No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PETITION FOR REHEARING EN BANC

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RULE 35 STATEMENT

"This case involves the largest certified class in history." Slip op. 1368. The class "encompasses approximately 1.5 million employees, both salaried and hourly, with a range of positions, who are or were employed at one or more of Wal-Mart's 3,400 stores across the country." *Id.* at 1344. Plaintiffs' central claim is that thousands of local managers intentionally discriminated against women in making millions of individualized, allegedly subjective pay and promotion decisions. They seek "billions" in backpay and punitive damages under Title VII.

A divided panel (Pregerson, J., joined by Hawkins, J.) has affirmed the certification. Judge Kleinfeld dissented because the district court's order "violates the Rule 23 class action certification criteria and deprives Wal-Mart of due process of law." Slip op. 1379. The panel's decision conflicts in numerous ways with decisions by the Supreme Court, this Court, and other Circuits, including at least a dozen appellate decisions issued *after* the certification order.[1] These conflicts raise questions of nationwide importance and warrant this Court's en banc review.

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[1] *In re IPO Litig.*, 471 F.3d 24 (2d Cir. 2006); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006); *Browning v. Dep't of the Army*, 436 F.3d 692 (6th Cir. 2006); *Bowe v. PolyMedica Corp.*, 432 F.3d 1 (1st Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307 (5th Cir. 2005); *Vessels v. Atlanta Indep.*

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First, must courts avoid any inquiry into the "merits" when evaluating class certification requirements? This Court previously answered "no." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). The panel, by contrast, answered "yes," relying on two decisions—*Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), and *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001)—that the Second Circuit itself recently "disavowed" in favor of the majority rule. *IPO*, 471 F.3d at 38-39, 42. The panel's decision thus creates a fresh intra- *and* inter-Circuit split on a question fundamental to all class action litigation.

Second, how should a court determine when monetary relief "predominates" under Rule 23(b)(2)? In *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), this Court rejected the "incidental damages" test adopted in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), which has been expressly followed by the Sixth, Seventh, and Eleventh Circuits, and endorsed instead the "ad hoc" test adopted in *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001). The panel, while purporting to follow *Molski*, applied a *different* test that turns exclusively on

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School Sys., 408 F.3d 763 (11th Cir. 2005); *Green v. New Mexico*, 420 F.3d 1189 (10th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004).

the named plaintiffs' *subjective* intent. That approach creates an intra-Circuit conflict and deepens an existing inter-Circuit split on a recurring issue.

Third, can the class device be used to deprive a litigant of the right to present individualized defenses to monetary claims? The Supreme Court and this Court have long recognized that Title VII confers such a right, and precludes a court from awarding money to non-victims. *E.g.*, *Teamsters v. United States*, 431 U.S. 324, 361-62 (1977); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003). Punitive damages, in particular, cannot be awarded without an individualized finding of harm to specific plaintiffs. *Philip Morris USA v. Williams*, U.S. No. 05-1256, Slip op. (Feb. 20, 2007); *Beck v. Boeing Co.*, 60 Fed. Appx. 38, 40 (9th Cir. 2003). By sanctioning a trial plan that deprives Wal-Mart of the right to present individualized defenses while permitting non-victims to collect backpay and punitive damages, the panel's decision conflicts with the Due Process Clause, Title VII, the Rules Enabling Act, and numerous decisions by the Supreme Court, this Court, and other Circuits.

ARGUMENT

"A court abuses its discretion if its certification order is premised on legal error." *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). The order in this case rests on a number of *legal* premises that contradict previous rulings of this and other appellate courts. En banc review is warranted.

I. The Panel's Decision Creates An Intra- And Inter-Circuit Conflict Concerning The Rigor With Which A District Court Must Analyze Rule 23's Criteria

Federal courts routinely deny certification of so-called "excess subjectivity" classes that span multiple facilities and job types. *E.g.*, *Grosz v. Boeing Co.*, 136 Fed. Appx. 960 (9th Cir. 2005); *Cooper*, 390 F.3d at 715; *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004). They do so because the plaintiffs' burden of establishing Rule 23's commonality requirement "is particularly difficult [to meet] where . . . multiple decisionmakers with significant local autonomy exist." *Garcia*, 444 F.3d at 632; *Love*, 439 F.3d at 730-31; *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980). In this case, the district court relieved plaintiffs of the weight of their burden by refusing to decide a number of legal and factual challenges Wal-Mart raised to plaintiffs' evidence, because those challenges overlap with the "merits" of the case. Slip. op. 1346.

The panel adopted the district court's view that "arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage" (slip op. 1348), relying on the Second Circuit's decisions in *Caridad* and *Visa Check* (*id.* at 1352-53). Not three months ago, however, the Second Circuit expressly "disavowed" the very aspects of *Caridad* and *Visa Check* that the panel relied on, clarifying that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), provides "no reason to lessen a district court's obligation to make a determination that

every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue." *IPO*, 471 F.3d at 41-42. The Second Circuit thus brought itself into alignment with appellate courts in the rest of the country on this question. *Id.* at 38-39; *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676-77 (7th Cir. 2001); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365-67 (4th Cir. 2004); *Bowe*, 432 F.3d at 5-6; *Bell*, 422 F.3d at 311-313; *Cooper*, 390 F.3d at 712-713; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-68 (3d Cir. 2001).

The panel's endorsement of the now-repudiated *Caridad/Visa Check* approach thereby creates an inter-Circuit conflict on an issue that is fundamental to all class action litigation. The panel's decision—which is the first by this Circuit to cite *Caridad* or *Visa Check* as they pertain to Rule 23—also creates an intra-Circuit split. *See Hanon*, 976 F.2d at 509 (courts are "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case"); *Blackie v. Barrack*, 524 F.2d 891, 897 (9th Cir. 1975) ("unlike . . . the notice issue in *Eisen*," the determinations relevant to Rule 23's criteria "may require review of the same facts and the same law presented by review of the merits").

The panel's view that it is inappropriate to decide issues that overlap with the merits at the certification stage pervades its rulings. Most critically, the panel

endorsed the district court's refusal to resolve Wal-Mart's challenges to plaintiffs' statistical evidence. Although plaintiffs' claims focus on "subjective" decisions made at the store level, plaintiffs presented only data aggregated at a regional or national level in their effort to show common sex-based discrepancies. Wal-Mart highlighted this tension, arguing that aggregated statistics cannot support a finding of commonality or typicality in light of plaintiffs' theory. *See Stastny*, 628 F.2d at 279 (reversing certification order for lack of commonality because the plaintiffs made "no showing of the extent to which, if at all, the overall [state-wide statistical] disparities were paralleled in the separate facilities or even a statistically reliable sample of them"); *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1992). Wal-Mart also argued that its store-level statistical analysis should be credited over plaintiffs' aggregated analysis. *See Paige v. California*, 291 F.3d 1141, 1148 (9th Cir. 2002) (aggregated statistics may be used *if* they are more probative than subdivided data); *Belmontes v. Woodford*, 350 F.3d 861, 894 (9th Cir. 2003) (statistics at the decisionmaking level held "materially more probative" than aggregated statewide statistics), *vacated on other grounds*, 544 U.S. 945 (2005).[2]

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[2] The panel's statement that Wal-Mart's expert only conducted a sub-store analysis (slip op. 1352 & n.6) is incorrect, as plaintiffs' own expert concedes. SER 342. And notwithstanding the panel's intimation (slip op. 1353), the store-level analysis conducted by Wal-Mart's expert was *not* stricken from the record.

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Without addressing the contrary authorities, the panel held that the district court had properly relied on plaintiffs' statistics in finding commonality because plaintiffs had presented a "reasonable" explanation for aggregating the data. Slip op. 1352. In *IPO*, however, the Second Circuit expressly repudiated the notion that the elements for certification can be established based on such a low standard. 471 F.3d at 42; *see also Cooper*, 390 F.3d at 716 (holding "it was plainly *necessary* for the district court to evaluate the statistical evidence" rigorously in order to determine whether the class members suffered a common experience of discrimination) (emphasis added); *Garcia*, 444 F.3d at 635 & n.11.

The panel also held that "it was appropriate for the court to avoid resolving 'the battle of the experts' at this stage of the proceedings." Slip op. 1352-53. Other Circuits, by contrast, recognize that the "rigorous analysis" required under *General Telephone Co. Southwest v. Falcon*, 457 U.S. 147 (1982), precludes such a hands-off approach. *E.g.*, *Blades*, 400 F.3d at 575 ("in ruling on class certification, a court may be required to resolve disputes," including "the resolution of expert disputes"); *Bowe*, 432 F.3d at 5 (rejecting the notion that "a district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of ex-

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Dukes v. Wal-Mart, Inc., 222 F.R.D. 189, 198 (N.D. Cal. 2004) ("this ruling does not mean that Dr. Haworth's statistical analysis or results are excluded").

perts"); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (rejecting this approach because it "amounts to a delegation of the judicial power to plaintiffs, who can obtain class certification just by hiring a competent expert"). Indeed, the only authorities for the supposed prohibition on "statistical dueling" cited by the panel were the "disavowed" *Caridad* and *Visa Check*. The panel's decision to part company with courts in the rest of the Nation isolates this Circuit and warrants en banc review.

II. The Panel's Decision Creates An Intra-Circuit Conflict And Deepens An Inter-Circuit Conflict Concerning When Monetary Relief "Predominates" Under Rule 23(b)(2)

The Supreme Court has recognized the "substantial possibility" that actions seeking monetary damages "can be certified only under Rule 23(b)(3), which permits opt out, and not under Rules 23(b)(1) and (b)(2), which do not." *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). *Ticor* thus "casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)" *at all*. *Allison*, 151 F.3d at 411. At minimum, Rule 23(b)(2) does not apply to cases where the relief sought "relates . . . predominantly to money damages." 1966 Adv. Comm. Notes. But "[t]here is a split among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.8 (D.C. Cir. 2006). The panel decision exacerbates that split and conflicts with this Court's precedent.

In *Allison*, the Fifth Circuit adopted the "incidental damages" test, which precludes Rule 23(b)(2) certification unless the monetary relief will "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." 151 F.3d at 415. Rule 23(b)(3)'s rigorous certification requirements (*e.g.*, predominance and superiority) and its greater protections for absent class members (*i.e.*, mandatory notice and opt-out rights) do not apply to a Rule 23(b)(2) class, because it is "assumed to be a homogenous and cohesive group with few conflicting interests among its members." *Id.* at 413. Where monetary relief does not flow from a class-wide finding of liability but rather depends on the varying circumstances of each class member's case, *Allison* reasoned, this assumption of cohesiveness evaporates and Rule 23(b)(2) certification is improper. *Id.*

The Sixth, Seventh, and Eleventh Circuits have expressly adopted *Allison*'s approach to Rule 23(b)(2) certification. *Reeb*, 435 F.3d at 649-50; *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580-81 (7th Cir. 2000); *Cooper*, 390 F.3d at 720; *see also Thorn*, 445 F.3d at 330 n.25. Moreover, this Circuit has explained that "[i]n Rule 23(b)(2) cases, monetary damage requests are generally allowable *only* if they are merely *incidental* to the litigation." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (emphasis added); *see also Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1196 (9th Cir. 2000) (citing *Allison*);

Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928-29 (9th Cir. 1982).

In *Molski*, however, this Circuit rejected *Allison* and its progeny, eschewing reliance on the incidental damages test or *any* "particular bright-line rule." 318 F.3d at 950; *id.* at 949 ("we refuse to adopt the approach set forth in *Allison*"). *Molski* instead adopted the "ad hoc" test announced by the Second Circuit in *Robinson*, which focuses primarily on the plaintiffs' intent in bringing suit. No other Circuits follow this approach.

The panel's decision separates this Circuit *further* from the mainstream by departing even from *Robinson*, which—by focusing on the "reasonable plaintiff[]"—requires an *objective* assessment of the plaintiffs' intent, as well as an evaluation of "'the relative importance of the remedies sought, given all of the facts and circumstances of the case.'" 267 F.3d at 164. Here, the panel looked to the named plaintiffs' stated *subjective* intent in bringing suit. Slip op. 1367 ("Plaintiffs have stated that it was their intent to obtain [injunctive] relief by bringing this suit"); *compare In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004) ("certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit"). And it did so to the express *exclusion* of all other "facts and circumstances of the case," contrary to *Robinson*.

