No. 10-277

IN THE
Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLAMSON, DEBORAH GUNTER, CHRISTNE 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 OF COSTCO WHOLESALE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF WAL-MART STORES, INC.

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INTEREST OF *AMICUS CURIAE*

Costco Wholesale Corporation is a Fortune 25 company and a Top Five U.S. Retailer.[1] Since 1983, Costco has grown from a single location in Seattle to more than 400 membership warehouses employing

[1] The parties have received timely notice of Costco's intent to file this brief and have consented to its filing by letters filed by Petitioner and Respondent with the Clerk of the Court. Costco advises, under Supreme Court Rule 37.6, that no counsel for a party authored any part of this brief and that no one other than Costco paid any money to prepare or submit this brief.

more than 100,000 people in eight geographical regions across 40 states. Costco warehouses are major enterprises employing hundreds of employees and selling over 4,000 items of goods and numerous services that generate, on average, more than $130,000,000 in annual revenue. To select warehouse managers, Costco promotes from within, elevating individuals who have proven themselves during many years of experience with the company. Costco relies on local decision-makers to determine whom to promote. They rely in turn on their own extensive information concerning each candidate's job performance and job-related personal qualities, which are not amenable to standardized testing. This promotional process, featuring the exercise of individual managerial judgments, makes Costco a target of class actions that would exploit the lax standards now endorsed, in *Dukes v. Wal-Mart*, by the Ninth Circuit, where Costco has its headquarters and 60% of its warehouses and employees.[2]

Other aspects of Costco's operation make it an even more attractive target of class actions that would seek to exploit the permissive approach that the Ninth Circuit has endorsed. First, Costco has an especially strong corporate culture, instilled by founders who still run the company, which promotes

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[2] Costco's concern is not merely hypothetical. In *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627 (N.D. Cal. 2007)—brought by some of the same lawyers who sue Wal-Mart and involving some of the same plaintiffs' experts—the district court certified a Rule 23(b)(2) class for claims of gender discrimination in promotion seeking backpay, punitive damages, and emotional-distress damages. That case, now on interlocutory appeal, awaits this Court's guidance. *Ellis v. Costco Wholesale Corp.*, No. 07-15838 (9th Cir. Dec. 8, 2010), ECF Docket No. 75 (deferring submission of case pending this Court's decision).

concern for Costco shopping members and employees above all else. Second, Costco has centralized EEO policies and has adopted various special employee protections such as those set forth in its comprehensive Employee Agreement. Third, in connection with its longstanding "Rothman Plan," Costco continues to press diversity initiatives to encourage the advancement of women and persons of color. All these benign aspects of Costco's governance promote Title VII compliance, yet the Ninth Circuit has endorsed an approach that would perversely treat each of these aspects as a factor favoring Rule 23(b)(2) certification of employment-discrimination claims. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 600-01 (9th Cir. 2010) (en banc) (citing evidence of "strong corporate culture," common policies on personnel, diversity, and EEO issues, and centralized coordination as factors supporting certification).

For all the reasons stated above, Costco has a uniquely significant interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a 6-5 decision with four opinions, the Ninth Circuit in *Dukes* upheld the certification of a nationwide Rule 23(b)(2) class of 500,000 women at 3,400 stores in positions ranging from part-time entry-level hourly employees to salaried managers. Plaintiffs seek billions of dollars in monetary compensation.

Dukes upholds a finding of Rule 23(a) commonality on the basis of "four categories" of evidence: (i) companywide policies that allow subjective decision-making, (ii) a sociological expert opinion that such decision-making is vulnerable to gender stereotyping, (iii) a statistical expert opinion that identifies gender

disparities in promotion and pay outcomes when they are aggregated at levels above those where decision-making actually occurs, and (iv) declarations reciting anecdotes of various managers holding or tolerating discriminatory attitudes. *Id.* at 600.

In thus finding commonality despite the absence of any evidence that discriminatory decision-making has affected the class generally, *Dukes* opens the door to Title VII class actions challenging the promotion and pay practices of virtually all large, decentralized employers, who necessarily rely on individual judgments by local decision-makers regarding which candidates to promote into higher management.

Compounding this error regarding Rule 23(a), *Dukes* adopts a novel interpretation of Rule 23(b)(2) to facilitate efforts to seek substantial monetary relief. *Dukes* holds that Rule 23(b)(2) certification can co-exist with monetary demands so long as the "appropriate final relief" does not relate "exclusively or predominantly to money damages." *Dukes* vaguely directs district courts to weigh "relevant" factors on a case-by-case basis, while providing certainty only on the point that backpay, categorically, is "fully compatible" with Rule 23(b)(2) certification. *Id*. at 617-20.

The *Dukes* approach toward Rule 23(a) and Rule 23(b)(2) enables Title VII lawsuits that rely upon statistical aggregation above the actual decision-making level, thereby permitting plaintiffs to gloss over the absence of any widespread discrimination at the level where employment decisions actually occur. *Dukes* not only accepts misleading aggregate statistical proof, but also permits plaintiffs to link that dubious evidence to an employment practice by invoking the sociological opinion that people resort to

stereotyping in stranger-on-stranger interactions where they lack the knowledge and incentive to make individuated judgments. *Dukes* glosses over the disconnect between this abstract theory and the actual facts at Wal-Mart, where managers making employment decisions about employees do possess individuated knowledge of the employees and do have incentives to use their personal knowledge of those employees' job-related qualities.

