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

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STATEMENT

This case challenges Wal-Mart's uniform pay and promotion policies for its retail store employees. Those policies fail to provide any application or posting process for promotions to store management or job-related criteria for setting pay or making promotion decisions – standard practices in the American workplace. Instead, Wal-Mart has chosen to adopt and maintain highly subjective policies, which are implemented, monitored and enforced on a daily basis by its Home Office to ensure consistency in results.

These subjective personnel decisions are exercised within a corporate culture that is rife with gender stereotypes demeaning to female employees: Wal-Mart executives refer to women employees as "Janie Qs," approve holding business meetings at Hooters restaurants, and attribute the absence of women in top positions to men being more aggressive in seeking advancement. The record supporting class certification was replete with evidence of the same kind of gender bias attributable to managers at all levels of the company. Thus, for example, named plaintiff Christine Kwapnoski was told that her male co-worker received a large raise "because [he] had a family to support." Wal-Mart's subjective personnel policies have operated as a vehicle for perpetrating gender bias in its pay and promotion decisions.

As Wal-Mart has long recognized, its female workforce has borne the brunt of these subjective policies. Even though its own data shows that its female employees are, on average, better performers and more experienced than their male counterparts, women's pay lags far behind that of male employees in every major job in each of the company's 41 regions. Women at Wal-Mart also face a classic glass ceiling – while women comprise over 80% of hourly supervisors, they hold only one-third of store management jobs and their ranks steadily diminish at each successive step in the management hierarchy.

Relying on long-standing statutory and Supreme Court authority, plaintiffs allege that Wal-Mart's policies discriminate against women in violation of Title VII. The class is limited to female retail store workers, the majority of whom hold one of only five hourly jobs. Regardless of their job titles or store location, these women are subject to the same uniform personnel policies. After a searching review of the substantial evidentiary record, the district court concluded that plaintiffs had satisfied Rule 23.

With this appeal, Wal-Mart attempts to dismantle several fundamental pillars of this Court's employment discrimination class action jurisprudence.

- It disputes that a policy of subjective decision-making is an employment practice that may be challenged under Title VII and would impose heightened Rule 23(a) standards for such cases.

- It would eliminate the use of pattern or practice methods of proof established by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). It would instead require that each woman's claim be litigated individually, even though the company failed to retain records that would allow the district court to conduct reliable individual remedies hearings.
- It would limit certification under Rule 23(b)(2) to cases seeking *exclusively* injunctive or declaratory relief.

These radical and far-reaching proposals to change the law find no support in Rule 23 or Title VII. Instead, they would subvert the goal of allowing workers to vindicate their rights as a class, precluding certification of all but the smallest employment discrimination cases, and would require this Court to overrule 45 years of civil rights and class action precedent. Wal-Mart's arguments also largely ignore – and are inapplicable to – plaintiffs' disparate impact claims where proof of intent is unnecessary.

In place of a single class action in which all common questions would be resolved – one way or the other – Wal-Mart would burden the federal courts with potentially thousands of store-level cases. This outcome would not only waste judicial resources, it would deprive plaintiffs of the ability to challenge and seek relief from Wal-Mart's systemic, company-wide practices. A multiplicity of cases could mask the otherwise unmistakable pattern of discrimination

against women throughout the company and obscure the role of senior management in maintaining this discriminatory system. Finally, many of these claims, which amount to an average annual wage loss of $1,100, would be too small to pursue.

SUMMARY OF ARGUMENT

1. The district court conducted a searching and rigorous analysis of the substantial evidentiary record and correctly applied Rule 23. App. 48a. Wal-Mart ignores the extensive findings of fact below and urges this Court to reweigh a daunting array of factual questions. The district court's decision to certify the class is subject to review for abuse of discretion; its findings are entitled to deference, unless clearly erroneous.

2. With respect to Rule 23(a), plaintiffs have identified an "employment practice" – subjective decision-making adversely affecting women – that may be challenged under either disparate treatment or disparate impact analysis. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301, 302 (1977); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989-91 (1988). Contrary to Wal-Mart's claim that the case is nothing more than a challenge to millions of local decisions, the district court found that Wal-Mart operates through *common* subjective policies implemented by managers at all levels, and that plaintiffs demonstrated a sufficient nexus between

the challenged practices and the adverse outcomes for women to satisfy Rule 23(a). App. 77a-78a, 186a. Cases involving local decisions have long been addressed under the pattern or practice method of proof. *Teamsters*, 431 U.S. at 338, 342 n.24; *Hazelwood*, 433 U.S. at 301, 302.

3. The district court's commonality findings rested on extensive evidence of excessive subjectivity in personnel decisions, guided by a strong corporate culture infused with sexual stereotyping; centralized oversight of decision-making; robust statistical evidence of gender disparities caused by discrimination; and anecdotal evidence of gender bias. App. 226a. The court evaluated the record as a whole and made findings that turned significantly on company documents and testimony, in addition to "statistics, anecdotes and social science."

4. Wal-Mart seeks to impose a host of "heightened" certification requirements, applicable only to Title VII cases challenging a pattern or practice of discrimination facilitated by a policy of excessively subjective decision-making. To satisfy Rule 23, civil rights plaintiffs would bear the burden of proving the merits of their claims to a degree that exceeds the standard required to demonstrate liability under Title VII. Wal-Mart's argument is at odds with the language of Rule 23 and Title VII and this Court's decision in *Falcon*. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

5. Wal-Mart seeks to impose *per se* rules on the kinds of evidence upon which a district court may rely in finding commonality satisfied under Rule 23(a)(2).

a. *Statistics* – Wal-Mart argues that, as a matter of law, only statistical proof disaggregated to the smallest possible unit may support commonality. This view contradicts the pattern or practice theory and ignores the court's finding that managers above the store level make *all* promotion and management pay decisions and must approve *all* hourly pay decisions in excess of a minimal range.

Wal-Mart wrongly asserts that its statistical regressions were "unrebutted" and showed no statistically significant pay rate differences in most stores. Pet. Br. 7, 11, 24. In fact, its regressions were subdivided below "store level," premised on a factual predicate so unreliable that the court struck it from the record, and thoroughly rebutted.

The district court credited plaintiffs' statistical analyses and found that they raised "an inference of company-wide discrimination in both pay and promotions." App. 281a. It analyzed the parties' competing claims concerning statistical aggregation and concluded that plaintiffs' regional analysis raised common issues appropriate for class adjudication. App. 73a.

b. *Anecdotal Evidence of Bias* – The district court properly relied on 120 class member declarations to further support its commonality finding. They vividly confirmed the uniformity of pay and

promotion policies, and the pervasiveness of sexual stereotypes within the company culture. They need not demonstrate claims of individual discrimination or a pattern or practice of discrimination to support commonality.

c. *Social Science* – The district court properly relied on the conclusions of plaintiffs' social science expert – that Wal-Mart's strong centralized common culture sustained uniformity of decision-making, that its highly subjective system was vulnerable to sexual stereotyping, and that its diversity policies failed to mitigate the effect of stereotyping – as additional evidence supporting its commonality finding. The court fully considered Wal-Mart's motion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and made findings sufficient to satisfy *Daubert's* admissibility threshold.

6. The district court made extensive findings to support its conclusion that the class satisfied the typicality and adequacy of representation requirements. Wal-Mart presents no legal argument, but instead asks the Court to revisit factual determinations made below.

7. Wal-Mart would eliminate the "pattern or practice" method of proof, requiring instead that systemic discrimination cases be litigated for both liability and remedies, individual-by-individual and store-by-store. Plaintiffs would be required to prove that "the motive for *every single* discretionary pay and promotion decision affecting every single class

member was discriminatory." Pet Br. 40. Wal-Mart claims a right to mount an individual defense to each class member's claim using Title VII's "mixed motive" provision, even though plaintiffs here do not rely on the mixed motive theory of discrimination. Despite unanimous circuit authority, Wal-Mart argues that back pay determinations could never be performed on a statistical basis, even where, as here, defendant's conduct and record-keeping would make individual determinations unreliable.

8. Wal-Mart would restrict the application of Rule 23(b)(2) to cases seeking *solely* injunctive and corresponding declaratory relief. Its interpretation is inconsistent with the text of the Rule, the Advisory Committee Notes, and the decisions of every circuit court to address the question. The Advisory Committee drafted Rule 23(b)(2) with the intention of permitting certification unless final relief "relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 Advisory Committee's Note (1966).

a. Back pay, when accompanying claims for injunctive relief, is consistent with (b)(2) certification, as every circuit court addressing the issue has concluded. Such claims are integral to Title VII's equitable remedies, can be objectively determined, and arise out of the same conduct generally applicable to the class that supports injunctive relief. Similarly, total back pay will result from the same factor that makes injunctive relief substantial – the size of the affected class.

b. Wal-Mart's contention that monetary claims must predominate because the former employee class members lack standing to seek injunctive relief confuses standing with the test for eligibility for relief under Rule 23(b)(2). Wal-Mart's one-sided calculus discounts the benefits of injunctive relief to current, future, and returning employees. Wal-Mart's rule would require a continual re-examination of the certification decision with normal employee turnover.

c. This Court need not resolve whether punitive damages may be certified under Rule 23(b)(2) because the Ninth Circuit vacated and remanded that claim. There is no support in Rule 23 for Wal-Mart's claim that punitive damages, which focus on defendant's conduct rather than individual harm, may never be so certified.

ARGUMENT

Plaintiffs contend that Wal-Mart engaged in a pattern or practice of discrimination in violation of Title VII's prohibition on disparate treatment. 42 U.S.C. § 2000e-2(a); *Teamsters*, 431 U.S. at 336-38. Wal-Mart's top management implemented and maintained its pay and promotion policies, even though they knew the system disadvantaged qualified female employees and perpetuated a corporate culture rife with gender stereotyping. As this Court has recognized, evidence of a policy pursued with knowledge of its adverse effect on a protected group supports a

finding of intentional discrimination. "[W]hen the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences [here], a strong inference that the adverse effects were desired can reasonably be drawn." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1979); *see also Teamsters*, 431 U.S. at 335 n.15.

Plaintiffs also challenge these subjective practices under the disparate impact theory of discrimination. 42 U.S.C. § 2000e-2(k); *Watson*, 487 U.S. at 989-91. They allege that the subjective pay and promotions policies, while neutral on their face, have disproportionately affected female employees and cannot be justified by business necessity. Wal-Mart's practices – far below the industry norms for corporate personnel practices – have resulted in statistically significant disparities in both pay and promotion for women.

Plaintiffs seek injunctive relief as well as back pay and punitive damages. They do not seek compensatory damages or retroactive promotions. App. 5a. Class Cert. Hearing Tr. at 68-70, 92, Dkt. 618 (N.D. Cal. Sept. 24, 2003).

I. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DETERMINED THAT RULE 23(a) REQUIREMENTS HAD BEEN SATISFIED

After extensive discovery, including over 200 depositions, production of more than a million pages

of documents, and electronic personnel data, plaintiffs assembled a massive record to support class certification. The district court issued a detailed 84-page class certification opinion as well as a lengthy opinion addressing challenges to the parties' expert evidence. App. 162a-283a; Pet. Opp. Add. 4-15. In reaching its conclusion, the district court weighed the evidence, as necessary, to determine whether the elements of Rule 23 had been satisfied, even when Rule 23 elements overlapped with the merits. App. 52a n.20, 65a; *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *see*, *e.g.*, App. 191a (rejecting claim that managers operate stores independently); App. 226a (finding evidence "raises an inference that Wal-Mart engages in discriminatory practices"). The district court's interlocutory decision to certify the class is subject to review for abuse of discretion and its findings are entitled to deference, unless "clearly erroneous." *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 400-01 (1990); *In re Initial Pub. Offerings*, 471 F.3d at 40-41. It properly exercised its discretion in finding Rule 23(a) satisfied.

Wal-Mart asks this Court to start from scratch. It audaciously claims that the district court's extensive factual "'findings' are entitled to no deference." Pet. Br. 18 n.2. It raises a host of objections to the district court's findings, based upon a selective description of the evidence, and invites the Court to decide anew whether each of the Rule 23(a) elements has been satisfied. That is not the proper role for this Court.

Cooter & Gell, 496 U.S. at 400-01; *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

A. The District Court Properly Held that Plaintiffs Demonstrated Common Questions of Law or Fact

Rule 23(a)(2) requires that plaintiffs demonstrate there are "questions of law or fact common to the class." "The threshold of 'commonality' is not high," *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) (citation omitted); 1 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 3:10 n.9 (4th ed. 2002) (commonality "is easily met in most cases"), and contrasts with the "far more demanding" predominance showing required by Rule 23(b)(3). *Amchem Products v. Windsor*, 521 U.S. 591, 623-24 (1997).

At the certification stage, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)). As the Ninth Circuit observed below, Rule 23(a)(2), by its terms, requires plaintiffs to demonstrate questions of law or fact, not to answer them. App. 36a, 40a; *see* Fed. R. Civ. P. 23 Advisory Committee's Note (2003) ("an evaluation of the probable outcome on the merits is not properly part of the certification decision"); *cf. Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010) ("We do not think it

appropriate for the judiciary to make its own . . . adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification. . . .") (Easterbrook, J.).

1. A System of Subjective Decision-Making Can Constitute a Common Employment Practice

Wal-Mart's principal objection is that company-wide certification was improper because it contends all pay and promotion decisions are made at the store level where managers have wide-ranging discretion and, as such, plaintiffs failed to identify a common policy or practice sufficient for either Title VII or Rule 23(a).

Wal-Mart is wrong. This Court established the standards of proof for pattern or practice cases in *Teamsters*, in which managers at 51 different terminals made hiring and promotion decisions purportedly by choosing the "best qualified." *Teamsters*, 431 U.S. at 336, 338, 342 n.24. This Court has held that a policy of subjective decision-making processes that leaves unguided discretion to managers is an employment practice subject to challenge under Title VII where, as here, it has resulted in a pattern of discrimination against women. *Hazelwood*, 433 U.S. at 301-302; *Falcon*, 457 U.S. at 159 n.15; *Watson*, 487 U.S. at 989-91. This Court recognized that subjective criteria, while not themselves unlawful, can be a conduit for biased decision-making. *Watson*, 487 U.S. at 989-91.

Cognizant of this potential threat to equal employment opportunity, federal courts have for more than three decades certified challenges to subjective employment practices under both disparate treatment and disparate impact theories. *See* App. 79a (citing cases); *Brown v. Nucor Corp.*, 576 F.3d 149, 150, 153, 157 (4th Cir. 2009); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 272 (5th Cir. 2008).

Wal-Mart repeatedly asserts that the Ninth Circuit observed that plaintiffs were unable to identify "a specific discriminatory policy promulgated by Wal-Mart." Pet. Br. 6, 20, 39. Wal-Mart quotes this language from the opinion entirely out of context. The quotation, in its entirety, reads:

> While a *jury* may ultimately agree with Wal-Mart that, in the absence of a specific discriminatory policy promulgated by Wal-Mart, it is not more likely than not, based solely on Dr. Bielby's analysis, that Wal-Mart engaged in actual gender discrimination, that question must be left to the merits stage of the litigation (and presumably will not have to be decided as there will be other evidence).

App. 59a.

2. The Evidence Supports the Finding that Wal-Mart's Practices Raised Common Questions

After weighing all the evidence, the district court concluded that plaintiffs had "exceeded" their burden

of establishing commonality and had demonstrated that Wal-Mart's company-wide policy of subjective decision-making, within a consistent compensation and promotion structure, raised questions of fact and law common to the class. App. 226a. Those common questions include, for example: 1) does Wal-Mart have a largely subjective compensation and promotion system? App. 173a-174a; 2) does that system result in lower pay and fewer promotions for women? App. 199a, 225a; 3) does Wal-Mart's strong corporate culture contribute to discrimination against women in pay and promotion? App. 186a; 4) which statistical analysis most accurately measures the disparities between male and female employees? App. 211a-212a; 5) was Wal-Mart's senior management aware that its subjective personnel system was resulting in adverse outcomes for women? and, 6) can Wal-Mart's subjective personnel system be justified as a "business necessity" and, if so, were there "less discriminatory alternatives"?

The district court's findings were based on an enormous record, including testimony from senior management and internal company documents – vastly more than Wal-Mart's rhetorical reduction ("sociology, statistics and anecdotes"). Pet. Br. 23. Those findings are summarized below.

Uniform Structure and Central Control – The district court found Wal-Mart stores are operated "with a high degree of store-to-store uniformity" and centralized control. App. 190a. "[T]he personnel structure within each store operates in a basically similar

fashion. . . ." App. 174a-175a. "[E]ach individual store is subject to oversight from the company's Home Office" that includes "a very advanced information technology system which allows managers in the Home Office to monitor the operations in each of its retail stores on a close and constant basis." App. 190a, 192a; J.A. 529a. Wal-Mart has a far higher concentration of its regional and senior management based in its Home Office than its competitors do, further confirming its unusually centralized nature. App. 191a n.17.

