No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.

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

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

More than a decade ago, this Court set forth a uniform standard for determining the reliability and admissibility of expert testimony in federal courts in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In certifying the largest employment class action in history, the district court, as affirmed by the Ninth Circuit, rejected application of the standard to plaintiff's expert offered in support of class certification. *Amicus curiae* addresses the following narrow question:

Whether this Court's mandate to rigorously analyze the requirements of Fed. R. Civ. P. 23 before certifying a class requires district courts to apply *Daubert* and ensure the reliability of expert testimony offered at the class certification stage.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a public interest law and policy center headquartered in Washington, D.C., with supporters nationwide.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 552 U.S. 941 (2007); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, No. 09-56965 (9th Cir., dec. pending); and *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004). WLF also filed briefs in this case when it was before the Ninth Circuit.

WLF is submitting this brief because it believes

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Ten days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file this brief. All parties have consented to the filing of this brief, by lodging with the Court letters granting blanket consent to all *amicus curiae* briefs.

that the en banc panel committed legal error when it affirmed the district court's consideration of testimony from plaintiff's expert in support of class certification without determining whether the expert's opinions were reliable under the standards articulated by the Supreme Court in *Daubert*. WLF submits this brief because it is concerned that failing to test the reliability of expert testimony at class certification runs afoul of this Court's mandate that district courts conduct a "rigorous analysis" of whether Rule 23's prerequisites are met. Certifying a class on untested expert testimony casts aside the carefully crafted balance of plaintiffs' interests, defendant's interests, and judicial efficiency embedded in Rule 23.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties.

STATEMENT OF THE CASE

Six women brought a nationwide class action on behalf of 1.5 million women alleging that Wal-Mart has across-the-board discriminatory policies and practices in all of its 3,400 stores, and that this discrimination is common to all women who work or have worked in a Wal-Mart store over the past decade. In support of class certification, plaintiffs and the district court relied in part on the testimony of Dr. William Bielby, a sociology expert who opined that gender stereotyping likely exists at Wal-Mart. As he has done against many other companies, Dr. Bielby testified that Wal-Mart's

organizational structure made it "vulnerable" to gender stereotyping, but he could not say how often such stereotyping occurred in connection with employment decisions at the company. Pet. App. 195a. Indeed, as noted by the district court, *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D. Cal. 2004), Dr Bielby could not say that gender stereotyping occurred 95% or 0.5% of the time. Nonetheless, Dr. Bielby's testimony was crucial to plaintiffs' attempts to demonstrate how millions of discretionary and subjective decisions made by thousands of individual managers at the local level could meet Rule 23's commonality and typicality requirements.

Wal-Mart moved to strike Dr. Bielby's testimony under Rule 702 of the Federal Rules of Evidence and pursuant to *Daubert*, but the district court refused to test the reliability of expert testimony at the class certification stage. The district court reasoned that it was prohibited from applying the full *Daubert* standard under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *Dukes*, 222 F.R.D. at 191. Although the Ninth Circuit did not agree that *Eisen* precluded a court from delving into the merits at class certification if those merits overlapped with the Rule 23 inquiry, the court nevertheless rejected the necessity of applying the *Daubert* standard at the class certification stage. Pet. App. 57a n.22; *see also id.* at 133a-137a (Ikuta, J., dissenting) (discussing majority's failure to require the appropriate level of scrutiny of expert opinion in support of class certification as required by *Daubert*).

REASONS FOR GRANTING THE PETITION

In 2003, the Civil Rules Advisory Committee amended Fed. R. Civ. P 23 to remove the provision that class certification "may be conditional." The amendment reflected the growing consensus among federal appellate courts that class certification should be denied unless a critical evaluation of the evidence supported findings that each of the Rule 23 requirements had been met. This often requires the judge to step into the role of fact finder and resolve disputed factual issues pertinent to determining whether Rule 23's requirements are met, even when those issues overlap with the ultimate merits of the case. The Ninth Circuit's approach in affirming class certification – deferring an evaluation of plaintiff's expert's opinions pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) – effectively resurrects conditional certification in the largest employment class action in history.