Dukes thus allows class actions to proceed merely on a theory that subjective decision-making could lead to discriminatory outcomes, notwithstanding this Court's directive in *General Telephone Co. v. Falcon*, 457 U.S. 147 (1982) that courts considering class actions challenging subjective decision-making must require "[s]ignificant proof" of a general policy of employment discrimination, *id.* at 159 n.15, and must use a "rigorous analysis" to ensure that the plaintiffs have satisfied the elements of Rule 23, *id*. at 161. *Dukes* impermissibly excuses the plaintiffs from their duty to bridge the "wide gap"[3] between their own claims for discrimination and the existence of a class that has suffered the same injury as a whole. The vague standard that *Dukes* espouses would enable plaintiffs to seek massive monetary damages for a purported class without meeting the

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[3] *See generally Falcon*, 457 U.S. 147 at 157 ("Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.").

Rule 23(b)(2) requirement to show that the defendant's conduct has affected the class as a whole.

ARGUMENT

I. THE *DUKES* CLASS CERTIFICATION ORDER CONFLICTS WITH RULE 23(A) REQUIREMENTS

A. The Ninth Circuit's Application Of Rule 23(a) And Rule 23(b)(2) Tempts Employers To Impose Quotas Rather Than Face Ruinous Class Claims

Justice O'Connor, in a four-Justice opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988), warned that extending disparate-impact analysis to subjective employment practices could "create a Hobson's choice for employers" and thus "lead in practice to perverse results." The results she feared involved a resort to surreptitious quotas by employers who lack any realistic means to "eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id*. at 992. She observed that quotas are contrary to Title VII, which expressly disclaims any intention to grant "preferential treatment" because of race or gender, or other protected status, "on account of an imbalance" that may exist with respect to any group's comparative presence in the work force. *Id*. (citing 42 U.S.C. § 2000e-2(j)).

To reduce this risk of encouraging surreptitious quotas, Justice O'Connor, while writing an opinion for the Court that extended disparate-impact analysis to subjective promotion decisions, also announced for herself and three other Justices (Chief Justice Rehnquist and Justices White and Scalia) certain

"evidentiary standards" to keep that "analysis within its proper bounds." *Id*. at 993-94. Justice O'Connor outlined the following standards for district courts to enforce: require proof of a specific employment practice causing the alleged disparity, require "sufficiently substantial" statistical disparities to raise an inference of causation, and give defendants liberal leave to challenge fallacies and deficiencies in the plaintiff's data with countervailing evidence, while keeping the ultimate burden of proof on the plaintiff. *Id*. at 993-99.[4]

Recognizing that many jobs, particularly at the managerial level, involve "personal qualities that have never been considered amenable to standardized testing," Justice O'Connor cautioned that courts are generally less competent than employers to structure business practices and should not attempt to do so unless mandated by Congress. *Id.* at 999 (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978)).

Although these pronouncements in *Watson* arose in a lawsuit by a single plaintiff, they figure more prominently still in the context of a class action, which greatly magnifies the dangers of unsupported judicial intermeddling with business practices.

Dukes realizes the worst fears expressed in *Watson*. By allowing certification of a nationwide class based on (i) a company's decision to delegate decision-making to local managers and (ii) statistics aggregated above the decision-making level—all without showing that local decisions generally reflect biased outcomes—*Dukes* permits plaintiffs to mask evidence

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[4] The Civil Rights Act of 1991 amended some of these standards.

about whether bias generally occurred at the decision-making level in fact. Under *Dukes*, plaintiffs need only assert a superficial theory of "statistical significance" and "causality" to force employers to capitulate on the basis of class certification alone, without the plaintiffs ever proving discrimination with respect to the class generally. *See Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842, 849-50 (7th Cir. 2010) (noting that even where the merits of claims are "slight," the pressure on a defendant to "settle on terms advantageous to its opponent will mount" if the plaintiff can proceed with ambitious class discovery); *Am. Nat'l Fire Ins. Co. v. York Cnty*, 575 F.3d 112, 114 (1st Cir. 2009) (noting that certification of a class is a serious matter because class litigation, by its very nature, "can alter the usual dynamics of litigation and bring to bear on defendants ... intense pressure to settle"); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310, 320 (3d Cir. 2008) (noting that certification is "pivotal" as it "often bestows upon plaintiffs extraordinary leverage" that can "create unwarranted pressure to settle non-meritorious claims"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (ruling that coercive effect of class certification could make certification effectively unreviewable at end of case).

Under the class-certification ritual ordained in *Dukes*, plaintiffs need only offer generalized opinions by a statistician and a sociologist to establish the requisite "commonality" under Rule 23(a), without needing to link those opinions to workplace realities. The statistician's role is simply to demonstrate a statistically significant disparity by aggregating a sufficiently large number of outcomes from independent decision-makers and by analyzing them at the regional or national level instead of at the lower level

where employment decisions actually occur. Through this method, plaintiffs can exploit the arithmetic of aggregation to conceal the lack of any statistically significant disparity in the employment decisions of most decision-makers.

With a misleading statistical disparity thus reported, the sociologist can then posit a causal nexus between that disparity and the employer's inevitable business decision to have its employment decisions made by local managers exercising individual discretionary judgments. The sociologist's role is simply to opine that people who evaluate a stranger—without either individuated information or incentives to make correct decisions about the stranger—can unconsciously rely on adverse stereotypes to fill the blanks in their knowledge, and then to opine that all putative class members are vulnerable to those stereotypes. *Dukes* endorses this approach, approving class certification without requiring that the plaintiffs tie their abstract theory to any actual evidence.

