

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,
CLEO PAGE, on behalf of themselves and all
others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE
CALIFORNIA EMPLOYMENT LAW
COUNCIL IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The California Employment Law Council (CELC) is an organization of approximately 50 major employers, many of them nationwide, that operate in the Ninth Circuit. CELC regularly files amicus briefs in major employment cases. CELC's objective is fair and moderate employment laws, fair to employer and employee alike.

All of CELC's members are subject to Title VII of the Civil Rights Act of 1964 (Title VII) and other employment-related statutes and regulations. All of CELC's nationwide members operate in California. Therefore, anyone desirous of bringing a nationwide class action against any of the CELC members has the option of doing so in the Ninth Circuit. As the strong dissent of Judge Ikuta to the 6-5 *en banc* decision makes clear, nationwide class certification against such employers is virtually automatic in the Ninth Circuit after its *en banc* decision since there are only three prerequisites, all easily available in most circumstances: (1) the opinion of an expert such as Professor Bielby that white male decisionmakers, because of ingrained stereotypical views, cannot help discriminating if allowed to exercise subjective judgments; (2) a handful of uncorroborated, untestable perceptions of discrimination by class members (in the instant case one for every 12,500

1. Counsel for *amicus curiae* authored this brief in its entirety. He has been CELC's General Counsel for over 25 years. He was one of the lawyers representing Wal-Mart in the district court and was listed as one of the counsel of record on the panel but not the *en banc* appeal. No person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief. Wal-Mart is not a member of CELC. Both parties have consented in writing to the filing of this brief, and the consent letters have been filed with the Clerk.

class members); and (3) aggregated nationwide statistics which, based on an untestable choice of variables by the plaintiffs' expert, shows statistical significance against the class in question. (Statistical significance is based on two factors: degree of disparity and sample size. With the large sample size of any nationwide certification, the smallest of disparities shown by choice of variables will yield statistical significance.) *See* Dissent, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 652 (9th Cir. 2010). ("Put simply, the door is now open to Title VII lawsuits targeting national and international companies, regardless of size and diversity, based on nothing more than general and conclusory allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.") Such a rule virtually guaranteeing nationwide class certifications against any nationwide employer that operates in the Ninth Circuit puts even the most non-discriminatory of America's nationwide employers at unfair risk.

SUMMARY OF ARGUMENT

This brief focuses only on the principal allegation in the case, allegedly discriminatory pay decisions made in a subjective fashion at the store level by the store managers of Wal-Mart's 3,400 stores. CELC will focus on two issues:

A. The Store-By-Store Statistics Differ Dramatically and Destroy Commonality and Typicality, and Demonstrate the Necessity for a 23(b)(3) Predominance Analysis.

Plaintiffs relied on three categories of evidence in seeking a nationwide class certification: (1) the opinion of

a sociologist; (2) a handful of anecdotes; and (3) statistics aggregated across region and nation. Only Wal-Mart's statistician did a store-by-store analysis.² The following is undisputed: 90% of Wal-Mart stores showed no statistically significant disparity with respect to male/female pay, 2.5% of the stores showed a statistical disparity *which favored women*, and 7.5% of the stores showed a statistical disparity which favored men. The dissent discussed the undisputed nature of the store-by-store analysis, with a citation to the district court opinion, at *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 630 (9th Cir. 2010).

B. Any Trial Plan Compliant with § 706(g) and This Court's *Teamsters* Line of Cases Would Require Individual Hearings Inconsistent with the Simple Injunctive Relief Cases for which 23(b)(2) Was Designed.

