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 OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC has a particular interest in the fair and efficient administration of class actions, which are increasingly global in reach. Foreign plaintiffs often seek class action relief in federal court for alleged wrongs committed on foreign soil. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1567 (2007)

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[1] This brief was authored by *amicus* and its counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or its counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this and other *amicus curiae* briefs. Letters indicating the parties' blanket consent have been submitted to the Court.

("Since few other countries have group or representative litigation devices, foreign victims often avail themselves of the class action device in order to bring their claims in U.S. courts. As a result, U.S. federal judges increasingly entertain motions to certify mixed U.S.-foreign claimant classes"). *See also In re Parmalat Sec. Litig.*, 497 F. Supp. 2d 526, 531-32, 540 (S.D.N.Y. 2007) (class of Italian investors alleged fraud against Italian food and dairy company; however, trial court dismissed claims of foreign purchasers because "all of the U.S. conduct was clearly peripheral to the fraud itself").

Moreover, despite longtime skepticism about American class actions, several countries have begun to adopt their own class action procedures. Australia, Canada, Italy, Germany, and Austria now provide some form of class relief. *See* Roald Nashi, *Italy's Class Action Experiment*, 43 Cornell Int'l L.J. 147 (2010) (analyzing Italy's class action regime enacted in 2010) (hereinafter *Italy's Class Action Experiment*); Christopher Smithka, *From Budapest to Berlin: How Implementing Class Action Lawsuits in the European Union Would Increase Competition and Strengthen Consumer Confidence*, 27 Wis. Int'l L.J. 173, 190 (2009-2010) (noting that Germany and Austria have versions of the class-action lawsuit) (hereinafter *From Budapest to Berlin*); R. Mulheron, *The Class Action in Common Law Systems* 5 (Hart Publishing: Oxford 2005) (noting that Australia, British Columbia and Canada all have their own versions of class action procedures); Susan M. Sharko, et al., *Global*

*Strategies and Techniques for Defending Class Action Trials: Defending the Global Company in Multinational Litigation*, 77 Def. Couns. J. 295 (2010). Other countries routinely look to Rule 23 as a benchmark for developing their own class action mechanisms. *From Budapest to Berlin*, *supra*, 27 Wis. Int'l L.J. at 192 (arguing for the wholesale adoption of Rule 23 by the European Union with the addition of a diversity requirement between plaintiff class members); *Italy's Class Action Experiment*, *supra*, 43 Cornell Int'l L.J. at 157 (comparing Rule 23 requirements with the Italian model). Accordingly, this Court's interpretation of Rule 23 will have a significant impact on IADC members both here and abroad.

## SUMMARY OF ARGUMENT

Petitioner and other *amici* have already argued at length about the flaws in the class certification here, which opens the door 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." Pet. App. 160a (Ikuta, J., dissenting). We do not repeat those arguments.

Rather, we explain why, given the level of organizational and cultural change plaintiffs claim is needed, a class action – or any solution imposed by a source

outside Wal-Mart – is unlikely to provide the type of sustained, structural change plaintiffs seek. First, organization-wide change in a company's culture is more likely to take root when the organization's members participate in the change, rather than having it imposed on them from the outside. Second, a "one-size-fits-all" approach to change is even less likely to be effective where, as here, different regions and stores are subject to substantial individual managerial discretion and may be at different stages of inclusiveness. We also describe an alternative to the nationwide class certified here as well as potential individual claims: a series of store-level classes.

## STATEMENT OF THE CASE

*Amicus* hereby adopts and incorporates by reference the Statement of the Case set forth in the Petitioner's Brief.