The *Dukes* paradigm thus enables plaintiffs to support Rule 23(b)(2) claims for substantial monetary remedies—such as backpay and punitive damages—as well as for injunctive and declaratory relief. By dispensing with the "rigorous analysis" and "significant proof" that this Court required in *Falcon*, *Dukes* leaves employers no means at the certification phase to defeat a weak showing of "commonality," even with evidence that most decision-makers have produced no statistical evidence of discrimination in fact. The *Dukes* paradigm leaves national employers such as Costco, who depend for the success of their businesses on the sound decision-making of local managers in the highly diverse market conditions in which they operate, to face the "Hobson's choice" foreseen in

Watson. Even if most local decision-makers demonstrably exercise informed, job-related judgments, incentivized to eschew discriminatory bias, and create no actual adverse impact, *Dukes* would still make the employer's overall decision-making subject to attack, because the process features not only objective facts but also individual managerial judgments. *Dukes* thus creates the specter of ruinous class actions that can challenge "subjective" decision-making through abstract theorizing, without any proof of disparities occurring at the level where the relevant employment decisions actually occur.

B. *Dukes* Improperly Finds Sufficient "Commonality" Based On Aggregated Statistics And External Labor Market Benchmarks That Mask The Absence Of Bias In Actual Decision-Making

1. Improper Reliance On Statistics Aggregated Above The Decision-Making Level

To test whether a decision-maker has engaged in unconscious cognitive bias, one should examine that decision-maker's record to see if decisional outcomes vary from the expected results. A statistically significant variance might indicate bias by *that* decision-maker. But aggregating the results of decisions by numerous, independent decision-makers would obscure the evidence that the promotion and pay decisions of many, or perhaps most, decision-makers indicate no bias whatsoever. Such an illusory showing of significant disparity would merely be an artifact of the arithmetic of aggregation, and could therefore suggest statistical significance on an aggregate basis even where most of the decisions analyzed separately would fail to indicate bias. This poten-

tially misleading situation, well-known to statisticians, is called Simpson's Paradox. *See, e.g., Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty.*, 122 F.3d 895, 919 n.4 (11th Cir. 1997) (cited in *Dukes*, 603 F.3d at 638 n.12 (Ikuta, J., dissenting)).[5]

Thus, an aggregate analysis can falsely indicate that all putative class members suffered from the injury of stereotypic decision-making merely by being a member of the class, although that in fact is not at all the case. Wal-Mart pointed out this fatal flaw in plaintiffs' analysis, demonstrating how aggregated statistics could suggest illusory disparities.[6] As Judge Ikuta's dissent in *Dukes* correctly notes,

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[5] *See generally* Paul Meier, Jerome Sacks & Sandy L. Zabell, *What Happened in Hazelwood: Statistics, Employment Discrimination, and the 80% Rule*, 1984 AM. B. FOUND. RES. J. 139, 156 (1984) ("Stratification can occur when different divisions of a firm make hiring decisions independently of one another. Such decisions may appear fair at the divisional level but unfair when viewed in the aggregate."); David H. Kaye & David A. Freedman, *in Reference Guide on Statistics*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 83, 108-10 & n.92 (Fed. Judicial Ctr. ed., 2d ed. 2000) (demonstrating how Simpson's Paradox can distort patterns in aggregated data).

[6] Wal-Mart's expert performed a Chow test to show the illusory effect of aggregation. Although *Dukes* dismisses use of that test, simply because no court has previously required it, 603 F.3d at 608 n.32, the Office of Federal Contract Compliance Programs, alert to the danger of relying on aggregated statistical data to establish discrimination, requires use of the Chow test or a similar statistical device. 71 FED. REG. 35,124 (June 16, 2006). The fallacy of aggregation here is analogous to the pitfalls of false averages. *See, e.g., Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 431 (E.D. Wis. 2001) (citing, in a similar context, the parable of Bill Gates and nine monks sharing a meal: on average the diners are extremely wealthy, but in reality 90% of them are under a vow of poverty).

"Information about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level." 603 F.3d at 637 (Ikuta, J. dissenting) (citing Marios G. Pavildes & Michael D. Perlman, *How Likely Is A Simpson's Paradox?*, 63 AM. STATISTICIAN 226, 230 (2009)).[7]

Thus, while "a general policy of discrimination *conceivably* could justify a class … *if* the discrimination manifested itself in … *promotion practices in the same general fashion*," *Falcon*, 457 U.S. at 159 n.15 (emphasis added), a practice of local decision-making that reveals no evidence of a statistically significant disparity precludes any genuine finding of a "general manifestation" and disproves the general application of plaintiffs' cognitive bias theory. *See Morgan v. UPS*, 380 F.3d 459, 464 (8th Cir. 2004) ("[D]iscrimination in some districts and not in others tends to defeat the argument that discrimination was [the employer's] nationwide standard operating procedure."). *See generally* Daniel S. Klein, *Bridging the Falcon Gap: Do Claims of Subjective Decisionmaking In Employment Discrimination Class Actions Satisfy The Rule 23(a) Commonality and Typicality Requirements?*, 25 REV. LITIG. 131, 170 (2006) (improper to base class certification on statistics aggregated at a higher level than the decision-making level).

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[7] Whether Wal-Mart's decisions occurred at the store level or the in-store department level, there is nothing to indicate that relevant employment decisions occurred at the regional level, which is the lowest level at which the plaintiffs chose to aggregate the statistics. *Dukes*, 603 F.3d at 604 (noting that plaintiffs' statistician, Dr. Drogin, "analyzed data at a regional level").