Such an approach falls far short of the rigorous class certification analysis mandated by this Court and followed by other circuits across the country. If not reversed, the court's implicit adoption of a lower admissibility threshold for expert opinion on class certification could have far-reaching, adverse effects, including making the district courts in the Ninth Circuit a magnet for the filing of class actions, certification a nearly foregone conclusion, and defendants a target of specious classwide claims. In addition, it could have serious adverse consequences on absent class members. The fundamental importance of the question of what evidentiary standards should be applied to class

certification justifies this Court accepting Wal-Mart's petition for a writ of certiorari.

I. REVIEW IS WARRANTED BECAUSE RIGOROUS ANALYSIS OF THE RULE 23 REQUIREMENTS COMPELS EVALUATION OF THE RELIABILITY OF EXPERT TESTIMONY AT THE CLASS CERTIFICATION STAGE

This Court has mandated that trial courts conduct a "rigorous analysis" of the Rule 23 requirements, which "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's causes of action." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A "rigorous analysis" requires courts to make factual determinations and to not merely accept plaintiff's allegations as true. *Id.*; *see also* Pet. App. 13a ("district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it.").

Evidence proffered in support of the Rule 23 requirements must be carefully scrutinized and weighed against competing evidence or argument. "A district

judge may not duck hard questions by observing that each side has some support . . . . Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives." *West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002); *see also Tardiff v. Knox County*, 365 F.3d 1, 4 (1st Cir. 2004) ("in our view a court has the power to test disputed premises early on if and when the class action would be proper on one premise but not on another"); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir 2004); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("a court may be required to resolve disputes concerning the factual setting of the case," which "extends to the resolution of expert disputes concerning the import of evidence"); *Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004).

Expert testimony is no different than any other form of evidence relevant to a Rule 23 inquiry. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008); *In re Public Offering Securities Litig. ("IPO")*, 471 F.3d 24, 42 (2d Cir. 2006); *West*, 282 F.3d at 938. But before a court may even begin to evaluate whether expert testimony supports a finding that Rule 23's requirements are met, it must first determine whether the expert testimony is reliable. As the Fifth Circuit observed, "[i]n order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable." *Unger v Amedisys Inc.*, 401 F.3d 316, 325 (5th Cir 2005) (citation omitted) (court "must engage in a thorough [class certification]

analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence"); *see also Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir 2010) (per curiam) ("The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.").

The Seventh Circuit similarly endorsed a rigorous review of expert opinion testimony in *West* when it held that it would "amount[] to a delegation of judicial power to the plaintiffs" to permit them class certification merely because they have the support of an expert. *West*, 282 F.3d at 938; *see also Polymedica Corporate Securities Litigation*, 432 F.3d 1, 17 (1st Cir. 2005) (holding that court "must evaluate the plaintiff's evidence . . . critically"). And now that *Falcon* has made clear that *Eisen* does not bar consideration of issues on class certification that overlap with merits issues – such as the reliability of an expert's testimony – there is no justification for not requiring the same scrutiny of expert testimony by the district courts in the Ninth Circuit.

This Court has established a standard for evaluating the reliability of expert testimony in federal court – *Daubert*. *Daubert* established a non-exhaustive list of guideposts to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. *Daubert*, 509 U.S. at 593-94. In addition, the 2000 Advisory

Committee's Notes to Rule 702 recommended additional benchmarks, including whether the expert's opinions resulted from independent research or are a product of litigation; whether the expert has accounted for alternative explanations; and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. There is no justification for requiring a lower standard at the class certification stage and every reason to apply the same standard for testing the reliability of expert testimony at every step of the litigation.

It is no wonder then that the Ninth Circuit's opinion in this case is an outlier. Every Circuit Court of Appeal to publish an opinion addressing this issue has determined that expert testimony must be carefully scrutinized during class certification. *See, e.g., Unger,* 401 F.3d at 324 ("[R]eliance on unverifiable evidence [in determining class certification] is hardly better than relying on bare allegations."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 323 (noting that expert testimony should not be "uncritically accepted" even if it is found reliable under *Daubert*). Just a few months ago, the Seventh Circuit reversed class certification where the lower court relied on expert testimony without first resolving whether the testimony would be admissible under *Daubert. Am. Honda Motor Co.*, 600 F.3d at 815-16. Although the district court had "definite reservations" about the reliability of the expert's opinions, the court declined to conduct a full *Daubert* analysis at the early stage of the proceedings. *Id.* at 814-16. This, the Seventh Circuit determined, was an abuse of discretion. *Id.* at 816. Holding that "a district court must make the necessary factual and legal

inquiries and decide all relevant contested issues prior to certification," the Seventh Circuit determined that the lower court's failure to evaluate plaintiff's expert's opinions pursuant to *Daubert* was a return to "provisional" class certification, a practice it has roundly rejected. *Id.* at 817.