The majority in each of the three Ninth Circuit opinions has found it impossible to come up with a trial plan that is consistent with § 706(g) and this Court's *Teamsters* line of cases. The original panel, by a 2-1 vote, with Judge Pregerson writing the majority opinion, affirmed in all respects, including affirming the trial court's trial plan. Under that trial plan, at Phase I, the jury would determine whether there was a pattern

2. In fact, she did two store-by-store analyses: (1) analyzing grocery departments separately (only a minority of Wal-Mart stores have grocery departments), she compared all non-grocery operations; and (2) she compared separately Wal-Mart's basic merchandising operation, and specialty operations such as opticians, hearing aids, and grocery. Plaintiffs' expert admitted starting to do a store-by-store analysis, and then abandoning the effort.

or practice of discrimination. If so, there would be no Phase II – based on expert opinion the total disparity in pay would be converted to a lump sum, which, along with any punitive damages awarded, would be distributed to discriminatee and non-discriminatee alike by formula. This would mean, for example, that any female employee under the male average (half of male employees are of course under the male average) working at a store where the statistics indicated females were favored or a store where the statistics showed no favoritism whatsoever would receive monetary relief. Following a petition for *en banc* hearing, which pointed out that the trial plan totally contradicted this Court’s *Teamsters* line of cases (*Teamsters v. United States*, 431 U.S. 324 (1977)), and the statute, particularly § 706(g) (court cannot award back pay to non-discriminatees), the panel totally withdrew their earlier opinion, totally rewrote it, and expressed no opinion on the district court’s trial plan, stating that the panel was confident that the trial court could construct a trial plan which was defensible. Rehearing *en banc* was then granted, and by a 6-5 vote, the *en banc* court majority (Judges Reinhardt, Hawkins, Graber, Fisher, Paez, and Berzon) affirmed the nationwide certification, with two exceptions: It directed the trial court to reconsider for possible 23(b)(3) certification punitive damages and relief for persons who were ex-employees at the time the complaint was originally filed. As was the case with the second panel opinion, the *en banc* majority refused to rule on the propriety of the district court’s trial plan.

Section 706(g)(2)(A) was crucial to the passage of Title VII. It prohibits a court from awarding back pay to any non-victim, a prohibition necessarily violated by any trial plan discussed by the district court or the court

of appeals. Although heavily relied upon by the *en banc* dissent, the majority simply ignored and did not discuss this clear statutory prohibition.

Separately, § 706(g)(2)(B), added by the 1991 Civil Rights Act, states that even if an employer has been shown to be discriminatory, it can avoid back pay by proving “a same decision” defense. Any trial plan discussed by the district court or the court of appeals would violate this back pay prohibition.

Separately, any trial plan would disregard this Court’s mandate that in class-action Title VII pattern-or-practice cases, there be a Phase I (liability) and Phase II (individual’s entitlement to relief). *Teamsters v. United States*, 431 U.S. 324 (1977), and its progeny, relying on § 706(g), held that in a Title VII class action, at Phase I plaintiffs must prove a pattern or practice of discrimination. At Phase II, individual claimants are presumed entitled to relief unless the employer can demonstrate that despite the pattern of discrimination the particular claimant was not a victim. Under any of the trial plans discussed by the district court or court of appeals, there would be no Phase II.

Next, the Rules Enabling Act provides that federal rules cannot abridge substantive rights. In order to create a manageable class action, Wal-Mart’s substantive right not to pay money to non-discriminatees will have to be abridged.

All of this makes it clear that this is not the simple type of injunctive-relief case for which 23(b)(2) was designed.

ARGUMENT**A. Any Trial Plan Compliant with § 706(g), as Construed By at Least Five U.S. Supreme Court Decisions, Would Not Be Appropriate for 23(b)(2) Certification.**

Under all trial plans discussed or proposed to make manageable a class that could potentially include more than 3,000,000 women,³ a pool of money will be calculated based on expert testimony, and distributed by formula to victim and non-victim alike. This procedure, under which Wal-Mart is precluded from proving which back-pay claimants are not discriminatees, conflicts with § 706(g)(2)(A) (court has no authority to award back pay to non-victims), as construed in at least five U.S. Supreme Court decisions, and with the Rules Enabling Act. Furthermore, it conflicts with § 706(g)(2)(B) (mixed motive; employer proved to be biased can avoid back pay by proving same decision would have been made in non-discriminatory environment).

Under any of the trial plans proposed or discussed (none of which has been approved even by the panel majority) the defendant will not be given the opportunity, at any stage of the case, to demonstrate that particular class members are not discrimination victims. Thus, numerous class members who are not discriminatees will recover back pay. That approach is incompatible with Title VII and due process.