## ARGUMENT

### I. A CLASS ACTION IS UNLIKELY TO CREATE THE KIND OF SUSTAINED ORGANIZATIONAL CHANGE PLAINTIFFS URGE.

#### A. A Change In Corporate Culture Is More Likely To Take Root When The Change Comes From Within An Organization.

Underlying the certification of this class is the notion that a nationwide class will produce the type

of change that is allegedly needed at Wal-Mart. The district court noted, for example, that the broad, prospective relief plaintiffs seek would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide" and would thereby benefit both current and future female employees. Pet. App. 239a. Such lasting, systemic change at the cultural level of an organization is unlikely to occur in direct response to a court decision, however. To the contrary, social science teaches that system-wide changes to an organization's culture are less likely to occur – and less likely to have staying power – when they are imposed from the outside.

Effective, permanent social change is grounded in participation: if people are active in decisions that impact them, they are more likely to adopt new ways. *See* Bernard Burnes, *Kurt Lewin and the Planned Approach to Change: A Reappraisal*, *in Organization Change: A Comprehensive Reader* 226-33 (W. Warner Burke et al., eds., Jossey-Bass 2009).

Pioneering behavioral scientist Kurt Lewin, whose particular expertise was resolving social conflict and combating discrimination against minority or disadvantaged groups, viewed the group (composed of individuals who share an "interdependence of fate") as the key to shaping an individual's perceptions, feelings, and actions. *Id*. at 229, 231. Because of the group's importance in shaping individual behaviors, Lewin focused change efforts on group norms, roles, interactions, and socialization. *Id*. at 230, 231.

"[R]outines and patterns of behavior in a group are more than just the outcome of opposing forces in a force field. They have a value in themselves and have a positive role to play in enforcing group norms"; therefore, "for change to be effective, it must take place at the group level, and must be a participative and collaborative process that involves all of those concerned." *Id*. at 232.

A successful change project, according to Lewin, involves three steps: (1) "unfreezing" old behavior and creating motivation to learn by disclaiming the validity of the status quo, inducing guilt or survival, and creating psychological safety to change; (2) the learning process itself, which requires interplay between research, action, and more research; and (3) "refreezing" or reinforcing new behavior so that it does not become short-lived. *Id*. at 234. The "refreezing" phase underscores why successful change must be a group activity: "[U]nless group norms and routines are also transformed, changes to individual behavior will not be sustained. . . . [R]efreezing often requires changes to organizational culture, norms, policies and practices." *Id*.[2] Behavioral scientists after Lewin have

[2] A study of leading corporate executives who engineered change at their companies revealed similar ingredients for successful change: (1) top management was committed to organization and culture change over the long term, (2) change was built on the unique strengths and core values of the organization, (3) no specific change was imposed from the top (rather, all levels were involved in implementing change), (4) the change was holistic across the company and planned, (5) changes to the

(Continued on following page)

come to view organizational change as an even more fluid, continuous, and open-ended process. *See id*. at 240-41.

Lewin, too, viewed change as unpredictable and contextual. He saw change "not as a predictable or planned move from one stable state to another, but as a complex and iterative learning process where the journey was more important than the destination, where stability was at best quasi-stationary and always fluid, and where, given the complex forces involved, outcomes cannot be predicted but emerge on a trial and error basis." *Id*. at 241.

### B. Corporate Diversity And Inclusion Initiatives Must Be Adaptable And Tailored To Each Organization To Be Successful.

Many contemporary diversity and inclusion initiatives are grounded in Lewin's approach to organizational and social change. After all, "[a]chieving a successful, inclusive, diverse organization requires fundamental changes: new styles of leadership, mindsets, engagement, problem solving and strategic planning. It requires new organizational structures,

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core of the organization were made where necessary (including to authority and power relationships), (6) the company took the interests of stakeholders and the external environment into account, and (7) the organization was adaptable and treated the change process as ongoing. W. Warner Burke, *Organization Change: Theory and Practice* 307-08 (3d ed., Sage Publications 2011).

