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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BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici Curiae will address the question

Whether the class certification ordered under Federal Rule of Civil Procedure 23(b)(2) was consistent with Rule 23(a).

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, *amicus* Atlantic Legal Foundation states that it is a Pennsylvania not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

Pursuant to Rule 29.6, *amicus* New England Legal Foundation states that it is a Massachusetts not-for-profit corporation. It does not have shareholders, and is not the parent or subsidiary of any other corporation that is publicly held.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

CASES (continued)

TABLE OF AUTHORITIES
(Continued)

Page

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to parents, scientists, educators, and other individuals and trade associations. Atlantic Legal Foundation is guided by a basic but fundamental philosophy: Justice prevails only in the presence of reason and in the absence of prejudice. Accordingly, Atlantic Legal Foundation promotes sound thinking in the resolution of legal disputes and the formulation of public policy. Among other things, the Atlantic Legal Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and sound science.

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Atlantic Legal Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community. Atlantic Legal Foundation has an abiding interest in the application of sound principles of science and other disciplines to expert evidence, and has served as *amicus curiae* or counsel for *amicus curiae* in numerous cases including, of particular relevance here, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner,* 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Amicus Curiæ New England Legal Foundation is a non-profit, nonpartisan public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities.

Because class actions can increase greatly the costs and burdens of litigation for business defendants, this case raises just such an issue of general economic significance for the business community. NELF has consistently advocated strict enforcement of Rule 23's requirements and has filed *amicus curiae* briefs opposing certification of class actions in cases where, NELF has argued, the plaintiffs have failed to offer adequate evidence of commonality. *See, e.g., Salvas v. Wal-Mart Stores, Inc.,* 453 Mass. 337, 893 N.E.2d 1187 (Mass. 2008); *Macomber v. Travelers Property and Cas. Corp.,* 273 Conn. 617, 894 A.2d 240 (Conn. 2006).

SUMMARY OF THE ARGUMENT

In their effort to satisfy the commonality requirement of Rule 23(a), Plaintiffs relied in part on expert witness William Bielby, who opined concerning the supposed prevalence of gender discrimination in large institutions like Wal-Mart. Bielby's testimony was not adequately scrutinized for reliability by the district court, despite Wal-Mart's motion challenging the testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Both the district court and the Ninth Circuit erred in failing to acknowledge that the *Daubert* standard applies to expert testimony proffered by plaintiffs in order to satisfy Rule 23's class

certification requirements. Instead, the lower courts ruled that a *Daubert* inquiry would intrude on merits issues in a manner supposedly prohibited at the class certification stage and that therefore Rule 23's requirements were satisfied by applying a less demanding standard to evaluate the reliability, and hence admissibility, of Bielby's testimony.

Federal Rule of Evidence 702 and the Court's holding in *Daubert* create a single standard for evaluating the reliability of expert testimony, whether at trial or at the class certification stage of an action. Scrutiny of proffered expert testimony is no less important at the certification stage than at any other part of the litigation process. Indeed, recognizing the important consequences of class certification, this Court has ruled, specifically in the context of Title VII, the Court has ruled that a trial court may certify a class only after it has conducted a "rigorous analysis" to determine that all of Rule 23(a)'s requirements have truly been satisfied. *Gen. Tel. Co. of the Southwest v. Falcon* ("*Falcon*"), 457 U.S. 147 (1982).

Numerous circuit courts have therefore properly ruled that, for the purpose of this "rigorous analysis," a trial court's Rule 23 inquiry may permissibly, and sometimes must, overlap merits issues.

Here the lower courts failed to follow the jurisprudence of this Court and the reasoning of

courts in other circuits. They thereby permitted a class to be certified, at least in part, on the basis of expert testimony that was never properly tested for reliability under the *Daubert* standard but was instead admitted under a less rigorous, ad hoc, standard.

The failure to apply sufficiently rigorous standards to Rule 23(a) determinations increases the likelihood that classes will be certified improperly, increasing the likelihood that defendants will be required to litigate meritless class actions. In such situations, business defendants are faced with the choice between hazarding trial and possible liability for huge money judgments or settling for large sums despite the weakness of the plaintiffs' class claims.

It is to avoid this situation that the Court has required a rigorous analysis of Rule 23(a)'s requirements which, in this case, required a *Daubert* analysis of the expert testimony proffered by the plaintiffs in support of certification.

ARGUMENT

I.

