No. 10-277

IN THE
Supreme Court of the United States

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

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

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

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

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INTERESTS OF THE *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a public interest law and policy center headquartered in Washington, D.C., with supporters nationwide.[1] WLF's primary mission is the defense and promotion of free enterprise, individual rights, and a limited and accountable government. In particular, WLF devotes a substantial portion of its resources to advocating and litigating against excessive and improperly certified class action lawsuits. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of class action litigation are *Philip Morris USA, Inc. v. Jackson*, No. 10-735 (U.S., cert. petition filed Dec. 2, 2010); *Engle v. Liggett Group, Inc.,* 945 So. 2d 1246 (Fla. 2006), *cert. denied,* 552 U.S. 941 (2007); *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); and *Conn. Retirement Plans and Trust Funds v. Amgen, Inc.*, No. 09-56965 (9th Cir., dec. pending). WLF also filed briefs in this case when it was before the Ninth Circuit.

WLF is submitting this brief because it believes that the en banc panel committed legal error when it affirmed the district court's consideration of testimony from plaintiff's expert in support of class certification

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

that was not determined reliable under the standards articulated by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). WLF submits this brief because it is concerned that failing to test the reliability of expert testimony at class certification runs afoul of this Court's mandate that district courts conduct a "rigorous analysis" of whether Rule 23's prerequisites are met. Certifying a class on untested expert testimony casts aside the carefully crafted balance of plaintiffs' interests, defendant's interests, and judicial efficiency embedded in Rule 23.

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

STATEMENT OF THE CASE

Six women brought a nationwide class action on behalf of 1.5 million current and former employees, alleging that Wal-Mart has across-the-board discriminatory policies and practices in all of its 3,400 stores, and that this discrimination is common to all women who work or have worked in a Wal-Mart store over the past decade. In support of class certification and Rule 23(a)'s commonality requirement, plaintiffs and the district court relied in part on the testimony of Dr. William Bielby, a sociology expert who opined that gender stereotyping likely exists at Wal-Mart. As he has done against other companies, Dr. Bielby testified that Wal-Mart's organizational structure made it "vulnerable" to gender stereotyping, but he could not

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

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

SUMMARY OF ARGUMENT

Class certification in this case is not consistent with the requirements of Fed. R. Civ. P. 23(a) because

the courts below failed to rigorously analyze those requirements. Specifically, the district court relied on the opinion of plaintiffs' expert in concluding that commonality was established but declined at the class certification stage to analyze the reliability and admissibility of that opinion using the standards for doing so mandated by this Court in *Daubert*. By deferring a true *Daubert* analysis to a subsequent phase of the litigation, the district court, as affirmed by the Ninth Circuit, breathed new life into the defunct notion of conditional certification.

As federal courts around the country have acknowledged, because class certification exponentially raises the stakes in litigation, it should not be granted unless the court is fully satisfied that the Rule 23 requirements have been met. This means digging below the surface of a plaintiff's allegations and putting her evidence to the test. That such an inquiry overlaps with the merits is no justification for avoiding it. Likewise, there is no justification for applying a lesser reliability standard at class certification than at other points in the litigation. The district court's failure to conduct a *Daubert* analysis of plaintiffs' expert's opinions, and the Ninth Circuit's failure to require one, was legal error jeopardizing the rights of Petitioner and absent class members.

ARGUMENT

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

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

Evidence proffered in support of the Rule 23 requirements, such as commonality, must be carefully scrutinized and weighed against competing evidence or argument. "A district judge may not duck hard questions by observing that each side has some support

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

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

admissible evidence"); *see also Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 816 (7th Cir. 2010) (per curiam) ("The court must also resolve any challenge to the reliability of information provided by an expert if that information is relevant to establishing any of the Rule 23 requirements for class certification.").