The district court below abused its discretion in finding commonality on the basis of plaintiffs' aggregated analysis, and the Ninth Circuit erred in affirming this finding and deferring to a later stage the question of the appropriate level for statistical analysis. Answering this question at the class certification stage is central to determining whether the plaintiffs' statistical analysis supports a finding of commonality and equitable relief for any appropriate class as a whole, and would not be, as *Dukes* contends, 603 F.3d at 607 & n.30, an impermissible evaluation of expert opinions on the merits.

2. Improper Reliance On External Labor Market Benchmarks

Dukes similarly fails to recognize the wide divide between theory and fact in addressing the plaintiffs' attempt to reinforce their aggregate statistics with an expert opinion by Dr. Marc Bendick. The Bendick "benchmark" study contended that women were under-represented within Wal-Mart's management ranks as compared to their presence at certain selected retailers. *Dukes* uncritically accepts this study as supporting class certification, using Dr. Bendick's tenuous logic that " 'if retail chains comparable to Wal-Mart are successfully employing women at some rate, then women are presumably available, interested, and qualified to hold comparable positions at Wal-Mart at a similar rate.' " 603 F.3d at 604 n.27 (quoting Dr. Bendick's testimony).[8]

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[8] Applying a similarly loose standard for class certification, the district court in *Ellis v. Costco* found that "Dr. Bendick's analysis, *while not without its flaws*, presents a sufficient foundation for his conclusion that women are underrepresented at these positions relative to women at comparable companies." 240 F.R.D. at 638 (emphasis added).

The Bendick benchmarks, analyzing Wal-Mart's workforce in light of *external* labor markets, were fundamentally flawed, because where, as here, the defendant employer promotes from within, the relevant pools are *internal* pools, not external pools such as those measured by the Bendick benchmarks. Decisions from several Circuits, including prior rulings of the Ninth Circuit, have recognized this point. *E.g., Paige v. California*, 291 F.3d 1141 (9th Cir. 2002); *Morgan v. UPS*, 380 F.3d 459 (8th Cir. 2004). Thus, just as plaintiffs' aggregate statistics systematically mask the evidence that gender disparities are lacking in individual managers' decisions, the Bendick benchmarks (i) circumvented Wal-Mart's evidence that it promoted women in line with female availability in the internal candidate pool[9] and (ii) "failed to provide information derived from the level at which promotion and pay decisions were actually made." *Dukes*, 603 F.3d at 638 n.13 (Ikuta, J., dissenting).

In *Paige v. California*, California Highway Patrol ("CHP") officers alleging race discrimination in promotions sought to compare the percentage of black CHP officers to the percentage of black law enforcement personnel in the California labor market. 291 F.3d at 1143. The Ninth Circuit rejected this reliance on an external labor pool, instead of an internal candidate pool, to show discrimination in promotions, notwithstanding plaintiffs' argument that the inter-

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[9] Bendick Dep. 51:20-52:11, 54:14-25, 196:18-197:3 & Exs. 5, 6; Scott Decl. ¶¶ 11, 14; Haworth Decl. ¶ 314 (chart) (all cited in Wal-Mart's Motion to Strike Declaration of Marc Bendick, Jr. Ph.D., ECF Docket No. 265, at 12:1-7, App. 33a) ("Bendick Motion to Strike"). As to the Haworth Decl., *see also* App. 1557-1558a.

nal pool was tainted by discrimination in hiring. *Id*. at 1145. The Ninth Circuit held that plaintiffs could not rely on the proposed external pool, because the plaintiffs lacked standing to challenge hiring decisions. Rather, the plaintiffs could compare themselves only against an internal pool of incumbent employees who, by definition, were already hired. *Id*. at 1146-47. This reasoning applies here *a fortiori*, where discrimination in hiring is not at issue.

Similarly, the Eighth Circuit in *Morgan v. UPS* rejected the plaintiffs' reliance on external labor markets to challenge failures to promote. The *Morgan* plaintiffs offered expert opinion that the percentage of UPS's black division managers was significantly below the representation of blacks in the general population. The Eighth Circuit rejected this opinion because "[t]he relevant inquiry was whether promotions from center to division manager were racially discriminatory, taking into account the proper pool of available qualified employees." 380 F.3d at 465.

The Bendick benchmarks—focused on *external* labor pools instead of the uniquely relevant *internal* labor pool of Wal-Mart employees available for promotion—is the same sort of overbroad bottom-line statistical comparison rejected in *Paige* and *Morgan*. Two Circuits have specifically rejected Bendick benchmarks for relying upon inapposite labor markets.[10]

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[10] In *United States v. City of Miami*, 115 F.3d 870, 873-74 (11th Cir. 1997), the Eleventh Circuit reversed the lower court's erroneous reliance on Dr. Bendick's "benchmark" analysis to prove promotion discrimination: "Bendick's analysis did not take into account the number of qualified minorities and women interested in promotion at each promotional rank. He declined

Dukes thus erred in accepting as evidence of commonality benchmarks that reveal nothing about the promotion decisions of individual Wal-Mart managers and thus fail to demonstrate commonality or to support injunctive relief with respect to the class as a whole.