The district court recognized, and the Ninth Circuit did not dispute, that the case was manageable as a class

3. The panel majority's lower estimate ignores the fact that every woman hired since the year 2003, when class certification was briefed and argued, could potentially be in the class.

only if Wal-Mart was denied the right (i) to prove, at any phase of the trial, that particular persons (or groups of persons, such as employees at particular stores)⁴ were not discriminated against, and (ii) to contest the eligibility of those individuals to back pay.

Under the district court's trial plan, which the majority neither approved nor disapproved, a "formula" would be used to determine the total amount of back pay. The trial plan envisions appointing a special master to identify the potential discriminatees, using "objective" evidence captured in Wal-Mart's personnel database (which, the court acknowledged, lacks relevant information such as the principal determinant of starting pay, prior experience, ER 1213).⁵

This procedure simply and demonstrably violates § 706(g)(2)(A) of Title VII. The mode of adjudication of a Title VII class action has been established since *Teamsters v. United States*, 431 U.S. 324 (1977). In Phase I, plaintiffs carry the burden of demonstrating that a pattern or

4. The parties' briefs reveal that the undisputed statistical evidence is that there is no statistically significant difference in pay between men and women at more than 90% of Wal-Mart stores nationwide, and that at 35-40% of the stores any disparity tends to favor *women*. The undisputed statistics thus suggest that the class includes hundreds of thousands of women who work at stores where women were statistically favored and thus do not appear to be even potential discriminatees.

5. This means, for example, that a female meat cutter with one year of experience, hired at \$15 per hour, on the same day that a male meat cutter with 20 years of experience is hired at \$16 per hour, will be statistically presumed to be a discrimination victim and entitled to back pay. The potential discriminatees would receive back pay according to formula, with no opportunity for the defendant to prove the absence of discrimination.

practice of discrimination generally exists. Each class member seeking monetary relief enters Phase II with a presumption in her favor, but the employer has an opportunity to prove that, despite the finding of a pattern of discrimination, a particular claimant was not a victim and is not entitled to relief. But here there will be no Phase II.

The federal courts are not free to sacrifice substance in the name of procedure. Section 706(g) of Title VII provides, in relevant part: “No order of the court shall require . . . payment to [any individual] of any back pay, if such individual . . . was [treated as he or she was] for any reason other than discrimination”

Thirty years of Supreme Court cases have explained the origin and significance of that section. *Teamsters* made clear that mere membership in a disadvantaged class is insufficient to warrant judicial relief: “The [district] court will have to make a substantial number of individual decisions in deciding which of the minority employees were actual victims.” 431 U.S. at 371. *Accord: Id.* at 361-62 (“To determine the scope of individual relief” following a pattern or practice finding, the employer may “demonstrate that the individual . . . was denied an employment opportunity for lawful reasons.”).

Teamsters reaffirmed the holding of *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). The Court in *Franks* (per Brennan, J.) cautioned that, even after a finding of a pattern or practice of discrimination at Phase I, the employer in the remedial phase will have the opportunity “to prove that [specific] individuals . . . were not in fact victims of . . . discrimination.” *Id.* at 772.

Then, in *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977), the court of appeals had certified a class notwithstanding the district court's finding that certain persons were not qualified for the jobs they sought. This Court unanimously reversed: "Even assuming, *arguendo*, that the company's failure even to consider [plaintiffs'] applications was discriminatory, the company was entitled to prove at trial that the [plaintiffs] had not been injured because they were not qualified and would not have been hired in any event." *Id.* at 404 n.9.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), the Court again considered the issue of relief to persons not shown to be discrimination victims. The statute "provide[s] make-whole relief only to those who have been actual victims of illegal discrimination." *Id.* at 580. This Court reviewed the legislative history, noting that Title VII's opponents had sought to scuttle the bill by speculating that employers could be ordered to grant formula relief to non-discriminatees. The *Stotts* Court quoted Senator Hubert Humphrey's dispositive response in the legislative history at the time:

[Under the proposed bill] [n]o court order can require . . . payment of back pay for anyone who was not . . . refused employment or advancement . . . by an act of discrimination forbidden by this title. This is stated expressly in [§ 706(g)]

Id. (quoting 110 Cong. Rec. 6549 (1964)) (remarks of Sen. Humphrey). *Stotts* also quoted "the authoritative" interpretative memorandum of the bill by Senators Clark and Case, "the bipartisan 'captains' of Title VII." *Id.* at 580 n.14. Under the proposed bill, those Senators

explained, “a court was not authorized to give [any relief] to nonvictims.” *Id.* at 581 (quoting 110 Cong. Rec. at 7214).