The Seventh Circuit similarly endorsed a rigorous review of expert opinion testimony in *West* when it held that it would "amount[ ] to a delegation of judicial power to the plaintiffs" to permit them class certification merely because they have the support of an expert. *West*, 282 F.3d at 938; *see also Polymedica Corporate Securities Litigation*, 432 F.3d 1, 17 (1st Cir. 2005) (holding that court "must evaluate the plaintiff's evidence . . . critically"). In fact, the Seventh Circuit recently reversed class certification where the lower court relied on expert testimony without first resolving whether the testimony would be admissible under *Daubert*. *Am. Honda Motor Co.*, 600 F.3d at 815-16. Although the district court had "definite reservations" about the reliability of the expert's opinions, the court declined to conduct a full *Daubert* analysis at the early stage of the proceedings. *Id.* at 814-16. This, the Seventh Circuit determined, was an abuse of discretion. *Id.* at 816. Holding that "a district court must make the necessary factual and legal inquiries and decide all relevant contested issues prior to certification," the Seventh Circuit determined that the lower court's failure to evaluate the plaintiff's expert's opinions pursuant to *Daubert* was a return to "provisional" class certification, a practice it has roundly rejected. *Id.* at 817.

It is no wonder then that the Ninth Circuit's opinion in this case is an outlier. Every Circuit Court of Appeal to publish an opinion addressing this issue has determined that expert testimony must be carefully scrutinized during class certification. *See, e.g., Unger*, 401 F.3d at 324 ("[R]eliance on unverifiable evidence [in determining class certification] is hardly better than relying on bare allegations."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 323 (noting that expert testimony should not be "uncritically accepted" even if it is found reliable under *Daubert*).

This is consistent with the rejection of conditional class certification. Nearly a decade ago, the Civil Rules Advisory Committee amended Fed. R. Civ. P. 23 to remove the provision that class certification "may be conditional." The amendment reflected the growing consensus among federal courts that class certification should be denied unless a critical evaluation of the evidence supported findings that each of the Rule 23 requirements had been met. Gone are the days of certify now and worry later. Yet the Ninth Circuit's failure to compel careful scrutiny of the expert opinion offered by plaintiffs in support of Rule 23(a)'s requirements here effectively resurrects conditional certification in the largest employment class action in history.

II. THE DISTRICT COURT'S FAILURE TO CONDUCT A FULL *DAUBERT* ANALYSIS EQUATES TO A FAILURE TO RIGOROUSLY ANALYZE RULE 23(a)'S CLASS CERTIFICATION REQUIREMENTS

This Court has established a standard for evaluating the reliability of expert testimony in federal court – *Daubert*. *Daubert* established a non-exhaustive list of guideposts to evaluate the reliability, and thus admissibility, of an expert's opinions, including whether the theory has been tested and subjected to peer review and publication, and whether it is generally accepted in the relevant scientific or technical community. *Daubert*, 509 U.S. at 593-94. In addition, the 2000 Advisory Committee's Notes to Rule 702 recommended additional benchmarks, including whether the expert's opinions resulted from independent research or are a product of litigation; whether the expert has accounted for alternative explanations; and whether the expert was as careful in forming his opinions for litigation as he would be in his non-testifying professional work. There is no justification for requiring a lower standard at the class certification stage and every reason to apply the same standard for testing the reliability of expert testimony at every step of the litigation.

The district court, however, did not conduct a full *Daubert* analysis of the expert testimony supplied by plaintiffs in support of the Rule 23 requirements. In support of their arguments that typicality and commonality existed, plaintiffs offered the opinions of Dr. Bielby who opined that Wal-Mart is vulnerable to gender stereotyping because Wal-Mart's managers have

too much discretion when making wage and promotional decisions, and that Wal-Mart's equal opportunity policies are not effective in eliminating gender barriers. Pet. App. at 193a-95a. Furthermore, according to Dr. Bielby, Wal-Mart's practices are uniform nationwide due to its strong corporate culture. *Id.* at 190a. Instead of analyzing Dr. Bielby's opinions against the guideposts established by *Daubert* and Rule 702, the district court took comfort in the fact that this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), considered expert testimony that was based on similar methodology and that two other courts in the Northern District of California had admitted Dr. Bielby's testimony on sex stereotyping. *Dukes v. Wal-Mart*, 222 F.R.D. at 191-92. But reliance on other courts' endorsements of a methodology or an expert's opinion in one case is not an adequate substitute for a reliability analysis under *Daubert* and 702 – particularly where, as here, the expert seeks to apply that methodology and expand his opinions beyond that ever considered by any other court.