The district court found that Wal-Mart's unique culture "promotes and sustains uniformity of operational and personnel practices," and "guide[s] managers in the exercise of their discretion." App. 188a, 192a. It found "no genuine dispute that Wal-Mart has carefully constructed and actively fosters a strong and distinctive, centrally controlled, corporate culture." App. 188a. The court noted that culture is an integral part of all management training programs. App. 188a-189a. Wal-Mart's practice of "promoting from within" means that "the culture lessons learned by junior-level employees contribute to building a foundation of common understanding and practice among the management team." App. 189a. Further, the company regularly moves store-level managers across stores and districts, and thereby "ensure[s] that a uniform Wal-Mart Way culture operates consistently throughout all stores." App. 189a-190a. Plaintiffs offered evidence that Wal-Mart "cultivates

and maintains a strong corporate culture which includes gender stereotyping." App. 173a.

The district court expressly rejected Wal-Mart's factual assertions that "each of its stores is a virtual 'main street' of stores within a store, all run by independent managers" and that "each division of stores has its own unique hierarchical structure." App. 191a.

Uniform Departments and Jobs – The court found that stores had similar jobs categories and descriptions. App. 175a. While there are several dozen departments within each store, most hourly workers fall within five job positions: Support Manager, Department Manager, Cashiers, Sales Associates and Stockers. App. 174a-176a; J.A. 482a. Employees are assigned and moved among departments frequently and pay policies make no distinction by department. R.A. 23-24;[1] J.A. 1402a. There are no minimum or preferred education or experience requirements for *any* hourly job. J.A. 373a.

Uniformity of Promotion Policies and Practices – Regional and district managers, who are mostly male, make *all* promotion decisions for *all* store management positions. App. 180a-182a; J.A. 481a; J.A. 1370a-1373a. The district court found that "[t]he subjectivity in promotion decisions occurs in two fundamental ways: (a) a largely subjective selection

[1] Five documents are attached and designated as Respondent's Appendix ("R.A.").

practice hindered by only minimal objective criteria, combined with (b) a failure to post a large proportion of promotional opportunities." App. 180a. As a result, "class members had no ability to apply for, or otherwise formally express their interest in, openings as they arose" and "[m]anagers did not have to consider all interested and qualified candidates, thus further intensifying the subjective nature of the promotion process." App. 182a-183a. More than a year after this case was filed, a Senior Vice President admitted that there was nothing at Wal-Mart that would explain to "an hourly associate how to get promoted." R.A. 41.

Uniformity of Compensation Policies and Practices – "All hourly employees at every Wal-Mart store are compensated pursuant to the same general pay structure." App. 176a. The Home Office establishes minimum starting rates for each hourly job in the retail stores. *Id.* While store managers are granted substantial discretion in making hourly pay decisions, any pay increase above a certain percentage is automatically reported to higher management and requires special approval. App. 177a.

The Home Office sets broad pay ranges for each in-store salaried position, but pay rates are set within these ranges "primarily by District Managers (the first level in the management hierarchy above Store Managers) and their superiors, the [Home Office-based] Regional Managers." App. 178a. For both hourly and salaried compensation policies and practices, the district court found that there "is significant uniformity across stores, and that Defendant's

policies all contain a common feature of subjectivity." App. 180a.

Gender Stereotyping – Relying on a broad range of evidence, the district court found "significant evidence" of "gender stereotyping." App. 226a. That evidence included testimony from plaintiffs' expert, Dr. Bielby, App. 196a, and abundant examples of stereotypes adverse to women, starting at the highest levels of management.

As far back as 1992, founder Sam Walton conceded that Wal-Mart's "old way" of requiring its managers to move frequently "put good, smart women at a disadvantage," and was unnecessary, J.A. 368a-369a, a view echoed by female managers. J.A. 414a, 417a. This policy nonetheless remained in effect after this action was filed. J.A. 220a-221a, 419a.

At Home Office executive meetings, senior officers for Sam's Club often referred to female store employees as "Janie Qs" and "girls." J.A. 303a-306a. The most senior human resource official saw nothing wrong with district managers holding their management meetings at Hooters restaurants. J.A. 232a. Numerous Wal-Mart managers admitted that they regularly go to strip clubs when they attend company management meetings. *See, e.g.*, Riggs Dep. at 196:1, Ex. 40, Dkt. 100 (N.D. Cal. Apr. 28, 2003); J. Brown Dep. at 185:8-12, Ex. 41, Dkt. 100; Seaman Dep. at 321:1-3, Ex. 42, Dkt. 100; Sherman Dep. at 259:10-23, Ex. 43, Dkt. 100. Female store managers were

required to attend these meetings at Hooters and strip clubs as part of the job. J.A. 924a-933a.

The company communicated stereotyped views of women to store managers who attended mandatory training at the Walton Institute in Bentonville. Participants were told that the reason so few women have reached senior management at Wal-Mart was because "men have been more aggressive in achieving those levels of responsibility . . . " R.A. 44.

A Women in Leadership Group identified a number of problems afflicting women employees, including that "[s]tereotypes limit opportunities for women," "[c]areer decisions are made for associates based on gender," and "[m]en's informal network overlooks women." R.A. 48. In 1998, a consultant retained by Wal-Mart advised the company that a "glass ceiling is perceived by many women" at Wal-Mart and "some [district managers] . . . do not seem personally comfortable with women in leadership roles." R.A. 63-64.

One former Wal-Mart Vice President described the company's diversity efforts as "lip service," J.A. 302a, a conclusion confirmed by a comprehensive analysis of Wal-Mart's diversity programs. App. 194a-195a.

The district court cited class member testimony about the common stereotypes prevalent throughout Wal-Mart. App. 225a-226a; *see also* J.A. 754a (female assistant manager told repeatedly by store manager that retail is "tough" and not "appropriate"

for women); J.A. 1188a-1189a (male store manager said "[m]en are here to make a career and women aren't. Retail is for housewives who just need to earn extra money"); J.A. 931a (district manager told female store manager that she should not be running a Wal-Mart store and "needed to be home raising [her] daughter"); J.A. 1001a (store manager said male associate received larger raise because he had "a family to support").

Unequal Promotional Opportunities – The district court found that "roughly 65 percent of hourly employees are women, while roughly 33 percent of management employees are women." App. 176a. Women hold only 14% of Store Manager positions yet disproportionately occupy 80 to 90% of the hourly supervisory positions. J.A. 479a (chart). When Wal-Mart's proportion of women in management was compared to that of its 20 largest competitors, 80% of its stores had significantly fewer female managers. App. 223a-225a. The district court credited plaintiffs' proof that, after controlling for relevant factors, "a statistically significant shortfall of women [were] being promoted into each of the in-store management classifications over the entire class period." This shortfall was "consistent in nearly every geographic region at Wal-Mart." App. 212a. Women also consistently took longer than men to advance to management positions. App. 198a, 214a; J.A. 484a-485a (average 4.4 years for women versus 2.9 years for men to Assistant Manager). These differences existed even though female employees at Wal-Mart generally

have more seniority and better performance ratings than male employees. J.A. 483a-485a.

The record shows that Wal-Mart executives were long aware of these promotion shortfalls and failed to remedy them. Executive Vice President Coleman Peterson made regular presentations to top management about the company's workforce. Shortly before this case was filed, Peterson informed management that, based upon the company's own internal benchmarking, "Wal-Mart's women in management percent . . . is significantly behind several of the other retailers reporting . . . [Wal-Mart] trails both the retail industry . . . and workforce averages." J.A. 408a. This report, like others that Peterson made to management and the Board, highlighted the troubling lack of women in the company's management jobs. J.A. 397a-404a, 410a, 413a. As Peterson candidly expressed in another memo about the treatment of women and minorities, "[w]e're behind the rest of the world." J.A. 405a. Until December 2000, Wal-Mart's Executive Committee was entirely male. J.A. 205a-208a.

Unequal Pay – Plaintiffs' statistical regressions for hourly and salaried employees showed that in every one of Wal-Mart's 41 regions women were paid significantly less than men, and this pay gap increased each year. J.A. 518a-519a. This pattern was consistent for all store classifications even when seniority, turnover, store, job performance, job position, part-time or full-time status, and other relevant factors were taken into account. App. 200a, 209a.

After careful consideration of the parties' competing analyses, the district court concluded that plaintiffs' statistical analysis raises "an inference of company-wide discrimination in both pay and promotions." App. 281a.

3. Neither Rule 23 nor Title VII Imposes a Heightened Commonality Standard for Challenges to Subjective Criteria

To satisfy commonality, plaintiffs must demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2).

Wal-Mart proposes a long list of additional requirements to these simple terms. These "add-ons" are not found in either the text of Rule 23 or Title VII. Indeed, they would make satisfying Rule 23(a)(2) far more exacting than even proving liability for a pattern or practice claim. According to Wal-Mart, Title VII plaintiffs must demonstrate:

- that there is "significant proof" of discrimination; Pet. Br. 19-20;
- "a policy that is entirely subjective;" Pet. Br. 20-21; and,
- the policy is a "general policy of discrimination" that is itself unlawful; Pet. Br. 20;
- the policy was implemented "in a discriminatory fashion common to *every single female employee*," Pet. Br. 20

> (emphasis added), and "the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory." Pet. Br. 40.

This Court has rejected the notion that Rule 23 includes special, unwritten rules for certain cases. "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1437 (2010). Nothing in Rule 23 or Title VII imposes such heightened certification standards for employment discrimination cases challenging a policy providing for subjective personnel decisions. Wal-Mart mistakenly relies on a footnote from *Falcon*, 457 U.S. at 159 n.15, for these enhanced burdens.

In *Falcon*, this Court addressed the application of Rule 23(a) requirements to a proposed Title VII "across the board" class action that sought to include job applicants denied hire and incumbent employees denied promotions. In support of class certification, the sole named plaintiff offered nothing more than his own personal claim of promotion discrimination and failed to make "any specific presentation identifying the questions of law or fact that were common" to himself and the proposed class. *Id.* at 158. The Court held that district courts may not presume compliance with Rule 23 from a single allegation of discrimination. Instead, they must conduct a "rigorous analysis" to ensure that each Rule 23 requirement is satisfied.

Id. at 161. The Court concluded that plaintiff's claim was insufficient to "bridge the gap" between an individual claim of promotion discrimination and a class claim challenging a pattern of discrimination. *Id*. at 157-58. Here, plaintiffs went far beyond presenting individual claims to address all elements of Rule 23. *See, e.g.*, App. 51a-53a, 188a, 192a, 226a, 231a n.43, 232a-234a. Nothing in *Falcon* supports Wal-Mart's claim that pattern or practice cases are subject to unique requirements under Rule 23.

Significant Proof – Wal-Mart asserts that plaintiffs did not satisfy Rule 23(a)(2) because they failed to adduce "*[s]ignificant proof* that [the] employer operated under a general policy of discrimination" implemented through "entirely subjective decisionmaking processes." Pet. Br. 19. It derives this standard from an incomplete quotation of one sentence in a footnote from *Falcon*.

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify *a class of both applicants and employees* if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Falcon, 457 U.S. at 159 n.15 (emphasis added).

The *Falcon* footnote, read in context, presents a hypothetical scenario under which applicants and employees could be included within the same certified

class. In other words, in circumstances where plaintiffs challenge "two distinct processes" – hiring and promotion – they must show significant proof of "a common policy *alleged* to be discriminatory" to unite applicants and employees in a single class. App. 42a-43a; *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003); *Griffin v. Dugger*, 823 F.2d 1476, 1486-87 (11th Cir. 1987). The language was not intended to create a new requirement that plaintiffs *prove* intentional discrimination at the certification stage. App. 43a. Moreover, this case is not, like *Falcon*, an "across the board" class where one class representative who has experienced only one form of discriminatory practice seeks to challenge a broad range of employment practices. *Falcon*, 457 U.S. at 153. Here, the named plaintiffs, current and former employees, challenge only discrimination in pay and promotion, which each has suffered.

The heightened standard Wal-Mart would impose on challenges to subjective decision-making finds no support in the text of Rule 23(a)(2). It also runs afoul of the central holding of *Falcon* that there are no special class certification rules for particular kinds of cases. *Falcon*, 457 U.S. at 161 ("a Title VII class action, *like any other class action*, may only be certified if . . . the prerequisites of Rule 23(a) have been satisfied.") (emphasis added). Nor does Title VII suggest a heightened standard for challenges to subjective decision-making practices. 42 U.S.C. § 2000e-2(a) & (k). Where the statutory language of Title VII does not indicate a clear intent by Congress

to impose a heightened evidentiary standard, this Court has declined to do so. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-101 (2003).

To require that plaintiffs adduce "significant proof" of discrimination where subjective practices are challenged also conflates the merits with the Rule 23(a) certification inquiry. App. 44a. The court's role at certification is limited to determination of whether common questions exist, not to answer them.

But, even if a heightened standard were to be applied, Wal-Mart's proposed "significant proof" standard was met here. The district court expressly found, in more than 24 pages of findings, that plaintiffs had offered "significant evidence" that raised an inference of classwide discrimination in the pay and promotion practices. App. 226a. These findings amply meet any new heightened showing of "significant proof" of discrimination. App. 46a-47a.

Entirely Subjective – Wal-Mart, again citing the *Falcon* footnote, argues that plaintiffs may only challenge a practice of subjective decision-making if they can establish that the system is "entirely subjective," an argument not raised below. Pet. Br. 20-21; App. 174a (parties agree that decisions are "largely subjective"). This argument is also at odds with the text of Rule 23(a)(2) and with Title VII. Wal-Mart would create a nonsensical rule that addition of one objective criterion (e.g., being of legal age) to an otherwise subjective process would insulate employers from liability. In *Watson*, this Court rejected just

such an assertion: "However one might distinguish 'subjective' from 'objective' criteria . . . selection systems that combine both types would generally have to be considered subjective in nature." *Watson*, 487 U.S. at 989-91; *see also Griffin*, 823 F.2d at 1486-87. The 1991 amendments to Title VII, which codified the adverse impact standard, make no distinction between an "employment practice" that is objective or subjective. *See* 42 U.S.C. § 2000e-2(k). Here, the district court found that subjectivity was a common feature of all challenged pay and promotion policies, satisfying commonality under Rule 23(a). App. 180a-183a.

General Policy of Discrimination – In its final misapprehension of the *Falcon* footnote, Wal-Mart claims that plaintiffs can only satisfy commonality by challenging a "general policy of discrimination" that must itself be unlawful. Pet. Br. 22. Title VII does not require that plaintiffs identify a *facially* discriminatory policy. Disparate impact claims, by definition, challenge "employment practices" that are "fair in form, but discriminatory in operation." *Lewis v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 2191, 2197 (2010) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); 42 U.S.C. § 2000e-2(k). Disparate treatment claims may challenge employment policies or practices, including a "policy of leaving promotion decisions to the unchecked discretion of lower level supervisors." *Watson*, 487 U.S. at 990. The existence and nature of the challenged practice may be proven through direct or circumstantial evidence. *Desert*

Palace, 539 U.S. at 100; *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983).

As a corollary, Wal-Mart asserts that plaintiffs cannot demonstrate a "general policy of discrimination" since Wal-Mart has a written anti-discrimination policy. Pet. Br. 19-20. But an employer cannot insulate itself from liability for discrimination simply by promulgating a written anti-discrimination policy. *See*, *e.g.*, *EEOC v. Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999).

Proof that Every Class Member Was Injured – Finally, Wal-Mart asserts, without authority, that plaintiffs must demonstrate that its policies operated "in a discriminatory fashion common to *every single female employee*." Pet. Br. 20 (emphasis added). Rule 23(a)(2) imposes no such requirement. *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1105 (5th Cir. 1993); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010); *cf. Kohen v. Pacific Inv. Mgmt. Co., LLC*, 571 F.3d 672, 676 (7th Cir. 2009) (Posner, J.).

A requirement that plaintiffs prove a policy has discriminated against every single class member to obtain certification would be far more demanding than the standard for proving liability, which requires a showing that discrimination was Wal-Mart's "regular rather than . . . unusual practice." *Teamsters*, 431 U.S. at 336-37. Were absolute uniformity required, an employer could defeat certification in every case by sparing just one class member or department from an

otherwise uniform and discriminatory policy. *Cf. Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). The language of Rule 23(a)(2) requires evidence of "common" questions, not that the challenged practices raise "identical" or "universal" questions. *See also* Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966) ("[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened *only as to one or a few members of the class*, provided it is based on grounds which have general application to the class.") (emphasis added).

4. Rule 23(a)(2) Does Not Restrict the Evidence that May Be Proferred to Support the Presence of Common Questions

Wal-Mart takes a similar approach to the evidence that plaintiffs may use to demonstrate the presence of common questions of law or fact, ignoring entire categories of evidence and seeking to impose restrictions not found in the Federal Rules of Evidence, Rule 23 or Title VII.

Statistics – Wal-Mart argues that the only statistical proof that can support commonality is analysis disaggregated to the store-by-store level. Wal-Mart's assertion hinges on its contention – unsupported by the record – that relevant decisions are made there. It entirely ignores the central role its senior management plays in making promotion and management

pay decisions and reviewing hourly pay decisions. Its basic premise is flawed because, in a pattern or practice case, the relevant question is whether there is a pattern of discriminatory decision-making, not whether the decisions of individual managers are discriminatory. *Teamsters*, 431 U.S. at 336. Subdividing a company into ever smaller units "to the point where it [is] difficult to demonstrate statistical significance" can mask a pattern of discrimination, while aggregated data may more likely reveal one. *Capaci v. Katz & Besthoff*, 711 F.2d 647, 654 (5th Cir. 1983); *Segar v. Smith*, 738 F.2d 1249, 1286 (D.C. Cir. 1984) (disapproving statistical analysis that "repeatedly disaggregate[ed] until groups were too small to generate any statistically significant evidence of discrimination").