For example, the panel held it irrelevant (slip op. 1362-63) that the majority of class members no longer work for Wal-Mart, and thus lack Article III standing to seek an injunction (*City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). *But see Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 979 (5th Cir. 2000) (reversing (b)(2) certification because most class members did not face further harm and thus had nothing to gain from an injunction: "The fundamental flaw in the certification of each claim was that, for most of the class, damages will be the only meaningful relief obtained"). The panel also disregarded the massive *amount* of monetary relief sought (slip op. 1363-64)—an amount that plaintiffs themselves admit runs in the *billions*, making it one of the largest prayers for monetary relief in the history of litigation. Greenhouse, *Court Approves Class Action Suit*, N.Y. TIMES, Feb. 7, 2007, at C2 (quoting plaintiffs' counsel). The panel likewise found plaintiffs' prayer for punitive damages extraneous to the analysis. Slip op. 1364-65. Other Circuits, by contrast, have refused to certify punitive damages claims under Rule 23(b)(2) because the class member-specific inquiry they necessitate destroys the class cohesiveness required by that provision. *Lemon*, 216 F.3d at 581; *Allison*, 151 F.3d at 417-18; *Cooper*, 390 F.3d at 720.[3]

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[3] The provision of limited notice and opt-out rights (slip op. 1365) does not remedy this problem. Moreover, it "undo[es] the careful interplay between Rules 23(b)(2) and (b)(3)" by permitting plaintiffs to pursue substantial monetary

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By adopting what amounts to a "bright-line rule"—albeit one different from that adopted in *Allison*—the panel's decision also conflicts with *Molski*. 318 F.3d at 950. It would make *every* class certifiable under Rule 23(b)(2) if the plaintiff is willing to sign an affidavit attesting to the importance of injunctive relief, regardless of whether the class is cohesive or promotes judicial economy, and no matter the magnitude of the monetary relief sought. *Compare Thorn*, 445 F.3d at 330 ("Rule 23(b)(2)'s categorical exclusion of class actions seeking primarily monetary relief, like Rule 23(b)(3)'s predominance requirement . . . ensures that the class is sufficiently cohesive that the class-action device is properly employed"); *Allison*, 151 F.3d at 414 ("By requiring the predomination of injunctive or declaratory remedies, (b)(2) was intended to serve th[e] purpose [of judicial economy] by inherently concentrating the litigation on common questions of law and fact"); *Robinson*, 267 F.3d at 165 (classes certified under (b)(2) should "achiev[e] judicial efficiency"); *Silzone v. St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005). En banc review is warranted to resolve these conflicts.

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claims without "requiring [them] to meet the rigorous Rule 23(b)(3) requirements" of predominance and superiority. *McManus v. Fleetwood Enters.*, 320 F.3d 545, 554 (5th Cir. 2003); *see also Allison*, 151 F.3d at 413 (monetary relief "predominates" when it "suggests that the procedural safeguards of notice and opt-out are necessary"); *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005).

III. The Panel's Decision Conflicts With Title VII And The Due Process Clause

While Title VII may permit an award of class-wide *injunctive* relief upon a statistical showing of a pattern-or-practice of discrimination, an employer is entitled to prove that *individual* class members are not entitled to *monetary* relief because they were not actually subjected to the discriminatory practice or would have received the same treatment even in its absence. This right stems from Section 706(g) of Title VII (42 U.S.C. § 2000e-5(g)(2)(A)-(B)), which expressly prohibits courts from awarding monetary relief to non-victims. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.10 (1989) ("we have . . . held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect"); *Fadhl v. San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) ("We have held in a variety of circumstances that an award of back pay . . . is appropriate only if the discrimination is a but for cause of the disputed employment action . . . . This is the settled rule among other circuits as well."). Section 1981a(b)(1) similarly gives an employer the right to prove that class members are not "aggrieved individual[s]" entitled to punitive damages. *Beck*, 60 Fed. Appx. at 40.

Under the trial plan approved by the panel, however, Wal-Mart would not be permitted to exercise these rights. If plaintiffs prove systemic discrimination based on statistics at phase I of the trial, the court will use a "formula" to calculate a

lump sum amount of backpay owed to the class on the promotion claim and will employ a statistical model to calculate the differential to be paid to class members on the pay claim. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 178-79, 185 (N.D. Cal. 2004). It will also assess a lump sum amount of punitive damages owed to the class. *Id.* at 172. A special master will then allocate that money to class members it selects on the basis of incomplete information contained in a computer database. *Id.* at 180, 184. At no point will Wal-Mart have the right to rebut any individual class member's entitlement to monetary relief or to call the alleged discriminators to the stand to speak in their own defense. Slip. op. 1375 ("Wal-Mart contends that individualized hearings, and not the analysis of aggregated data, are necessary . . . . We disagree."). As a result, "women injured by sex discrimination will have to share any recovery with women who were not" and "[w]omen who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve." *Id.* at 1388 (Kleinfeld, J., dissenting).

This trial plan directly contravenes Title VII and over thirty years of case law interpreting it. *Teamsters*, 431 U.S. at 361-62; *Costa*, 299 F.3d at 857; *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987) (in the "Title VII context[], the decisionmaker has an opportunity to explain the statistical disparity"); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("defendants must be allowed to present any relevant rebuttal evidence they choose"); *Reeb*, 435 F.3d at 651 ("in a

Title VII case, whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis"). As this Court has succinctly stated: "[A]llowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights . . . [and] is clearly prohibited by the [Rules] Enabling Act." *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974); *see also Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 343 (4th Cir. 1998).

The panel's decision as it relates to punitive damages similarly contravenes substantive law. Just today the Supreme Court reiterated that the Due Process Clause forbids the imposition of punishment for lawful conduct and requires that a defendant have "'an opportunity to present every available defense'" before being punished. *Philip Morris*, slip op. 5; *BMW of N. Am. v. Gore*, 517 U.S. 559, 573 n.19 (1996). Due process also mandates that an award of punitive damages "have a nexus to the specific harm suffered by the plaintiff." *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). The trial plan violates these constitutional requirements, as it guarantees that non-victims will share in any award of punitive damages, precludes individualized defenses, and prohibits any individualized inquiry into the harm (if any) suffered by those class members who actually were victims. That the panel found *State Farm* "readily distinguishable" be-

cause it was "brought on behalf of *one* individual" (slip op. 1376) merely highlights the panel's elevation of the class device over substantive rights: The panel did just what the Rules Enabling Act precludes. 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997).

This Court has previously held that certifying a punitive damages class where "the beneficiaries of the punitive damages award would necessarily include those class members not affected by the alleged discriminatory policy as well as those who were . . . *may not be done.*" *Beck*, 60 Fed. Appx. at 40 (emphasis added). Other Circuits agree. *E.g.*, *Cooper*, 390 F.3d at 721 (punitive damages claims "require detailed, case-by-case fact finding, carefully calibrated for each individual employee"); *Lemon*, 216 F.3d at 581 ("to win punitive damages, an individual plaintiff must establish that the defendant possessed a reckless indifference to the plaintiff's federal rights—a fact-specific inquiry into that plaintiff's circumstances"); *Allison*, 151 F.3d at 418 ("punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage"). The panel's opinion contradicts these and other decisions.

The panel held that individualized hearings could be eliminated here because the subjective nature of the decisionmaking process "would reduce efforts to re-

construct individually what would have happened in the absence of discrimination to a 'quagmire of hypothetical judgments.'" Slip op. 1370 (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974)). However, proof of even a "subjective" nondiscriminatory reason for taking employment action is sufficient to defeat monetary liability absent a showing of pretext. *Browning*, 436 F.3d at 696-97; *Vessels*, 408 F.3d at 769; *Green*, 420 F.3d at 1195-96. Wal-Mart's right to present such proof cannot be abridged merely because plaintiffs have elected to bring this suit as a class action. Moreover, *Pettway*, upon which the panel relied, recognized that the defendant could "challenge particular class members' entitlement to back pay." 494 F.2d at 260. The same Circuit has held that individualized hearings are *required* in cases in which punitive damages are sought. *Allison*, 151 F.3d at 418. Until the panel's decision, this Court agreed. *Beck*, 60 Fed. Appx. at 40. Because the panel's decision sharply departs in this and so many other ways from the laws enacted by Congress as they have been construed by the appellate courts, en banc review is warranted.

CONCLUSION

On many recurring legal issues, a divided panel has departed from the positions taken by courts in the rest of the Nation and by this Court. The en banc Court should grant review to address the conflicts created by the panel's unprecedented decision.

Respectfully submitted.

February 20, 2007.

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rules 35-4 and 40-1, the attached petition for rehearing en banc is proportionally spaced, has a typeface of 14 points and contains 4,199 words.

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February 26, 2007

United States Court of Appeals for the Ninth Circuit
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RE: *Dukes, et al. v. Wal-Mart Stores, Inc.*
No. 04-16688

Letter Brief *Amicus Curiae* of the Equal Employment Advisory Council Supporting Petition for Rehearing *En Banc* and in Support of Reversal

To the Honorable Chief Judge and Circuit Judges of the U.S. Court of Appeals for the Ninth Circuit:

Pursuant to the Circuit Advisory Committee Note to Rule 29-1 of the Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the Equal Employment Advisory Council respectfully submits this letter as *amicus curiae* joining in the arguments and factual statements of Defendant-Appellant/Cross-Appellee Wal-Mart Stores, Inc. in support of Defendant/Appellant/Cross-Appellee's Petition for Rehearing *En Banc* before this Court. Plaintiffs/Appellees/Cross-Appellants Betty Dukes, *et al.*, and Defendant/Appellant/Cross-Appellee Wal-Mart Stores, Inc. have consented to the filing of this brief.

On February 6, 2007, a panel of this Court, in a 2-1 decision, upheld the district court's order granting plaintiffs' motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. In so doing, the panel allowed a class action – whose member size now is estimated at nearly two million people– to proceed even though the plaintiffs simply did not

satisfy Rule 23's rigorous class certification requirements. This brief thus urges the full Court to review and reverse the panel's troublesome ruling.

Interest of the *Amicus Curiae*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes more than 310 of the nation's largest private sector companies, collectively providing employment to more than twenty million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and other equal employment statutes and regulations. Many of these companies do business within the Ninth Circuit. The panel's decision allowing class certification despite the district court's failure to properly apply Rule 23's stringent class certification requirements is likely to open the floodgates to frivolous employment class action litigation in the Ninth Circuit on a scale never before seen. Accordingly, the issues presented in the instant litigation are extremely important to the nationwide constituency that EEAC represents.

Large-Scale Punitive Damages Claims Under Title VII Are Fundamentally Incompatible with Rule 23(b)(2)'s Class Certification Requirements

Because of the nature of the monetary damages claim made by the plaintiffs in this action and the extent to which individualized findings of harm will be needed in order to assess which class members are entitled to such relief, the action simply is unsuitable for class certification under Rule 23(b)(2). Plaintiffs seeking class certification are required to satisfy all four

prerequisites of Fed. R. Civ. P. 23(a), and the requirements of at least one subsection of Fed. R. Civ. P. 23(b). Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001).

Rule 23(b) criteria generally look at whether conducting the case as a class action would be fair and efficient. In particular, Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: the party opposing the class has acted or refused to act on grounds *generally applicable to the class*, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect *to the class as a whole*.

Fed. R. Civ. P. 23(b)(2) (emphasis added).

In the context of employment discrimination class action litigation, plaintiffs seeking punitive damages must make individualized showings of harm in order to be entitled to the relief sought. *See* 42 U.S.C. § 1981a. Prior to 1991, the only statutory remedy available to Title VII litigants was equitable relief. With the passage of the Civil Rights Act of 1991 ("CRA"), 42 U.S.C. § 1981a, however, Congress greatly expanded the remedies available under Title VII by permitting compensatory and punitive damages in cases of intentional discrimination. 42 U.S.C. § 1981a (a)(1).