The district court here refused to properly scrutinize Dr. Bilby's testimony, believing that *Eisen* prohibited such a review for purposes of class certification. *See Dukes*, 222 F.R.D. at 191. While it purported to determine that Dr. Bielby's opinions were not "fatally flawed," the Second Circuit in *IPO* expressly rejected the "fatally flawed" standard as an appropriate reliability standard. 471 F.3d at 42. The Ninth Circuit correctly rejected the district court's reading of *Eisen* as prohibiting an inquiry into facts overlapping with the merits of the case in analyzing the Rule 23 requirements, but it nevertheless erroneously adopted the mistaken corollary that *Daubert* should not apply at class certification because it is a merits-type inquiry. *See* Pet. App. 22a-25a, 31a, 57a n.22.

The Ninth Circuit's view is not supported by reason or the jurisprudence of this Court and marks a departure from other federal Courts of Appeal. If left undisturbed, the *Dukes* opinion will have far-reaching and adverse consequences on defendants and absent class members.

II. PERMITTING COURTS TO CONSIDER EXPERT TESTIMONY IN SUPPORT OF CLASS CERTIFICATION WITHOUT TESTING ITS RELIABILITY UNDER *DAUBERT* IS INEFFICIENT AND PREJUDICES DEFENDANTS AND ABSENT CLASS MEMBERS

Failure to test the reliability of plaintiff's expert testimony at the class certification stage as compelled by *Daubert* is inefficient at best and at worst prejudices the parties. Class certification dramatically raises the stakes in the litigation for defendants, often creating "insurmountable pressure . . to settle" even weak claims (a situation tantamount to "judicial blackmail"). *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Defendants who bow under this pressure may never get the opportunity to compel the required scrutiny of plaintiffs' experts' testimony *See Szabo*, 249 F.3d at 676 ("[A]n order certifying the class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and if the case is settled, there could not be such an examination . . .)."). Moreover, forcing defendants to conduct classwide discovery and expend the resources necessary to reach the merits phase of a class action only to have it determined that the expert testimony on which the court based its class certification decision is unreliable is fundamentally unfair.

Finally, and perhaps more importantly, absent class members' rights may be substantially impaired or lost altogether when a class is certified based on unreliable expert testimony that is ultimately excluded

following a full *Daubert* review This is precisely why Rule 23 requires courts to probe beyond the pleadings and scrutinize the evidence to ensure that absent class members' interests are adequately represented and their rights are preserved.

As this Court observed in *Falcon*, in Title VII class actions, plaintiffs must bridge the gap between their individual claims of discrimination and "the existence of a class of persons who have suffered the same injury . . . such that the individual's claim and the class claims will share common questions of law and fact and that the individual's claim will be typical of the class claims." *Falcon*, 457 U.S. at 157. Here, plaintiffs offered Dr Bielby's testimony to "bridge the gap" between their individual claims of gender discrimination and those of more than *1.5 million women in 3,400 stores*. Pet. App. 115a-117a (Ikuta, J., dissenting). The district court relied on this evidence, without even considering whether the testimony was reliable under *Daubert* to determine that plaintiffs satisfied the requirements of Rule 23.

This same evidence will be critical to carrying plaintiffs' burden of proof at trial. If, after conducting the reliability and admissibility analysis required by *Daubert* prior to trial, the court determines that Dr. Bielby's testimony should be excluded, it could have "catastrophic consequences" to absent class members. While the loss of such evidence could lead to de-certification of the class, it may also be deemed a failure of proof on the class claims, resulting in a defense verdict:

> Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir 1969) (Godbold, J., concurring specially). *Daubert* affords another level of protection to absent class members in the Rule 23 inquiry by exposing, at a preliminary stage, expert testimony that is unreliable and would not likely be admissible at trial. For this reason, it is important that this Court affirmatively rule that *Daubert*, and not a lesser standard of review, must apply at class certification.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation requests that the Court grant Wal-Mart's petition for a writ of certiorari.

Respectfully submitted,

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