Plaintiffs' statistician prepared hourly pay regressions at the regional level, because of the scope of Wal-Mart's policies and decision-making. He relied upon corporate policies under which the subjective decisions were made, the oversight of pay decisions by district and regional managers, company-wide training and culture, and the frequent movement of store managers among districts and regions. App. 202a-204a; R.A. 18-26, 36-38. To account for any differences at the store level, these regressions included a variable for "store" to capture any difference in pay rates and staffing. App. 209a. The district court found this approach to be a "reasonable means of conducting a statistical analysis." App. 208a.

In contrast, Wal-Mart's expert offered a highly atomized analysis, which sub-divided the workforce even within stores into small sub-units that obscured any pattern of discriminatory decision-making and was far below the level of *any* relevant decision-maker in this case. Rather than a store-level analysis, each store was broken into at least three separate sub-parts for analysis – grocery, non-grocery and specialty departments – resulting in over 7,600 regressions. These artificial divisions were further segmented by 21 variables in the regressions, including department, which reduced the statistical unit of analysis. R.A. 19-20. This wholly artificial model, which tracks neither Wal-Mart pay policy nor decision-making, offered two advantages to Wal-Mart. It resulted in regressions with too few employees to yield statistically significant results, R.A. 19-20, and obscured Wal-Mart's broader discriminatory pay pattern. R.A. 24.

Nor is Wal-Mart correct in asserting that its expert's conclusion – that "90% of the stores" had no statistically significant gender pay differences – was "unrebutted." Pet. Br. 7, 11. Plaintiffs' expert comprehensively rebutted Wal-Mart's expert's methodology and conclusions. R.A. 19-39. Even more significantly, the district court struck the central justification for analyzing pay by store – a survey conducted by defense counsel – after Wal-Mart's expert admitted she could not vouch for its reliability. App. 203a-204a; Pet. Opp. Add. 17-23. Yet even these analyses, flawed

as they were, showed an overall adverse impact. J.A. 1663a-1665a.

Wal-Mart faults the district court for failing to resolve conclusively which statistical model was more persuasive. Pet. Br. 25. In fact, the district court devoted 18 pages of analysis to the competing models and "weighed evidence and made findings" in its Rule 23 determinations. App. 49a. It "did not shy away" from issues overlapping with the merits "to the extent necessary to satisfy itself . . . that Plaintiffs raised common questions." App. 65a. For example, the court rigorously analyzed why plaintiffs' "statistical method best reflected the alleged discrimination" in crediting plaintiffs' regional analysis over defendant's challenges. App. 66a-67a, 71a, 204a. In evaluating each side's promotion analysis, the court determined that plaintiffs have "shown" reasons to accept their statistics and concluded that defendant's "assertion that its approach is necessarily superior does not withstand scrutiny." App. 73a, 222a.

The circuits agree that the district court must analyze the underlying factual and legal issues relevant to Rule 23, even if they overlap with the merits. App. 15a-22a. As the Ninth Circuit noted, "this does not mean a district court should put the actual resolution of the merits cart before the motion to dismiss, summary judgment, and trial horses." *Id.* In a Title VII case where statistical proof will form the basis of both the certification showing and the merits, a determination of whether plaintiffs' statistics prove discrimination goes beyond Rule 23, which

requires only a finding of common questions. App. 36a.

Wal-Mart seeks to convert this fact-laden statistical dispute into a single legal issue. It argues that the appropriate level of statistical aggregation is a legal issue that must be resolved as part of the Rule 23 inquiry. Pet. Br. 26. It cites only this Court's decision in *Wards Cove*, which addressed neither statistical aggregation nor Rule 23 criteria. *Wards Cove Packing Co., v. Antonio*, 490 U.S. 642, 650-55 (1989), *abrogated on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, S. 1745, 105 Stat. 1071 (1991). The question in *Wards Cove* was the proper definition of the qualified labor pool for evaluation of plaintiffs' claim of disparate impact in hiring. *Id.* at 650. That case provides no support for an inflexible standard on the proper level of statistical aggregation, divorced from the facts in the case, which would impermissibly straitjacket the Rule 23 inquiry in employment discrimination cases.

Anecdotal Evidence – This Court has observed that, in a Title VII pattern or practice case, anecdotal evidence "[brings] the cold numbers convincingly to light." *Teamsters*, 431 U.S. at 339. At the Rule 23 stage, anecdotal declarations may be relevant to demonstrating the presence of common questions of law or fact. *Brown*, 576 F.3d at 153, 156-57.

Here, among the many types of evidence upon which the district court relied were "over a hundred declarations by designated class members showing

common subjective practices." App. 186a. These remarkably similar accounts, from hourly and management level women in 30 different states, attest to the uniform and centralized control of operations, unequal pay for the same work, ever-shifting subjective criteria for promotion, and gender stereotyping. App. 186a; J.A. 420a (map of declarant locations); J.A. 586a, 607a-608a, 643a, 697a-698a, 707a-709a, 752a, 845a, 887a, 899a-900a, 1001a, 1019a, 1020a, 1079a, 1188a. They illustrate how a single corporate culture influences the way in which subjective pay and promotion decisions are made.

Wal-Mart suggests that courts may only credit such evidence if each declaration recounts "actionable claims of discrimination" and, together, they prove the existence of a "pattern or practice" of discrimination. Pet. Br. 31-32. Nothing in Rule 23 or Title VII provides any support for such a *per se* rule. Nor is there any basis for excluding declarations from former employees, as Wal-Mart implies by arbitrarily reducing of the number of declarations offered from 114 to 63. Pet. Br. 31. Probative evidence may come from a wide variety of percipient witnesses. Fed. R. Evid. 601; *cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). It was well within the discretion of the trial court to rely on this evidence in finding Rule 23(a)(2) was satisfied.

Social Science – Plaintiffs' expert, Dr. Bielby, offered an opinion concerning the uniform and centralized nature of Wal-Mart's operations ("[c]entralized coordination, reinforced by a strong organizational

culture, creates and sustains uniformity in personnel policy and practice"), and a separate opinion about the risks associated with its subjective personnel practices ("[s]ubjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias."). J.A. 525a. Dr. Bielby's conclusion that Wal-Mart's system increased the risk of gender stereotyping tended to show why, in the circumstances of this case, there was a common question as to whether subjectivity was a "ready mechanism for discrimination." J.A. 545a-546a.

Wal-Mart conflates these two opinions and mischaracterizes Bielby's hypothesis as stating "Wal-Mart may be 'vulnerable' to gender stereotyping *because* it . . . has a 'strong corporate culture.'" Pet. Br. 29 (emphasis added). That is not what he said. Instead, Dr. Bielby concluded that the company's strong corporate culture, about which the district court itself made separate findings, "sustains uniformity in personnel policy and practice." J.A. 525a.

Wal-Mart complains that Dr. Bielby failed to quantify how many employment decisions were the product of stereotyped thinking. Pet. Br. 28. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 255-56 (1989), *abrogated on other grounds by* Civil Rights Act of 1991, Pub. L. No. 102-166, S. 1745, 105 Stat. 1071 (1991), this Court endorsed the use of expert testimony regarding gender stereotyping in discrimination cases and did so even though that expert (like any credible expert) could not specify which

particular decisions were the product of stereotyping. Expert testimony need not provide quantifiable knowledge to be admissible. Fed. R. Evid. 702 (the "scientific . . . knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.").

Wal-Mart moved to strike Dr. Bielby's opinions. The district court conducted a thorough assessment of Wal-Mart's arguments, "guided by *Daubert*," and concluded that the opinions were "based on valid principles" and "sufficiently probative to assist the Court in evaluating the class certification requirements." Pet. Opp. Add. 5-6. The Ninth Circuit found no abuse of discretion. App. 57a-58a & n.22. The Ninth Circuit opted not to reach the unresolved legal question whether a *Daubert* inquiry is required at the class certification stage as the district court had conducted an equivalent analysis. This Court need not reach the question either.

B. The District Court Properly Held that Plaintiffs Demonstrated Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality ensures that the class representatives share the issues common to other class members and tends to merge with commonality. *Falcon*, 457 U.S. at 158 n.13. The interests and claims of the named plaintiffs and class

members "need not be identical to satisfy typicality." *Stricklin*, 594 F.3d at 1198.

Here, the *six* named plaintiffs are all current or former employees, who allege they were injured by the same challenged pay and promotion practices. App. 80a. Plaintiff Christine Kwapnoski repeatedly sought management promotions that went to less qualified men. Although she was assigned to supervise the receiving dock, her General Manager encouraged her "to doll up, to wear some makeup, and to dress a little better." J.A. 1001a-1003a (internal quotations omitted). When she complained about a male co-worker receiving a larger raise, the same manager told her the male employee "had a family to support." *Id.* Plaintiff Betty Dukes, who has worked for Wal-Mart since 1994, has been paid significantly less than men with less seniority performing similar work, and was passed over for several Support Manager promotions. J.A. 743a-749a; *see* J.A. 606a-624a (Arana); J.A. 827a-838a (Gunter); J.A. 1242a-1247a (Surgeson); and J.A. 1298a-1301a (Williamson).

Wal-Mart raises a number of factual issues about the claims and defenses relevant to the named plaintiffs. Pet. Br. 32-34. It selects snippets from their declarations and argues that those individual facts render them atypical. Pet. Br. 32-33. The district court thoroughly evaluated these same arguments and found that the named plaintiffs' claims were "reasonably co-extensive" with those of the class. App. 228a-231a. While it is plainly dissatisfied with these

findings, Wal-Mart presents no legal issue for this Court.

C. The District Court Properly Concluded that the Named Plaintiffs Were Adequate Representatives

Rule 23(a)(4) requires that the named plaintiffs "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23. To satisfy adequacy, a "class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Amchem*, 521 U.S. at 625-26 (citation omitted). In such circumstances, class representatives are adequate because they are likely to "vigorously prosecute the interests of the class." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 563 (6th Cir. 2007).

Wal-Mart contends that the mere possibility of disagreements among the class renders the named plaintiffs inadequate. But, to defeat adequacy, a "conflict must be fundamental" and "must go to the heart of the litigation." *Gunnells v. Healthplan Servs. Inc.*, 348 F.3d 417, 430-31 (4th Cir. 2003) (citation omitted); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). A conflict is not fundamental where the named plaintiffs share common objectives and factual and legal positions with the class. *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010). Moreover, a conflict will not defeat adequacy

where it is "merely speculative or hypothetical." *Id.* at 180 (citation omitted).

No inherent conflict exists just because a class includes supervisory and non-supervisory employees; rather, adequacy depends upon the specific facts and claims presented. *Staton*, 327 F.3d at 958-59; *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 595-96 (2d Cir. 1986). After a detailed factual inquiry, the district court concluded that no substantive conflict existed because: 1) the named plaintiffs held supervisory as well as non-supervisory positions; 2) the requested injunctive and monetary relief would be available throughout the class; and 3) Wal-Mart's alleged discriminatory policies affect supervisory and non-supervisory employees alike. App. 232a-234a, 280a-81a.

In contesting this finding, Wal-Mart offers only speculation that the interests of supervisory and nonsupervisory employees are "diametrically opposed" without identifying any evidence of a substantive conflict. Pet. Br. 35; *cf. Hansberry v. Lee*, 311 U.S. 32, 43-44 (1940) (homeowner opposing racial covenant inadequately represented by named plaintiffs with diametrically opposed interest in enforcing it). Wal-Mart offers no evidence that class members endorsed the challenged gender bias or practices. "To deny class certification now, because of a potential conflict of interest that may not become actual, would be premature." *Kohen*, 571 F.3d at 680.

Nor is there any merit to Wal-Mart's assertion, first raised on appeal, that the named plaintiffs are inadequate because they have not pursued class compensatory damages. Pet. Br. 35-36. Courts recognize that plaintiffs are permitted to press those claims that afford them the best chance of certification and success for the class. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96, 113 (2d Cir. 2005) ("due process does not require that all class claims be pursued"); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 668-70 (D. Kan. 2004). Likewise, Wal-Mart's assertion that non-victims might benefit from the case simply ignores the findings of the district court. *See* App. 166a n.4, 275a (actual victims can be identified and compensated).

D. Certification Has Not Altered Substantive Law

Wal-Mart argues that the certification order violates the Rules Enabling Act by relieving plaintiffs of the burden of proving their claims individually and depriving it of the ability to present its defenses. Pet. Br. 38-44. The argument boils down to one false premise: that an employment discrimination class action may only be litigated decision-by-decision and class member-by-class member. This radical claim, never accepted by any court, is at odds with the plain language of Title VII and decades of employment discrimination class action jurisprudence.

1. Discriminatory Intent May Be Proven Classwide

Wal-Mart asserts that Title VII requires plaintiffs to "prove that the motive for *every single* discretionary pay and promotion decision affecting every single class member was discriminatory." Pet. Br. 40. It faults the district court for allegedly failing to "grapple" with the question of whether the element of intent requires individualized proof of intent for each manager at each facility.

Plaintiffs' disparate impact claim requires no proof of intent. *Lewis*, 130 S. Ct. at 2199; *Watson*, 487 U.S. at 990-91. As for plaintiffs' disparate treatment claim, Wal-Mart ignores the "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. . . ." *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 (1984). The focus in a pattern or practice case is not on individual employment decisions, "but on a pattern of discriminatory decision-making." *Teamsters*, 431 U.S. at 360 n.46. Plaintiffs must demonstrate that the discrimination was the employer's "standard operating procedure the regular rather than the unusual practice." *Id.* at 336; *Cooper*, 467 U.S. at 875-76, n.9 (*Teamsters* standards apply to private class actions). A finding of an unlawful pattern or practice, "without any further evidence" supports the issuance of prospective relief and creates a presumption that every member of the class is entitled to relief. *Teamsters*, 431 U.S. at 360-62. And the pattern or practice method of proof, in which

intent can be inferred from, among other evidence, significant statistical disparities, is consistent with this Court's consideration of proof of intent under the most demanding standards. *Feeney*, 442 U.S. at 279 n.25; *Teamsters*, 431 U.S. at 335 n.15, 339 & n.20.

The application of "pattern or practice" theory applies equally to single and multi-facility cases. *See, e.g.*, *Teamsters*, 431 U.S. at 328, 329 n.2 (challenging "nationwide operations" at 51 terminals in 26 states); *Bazemore v. Friday*, 478 U.S. 385, 389, 405-06 & n.17 (1986); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291-92 (2d Cir. 1999) (certifying class of all African Americans employed throughout commuter railroad), *disagreed with on other grounds by In re Initial Pub. Offerings*, 471 F.3d at 39-42; *Staton*, 327 F.3d at 956; *see also Califano*, 442 U.S. at 702.

Wal-Mart relies on *Hohider v. UPS, Inc.*, 574 F.3d 169, 184 (3d Cir. 2009), which expressly distinguished requirements for proof of liability in an ADA case, at issue there, from pattern-or-practice cases under Title VII. *Id.* at 184-85.

2. Mixed Motive Defense Does Not Apply to Plaintiffs' Claims

Wal-Mart argues that 42 U.S.C. § 2000e-5(g)(2)(A), added to Title VII by the Civil Rights Act of 1991 to address "mixed motive" claims, guarantees it the right to present a "mixed motive" defense to each class member's claim. Wal-Mart makes this claim even though plaintiffs in this case have never alleged

a mixed motive claim, and Wal-Mart never pled an affirmative defense to one. J.A. 47a-80a, 100a-103a.

Title VII provides distinct methods of proving discrimination: plaintiffs may establish intentional discrimination either by proof of disparate treatment *or* by the "mixed motive" provisions of Title VII. *Compare* 42 U.S.C. § 2000e-2(a) *with* § 2000e-2(m). Plaintiffs may also avail themselves of the disparate impact theory to prove a violation of Title VII. 42 U.S.C. § 2000e-2(k).

The text of the mixed motive provisions make clear that it is an *alternative* theory of liability. 42 U.S.C. § 2000e-2(m) ("Except as otherwise provided in this subchapter, an unlawful employment practice is established. . . . "). *See Desert Palace*, 539 U.S. at 94 ("The first [provision] establishes an alternative for proving that an 'unlawful employment practice' has occurred") (citation omitted). Its companion provision, section 2000e-5(g)(2)(B), permits an employer to limit remedies if it proves that it would have taken the same action in the absence of the impermissible factor, *but only* "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title. . . ."

A mixed motive defense may not be used to rebut a single motive disparate treatment claim. *Fogg v. Gonzales*, 492 F.3d 447, 453-54 (D.C. Cir. 2007). As this Court observed last Term, Title VII's methods of proof are not "coextensive." *Lewis*, 130 S. Ct. at 2199

(defense to disparate treatment claim inapplicable to disparate impact claim). Thus, where plaintiffs have not elected to use the "mixed motive" method of proof, Wal-Mart may not defend on this basis. Finally, Wal-Mart's mixed motive argument has no application to plaintiffs' disparate impact claim, which requires no proof of intent.