The CRA made punitive damages available to Title VII plaintiffs only if they could prove that the defendant intentionally discriminated against them "with malice or with reckless indifference to the federally protected rights *of an aggrieved individual*." 42 U.S.C. § 1981a (b)(1) (emphasis added); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). As the Supreme Court observed in *Kolstad*:

> The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional

> discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstrat[ion]" of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability -- one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.

Kolstad, 527 U.S. at 534.

A finding of "pattern or practice" discrimination, while establishing general harm to the group, does not automatically entitle class members to punitive damages. Rather, assessing the availability of punitive damages requires an individual inquiry into the harm suffered by each victim of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring). As the Fifth Circuit noted in *Allison v. Citgo Petroleum Corp.*:

> [B]ecause punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages. Thus, punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage. Moreover, being dependent on non-incidental compensatory damages, punitive damages are also non-incidental--requiring proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards.

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998) (citations omitted); *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("A class-action claim for monetary relief may present common questions of liability, but, because the goal of the damage phase is to compensate the *plaintiffs* for their *individual injuries*, the claim

will generally require the court to conduct individual hearings to determine the particular amount of damages to which each plaintiff is entitled").

The plaintiffs in this case are seeking billions of dollars in punitive damages on behalf of a class of nearly two million current and former employees of Wal-Mart. Because Title VII requires that an individualized showing of harm be made prior to any award of punitive damages, the court necessarily will need to conduct individual hearings to ascertain what, if any, punitive damages is owed to *each class member*. As the Fifth Circuit observes in *Allison*, "punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern and practice case, not upon the mere finding of general liability to the class at the first stage." 151 F.3d at 418.

Such an individualized inquiry is fundamentally inconsistent with the very purpose and utility of class certification under 23(b)(2). "The underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 413 (internal quotations, citations and footnote omitted).

Accordingly, both the district court and the panel majority of this Court erred in granting class certification in this case.

Class Certification Under Rule 23(b)(2) Is Inappropriate Where, As Here, Money Damages Predominate Over Injunctive Relief

The advisory committee notes accompanying Rule 23(b)(2) provide that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23 advisory committee's notes (Subdivision (b)(2)). Class certification thus is available under Rule 23(b)(2) only where claims of injunctive relief predominate over claims for monetary damages. *Id.*

Indeed, this Circuit and others repeatedly have held that class certification under Rule 23(b)(2) is improper unless the claim for monetary

damages is merely incidental to the injunctive relief being sought. *See, e.g., Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (citing *Probe v. State Teachers Ret. Sys.*, 780 F.2d 776, 780 (9th Cir 1986)); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (citing cases); *but cf. Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001).

While the Second Circuit in *Robinson* appears to have eschewed the bright-line, "incidental damages" approach taken by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), even it recognized:

> Although the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, *at a minimum*, satisfy itself of the following: (1) *even in the absence of a possible monetary recovery*, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.

Robinson v. Metro-North Commuter R.R., 267 F.3d at 164 (emphasis added).

This Court in *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003), also refused to adopt the Fifth Circuit's "incidental damages" approach, but based on vastly different facts and circumstances than are presented in the instant case. In *Molski*, the Court permitted class certification where only $5,000 of money damages was sought on behalf of a single named plaintiff. It concluded that the primary relief sought there *was* injunctive, rather than monetary, thus satisfying Rule 23(b)(2).

Unlike the class in *Molski*, the plaintiffs in this case are seeking billions of dollars in punitive damages. As they know they must under 23(b)(2), they also have made an ancillary claim for injunctive relief. But as Judge Kleinfeld observed in his dissent, more than half of the class members do not have legal standing to sue for injunctive relief, since their employment with Wal-Mart has ended and they likely will never seek

reemployment there. Thus, as this Court observed in *Kantor,* "if Plaintiffs succeed in obtaining a significant award of monetary damages, they will likely accomplish what we believe to be their essential goal in this litigation without the added spur of an injunction." *Kanter v. Warner-Lambert Co.*, 265 F.3d at 860; *see also Robinson v. Metro-North Commuter R.R.*, 267 F.3d at 164 ("Insignificant or sham requests for injunctive relief should not provide cover for (b)(2) certification of claims that are brought essentially for monetary recovery").

There can be no doubt that the vast majority of the class members are more interested in the possibility of obtaining windfall monetary damages than they are in whether, and to what extent, Wal-Mart revises its employment policies. Given that so many members of the class do not stand to benefit from the injunctive relief being sought, coupled with the sheer enormity of the punitive damages award, there can be no question that monetary relief predominates, thus rendering class certification under 23(b)(2) improper.

Although it has not yet decided the issue, the Supreme Court has indicated that granting class certification status under Rule 23(b)(2) where money damages are sought raises constitutional and due process concerns. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Indeed, the Court has strongly suggested "a substantial possibility" exists that damage claims can *never* be certified under Rule 23(b)(2). *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

Whether a punitive damage award is constitutional depends significantly on the actual harm the defendant has caused an individual. As the Supreme Court noted in *BMW, Inc. v. Gore*, 517 U.S. 559 (1996), "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct *as well as the harm that actually has occurred.*" *Id.* at 581 (internal quotations and citations omitted; second emphasis added). *See also State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").

In this case, the plaintiffs are not seeking compensatory damages and thus there never will be a specific jury finding of intentional discrimination. Nor will there be any evidentiary hearing to determine whether, and to what extent, each of the *individual* class members is entitled to punitive damages. Rather, the jury's assessment as to whether or not punitive damages are available will "be based solely on evidence of conduct that was directed towards the *class*" so as to ensure "that the punitive damage award will be calibrated to the specific harm *suffered by the plaintiff class*."

Because there will be no relationship between any punitive damages awarded to the class in this case and any actual harm that has been suffered by individual class members, class certification is constitutionally suspect and thus is improper.

For all of these reasons, EEAC respectfully submits that the Petition for Rehearing *En Banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case Nos. 04-16688 & 04-16720

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_____
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CERTIFICATE OF SERVICE

This is to certify that two true and correct copies of the Letter Brief *Amicus Curiae* of the Equal Employment Advisory Council Supporting Petition for Rehearing *En Banc* of Defendant/Appellant/Cross-Appellee Wal-Mart Stores, Inc. and in Support of Reversal were served today on the following counsel via Federal Express overnight delivery, addressed as follows:

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Nos. 04-16688 & 04-16720

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

—v.—

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* THE RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF DEFENDANT/APPELLANT/ CROSS-APPELLEE WAL-MART STORES, INC.'S PETITION FOR REHEARING *EN BANC*

February 28, 2007

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RILA'S INTEREST

The Retail Industry Leaders Association ("RILA") is the world's leading alliance of retailers, product manufacturers, and service providers, representing approximately 600 companies worldwide, including many of the largest retail employers in the United States. RILA's members together account for more than $1.5 trillion in annual sales, provide millions of jobs, and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

This case involves questions of exceptional importance to RILA's members. The Court's 2-1 panel decision of February 6, 2007 ("Decision") establishes criteria for class certification likely to adversely affect large retailers who appropriately allow local, discretionary decisionmaking while at the same time exercising centralized employee oversight.

The Decision erroneously allows certification of massive nationwide class actions stemming from employers' use of subjective criteria in connection with challenged employment decisions, when combined with (1) any kind of centralized employer policies; (2) vague, inconclusive expert testimony about gender stereotyping; (3) unsuitably aggregated statistical evidence; and (4) insignificant anecdotal evidence. These types of certifications immediately generate momentous pressure on affected employers completely unrelated to the merit of

the lawsuit. As stated by dissenting Judge Kleinfeld, "[w]hen the potential loss is stratospheric, a rational defendant will settle even the most unjust claim." *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720, 2007 WL 329022, at *22 (9th Cir. Feb. 6, 2007). Such behemoth class actions create the illusion of justice while in fact lining the pockets of lawyers rather than making true victims whole.

This unprecedented certification presents issues of grave consequence to RILA members, and deviates from standards applied by this Circuit and other United States Courts of Appeals under the commonality and typicality tests of Federal Rule of Civil Procedure 23(a). It should be reheard *en banc*.

All parties have consented to RILA's filing of this brief.

ARGUMENT

I. EFFECTIVE PERSONNEL MANAGEMENT BY RILA MEMBERS DEMANDS DECENTRALIZED, DISCRETIONARY DECISIONMAKING

The panel's holding that Wal-Mart's decentralized, subjective decisionmaking may serve as a "policy" subject to class challenge discourages the use of legitimate practices that allow a retailer effectively to administer a large number of stores. It is the norm in the retail industry to manage based on centralized policies and decentralized, store-level, case-by-case decisionmaking.

Retailers rely on in-store managers, who have the best information about strengths and weaknesses of employees under their supervision, as well as local labor markets, to make critical personnel decisions such as those involving pay and promotion.

Courts uniformly recognize that employers must be allowed to exercise their good faith business judgment in operating their enterprises, without second guessing by courts acting as "super personnel departments." *See N. L. R. B. v. Harrah's Club*, 337 F.2d 177, 180 (9th Cir. 1964). Moreover, "leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *see also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000) (the "relevance [of subjective decisionmaking] to proof of discriminatory intent is weak") (internal citations omitted). "Indeed, in many situations [subjective criteria] are indispensable to the process of selection in which employers must engage." *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986).

The Decision sets the bar for commonality and typicality so low that it interferes with the right of retailers to utilize invaluable subjective performance criteria (such as attitude or initiative) in employment decisions, and to promote a

strong corporate culture, to effectively manage their enterprises. Judicially-imposed standards for class certification should not penalize companies who exercise business judgment to implement valid organizational structures.

II. THE DECISION CONTRADICTS APPELLATE COURT JUDGMENTS DISALLOWING CERTIFICATION BASED UPON DECENTRALIZED SUBJECTIVITY IN MULTIPLE FACILITIES

In order to conclude that Wal-Mart's decentralized and subjective pay and promotion decision making process served as a common practice sufficient to fulfill the commonality and typicality requirements of Rule 23(a), the panel had to find that this process—as implemented by thousands of different decisionmakers, in 3,400 different stores, to approximately 170 different job classifications — "demonstrably affect[ed] all members of [the] class in substantially, if not completely, comparable ways." *Stastny v. So. Bell Tel. Co.*, 628 F.2d 267, 273 (4th Cir. 1980). Previous decisions of this and other appellate courts have recognized the virtual impossibility of demonstrating such a common "policy" of decentralized subjectivity when applied to numerous facilities or job types in companies far smaller than Wal-Mart.

In *Grosz v. Boeing Co.*, 136 Fed. Appx. 960 (9th Cir. Mar. 8, 2005), a panel of this Court explained that an "excessive subjectivity" class action may fail for lack of commonality when numerous job types are included in the class, given that

"[d]etermining what level of subjectivity is appropriate in making employment decisions depends greatly on what job classification is being evaluated." 136 Fed. Appx. at 962 ("diversity within job classifications, with their varying degrees of complexity and analysis, affects the determination of whether the alleged discriminatory practice, excessive subjectivity, is discriminatory or a legitimate business practice"); *see also Rhodes v. Cracker Barrel*, No. Civ.A. 4:99-CV-217-H., 2002 WL 32058462, at *58 (N.D. Ga. Dec. 31, 2002) (collecting 20 decisions denying certification where plaintiffs brought discrimination claims attacking decentralized decisionmaking).

Likewise, the Sixth Circuit has noted that where "class certification [is] sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004). As pointed out by the Fourth Circuit, although "evidence of subjectivity in employment decisions may well serve ... to bolster statistical proof of class-wide discrimination in the very facility where the autonomy is exercised, it cuts against any inference for class action commonality purposes" in a case involving multiple facilities. *Stastny*, 628 F.2d at 279; *see also Cooper v. So. Co.*, 390 F.3d 695, 716 (11th Cir. 2004) (finding a lack of commonality where the challenged compensation and promotion decisions affecting each of the named plaintiffs

"were made by individual managers in disparate locations, based on the individual plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements and performance in interviews...").