C. *Dukes* Improperly Finds Sufficient "Commonality" Based On A Theory That Delegating Decision-Making To Local Managers Created A Conduit For Unconscious Bias

1. No "Rigorous Analysis" Links Plaintiffs' Abstract Causation Theory With The Actual Facts To Justify Finding The Requisite Commonality

Plaintiffs argue that Wal-Mart's practice of delegating pay and promotion decisions to local managers, without adequate bureaucratic oversight, fostered discrimination because "subjective and discretionary" decisions are "vulnerable to gender bias."[11] Reasoning backwards from a conclusion of

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to measure the interest of women in various Department jobs and improperly assumed that all employees would seek promotion upon eligibility at the same rate as their percentage in the general population." *See also Middleton v. City of Flint*, 92 F.3d 396, 406-08 (6th Cir. 1996) (finding that lower court erred in adopting Bendick's labor pool statistics, which were "incomplete" and contained "conclusory assumptions" that had "no basis in the law").

[11] Bielby Decl. ¶ 63: "I have concluded that subjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias. ... Personnel policy and practice at Wal-Mart as implemented in the field has features *known to be vulnerable* to gender bias. Discretionary and subjective elements of Wal-Mart's personnel system and inadequate oversight and

bias drawn from aggregated statistics—which overlooks the absence of significant disparities in the decision-making by local managers—plaintiffs theorize that Wal-Mart's policy of delegation acts as a "conduit" for diverse, independent local decisions, to establish a harm common to all class members.

But just as plaintiffs' aggregate statistical analysis conceals the absence of evidence that women suffered disproportionately from local decision-making, plaintiffs' sociological theory of causation does not indicate whether subjectivity allowed stereotypic decisions by local decision-makers to harm women in a pervasive manner.

Simply put, a centralized decision to allow decentralized decision-making is, by itself, neither evidence of causation nor a basis for finding commonality. Thus, plaintiffs' expert Dr. Bielby could not determine whether 0.5%, 5%, 50%, or 95% of Wal-Mart's employment decisions resulted from stereotypic thinking.[12] Dr. Bielby could not opine as to "how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," simply because the limitations of his science do not allow him to connect theory to the facts of the case. His opinion thus leaves "too great an analytical gap between the [facts of the case] and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (Breyer,

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ineffective anti-discrimination efforts *contribute* to disparities between men and women in their compensation and career trajectories at the company." App. 577a (emphasis added).

[12] Bielby Dep. 87:19-88:12, 161:25-162:12, 370:17-371:3 (cited in Wal-Mart's Motion to Strike Declaration, Opinion and Testimony of Plaintiff's Expert William T. Bielby, Ph.D., Ninth Cir. ECF Docket No. 263 at 9:11-16, App. 33a) ("Bielby Motion to Strike").

J., concurring).[13] *Dukes* errs in affirming the district court's finding of sufficient commonality under Rule 23(a), as a basis for class certification under Rule 23(b)(2).[14]

The generality of Dr. Bielby's opinion—that the subjective elements inherent in managerial decisions make them "vulnerable" to stereotypic thinking adverse to women—does not acknowledge the potentially dispositive facts that, as he elsewhere concedes,[15] would mitigate or entirely "erase" the asserted effects of that kind of thinking. Those facts include (i) the extent to which a Wal-Mart manager possesses accurate "individuating" information" about employees,[16]

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[13] *See also Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002) (no abuse of discretion to exclude opinion "connected to existing data only by the *ipse dixit* of the expert") (internal citations omitted); *Marmo v. Tyson Fresh Meats*, 457 F.3d 748, 758 (8th Cir. 2006) (excluding expert from testifying on causation based on analytical flaws); *Astra Aktiebolag v. Andrx Pharm.*, 222 F. Supp. 2d 423, 488 (S.D.N.Y. 2002) ("where the proffered testimony is based on a methodology transposed from one area to a completely different context, and there is no independent research supporting the transposition, the 'fit' requirement [in *Daubert*] may not be satisfied").

[14] Costco's point obtains regardless of whether a Rule 23 "rigorous analysis" requires a *Daubert* hearing. While that is the correct view, *e.g., Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010) ("[T]he district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."), Dr. Bielby's testimony, on its face, simply does not support a finding of commonality.

[15] Bielby Dep. 323:9-20, 328:20-329:1, 340:13-17 (cited in Bielby Motion to Strike at 9:2-10, App. 33a).

[16] Proponents of cognitive bias theory recognize, as they must, that the more "individuating information" a decision-maker has about someone, the weaker is the influence of any stereotype. E.g., Susan T. Fiske & Steven L. Neuberg, *A Continuum of*

(ii) the opportunity the manager has to make a considered judgment, (iii) the incentives the manager has to make the right, job-related decision, and (iv) the diverse abilities, characteristics, or experiences that exist among individual managers that may affect the "automaticity" of their cognitive perceptions.[17] Further, Dr. Bielby shows no interest in knowing whether a statistical analysis of employment decisions by individual store managers would show a pervasive gender disparity. For his purposes that evidence is beside the point. Similarly, the Ninth Circuit and district court, in applying what purported to be a "rigorous analysis," found it unnecessary to consider that evidence.

Accordingly, as long as courts follow *Dukes* in embracing the self-limited theory of stereotypic decision-making, Dr. Bielby's form declaration will supply a ready-made template that, combined with sufficiently aggregated statistics, will facilitate Rule 23(b)(2) class certification in any industry where operations are widely distributed and local decision-

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Impression Formation, From Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation, 23 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1 (Academic Press, 1990); Ziva Kunda & Paul Thagard, *Forming Impressions From Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103(2) PSYCHOL. REV. 284 (1996).