3. Individual Stage II Trials Are Not Required

Wal-Mart claims the right to individual class member trials, citing language from *Teamsters*, in which this Court articulated the standards for bifurcated litigation of Title VII pattern-or-practice cases. Pet. Br. 41-42. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be conducted. *Teamsters*, 431 U.S. at 361. No court has read this language to *require* individualized hearings in every case. Instead, *Teamsters* vested trial courts with broad discretion to "fashion such relief as the particular circumstances of a case may require to effect restitution." *Id.* at 364 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

Where the defendant's practices make it impossible to recreate the employment decisions that would have been made absent discrimination, individual Stage II remedies hearings may be inappropriate, as the circuits have unanimously held. *See McClain*, 519 F.3d at 280-81; *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274-75 (10th Cir. 1988); *Segar*, 738 F.2d at 1289-91;

Domingo v. New England Fish Co., 727 F.2d 1429, 1444-45 (9th Cir. 1984); *Pettway v. Am. Cast Iron Pipe Co.*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local Union No. 396*, 637 F.2d 506, 520-21 (8th Cir. 1980); *Stewart v. GM Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976). *Teamsters* does not require individual class member hearings if they would lead to a "quagmire of hypothetical judgments." *Pettway v. Am. Cast Iron Pipe, Co.*, 494 F.2d 211, 260 (5th Cir. 1974). Where, as here, the employer's system has been infected with subjective decision-making and lacks records to document the employment decisions at issue, courts have concluded that allocating relief based upon economic models that replicate the decisions at issue "has more basis in reality . . . than an individual-by-individual approach." *Id*. at 263.

Here, the district court made findings to support the need for a classwide approach. App. 256a, 270a-276a. "Wal-Mart's database contains the critical information necessary to perform such an analysis for each employee individually, including job history, seniority, job review ratings, weeks worked, full-time versus part-time status, regular-time versus overtime, and store location." App. 271a-272a. While it determined that there was "no need to assess individual interest levels with respect to equal pay," the district court limited promotion back pay claims because of the absence of data demonstrating individual class member interest in promotion. App. 269a, 271a.

Moreover, Wal-Mart's claim that individual hearings would somehow produce a more reliable result does not withstand scrutiny. Wal-Mart has maintained no contemporaneous records of the reasons for the tens of thousands of pay or promotion decisions at issue here. Many of the decisions were made more than ten years ago by managers who, at any one time, had hundreds or thousands of employees under their supervision. If individual hearings mean that Wal-Mart will offer little more than *post hoc* rationales for decisions it chose not to document, the district court was within its discretion not to require them. 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 10:2 (4th ed. 2002). ("[A]ggregate evidence of the defendant's liability is more accurate and precise than would be so with individual proofs of loss.").

4. There Is No Due Process Right to Defend Claims Individually

Finally, Wal-Mart invokes the Due Process Clause to assert a constitutional right to "present every available defense," which the company interprets here as the "right" to defend any class action individual-by-individual. Pet. Br. 43. The cases from which it derives this sweeping (and heretofore unrecognized) constitutional right – one which would foreclose the use of class actions entirely – do not support the claim. *Lindsey v. Normet*, 405 U.S. 56, 64 (1972) (state statute requiring trial within six days in landlord-tenant actions does not violate Due Process

Clause); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("the scope of a consent decree must be discerned within its four corners").

This Court has never recognized a constitutional right to present one's defense using *particular* forms and methods of proof. Such case management decisions lie within the discretion of the trial courts, subject to appellate review after final judgment. *See, e.g.*, Fed. R. Civ. P. 16(c)(2); Manual for Complex Litigation § 11.64 (4th ed. 2009). Likewise, Rule 23 explicitly empowers trial courts to "determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument." Fed. R. Civ. P. 23(d)(1).

II. CLAIMS FOR MONETARY RELIEF MAY BE CERTIFIED UNDER RULE 23(b)(2)

A. Rule 23(b)(2) Does Not Limit Certification to Cases Seeking Exclusively Injunctive or Corresponding Declaratory Relief

Wal-Mart argues that a case may be certified under Rule 23(b)(2) only if it seeks *exclusively* injunctive and declaratory relief. This novel reading of Rule 23 is unsupported by the language of the Rule, the Advisory Committee Notes and more than 45 years of case law interpreting the Rule and Title VII.

The text of Rule 23 provides in relevant part:

> A class action may be maintained if Rule 23(a) is satisfied and if. . . . (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole.

Fed. R. Civ. P. 23.

By its terms, whether a class may be certified under Rule 23(b)(2) depends on the nature of the defendant's conduct *and* whether that conduct may be addressed through injunctive or declaratory relief for the class.

The text does *not* limit Rule 23(b)(2) actions to cases which seek *only* injunctive or declaratory relief. Indeed, nothing in the text of the Rule places any limit on relief available in a (b)(2) class action. Rather, "the language describes the type of conduct by the party opposing the class which is subject to equitable relief by class action under (b)(2)." *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 251 (3d Cir. 1975). The term "making appropriate final injunctive relief" is thus a description of the conduct that justifies a 23(b)(2) class, not the relief that is available:

> This is not to be read as saying "thereby making appropriate *only* final injunctive relief. . . ." All that need be determined is that conduct of the party opposing the class is

> such as makes such equitable relief appropriate.

Pettway, 494 F.2d at 256-57 (emphasis added); *accord Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) ("Rule 23(b)(2), by its own terms, does not preclude all claims for monetary relief.").

Nor may such limitation be read into the Rule. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 130 S. Ct. at 1437. "[T]he rule as now composed sets the requirements [courts] are bound to enforce. . . . Courts are not free to amend a rule outside the process Congress ordered. . . ." *Amchem*, 521 U.S. at 620.

The Advisory Committee Notes, to which this Court often refers in interpreting the Rules, *Amchem*, 521 U.S. at 615-17; *Eisen*, 417 U.S. at 173-74, confirm this interpretation of Rule 23. The Notes provide that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966) (emphasis added). The Committee plainly anticipated final relief in a Rule 23(b)(2) action could include money damages, in addition to injunctive or declaratory relief. This language quite consciously reflects the distinction that the modern Rule drew between Rule 23(b)(2) cases, where money damages will not predominate, and Rule 23(b)(3) where damages may predominate. For the latter, the Rule imposes additional safeguards

to ensure the interests of the class are adequately protected.

Notwithstanding the unmistakably clear meaning of the Advisory Committee Notes, Wal-Mart would infer a contrary – and unspoken – intention to reserve Rule 23(b)(2) for exclusively injunctive relief claims from a list of pre-1966 cases cited in the Notes in which only non-monetary relief was sought. The Notes explain, however, that the list is intended to be "illustrative" of actions "in the civil-rights field where a party is charged with discriminating unlawfully against a class" – in other words, where defendant "has acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966).

That the Advisory Committee list of cases did not include Title VII or other types of civil rights actions that authorized monetary relief is explained, not by an intention to exclude such claims, but by the timing of the Rules amendment process. The draft of the Committee Notes for the modern Rule 23 was completed and published in March 1964. *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Court*, 34 F.R.D. 325 (March 1964). It was not until July 2, 1964, that Congress passed the Civil Rights Act of 1964, which provided comprehensive civil rights protections in employment, public accommodations, housing and education. Pub. L. No. 88-352, 78 Stat. 241 (1964). The Notes, thus, cannot be read to implicitly limit the types of civil

rights cases nor the types of relief that may be sought under Rule 23(b)(2).

Wal-Mart also relies on *Ortiz v. Fibreboard*, 527 U.S. 815, 842 (1999), to argue that Rule 23(b)(2) must be limited to its "historical antecedents." *Ortiz* did not address – nor even mention – the proper scope of Rule 23(b)(2).

The Advisory Committee plainly did not intend to limit the new provision to its "historical antecedents." It sought to facilitate civil rights cases. *Amchem*, 521 U.S. at 614 (Rule 23(b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field") (quoting Benjamin Kaplan, *Continuing Work of the Civil Rules Committee*, 81 Harv. L. Rev. 356, 389 (1967)); *In re Monumental Life Insurance Co.*, 365 F.3d 408, 417 n.16 (5th Cir. 2004) (quoting 7A Charles A. Wright et al., Federal Practice and Procedure § 1775 (2d ed. 1986)). As Professor Kaplan explained, the new (b)(2) provision was intended to avoid the inefficiency of individual suits where the conduct was directed at a group: "individual lawsuits . . . would nevertheless be inadequate and inefficient [because] . . . the party opposing a class had acted on grounds apparently applying to the whole group." 81 Harv. L. Rev. at 389.

Wal-Mart argues in the alternative that, if *any* form of monetary relief is permitted under Rule 23(b)(2), the Court must find Rule 23(b)(2) unconstitutional. Pet. Br. 47. It rests this claim on two assertions: that the Due Process Clause *requires* notice and

opt-out rights for any class action in which *any* amount or form of monetary relief is sought, and that Rule 23(b)(2) *prohibits* notice and opt-out to class members. Neither Rule 23 nor this Court's Due Process jurisprudence supports these sweeping conclusions.

This Court has never held that the Due Process Clause mandates opt-out rights whenever any kind of monetary relief is sought in a class action. "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) ("we generally have declined to establish rigid rules"). The requirements of Rule 23(a) and (b)(2) afford class members important due process protections. The Rule 23(b)(2) requirement that the district court determine whether injunctive relief predominates over monetary relief, which tests the cohesiveness of the class interests, "serves essentially the same functions as the procedural safeguards . . . mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15. In addition, class members' rights are protected by the determination that both the named plaintiffs and their counsel will adequately represent the interests of the class. *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981) (no due process right to opt out of a 23(b)(2) class settlement); *Wetzel*, 508 F.2d at 257

(declining "to hold that due process ineluctably requires notice in all (b)(2) class actions").

This Court's decision dismissing *certiorari* as improvidently granted in *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994), did not address – much less decide – whether due process may be satisfied through other safeguards built into Rule 23(b)(2) where claims for back pay accompany proper claims for injunctive relief. App. 96a n.44. *Shutts* did not address these questions either. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Court limited its holding in *Shutts* to "claims wholly or predominately for money judgments" and mandated protections for state court class actions equivalent to those provided by Rule 23(b)(3) for damages cases. *Id.* at 812 n.3. It expressed "no view concerning other types of class actions, such as those seeking equitable relief." *Id*. No court has ever held that notice and opt out rights are always required when any monetary relief is sought.

In any event, Rule 23 empowers a district court to take steps to protect a class in (b)(2) or other class cases. Fed. R. Civ. P. 23(d)(1) confers broad discretion on the district court to issue orders "to protect class members and fairly conduct the action," which include notice of "members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims and defenses, or to otherwise come into the action." Fed. R. Civ. P. 23(d)(1)(B). This subsection is, thus, part of the protections "designed to fulfill requirements of due process to which the class action procedure is of

course subject." Fed. R. Civ. P. 23(d)(2) Advisory Committee's Notes (1966).

The 2003 amendments to Rule 23(c)(2) confirmed a court's authority to order notice in Rule 23(b)(1) and (b)(2) actions. The Notes explain that the amendment did not confer new authority but instead "call[s] attention to the court's authority – already established in part by Rule 23(d)(2) – to direct notice of certification to a Rule 23(b)(1) or (b)(2) class." Fed. R. Civ. P. 23 Advisory Committee's Note (2003). Several circuits, and the district court below, have found that the language of Rule 23 permits, but does not require, notice and opt-out rights in (b)(2) actions. *See, e.g.*, *Eubanks v. Billington*, 110 F.3d 87, 94-95 (D.C. Cir. 1997) ("we join those circuits holding that the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions."); *In re Monumental Life*, 365 F.3d at 417; *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 165-66 (2d Cir. 2001).

B. The Back Pay Remedy in Title VII Class Actions Is Consistent with Certification Under Rule 23(b)(2)

Although Wal-Mart did not dispute in the district court that "claims for . . . lost pay readily fall within the ambit of a (b)(2) class action," App. 236a, it now challenges the inclusion of back pay claims in any Rule 23(b)(2) class. Pet. Br. 53-55. Both the district court and the Ninth Circuit concluded that plaintiffs'

back pay claims were properly certified under Rule 23(b)(2). App. 90a-94a, 269a, 276a.

The circuits unanimously concur that back pay relief may be sought in a Rule 23(b)(2) action. *See Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 650 (6th Cir. 2006); *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004), *overrruled on other grounds by Ash v. Tyson Foods Inc.*, 546 U.S. 454, 457 (2006) (per curiam); *Robinson*, 267 F.3d at 169-170; *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 896 (7th Cir. 1999); *Allison*, 151 F.3d at 415-16; *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 699-700 (8th Cir. 1980); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 342 (10th Cir. 1975); *Pettway*, 494 F.2d at 257-258; *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971). This is true even for courts that have adopted the so-called "incidental damages" test for (b)(2) certification. *See, e.g.*, *Allison*, 151 F.3d at 415-16.

The equitable nature of the Title VII back pay remedy and its close relationship with injunctive relief means that such a remedy is generally available in (b)(2) actions. The purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs*, 401 U.S. at 429-30). As this Court has noted, back pay "has an obvious connection" to that purpose:

> If employers faced only the prospect of an injunctive order, they would have little

> incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers . . . to endeavor to eliminate [discriminatory practices]."

Albemarle, 422 U.S. at 417-18 (citation omitted). Back pay is an integral component of Title VII's "make whole" remedial scheme. *Id*. at 419-21.

Title VII back pay awards are not "money damages," which the Advisory Committee Notes address. *Wetzel*, 508 F.2d 239, 250-51 n.21. Back pay is an equitable remedy under Title VII, rather than a form of compensatory damages, and is awarded by the court. 42 U.S.C. § 2000e-5(g); *Albemarle*, 422 U.S. at 416-17, 421; *Allison*, 151 F.3d at 423 n.19. When Congress amended Title VII in 1991 to add compensatory and punitive damage remedies, it left intact the equitable nature of back pay, explicitly excluding back pay from the definition of compensatory damages. *See* 42 U.S.C. § 1981a(b)(2) ("Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. § 2000e-5(g)]."); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 527 (1999) (citing "the 1991 Act's distinction between equitable and compensatory relief"); *see also United States v. Burke*, 504 U.S. 229, 238-39 (1992), *superseded by statute on other grounds*, Pub. L. No. 104-188, § 1605 (1996), 26 U.S.C. § 104 (concluding that a Title VII back pay award was not excludable from income for

tax purposes since it did not compensate for personal injuries).

The discretion to deny back pay is extremely limited and justified only, in the rare instance, where an award would "frustrate the central statutory purposes" of Title VII. *Albemarle*, 422 U.S. at 405. Wal-Mart claims back pay is "nothing more than monetary compensation for past harm." Pet. Br. 53; *see Great-West Life & Annuity Ins. Co v. Knudson*, 534 U.S. 204, 218 (2002). While the ERISA claim in *Great Western* may be so described, this Court distinguished Title VII back pay as "an integral part of an equitable remedy." *Id.* at 218 n.4 (citation omitted).

Moreover, like injunctive relief claims, back pay claims are "rooted in grounds applicable to . . . the class." *Allison*, 151 F.3d at 415-16 (quoting *Pettway*, 494 F.2d at 257). Both injunctive relief and class entitlement to back pay derive from defendant's conduct that applies "generally to the class." Such conduct forms the basis for a liability determination that settles "the legality of the behavior with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2) Advisory Committee's Note (1966). This liability determination is the predicate both for class injunctive relief and an award of back pay to the class, establishing for each class member a presumptive right to back pay. *Teamsters*, 431 U.S. at 361-62.

Finally, unlike damage claims, back pay proceedings under Title VII are tried to the court, not a jury, and do not turn on highly individualized factors such as causation or the subjectivity inherent in claims for emotional harm. *Allison*, 151 F.3d at 416-17. Back pay awards typically involve "less complicated factual determinations," *Reeb*, 435 F.3d at 650, and may be calculated for the class based upon objective information found in the employer's payroll records. This is particularly true for the equal pay claims here, where there is no need to assess individual interest levels, and where objective computerized data "is readily available." App. 271a.

Wal-Mart contends that back pay is highly individualized and may be awarded *only* through individual hearings. Pet. Br. 55. As noted above, individual hearings are not required in all pattern or practice cases. Moreover, even where Stage II hearings are required, Rule 23(b)(2) certification remains appropriate because of the equitable nature of back pay, and the common interest of class members in obtaining back pay that follows a pattern or practice liability finding. To hold otherwise would undermine this Court's determination that the *Teamsters*' pattern or practice method of proof is fully compatible with a Rule 23 class action. *Cooper*, 467 U.S. at 876 n.9 ("it is plain that the elements of a prima facie pattern-or-practice case are the same in a private class action.").

