareness of and incentive to

¹² According to a survey of 132 large Irish firms, monitoring personnel practices by gender, race-ethnicity, and disability along with other accountability structures was profitable. Firms that implemented these structures were more productive and had lower labor turnover. Claire Armstrong, et al., *The Impact of Diversity and Equality Management on Firm Performance: Beyond High Performance Work Systems*, 49 Human Resource Mgmt. 977, 989 (2010).

suppress stereotypes and are more likely to favor persons of their own sex.¹³ Tying managers' performance appraisal ratings, raises, and bonuses to nondiscriminatory behavior has been found to increase female representation in nontraditional jobs. See Raymond A. Noe, *Employee Training and Development* (2002). Class action consent decrees often do just that.

A large body of social science research indicates that when people expect that they will have to justify their decisions, they scrutinize their behavior more carefully. Thus, the expectation that one may have to account for one's personnel decisions ("accountability apprehension"), reduces the likelihood that personnel decisions will be biased. Frank Dobbin, et al., *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, 34-49 (2009), http://www.wjh.harvard.edu/~dobbin/cv/workingpapers/Someone_to_Watch_Over_Me.pdf.

For example, a case study on how pay was set concluded that "[t]he lack of accountability for

¹³ See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 Soc. Just. Res. 143 (2004); Miles Hewstone, Mark Rubin & Hazel Willis, *Intergroup Bias*, 53 Ann. Rev. Psychol. 575 (2002) (reviewing research on bias in favor of in-groups at the expense of out-groups, including measurement and conceptual issues (especially in-group favoritism vs. out-group dynamics), key moderators of bias, reduction in bias, and association between in-group bias and out-group hostility).

decisions, the lack of normative structure defining appropriate action, and the greater the ambiguity in performance criteria, the more likely personnel decisions will be influenced by bias.” Elvira, *supra*, at 614. Social psychologists have demonstrated that decision makers make less biased decisions when they know that their assessments and their results will be public.¹⁴ Importantly, research subjects who were told that they would be held accountable for their judgments before they began an assessment engaged in more complex thought and made more accurate predictions of the behavior of those they were judging than subjects who had not been told that they would be held accountable. See Phillip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. Psychol. & Soc. Psychol. 700 (1987).

Performance goals that are explicitly geared toward enhancing managerial accountability in reducing discrimination are associated with lower levels of discrimination. U.S. Department of Labor, Office of Federal Contract Compliance Programs, *OFCCP Glass Ceiling Initiative: Are There Cracks in the Ceiling?* (1997).

Accountability structures are ineffective, however, unless an employer designates someone to be responsible for regularly assessing managers’ practices and decisions and for providing feedback to

¹⁴ For a review, see Lerner & Tetlock, *supra*.

those managers. In addition, mechanisms must exist to sanction managers who depart from required practices. See Kalev, *Best Practices*, *supra*. For example, Home Depot increased its demographic diversity in part by insisting that managers follow its standardized hiring procedures. Sturm, *supra*, at 515-16. Class action consent decrees, like the consent decree in *Home Depot*, therefore can serve as an important mechanism for ensuring organizational accountability for equal employment opportunity.

In the IWPR study, half of class action consent decrees included specific provisions for holding supervisors accountable (for EEO implementation), but fewer than one in five settlements in discrimination cases of fewer than 20 plaintiffs had a similar requirement. Hegewisch, et al, *Ending*, *supra*, at 36 (Table 7).



CONCLUSION

It is critical that plaintiffs continue to be able to have claims of employment discrimination certified under Rule 23(b)(2) to challenge systemic bias and obtain comprehensive injunctive and equitable relief necessary to change policies and practices. For these

reasons, amicus curiae respectfully suggest that the class certification order should be affirmed.

March 1, 2011

Respectfully submitted,

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