The panel's holding ignores the inherent contradiction in finding commonality in a "policy" of allowing various individual supervisors to rely on facts particular to the affected employees in making personnel decisions. As the District of Columbia Circuit recently explained, "[e]stablishing commonality for a disparate treatment class is particularly difficult where . . . multiple decisionmakers with significant local autonomy exist." *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006). *See also Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006) ("the geographic dispersal and decentralized organization of the [defendant's] loan offices *cut[] against* any inference for class action commonality") (emphasis added); *Cooper*, 390 F.3d at 715 ("[w]here, as here, class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes"). The concerns expressed in these decisions regarding the inappropriateness of class certification in light of variations by job type, facility, and geographic location are magnified in a case of the colossal scope at issue here.

III. OTHER EVIDENCE CONSIDERED BY THE PANEL DOES NOT ESTABLISH COMMONALITY OR TYPICALITY

The panel pointed to excessive subjectivity in combination with four other categories of evidence to support its decisions on commonality and typicality: (1) factual evidence, (2) expert opinion, (3) statistical evidence, and (4) anecdotal evidence. *Dukes*, 2007 WL 329022, at *5. Each of these factors fails to transform subjective decisionmaking into a common policy sufficient for class certification under Rule 23(a).

First, the panel found that Wal-Mart's "centralized company culture and policies" provided the necessary "nexus" between the "policy" of subjectivity and plaintiffs' statistics to demonstrate commonality. *Id.* at * 9. However, it is undisputed that the evidence of Wal-Mart's "centrally controlled culture" did not include practices addressing the challenged pay and promotion decisions. The "culture" at issue involved practices universally acknowledged as appropriate business management: new employee orientation, training on diversity, operations, and customer service, daily and weekly meetings addressing corporate culture, employee transfers between stores, and a central information technology system allowing for monitoring of each retail store's operations. ER 1157-1158.

The panel's determination that any type of centralized oversight leads to a class certification encourages retail employers to change their policies in ways that would undermine the goals of the employment discrimination laws. A reduction in centralized monitoring of company practices removes safeguards that serve to foster equal employment opportunities for women and minority employees. Under the panel's twisted logic, a company's nationwide equal employment opportunity program serves as evidence of a uniform policy allowing a class action discrimination suit.

Second, Plaintiffs' sociology expert, Dr. Bielby, opined that the discretionary nature of Wal-Mart's challenged decisionmaking renders Wal-Mart "vulnerable to gender bias" (ER 296). This testimony is not sufficiently probative to support class certification. *Compare Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36 (1989) (allowing social psychologist's testimony that the defendant was "*likely influenced* by sex stereotyping") (emphasis added). Plaintiffs' expert admitted that he had no studies to support his theories and no opinion on how gender stereotypes play a role in the challenged employment decisions at Wal-Mart. ER 1127, citing Bielby Dep. at 87-88; 161-162; 370-371. Further, although he asserts that Wal-Mart should have been more vigilant in its efforts, Dr. Bielby acknowledged that Wal-Mart utilized many of the practices that he believes are useful to combat discrimination. ER 1161, citing Bielby Decl. ¶¶ 52, 54, 62. This

expert opinion fails to meet the standards under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and cannot support class certification.

Third, the panel believed that Plaintiffs' expert Dr. Drogin's use of aggregated statistics was "reasonable" based on his assertion that a store-by-store analysis would not capture "(1) the effect of district, regional, and company-wide control over Wal-Mart's uniform policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; or (3) Wal-Mart's strong corporate culture." Slip op. at 1351-52. This explanation rests upon erroneous conclusions regarding the nature of the "control" exercised by Wal-Mart, as explained above; moreover, aggregated statistics simply cannot provide persuasive evidence of commonality in a multiple facility class action challenging subjective decisionmaking at the facility level.

At the decisionmaking (store) level, Wal-Mart's statistical evidence demonstrates that "[a]t more than 90% of the stores, the hourly pay rates are not statistically significantly different between men and women." ER 651. Lacking any evidence of similar gender disparities across Wal-Mart's stores, "the scope of the proposed class defeats the existence of common questions of fact." *Beck v. Boeing Co.*, 203 F.R.D. 459, 463-64 (W.D. Wash. 2001) (involving a proposed

class that was "immense – not only across four geographically diverse locations, but a multitude of facilities within those locations..."), *aff'd in relevant part*, 60 Fed. Appx. 38 (9th Cir. 2003). Inconsistent data on gender disparities from region to region or from facility to facility "call[] into question both the existence of commonality and typicality on the scale of litigation envisioned by the plaintiffs." *Id.* at 464; *see also Grosz v. Boeing Co.*, 92 Fair Empl. Prac. Cas. (BNA) 1690, 1695 (C.D. Cal. 2003) ("[A]t some sites, women were treated more favorably than men; in other . . . sites they were treated less favorably. This disparity of outcomes belies the existence of commonality or typicality."), *aff'd,* 136 Fed. Appx. 960 (9th Cir. 2005); *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 464 (8th Cir. 2004) (proof of discrimination in some districts and not others cuts against the notion that discrimination was the employer's nationwide standard operating procedure.)

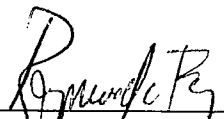
Finally, Plaintiffs' "anecdotal evidence" consists of declarations from 113 class members, representing less than 1/100th of one percent of the class of at least 1.5 million women and only about three percent of Wal-Mart's 3,400 stores. Even if these individuals have valid claims, systemic discrimination of the scope claimed in this putative class cannot reasonably be inferred from their experiences.

CONCLUSION

For the reasons set forth above, this class action certification violates Rule 23 class action criteria and should be reheard *en banc*.

February 28, 2007

Respectfully submitted,



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Appeal No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees,

v.

WAL-MART STORES, INC.,

Defendant/Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The **Chamber of Commerce of the United States of America** has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e (2003) *et seq.* The Chamber's members devote extensive resources to developing employment practices and procedures, and developing compliance programs designed to ensure that their employment actions are consistent with Title VII and other legal requirements. If the panel' decision stands, it will have a potentially destructive effect on the Chamber's members, who are likely to face exposure to billions of dollars in new claims, without any opportunity to present the evidence in their own defense. All parties have consented to the filing of this brief.

ARGUMENT

The Chamber agrees with the arguments set forth in Wal-Mart's Petition for Rehearing En Banc. It submits this brief to highlight the conflict between the

panel's decision and Supreme Court precedent, the Rules Enabling Act, and the fundamental purposes of Title VII.

Put bluntly, the panel's decision purports to eliminate the single most important right granted to employers by Title VII – the right to present rebuttal evidence demonstrating that particular plaintiffs have not actually suffered from discrimination. This right is the mainstay of individual employment discrimination cases, providing the critical mechanism through which employers can answer a plaintiff's prima facie case of discrimination with evidence demonstrating that the plaintiff's alleged harm was not an instance of discrimination, but rather a legitimate employment decision based on the plaintiff's lack of qualifications, failure to seek a particular promotion, or some other legitimate business rationale. Stripping defendants of this right would gut the traditional Title VII analysis, reducing it to a mere exercise in establishing a prima facie case. Yet that is precisely what the panel's decision does, endorsing a procedure that permits plaintiffs to present a prima facie case based on statistical evidence, and then move straight to a determination of remedies, skipping *entirely* the defendant's right to present evidence in its defense.

That result is plainly wrong. The panel's decision conflicts with Supreme Court precedent recognizing an employer's fundamental rights under Title VII, and

with the Rules Enabling Act, which mandates that substantive rights cannot be truncated simply to permit claims to be tried on a class basis. And it would have disastrous practical effects, pressuring employers to settle huge claims regardless of their merit and to adopt the kinds of quota-like policies that Title VII was enacted to prevent. Rehearing should be granted to correct the panel's decision.

I. THE PANEL'S DECISION WOULD DEPRIVE EMPLOYERS OF THE FUNDAMENTAL RIGHT TO PRESENT KEY REBUTTAL EVIDENCE

In the face of the "largest certified class in history," slip op. at 1368, the panel's decision purports to deny Wal-Mart the right to present crucial evidence in its own defense. Under the decision, plaintiffs will be permitted to proceed directly from demonstrating a prima facie case of classwide discrimination based on statistical and anecdotal evidence to a determination of remedies, without the employer being allowed to exercise its right to submit rebuttal evidence in its own defense. That fundamental right, guaranteed both by the Due Process Clause and by Title VII, would be swept aside in the name of convenience, based on the district court's conclusion that conducting individualized hearings would be "impractical on its face." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 176 (N.D. Cal. 2004).

Convenient or not, it is well-established that every employer is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). The opportunity to present case-specific rebuttal evidence of the lawful basis for an employment action (such as job qualifications, work performance, misconduct, economic need, or attendance) has been decisive in myriad employment discrimination cases. For example, in *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000), this Court affirmed summary judgment for an employer in an age discrimination case after the employer demonstrated that plaintiffs "were not as qualified as those employees chosen," and plaintiffs were unable to show that this justification was pretextual. *See also, e.g.*, *Lyons v. England*, 307 F.3d 1092, 1117 (9th Cir. 2002) ("whether [plaintiff was] as qualified as any of the promotion recipients is a factually intensive question best resolved by the jury"); *Bateman v. United States Postal Serv.*, 151 F. Supp. 2d 1131, 1139-40 (N.D. Cal. 2001) (plaintiff could not overcome evidence that termination was based on misconduct, not race

discrimination); *Tempesta v. Motorola, Inc.*, 92 F. Supp. 2d 973, 980 (D. Ariz. 1999) (plaintiff could not show that he had applied for any positions).

The Supreme Court has confirmed that individualized hearings are an integral part of both individual Title VII cases and class actions, providing the employer with an opportunity to offer individualized substantive defenses to liability. In *Teamsters*, the Court explained that if plaintiffs prove that an employer has "engaged in a pattern of racial discrimination," the burden "shift[s] to the employer to prove that individuals who reapply were not in fact victims of previous hiring discrimination." *Teamsters*, 431 U.S. at 359 (internal quotation omitted). But plaintiffs' prima facie evidence "d[oes] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice." *Id.* at 359 n.45. Thus, in cases where plaintiffs seek individual monetary relief, "a district court must usually conduct additional proceedings" – *i.e.*, individualized hearings – at which the employer can "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 361-62. For example, "the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient." *Id.* at 369 n.53. In short, the trial court "will have to make a

substantial number of *individual determinations* in deciding which of the ... employees were actual victims of the company's discriminatory practices." *Id.* at 371-72 (emphasis added). *See also Reid v. Lockheed Martin Aero Co.*, 205 F.R.D. 655, 687 n.35 (N.D. Ga. 2001) (employer has "the right to rebut the presumption that the adverse employment action was due to discrimination and to show that individual members of the class are not entitled to back pay").

The panel's decision in this case cannot be reconciled with *Teamsters*. The panel concedes that if plaintiffs successfully demonstrated a general practice of discrimination via statistics and anecdotes, they would be entitled only to a "*rebuttable* presumption that they are entitled to relief." *Id.* (emphasis added). Yet the trial plan approved by the panel wholly undermines this concession, giving the employer no opportunity whatsoever to "rebut" this presumption. Instead, after the prima facie stage, the case would immediately proceed to a "remedy stage" to be resolved pursuant to a "formula" and without individualized hearings. In approving this procedure, the panel decision *flatly denies* Wal-Mart the fundamental right, affirmed in *Teamsters*, to demonstrate that it had lawful reasons for denying particular class members promotions or higher pay.[1]

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[1] Attempting to distinguish *Teamsters*, the panel claims that the Supreme Court merely held that courts must "*usually* conduct" individualized hearings to determine the scope of individual relief. Slip op. at 1369 (quoting *Teamsters*).

The panel's decision also violates the Rules Enabling Act, which provides that "general rules of practice and procedure . . . shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b). Under the panel's decision, employers would face liability for employment decisions they could readily defend if the claims were brought in the context of an individual action. The panel's decision thus fundamentally alters the substantive rights and burdens that would otherwise obtain in an individual action.[2]

That language is inapposite where, as here, the scope of any "individual relief" cannot be determined without individualized hearings. As discussed above, *Teamsters* makes plain that such individualized determinations are required. Indeed, the Court there rejected claims that the evidence demonstrated a classwide desire for the jobs at issue, and held that plaintiff had to prove entitlement to relief "*with respect to each specific individual*, at the remedial hearings to be conducted by the District Court." 431 U.S. at 371 (emphasis added).

Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004), is similarly unavailing. Although *Carnegie* recognized that "imaginative solutions" to complex damages issues might be appropriate, the examples it offered contemplated individualized proof, including: (1) bifurcating liability and damages; (2) "appointing a magistrate judge or special master to preside over *individual damages proceedings*"; (3) conducting a liability trial, then decertifying the class and providing notice to class members regarding how they may individually prove damages; (4) creating subclasses; or (5) amending the class. *Id.* at 661 (quoting *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 141 (2d Cir. 2001)).

[2] To the extent *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) and its progeny permit monetary relief to be awarded absent the opportunity for the employer to present individualized defenses, they too are inconsistent with *Teamsters* and violate the Rules Enabling Act.

II. IF ALLOWED TO STAND, THE PANEL'S DECISION WILL COERCE SETTLEMENTS AND SUBVERT THE PURPOSES OF TITLE VII

If permitted to stand, the panel's decision will have two predictable effects. First, it will create strong pressures on employers to settle, even when the lawsuits they face lack merit. Courts have long recognized that class actions may unduly pressure a defendant to settle regardless of the suit's merits. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."). This pressure is intensified when an employer has no opportunity to present evidence in its own defense.

Second, the panel decision will encourage employers to adopt the kinds of quota-like policies Title VII was adopted to prevent. If employers are denied an opportunity to present evidence demonstrating that their actions were lawful, then they can only avoid liability by making it impossible for any plaintiff to establish a prima facie case of discrimination in the first place. This can only mean ensuring there is *no* way to produce *any* kind of statistical case that their policies have a statistically disparate effect. But satisfying this standard would take employers well beyond the legitimate and necessary exercise of policing their employment policies and practices for true discrimination. As a plurality of the Supreme Court has observed,

> It 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. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality op.) (citation omitted). Unable to avoid lawsuits by aggressively rooting out true discrimination, employers may be pressured to adopt "inappropriate prophylactic measures." As the plurality also observed,

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

Id. at 993. This result would be intolerable, because "[p]referential treatment and the use of quotas by public employers ... can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII." *Id.* (internal quotation marks and citations omitted). Yet this intolerable result is *precisely* what the panel decision in this case will bring about. The Court should grant rehearing en banc to prevent these perverse and destructive results.

CONCLUSION

For the reasons stated, this Court should grant Defendant-Appellant's petition for rehearing en banc.

Respectfully submitted,

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No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF PETITION OF DEFENDANT-APPELLANT WAL-MART STORES, INC. FOR *EN BANC* RECONSIDERATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, amicus states as follows:

The Product Liability Advisory Council ("PLAC") is a non-profit association with no parent or subsidiary corporations. No publicly held company owns 10% or more of its stock.

INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit association of 127 American and international product manufacturers. In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

PLAC seeks to contribute to the improvement and reform of law affecting product liability in the United States and elsewhere. PLAC's perspective reflects the experience of corporate members in diverse manufacturing industries. Since 1983, PLAC has filed over 750 briefs as *amicus curiae* in state and federal courts, including this Court, presenting the broad views of product manufacturers seeking fairness and balance in product liability litigation.

Many product liability cases – so-called "mass torts" – involve aggregation of claims through class-action certification or similar methods of consolidation. PLAC's members are defendants in many such mass torts, and frequently face efforts to aggregate punitive damages. The constitutional questions this case presents directly and profoundly impact PLAC's members: does Due Process prohibit a punitive damages class action where absent class members would share in an award and, (1) the defendant cannot assert available individualized defenses, or (2) inquire into individual class members' harm.

This *amicus curiae* brief is respectfully submitted to the Court to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case. PLAC files this brief with the consent of all parties.

INTRODUCTION

Shortly after the panel opinion here, the United States Supreme Court revisited the inherent constitutional perils of punitive damages awards. *Philip Morris USA v. Williams*, 549 U.S. ____, 127 S.Ct. 1057, 1064 (Feb. 20, 2007). They pose "risks of unfairness" – especially arbitrariness and lack of adequate notice – thus trials involving punitive damages require specific procedures to ensure compliance with constitutional protections. *Id.*; *see also State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 416-417 (2003) (expressing "concerns over the imprecise manner in which punitive damages systems are administered"; discussing procedural and substantive limitations); *BMW of North America, Inc. v. Gore*, 517 U.S. 573, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose."). The trial plan approved by the majority does not come close to providing the constitutionally-required protections required by this controlling Supreme Court precedent.

This case involves a nationwide class of approximately 1.5 million women who, during a nine-year period, worked in one of Wal-Mart's 3400 stores. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1222 (9th Cir. 2007). Plaintiffs allege various forms of sexual discrimination. *Id.* Beyond injunctive and declaratory relief, they seek "billions" of dollars in punitive damages. *Id.* at 1235. On February 6, 2007, a divided panel affirmed certification of this overbroad and unprecedented class. Judge Kleinfeld dissented because, *inter alia*, the punitive damages certification "deprives Wal-Mart of due process of law." *Id.* at 1244, 1248-49.

The majority's decision contradicts the great bulk of recent precedent holding that aggregation of punitive damages is an unconstitutional violation of Due Process. This conflict implicates the Supreme Court decisions already discussed – *Williams*, 127 S.Ct. 1057, *Campbell*, 538 U.S. 408, and *BMW*, 517 U.S. 573 – as well as:

- Other decisions of this Court – *Beck v. Boeing Co.*, 60 Fed. Appx. 38, 40 (9th Cir. 2003).
- Other court of appeals decisions – *In re Simon II*, 407 F.3d 125, 139 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998).
- State supreme court decisions – *Johnson v. Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005) (rejecting "aggregate disgorgement"); *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1265 (Fla. 2006).

- Other federal decisions. *Colindres v. QuitFlex Manufacturing*, 235 F.R.D. 347, 378 (S.D. Tex. 2006); *O'Neal v. Wackenhut Services, Inc.*, 2006 WL 1469348, at *22 (E.D. Tenn. May 25, 2006).

Because of these conflicts and *Williams*' intervening controlling authority, the Court should grant en banc review.

ARGUMENT

I. Recovery Of Punitive Damages By Absent Class Members Is Unconstitutional Under *State Farm* and *Williams*.

Due Process limits both punitive damages procedures and the amounts of such awards. *Williams*, 127 S.Ct. at 1062. Substantively, Due Process requires that punitive damages "have a nexus to the specific harm suffered by the plaintiff," provide "fair notice. . .of the severity of the penalty," and be free from "arbitrary punishment[]" and "decisionmaker's caprice." *State Farm*, 538 U.S. at 418, 422; *BMW*, 517 U.S. at 574. Procedurally, Due Process prohibits punishing a defendant for harm to others. *Williams*, 127 S.Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

A. Due Process Prohibits Punishing A Defendant For Harm To Others.

Here, the District Court intends to determine punitive damages on a class-wide basis for well over a million people. *Dukes*, 474 F.3d at 1237. Necessarily,

this procedure dispenses with individualized hearings to determine if **any** particular class member was harmed.[1] *Id.* at 1238-1240. Under its plan, a punitive damages award would be based not on actual harm to class representatives, but on postulated injury to hundreds of thousands of absent class members – none of whom is before the court and to whom Wal-Mart could be found liable before any opportunity to contest their claims. This is **precisely what Due Process prohibits**. In *Williams*, the Court specifically held that punitive damages may not constitutionally be awarded on a "represent[ative]" basis:

> [T]he Constitution's Due Process Clause **forbids** a State to use a punitive damages award to punish a defendant for injury that it inflicts upon **nonparties or those whom they directly represent**, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.

Williams, 127 S.Ct. at 1063 (emphasis added).

Due Process gives defendants the right to "every available defense" **before** being held liable for punitive damages. *Id.* ("the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an

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[1] Instead of individual injury hearings, the District Court adopted a "formula approach," permitting awards to both "potential victims" and "actual victims." *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 137, 184-185 (N.D. Cal. 2004).

opportunity to present every available defense").[2] Aggregate punitive awards encompassing "nonparties" are necessarily "standardless" and "speculative" in violation of Due Process:

> To permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?... The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty, and lack of notice – will be magnified.

Id. (citations omitted). A jury therefore may not punish a defendant for harm to others. *Id.* at 1064 ("a jury may not go further...and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties").

Class actions are inherently "representative" litigation. Their only reason for existence is to adjudicate the claims of persons not formally before the court. After *Williams*, the conclusion that almost every other court (save the opinions here) reached on the strength of *State Farm* is unavoidable – aggregated, class-action treatment of punitive damages is so likely disproportionate to any individual harm as to be incompatible with Due Process. Because representative adjudication of

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[2] The defenses in *Williams* were inherently individualized: that an absent "victim...knew that smoking was dangerous or did not rely upon the defendant's statements." *Id.*

punitive damages is unconstitutional under *Williams*, this Court should grant *en banc* review.

B. Determination Of Punitive Damages Before Determination Of Actual Damages Violates The Nexus Requirement Of Due Process.

Assuming, contrary to *Williams*, that an aggregate trial of punitive damages could be constitutional under any circumstances, the trial plan here still violates Due Process by determining punitive damages **before** deciding defendant's backpay liability. *E.g. Engle*, 945 So.2d at 1265 ("compensatory damages must be determined in advance"). In *State Farm* the Supreme Court found the amount (if any) of a compensatory judgment to be a constitutional predicate for excessiveness review. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426. "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. *See also BMW*, 517 U.S. at 580 (1996) (the "most commonly cited indicium of an unreasonable or excessive punitive damage award is its ratio to the actual harm inflicted on the plaintiff"; prior cases "endorsed the proposition that a comparison between the compensatory award and the punitive award is significant"). A court cannot evaluate proportionality – let alone the

numerical ratio – of a punitive award "to the general damages recovered" unless an award of general damages exists.

The Second Circuit recognized that *State Farm* precludes aggregation of punitive damages via classwide proceedings in an opinion post-dating the District Court opinion here. *Simon II* reversed certification of a punitive damages class action because any procedure that determined punitive damages before compensatory damages is unconstitutional. There was no "nexus":

> In certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms.

407 F.3d at 138. The majority's ruling here, 474 F.3d at 1241, directly conflicts with *Simon II*.[3]

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[3] The panel majority would distinguish Title VII punitive damages issues from *Simon II* because a federal statute is more "uniform" than state law. 474 F.3d at 1242. Such theoretical uniformity has next to no practical effect. Rather, Title VII punitive damage awards vary widely, as just cases decided this year demonstrate. *Compare*, *Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007) (sex and race discrimination; seventeen plaintiffs; between $9,500 and $50,000 compensatory damages; lump sum of $289,000 in punitive damages); *Murray v. Cars Collision Center, LLC*, 2007 WL 433124 (D. Colo. Feb. 2, 2007) (sex discrimination; $250,000 compensatory and $1,500,000 punitive damages); *Leggett v. Gold International, Inc.*, 2007 WL 439033 (S.D. Ga. Feb. 8, 2007) (sex discrimination; $0 compensatory and $5,000 punitive damages).

This Court should grant *en banc* review to resolve the conflict between the panel's holding, allowing prior determination of punitive damages, and the great weight of contrary precedent. *See, e.g.*, *Allison*, 151 F.3d at 417-18 ("punitive damages must be determined after proof of liability to individual plaintiffs. . ., not upon the mere finding of general liability to the class").

II. Any Procedure That Precludes Available Individual Defenses To Punitive Damages Violates Due Process.

Under *Williams* a defendant cannot be punished without first having "an opportunity to present every available defense." *Williams*, 127 S.Ct. at 1063 (citing *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). The District Court has **specifically precluded** available individualized defenses during adjudication of punitive damages. *Dukes*, 222 F.R.D. at 174. The panel affirmed, holding that Title VII imposes no contrary requirement. *Dukes*, 474 F.3d at 1239. PLAC does not address Title VII issues, but under *Williams*, if the Act does not provide for individualized defenses, it cannot constitutionally support punitive damages class actions.[4] *Williams* expressly holds – as a matter of Due Process – that depriving a

[4] "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation and quotation marks omitted).