Wal-Mart projects potentially "billions of dollars of back pay claims" which it argues, makes this case

categorically ineligible for back pay relief. Pet. Br. 55. Wal-Mart's simplistic calculus of the total potential back pay ignores the value of the corresponding injunctive claims in this case. Here, a potentially large back pay award for the class as a whole simply reflects the size of the class and thus results from the same facts that convinced the district court that injunctive relief claims had a broad scope. App. 89a, 238a-239a. Wal-Mart's approach would simply insulate defendants from (b)(2) classes whenever the class is large, no matter how significant the corresponding injunctive relief, a position that finds no support in either Rule 23 or Title VII. Wal-Mart would foreclose the use of 23(b)(2) in precisely the circumstances that the class action can provide the greatest efficiencies for redressing the effects of pervasive workplace discrimination. *Cf. Carnegie v. Household Fin.*, 376 F.3d 656, 660-61 (7th Cir. 2004) (Posner, J.).

Significantly, individual class claims for back pay in this case are likely to be relatively small, amounting to an average of $1,100 per year for hourly workers. J.A. 475a. Prosecution of such claims individually would be largely impracticable, and thus would not implicate the preference for individual litigation that may arise where damages predominate. *See* Fed. R. Civ. P. 23(b)(3) Advisory Committee's Note (1966); App. 89a. In contrast, the injunctive claims are substantial and would lead to "very significant long-term relief" for the class. App. 239a.

C. Former Employees Are Properly Included in a Rule 23(b)(2) Class

Wal-Mart asserts that back pay must predominate over injunctive relief because class members who leave Wal-Mart at any time prior to judgment lack standing to seek injunctive relief. Pet. Br. 52. Wal-Mart thus reduces the Rule 23(b)(2) "predominance" determination to tallies of class members with an interest in injunctive relief, and those allegedly without, a calculation that would have to be performed continuously throughout the litigation, as current workers leave and new workers are hired.

Wal-Mart confuses two very different issues – standing of individual class members and the criteria for (b)(2) certification.[2] Under this Court's precedents, plaintiffs and the class they represent have standing to seek injunctive relief. Two named plaintiffs are still Wal-Mart employees as are a substantial number of class members, and thus they unquestionably have standing to seek injunctive relief on behalf of themselves and the class. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755-56 (1976).

Rule 23(b)(2) focuses on a defendant's conduct that gives cohesion to the class. This cohesion is not

[2] The Ninth Circuit's more limited holding, excluding employees who left employment prior to the filing of the action, also conflated class member standing with the Rule 23(b)(2) inquiry. App. 100a-102a.

lost if injunctive relief subsequently becomes unavailable for some or even all class members. "The conduct of the employer is still answerable 'on grounds generally applicable to the class.'" *Wetzel*, 508 F.2d at 251.

Where a group of victims challenge the same discriminatory employment practice, Rule 23 provides an efficient and economical means of adjudicating these claims. *See Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 (1983) (recognizing "the principal purposes of the class action procedure" are the "promotion of efficiency and economy of litigation"). Treating current and former employees as members of the same class serves this goal because a pattern or practice liability finding establishes the common predicate for injunctive *and* monetary relief. *Teamsters*, 431 U.S. at 361-62.

Wal-Mart's formulation once again relies on an incomplete calculus for assessing whether monetary claims predominate. First, it assumes that back pay claims of former employees undermine 23(b)(2) status, a view at odds with the role of back pay in Title VII. *See supra* at 55-60. Moreover, predominance cannot be determined solely by a head count of former and current employees, because injunctive relief will benefit not only class members who are current employees, but also "all future female employees as well." App. 239a. Former employees could also benefit from an injunction, since they may seek employment with Wal-Mart in the future once discriminatory conditions are eliminated. *Wetzel*, 508 F.2d at 253

(former employees "may desire to renew their employment . . . if the discriminatory practices are terminated."); *see Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (applicant denied admission to university who expressed a desire to reapply may challenge admission practices).

It is inevitable that the class of victims affected by an allegedly discriminatory workplace practice will include both current and former employees. This is, of course, because employee turnover is common, especially in the retail industry. Pet. Br. 52. One would expect turnover to be even higher in a workplace where discrimination is prevalent. Wal-Mart's approach would encourage employers to prolong the EEOC process and subsequent litigation, so that normal turnover may do its work to undermine any potential 23(b)(2) class. Even ordinary non-class litigation is lengthy:

> Delays in litigation unfortunately are now commonplace. . . . In a better world, perhaps, lawsuits brought under Title VII would speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of the litigation would not be as important a consideration. We do not now live in such a world. . . .

Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982). The delays in this case, filed nearly 10 years ago, are by no means unique. *See, e.g.*, *Lewis*, 130 S. Ct. at 2196 (complaint filed in 1998).

Wal-Mart's misconception also creates a "perverse incentive" for employers to fire employees who might initiate – or simply be a member of – a Title VII class action. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (concluding that similar concerns support protection of former as well as current employees under Title VII's anti-retaliation provision); *Wetzel*, 508 F.2d at 247 (if former employee could not be a class representative for current employees, "employers would be encouraged to discharge those employees suspected as most likely to initiate a Title VII suit").

D. Punitive Damages May Be Certified Under Rule 23(b)(2) in Some Cases

This case does not now present the question whether class punitive damages may be certified under Rule 23(b)(2). The Ninth Circuit vacated and remanded the district court's certification of the claim of punitive damages, directing the court to consider a variety of factors in order to determine whether punitive damages may be awarded to a class certified under Rule 23(b)(2) or (b)(3). Respondents briefly address Wal-Mart's contentions although the Court need not address this issue.

Wal-Mart argues that punitive damages will always predominate. Pet. Br. 55 (citing *Allison*, 151 F.3d at 418). Its categorical approach finds no support in the text of Rule 23(b)(2) and cannot be reconciled with the Advisory Committee's explanation that (b)(2)

certification is appropriate unless relief sought is "exclusively or predominantly" monetary damages. *See id.* at 426 (Dennis, J., dissenting); App. 87a.

Wal-Mart asserts that punitive damages must be assessed on an individual basis, even in a class case. Pet. Br. 56. The availability of punitive damages in a class case that challenges company-wide policies and practices turns on facts that are common to the class. Here, class members have a cohesive interest in ensuring that a punitive damage award will punish and deter defendant's conduct consistent with Rule 23(b)(2). *See Allison*, 151 F.3d at 417 (punitive damages might be certified under (b)(2) under some circumstances). Punitive damages in a Title VII case are not compensatory, but focus on the defendant's state of mind. *Kolstad*, 527 U.S. at 538; *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). The defense to a punitive damage claim in a corporate setting does not turn on the acts of lower level subordinates, but on the employer's "good-faith efforts to comply with Title VII." *Kolstad*, 527 U.S. at 545-46.

Wal-Mart relies on the use of the term "aggrieved individual" in Title VII's punitive damage provision. 42 U.S.C. § 1981a(B)(1). Nothing in that provision or its legislative history suggests that punitive damages must be assessed on an individual basis. This Court has held that use of the term "individual" in a statute does not preclude class treatment of claims. *Califano*, 442 U.S. at 698-701.

Wal-Mart's reliance on *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003), and *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), is similarly misplaced. These cases both involved punitive damage awards in *individual* state personal injury cases, where the jury's award took into account similar harm inflicted on non-parties to the litigation. In contrast, in a class action like this, the injured parties are all before the court and the court can ensure that any award of punitive damages is based "solely on . . . conduct that was directed toward the class." App. 241a.

* * *

Wal-Mart assumes that Rule 23 certification is an all-or-nothing proposition: either the case must be certified under Rule 23(b)(2) in its entirety or, as it advocates, not at all. Rule 23 is not so inflexible. The text of Rule 23 and the Advisory Committee Notes set forth the appropriate framework for Rule 23; the application of the Rule is left to the "broad discretion" of the district court. *Falcon*, 457 U.S. at 160. Courts have certified for trial as to specific common issues, *In re Nassau Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471-72 (7th Cir. 2004), or adopted a "hybrid" approach, certifying liability under Rule 23(b)(2) and damage claims under 23(b)(3). *Jefferson*, 195 F.3d at 898; *see* Fed. R. Civ. P. 23 Advisory Committee's Note (2003) (endorsing hybrid certification).

The district court is in the best position to evaluate the "pragmatic ramifications of adjudication in

each situation," particularly in making a Rule 23 (b)(2) determination. *Pettway*, 494 F.2d at 256-57 (quoting 3B Moore's Federal Practice ¶ 23.45 at 703 (2d ed. 1969)). Here, the district court understood and fulfilled this pragmatic role. While recognizing "the importance of the courts in addressing the denial of equal treatment under the law wherever and by whomever it occurs," App. 166a, the district court conducted a thorough and rigorous Rule 23 inquiry, evaluating the evidence and arguments presented by each side. It determined to certify the class but limited the promotion claims and approved a right to opt out. App. 243a, 267a. The district court's order was a proper exercise of discretion.

CONCLUSION

This Court should affirm the certification of the class.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiff,

vs.

WAL-MART STORES, INC.,

Defendant

Case No. C-01-2252 MJJ

DECLARATION OF DR. RICHARD DROGIN IN SUPPORT OF PLAINTIFFS' REPLY BRIEF IN SUPPORT OF CLASS CERTIFICATION

(Filed Jul. 3, 2003)

Date: July 25, 2003
Time: 10:00 a.m.
Courtroom: 11

I, Dr. Richard Drogin declare:

I make this declaration of my own personal knowledge and could testify thereto if called as a witness.

A. INTRODUCTION

1. I have been retained by Plaintiffs' counsel to analyze statistical questions raised in the *Dukes v. Wal-Mart Stores, Inc.* litigation. The purpose of my study was to obtain descriptive summaries of computer data, and prepare various statistical analyses relevant to the issues in the case. I have previously submitted a report in this litigation, dated February 3, 2003. Subsequently, defendant's expert Dr. Joan Haworth submitted a report dated April 1, 2003 giving her opinion and results regarding her review of my February 3 report. On April 18, 2003 she provided an amended report and revised analyses. Then, on April 21, 2003, at her deposition, she provided additional backup materials for her revised analyses. I attended that deposition. Subsequently, she filed a declaration in Opposition to Class Certification. The declaration below gives my rebuttal to Dr. Haworth's report and deposition testimony. Except for the addition of citations to Dr. Haworth's declaration in Opposition to Class Certification, the attachment of cited documents, and the correction of typos, this declaration is identical to the rebuttal report I wrote dated May 6, 2003.

2. Dr. Haworth's report covers several issues regarding plaintiff's expert reports. My rebuttal will address those areas where she has presented her opinions regarding issues covered in my February 3 report. In this declaration I will explain the flaws in her conclusions regarding the promotion process and compensation system at Wal-Mart. Unless otherwise noted, all references given below to her report will refer to the original report dated April 1, 2003 and corresponding references in her Declaration. She has testified at her deposition that there are no substantive differences between her April 1, 2003 report and the revised report of April 18, 2003. Her declaration adds additional analyses and material, which I have not analyzed. Some of the tables in her Declaration also cover a shorter time frame than those utilized in her report, and thus the numbers do not always correspond to those in her report. My rebuttal report, and this declaration, do not address these changed numbers.

B. SUMMARY OF FINDINGS

3. Dr. Haworth's analysis and conclusions are defective because she:

a. Relies on incomplete and "nearly useless" job posting data in her analysis of promotions to hourly jobs;

b. Fails to note that job posting selections contribute to gender segregation by department;

c. Fails to note that the average percentage of women in the appropriate pool of most qualified applicants determined from the MIT program is nearly identical to the average percentage of women in the availability pool I used in my promotion analysis presented in my February 2003 report, thus corroborating my earlier analysis of promotions into MIT;

d. Relies on Management Career Selection data that is incomplete and biased, thereby ignoring all promotions to salaried jobs except Store Manager;

e. Inappropriately disaggregates hourly employees into 7500 separate subunits to perform her regression analysis of hourly pay rates because she:

- Ignores documented company policy for setting pay rates in her decision to analyze stores separately;
- Incorrectly applies statistical methodology in deciding to analyze stores separately;
- Arbitrarily subdivided stores further into smaller grocery/non-grocery and specialty subunits, which is unsupported by any written company policy;

f. Relies on a Store Manager Survey to justify her regression model, despite admitting that the survey methodology violates accepted scientific standards, and was conducted by defense counsel contrary to her recommendations;

g. Erroneously excludes from her hourly pay rate analyses persons who were Department Heads;

h. Arbitrarily and inexplicably excludes from her hourly pay rate regressions persons who were ever demoted and persons who ever had been salaried;

i. Includes tainted variables in her compensation regression analyses despite her testimony in other litigations stating that this should not be done;

j. Includes variables in her compensation regressions without justification or explanation;

k. Fails to report statistically significant aggregated results of her subunit regressions even though she has testified in other litigations that such aggregation is appropriate to determine if there is an overall disparity;

l. Fails to report compensation regressions for salaried employees other than Store Manager even though these are included in her backup materials.

C. PROMOTIONS

4. Dr. Haworth criticized my promotion analyses, and presented various analyses of her own derived from the Job Posting System, Management Training Posting, and Management Career Selection System. Each of these is addressed below.

Job Posting Data – Nearly Useless

5. Dr. Haworth presents a lengthy discussion of the job posting system at Wal-Mart and does several analyses concluding that "[w]hen all of the job postings for all the stores in all districts and all regions are all aggregated there are 3,266 more female job offers than expected in a gender-neutral process when controlling for department and job code."[1] Dr. Haworth's analysis and conclusion are misleading, and not probative, because the job posting data upon which she relies is incomplete and is not utilized systematically.

6. For example, for promotions into Support Manager, a job where it is possible to determine the completeness of the job posting data relative to actual promotions recorded in the PeopleSoft job history data, the job posting data includes posting and acceptances in only 20% of the total number of actual promotions found in the PeopleSoft data.[2] With such a large percent of vacancies filled outside the job posting system, and no policy or explanation regarding when the system was utilized or by-passed, no meaningful analysis of promotions can be conducted from this dataset.

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[1] See middle of page 24 of her report; Declaration at 47:17-19.

[2] See Table 19, pages 28-29 of Drogin, February 2003 report. Lateral moves are not counted in the PeopleSoft promotions in this study.

7. Dr. Haworth relied on the job posting data, but made no attempt to evaluate or study the completeness of the job posting data.[3] At her deposition, when asked whether she had done any " ... analysis for any position in the job posting data versus Global PeopleSoft", she answered, "I don't recall doing such."[4] Further, when asked "So you don't know what proportion of positions that were filled in the Global PeopleSoft were filled by posting for any hourly job?" she answered " ... I do not know what proportion of the moves into support manager, whether demotions, promotions or laterals, were therefore covered by the posting."[5]

8. In fact, it can only be concluded that the job posting data is "nearly useless" according to Dr. Haworth's published statements in the Employee Relations Law Journal. Dr. Haworth's failure to note the high degree of incompleteness of the job posting data, the apparent lack of any system governing when the job posting was used, and her failure to present any study of these obvious problems directly contradict the first caveat she espoused in an article

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[3] Dr. Haworth was aware there was or might be a problem with the job posting data, since she had read my report, which indicated the job posting data was incomplete, and also attended my deposition at which I described the problem.

[4] Haworth deposition page 101, line 14.

[5] Haworth deposition, page 101, lines 15-24.

co-authored with her husband published in the Employee Relations Law Journal:[6]

> "The information collected from applicants must be sufficient to allow a proper analysis of the selection process in a race- and gender-neutral environment. To this end, there are two general caveats. First, information that is collected but never verified or checked for accuracy is nearly useless."

Job Posting Selections Contribute to Gender Segregation by Department

9. Ignoring the defects with job posting data described above, Dr. Haworth fails to note, or present any explanation of, obvious gender segregation patterns indicated by her job posting promotion analysis. For example, her analysis shows that female bidders for Department Head jobs receive significantly more promotions in the departments with the highest percent female than would be expected based on their application rate, and significantly fewer promotions in departments with highest percent men. Tables 1a and 1b below list the ten departments with the

[6] The article appears in Volume 12, pages 352-369 of the Employee Relations law Journal, and has been designated in this litigation as Bates WMHO1234046-WMHO1234063. Quote appears on WMHO1234058, attached as Ex. 1.

highest percent women, and the lowest percent women[7] as of year-end 2001.

Table 1a

Dr. Haworth Job Posting Analysis for 10 Departments with Highest Percent Women

	Target Department	% Wom	Diff.	Z-Value
34	Ladies Sportswear	99.2	35.10	5.20
27	Hosiery	99.1	66.30	6.90
19	Piece Goods	99.1	61.50	7.40
46	Health & Beauty	98.7	56.40	6.70
26	Infants & Toddlers	98.6	79.90	6.60
32	Jewelry	97.3	58.30	6.20
910	Back Office	94.2	203.20	9.30
23	Men's Wear	92.5	92.80	6.90
20	Domestic Goods	92.4	20.90	1.90
40	Pharmacy	88.8	54.20	5.00
	Total		728.60	19.41

[7] '% Women' is the % women among active employees at year-end 2001, restricted to departments with at least 5000 employees, shown in Table 14 of my February 2003 report, 'Diff' and 'Z-Value' are taken from Dr. Haworth's table on page 22-23 of her report. See Declaration at 43-44.