[17] The greater the cognitive ability of the decision-maker, the weaker the influence of possible stereotype. *E.g.*, Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 365 (4th ed. 1998) (cited generally in Bielby Decl. ¶¶ 29, 32, App. 539a, 543a); Sam G. McFarland & Zachary Crouch, *A Cognitive Skill Confound on the Implicit Association Test*, 20(6) SOCIAL COGNITION 483 (2002).

making is an essential feature of an effective business model.[18] Because "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance," *Watson*, 487 U.S. at 992-93, employers with decentralized business models will have few avenues available to escape a Bielby-enabled certification order, other than resorting to surreptitious quotas to ensure that all decisional outcomes affecting women and minorities fall within 1.96 standard deviations of the mean.

2. Social Framework Analysis Does Not Cure The Disconnect Between Dr. Bielby's Opinion And Facts at Wal-Mart

Dr. Bielby cites case studies that say nothing relevant about the behavior of Wal-Mart managers or about retail managers in general. Dr. Bielby did not perform his own investigations to support his

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[18] Thus, Dr. Bielby's declaration mirrors reports that he has submitted in dozens of other cases propounding the same theory. *See* Bielby Motion to Strike at 1 n.1, App. 33a, (citing Exhibit D of the Declaration of Neal D. Mollen in Support, comparing Dr. Bielby's report in *Dukes* with his reports in other cases). *See also* Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133, 133-46 (2010) ("As of 2004, Dr. Bielby alone had testified in more than fifty cases, offering case-specific opinions similar to those he offered in *Dukes*.") (citing Justin Scheck, *Expert Witness Helps Launch Employment Law Industry*, THE RECORDER, Oct. 23, 2004, at 1); Michael Orey, "White Men Can't Help It," BUSINESS WEEK ONLINE, May 15, 2006, *available at* http://www.Businessweek.com/magazine/content/06_20/b3984081.htm (noting that Dr. Bielby has been a plaintiffs' expert in dozens of major cases, including class actions against Wal-Mart, FedEx, Johnson & Johnson, Cargill, and Morgan Stanley).

opinion, and cited no experiments conducted in an industrial setting, much less in a workplace comparable to Wal-Mart's.[19] Further, the laboratory experiments he cites merely support a theory of "automatic cognitive bias" as a general trait that causes human beings to take a "cognitive shortcut" in stranger-to-stranger encounters by using stereotypes to fill in the blanks of what they do not know about a stranger.[20] Yet according to the approach now ordained in *Dukes*, Dr. Bielby can apply his theory *a priori*, without any distractions arising from the actual facts present at Wal-Mart. He thus need not search for empirical evidence. Rather, he can simply opine abstractly that subjective decision-making in the Wal-Mart workplace, or in any other workplace, is

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[19] Dr. Bielby admitted that he had not conducted laboratory research of his own (Bielby Dep. 33:20-34:15, cited in Bielby Motion to Strike at 9 n.15, App. 33a) and had not assessed Wal-Mart managers' exercise of their discretion (Bielby Dep. 128:20-25, cited in Bielby Motion to Strike at 9 n.15, App. 33a).

[20] Bielby Decl. ¶ 32: "A large body of research demonstrates that the tendency to invoke gender stereotypes in making judgments about people is spontaneous and automatic. As a result, people are often unaware of how stereotypes affect their perceptions and behavior, and individuals whose personal beliefs are relatively free of prejudice or bias are susceptible to stereotypes in the same ways as people who hold a personal animosity towards a social group." App. 542a-543a. See articles cited in Bielby Decl. ¶¶ 39, 34, App. 539a n.38, 545a n.45: Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 364-75 (4th ed. 1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach To Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1198 (1995) ("In a sense, we can say that human cognitive organization predisposes us to stereotyping.").

inherently "vulnerable" to unconscious discrimination, regardless of the actual facts.

This theory of cognitive bias, however, tells only part of the story, as its proponents readily concede. There is no evidence that Wal-Mart promotes on the basis of stranger-to-stranger perceptions. On the contrary, Wal-Mart decision-makers possess current and accurate information about employees in the relevant work environment, including their work histories, skills, abilities, past performance, and interests. The decision-makers may have worked side by side with the same employees for years. As all researchers agree, accurate, current "individuated information" present in a workplace such as Wal-Mart's can reduce or eliminate stereotyping.[21]

If pervasive statistical disparities are not manifest across the decision-makers, viewed individually, then "cognitive bias" theory does not work predicatively in the subject environment, and thus fails to supply the common causative link to support a showing of "commonality." Instead, the evidence here discloses no more than isolated individualized circumstances, not a pervasive harm visited generally on the putative class members. Dr. Bielby's opinion—the lynchpin of plaintiffs' theory of commonality endorsed in *Dukes*—ignores evidence indicating that stereo-

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[21] Bielby Dep. 198:2-16, 223:23-224:1 ("Q. [B]y providing relevant information [about individual employees], sex bias can be significantly reduced or even eliminated; isn't that right? A: Correct."). *See also* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 20, at 391 ("The good news is that people can sometimes control even apparent automatic biases and if appropriately motivated, given the right kind of information and in the right mood.").

typic decisions are not pervasive across the decision-makers.