THE CERTIFICATION ORDER IS NOT CONSISTENT WITH RULE 23(a)

There is no dispute that Rule 23(a) requires that the claims of the class meet requirements of numerosity, commonality, typicality, and adequacy of representation. *See Gen. Tel. Co. of the Southwest v. Falcon* ("*Falcon*"), 457 U.S. 147, 157, n. 13 (1982). Further, a class action may be certified only if the court is satisfied, *"after a rigorous analysis*," that the prerequisites of Rule 23(a) have been satisfied, and these criteria apply to Title VII class actions. *Id*. at 161.

Plaintiffs in this case have not demonstrated that there are sufficient "questions of law or fact common to the class," or that the "claims . . . of the representative parties [that] are typical of the claims . . . of the class," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).[2]

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[2] "The commonality and typicality requirements of Rule 23(a) tend to merge," and "[b]oth serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon*, 457 U.S. at 157, n.13. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 479 (1978).

Plaintiffs rely on three types of evidence to establish typicality and commonali ty: statistical, sociological, and anecdotal. *Amici* will address the errors of the district court and the Ninth Circuit in their approach to Plaintiffs' sociological evidence.

Plaintiffs rely heavily on their sociology expert, William Bielby, who opined that Wal-Mart and other large organizations are "vulnerable to gender bias." Pet. App. 195a. This thesis, if accepted, would render every large organization -- public or private, commercial or governmental or non-profit -- open to a Title VII claim.

The Ninth Circuit itself recognized that Bielby merely "interpret[ed] . . . facts that *suggest* that Wal-Mart has and promotes a strong corporate culture – a culture that *may* include gender stereotyping."*Dukes v. Wal-Mart Stores*, 603 F.3d 571 (*en banc*) (9th Cir. 2010), Pet. App. 54a, 192a (emphasis added). The district court recognized that "Bielby's opinions have a built-in degree of conjecture"[3] and that Bielby did not opine on how often gender stereotyping *actually* occurred or that it was common to all class members. Bielby did not

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[3] Bielby "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Dukes v. Wal-Mart*, 222 F.R.D. 189, 192 (N.D.Cal. 2004).

opine that Wal-Mart's corporate culture *does in fact* include stereotyping.

Bielby's testimony, even if taken as true, could at most prove that Wall-Mart's employment policies were potentially "vulnerable" to discrimination, J.A. 525a, but not that any discriminatory practices or procedures that are actionable under Title VII were in fact found at Wal-Mart. In sum, this expert evidence proffered by plaintiffs tends to show, at most, that Wal-Mart's pay and promotion system *could possibly* result in individual disparities, not that it was designed or intended to do so or that it would inevitably or even "more likely than not" do so with respect to members of the class.

Bielby's testimony was nothing more than speculation, *see General Electric Co. v. Joiner*, 522 U.S. 136, 140 (1997), and his conclusions were connected to the data only by his *ipse dixit* and there is too great an analytical gap between the data and the opinion proffered. *Id.* at 146.[4]

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[4] As one scholar in the field concluded, Bielby's "research did not meet the standards expected of social scientific research into stereotyping and discrimination." *See* John Monahan *et al.*, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1747 (2008). Bielby's testimony "explicitly link[ing] general research findings on gender discrimination to specific factual

(continued...)

Moreover, Bielby's evidence did not support plaintiffs' ultimate contention that Wal-Mart discriminated against the putative class.

We submit, however, that this Court need not reach the substance of Bielby's testimony, because both the district court and the Ninth Circuit erred in a significant way by not sufficiently scrutinizing Bielby's evidence to ensure its reliability, and this Court should therefore reverse and either vacate the class certification order or remand for an appropriate, thorough, assessment of Bielby's methodology and whether his testimony "fits" the legal conclusion it was proffered to support.

Wal-Mart moved to strike Bielby's testimony as unreliable and inadmissible, but the district court rejected Wal-Mart's motion, reasoning that it was proscribed from undertaking a "*Daubert*" inquiry under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189 at 191. The Ninth Circuit affirmed, albeit on somewhat different grounds, holding that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), does not have "exactly the same application at the class certification stage as it does to expert

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[4](...continued)
conclusions about Wal-Mart in particular, exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by . . . 'social framework' evidence." *Id.* at 1719.

testimony . . . at trial." Pet. App. 57a n.22. This statement is inexplicable in light of this Court's *Daubert* jurisprudence.

Amici submit that the lower courts erred. Federal Rule of Evidence 702, which governs the reliability of expert testimony and implements *Daubert*, is not limited to trial. Its purpose is to ensure that expert testimony is "relevant and reliable," *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 141, 152 (1999), as the basis for decision at all stages of a litigation. Indeed, *Daubert* motions are made and *Daubert* evidentiary hearings are commonly held, at or before the summary judgment stage. Indeed, all three of the "Daubert trilogy" of cases (*Daubert, Joiner* and *Kumho Tire*) reached this Court after summary judgment decisions. There is no principled reason why *Daubert* criteria should not be used at the class certification stage, and *amici* contend that they should be.