Table 1b

Dr. Haworth Job Posting Analysis for 10 Departments with Lowest Percent Women

	Target Department	% Wom	Diff.	Z-Value
16	Horticulture	39.3	8.30	0.40
8	Pets and Supplies	37.6	-77.00	-3.10
284	Div 28 Receiving	30.7	7.50	1.40
9	Sporting Goods	30.2	14.20	0.70
4	Paper Goods	29.5	-33.40	-1.30
11	Hardware	27.7	-26.90	-1.20
90	Dairy Products	25.9	-30.20	-2.70
93	Meat	21.9	-4.10	-0.70
94	Produce	9.4	-10.70	-1.90
37	TBO Service	6.7	-170.70	-3.60
	Total		170.00	-3.18

10. Tables 1a and 1b show that women received 728.6 more offers for Department Head jobs in highly female departments than expected, and 170 fewer offers than expected in highly male departments, based on their percent among applicants. These disparities are statistically significant: For the over-promotion of women into Department Head in highly female departments with Z-value of 19.41, there is only 1 chance in 10 to the 70th power that a disparity this large would occur under random selection. For the under-promotion of women into Department Head in departments with the lowest percent female the Z-value of -3.18 indicates there is less than 1 chance in 700 that a disparity this large would occur under

random selection.[8] For both of these analyses, the expected number is based on the percent of women among applicants who applied for the positions, as determined from the job posting data. Thus, Dr. Haworth's job posting analysis demonstrates that gender segregation by department is perpetuated, in part, through the job posting system.

2003 Assistant Manager Training Program Corroborates Plaintiff's Analysis

11. Prior to January 2003 Wal-Mart had no system for hourly employees to express interest or apply for any entry level salary management positions. In January 2003 Wal-Mart introduced for the first time a system for accepting applications for their new Assistant Manager Trainee Program (also referred to as the Management-In-Training Program, or, simply, MIT Program). During a one week period Wal-Mart received about 30,000 applications through

[8] Dr. Haworth's table on page 22 of her report shows that women received 62.6 fewer promotions into Department Head jobs in the Home Furnishing Department, resulting in a Z-value for this disparity of -3.35. The Home Furnishing Department had only 23% women among its employees at year-end 2001, but was not included in Table lb above, because the number of employees in this department was below the 5000 level that I used for selecting departments. If Home Furnishings had been included in Table lb, then the disparity, and pattern of under-promotion of women in predominately male departments would be more pronounced. Her declaration uses similar, although somewhat changed numbers, reflecting a shorter time frame. Declaration at 43-44.

this system, and about 1400 selections were made during March.

12. Dr. Haworth presents an analysis of the data from this MIT Program, and reports that "The percentage of females who voluntarily expressed interest in 2003 in promotion to management levels (44%) is similar to the 41% women were among those who were promoted in the Assistant Manager Trainee positions in the five years prior to the inception of this program."[9] Her statement ("44% is similar to 41%") suggests that the 2003 MIT program indicates the selection of female hourly employees to positions as MIT during 1998-2002 was consistent with their interest and qualifications for such positions.[10] In fact, the MIT data she presents shows the exact opposite, and corroborates the analysis of promotions into MIT positions that I presented in my report.

13. Assume, as Dr. Haworth does, that the January 2003 MIT program was fair and unbiased with respect to gender[11]. Under this assumption, the

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[9] Page 25 of Haworth report. Declaration at 51:7-10.

[10] She also suggests the bid rate for Support Manager positions in the job posting data is consistent with the actual promotions into MIT positions, on page 25 of her report. However, in her deposition testimony, page 116, lines 6-10, she admitted that this comparison is not meaningful. Her Declaration does not include this suggestion.

[11] At her deposition, page 122, line 24 through page 123, line 16 Dr. Haworth indicated her opinion that the MIT selections were the "most qualified" applicants among those "interested and

(Continued on following page)

data from the MIT program might be used to obtain the correct unbiased percentage of women among the most qualified hourly employees who want to enter salary management positions. Dr. Haworth incorrectly suggests the fair availability percentage would be 44%, i.e. the percentage of women among all those applying in the MIT program. However, the correct percentage of females among the "true, unbiased" availability pool would be those interested and available, and also most qualified. There may be many men and women who submitted applications in the 2003 MIT program who expressed interest in promotion, but for some reason are not among the most qualified. The group of people who are interested, available, *and* most qualified would be determined by the percentage of females among those actually selected from the process, since presumably (as Dr. Haworth believes[12]) Wal-Mart has selected the best, most qualified applicants. The percentage of women selected in the MIT program was 59.8%. Thus, based on Dr. Haworth's assumptions, the most accurate availability figure of women who are interested in MIT positions among those most qualified would be 59.8%.

14. In my February 2003 report I presented an analysis of promotions into MIT positions during

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available", and she had "no information" that affirmative action was being used to select women.

[12] Page 122 line 24 through page 123 line 6 of Haworth deposition.

1997-2002. I determined the percentage women in the pool of those available for promotion to be 59.6%, as shown in Table 23 of my report. My determination of this percentage was based on the percent of women in the historical feeder pools for the MIT positions.[13] The 59.6% availability figure I derived in my promotion analysis is nearly identical to the 59.8% availability figure derived from the January 2003 MIT Program selections, as described in the previous paragraph. Based upon my analysis, I found that there was a shortfall of about 3000 females promoted to MIT positions during 1997-2002. Since the 59.8% and 59.6% availability figures are so close, the results of the recent 2003 MIT Program corroborates the female availability for promotions into MIT positions I used to compute this shortfall in female promotions to MIT positions.

15. Moreover, Dr. Haworth has reported that 40.8%[14] of applicants for MIT positions from Sam's Club employees were women, while only 31.4%[15] of those promoted to MIT positions at Sam's during 1996 through first quarter 2002 were women. At her deposition, she was asked if the MIT bid rate of 40.8%

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[13] In my report, and at my deposition I explained that insufficient information was available at that time to evaluate the fairness of the January 2003 MIT postings.

[14] Page 30 of Dr. Haworth's redlined report. Declaration at 53:21

[15] Page 89 of Dr. Haworth's redlined report. Declaration at 165:6. My computations show only 25.4% of MIT promotions were women during 1997-1st quarter 2002.

was compared to the selections during the period 1996-2002, whether the disparity would be statistically significant.[16] She first answered "I don't know"[17]. When asked again, she said "I don't know, but one would calculate it."[18] Finally, when asked a third time she answered "If you aggregated them all, I think they would be more than two standard deviations."[19] Thus, according to Dr. Haworth's own deposition testimony, there is a statistically significant female shortfall in actual promotions to MIT positions during 1996-2002 at Sam's Club, compared to female availability based on applicants for the MIT program from Sam's in January 2003.

Management Career Selection Incomplete

16. The MCS system is used by Wal-Mart to fill some openings in salary management jobs. Dr. Haworth concludes from her analysis of MCS data that there are no statistically significant selection decisions adverse to women across all the postings for each salaried job. This conclusion is misleading, because the MCS system cannot be considered as an unbiased, fair bidding system as described below, and covers only a small number of salary store management decisions.

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[16] Haworth deposition, page 151 lines 7-11.

[17] Page 151, line 12

[18] Page 151, line 21

[19] Page 152, lines 1-2

17. The MCS system is rarely used to fill management positions below Store Manager. As Dr. Haworth reports (page 35 of her report, Declaration at 66:4-6), the MCS system was used to fill only 2% of Co-Manager positions, and less than 1% of Assistant Manager Positions. At her deposition, Dr. Haworth testified[20] that she could not say whether or not the small number promotions into Co-Manager or Assistant Manager positions found in the MCS data were a representative sample from those interested in these positions. Accordingly, no meaningful analysis of promotions into Co-Manager or Assistant Manager can rely on the MCS system. The only store a salary management position for which the MCS system appears to have been used on any kind of regular basis is the Store Manager job.

18. The MCS appears to be used most of the time for filling Store Manager openings, but still the number of moves found in the MCS is about 400 fewer than the number found in the PeopleSoft data, according to Dr. Haworth's calculations. (Report at 35; Declaration at 66:5). Dr. Haworth gives no explanation why there would 400 Store Manager openings filled outside of the MCS system. In Addition, as explained in my February 2003 report, the MCS system cannot be considered an unbiased bidding system due to the requirement that prior approval is necessary before an employee can bid. Moreover,

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[20] Page 310, lines 11-16

Dr. Haworth fails to point out the fact that women promoted into Store Manager positions are disproportionately assigned to smaller stores than men, and hence earn less money.[21]

D. COMPENSATION

19. In my February 2003 report I presented several analyses of compensation of all hourly and salaried store management employees, based upon the statistical technique known as *linear regression.* Dr. Haworth presented an analysis of compensation for hourly employees, and for salaried store management employees restricted to Store Managers. She did not present any compensation analysis for Co-Managers and Assistant Managers in her report, or any other salaried employees, though she did perform them.[22]

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[21] I examined whether women were disproportionately assigned to smaller stores. Promotions into Store Manager were divided up according to whether the target store was large or small, where 'large' stores were those with size 60,000 square feet or more. For each year, and for Sam's and non-Sam's stores, I determined the shortfall of women promoted into large stores compared to what is expected from their proportion among promotees. The overall Z-value for this analysis is -3.97, indicating a statistically significant pattern where women were moved into smaller stores.

[22] She admitted in her deposition that she had performed such analyses, see page 320, lines 14-18, and page 322 lines 14-18. Her backup materials indicate the results she found showed a pattern adverse to women.

20. Dr. Haworth also used linear regression analysis to do her compensation studies, but used a different model than I did. She claims that her studies "properly model the decision process"[23]. She cites deposition testimony, the Store Manager Survey, and certain statistical tests as the basis for her conclusions.

Compensation for Hourly Employees

21. Dr. Haworth incorrectly decided it is necessary to divide the hourly employees into about 7500[24] separate subunits and do separate regressions for each subunit. Moreover, she improperly includes certain explanatory variables in her regressions that are either tainted, or not considered by Wal-Mart in setting pay rates. Accordingly, her analysis is inaccurate and unreliable. The following paragraphs describe the defects in her analysis in more detail.

22. She ended up with such a large number of separate regressions by first dividing employees by store, then further dividing them by whether they held grocery or non-grocery jobs, then further dividing the non-grocery jobs into the six specialty

[23] Haworth report, page 104. Declaration at 132:19.

[24] The total number of sub-units for which she attempted regressions is 7691, based on her supplemental results contained on the CD she turned over at her deposition. Also, see page 172 lines 15 through page 173 line 9 of her deposition.

divisions[25] and the remaining non-grocery jobs. In many stores, her analysis separates employees into eight subunits within a store[26]. There is no basis in Wal-Mart policy, or statistical justification for the extreme disaggregation of the data used by Dr. Haworth. The consequence of her disaggregation is to reduce the number of employees analyzed in each regression to a small group, sometimes as low as 20-30 employees.[27] In many cases there are so few employees in a subunit that the regression for this group could not be run.

Overly Disaggregated Analysis, Stores

23. Dr. Haworth ignores established, documented company wide policy controlling much of the compensation process, and contradicting her methodology. She cites Store Manager discretion[28] in setting pay rates as an important reason for her decision to do separate store regressions. In fact, Store Managers are constrained in the amount of discretion they have in setting pay rates. Wal-Mart's company wide Field Associate Compensation Guidelines indicate several

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[25] Haworth deposition, page 196, lines 10-25.

[26] For example, in SuperCenter stores, Dr. Haworth would separate employees into grocery, non-grocery, and 6 specialty division jobs.

[27] Haworth deposition, page 188-191.

[28] See page 41 of her report. Declaration at 92:16-93:2. On page 47, she says, "Because pay rates for hourly employees at Walmart and SC etc. are generally established by Store Mgrs etc."

aspects of salary setting and job assignment which require approval at the District and/or Regional Manager level. The Compensation Guidelines state that "the Store Manager needs to have the flexibility to address ... differences"[29] among employees in setting pay rates. However, these Guidelines list several ways in which the Store Manager is constrained in their discretion:

a. "Exceptions to these guidelines will be reported every pay period in the Payroll Exception Report, which will roll up to the Distinct Manager and Regional Vice President."[30]

b. "The People Group and your Regional People manager will act as consultants to ensure consistency in the program's administration and to provide compensation standards for hiring, evaluating and awarding pay increases."[31]

c. "A facility's pay structure is based on local competitive pay rates of comparable jobs, and established in conjunction with the District Manager, Regional Vice President, and Regional People Manager."[32]

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[29] Field Associate Compensation Guidelines, WMHO000676. The Guidelines are attached as Ex. 2

[30] Field Associate Compensation Guidelines, WMHO000676.

[31] Field Associate Compensation Guidelines, WMHO000676.

[32] Field Associate Compensation Guidelines, WMHO000677.

d. In setting the starting rate for new hires, " ... any increase above 6% of the Starting Rate requires District Manager or Specialty Group Regional Manager approval."[33]

e. " ... all associates' pay levels should be reviewed and any pay inequities caused by the Start Rate adjustments should be identified and discussed with your District Manager."[34]

f. A national pay structure specifies a $0.25 per hour gap between Start Rates in consecutive pay classes (i.e. pay class 1 to 2, pay class 2 to 3, etc.)[35]

24. Moreover, store management employees frequently change stores, districts and even regions.[36] These personnel decisions made by Wal-Mart reflect control exerted above the Store Manager level, further indicating that stores are not isolated from each other. By doing separate regressions for every store

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[33] Field Associate Compensation Guidelines, WMHO000678. I found that during the period May 1999 through April 2000 (the one year period following the effective date of these Guidelines) approximately 90% of the stores had at least one instance where there was a new hire paid at least 6% above the starting rate in that store for the pay class into which the employee was hired. Moreover, I found that approximately 40% of all hires were initially paid at least 6% above the starting rate in that store for the pay class into which the employee was hired.

[34] Field Associate Compensation Guidelines, WMHO000687.

[35] WMHO205186

[36] See Table 16 and 17 of Drogin February 2003 report.

subunit, Dr. Haworth fails to capture the effect of District, Regional, and company wide control over the compensation process.

Overly Disaggregated Analysis, Subunits within Store

25. Dr. Haworth claims each store contains too broad of a group of employees for making meaningful comparisons. So, she divides each store into as many as eight subunits for separate analysis (i.e. grocery, non-grocery, and the six specialty divisions. Her disaggregating of each store into sub-groups is not justified by any written Wal-Mart policy, nor did she conduct any statistical analyses to justify her assertions that the subunits she defines within a store have different "pay structures".[37]

26. Dr. Haworth admitted at her deposition that Wal-Mart guidelines do not mention department as a factor to consider in setting pay rates.[38] Wal-Mart's Field Associate Compensation Guidelines indicate how starting pay rates, and increases thereafter, are to be set for hourly jobs, and make no distinction between department or divisions. Thus, according to company wide Wal-Mart policy expressed in its Field Associate Compensation Guidelines, there is no

[37] The Chow tests she incorrectly claims justify her disaggregation of employees by store, were never applied to tests for differences between subunits within stores.

[38] Page 81, line 14 through page 82, line 8, and pages 201-203 of Haworth deposition.

separate "pay structure" for grocery, non-grocery, and each of the six specialty divisions.

27. There is a great deal of movement between departments[39] in a store, indicating that Dr. Haworth's departmental subunits in a store do not have isolated decision making structures. Dr. Haworth testified at her deposition that it is ultimately the Store Manager's decision to reassign employees between departments.[40]

28. Dr. Haworth's disaggregating of stores into subunits within the store, and doing separate analysis for each sub-group, makes it impossible to identify important gender patterns that may occur in a store. For example, if men and women are disproportionately assigned to different departments, which are in separate sub-groups in Dr. Haworth's analysis, then the pay rates for these men and women would never be included in the same regression, and therefore never compared.

Store Manager Survey Improper and Unreliable

29. Dr. Haworth relies extensively on the manager survey[41] to justify her method of disaggregating

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[39] Haworth report, page 16, Declaration at 48:5-7.

[40] Haworth deposition, page 95, lines 14-17.

[41] See Haworth report at the top of page 42, and page 45, Declaration at 93:4-99:4, "The above description of the decision-making process makes it clear that there are multiple compensation structures and decision-making processes for hourly

(Continued on following page)

employees and variable selection in regression model, despite admitting that the methodology of the survey violates accepted scientific standards, and was conducted in a manner contrary to her recommendations. Moreover, she acknowledged that having attorneys conduct the survey is considered to be biased and unreliable by courts and the scientific community. At her deposition she was asked, "Do you consider this survey as designed and as implemented to be a scientifically acceptable survey?"[42] She answered: "I don't know enough about the survey, and I'm also not a survey expert. I don't know enough about the survey and the way it was administered to be able to reach a judgment on whether it's a scientifically sound survey."[43] However, Dr. Haworth and her staff were deeply involved in the design of the survey and made recommendations on how it should be implemented.[44] She knew the survey was conducted by attorneys in this litigation,[45] although she advised the lawyers for Wal-Mart that having the attorneys conduct surveys was not a good idea,[46] "[b]ecause

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employees of Div 1 etc." Also, page 40: (Declaration at 85:20-86:2) " ... we must account for the factors used by decision makers at Wal-Mart to set salary levels and we must account for the different compensation decision-making processes found throughout the company."