Where there is a pattern or practice of discrimination, a court of course may order injunctive or other affirmative relief to put a stop to the discriminatory practice. But individual-specific monetary or equitable relief cannot be granted to non-victims, *Stotts* explained. This Court cited Title VII’s bipartisan sponsors’ newsletter: “[N]ot even a court, much less the [Equal Employment Opportunity] Commission, could order . . . payment of back pay for anyone who was not discriminated against in violation of this title.” *Id.* at 581-82 (quoting 110 Cong. Rec. at 14465).

Thereafter, in *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court considered the special problem of plaintiffs who may have been denied job benefits partly for legitimate and partly for discriminatory motives. Citing § 706(g), the plurality opinion reiterated “that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. [Citations to *Franks*, *Teamsters* and *Rodriguez* omitted.] These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination” *Id.* at 245. Systemic discrimination is exactly the allegation here.⁶

6. The Civil Rights Act of 1991 codified *PriceWaterhouse* in part and modified it in part on grounds not material here. “The 1991 Act affirmed the *PriceWaterhouse* holding that mixed motive is an affirmative defense” for the employer to invoke. Barbara Lindemann & Paul Grossman, *EMPLOYMENT DISCRIMINATION LAW* 99 & n.318 (4th ed. 2007) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)) (permitting the employer to demonstrate that it “would have taken the same action in the absence of the impermissible motivating factor”).

The *en banc* majority's decision here is irreconcilable with *Teamsters* and the other above-described cases of this Court construing § 706(g).⁷ What has essentially been done is that substantive law (Wal-Mart's right not to pay money to non-victims) has been ignored in order to cram a particular case into the class action device.⁸ The Rules Enabling Act says otherwise. 28 U.S.C. § 2072(b). As the Supreme Court said, in discussing Rule 23:

The Rules Enabling Act underscores the need for caution. As we said in *Amchem*, no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.

7. The *en banc* majority relies on the outlier case of *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), which was a class action protesting torture, summary execution and disappearance at the hands of Ferdinand Marcos, the Philippines' former President. *Id.* at 771. Even ignoring the outlier nature of *Hilao*, it was not an employment discrimination case. Thus, § 706(g) and the *Teamsters* line of Supreme Court decisions, barring relief to non-victims, were inapplicable.

8. One fallacy, not expressed in but perhaps underlying the *en banc* majority's decision, is that it must be "this class or no class," and that Wal-Mart because of its size is seeking an effective exemption from the law. Not so. More narrowly tailored litigation of course is possible. Here, as noted above, the undisputed store-by-store statistics show that only 10% of Wal-Mart stores had a statistically significant difference in pay (with one-fourth of those stores favoring women). If this Court reverses class certification, the nationwide consortium of law firms representing plaintiffs surely will bring individual store class actions at the stores where the statistics indicate that a real problem may have existed in the past. Wal-Mart stores are large, and an individual store class action, if certified, would average hundreds of class members, the size of a typical, manageable Title VII class action.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) (internal quotation marks and citations omitted); *accord: e.g., In Re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (“Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties’ legal rights may be respected.”).

Once it is recognized that Wal-Mart has a right not to pay money to non-discriminatees, and that a Phase II is in fact necessary, the case is inappropriate for 23(b)(2) certification and, indeed, could not meet the predominance standard of 23(b)(3).

B. The Undisputed Store-By-Store Statistics in This Multiple-Facility Excess-Subjectivity Nationwide Certification Demonstrate a Lack of Commonality and Typicality and the Inappropriateness of (b)(2) Certification.

