

No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.
BETTY DUKES, ET AL.,
Respondents.

**On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

BRIEF OF *AMICI CURIAE*
U.S. WOMEN'S CHAMBER OF COMMERCE,
NATIONAL PARTNERSHIP FOR WOMEN &
FAMILIES, AND CALIFORNIA WOMEN LAWYERS
IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	4
CONCLUSION.....	26

TABLE OF AUTHORITIES

CASES

<i>Brown v. Board of Education</i> , 347 U.S. 483 (1954).....	14
<i>Haynes v. Shoney's, Inc.</i> , No. 89-30093-RV, 1993 U.S. Dist. LEXIS 749 (N.D. Fl. Jan 25, 1993).....	15, 23
<i>Ingram v. Coca-Cola Co.</i> , 200 F.R.D. 685 (N.D. Ga. 2001).....	16, 23
<i>Roberts v. Texaco, Inc.</i> , 979 F. Supp. 185 (S.D.N.Y. 1997).....	21, 23
<i>Velez v. Novartis Pharm. Corp.</i> , No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).....	19, 20, 23

STATUTES & REGULATIONS

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).....	22
29 C.F.R. § 1608.1 (2011)	10

AMICUS BRIEFS

Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Respondent, <i>Smith v. Bayer Corp.</i> , No. 09- 1205 (U.S. argued Jan. 18, 2011)	23
Brief for the Institute for Women’s Policy Research et al. as Amici Curiae Supporting Respondents, <i>Wal-Mart Stores, Inc. v.</i> <i>Dukes</i> , No. 10-277 (U.S. filed Mar. 1, 2011)	13, 16
Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et. al. as Amici Curiae Supporting Respondents, <i>Grutter v.</i> <i>Bollinger</i> , 539 U.S. 306 (2003) (No. 02-241), and <i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003) (No. 02-516)	14
Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, <i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003) (No. 02-241), and <i>Gratz v. Bollinger</i> , 539 U.S. 244 (2003) (No. 02-516)	7, 14

ARTICLES AND BOOKS

ROY D. ADLER, WOMEN IN THE EXECUTIVE SUITE CORRELATE TO HIGH PROFITS (2001)	5
AFL-CIO & INST. FOR WOMEN’S POL’Y RES., EQUAL PAY FOR WORKING FAMILIES: NATIONAL AND STATE DATA ON THE PAY GAP AND ITS COSTS (1999)	12

Gavin S. Appleby, <i>Protect Yourself Against Common Discrimination Mistakes</i> , ENTREPRENEUR, Mar. 1, 2008.....	6
Jessica Bennett & Jesse Ellison, <i>Tracking the Wage Gap</i> , NEWSWEEK, Apr. 20, 2010.....	12
Francine D. Blau & Lawrence M. Kahn, <i>Gender Differences in Pay</i> , 14 J. ECON. PERSP. 75 (2000).....	11
Francine D. Blau & Jed DeVaro, <i>New Evidence on Gender Differences in Promotion Rates: An Empirical Analysis of a Sample of New Hires</i> , INDUS. REL., July 2007	11
BNA HR DECISION SUPPORT NETWORK, DIVERSITY & INCLUSION: MOVING FROM CELEBRATING DIFFERENCES TO MAKING THE BUSINESS CASE FOR DIVERSITY (2009)	7
Douglas E. Brayley & Eric S. Nguyen, <i>Good Business: A Market-Based Argument for Law Firm Diversity</i> , 34 J. LEGAL PROF. 1 (2009).....	7, 8
CATALYST, THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY (2004).....	5
CATALYST, 2008 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS OF THE FORTUNE 500 (2008).....	11

CATALYST, WOMEN IN U.S. MANAGEMENT (2010).....	10
CHICAGO AREA PARTNERSHIPS, PATHWAYS AND PROGRESS: BEST PRACTICES TO ENSURE FAIR COMPENSATION (2003)	9, 18
CATHY CRONIN-HARRIS & DAVID M. WHITE, NEGOTIATING ENDURING CORPORATE CHANGE: A CASE STUDY ON THE TASK FORCE ON EQUALITY AND FAIRNESS IN <i>ROBERTS V.</i> <i>TEXACO INC.</i> (2005).....	21
Donald Deere, <i>Conduct a Pay Equity Study to Mitigate Litigation Risks</i> , SOCIETY FOR HUMAN RESOURCE MANAGEMENT, Sept. 7, 2010	9, 18
JUDY GOLDBERG DEY & CATHERINE HILL, BEHIND THE PAY GAP (2007)	11
<i>Does Your Company Have Internal Pay Equity?</i> , PAYSACLE FOR EMPLOYERS: COMPENSATION TODAY, June 31, 2009	6
Jesse Ellison, <i>Shattering Glass Ceilings</i> , NEWSWEEK, June 15, 2010	24
FED. GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995).....	5