[42] Haworth deposition, page 288, lines 9-13.

[43] Haworth deposition, page 288, lines 21-25.

[44] Haworth deposition, pages 267-274.

[45] Haworth deposition, page 251, lines 7-25.

[46] Haworth deposition page 254, lines 3-7.

typically it's difficult for an attorney to collect information in a neutral environment so that they truly get a neutral set of information back."[47]

30. Dr. Haworth testified at her deposition that she was aware that the survey violated important principles in survey design listed in the "Reference Manual on Scientific Evidence"[48], which she admitted is an authoritative treatise on scientific evidence in her deposition[49], and cites in her report.[50]

31. In explaining how she developed her regression models, and determined which variables to include in those models, Dr. Haworth states:

> "Second, we need to gain an understanding of the factors that the decision-makers rely upon when determining the pay rates for hourly employees. With the answers to these questions, the researcher is able to construct a statistical model that reflects the actual decision-making process as closely as possible."[51]

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[47] Haworth deposition, page 254, lines 14-17.

[48] Reference Manual on Scientific Evidence, 2nd ed, West Group, 2000, page 237-238, and Haworth deposition page 291, lines 1-16.

[49] Haworth deposition, page 290, lines 20-21.

[50] Haworth report, page 109, footnote 241. This citation is not included in her Declaration.

[51] Haworth report, page 41, Declaration at 92:12-15..

She claims to rely on the store manager survey "to gain an understanding of the factors that the decision-makers rely upon when determining the pay rates for hourly employees." However, Dr. Haworth fails to point out the most important single factor, cited by more store managers than any other factor as playing a role in determining starting hourly pay. The most frequently cited factor was: "The minimum pay established for the job classification by Wal-Mart's pay guidelines."[52] This same factor was also cited most often as being relied upon by store managers in setting promotional pay increases. Thus, company wide pay guidelines were found to be the most important factor that store managers rely upon in setting pay rates and pay increases. This fact is never pointed out in Dr. Haworth's report[53], and

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[52] Haworth report, Appendix C-7, (appendix C-16 to her Declaration) and Haworth deposition page 276, lines 9-17. The second most frequently cited factor that Store Managers said they took into account in determining starting pay rates was the "Starting rate in the department in the store at the time the offer is made." This factor is 'nonsensical' because there is no starting pay for a department. The Field Compensation Guidelines indicate there is a starting pay rate for each pay class, regardless of the department. Dr. Haworth agreed that there is no starting pay for a department at her deposition (see page 202 line 10 to page 203 line 3, and page 295 line 19 through page 296 line 8).

[53] On pages 42-44 of her report,(Declaration 93-98) Dr. Haworth lists the factors included in the manager survey, but does not give the percentages of managers who said they relied on each factor, and she could not give any rationale for how the factors were ordered on the 3 page list, as stated on page 275 of her deposition. The most important factor, "The minimum pay

(Continued on following page)

indeed, contradicts her interpretation that all store subunits operate with different pay structures and decision making processes. Although the store manager survey suffers from serious defects as described in the previous paragraphs, Dr. Haworth's misinterpretation of the results of this survey undermine the justification she gives for her highly disaggregated models.

Improperly Excludes Hourly Department Heads

32. Dr. Haworth has inexplicably excluded all employees holding hourly Department Head[54] positions from her compensation regressions for hourly employees. Department Heads are among the highest paid hourly employees at Wal-Mart. Dr. Haworth's exclusion of approximately 60,000 hourly employees from her analysis appears to be an error. She never mentioned this exclusion in her report or at her deposition, she never criticized my compensation analysis for including these hourly employees, and there is no reason Department Heads should be excluded. This apparent error in her analysis was discovered through examination of her backup materials that included her computer programs and the raw data files used as input for those programs.
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established for the job classification by Wal-Mart's pay guidelines" is listed last on page 44 of her report, and in her Declaration at 98.

[54] Department Heads are designated by job code = 101.

33. Dr. Haworth constructed a variable 'mgrsalever', among others, for identifying employees she wished to exclude from her compensation regressions for hourly employees.[55] The programs used to run her hourly regression analyses include a statement which excludes any employee for whom the variable mgrsalever =1. Since Department Heads are identified by job code = 101, and every employee with job code = 101 has the value mgrsalever=1 in her raw data files, it follows that every employee with job code = 101 is excluded by her programs. It appears that her variable mgrsalever was designed to restrict her regressions to employees who "had never been salaried employees during their employment at Wal-Mart" specified at lines 4-5 of page 47 of her report. See Declaration at 101:17-18. For example, there are a small number of employees as of October 2001 (the date Dr. Haworth used for measuring pay rates in her analysis) who were currently in hourly jobs, but who were previously in salary positions such as Store Manager, Co-Manager, or Assistant Manager. Inexplicably, Dr. Haworth sought to exclude such employees, and set the variable mgrsalever =1 for these former salaried employees. Unlike Department Heads, other employees holding hourly supervisor jobs such as Support Manager (1050), CSM (510) and Lead (910) all have mgrsalever =0, and are included in Dr.

[55] These programs are contained on a CD provided at her April 21, 2003 deposition.

Haworth's regressions of hourly employees (unless excluded for some other reason).

34. If Dr. Haworth intended to include Department Heads in her hourly regressions, but excluded them, then her results are incorrect. On the other hand, if she intended to exclude them, her analysis is not probative. There are an average of about 30 Department Heads per store, and they account for approximately 13% of the hourly employees. As I pointed out in my February report[56], women earned about $1800 less than men during 2001, among full-time Department Heads working over 45 weeks. Accordingly, presenting an analysis of compensation for hourly employees excluding Department Heads without giving any explanation is practically useless. After my rebuttal report was served and my second deposition taken, Dr. Haworth, in her Declaration at 101 n. 134, asserts that she has performed "alternative" regressions that purport to correct this error. I have not been provided any back-up material from which I could assess this assertion.

Arbitrarily Excludes Many Employees from Regressions

35. Aside from Dr. Haworth's exclusion of Department Heads, she also excludes employees from her analysis based upon her use of arbitrary and unexplained restrictions. For example, she has excluded

[56] Drogin report, Table 10.

employees from her analysis of hourly employee pay rates if they have ever been demoted while working at Wal-Mart, or had ever been salaried employees during their employment at Wal-Mart.

Improperly Includes Tainted Variables

36. Dr. Haworth includes several tainted variables in her compensation analysis that have the effect of masking gender disparities in pay rates. Dr. Haworth has written in a law review article[57] that it is inappropriate to include variables in a model when the values of the variable itself may be influenced by employer discrimination. However, she has included several such variables in her models.

a. The gender distribution among departments is far from being a random distribution.[58] This uneven distribution originates at time of hire[59] as a result of Wal-Marts' uneven gender assignment to initial department. The initial hire

[57] Notre Dame Lawyer, vol 54:633, on page 656. Ex. 3. Also, see the article "Advanced Statistical Techniques – Compensation Analysis", page 8, 2nd paragraph from bottom. This page is designated as WMHO1234022 in this litigation. Ex. 4

[58] For example, see Table 14 on page 21 of my February report.

[59] I analyzed the assignment of new hires to departments, and found that women were disproportionately assigned at hire into the 10 departments with the highest percent female, and found the disparity to be highly significant (Z=125.59). This analysis was conducted on all hires at Wal-Mart, using the department at the time of hire, store, year of hire, starting status (pt or ft).

separation by gender is re-enforced by the job posting system, where women are significantly less likely to be promoted into the highly male departments, and significantly more likely to be promoted into the highly female departments[60].

b. Starting pay rate is another tainted variable Dr. Haworth includes in her analysis. Table 15 on page 23 of my February 2003 report indicates that women are paid less than men at time of hire. That table shows women hired in 1996 were paid between 20 and 40 cents less per hour than men hired in the same job, on the average, for the jobs with the most hires. I have performed a more refined analysis of gender differences in starting pay rate, using Dr. Haworth's data file provided with her backup materials. My analysis shows that initial pay rates for women are less than men's, and this difference is statistically significant.[61]

c. Dr. Haworth includes among her explanatory factors the variable "whether or not someone has ever worked in a

[60] See Tables 1a and 1b above.

[61] I compared the starting pay rates of men and women hired into hourly jobs, in the same store, in the same year, in the same starting pay group, and having the same first status (pt/ft), based on Dr. Haworth's raw data file of hourly employees active or on leave as of October 2001. The disparity for this comparison has a Z-value of -71.63, indicating a high degree of statistical significance for the shortfall in female starting pay rates.

grocery division". Again, this variable reflects uneven assignment of males to grocery departments, compared to women.[62]

d. Dr. Haworth includes the variable "whether someone was promoted in the past year" in her regressions, but gives no explanation or justification for including this variable. In fact, this is another improperly included tainted variable, since the promotion discrimination is an important issue in the case and my February 2003 report presents several results indicating that the promotion decisions at Wal-Mart have significant adverse impact on women.

Variables Included in Regressions Without Justification or Explanation

37. Aside from the tainted variables, there are several other variables that Dr. Haworth included in her regression model for which no explanation or justification is presented. These include:

Whether or not someone has changed stores at any time during their career;

[62] I compared the percent of men to the percent of women who have ever held a grocery job among those included in Dr. Haworth's raw data file of hourly employees active or on leave as of October 2001. The analysis controls for year of hire, and first store, and results in a Z-value of -71.36, indicating a high degree of statistical significance for the pattern that the percent of women who were "ever grocery" is less than the percent for men, based on Dr. Haworth's raw data.

Whether or not someone was hired as part-time or full-time;

Whether or not someone's job code is one of the Sales Associate job codes[63];

Interaction term between Sales Associate and department;

Whether or not someone ever received a premium for working night shifts;

Whether or not someone had ever held secondary job responsibilities;

First pay group;

Division.

Incorrect Application of Chow Test

38. Dr. Haworth incorrectly applies statistical theory to perform her analysis. She refers to a statistical procedure known as the "Chow Test" to justify her decision to do separate regressions for every subunit of every store.[64] The test is named after its author, Gregory C. Chow. His original article is attached as Ex. 4. In fact, the statistical theory on

[63] It should be noted that indicators for each Job code are already included as separate variables.

[64] Page 47 of Haworth report, "A statistical test called a 'Chow' test allows us to determine whether there are statistically significant differences between stores with respect to their compensation structures. If the structural differences between stores are statistically significant, then there is also a statistical justification for conducting a separate regression analysis for each store."

which the Chow Test is based does not justify her conclusion that separate regressions must be run for every store sub-component.

a. The statistically significant results from the Chow Test would indicate only that there might be at least one variable that is different in two or more stores. It does not imply that every variable in every store has a different relationship to pay rate. In fact, the method she employed tells her nothing about which stores or which factors might be different.[65] Dr. Haworth's regression implementation is equivalent to assuming that every factor in every store has a different relationship to pay rate. It could be, based on her variables, that only one store is different from other stores.

b. Dr. Haworth did not perform any Chow Tests for studying whether her store sub groupings into each of the specialty divisions are appropriate.[66] At her deposition she claimed to have done Chow tests

[65] Haworth deposition, page 182, lines 15-22.

[66] At her deposition she could not recall doing any Chow test for testing whether her models differed in any way among specialty departments, and was not certain whether she had done Chow tests, which would have led her to separate grocery and non-grocery. See page 180 lines 25 – page 181 line 4, and page 179 lines 8-19. After her deposition, I was provided with a new disk of data that purported to include grocery/non-grocery chow tests. The date of the output for this analysis indicates that it was done after her deposition.

comparing grocery and non-grocery subgroups, but these are not mentioned in her report, and they were not included in her backup materials.

Fails to Re-Aggregate to Compute Overall Results

39. As explained above, Dr. Haworth separates employees into approximately 7500 subunits, does a separate regression for each subunit, but never reports any measure of disparity resulting from re-aggregating her subunits. This is contrary to principles she has espoused in other cases[67] and articles[68], where she suggests computing an overall measure of disparity and its statistical significance when an analysis is done separately on independent subunits, as she has done with her regressions in this case. At her deposition, when asked " ... did you ever aggregate all the individual results to see if overall there was a statistically significant pattern against

[67] For example, see "Affidavit of Joan Haworth", sworn on June 14, 1994, in Thomas v. Christopher, on page 3. Ex. 6 Also, see her report "Statistical and Economic Characteristics of Ingles Markets and Workforce " dated April 12, 1998, on page 8, and designated as WMHO1227076 in this litigation. Ex. 7.

[68] See page 8 of Dr. Haworth's article "Economics and Statistics in the Employment Environment", designated as WMHO1234043 in this litigation. Ex. 8.

women?", she responded "I don't know how to do that – other than to show you the patterns that are here."[69]

40. In fact, it is a straightforward statistical exercise to obtain an overall measure of disparity and corresponding measure of statistical significance by properly reaggregating the results computed separately from each of the sub-groups Dr. Haworth has created. Since the subunits include disjoint groups of employees, it's possible to get a (weighted) average of the gender coefficients across the sub-groups. The calculation of the average[70] gender coefficient across Dr. Haworth's sub-groups results in an average pay shortfall of $0.12 per hour for hourly employees. The t-value for this disparity is -7.22 indicating a statistically significant result, which would occur with less than 1 chance in 10 to the 11th power by random fluctuation.

41. Thus, the reaggregated results computed from Dr. Haworth's unjustified extreme disaggregating of hourly employees, and using her tainted and

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[69] Haworth deposition, page 231, lines 19-24.

[70] The average gender coefficient is computed by taking the weighted average of the gender coefficients Dr. Haworth found in her individual sub-groups weighted by the number of women in the sub-group. This corresponds to the average dollars per hour women are paid less than men, after controlling for store, all the independent variables Dr. Haworth uses, and also all possible interactions between store and her independent variables. The calculation is made from the backup data files provided by Dr. Haworth, using her results for the model, which do not include starting pay rate as a variable.

unexplained variables, still shows a statistically significant difference in average pay rate for men and women of about $0.12 per hour. This result is consistent with Dr. Haworth's admission at her deposition that in each set of subunits in Wal-Mart Division 1, Sam's Club, and SuperCenter grocery and non-grocery a majority of the subunits showed pay rate differences adverse to women, both for all regressions, and restricted to those that resulted in statistically significant gender coefficients.[71]

Effects of Her Methodology

42. Dr. Haworth's extreme disaggregating of the employees makes her analysis unable to detect possible important gender differences. There are two types of situations where Dr. Haworth's method will overlook or minimize important disparities.

a. There are many cases where men and women holding the same job are separated by their department, as well as other categorical factors Dr. Haworth includes in her models. Where men tend to be placed in departments with higher pay, then differences in pay between men and women in the same job would be attributed to the department variable, not the gender variable. The more variables that are included in the model, the more this situation will occur.

[71] Haworth deposition, page 229 lines 10 through page 231 line 5.

b. By doing separate regressions for each store subunit, Dr. Haworth will never detect the situation where men are paid more in one store subunit than women in another store subunit, even though they have identical values for her explanatory factors. Her models would attribute gender pay differences to different "pay structures" in different store subunits, even though no such differences exist.

E. COMPENSATION FOR SALARIED EMPLOYEES

43. In her report, Dr. Haworth presented an analysis of total compensation for Store Managers of Wal-Mart Discount and SuperCenters, and a separate analysis of Managers of Sam's Clubs. She did not present any compensation analysis for Co-Managers and Assistant Managers.

44. Dr. Haworth compensation analysis for Store Managers is defective, because she includes tainted variables that mask the gender differences in earnings. As was noted earlier in this report, my analysis of promotions into Store Manager show that promoted women are disproportionately assigned to smaller stores. Therefore, in analyzing Store Manager compensation, "Square footage of the store", and "Number of employees at that store" are tainted variables, which mask compensation shortfalls of female Store Managers. Dr. Haworth also includes the variable "Store profit per square foot" without

explanation or any justification why this would be a relevant and gender neutral factor.

I declare under penalty of perjury that the foregoing is true and correct.

Date: July 1, 2003 /s/ Richard Drogin
Richard Drogin

From: Charlyn Jarrells Porter
Sent: Thursday, June 27, 2002 7:45 PM
To: Oneil Clark; Kevin Harper
Subject: Urgent Project
Oneil, Kevin

I need to get someone working immediately on a project of how does an hourly associate know how to get promoted into the management training program. We do not have a poster, brochure, nothing that I am aware of. We may even need to put it on pipeline and capture those that express interest. This will need to be done jointly with People and Training. Let me know your thoughts.

I also want the three of us to discuss using some RPMs as project coordinators as they await an opportunity to go be a district manager. We don't want to increase headcount in training long term. By using RPMs, Kevin can interview and select new RPMs and still have some flexibility on when they come in and leave. I think this will serve all interests. Let's discuss or since I am going on vacation next week, if the two of you want to get together and discuss that will be great. Thanks.