All material pay decisions are made at the store-manager level. Wal-Mart’s statistical expert did two different store-by-store studies: (1) she compared each store’s entire store operations, excluding only a separate line of business, the grocery departments, for those stores that had grocery departments; and (2) she compared the core merchandising business of each store, and, separately, the specialty departments such as tires, hearing aids, optical and grocery. Each led to substantially similar findings: At 90% of Wal-Mart’s 3,400 stores, there was no statistically significant difference in pay between men and women; at 30-40% of the stores women were favored, although not to a statistically significant degree. Women were favored in 2.5% of the stores to a statistically significant degree; 7.5% of the stores favored men to a

statistically significant degree. Plaintiffs' expert admitted that he began a store-by-store analysis, but abandoned it. He submitted only aggregated statistics, nationwide and by region (a region includes approximately 80 stores).

Even without the store-by-store statistics, it is intuitively obvious that when the plaintiffs' theory is "excess subjectivity" – that managers at geographically separate locations made biased subjective judgments at the local level – the effect of these subjective judgments would differ facility-by-facility, rendering a multiple-facility excess subjectivity case, absent unusual facts, analytically impossible. There would be no commonality and typicality – every location would require a separate analysis. That is precisely what the D.C. Circuit has held.

In *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006), a national origin lending discrimination case, the allegation was that multiple-facility decisionmaking was subjective and led to discrimination. The D.C. Circuit affirmed a denial of class certification:

Establishing commonality for a disparate treatment class is particularly difficult where, as here, multiple decisionmakers with significant local autonomy exist.

Id. at 632.

[T]heir claims arise from multiple individual decisions [Plaintiffs did] not cite a single reversal of a district court's denial of class certification based on no commonality resulting from the geographic spread of the decisionmakers. [numerous citations omitted]

Id. at 633. Plaintiffs argued, as do the plaintiffs in the Wal-Mart case, that excess subjectivity was both disparate treatment and disparate impact. The D.C. Circuit rejected the idea that either could be attacked on an excess subjectivity theory spread over numerous decisionmaking locations: The “subjective decisionmaking process constitutes the [allegedly] common facially neutral practice.” *Id.* at 633-34. “We reject both theories and instead affirm the district court’s denial of class certification because the appellants failed to show a common facially neutral . . . policy” *Id.* at 634.

In language equally applicable herein, the D.C. Circuit stated: “It does not suffice under Rule 23(a)(2) to show an ethnic imbalance . . . ; rather the appellants must show that a common facially neutral policy caused the imbalance.” *Id.* at 635.

The D.C. Circuit in *Love v. Johanns*, a companion case charging sex discrimination in lending at multiple geographic locations, noted in language also equally applicable to the Wal-Mart case that if the class was certified “the outcome . . . would nevertheless turn on a series of individualized inquiries into . . . practices in more than 2,700 . . . offices across the country” *Id.* at 730. “The District Court concluded that the geographic dispersal and decentralized organization . . . ‘cut[] against any inference for class action commonality.’” *Id.*

Perhaps the most extensive analysis of why an excess subjectivity multiple-facility class action cannot be certified was done in *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001). After reviewing numerous excess subjectivity multiple-facility cases, the court

denied class certification because plaintiffs seemed to be contending that the employer “had a centralized policy of decentralization, which is insufficient . . . to satisfy commonality or typicality” with respect to a multi-facility class. *Id.* at 670. The court noted that this Court in *Falcon* required significant proof to justify certification of a broad class based on excess subjectivity and this is not shown by aggregated statistics.

CONCLUSION

The judgment of the Ninth Circuit is that nationwide Title VII class certification is automatic based simply on the submission of three categories of evidence: (1) the opinion of a sociologist which will not be reviewed under Daubert; (2) anecdotal claims of discrimination from 1/100th of 1% of the class which cannot be tested; and (3) aggregated nationwide statistics. Dissent, *Id.* at 652 (“Put simply, the door is now open to Title VII lawsuits targeting national and international companies . . . based on nothing more than general and conclusory [expert] allegations, a handful of anecdotes, and statistical disparities that bear little relation to the alleged discriminatory decisions.”). This judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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