Dr. Bielby would credential his methodology by characterizing it as a type of the "social framework analysis" legitimated in SOCIAL SCIENCE IN LAW (4th ed. 1998) by John Monahan and Laurens Walker.[22] But Professors Monahan and Walker themselves have repudiated Dr. Bielby's misuse of their work. They point out that Dr. Bielby has improperly tried to link general principles of social science to the specific facts of a case, with no more scientific basis than his own subjective, selective view of the record.[23] This criticism of Dr. Bielby's suspect methods specifically encompasses his opinions in *Dukes v. Wal-Mart,*
Inc., 222 F.R.D. 137, 151, 153 (N.D. Cal. 2004).[24] A colleague of Professors Monahan and Walker has observed, "given that [Dr. Bielby] reviewed the record using an entirely subjective analytical method after knowing the plaintiffs' statistical evidence of disparities, it is not surprising that Dr. Bielby reached conclusions supporting the plaintiffs' claims."[25]

Courts have also criticized the Bielby method. In *Robinson v. Metro-North Commuter R.R.*, 175 F.R.D. 46 (S.D.N.Y. 1997), *rev'd in part on other grounds*, *Caridad v. Metro-North Commuter RR*., 191 F.3d 283

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[22] Bielby Decl. ¶ 8, App. 524a & n.1

[23] John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1742-48 (2008).

[24] John Monahan, Laurens Walker & Gregory Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307, 311-14 (2009).

[25] Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133, 137 (2010).

(2d Cir. 1999), the district court rejected a Bielby opinion, similar to the opinion offered here, as unscientific conjecture that did not support a Title VII class action:

> As for [Dr. Bielby's] sociological opinion, even if one puts aside reservations one might have as to its ultimate admissibility under [*Daubert*], it consists on its face of little more than rank conclusion and gross speculation. For example, the opinion baldly premises that negative stereotypes result in African Americans being considered "inappropriate for higher level jobs" by defendant's managers. Similarly, the opinion simply presumes that [defendant's] personnel and disciplinary systems are inherently subjective and allow managers to materially circumvent policies that would reduce subjectivity and bias. No meaningful weight can reasonably be attributed, even at this stage of the proceedings, to a report so facially suspect.

175 F.R.D. at 48 (internal citations omitted).[26] *See also EEOC v. Wal-Mart Stores, Inc.*, 2010 WL 583681, at *3-4 (E.D. Ky. Feb. 16, 2010) (excluding Dr. Bielby's testimony, which made clear that gender stereotyping does not even necessarily include intentional discrimination).

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[26] When reversing the *Robinson* decision, the Second Circuit did not question the district court's rejection of Dr. Bielby's testimony. *See* 191 F.3d at 287-88. *See also EEOC v. Bloomberg, LLP*, 2010 U.S. Dist. LEXIS 92511 (S.D.N.Y. Aug. 31, 2010) (rejecting "social framework" testimony by Dr. Eugene Borgida because he did not apply his analysis to facts of workplace at issue).

Nonetheless, *Dukes*, ignoring the suspect nature of Dr. Bielby's approach, uncritically accepts his description of it as "social framework analysis." 603 F.3d at 601. *Dukes* further errs in stating that this Court "considered similar evidence offered by [an] expert social psychologist" in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 255-56 (1989). 603 F.3d at 602. *Dukes* thus badly misapprehends not only "social framework analysis" but also this Court's opinions in *Price Waterhouse*, none of which endorsed the approach of plaintiffs' expert Dr. Susan Fiske. Justice Brennan, writing for the majority, suggested that the Fiske testimony was "merely icing on [the] cake" for which no expert testimony was required, *id*. at 256. Justice O'Connor, concurring, found the Fiske testimony insufficient standing alone to shift the burden of persuasion, *id*. at 277. Justice Kennedy, in dissent, suggested that the Fiske testimony could have been excluded if the defendant had timely objected to it. *Id.* at 294 n.5. Justice Kennedy explicitly cautioned that "[t]oday's opinions cannot be read as requiring factfinders to credit testimony based on [the expert's] type of analysis." *Id.*

Dukes, therefore, in ignoring the point that Dr. Bielby's theory is not "significant proof" that gender disparities resulted from subjectivity and unconscious stereotypes, has failed to insist upon the "rigorous analysis" required. This Court should correct any notion that critically reviewing Dr. Bielby's declaration would have been impermissibly prejudging the merits. Although his dubious use of "social framework analysis" may highlight the need for a *Daubert* inquiry, as the *Dukes* dissent powerfully argues, 603 F.3d at 639 n.15 (Ikuta, J., dissenting), here one need only ask whether Dr. Bielby's prepared testimony

furnishes the requisite showing of commonality. Respectfully, it cannot, by its own account.

II. *DUKES* IMPROPERLY ALLOWS RULE 23(B)(2) CERTIFICATION OF CLAIMS FOR DIVERSE MONEY DAMAGES

Dukes circumvents the language of Rule 23(b)(2), which requires that a defendant's conduct "apply generally to the class, so that final injunctive relief … is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). As shown above, plaintiffs cannot meet that standard with their aggregated statistics, "benchmark comparisons," and flawed sociological theory of causation. None of this evidence, singly or collectively, shows that the offending conduct—individual managerial decisions—produced gender disparities, generally. Wal-Mart's factual evidence to the contrary went unchallenged.