First, as Rule 702 makes clear, expert opinion is not admissible simply because it is based on reliable principles and methodology. The *application* of that methodology to the facts of the case must be reliable. *See* Fed. R. Evid. 702(2)-(3). For this reason, whether an expert's opinions were deemed admissible in one case has little bearing on whether such testimony should be admitted in a subsequent case where the expert seeks to apply his methodology in a new, untested way. Although the expert in *Price Waterhouse v. Hopkins* used a methodology similar to Dr. Bielby's, she did not seek to apply her opinions to thousands of employees

spread across the country in a nationwide class. On the contrary, the expert in *Price Waterhouse* relied on facts specific to a single plaintiff's employment situation and scrutinized the specific promotional decision at issue to arrive at her ultimate conclusion that Price Waterhouse's partnership process was vulnerable to sex stereotyping. 490 U.S. at 235-36.

Second, none of the cases cited by the district court involved allegations of *nationwide* discrimination. *See Price Waterhouse*, 490 U.S. at 231-32 (discrimination claim by one female employee); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1266 (N.D. Cal. 1997) (class of females in Home Depot's West Coast Division); *Stender v. Lucky Stores*, 803 F. Supp. 259, 266 (N.D. Cal. 1992) (class consisting of African-American female employees in Lucky's Northern California Food Division). The classes in *Butler* and *Stender* were limited to employees within a specific geographic division of the defendant employer. *Butler*, 984 F. Supp. at 1266; *Stender*, 803 F. Supp. at 266. As Wal-Mart argued below, while Dr. Bielby conceded that the content of stereotypes and the intensity with which they are held will vary significantly based on a variety of demographic factors, including geography, he did not control for geographic differences, or any other variable that may have impacted the thousands of other individual promotional decisions made by Wal-Mart managers across the country. Mtn. to Strike Decl. of William T. Bielby, D.E. 263 (Jun. 12, 2003) at 31-32, 32 n.29, 33-34. Even though Dr. Bielby's principles and methodology may have been deemed reliable enough by some courts to address discrimination practices limited to a specific region in the country, this does not mean

the same methodology provides a reliable foundation to assert opinions and conclusions about discriminatory practices by Wal-Mart managers across the board nationwide. Yet the district court accepted Dr. Bielby's opinions at face value and relied upon them in finding Rule 23's requirements satisfied here without evaluating those opinions against the *Daubert* guideposts.

The district court attempted to dismiss Wal-Mart's challenges to Dr. Bielby's opinions as ones that went to the weight of the evidence rather than the reliability of Dr. Bielby's testimony. Such a conclusion ignores that Wal-Mart's challenges went directly to the guideposts established by *Daubert* and Rule 702, including whether the theory can be (and has been) tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential rate of error, whether the expert's theory has gained widespread acceptance within the relevant scientific community, whether the expert's conclusions are reasonable extrapolations from the underlying data, whether the expert has accounted for alternative explanations, and whether the expert has approached his opinions with the same level of intellectual rigor with which he approaches his non-testifying work. *See Daubert*, 502 U.S. at 593-94; Fed. R. Evid. 702.

Wal-Mart challenged Dr. Bielby's opinions on a number of these fronts. For example, Wal-Mart argued that Dr. Bielby conceded that he had not tested his theory nor had such a theory been tested in the working environment to which Dr. Bielby applied his opinions here. Mtn. to Strike at 4-5, 18-20. Wal-Mart pointed

out that none of the studies on which Dr. Bielby relied involved a decision-maker who knew the purported target of the stereotyping and had individuating information about her, a situation distinct from that of Wal-Mart's managers. *Id.* at 28-29. And Dr. Bielby acknowledged that he had not reviewed any materials to determine what information Wal-Mart's managers had at their disposal that could have impacted their decisions with regard to any individual employee, although he conceded that Wal-Mart managers likely would have had an abundance of individualized information. *Id.* at 6, 19-20. Wal-Mart also raised the fact that, despite his own failure to do so, Dr. Bielby testified that he would expect experts operating in a non-litigation context to confront contrary data and to incorporate this data into their own conclusions by explaining them, distinguishing them, disagreeing with them, or by modifying their own findings. *See id.* at 44. None of these challenges were addressed by the district court.