Cheryl Francis & Sheila Penrose, <i>Getting More Women to the C-Suite</i> , HUM. RESOURCE EXEC. ONLINE, Feb. 7, 2011	8
Tristin K. Green, <i>Targeting Workplace Context: Title VII as a Tool for Institutional Reform</i> , 72 FORDHAM L. REV. 659 (2003)	14
Linda S. Hartenian & Donald E. Gudmundson, <i>Cultural Diversity in Small Business: Implications for Firm Performance</i> , 5 J. DEVELOPMENTAL ENTREPRENEURSHIP 209 (2000)	8
ALEXIS M. HERMAN ET AL., FIFTH ANNUAL REPORT OF THE TASK FORCE (2006).....	<i>passim</i>
Cedric Herring, <i>Does Diversity Pay?: Race, Gender, and the Business Case for Diversity</i> , 74 AM. SOC. REV. 208 (2009)	4
SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS (2007).....	14, 24
HR Specialist, <i>How Not to Manage HR: Forget about Formal Hiring and Promotions Processes</i> , BUS. MGMT. DAILY, June 10, 2010	9
INST. FOR WOMEN'S POL'Y RES., THE GENDER WAGE GAP: 2009 (2010).....	10

Harry Kalven Jr. & Maurice Rosenfield, <i>The Contemporary Function of the Class Suit</i> , 8 U. CHI. L. REV. 684 (1941).....	13
Nancy Levit, <i>Megacases, Diversity, and the Elusive Goal of Workplace Reform</i> , 49 B.C. L. REV. 367 (2008).....	4, 15, 24
Orly Lobel, <i>Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions</i> , 39 CONN. L. REV. 1685 (2007).....	24
McKINSEY & CO., WOMEN MATTER 2010 (2010).....	5
<i>Research Makes a Business Case for Diversity</i> , FED. HUM. RESOURCES WK., Sept. 24, 2001	4
THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING (Heather Boushey & Ann O'Leary eds., 2009)	12
SOC'Y FOR HUM. RES. MGMT., 2007 STATE OF WORKPLACE DIVERSITY MANAGEMENT (2008).....	6, 7
Susan Sturm, <i>Second Generation Employment Discrimination: A Structural Approach</i> , 101 COLUM. L. REV. 458 (2001).....	6
Davia Temin, <i>Making the Business Case for Gender Equality</i> , FORBES, Nov. 9, 2010.....	7

U.S. GOV'T ACCOUNTABILITY OFF., WOMEN IN MANAGEMENT: FEMALE MANAGERS' REPRESENTATION, CHARACTERISTICS, AND PAY (2010)	11
STEVE WATKINS, THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE (1997)	15, 16
Theresa M. Welbourne, <i>Wall Street Likes Its Women: An Examination of Women in the Top Management Teams of Initial Public Offerings</i> (Cornell Univ. Ctr. for Advanced Hum. Res. Working Paper Series, Paper No. 99-07, 1999)	5
Stephen C. Yeazell, <i>Brown, the Civil Rights Movement, and the Silent Litigation Revolution</i> , 57 VAND. L. REV. 1975 (2004)	13
MISCELLANEOUS	
Coca-Cola Co., <i>Diversity: Our Progress</i> (2011), http://www.thecoca- colacompany.com/citizenship/our_progress. html	18
Declaration of Marc Bendick, Jr., Ph.D. in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003), App. 448a Wal-Mart Stores, Inc. v. Dukes, No. 10-277	11

U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform, Statement on The Class Action Crisis and S. 1712 – “The Class Action Fairness Act” (July 31, 2002).....	23
U.S. Chamber Institute for Legal Reform, Class Action Toolkit, http://www.legalreformnow.com/images/stories/documents/pdf/ClassActionToolkit.pdf	23
U.S. Department of Labor, Bureau of Labor Statistics, Women’s Earnings and Employment by Industry, 2009.....	11
Transcript of Proceedings Held on Nov. 19, 2010 before Judge Colleen McMahon, <i>Velez v. Novartis Pharm. Corp.</i> , No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).....	19

STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,¹ in support of Respondents' argument that the order of class certification was consistent with Rule 23 of the Federal Rules of Civil Procedure. Specifically, the *amici* submit this brief to highlight the business benefits of fair pay and promotions, the impact of persistent disparities, and the role of class actions in providing systemic reform to address unlawful discrimination.

The U.S. Women's Chamber of Commerce ("Women's Chamber") is the preeminent national women's chamber of commerce network, representing 500,000 individuals, business owners, career professionals, women's organizations, economic development organizations and leadership organizations. Its mission is to develop leaders, accelerate economic growth, and promote economic opportunity for women at every level of the U.S. economy. It is specifically concerned with issues of economic discrimination against women.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women

¹ Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance equal employment opportunities through several means, including by challenging discriminatory employment practices in the courts.

California Women Lawyers (CWL) represents a broad range of lawyers throughout California. Throughout its thirty-year history, CWL has promoted its mission of advancing women's interests, extending universal equal rights, and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins amici briefs challenging discrimination by private and governmental entities, weighs in on proposed California and federal legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

SUMMARY OF ARGUMENT

Although women have made great strides since the passage of Title VII of the Civil Rights Act of 1964, disparities and discrimination persist in many workplaces. When recalcitrant employers fail to address systemic discrimination and ignore internal calls for reform, employees are more likely to turn to class litigation to obtain compliance with the law. While class litigation is relatively infrequent, such litigation can provide appropriate relief for harms that would otherwise go unremedied.