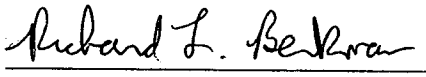
defendant of "an opportunity to present every available defense" is "**prohibit[ed]**." 127 S.Ct. at 1063 (emphasis added).

The certification order here – permitting classwide punitive damages while precluding available individual defenses – blatantly violates Due Process. The panel's holding directly contradicts the Supreme Court's subsequently issued *Williams* decision. *En banc* review is appropriate to remedy this conflict.

CONCLUSION

To try the punitive damages claims of a million-and-a-half people in one proceeding runs roughshod over any modern conception of Due Process. This case cries out for *en banc* review.

Respectfully submitted,



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No.04-16688

IN THE UNITED STATES COURT OF APPEALS
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Defendant/Appellant.

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I. Introduction

En banc review is reserved for the rarest of cases in which a genuine intra-circuit conflict demands the attention of the full court. While this case is undeniably noteworthy for its size and for the broad reach of Wal-Mart's discriminatory practices, these factors do not substitute for the showing that Federal Rule of Appellate Procedure 35 demands. Because the panel decision rests squarely on the well-established law of this circuit, *en banc* review should be denied.

First, the panel's decision in *Dukes* is consistent with this circuit's standards for the rigorous analysis of Rule 23 requirements. The district court conducted a searching evaluation of the enormous factual and legal record presented at class certification and determined that each element of Rule 23 is satisfied. The panel, in turn, concluded that the district court properly exercised its discretion in granting in part, and denying in part, certification of the proposed class.

Wal-Mart claims that *Dukes* is at odds with the recent decision in *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (2d Cir. 2006), in which the Second Circuit reaffirmed that a district court must rigorously analyze Rule 23 criteria, even if the certification inquiry overlaps with the merits. Wal-Mart's claim of an inter-circuit conflict rests on its assertion

that the *Dukes* panel improperly condoned a refusal by the district court to weigh evidence and resolve factual disputes relevant to Rule 23 issues whenever those issues overlapped with the merits. That assertion is wrong. The district court's 84-page opinion thoroughly examined an extensive factual record including evidence also relevant to the merits issues. The district made factual findings relevant to the Rule 23 inquiry, many about the competing expert testimony, even when the evidence overlapped with the merits.

Second, the panel broke no new legal ground when it held the certification under Rule 23(b)(2) was proper. The district court scrupulously followed the standard established in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). Wal-Mart's contention that the panel reduced the *Molski* analysis to mere dogmatic acceptance of the named plaintiffs' declarations does not withstand scrutiny. While Wal-Mart asserts a pre-existing circuit split on this issue, the cases that it cites involved claims for compensatory damages, a remedy not sought in this case. Thus, even if the full court wished to revisit *Molski*, this case is an inappropriate vehicle to do so.

Third, the panel properly rejected Wal-Mart's theory that it must be permitted to defend the claims of each class member at individual hearings. Wal-Mart can cite neither an intra- nor inter-circuit conflict on this issue

because no court has *ever* accepted this radical notion. The panel correctly declined Wal-Mart's invitation to be the first, as its adoption would have the effect of eliminating Title VII class actions in all but the smallest cases. Seven circuits, including this one, have held that courts may use statistical methods to determine individual remedies in a Title VII class action. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984) and cases cited at n.9, *infra*. There is, moreover, no risk that a punitive damage award would violate Wal-Mart's due process rights because the district court's trial plan imposed significant procedural safeguards, protections that Wal-Mart neither acknowledges nor challenges.

There is, therefore, no basis for *en banc* review. Wal-Mart's female workers, having waited nearly six years, should be allowed their day in court without further delay.

II. Wal-Mart Fails to Satisfy the Exacting Standards for *En Banc* Review

The standard for *en banc* review is exceptionally high. This Court grants rehearing *en banc* only when the panel's opinion creates an *intra*-circuit conflict or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Under circuit rules, an *inter*-circuit conflict will not be sufficient to warrant *en banc* review unless the petitioner can demonstrate that the conflict "substantially affects a rule of national

application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1. Wal-Mart has not met these exacting standards for *en banc* review.

Furthermore, this appeal is from a class certification order and, thus, only subject to reversal for an "abuse of discretion." *Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir. 2003). The panel conducted a thorough review of the heavily fact-based lower court decision. Wal-Mart has received the benefit of a discretionary interlocutory appeal, despite the disruption and lengthy delay it entailed, and no further review from this Court is warranted.

III. The Panel Decision Creates No Intra- Nor Inter-Circuit Conflict Concerning the Rigor with Which a District Court Must Analyze Rule 23 Criteria

Wal-Mart entreats this Court to resolve what it claims is an intra-circuit and inter-circuit conflict concerning the "rigor" with which a district court must determine whether the record satisfies Rule 23. The crux of its argument is that, contrary to decisions in this and other circuits, the panel endorsed the district court's refusal to resolve any factual dispute at class certification that overlapped with the merits. Petition at 2, 5. The argument is without merit.

First, the standard that the panel opinion applied comports with the law in this Circuit. The Ninth Circuit holds that "[a]lthough some inquiry

into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." *Staton*, 327 F.3d at 954 (quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983)); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). In conducting the Rule 23 inquiry, the district court is nonetheless "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).[1]

These cases recognize the fundamental difference between the class certification and merits inquiries, a distinction that Wal-Mart attempts to blur. The role of the court at class certification is to determine whether the requirements of Rule 23 have been met, not to adjudicate the underlying merits.[2] The language of Rule 23(a)(2) requires the court to ascertain whether there exist *questions* of law or fact common to the class, not to *answer* those questions. *See Hnot v. Willis Group Holding*, -- F.R.D. --,

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[1] The panel decision is consistent with *Hanon*, which held that the defense of non-reliance is a merits issues that "is not a basis" for denial of class certification, citing *Eisen*. *Hanon*, 976 F.2d at 509.

[2] Such merits determinations at class certification would violate the parties' jury trial rights. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1106-07 (10th Cir. 2001).

2007 WL 749675, *6 (S.D.N.Y. 2007). As the *Dukes* panel correctly noted: "[O]ur job on this appeal is to resolve whether the 'evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed class, not whether the evidence ultimately will be *persuasive*' to the trier of fact." *Dukes v. Wal-Mart, Inc. (Dukes III)*, 474 F.3d 1214, 1229 (9th Cir. 2007) (*quoting In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001)). The panel decision, thus, hewed precisely to the Rule 23 law in this Circuit.

Second, the factual predicate for Wal-Mart's argument is demonstrably false. Neither the district court nor the panel shied away from making factual findings relevant to Rule 23 requirements merely because they overlapped with the merits. The district court reviewed merits evidence and made many factual findings that overlapped with the merits. Indeed, the panel cited the lower court's findings:

> Plaintiffs have exceeded the permissive and minimal burden of establishing commonality by providing: (1) significant evidence of company-wide corporate practices and policies, which include (a) excessive subjectivity in personnel decisions, (b) gender stereotyping, and (c) maintenance of a strong corporate culture; (2) statistical evidence of gender disparities caused by discrimination; and (3) anecdotal evidence of gender bias. Together, this evidence raises an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner.

Dukes III, 474 F.3d at 1225 (*quoting Dukes v. Wal-Mart Stores, Inc. (Dukes I)*, 222 F.R.D. 137, 166 (N.D. Cal. 2004)). These findings indisputably overlap with the ultimate merits question—whether Wal-Mart engaged in a pattern or practice of discrimination. Wal-Mart's petition fails to cite these critical factual findings to this Court.

Moreover, consideration of overlapping certification and merits issues extended to the expert evidence. The district court considered *Daubert* motions filed by both sides and thoroughly evaluated the statistical evidence in eighteen pages of findings on those motions. *See Dukes v. Wal-Mart, Inc. (Dukes II)*, 222 F.R.D. 189 (N.D. Cal. 2004). In the class certification order, the district court painstakingly parsed the expert analyses from both sides, before concluding that commonality had been established. *Dukes I*, 222 F.R.D. at 149-66.

To obtain reversal of the district court's certification order, Wal-Mart must show that the court *actually* failed to make a factual finding on an issue necessary to the Rule 23 determination, not merely some theoretical dispute about the applicable standard. *See Hnot*, 2007 WL 749675 at *4-6. The *only* example Wal-Mart cites involves the extent to which statistical analyses should be aggregated. Plaintiffs' expert offered regression analyses to show a common pattern of pay disparities across the 41 regions, while Wal-Mart

relied on over 7500 separate sub-store regressions. The panel properly rejected Wal-Mart's assertion that, as a matter of law, its disaggregated approach should be adopted. *Paige v. State of California*, 291 F.3d 1141, 1149 (9th Cir. 2002). Instead, the proper level of aggregation "depends largely on the similarity of the employment practices and the interchange of employees at the various facilities"—a factual question. *Dukes III*, 474 F.3d at 1228.[3]

Both the district court and the panel carefully analyzed the factual foundation for each expert's approach to aggregation. As the panel noted, plaintiffs' analysis was grounded in numerous Wal-Mart policies about which the district court had already made factual findings.[4] In contrast, the factual rationale for Wal-Mart's disaggregated sub-store analyses was a store manager survey that was stricken from the record. *Id.* at 1229-30; *Dukes II*,

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[3] Wal-Mart wrongly implies that aggregated statistics may not be used to challenge the delegation of subjective decision-making authority to local decision-makers. Petition at 6. *See, e.g.*, *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 1, 14-17 (D.D.C. 2004); *Butler v. Home Depot, Inc.*, Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754 (N.D. Cal. Aug. 29, 1997).

[4] The panel cited: "(1) the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; and (3) Wal-Mart's strong corporate culture." *Dukes III*, 474 F.3d at 1228-29.

222 F.R.D. at 198 (disallowing use of discredited survey to attack plaintiffs' expert or to support disaggregated analysis).

Wal-Mart asserts that the recent decision in *In re Initial Public Offering Securities Litigation (IPO)*, 471 F.3d 24 (2d Cir. 2007), creates an inter-circuit split with *Dukes*. In *IPO*, the district court had required the plaintiffs to make only "some showing" of compliance with Rule 23, and credited plaintiffs' expert testimony so long as it was not "fatally flawed." The Second Circuit rejected this analysis:

> [O]ur conclusions necessarily preclude the use of a "some showing" standard, and to whatever extent *Caridad* [*v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir.1999)], might have implied such a standard for a Rule 23 requirement, that implication is disavowed. Second, we also disavow the suggestion in *Visa Check* that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed.

Id. at 42. Neither the district court nor the panel decision in *Dukes* endorsed or applied the lax "some showing" standard, nor did either permit expert testimony to satisfy Rule 23 as long as it was not "fatally flawed." Thus, *IPO* creates no conflict with *Dukes*.

Wal-Mart's inter-circuit conflict claim rests instead on the panel's citation to general language from the *VisaCheck* and *Caridad* decisions, in which courts were counseled to "avoid the battle of the experts" at class

certification. *IPO*, however, did nothing more than clarify that courts could examine expert analyses as necessary to determine commonality.[5] It did not, as Wal-Mart argues, mandate that the district court select which expert's analyses is more persuasive. *See Hnot*, 2007 WL 749675 at *6 ("*IPO* does not stand for the proposition that the Court should, or is even authorized to, determine which of the parties' expert reports is more persuasive."). In short, while a district court must address the certification requirements, it "should not assess any aspect of the merits unrelated to a Rule 23 requirement." *IPO*, 471 F.3d at 41.

IV. The District Court and the Panel Correctly Applied this Circuit's Standard for Rule 23(b)(2) Certification

This Court's decision in *Molski v. Gleich* established the standards for Rule 23(b)(2) certification for cases in which plaintiffs seek both injunctive and monetary relief on behalf of the putative class. 318 F.3d 937 (9th Cir. 2003). *Molski* requires that, in determining whether injunctive relief predominates over monetary relief, the district court examine the "specific facts and circumstances of each case" and "focus[] on the language of Rule

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[5] *IPO* cited favorably to the decision in *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 433, 440 (S.D.N.Y. 1995), in which the court properly noted that "the experts' disagreement *on the merits*—whether discriminatory impact could be shown—was not a valid basis for denying class certification." *IPO*, 471 F.3d at 35 (emphasis added).