policies, practices, behaviors, values, goals and accountabilities – in short, a complete systemic culture change." Frederick A. Miller & Judith H. Katz, *The Path from Exclusive Club to Inclusive Organization: A Developmental Process* 1 (2007) (unpublished manuscript) (on file with author); *Id*. at 10 (quoting one executive who led an organization toward inclusiveness: "Inclusion changes everything – how we make decisions, who comes to meetings, how we evaluate performance and how we work together").[3] "Every organization is different. A rigid formula for change cannot be applied successfully. . . . The route each organization takes depends on its size, hierarchy, infrastructure, people, leadership, and history." Frederick A. Miller & Judith H. Katz, *The Inclusion Breakthrough: Unleashing the Real Power of Diversity* 177 (Berrett-Koehler 2002). This is so because an organization's culture "strongly influences people's behavior and reactions." *Id*. at 36. *See also Amicus Curiae* Brief of Altria Group, et al., in support of Petition for Writ of Certiorari at 10 (defining "corporate culture").

"Just as every human being must undergo a developmental process to reach adulthood, organizations must experience a series of developmental stages to

[3] "An organization is inclusive when everyone has a sense of belonging; feels respected, valued and seen for who they are as individuals; and feels a level of supportive energy and commitment from leaders, colleagues and others so that all people – individually and collectively – can do [their] best work." Miller & Katz, *The Path from Exclusive Club to Inclusive Organization*, *supra*, at 2.

achieve the enriching benefits of diversity and to create an inclusive culture. . . . Just as children must crawl before they walk, organizations cannot expect to skip directly to inclusiveness." Miller & Katz, *The Path from Exclusive Club to Inclusive Organization*, *supra*, at 1, 2. "[J]ust *having* diversity does not result in *leveraging* diversity." Miller & Katz, *The Inclusion Breakthrough*, *supra*, at 8. To leverage diversity, an organization must reach a true stage of inclusiveness.

Frederick Miller and Judith Katz, who advise Fortune 500 companies about diversity and inclusion strategies, propose a developmental path for organizations; depending on where they fall on the continuum, organizations will choose different methods for achieving their inclusiveness goals. Miller & Katz, *The Path from Exclusive Club to Inclusive Organization*, *supra*, at 4 ("Diagnosing the organization and determining where it is on The Path makes it possible to tailor interventions based on that point, rather than force-fitting the system to the intervention"). Different units, divisions, or groups may be further along than others; in those cases, methods may need to be individually tailored to each division, rather than applied uniformly companywide. *Id.* No matter where an organization is along the developmental path, the answers must come from the organization's own members. *Id.* at 5, 7-10. At one stage, this may mean engaging the ten to fifteen percent of the organization's members who serve as its thought leaders; at another, it may mean valuing and embracing diversity at the local level before expanding beyond each location. *Id*. at 8, 10.

In every case, "[m]anagers and leaders at all levels must be able to translate the organization's business and operational needs for leveraging diversity and inclusion into everyday practice"; "[c]ulture change [cannot] become visible, viable, and believable until managers and leaders at all levels embrace and model the change." Miller & Katz, *The Inclusion Breakthrough*, *supra*, at 212-13.

### C. A One-Size-Fits-All Approach To Inclusion In This Case Would Further Ignore Differences Between Wal-Mart's Regions And Stores.

Wal-Mart's founder, too, "valued change, experimentation, and constant improvement." James C. Collins & Jerry I. Porros, *Built to Last: Successful Habits of Visionary Companies* 36 (1994). To foster innovation, he gave department managers the authority and freedom to run each department as if it were their own business. *Ibid*. *See also Amicus Curiae* Brief of Altria Group, et al., in support of Petition for Writ of Certiorari at 8-9. As the district court noted, Wal-Mart's current model still incorporates a substantial level of local managerial discretion, overlain with a centralized corporate culture. *See* Pet. App. 180a, 192a. Overarching this localized discretion, and included in the broader company culture, is an established, award-winning, company-wide diversity program implemented through company handbooks, trainings, diversity goals, and performance assessments. Pet. App. 195a.

Nationwide, Wal-Mart's retail operations encompass 7 different divisions broken down into 41 regions (each comprised of 80 to 85 stores); a total of 3,400 stores each employs between 80 and 500 people. Pet. App. 163a, 174a; *see also id.* at 114a (Ikuta, J., dissenting). Led by the store manager, the management team at each store location includes several assistant managers as well as managers of eight specialty departments. Pet. App. 174a, 175a.