Indeed, class actions have played a critical role in changing discriminatory business practices and promoting systemic reforms that comply with the law, industry standards and best practices. These reforms have proven to be carefully-tailored to the corporations' own needs and infrastructures and to have long lasting effects. Such reforms have served to carry out the legislative intent of our civil rights laws, to the benefit of both employees *and* employers.

ARGUMENT

I. Fair compensation and promotion practices serve the bottom line.

Research has shown that business benefits from compensating and promoting women fairly. When companies adopt equal pay and promotion practices, they attract more and better-qualified female workers, boost employee loyalty and productivity, and improve their public image² — all of which translates into dollars and cents. Businesses with greater levels of gender diversity average \$644.3 million in revenues per year, compared to only \$45.2 million for businesses with low levels of gender diversity.³ Additionally, businesses with high levels of gender diversity are more likely to report above average profitability and market share.⁴

Indeed, success in today's business world demands diverse competencies and a diverse workforce *at all levels*. The representation of women in top management and executive positions also correlates with financial performance. Fortune 500 companies with a high number of female executives

² Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 426 (2008); *Research Makes a Business Case for Diversity*, FED. HUM. RESOURCES WK., Sept. 24, 2001.

³ Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOC. REV. 208, 215-16 (2009).

⁴ *Id.*

exceed the industry median on multiple measures of profitability.⁵ In fact, Fortune 500 companies with the highest representation of women on their top management teams significantly outpace those with the lowest representation with respect to both return on equity and total return to shareholders.⁶ Firms with a higher percentage of women in upper management experience better short-term performance, higher three-year growth in stock price, and higher growth in earnings per share following an initial public offering.⁷ Another study of Standard & Poor's 500 companies showed that firms that succeed in shattering their own glass ceilings racked up stock-market records that were nearly two and a half times better than otherwise-comparable companies.⁸

⁵ ROY D. ADLER, WOMEN IN THE EXECUTIVE SUITE CORRELATE TO HIGH PROFITS 4 (2001), http://www.women2top.net/download/home/adler_web.pdf.

⁶ CATALYST, THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY 2 (2004), <http://www.catalyst.org/file/44/the%20bottom%20line%20connecting%20corporate%20performance%20and%20gender%20diversity.pdf>.

⁷ Theresa M. Welbourne, *Wall Street Likes Its Women: An Examination of Women in the Top Management Teams of Initial Public Offerings* 2 (Cornell Univ. Ctr. for Advanced Hum. Res. Working Paper Series, Paper No. 99-07, 1999), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1105&context=cahrswp>; see also MCKINSEY & CO., WOMEN MATTER 2010 7 (2010), http://www.mckinsey.com/locations/paris/home/womenmatter/pdfs/Women_matter_oct2010_english.pdf (finding that companies with the highest share of women executives significantly outperform companies with no women in terms of return on equity and operating results).

⁸ See FED. GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD

Increasingly, businesses recognize that compensating women at the same rate as men enhances profitability. As one company has observed, “internal pay equity makes good business sense because being known as a responsible, considerate employer not only improves retention of your current top performers, but also increases your chances at hiring the top talent in your industry.”⁹ In contrast, wage discrimination “create[s] a negative workplace,” thereby damaging employee morale and increasing turnover costs.¹⁰

Furthermore, businesses and human resources professionals are increasingly aware that moving women up the career ladder is a necessary part of sustaining an organization’s competitive position in the marketplace.¹¹ These industry

FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL 14 (1995).

⁹ *Does Your Company Have Internal Pay Equity?*, Payscale FOR EMPLOYERS: COMPENSATION TODAY, June 31, 2009, <http://blogs.payscale.com/compensation/2009/03/importance-of-internal-pay-equity.html#more>; see Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 498 (2001) (Deloitte & Touche’s CEO in 1991, Mike Cook, “credits his firm’s thirty percent growth rate in 1999, the best among the ‘Big Five,’ to lower turnover. Deloitte’s success has attracted attention and awards, and has itself become an effective recruitment tool.”)

¹⁰ Gavin S. Appleby, *Protect Yourself Against Common Discrimination Mistakes*, ENTREPRENEUR, Mar. 1, 2008, <http://www.entrepreneur.com/management/legalcenter/legalcenter/article191772.html>.

¹¹ SOC’Y FOR HUM. RES. MGMT., 2007 STATE OF WORKPLACE DIVERSITY MANAGEMENT 9 (2008), available at <http://www.bus.iastate.edu/emullen/mgmt472/shrmdiversityrep>

leaders appreciate that gender diversity improves decision-making and lowers unnecessary risk-taking;¹² brings forth greater creativity and innovation;¹³ and enhances companies' market share, marketability, and their competitive advantage.¹⁴

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), sixty-five prominent American companies submitted an amicus brief to attest that diversity was a “critical component of their business, culture and planning” and that they “need[ed] the talent and creativity of a workforce...as diverse as the world around it.”¹⁵ Indeed, research has shown that diverse teams solve problems more effectively.¹⁶

Like large corporations, small businesses also benefit from the economic advantages of diversifying

ort2007.pdf.

¹² Davia Temin, *Making the Business Case for Gender Equality*, FORBES, Nov. 9, 2010, <http://www.forbes.com/2010/11/09/gender-gap-business-case-diversity-forbes-woman-leadership-harvard-women-public-policy.html>

¹³ SOC'Y FOR HUM. RES. MGMT., *supra* note 11, at 9.