In failing to sufficiently scrutinize the reliability and admissibility of Dr. Bielby's opinions, the district court failed to rigorously analyze Rule 23's class certification requirements. If Dr. Bielby's opinions ultimately could not withstand *Daubert* scrutiny, these opinions fail and thus cannot supply evidence of commonality or typicality, as required by Rule 23(a).

On appeal, a panel of the Ninth Circuit initially endorsed the district court's lack of scrutiny of Dr. Bielby's opinions on the grounds that *Eisen* precluded an in-depth analysis of certain issues because a court may not consider the merits at the class certification

stage. *Dukes v. Wal-Mart*, 474 F.3d 1214, 1227 (9th Cir. 2007). After a rehearing en banc, the Ninth Circuit abandoned that justification and instead embraced the district court's claim that Wal-Mart failed to challenge Dr. Bielby's methodology. Pet. App. at 56a-57a. Mischaracterizing Wal-Mart's objections as ones attacking the persuasiveness of the evidence, the court reasoned that "testing Dr. Bielby's testimony for '*Daubert* reliability' would not have addressed Wal-Mart's objections." *Id.* As demonstrated above, this was error.

The Ninth Circuit concluded that the district court committed no error in admitting Dr. Bielby's testimony because "Dr. Bielby presented scientifically reliable evidence" demonstrating commonality. Pet. App. at 59a-60a. It is unclear, however, how the court could have arrived at this conclusion when no court subjected the expert's opinions to *Daubert* scrutiny. To further confuse matters, the court went on to say that even if *Daubert* did apply, the district court still did not abuse its discretion in admitting Bielby's testimony because it "considered" *Daubert* and "was within its discretion to limit its inquiry." *Id.* at 57a-58a, n.22. There is no evidence, however, that the district court thoroughly analyzed Dr. Bielby's testimony as required by *Daubert*, and the Ninth Circuit provides no justification for permitting the district court to "limit" its inquiry.

The Ninth Circuit's decision to affirm the district court's decision to consider Dr. Bielby's testimony in support of class certification is not supported by reason or the jurisprudence of this Court and marks a

departure from other federal Courts of Appeal. If left undisturbed, the *Dukes* opinion will have far-reaching and adverse consequences on defendants and absent class members and return class action jurisprudence to the days of conditional class certification.

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

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

is fundamentally unfair.

Finally, and perhaps more importantly, absent class members' rights may be substantially impaired or lost altogether when a class is certified based on unreliable expert testimony that is ultimately excluded following a full *Daubert* review. This is precisely why Rule 23 requires courts to probe beyond the pleadings and scrutinize the evidence to ensure that absent class members' interests are adequately represented and their rights are preserved.

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

This same evidence will be critical to carrying plaintiffs' burden of proof at trial. If, after conducting the reliability and admissibility analysis required by *Daubert* prior to trial, the court determines that Dr. Bielby's testimony should be excluded, it could have

"catastrophic consequences" to absent class members. While the loss of such evidence could lead to de-certification of the class, it may also be deemed a failure of proof on the class claims, resulting in a defense verdict:

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

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring specially).

Daubert affords another level of protection to absent class members in the Rule 23 inquiry by exposing, at a preliminary stage, expert testimony that is unreliable and would not likely be admissible at trial. For this reason, it is important that this Court affirmatively rule that *Daubert*, and not a lesser standard of review, must apply at class certification.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court reverse the judgment below, as inconsistent with Fed.R.Civ.P. 23(a).

Respectfully submitted,

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