Charlyn Jarrells Porter
Senior Vice President
People/Labor Relations
Wal-Mart Stores, Inc.
Telephone: (479) 273-4456
Fax: (479) 277-0901

Sharon M Bilgischer

From: Sharon M Bilgischer
Sent: Monday, July 20, 1998 6:12 PM
To: Andy Wilson; Maxie Carpenter; Scott Northcutt; John Bell; Michael Merrill; Kevin R Harper
Cc: Cole Peterson; Dennis Anderson; Bryan Miller; Paul Beard
Subject: WI Diversity Questions

Below are questions that this week's Walton Institute participants asked as part of a diversity discussion:

Q1 We have a large Hispanic customer base. How do we get more Hispanic people to apply?

A. – At a corporate level we participate in annual job fairs sponsored by LULAC & USHCC. We also contribute to the NHSF & Maxie Carpenter sits on the Board of UTPA and leads the college recruitment team for that campus.
– At a local level, unit managers can partner with Hispanic organizations in your community, post job openings on community bulletin boards in Spanish & English, advertise hiring opportunities in local Hispanic publications & on Hispanic radio stations.

Q2 How are we addressing our aging workforce as it relates to heavy work as it exist in our clubs?

A. On an individual basis at this time with an understanding that it will become a growing issue.
– Partners should be placed in positions based on their ability meet job matrix requirements. Exceptions should be handled on an individual basis of reasonable accommodations.

– The need for adjustments to job matrix requirements should be addressed through RPMs as issues arise.

Q3 How do we find a balance between getting the diversity we need & still finding the best person for the job?

A. Recruitment & development planning.
– Expand the pool of candidates from which hiring & promotions are selected to better reflect/represent the customers that we serve.
– Ensure developmental opportunities for all associates based on individual qualifications vs stereo types and assumption.

Q4 How do we draw the line between hiring for diversity and hiring the best person for the job?

A. There is no line to draw. Our direction has always been & continues to be that we hire the most qualified person for the job. We enhance the quality of our workforce by expanding the pool from which we select to ensure we have identified the best person for the job.

Q5 How does W-M (diversity) compare to other top-notch companies, i.e. General Electric?

A. It varies by level in comparison to very general studies reported by various corporate responsibility watch groups:
– total population – very good/excellent
– entry level mgmt – good
– middle/upper mgmt – needs improvement
– board members – very good

Q5 Why are there no women at the front table at the (Saturday) morning meeting?

A. Historically men have been more aggressive in achieving those levels of responsibility which require a high level of experience. We are experiencing an evolutionary process that must take place in order to achieve orderly and lasting change of representation at the officer level.

Q6 Has our percentage of minorities & women in middle & upper mgmt increased/decreased over the past 5 years?

A. It has gradually increased.

Q7 We would like to know the percentage of females (& minorities) in the following positions:

A.

	Div 01	SC	SAM's	DCs	Private Fleet
Unit Mgr.	17.8/9.6	7.8/5.9	8.7/8.5		
DM/DO	9.3/8.9	2.0/4.1	9.4/10.9		
Regional	4.0/8.0	0/0	20/0		
GM				3.8/ 8.8	
Ops Mgr				13.3/ 12.7	18.8/ 16.5
Dispatch Mgr (combined GM)					3.6/0

Q8 Why & when will there be more diversity in senior mgmt?

A. Given the fact that there is a limited pool of experienced minorities and women to draw from at middle mgmt, based on our history, in addition to the decreasing number at positions available at the upper levels this has led to a slow but steady process.

Q9 Why is there no follow-up to ensure stores maintain demographic representation?

A. There is ever increasing follow-up & accountability to this issue at the divisional & regional levels that should reach the unit level in the near future.

Q10 Has any research been done concerning the feasibility of a daycare system for associates & their children to try to reduce call-ins & turnover at store level? W-M does not necessarily have to provide the space or people, but could possibly help fund the program using an outside service.

A. A least two studies have been done in the past. It has been determined that it isn't feasible. We recently participated in a survey with 5 other major retailers. Two of them reported daycare provisions for their corporate personnel only. We are one of three companies that offer discounted services to field personnel.

Q11 What other activities or business outside of retail will W-M venture into?

A. Quoting David Glass, "We are in the business of buying & selling merchandise." So we are not likely to diversify our business interest outside of retailing. We have entered an agreement to lease space to Carmike from which we receive a percent of profit from the business they manage in what might otherwise be dark store losses.

Q12 What is being done on the front end (of expatriate assignments) to ensure cultural training & global awareness?

A. To be answered by a representative from international.

WAL★MART
PEOPLE GROUP

[IMAGE]

WAL-MART STORES, INC
CORPORATE OFFICES
702 S.W. 8TH ST.
BENTONVILLE, AR
72716-9034

To:

Date:

From: Sharon Bilgischer

Re: Women in Leadership

The mission of Women in Leadership (WIL) is to successfully achieve company goals while promoting the career development of women at all levels within Wal-Mart Stores, Inc. The following information provides a brief history of the group, our current objectives and a membership directory.

The charter members of the Women in Leadership Group are:

Carol Bemis
Terry Bertschy
Debbie Davis Campbell
Claudia Gardner
Sandy Glover
Marie Hughes
Dana King
Lorie Meyer

In the Fall of 1992, when the group began, they identified the following issues, recommendations and responsibilities:

PROFESSIONAL

- Lack of awareness and sensitivity to issues that affect women's image
- Perception of compensation and differences (salary, stock options) between men and women
- Absence of career development, personal development or career counseling
- Fast-Track Programs lack women
- Career decisions are made for associates based on gender
- Personal upbringing and past experiences determine how women are perceived and treated in the workplace

  – Aggressive women intimidate men

  – Men are interviewed as replacements, women are viewed as support

  – Opportunities are not offered to women, if there is risk of failure

  – Stereotypes limit the opportunities offered to women
- Men's informal network overlooks women

  – It is not appropriate for men and women to have lunch together

  – It is not appropriate for men and women to travel together

- No female senior management brought in from the outside
- Current senior management not reflective of workforce

FAMILY:

- Career decisions are made for associates based on family situations
- Performance is judged by time spent in office, instead of productivity
- Regularly scheduled meetings are set to begin before 7:30 AM without regard for impact on dual career families
- Not enough flexibility in work schedule

RECOMMENDATIONS:

- Assess the depth of the problem through the use of an outside facilitator
- Increase AWARENESS to provide an environment that supports equality

  – Provide Awareness training with attendance by all management levels

  – Review salaries and stock option offerings for inequities, address problems
- Train and Develop

  – Provide career counseling, career development and personal development training

  – Perform associate development planning sessions annually

– Begin a formal mentoring program for females with executives

– Accelerate growth of high potential females through a fast-track program

– Institute effective development programs to grow first and middle managers into areas of responsibility

– Provide training on negotiation skills

– Provide training on women and men working as colleagues

- Promote

  – Market high potential females across divisions

  – Advertise the company's success in developing females

  – Post job opportunities in the home office

WOMEN'S RESPONSIBILITIES:

- Be aware of the image being presented in meetings
- Create awareness of career goals by speaking out
- Hold sessions among women from various areas to educate each other on attributes and traits needed to get ahead
- Support each other through networking
- Stand up for your beliefs
- Prepare a career plan
- Practice self-promotion
- Adopt an Executive
- Be a mentor

- Project a professional image
- Be equal, but different
- Utilize information technology to demonstrate that flexibility works

One objective of the group continues to be identifying barriers that keep women from achieving their full potential, then taking actions or making recommendations to remove those barriers,

If you are committed to **ACTIVELY PARTICIPATE** in the development and advancement of yourself and other women at Wal-Mart, then we need you. *Our group meets the first Thursday of every month at 4:00 PM in the People Conference Room.* Please feel welcome to join us, then if you decide you want to become a member, provide me with your e-mail address and telephone number. If you are not able to attend a meeting, you may contact another member for details of that meeting.

A copy of our current objectives and a directory of members is attached.

Diversity Management® Inc.

Management Development for Measurable Results

To: Wal-Mart Field Trainers
From: Chuck Shelton and Claudia White
Date: November 24th
Topic: Follow-up to October 26th diversity training

We appreciated the opportunity to train with you last month. As promised, we are following up with:

1) Your Project Success Input (page 1)
2) Updated "Diversity Challenges in Wal-Mart Stores" (page 5)
3) A draft document of Wal-Mart's 'Reasons for Diversity', focusing on developing and promoting qualified candidates, (page 11) and
4) A DMI bookmark to encourage you.

Analysis of the diversity surveys you completed will come later. Thanks again for your participation, and please contact us if we can help when a diversity problem or opportunity arises in your work.

---

1) Project Success Input

The Diversity Project was reviewed with the field trainers, and they were asked to write their answer to two questions:

> What will it take for this Diversity Project to succeed?

> What will make it hard for this Project to succeed?

SUMMARY – What will it take for this Diversity Project to succeed?

# of Responses	Input
21	Buy-In and demonstrated commitment among levels in the organization (the most, 7, indicated executive commitment is key)
15	Open minds and honesty
8	A clear answer to: What is diversity? Why is it important to the company? What does it have to do with my work?
7	Diversity education and training for all
3	Hiring and promoting the most qualified people
3	Telling diversity stories from inside the company, and include diverse people in this Project

RESPONSES – What will it take for this Diversity Project to succeed?

Open minds

The project must start with the executive level and move down from there

The project needs support at all levels

Upper management must extend an open mind to all opinions and ideas

Everyone must have a fuller understanding of what is involved with diversity

Open minds among all associates

All associates being trained on diversity and its importance

Everyone in stores and in the company to know they are not threatened by diversity but it makes us stronger. This has to come with explanations from Operations.

We will need to have the total support of all upper management within the company

It should be successful because of Wal-Mart's 3 beliefs, and it is already so diverse

A solid buy-in from the rank and file

Must change the view of diversity as another name for affirmative action

We have to honest with each other and ourselves

Support of executive committee, divisional and regional level managers

Education for all levels of management as to what's in it for them financially to embrace diversity

Training (learning) of assistant managers, fresh managers and specialty managers

Management with open minds

Teamwork

Everyone with the same agenda, common goal

Senior management awareness and buy-in, demonstrated when they continue to talk about diversity during every opportunity/meeting

The ability to pry open some minds

A diversity survey that would assess open-mindedness

Everyone keeping an open mind

Everyone needs to understand what diversity is exactly if they don't already

Identifying diversity within our company

Proper education on what diversity is. Diversity is not just what you see but who the person is.

It will have to have more recognition by everyone. We must accept differences first.

Must start at the top and work its way right through the stores

Management staff inside the stores should have diversity that matches the customer and associate base

Buy-in; quit calling it what it is not

Change the mindset that diversity does not mean we have to hire mass quantity of minorities

Hire the most qualified people

More open-mindedness among all

Greater effort to select the best person for the job with diversity a secondary consideration, and more willingness to admit our failures in this aspect

It will take time, commitment and an open mindset among managers

Needs strong support from Operations

Education is essential

Support from RPMs and Operations

Training the management associates to understand it

Realize we aren't trying to change personal beliefs, but state our company, expectation and goal

Buy-in from all aspects of the company; it's great to have this for executives, but we really need to push this information down. Total company buy-in is a necessity.

Educate management and district managers what diversity is and what it is not

Management must actually believe it is not who you know and quotas

Open minds of all who participate

A clear definition of what it is

Bringing in diverse groups of people at same time

Getting this information on diversity up the chain to include not only field management but also our top executives on down to our DMs, Store Managers, Assistant Managers, etc.

The commitment of all involved. Some managers take meetings like this only as window dressing. They have to willing to learn.

SUMMARY – What will make it hard for this Project to succeed?

# of Responses	Input
10	The lack of a clear answer to: What is diversity? Why is diversity important to the company? What does it have to do with my work?
7	A lack of commitment and action
7	Closed minds
5	Perceptions of threat or fear related to: ➔ diversity unfairly limits promotion opportunities for whites ➔ concerns in the rural population ➔ sexual orientation issues

3	Upper management is all white male, and some of them are not open to diversity
3	Good ol' boys and old ways of thinking
2	So many associates to reach
Other	Time constraints facing field managers
	Getting to the people who need diversity training the most

RESPONSES – What will make it hard for this Project to succeed?

The good ol' boy philosophy is still strong in the company

Upper management is not diverse

Lack of knowledge and education about diversity

People who are not open-minded or do not want to try to fully understand

Poor communication tools from Operations to the stores

The typical white assistant store manager does and will feel that diversity means they will have a harder time being promoted

How convinced we are in our own beliefs and how used we are to being the information holder and giver

Existing homogeneity of executives

Overcoming fears that exist in rural areas

The difficulty of managers to understand and manage issues around sexual orientation

Everyone with different agenda and goals

The vast number of associates we need to reach

Close-minded management teams

Old ways of thinking, and the lack of knowledge as to what makes up diversity

A few of the people with the most closed minds are at the top of the corporate ladder. Even though there are only a few, this is where the greatest impact will happen.

If everyone does not take hold of the project and take it seriously

New associates that may view diversity as “race and gender” only

Those who only look at the outward appearance of a person and think that is the only form of diversity and have to meet a “quota”

If everyone is not accepting diversity as the way it should be

Look at our top executives: almost all are white men

The way diversity is viewed

Lack of faith or effort from the field: DMs and managers

Placement/Promotion based only on the fact that "we need a female DM or we need an African-American DM", rather than them being qualified for the position

It will take time and new levels of comfort and knowledge

Time constraints in the field, where management tends to be too busy

Lack of education and desire

Closed-mindedness, lack of commitment, inaction

Good ol' boys, closed minds

No real buy-in from Operations

Overcome the belief that no problems/issues regarding diversity exist

If this is just a whim it will not succeed. If we only have a small focus group, the rest of the company won't see the benefits.

Not knowing what diversity is beforehand, and negative connotations of diversity

Getting to the people in the company that most need this training

Hard to roll out a program like this in a timely manner to the vast number of people who need it

2) **63 Diversity Challenges in Wal-Mart Stores**

All of the following challenges have been provided by Wal-Mart associates; the factual basis or generalizability of these instances has not been verified. In some of these situations human differences are directly involved, and in other diversity is just one variable.

Associates

Recruit Associates –

How to find good associates in under-employed minority neighborhoods and in a tight labor market

Use a temp service, job fair, and ad in an ethnic-specific newspaper to attract prospects

Help associates involved with hiring to recognize and work effectively with diversity issues (e.g. cultural differences during job interviews, avoiding discrimination when deciding on the 'fit' of a candidate)

Recruiting may take unexpected directions: in a Mississippi store with mostly black associates and

customers, the personnel manager focused on hiring white and Hispanic men for positions in the front end

Retain Associates –

If new associates drop out during orientation, find out why (there may be diversity-related concerns, like wondering if the store will be a safe place to be black) and improve both recruiting and orientation messages

Conduct exit interviews with associates, inquiring as to whether any dimension of diversity (race, gender, disability, age, sexual orientation, etc.) is part of their decision to leave

Calculate the cost of turnover: how many people have you hired? How many still work at Wal-Mart (usually less than 50%)? Multiply the loss by $1,500.

Develop Associates –

Help associates develop diversity-related insights and skills as part of their job training plan so that they learn how to handle their own diversity challenges

Learn to recognize and reward associates as individuals, taking their cultures into due account

Understand why associates who are alike congregate in the store (e.g. African-Americans gathering at a lunchroom table, Latinos speaking Spanish when they are together), and how to handle it

Some leaders feel more isolated and at-risk when there are few role models for them (e.g, being the only young female store manager with a baby in an entire region)

Promote Associates –

Conduct performance reviews that address facts and perceptions around diversity challenges and goals. Examples:

> One female assistant manager said: "For three years running my store manager never told me I wasn't doing a good job, and each year he said that I should be ready for the move up to store manager in 6-12 months. He doesn't seem able to tell me how to improve my performance, so I'm wondering if my promotion won't happen simply because I'm a woman, which I can't improve upon!"
>
> Several African-Americans report overhearing a white manager say "we can't let too many darkies get ahead here"

Fact or perception that advancement is not sought by diverse associates: e.g. when women are unwilling to seek advancement because they see how a female store manager or DM is treated

Fact or perception that less-qualified women are being promoted over more-qualified men

Some DMs and Store Managers (e.g. women) have an extra opportunity as a role model to encourage others (e.g. women associates) to pursue advancement

Issues around notification of openings:

> When positions are not posted, or only certain people hear about them or are encouraged to apply, or positions are filled prior to posting, then this hampers aspiration for and pursuit of advancement
>
> On the other hand, it has been reported that the new practice of posting openings on the Pipeline is encouraging candidates to explore promotions when they might not have the nerve to tell their store manager about their interest face-to-face

How to encourage people of color and white women to move up: CBL and on-the-job training, enabling them to decide to become a management trainee and to manage their career so they move to department managers, assistant manager, etc.

The glass ceiling is perceived by many women and people of color at the assistant manager level. Many feel like they have to work harder than white men to advance. One stated: “I knew I would never be promoted to store manager under my DM, because I was a woman and everyone knew he didn’t think women

could manage stores well. So I was aggressive about finding other opportunities"

Female assistant managers report limits on promotions because they cannot do heavy lifting or are seen to delegate too much rather than 'get in there and roll up your sleeves'

Some DMs who don't have any or very few female store managers don't seem personally comfortable with women in leadership roles, which is more of a problem as the pool of qualified assistant managers diversifies