¹⁴ BNA HR DECISION SUPPORT NETWORK, DIVERSITY & INCLUSION: MOVING FROM CELEBRATING DIFFERENCES TO MAKING THE BUSINESS CASE FOR DIVERSITY 8 (2009).

¹⁵ Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

¹⁶ Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 3 (2009).

their workforces. One study of over two hundred small business concluded that firms with more diverse workforces experience greater increases in revenue than firms with less diverse work forces.¹⁷

Similarly, in the legal profession, the data demonstrates that highly diverse firms generate greater revenue per lawyer and turn higher profits per partner.¹⁸ The data strongly suggest that diversity is good for business, because highly diverse firms are outperforming their peers.¹⁹

The diversity in talent and creativity needed in today's business world cannot be obtained in the absence of fair pay and promotions for women. In the words of corporate executives writing about the importance of inclusive policies and practices, "retaining and advancing high-potential women [is] a strategic imperative that makes good business sense."²⁰

Many employers have implemented policies and procedures that prevent discriminatory bias and that promote gender equity in the workplace. A number of straightforward policies and practices have proven effective in preventing or rooting out

¹⁷ Linda S. Hartenian & Donald E. Gudmundson, *Cultural Diversity in Small Business: Implications for Firm Performance*, 5 J. DEVELOPMENTAL ENTREPRENEURSHIP, 209, 209, 211 (2000).

¹⁸ Brayley & Nguyen, *supra* note 16, at 2.

¹⁹ *Id.* at 3.

²⁰ Cheryl Francis & Sheila Penrose, *Getting More Women to the C-Suite*, HUM. RESOURCE EXEC. ONLINE, Feb. 7, 2011, <http://www.hreonline.com/HRE/story.jsp?storyId=533329411>.

discrimination. For example, the Society for Human Resource Management advises employers that “[c]onducting a well-designed and well-executed pay equity study using well-maintained and complete data is a good business practice that serves as an important tool in managing the risk associated with allegations of pay discrimination.”²¹ Other widely accepted practices that can help employers protect against wage disparities include linking pay ranges to neutral, relevant factors; developing tracking tools and processes to monitor compensation criteria and decisions; and creating defined benchmarks for measurement.²² Similarly, businesses can avoid discriminating in promotions by creating “job descriptions, including a list of essential functions, so managers know what characteristics they’re looking for when interviewing applicants,” and by adopting policies and processes, because “[e]mployers that rely on management recommendations alone risk having decision-making tainted by managerial bias.”²³

²¹ Donald Deere, *Conduct a Pay Equity Study to Mitigate Litigation Risks*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, Sept. 7, 2010, <http://www.shrm.org/hrdisciplines/compensation/Articles/Pages/PayEquityStudy.aspx>.

²² CHI. AREA P'SHIPS, PATHWAYS AND PROGRESS: BEST PRACTICES TO ENSURE FAIR COMPENSATION 9-10 (2003), http://www.womenemployed.org/docs/best_practices_to_ensure_fair_compensation_report.pdf.

²³ HR Specialist, *How Not to Manage HR: Forget about Formal Hiring and Promotions Processes*, BUS. MGMT. DAILY, June 10, 2010, <http://www.businessmanagementdaily.com/articles/22449/1/How-not-to-manage-HR-Forget-about-formal-hiring-and-promotions-processes/Page1.html#>.

Practices like these have helped working women make significant gains since the passage of equal employment opportunity laws like Title VII of the Civil Rights Act of 1964. Though a significant pay gap persists, women working full-time, year-round earn 18 cents more on the dollar than they did thirty years ago.²⁴ Representation as corporate officers in Fortune 500 companies has nearly doubled since 1995.²⁵ Businesses that adhere to the latest industry standards deserve much of the credit for the growth in opportunities for working women. However, some employers have failed to adopt policies that can help to root out or prevent discrimination, in violation of Title VII mandates.²⁶

II. Persistent disparities in compensation and advancement impact working women, their families, and the nation's economy.

Despite the significant gains noted above, many women workers continue to face significant disparities in pay and promotions. Women working full-time, year-round still are paid only 77 cents for every dollar paid to men.²⁷ Women's earnings lag

²⁴ INST. FOR WOMEN'S POL'Y RES., THE GENDER WAGE GAP: 2009 (2010), http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2009/at_download/file.

²⁵ CATALYST, WOMEN IN U.S. MANAGEMENT (2010), http://www.catalyst.org/file/308/qt_women_in_us_management.pdf.

²⁶ See 29 C.F.R. § 1608.1 (2011) (calling on employers "to modify employment practices and systems which constitute[...] barriers to equal employment opportunity.").

²⁷ INST. FOR WOMEN'S POL'Y RES., *supra* note 24.

behind men's in every industry, and the pay gap in the wholesale and retail trade industry is larger than most.²⁸ Even when researchers control for occupational choices and "human capital" factors such as education and years of experience, a substantial gender wage gap remains that can be attributed to discrimination.²⁹

Research also shows that the glass ceiling still prevents many women from advancing in their careers, in light of evidence that men are promoted at a higher rate than equally qualified women.³⁰ To date, women comprise only 40 percent of managers across all industries.³¹ At the uppermost levels, women's representation is even thinner: a mere one-sixth of corporate officers in the Fortune 500 companies are female.³²

²⁸ U.S. Department of Labor, Bureau of Labor Statistics, Women's Earnings and Employment by Industry, 2009, http://www.bls.gov/opub/ted/2011/ted_20110216.htm.