By nonetheless certifying a Rule 23(b)(2) class, *Dukes* allows money damages where plaintiffs have merely alleged but cannot show that stereotypic decisions affected all class members in a similar way. *Dukes* accomplishes this result with a novel interpretation of Rule 23(b)(2). In repudiating its own previous indefensible Rule 23(b)(2) standard in *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003), the Ninth Circuit in *Dukes* has invented one nebulous standard to replace another. The new standard relies on a single sentence in the Advisory Committee Note—that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." 603 F.3d 571 at 615. *Dukes* exegetes that language by arbitrarily selecting one, among many, dictionary definitions of "predominant"—"superior [in] strength, influence, or

authority" (*id*. at 616)—that is simply inapposite in the context of Rule 23(b)(2).

Dukes then erects a multi-factor test that conflates the term "predominantly" found in the Advisory Committee Note with the term "predominate" that appears, in a different context, in Rule 23(b)(3). This test invokes a list of vaguely defined, non-exclusive factors that an enterprising plaintiffs' counsel could easily manipulate: "whether the monetary relief sought determines the key procedures that will be used, whether it introduces new and significant legal and factual issues, whether it requires individualized hearings, and whether its size and nature—as measured by recovery per class member—raise particular due process and manageability concerns." *Id.* at 617. *Dukes* avoids any effort to be more definitive, stating that no one factor is determinative, and that the listed factors are not necessarily exclusive. *Id*. at 617, 622.

Dukes prefers this ill-defined standard for Rule 23(b)(2) certification to the "incidental damages standard" of *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 415-16 (5th Cir. 1998), even though most Circuits have adopted the *Allison* test, 603 F.3d at 616 (citations omitted). *Dukes* finds the *Allison* standard too limiting for a plaintiff whose damage claims are more than "incidental" but less than "predominant." *Id*. But the *Dukes* standard has no meaningful limits. Proof of this point is the Ninth Circuit's remarkable conclusion that "the objective effect of the relief sought in [this] litigation"—which includes billions of dollars in heterogeneous damage claims—is no impediment to class certification. *Dukes* thus signals that its ill-defined standard could support Rule 23(b)(2) certification of unbounded monetary

claims. A standard this loose would encourage plaintiffs to seek Rule 23(b)(2) certification not only for claims of backpay and punitive damages, but even for inherently individualized claims of emotional-distress damages.[27]

In *Dukes* the backpay claims alone arguably would not pass muster under *Allison*'s "incidental damages" standard, because each class member would have to show she was available and interested in a promotion but failed to receive the promotion because of stereotypic decision-making by individual Wal-Mart managers. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 368-71 (1977) (holding that the "known prospect of discriminatory rejection" does not show which non-applicants actually wanted the jobs in question or possessed the requisite qualifications for them). Alternatively, plaintiffs would have been obligated to proceed under Rule 23(b)(3); but *Dukes* allows them to circumvent Rule 23(b)(3) requirements by re-conceptualizing huge "backpay" damages as merely "equitable relief" to fit within the language of Rule 23(b)(2). 603 F.3d at 618.

The proper question, however, is not how to label the monetary relief at issue but rather how the trier of fact would determine the damages for each class member. Where, as here, an award of backpay would depend on individualized proof, *Dukes* is wrong to

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[27] *E.g., Ellis*, 240 F.R.D. at 642-43 (finding need for individualized determination no impediment to Rule 23(b)(2) monetary damage claims, including claims for punitive damages and emotional distress); *see also Hnot v. Willis Grp. Holdings Ltd*., 241 F.R.D. 204, 212 (S.D.N.Y. 2007) (concluding that Rule 23(b)(2) "only require[s] that the Court find that, if plaintiffs succeed at trial, they 'will be entitled to the injunctive and declaratory relief that they seek' ").

deem that form of monetary relief, categorically, as "fully consistent with the certification of a Rule 23(b)(2) class action." *Id*. at 619.

It is even more apparent that individual proof would be needed for punitive damages—available only when the employer acted "with malice or with reckless indifference to federally protected rights of an aggrieved individual," 42 U.S.C. § 1981a(b)(1)—because the harm alleged does not affect all class members in a similar way. *See McLaughlin v. Am. Tobacco Co*., 522 F.3d 215, 231-32 (2d Cir. 2008). Plaintiffs' theory of causation—that individual managers are "vulnerable" to *unconscious* gender-based stereotypic decisions—is itself inconsistent with a uniform showing of malice or reckless indifference to individual rights. Although *Dukes* expresses its own misgivings as to the propriety of certifying a punitive-damages class, because punitive damages introduce new and substantial factual issues and manageability concerns, 603 F.3d at 621-22, *Dukes* errs in concluding that these punitive-damages issues do not require individual determination in a Rule 23 context.

The class certification of heterogeneous damages claims under Rule 23(b)(2) thus allows class treatment for a mandatory, non-opt-out class that might never have met the requirements—and protections—of Rule 23(b)(3). Whereas the cohesiveness of a mandatory, non-opt-out class should be greater under Rule 23(b)(2) than Rule 23(b)(3), *Dukes* countenances a *lesser* threshold for a Rule 23(b)(2) class while allowing plaintiffs to evade Rule 23(b)(3) requirements altogether. If Rule 23(b)(2) certification were appropriate despite the diverse circumstances present here, then it would be difficult to imagine a case where

certification of monetary claims would not be allowed under Rule 23(b)(2), eliminating the purpose of Rule 23(b)(3) and exposing employers to escalating class claims upon superficial showings.

Accordingly, the Ninth Circuit's decision to allow certification of monetary damages claims under Rule 23(b)(2) should be reversed.

CONCLUSION

This Court should order the Ninth Circuit to remand to the district court to vacate the Rule 23(b)(2) class certification order and to consider whether a class action would be permissible under the standards of Rule 23(b)(3).

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