Each of those regions and stores may be at different points on the road to inclusiveness, and each may require a different set of strategies to reach its goals. If a one-size-fits-all approach to inclusion were imposed on Wal-Mart, such an approach would necessarily ignore variations between locations and might undermine the company's preexisting programs and efforts. Wal-Mart is in a better position than the courts to determine the best ways to leverage its diversity and sustain and enhance its inclusion gains. *Cf. Byrnie v. Town of Cromwell, Bd. Of Educ.*, 243 F.3d 93, 106 (2d Cir. 2001) (courts should not act as "super-personnel departments").

Even assuming plaintiffs are correct and change is needed at Wal-Mart, the change plaintiffs propose will not be sweeping or lasting unless it is created from inside the organization, in accordance with Wal-Mart's culture. Standing alone, a class action lawsuit such as this – which involves no express policy of discrimination, imposes change from the outside, and does not tailor solutions to Wal-Mart as

an organization – will not produce meaningful, long-term cultural change or inclusion.

## II. THERE ARE ALTERNATIVES TO CERTIFYING A SINGLE NATIONWIDE CLASS OF PLAINTIFFS IN THIS CASE.

If this Court holds that the nationwide class certified in this case must be vacated, plaintiffs still have a viable method of collectively pursuing their allegations. The only alternative to a nationwide class action may not be, as the Ninth Circuit assumed, "innumerable individual suits." Pet. App. 111a. A number of smaller, more manageable classes also could be certified for each store,[4] provided plaintiffs can establish sufficient commonality.

It is undisputed in this case that there is no "specific discriminatory policy promulgated by Wal-Mart" (Pet. App. 59a) and that "Wal-Mart managers make pay and promotion decisions for in-store employees in a largely subjective manner." Pet. App. 173a. A "policy of leaving promotion decisions to the unchecked discretion of lower level supervisors . . .

[4] The level at which promotion and pay decisions are made differs between salaried and hourly employees. For salaried employees, employment decisions were made by district and regional managers. Pet. App. 178a. Thus, for salaried employees, a regional class action may be appropriate. For hourly employees who comprise the vast majority of the current class, store managers made employment decisions, so the proper scope of that class would be at the store level. Pet. App. 176a-77a.

itself raise[s] no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). In other words, without more, a "decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996). Without proof that a common policy of distributing discretion was adopted in order to perpetuate or effectuate discrimination, or that such discretion was exercised in a discriminatory fashion as a result of a company's central policies or culture, the requisite commonality for a class action is absent. A plaintiff must provide "[s]ignificant proof that an employer operated under a general policy of discrimination" before a class can be certified. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

Plaintiffs rely on anecdotal evidence and statistical data which they claim give rise to an inference of company-wide discrimination. As the Ninth Circuit en banc dissent noted, the anecdotes do not demonstrate companywide discrimination and the requisite commonality for class certification because the "affiants claim discrimination in different forms, at the hands of different people, in different stores, in different parts of the country, at different times, and under a constellation of facts unique to each individual." Pet. App. 127a. (Ikuta, J., dissenting). That leaves the

statistical data that "women were underrepresented in management in almost every one of Wal-Mart's 41 regions[ ]" and that "Wal-Mart pays women less than men in comparable hourly positions." Pet. App. 128a. This information also fails to "alone raise the inference that a company-wide policy of discrimination is [being] implemented by discretionary decision at the store and district level." Pet. App. 130a (Ikuta, J., dissenting).

Nonetheless, we will assume that the data does give rise to an inference of systematic discrimination at the store level. Analyzed at the store level, the data shows that "over 90 percent of Wal-Mart's stores [have] no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." Pet. App. 130a-31a (Ikuta, J., dissenting). Of the remaining ten percent, only 7.5 percent of stores showed a statistical disparity that favored men, and the remaining 2.5 percent of stores showed a disparity that favored women. *Amicus Curiae* Brief of California Employment Law Council in support of Petition for Writ of Certiorari at 3.