²⁹ See, e.g., JUDY GOLDBERG DEY & CATHERINE HILL, BEHIND THE PAY GAP 3 (2007), <http://www.aauw.org/learn/research/upload/behindPayGap.pdf>; Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, 14 J. ECON. PERSP. 75, 82 (2000).

³⁰ Francine D. Blau & Jed DeVaro, *New Evidence on Gender Differences in Promotion Rates: An Empirical Analysis of a Sample of New Hires*, INDUS. REL., July 2007, at 511, 544.

³¹ U.S. GOV'T ACCOUNTABILITY OFF., WOMEN IN MANAGEMENT: FEMALE MANAGERS' REPRESENTATION, CHARACTERISTICS, AND PAY 6 (2010), <http://www.gao.gov/new.items/d10892r.pdf>; see also App. 448a, Declaration of Marc Bendick, Jr., Ph.D. in Support of Plaintiffs' Motion for Class Certification (Apr. 28, 2003) (describing that the rate of women in management at the 20 largest comparable retailers is 55%).

³² CATALYST, 2008 CATALYST CENSUS OF WOMEN CORPORATE

Discrimination against women impacts not only working women, but also their families and the nation's economy. With four in ten mothers acting as primary breadwinners and another 25 percent contributing a significant portion of their household income,³³ women's earnings are crucial to the well-being of American families. If women received the same compensation as their male counterparts, poverty rates among their families would fall by more than half.³⁴ Because women make 80 percent of purchase decisions by consumers, lost earnings for women due to discrimination carry detrimental effects for the nation's economy.³⁵

While market forces should provide ample incentive to eradicating gender discrimination in the workplace, discrimination persists. Although the nation's businesses have made significant progress in closing gender disparities, work remains to be done. Countless corporations and executives have

OFFICERS AND TOP EARNERS OF THE FORTUNE 500 (2008), http://www.catalyst.org/file/241/08_census_cote_jan.pdf.

³³ THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 19 (Heather Boushey & Ann O'Leary eds., 2009), http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf.

³⁴ AFL-CIO & INST. FOR WOMEN'S POL'Y RES., EQUAL PAY FOR WORKING FAMILIES: NATIONAL AND STATE DATA ON THE PAY GAP AND ITS COSTS 14 (1999).

³⁵ THE SHRIVER REPORT, *supra* note 33, at 199. In fact, recent calculations suggest that if women and men were compensated at equitable rates, this country's gross domestic product would increase by 9 percent. Jessica Bennett & Jesse Ellison, *Tracking the Wage Gap*, NEWSWEEK, Apr. 20 2010, <http://www.newsweek.com/2010/04/19/tracking-the-wage-gap.html>.

committed to addressing such disparities by implementing policies and procedures to root out discrimination. However, too often, evidence of persistent gender discrimination goes ignored even by well-intentioned employers.

This problem is heightened in circumstances where corporations, executives, and managers are steeped in bad habits and reliant on bad practices. The simple fact is that far too often executives and corporations are either unable or unwilling to see or acknowledge gender disparities in the workplace.³⁶ When recalcitrant employers refuse to adopt inclusive policies and practices and refuse to acknowledge internal calls for reform, they not only open the door for bias and stereotypes to take hold in the workplace but also make it more likely that victims of unlawful discrimination will turn to class litigation as a last resort.

III. Class actions have played a positive role in promoting change and correcting persistent disparities.

There is a long and honorable history of class actions acting as both instigators and mechanisms of structural reform.³⁷ The most notable of these

³⁶ Brief for the Institute for Women's Policy Research et al. as Amici Curiae Supporting Respondents, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Mar. 1, 2011).

³⁷ See, e.g., Stephen C. Yeazell, *Brown, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1978 (2004); Harry Kalven Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U.

examples is the *Brown v. Board of Education* litigation.³⁸ Improvements to public education stemming from the *Brown* litigation continue to benefit the nation's corporations and the community as a whole.³⁹ Again, we can boast of those improvements only because of privately initiated class action litigation.

Class litigation in the employment arena also has served an integral role. Courts have long recognized the role of class actions in righting the wrongs perpetuated by systemic, discriminatory employment practices. Furthermore, such litigation has provided important guidance on the proper development of workplace policies, procedures, and institutional structures.⁴⁰ An early example of

CHI. L. REV. 684 (1941).

³⁸ 347 U.S. 483 (1954).