23(b)(2) and the intent of the plaintiffs in bringing the suit." *Id.* at 950. The opinions in *Dukes* follow *Molski* to the letter.

Wal-Mart devotes *only one sentence* of its petition to explaining its contention that *Dukes* creates an intra-circuit split with *Molski*, even though this showing is a prerequisite for *en banc* review. Petition at 12. It asserts that *Dukes* adopted a test that "would make *every* class case certifiable under Rule 23(b)(2) if the plaintiff is willing to sign an affidavit attesting to the importance of injunctive relief." *Id.* Its cynical reading of *Dukes* does not satisfy Federal Rule of Appellate Procedure 35.

Neither the district court nor the panel relied exclusively or uncritically on the declarations of the plaintiffs about their motivation in bringing the case.[6] The district court's Rule 23(b)(2) analysis carefully evaluated the specific nature of the injunctive relief sought and what it would achieve for the class:

> Plaintiffs' claims for injunctive and declaratory relief, if successful, 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 that would benefit not only current class members, but all future female employees as well.

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[6] While Wal-Mart faults the district court for accepting the statements of the plaintiffs, it offered *no* evidence below to contradict or question the sincerity of plaintiffs' explicitly declared goals. *See Dukes III*, 474 F.3d at 1235 n.12.

Dukes I, 222 F.R.D. at 171. In addition, the district court considered the types and amount of monetary relief sought. Plaintiffs' decision to forego compensatory damages but seek punitive damages further supported a finding that injunctive relief was the primary goal of the litigation.[7] *Id.* Contrary to Wal-Mart's assertion, the district court specifically considered the impact of punitive damages on class cohesiveness and homogeneity. *Id.* at 171-72.

Like the district court, the panel carefully considered the range of factors articulated by *Molski* and the language of Rule 23 in determining whether 23 (b)(2) was satisfied. *Dukes III*, 474 F.3d at 1234-37.[8] The panel thoroughly reviewed Wal-Mart's other arguments about the claims seeking injunctive and monetary relief. There is, thus, no basis for Wal-Mart's intra-circuit conflict claim.

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[7] The district court and the panel correctly rejected Wal-Mart's assertion that the potential amount of a punitive damage award makes monetary relief predominate, which would effectively preclude class treatment for the largest or most pernicious violators of Title VII. *Dukes III*, 474 F.3d at 1235-36; *Dukes I*, 222 F.R.D. at 171.

[8] Wal-Mart's claim that *Dukes* departs from the Second Circuit's standard in *Robinson v. Metro-North* is inaccurate. Petition at 10. The panel considered the plaintiffs' subjective intent and evaluated those expressions of intent against an objective standard, concluding that the plaintiffs' expressed intent was grounded in "logic." *Dukes III*, 474 F.3d at 1235.

Wal-Mart instead devotes the lion's share of its argument to the contention that the Rule 23(b)(2) analysis used in this circuit is different from that used in circuits that have adopted the *Allison* test. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). An inter-circuit split alone does not satisfy Rule 35. *See* Section II. Nor did *Molski create* the circuit split, as the split began with conflicting decisions from the Second and Fifth Circuits. The *Molski* court carefully analyzed and correctly rejected *Allison*. "[A]doption of a bright-line rule . . . would nullify the discretion vested in the district courts through Rule 23 . . . [and] holds troubling implications for the viability of future civil rights class actions." *Molski*, 318 F.3d at 950; *see Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 163-64 (2d Cir. 2001); *Allison*, 151 F.3d at 430-31 (Dennis, J., dissenting).

Regardless, *Dukes* is not an appropriate case with which to revisit *Molski* because, unlike *Allison* and *Molski*, it does not include a claim for compensatory damages. Because compensatory damages serve a different purpose (compensating class members) from punitive damages (deterring the defendant), the analysis of Rule 23(b)(2) predominance differs in cases addressing one or the other alone.

V. Wal-Mart's Theory that Individualized Hearings Are Mandatory at the Remedies Stage Presents Neither an Intra- nor Inter-Circuit Conflict

Wal-Mart contends that Title VII and due process mandate that the district court conduct individual remedies hearings for each class member. There is no intra- or inter-circuit conflict on this point, as there is no appellate authority that has ever accepted this radical theory.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court articulated the standards for bifurcated litigation of Title VII "pattern or practice" cases. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be conducted. *Id.* at 361. The district court and the panel correctly rejected Wal-Mart's theory that this language must be read to *require* individualized hearings in *every* case. *Dukes III*, 474 F.3d at 1238-39; *Dukes I*, 222 F.R.D. at 174. Wal-Mart's interpretation is squarely at odds with language in *Teamsters* that vested district courts with broad discretion to "fashion such relief as the particular circumstances of a case may require to effect restitution." *Teamsters*, 431 U.S. at 364 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976)).

The Ninth Circuit and six other circuits have concluded that individual remedies hearings may be inappropriate when the employer's practices make

it "difficult to determine precisely which of the claimants would have been [in a more favorable position] absent discrimination, but it is clear that many should have." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984).[9] Where the employer's system has been infected with subjective decision-making and the employer lacks records to justify employment decisions, as has occurred here, courts have concluded that allocating relief based upon statistical analyses is more appropriate than a "quagmire of hypothetical judgments." *Id.* at 1444 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1975)).[10]

Wal-Mart's claim that sections of Title VII added in 1991 to *expand* the remedies available to victims of discrimination, in fact, overruled *sub silencio 25* years of Title VII class action jurisprudence is equally far-fetched. Nothing in the 1991 Civil Rights Act indicates that the new "mixed motive" provision or the "person aggrieved" punitive damages language was

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[9] *See Shipes v. Trinity Indus.*, 987 F.2d 311, 318 (5th Cir. 1993); *Pitre v. W. Elec. Co.*, 843 F.2d 1262, 1274 (10th Cir. 1988); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452-53 (7th Cir. 1976); *Pettway v. Am. Cast Iron Pipe Co. (Pettway V)*, 681 F.2d 1259, 1266 (11th Cir. 1982); *Segar v. Smith*, 738 F.2d 1249, 1289-91 (D.C. Cir. 1984).

[10] The district court tailored its certification order to the unique facts presented by the evidence and, thus, denied certification for promotion monetary claims that could not be proven by reference to objective evidence. *Dukes III*, 474 F.3d at 1243-44.

intended to limit the use of class actions or require that remedies be determined on an individual basis. *Dukes III*, 474 F.3d at 1241; *cf. Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1979). Wal-Mart cites no authority, either within or outside this Circuit, to support its request for *en banc* review on this basis.

Finally, Wal-Mart advances the novel proposition that an award of class punitive damages, without individualized hearings, would violate due process because it would punish legal conduct and award damages to non-victims. The Supreme Court cases upon which it relies involved punitive damages awarded to individuals based on defendants' conduct toward different victims not before the court and, in some cases, subject to different legal standards. *See Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Here, plaintiffs seek an award to the class based on Wal-Mart's conduct toward the class, whom Title VII uniformly protects. This Court has approved the award of punitive damages to a class. *See Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

Moreover, Wal-Mart ignores the most critical elements of the due process analysis endorsed by the district court and the panel. First, the

district court stated that it would limit any award of punitive damages to "evidence of conduct that was directed toward the class." *Dukes I*, 222 F.R.D. at 172; *see also Dukes III*, 474 F.3d at 1242. Second, only "those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct" will be eligible for a share of punitive damages. *Dukes I*, 222 F.R.D. at 172. Third, the allocation of punitive damages to individual class members will be "in reasonable proportion to individual lost pay awards." *Id.*[11] Finally, the district court ordered that notice and an opportunity to opt out will be provided to class members, should any of them wish to pursue a claim of punitive damages on their own. *Id.* at 173.

Not only do these safeguards fully protect the parties' rights to due process, they serve to highlight why it is inappropriate to address this issue at this juncture.[12] Without the benefit of a full trial record, this Court lacks the requisite information to evaluate whether a punitive damages award in this case—if there ever is such an award—comports with due process.

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[11] These safeguards directly address and satisfy the concerns raised in this Court's decision in *Beck v. Boeing*, 60 F. App'x 38 (9th Cir. 2003).

[12] Importantly, the Supreme Court opinions addressing due process and punitive damages have all followed trial and the *actual*, rather than *hypothetical,* award of a specific amount of damages. If plaintiffs prevail and are awarded punitive damages, Wal-Mart will have the opportunity to challenge such an award on a full record.

VI. Conclusion

Wal-Mart is not entitled to *en banc* review by virtue of its size, or its net worth, or the historic nature of this case. Like all litigants, Wal-Mart must meet this Court's exacting standards for *en banc* review. It has failed to identify a genuine intra-circuit conflict or any issue of exceptional national importance. Accordingly, its petition should be denied.

Respectfully submitted.

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March 15, 2007

No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

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REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

Plaintiffs contend that the panel's decision "rests squarely on the well-established law of this circuit." Opp. 1. But as demonstrated in Wal-Mart's petition, the panel's decision creates clear intra-circuit splits on at least three separate issues. Pet. 5, 12, 13-17. The panel's decision also dramatically departs from the law in the vast majority of other circuits; while plaintiffs contend that these inter-circuit splits do not "substantially affect[] a rule of national application in which there is an overriding need for national uniformity" (Opp. 3-4), it is difficult to conceive of issues more demanding of national uniformity than the core prerequisites for certification of a nationwide class action. The nationwide importance of the issues raised in Wal-Mart's petition is well reflected by the number of *amicus* briefs submitted on *both* sides by organizations with nationwide interests and constituencies.

First, plaintiffs contend that "Wal-Mart's claim of an inter-circuit conflict [with *In re IPO Litig.*, 471 F.3d 24 (2d Cir. 2006),] rests on its assertion that the *Dukes* panel improperly condoned a refusal by the district court to weigh evidence and resolve factual disputes relevant to Rule 23 issues whenever those issues overlapped with the merits." Opp. 1-2. "That assertion," they argue, "is wrong." *Id.* at 2. But the panel itself expressly recognized that "Wal-Mart raised a number of

challenges to Plaintiffs' evidence of commonality but [the district court] held that such objections related to the *weight* of the evidence, rather than its validity, and thus should be addressed by a jury at the merits phase." Slip op. 1346 (emphasis in original). In *IPO*, by contrast, the Second Circuit "decline[d]" to hold that "a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits." 471 F.3d at 42.

Contrary to *IPO*, for example, the district court refused to resolve disputes relevant to the critical issue of whether plaintiffs' aggregated statistical analysis demonstrates commonality. Instead, the district court simply accepted plaintiffs' analysis because it was not entirely "lacking in probative value" and was, in the court's view, "at least *a* reasonable means of conducting a statistical analysis." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 159 (N.D. Cal. 2004) (emphasis in original). This is *precisely* the approach endorsed in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), and *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124 (2d Cir. 2001), and expressly "disavowed" in *IPO*, 471 F.3d at 42. In fact, in upholding the district court's approach the panel cited the exact pages of *Caridad* and *Visa Check* containing the "some showing" and "not fatally flawed" standards that the Second Circuit has expressly rejected. Slip op. 1352-53; *see also Dukes*, 222 F.R.D. at 159 n.29.