Assuming that ten percent of Wal-Mart's stores would qualify for class treatment, the total number of potential plaintiffs would fall from 1.5 million to 150,000. The ensuing smaller classes would make it easier to separately adjudicate Wal-Mart's individual statutory defenses. *See In re Copley Pharm., Inc.*, 161 F.R.D. 456, 469-70 (D. Wyo. 1995) (bifurcating common issue of drug contamination from individual issues like causation). The data used to demonstrate

a pattern or practice would be different for each store since any discrimination would stem from individual store managers exercising discretion. Store-level classes, furthermore, would not run afoul of the Seventh Amendment because any bifurcated issues would be "distinct and separable." *Gasoline Prod. Co. v. Champlin Refinery Co.,* 283 U.S. 494, 500 (1931).[5]

Regional classes such as these are not new in Title VII cases. *See, e.g., Stastny v. S. Bell Tel. & Tel.*

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[5] Courts routinely bifurcate issues amenable to collective adjudication from those requiring individual proof without violating the Seventh Amendment. *See, e.g., Butler v. Home Depot*, No. C-94-4335 SI, 1996 U.S. Dist. LEXIS 3370, at *14-22 (N.D. Cal. Jan. 24, 1996) (certifying class action on the first stage of a pattern or practice case and reserving judgment on certification of the second stage); *Arthur Young & Co. v. United States Dist. Court*, 549 F.2d 686, 696 (9th Cir. 1977) (bifurcating securities fraud class action by ordering separate juries to decide the issues of liability and damages was "well within the scope of a trial court's discretion under Fed. R. Civ. P. 42(b)"); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1194 (6th Cir. 1988) (explaining that the district court had trifurcated common liability issues, causation for the class plaintiffs, and damages for the class plaintiffs, then deferred individualized hearings on causation and damages for other purported class members until after the trial in mass tort class action); *In re Telectronics Pacing Sys., Inc.*, 168 F.R.D. 203, 211 (S.D. Ohio 1996) (certifying class action for determination of common issue of defendant's liability in manufacturing allegedly defective pacemakers, and reserving for separate adjudication individual questions of compensatory damages); *In re Copley Pharm., Inc.*, *supra*, 161 F.R.D. at 469 (ordering common issue of liability to be tried in class adjudication context in products liability suit but leaving individual questions of causation, injury and compensatory damages claims to be tried separately before separate juries).

*Co.*, 628 F.2d 267, 280 n.20 (4th Cir. 1980) (suggesting that classes for each facility at which discretionary employment decisions were made would be more appropriate than a statewide class); *In re FedEx Ground Package Sys., Empl. Practices Litig.*, No. 3:05-MD-527, 2008 U.S. Dist. LEXIS 112104, at *40-41 (N.D. Ind. Mar. 25, 2008) (certifying class of employees from some states but not from others); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 541 (N.D. Okla. 2004) (certifying class of Oklahoma employees).[6] Store-level classes may well provide an alternative here to certifying a nationwide class of members who "held a multitude of jobs, at different levels of Wal-Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed depending on each class member's job, location and period of employment." Pet. App. 161a (Kozinski, J., dissenting).

[6] Regional classes have long been certified in other types of cases as well. *See, e.g.*, *Thompson v. Clear Channel Commc'ns., Inc. (In re Live Concert Antitrust Litig.)*, 247 F.R.D. 98, 154 (C.D. Cal. 2007) (certifying different classes based upon the region in which an alleged antitrust violation occurred); *Pella Corp. v. Saltzman*, 606 F.3d 391, 392 (7th Cir. 2010), *cert. denied*, ___ U.S. ___, 2011 U.S. LEXIS 806 (Jan. 18, 2011) (affirming certification of "six statewide liability classes" in product liability action).

## CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded with instructions to decertify the class.

Respectfully submitted,

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