³⁹ The integration of public schools paved the way for the diverse workforce we now have – a diverse workforce that was eloquently defended in the amicus briefs for *Grutter v. Bollinger*. See, e.g., Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

⁴⁰ As Sylvia Ann Hewlett, Director of the Gender and Policy Program at Columbia University's School of International and Public Affairs, has observed "lawsuits can be surprisingly effective in forcing change...they cannot be concealed or ignored." SYLVIA ANN HEWLETT, OFF-RAMPS AND ON-RAMPS: KEEPING TALENTED WOMEN ON THE ROAD TO SUCCESS 93 (2007). For an academic discussion through the legal lens, see generally Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659,

effective class action employment discrimination litigation is *Haynes v. Shoney's*.⁴¹ The 1989 *Shoney's* class action made headlines when it revealed smoking-gun evidence of racial discrimination and ultimately resulted in a settlement benefiting approximately 200,000 rejected applicants and current and former African-American employees.⁴²

The *Shoney's* litigation resulted in the institution of a number of reforms intended to root out discrimination. Notable best practices included the designation of Equal Employment Opportunity Managers “to investigate and process complaints of employment discrimination, harassment and/or retaliation and to assist in the implementation of the fair employment and affirmative action provisions of this Decree,”⁴³ and the codification and posting of the minimum requirements for each job title,⁴⁴ which allowed employees to better self-identify readiness for a position. The positive effects of these reforms are evident in the hard numbers. Before the lawsuit, only 3% of dining room supervisors, 5% of assistant managers and 1.8% of managers at Shoney's were African-Americans; three years after the settlement, those numbers had risen to 13% of dining room

671-705 (2003); Levit, *supra* note 2.

⁴¹ *Haynes v. Shoney's, Inc.*, No. 89-30093-RV, 1993 U.S. Dist. LEXIS 749 (N.D. Fl. Jan 25, 1993).

⁴² *Id.* at *11 (“Over 225,000 actual notices or requests [from class members] have been handled by the parties.”); see also STEVE WATKINS, *THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE* (1997) (exploring in detail the case, its development, and its effects).

⁴³ *Haynes*, 1993 U.S. Dist. LEXIS 749, at *59.

⁴⁴ *Id.* at *80.

supervisors, 21% of assistant managers, and 12% of managers.⁴⁵

Just as the *Shoney's* class litigation and resulting consent decree popularized best practices in the late 80's that are now commonplace, subsequent class employment litigation has generated similar results with ever increasing sophistication. Examples abound of equitable relief packages laying forth policies and procedures that are now standard best practices utilized by corporations across industries.⁴⁶

Most extensively documented is the equitable relief package resulting from the class action against Coca-Cola, *Ingram v. Coca-Cola Co.*, originally filed in 1999.⁴⁷ The *Coca-Cola* settlement included best practices that echoed the *Shoney's* settlement, but it also laid out more advanced mechanisms to address virtually every aspect of the corporation's policies and procedures, including modifications to staffing, compensation, performance evaluation, and career development systems.⁴⁸

⁴⁵ WATKINS, *supra* note 42, at 231.

⁴⁶ Brief for the Institute for Women's Policy Research et al. as Amici Curiae Supporting Respondents, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. filed Mar. 1, 2011).

⁴⁷ 200 F.R.D. 685 (N.D. Ga. 2001).

⁴⁸ Central to these sophisticated reforms was the independent task force that worked to both direct and oversee the reform efforts. See ALEXIS M. HERMAN ET AL., FIFTH ANNUAL REPORT OF THE TASK FORCE (2006), http://www.thecocacolacompany.com/ourcompany/task_force_report_2006.pdf. [hereinafter TASK FORCE REPORT].

Key amongst the *Coca-Cola* reforms was the revision of the performance evaluation process away from excessively subjective measurements to a system based on “specific, job-related measurements.”⁴⁹ Moving away from undirected exercises of managerial discretion,⁵⁰ the performance review process was changed to “emphasize[] the linkage between performance objectives and business unit goals” by simplifying what would be measured and “revising the rating scale to clarify performance expectations.”⁵¹ These modifications to the *Coca-Cola* performance review system were tailored to the specifics of the company’s operations and were designed to fit fluidly into the existing infrastructure. As such, the performance reforms informed and coincided with, for example, reforms to

⁴⁹ *Id.* at 25.

⁵⁰ Nothing in this section should be taken to suggest that all managerial discretion is inappropriate. To the contrary, managerial discretion is a necessary and appropriate part of good business management. However, there are both proper and improper ways in which that discretion can be utilized. Discretion should be given within the confines of properly tailored parameters, detailed guidance on the exercise of that discretion, and concurrent oversight by more senior leadership. In fact, the Coca-Cola settlement provided for just that sort of exercise of discretion. *See id.* at 34 (“Key to the successful continuation of its ongoing compensation programs are the communication tools provided by the Company for managers and employees to better understand and execute the compensation process and the ongoing data monitoring systems by which the Company tracks the fairness of compensation decisions. As in the past, managers are given some flexibility and discretion in making compensation decisions, but the Company actively monitors these decisions to ensure fairness and managers are held accountable for their decisions.”).

⁵¹ *Id.* at 25.

the compensation system.⁵² Another notable component of Coca-Cola's compensation reforms was the implementation of pay equity studies, a practice recommended by the Society for Human Resources Management.⁵³

As a result of the litigation-initiated reforms, policies and procedures at Coca-Cola came in line with industry standards⁵⁴ and the corporate climate improved with significant and measurable results.⁵⁵ The equitable relief in the *Coca-Cola* litigation applied to both the non-salaried and salaried workforces was by no means a crude, one-size-fits-all quick-fix. Instead, the *Coca-Cola* class litigation led to the sophisticated and careful application of industry best-practices to Coca-Cola's particular business model — an application that ultimately positioned Coca-Cola as a leader on anti-discrimination efforts in the workplace.⁵⁶

⁵² *Id.* at 34-35.