An assessment of the relevance and reliability of expert evidence is equally important (and for the reasons stated in Point II, *infra*, is especially important) at the class certification stage, when the district court must "assess all of the relevant evidence admitted . . . and determine whether each Rule 23 requirement has been met, just as the judge would resolve a dispute about any other threshold prerequisite for continuing a law-suit . . . ." *In re IPO Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006).

This Court has held that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161 (emphasis supplied). District courts must, perform a rigorous analysis to ensure that each of the prerequisites of Rule 23 have been satisfied, and this will often require looking behind the pleadings to issues overlapping with the merits of the underlying claims. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001); *see also West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) ("Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.").

The appropriate scrutiny requires the court to "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) (the court "must engage in a thorough [class certification] analysis, weigh the relevant factors . . . 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.").[5]

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[5] Here, the district court, applied a "lower" standard in mistaken deference to *Eisen*, and ruled that Bielby's testimony "sufficed," *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137, 155 and was not "so flawed" as to be without "sufficient"probative value, *Dukes v. Wal-Mart Stores*, 222 F.R.D. 189, 192. Plainly, in comparison to a proper *Daubert* evaluation, the judge lowered the bar for admissibility of expert testimony in the context of class certification. Other courts have quite properly rejected this approach. *See IPO*, 471 F.3d at 42 ("We also disavow the suggestion . . . that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed."); *id.* ("[T]he important point is that the requirements of Rule 23 must be met, not just supported by some evidence.") (commenting on significance of *Falcon*); *Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 321 (3rd Cir. 2008) (citing *IPO*). As the Third Circuit, in contrast to the district court and circuit court here, has held:

> Expert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis. . . . Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.

Id. at 323 (citing *Blades v. Monsanto Co.*, 400 F.3d 562, (continued...)

Although the district court in *American Honda* had "definite reservations" about the reliability of the expert's opinions, it declined to conduct a full *Daubert* analysis at the early stage of the proceedings. *Id.* at 814-16. This, the Seventh Circuit held, was an abuse of discretion. *Id.* at 816: "[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 has been rejected. *Id.* at 817.[6]

The district court in this case failed to scrutinize Bielby's testimony rigorously, believing that *Eisen* prohibited such a review for purposes of class

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[5](...continued)
575 (8th Cir. 2005)).

[6] This is consistent with the renewed emphasis on trial courts making firm certification decisions after a thorough inquiry into whether a plaintiff satisfies Rule 23 requirements, the provision of Rule 23(c)(1)(C) permitting "conditional" certification was deleted in the amendments. As the Advisory Committee Notes describe this change, "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met."

certification.[7] In this case, the district court applied a "lower" standard under which Dr. Bielby's testimony was found to be not "so flawed" as to be inadmissible. *See Dukes*, 222 F.R.D. 189 at 192. We submit that the "not so flawed" standard is far from the "rigorous analysis" required by *Falcon* and the "searching inquiry" required by *Daubert*.[8]

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 erred by adopting the equally mistaken corollary that *Daubert* should not apply at the class certification stage because it is a merits-type inquiry. *See* Pet. App. 22a-25a, 31a, 57a n.22.[9]

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[7] As noted, the district court applied the "not fatally flawed" standard, which has been expressly rejected by the Second Circuit in *IPO*, 471 F.3d 24, 42; *Hydrogen Peroxide*, 552 F.3d 305, 318. This Court should likewise hold that the "fatally flawed" standard is inconsistent with Fed.R.Evid. 702 and *Falcon*.

[8] "Since *Daubert,* moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

[9] *Eisen* merely restricts a court from expanding the Rule 23 certification analysis to include consideration of whether the proposed class is likely to

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The fact that at the class certification stage a *Daubert* review of an expert's testimony might overlap the merits in some respects in no way distinguishes such a review from any other aspect of the rigorous analytical inquiry the trial court must conduct in order to reach a definitive decision on certification. *American Honda*, 600 F.3d 813, 815; *Hydrogen Peroxide*, 552 F.3d at 316.[10]

The Ninth Circuit's view that *Daubert* should not apply at the class certification stage because it is a merits-type inquiry is neither supported by reason nor by the jurisprudence of this Court, and marks a departure from other federal courts of appeal. If left undisturbed, the Ninth Circuit's opinion will have

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[9](...continued)
prevail on the merits.