⁵³ Deere, *supra* note 21.

⁵⁴ See, e.g., CHI. AREA P'SHIPS, *supra* note 22, at (explaining that good practices include creating benchmarks for measurement that are defined clearly up front; linking pay ranges to neutral, relevant factors; developing tracking tools and processes to monitor compensation criteria and decisions; and routinely auditing the outcomes of compensation systems against legal and fairness standards).

⁵⁵ TASK FORCE REPORT, *supra* note 48, at 21-22.

⁵⁶ In the last two years alone, Coca-Cola has won numerous awards including being named one of the Top 50 Companies for Diversity by DiversityInc., one of the 40 Best Companies for Diversity by Black Enterprise Magazine, and America's Top Corporation for Women Business Enterprises by Women Business Enterprises National Council. See Coca-Cola Co., Diversity: Our Progress, <http://www.thecoca->

The 2010 resolution of the class litigation *Velez v. Novartis Pharmaceuticals Corporation* provides the most recent example of class litigation generating significant and refined reforms for a nationwide corporation.⁵⁷ Filed in 2004 and tried in 2010, the *Novartis* case involved claims regarding gender discrimination in compensation and promotions, along with pregnancy discrimination. The case settled after the plaintiffs prevailed on all counts at trial.⁵⁸

In approving the equitable relief package in the settlement, the judge commented:

the noneconomic side of the settlement has a great deal to commend it, not the least of which is that I truly believe that *Novartis is on the verge of becoming the company that it said it was* but that the jury plainly believed that it was not. The noneconomic terms of the settlement reflect, in my judgment, *a sincere and deeply felt commitment on behalf of this company to look at itself seriously and to make itself a place where women as well as men can be proud to work*, knowing that it truly is an equal opportunity employer in the marketing area.⁵⁹

colacompany.com/citizenship/our_progress.html (last visited Feb. 23, 2011).

⁵⁷ *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

⁵⁸ *Id.* at *10-11.

⁵⁹ Transcript of Proceedings Held on Nov. 19, 2010 before Judge Colleen McMahon, *Velez v. Novartis Pharm. Corp.*, No. 04 Civ.

The court's comments on the settlement contain two important observations: first, that the settlement fostered reforms that the company previously would have rejected as unnecessary, and second, that the class litigation had generated a true and lasting change in the corporation's commitment to non-discrimination. Thus, the *Novartis* class litigation had precisely the sort of effect envisioned by Congress when it passed Title VII: an effect that, although originating from external private litigation, is tailored to bring about meaningful and lasting change to the company's culture, systems, and practices.⁶⁰

Indeed, history teaches us that class litigation can have positive effects that long outlast the litigation. The external pressures of class litigation can force an internal reexamination of executive attitudes and corporate culture for which parallels cannot be found in individual litigation. For example, after the litigation was filed but *before* the

09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010) (emphasis added).

⁶⁰ The reforms in the *Novartis* settlement include changes to the company's management development process that made it more transparent, self-guided, consistent and accessible; changes to the performance management system to make the evaluations more closely tied to the actual job duties being performed by the corporation, and changes to the compensation system to ensure that the discretion exercised by managers in deciding employees' compensation is directed by corporate guidelines and reviewed by higher management. In addition, the monetary relief included full backpay awards to the entire class. *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

class litigation was settled in *Roberts v. Texaco, Inc.*,⁶¹ Texaco's senior management initiated an independent internal investigation that led to the conclusion "that the time was right for [Texaco] to declare total war on intolerance," including not only race *but also gender* discrimination.⁶² To that end, Texaco hired the Honorable A. Leon Higginbotham, former Chief Judge of the U.S. Court of Appeals for the Third Circuit, to work with Texaco to "transform our Company to be a model of fairness, without discrimination in the workplace."⁶³ The corporate leadership was galvanized by large-scale litigation in two ways—first to address systemic problems with race that the litigation targeted, and second to implement beneficial reforms that far exceeded the scope of the litigation.⁶⁴ Similarly, reforms implemented by Coca-Cola to address race problems also yielded benefits to female employees, with a 68% increase in female leadership at the company over the five-year period of the settlement.⁶⁵

⁶¹ 979 F. Supp. 185 (S.D.N.Y. 1997).

⁶² Cathy Cronin-Harris & David M. White, NEGOTIATING ENDURING CORPORATE CHANGE: A CASE STUDY ON THE TASK FORCE ON EQUALITY AND FAIRNESS IN *ROBERTS V. TEXACO INC.* 14 (2005) (citing an interview with Texaco Vice Chairman Allen Krowe), <http://www.dmwlawfirm.com/resources/Texaco%20Case%20Study.pdf>.

⁶³ *Id.* at 15 (citing a November 26, 1996 press release issued by Texaco CEO Peter I. Bijur).

⁶⁴ *Id.*

⁶⁵ TASK FORCE REPORT, *supra* note 48, at 6.

In sum, class action litigation can serve as a wake-up call for recalcitrant corporations. That wake-up call often leads to real and meaningful change in the corporate cultures at issue. The centerpiece of class action relief is the set of systemic reforms that provide practical steps to bring about necessary long-term changes. Historically, such systemic reforms represent carefully-tailored applications of the business community's best practices. As such, class actions provide an appropriate remedy for those corporations that suffer from persistent, institutionalized discrimination.⁶⁶

IV. Class actions can provide businesses with more efficient alternatives to individual litigation.

Class actions also provide an efficient mechanism to address disparities arising from discrimination for both employees and employers. Indeed, the business sector has long acknowledged the efficiencies of class actions. For example, in support of the Class Action Fairness Act of 2005,⁶⁷ the U.S. Chamber of Commerce took the position that “[c]lass action litigation is a necessary part of our legal system because it can bring efficiency and fairness to situations involving many people with

⁶⁶ As these cases demonstrate, not all class actions are without merit. Where there is merit to the claims, equitable relief in the form of backpay and in the form of systemic reform is not only appropriate but laudable.

⁶⁷ Pub. L. No. 109-2, 119 Stat. 4 (2005).

similar claims.”⁶⁸ The Chamber asserted that federal lawsuits “ensure an evenhanded forum for bringing large, interstate class actions.”⁶⁹ And in a recent amicus brief before this Court, the Chamber acknowledged that there is an “enormous societal interest in preventing serial litigation.”⁷⁰

Indeed, the common sense nature of this observation is borne out by history. The *Shoney’s* settlement resolved the claims of approximately 200,000 individuals, the *Coca-Cola* settlement resolved the claims of 2,200 individuals, the *Texaco* settlement resolved the claims of 1,300 individuals, and the *Novartis* settlement resolved the claims of 6,200 individuals.⁷¹ Rather than burdening corporations (and courts) with nearly 210,000 individual actions, these claims were resolved

⁶⁸ U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform, Statement on The Class Action Crisis and S. 1712 – “The Class Action Fairness Act” (July 31, 2002), <http://www.uschamber.com/issues/testimony/2002/class-action-fairness-act>.

⁶⁹ U.S. Chamber Institute for Legal Reform, Class Action Toolkit, <http://www.legalreformnow.com/images/stories/documents/pdf/ClassActionToolkit.pdf> (last visited Feb. 23, 2011).

⁷⁰ Brief for the Chamber of Commerce of the U.S. as Amicus Curiae Supporting Respondent, *Smith v. Bayer Corp.*, No. 09-1205 (U.S. argued Jan. 18, 2011).

⁷¹ *Haynes v. Shoney’s, Inc.*, No. 89-30093-RV, 1993 U.S. Dist. LEXIS 749 (N.D. Fl. Jan 25, 1993); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685 (N.D. Ga. 2001); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 U.S. Dist. LEXIS 125945 (S.D.N.Y. Nov. 30, 2010).

through just four actions.⁷² Just as the court system benefits from the administrative efficiencies of a class action, so do the corporations that resolve claims through class actions.

Aside from the obvious efficiencies in resolving the multitude of claims at one time, class actions can provide future benefits. Systemic reforms help to insulate businesses from unfounded claims of discrimination going forward.⁷³ Corporations that have adopted systemic reforms are better positioned to demonstrate that they have taken proper steps to ensure nondiscrimination.⁷⁴

In addition, where a corporation makes significant modifications to its policies and procedures, particularly as a highly visible and public response to class litigation, those changes can have widespread effects “on corporate employment practices—even for smaller employers who pattern after the larger shops.”⁷⁵ Innovations adopted by

⁷² Of course, other employment discrimination class actions that are not discussed here have also resulted in the successful resolution of hundreds of thousands of additional claims.

⁷³ For example, the *Roberts v. Texaco* case is, again, informative. See Levit, *supra* note 2, at 394 n.187.

⁷⁴ *Id.* at 394 n.187 (discussing Texaco’s subsequent litigation history), 405 n.261 (discussing Coca-Cola’s subsequent litigation history).

⁷⁵ HEWLETT, *supra* note 39, at 370; Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1688 (2007) (discussing how labor relations norms established with the “Big Three” auto manufacturers set industry standards); Jesse Ellison, *Shattering Glass Ceilings*, NEWSWEEK, June 15, 2010, <http://www.newsweek.com/2010/06/15/shattering-glass->

larger corporations not only are more visible by virtue of the size of the employer but also suggest a level of reliability that invites smaller companies to rely on the larger corporations' vetting process. While it is impossible to know precisely how many executives called for internal analysis of gender and race disparities after the resolution of cases like *Shoney's*, *Texaco*, *Coca-Cola*, or *Novartis*, good business practice dictates that one learns from both the mistakes and advances of its competitors. Thus, good business practices adopted because of a class action in order to comply with the law can have a domino effect, reaching down to the smaller businesses that follow suit.

The benefits of class litigation, both those directly linked to compliance with Title VII and the efficiency benefits described above, therefore, are not limited to the individual corporation subject to a meritorious suit. Instead, the benefits extend to the business community as a whole—to employees and employers alike.

ceilings.html (discussing how the Novartis verdict would lead to employers examining their own policies and practices more closely).

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Ninth Circuit should be AFFIRMED.

Respectfully submitted,

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