[10] *See* Advisory Committee Notes to 2003 Amendment to Rule 23(c)(1)(A):

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the merits, limited to those aspects relevant to making the certification decision on an informed basis.

far-reaching and adverse consequences on defendants and absent class members. The Seventh Circuit has most explicitly directly drawn the proper conclusion concerning *Daubert* and class determination, writing in a recent decision:

> In *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir.2001), we held that a district court must make whatever factual and legal inquiries are necessary to ensure that requirements for class certification are satisfied before deciding whether a class should be certified, even if those considerations over-lap the merits of the case. . . . But we have not yet specifically addressed whether a district court must resolve a *Daubert* challenge prior to ruling on class certification if the testimony challenged is integral to the plaintiffs' satisfaction of Rule 23's requirements. . . . We hold that when an expert's report or testimony is critical to class certification, as it is here, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.

Am. Honda Motor Co., 600 F.3d at 815-16.

The Seventh Circuit's decision is surely the correct one for the certification stage of litigation.

Only a full *Daubert* analysis of expert testimony comports, with the rigorous analysis mandated for Rule 23 certification issues generally by this Court in *Falcon*. To employ a lower, less rigorous standard, as the district court here did, represents an approach that is inconsistent with both *Falcon* and *Daubert* and should be rejected.

The lower courts' views should be rejected for the additional reason that a *Daubert* review is especially appropriate and necessary at the class certification stage because, in many instances, the expert's testimony proffered in support of certification will never be subject to scrutiny again in the case. *See Szabo,* 249 F.3d 672, 676 ("[A]n order certifying a 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 even if the district judge viewed the certification as provisional).")

II.

PERMITTING COURTS TO CONSIDER EXPERT TESTIMONY ON A CLASS CERTIFICATION MOTION WITHOUT A *DAUBERT* ANALYSIS DOES NOT SERVE THE INTERESTS OF JUSTICE

As a practical matter, class certification can create tremendous pressure on a defendant to settle. *See, e.g., Hydrogen Peroxide*, 552 F.3d 305, 310.

Because of the aggregation of individual claims, class certification "turns a $200,000 dispute . . . into a $200 million dispute," creating a "bet-the-company" situation for a defendant that "may induce a substantial settlement even if the [plaintiffs'] position is weak." *Szabo*, 249 F.3d at 675. "An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Advisory Committee Notes to 1998 Amendment to Fed. R. Civ. P. 23(f).[11]

One scholar has calculated that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals)

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[11] Fed. R. Civ. P. 23 was amended expressly to ameliorate this potentially distorting effect of class certification by creating a discretionary right to interlocutory appellate review.

for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U.L. Rev. 74, 143 (1996); *see also* Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases*, 2000 Lab. Law. 415, 416. *See also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006)("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.").

This Court recently cautioned that certain class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The potential for unwarranted settlement pressure "is a factor that should be weighed in the certification calculus." *Hydrogen Peroxide*, 552 F.3d 305 (3d Cir. 2008).

This case illustrates the potentially ruinous impact of class certification after inadequate inquiry into whether the Rule 23 requirements have been met. The putative class consists of approximately 1.5 million female Wal-Mart employees who worked in more than individual 3,400 stores scattered throughout the United States, were allegedly had a myriad of experiences unique to their specific job titles, employment histories and past job performance, different backgrounds, at different

store locations, and with different store managers, among other factors.[12]

In view of the fact that certification of such a huge class creates immense financial exposure (even for a company Wal-Mart's size), together with corresponding pressure to settle regardless of the merits of the class claims, this Court should require that no defendant be placed in such a position as a result of a Rule 23(a) analysis of commonality that short-circuits a searching scrutiny under the *Daubert* standard.

In short, fundamental fairness requires that expert witnesses proffered to bolster a plaintiff's motion for class certification be subject to the standard that this Court has established for "any and all scientific testimony," *Daubert*, 509 U.S. at 589, and not to some "lower" standard.

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[12] As noted in Point I, the named plaintiffs sought class certification by portraying themselves as representatives of a uniform class suffering a common injury arising from common employment policies, relying in critical part on Bielby's challenged testimony.

CONCLUSION

For the foregoing reasons, amici curiae Atlantic Legal Foundation and New England Legal Foundation request that the Court find that the certification order is inconsistent with Rule 23(a), reverse the order of the Court of Appeals for the Ninth Circuit and decertify the class, or, in the alternative, remand for the "rigorous analysis" required by *Falcon* and the "searching inquiry" required by *Daubert*.

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Respectfully submitted,

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