By permitting certification based on such a minimal, uncritical evaluation of *one* party's evidence, the panel's decision stands in direct conflict not only with *IPO* but with this Court's precedent and numerous other appellate decisions from across the nation. Pet. 5, 7-8; WLF Br. 5-8. Indeed, the Fifth Circuit observed just last week that the *IPO* approach "enjoys widespread acceptance in the courts of appeals." *See Regents v. Credit Suisse First Boston (USA), Inc.*, 2007 U.S. App. LEXIS 6396, *15 (5th Cir. March 19, 2007). The same decision makes clear that where, as here, a district court premises its certification order on an incorrect legal standard, reversal is warranted. *Id.* at *13 (reversing class certification order because,"[a]lbeit with the best of intentions and after herculean effort," the district court employed incorrect legal standards in reaching its decision).[1]

Second, regarding the question whether monetary relief "predominates" over injunctive and declaratory relief, plaintiffs claim that "Wal-Mart's contention that the panel reduced the *Molski* [*v. Gleich*, 318 F.3d 937 (9th Cir. 2003),] analysis to mere dogmatic acceptance of the named plaintiffs' declarations does not withstand scrutiny." Opp. 2. But that is precisely how one leading commentator has

[1] Plaintiffs charge that Wal-Mart's petition fails to cite the "critical factual findings" quoted on page 6 of their opposition, which supposedly support a finding of commonality. Opp. 7. But the quoted passage is merely a one-sided recitation of plaintiffs' evidence, with no acknowledgment either of Wal-Mart's legal challenges to that evidence or the contrary evidence presented by Wal-Mart. *See also* RILA Br. 7-10.

interpreted the decision. Coffee, *Dukes v. Wal-Mart: Several Bridges Too Far*, 8 CLASS ACTION LITIG. RPT. 184 (March 9, 2007) (the "sleight of hand used by the Ninth Circuit" to determine predominance under Rule 23(b)(2) was to rely on "the written declarations of the class representatives") (attached). Rather than analyzing whether the *billions* of dollars plaintiffs seek predominates over their prayer for injunctive relief, the panel merely recited (incompletely) Wal-Mart's arguments as to why Rule 23(b)(2) certification is inappopriate before holding each *irrelevant* in light of the named plaintiffs' stated *subjective* intent. Slip op. 1362-63 (that a majority of class members lack standing to seek injunctive relief "does not alter" the analysis given that the named plaintiffs stated "their common intention as ending Wal-Mart's allegedly discriminatory practices"); *id.* 1364 (predominance test does not turn on "the theoretical or possible size of the damage award"); *id.* 1365 (district court properly held punitive damages do not predominate because plaintiffs "stated that their primary intention in bringing this case was to obtain injunctive and decaraltory relief"). The panel has applied precisely the sort of "bright line" test expressly *rejected* by the Ninth Circuit in *Molski*. *See* Pet. 10, 12.

Plaintiffs *concede* that there exists an *inter*-circuit split over the standard for certifying monetary claims under Rule 23(b)(2), but assert that this case is "an inappropriate vehicle" for addressing that split because plaintiffs do not seek compensatory damages. Opp. 2. However, the standard to be applied for Rule

23(b)(2) certification does not change depending on the *type* of monetary relief sought. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006). Moreover, plaintiffs seek punitive damages, and the panel decision squarely conflicts with decisions of the Fifth, Seventh, and Eleventh Circuits on the availability of Rule 23(b)(2) certification in such cases. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 581 (7th Cir. 2000); *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004), *disapproved on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006); *see also* EEAC Br. 2-5. Plaintiffs have *nothing* to say on that subject.

Third, plaintiffs denounce as "radical" the notion that Wal-Mart has the right to mount individualized defenses to class members' monetary claims, reciting that formulaic relief is appropriate here because litigating individually over "subjective" pay and promotion decisions would result in a "quagmire of hypothetical judgments." Opp. 14-15. But Wal-Mart demonstrated in its petition that an employer may defeat any individual claimant's entitlement to monetary relief by presenting evidence of even a "subjective" non-discriminatory reason for the challenged decision. Pet. 17. Plaintiffs have no response to that. Nor do plaintiffs deny that the contemplated trial plan will result in the payment of money to non-victims. *See* slip op. 1388 (Kleinfeld, J., dissenting). As explained in Wal-Mart's

petition, this is expressly prohibited by Section 706(g) of Title VII and numerous Supreme Court and Ninth Circuit decisions interpreting it. Pet. 13-15; *see also* CELC Br. 2-11; U.S. Chamber Br. 3-7. Yet plaintiffs fail to even mention Section 706(g) in their opposition, much less offer any explanation as to why its express dictates can be ignored.[2]

Plaintiffs label as "novel" Wal-Mart's argument that the trial plan's express abrogation of Wal-Mart's ability to mount individualized defenses violates due process. Opp. 16. In so doing, plaintiffs ignore the Supreme Court's teaching in this area. The Supreme Court has squarely held that due process *requires* that defendants facing punitive damages have the opportunity to present "every available defense" (*Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007)) and *mandates* that an award of punitive damages be calibrated "to the specific harm suffered by the plaintiff" (*State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003)). The trial plan clearly violates both dictates. Although plaintiffs

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[2] Contrary to plaintiffs' suggestion (Opp. 15), *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984), provides no support for the unprecedented trial procedures contemplated here. *See id.* at 1445 (providing that the employer shall have the opportunity to "prov[e] that [a particular] applicant was unqualified or show[] some other valid reason why the claimant was not, or would not have been, acceptable"). Nor do the decisions from other Circuits cited in footnote 9 of plaintiffs' opposition: *None* involved a situation in which an employer with the ability to demonstrate that particular class members were not subject to discrimination requested but was denied the right to do so.

purport to distinguish the entirety of the Supreme Court's punitive damages jurisprudence on the ground that those cases "involved punitive damages awarded to individuals," whereas plaintiffs here "seek an award to the class" (Opp. 16), this only highlights their refusal to accept that the Rules Enabling Act precludes courts from remaking substantive law in order to serve the procedural class action device. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). A constitutional right that Wal-Mart would indisputably enjoy in an individual case does not disappear simply because a class has been certified. If anything, because class actions pose special dangers, defendants in such cases should be afforded *more* constitutional protections against arbitrary deprivation of property.[3]

Plaintiffs unsuccessfully attempt to distinguish *Beck v. Boeing Co.*, 60 Fed. Appx. 38 (9th Cir. 2003), which—in direct conflict with the panel decision—held that certifying a punitive damages class where "the beneficiaries of the punitive

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[3] It speaks volumes that the *only* case plaintiffs cite as supporting the contemplated procedure for the award of punitive damages is *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). The majority decision in *Hilao* relied on asbestos cases since superseded by *Ortiz* and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *State Farm* and *Williams* now make clear that the punitive damages process in *Hilao* was invalid. In any event, *Hilao* is clearly distinguishable. The majority decision in *Hilao* emphasized that the procedures it sanctioned were justified by the "extraordinarily unusual" nature of the case: Torture by a foreign dictator. 103 F.3d at 786. Moreover, the defendant's challenge to the district court's procedure was "very narrow," and it had "waived any challenge to the computation of damages." 103 F.3d at 784-85 n.12. Wal-Mart has made no such waiver.

damages award would necessarily include those class members not affected by the alleged discriminatory policy as well as those who were . . . *may not be done.*" *Id.* at 40 (emphasis added). They contend that "safeguards" in the instant case "satisfy the concerns" expressed in *Beck*, namely that punitive damages will be awarded only to class members who recover backpay (and in proportion thereto). Opp. 17 n.11. Because Wal-Mart is being deprived of the opportunity to dispute that particular individuals were discriminated against, however, backpay will *also* be awarded to non-victims. Thus, that punitive damage awards will follow backpay awards means only that non-victims will recover *twice*. The certification order in this case therefore *exacerbates* the defect identified in *Beck*. It also conflicts with numerous decisions from other circuits refusing to certify punitive damages classes—decisions that petitioners do not even attempt to distinguish. *See* Pet. 16.

Plaintiffs' contention that "[w]ithout the benefit of a full trial record, this Court lacks the requisite information to evaluate whether a punitive damages award in this case ... comports with due process" is similarly without merit. Opp. 17. As the case now stands, Wal-Mart will be precluded from presenting its individualized defenses—*i.e.*, from proving that any particular class member was not in fact a victim of discrimination. Because the Due Process Clause guarantees Wal-Mart the right to "fair notice" and fair procedures that allow it to present "every available defense" (*Williams*, 127 S. Ct. at 1063), it is inevitable that further

proceedings in this case will deprive Wal-Mart of its constitutional rights. *See also* PLAC Br. 9-10.

CONCLUSION

The application of the wrong legal standards led the district court to certify an "excessive subjectivity" class spanning 3,400 stores, hundreds of varied job classifications, thousands of managers, and millions of absent class members. By upholding that decision, the panel has left the Ninth Circuit standing "virtually alone" (Coffee, *supra*), and has created chaos within the Circuit. The en banc Court should grant review.

March 27, 2007.

Respectfully submitted.

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March 27, 2007

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Re: *Dukes v. Wal-Mart Stores,* Inc., No. 04-16688

Dear Ms. Catterson,

We are writing on behalf of the U.S. Women's Chamber of Commerce to request permission to submit this letter as an amicus curiae in support of Plaintiffs' Opposition to the petition for rehearing en banc pursuant to Ninth Circuit Advisory Committee Note to Circuit Rule 29-1 encouraging amici to file a short letter in lieu of a brief.

The U.S. Women's Chamber of Commerce ("Women's Chamber") is a not-for-profit advocacy group with national headquarters located in Washington, D.C. The Women's Chamber is the preeminent national women's chamber of commerce network, representing 500,000 individuals, business owners, career professionals, women's organizations, economic development organizations and leadership organizations. Founded in 2001, its mission is to develop leaders, accelerate economic growth and promote economic opportunity for women at every level of the U.S. economy. It is specifically concerned with the ability of women to organize in order to address historic issues of economic discrimination against women. It is the goal of the Women's Chamber to move women's economic role from merely a "target market" for corporate and political gain to be recognized as ***the leading economic force in America.***

The Women's Chamber agrees with the arguments set forth in the Plaintiffs' Opposition to Petition for Rehearing En Banc. The Women's Chamber submits this letter to underscore the vital importance of this case to expose gender discrimination in the workplace and to vindicate women's essential legal rights.

For Women, the Promise of Equal Pay Is Still Only A Promise

Despite years of advancement and acknowledgement of the growing economic clout of women, women still do not stand on equal footing with men in the workplace. In 1995, the federal Glass Ceiling Commission issued a fact finding report titled "Good for Business: Making Full Use of the Nation's Human Capital."[1] In that report, the Commission found that in the

[1] U.S. Glass Ceiling Commission, Good for Business: Making Full Use of the Nation's Human Capital: The Environmental Scan (1995), www.digitalcommons.ilr.cornell.edu/key_workplace/116. The Glass Ceiling

private sector, "equally qualified and similarly situated citizens are being denied equal access to advancement into senior-level management on the basis of gender, race, or ethnicity. At the highest levels of corporations the promise of reward for preparation and pursuit of excellence is not equally available to members of all groups." The almost 300-page report detailed the barriers to entry for women and minorities including factual findings and conclusions. A second report provided recommendations and a strategic plan noting that "the glass ceiling is not only an egregious denial of social justice that affects two-thirds of the population, but a serious economic problem that takes a huge financial toll on American business."[2] In 2002, a report of the General Accounting Office found that a majority of women managers were worse off in 2000, relative to men, than they were in 1995.[3] A report issued in 2003 noted that despite the media's identification of the glass ceiling problem over twenty years ago, and the government's acknowledgement and promotion of suggestions some ten years prior, the glass ceiling persists and the progress of women into the upper echelons of communications companies had become stagnant.[4]

Despite the media attention to the problem and government support of a bipartisan commission, women's earnings have continued to lag behind as compared to men's earnings. According to the United States Department of Labor, in 2005, women earned only 81 percent of what men earned. [5] At the same time, almost 60 percent of all women were in the labor force and women made up 46.4 percent of the total civilian labor force. It is not surprising that women have sought redress in the courts for the gaping disparities in pay and promotions and to seek equal treatment in the workplace.

Commission was established by Title II of the Civil Rights Act of 1991 which created a bipartisan commission of twenty-one members charged with a mission to "conduct a study and prepare recommendations on eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business."

[2] U.S. Glass Ceiling Commission, A Solid Investment: Making Full Use of the Nation's Human Capital (1995), www.digitalcommons.ilr.cornell.edu/key_workplace/120.

[3] A New Look Through the Glass Ceiling: Where are the Women? The Status of Women in Management in Ten Selected Industries (January 2002), http://maloney.house.gov/documents/olddocs/womenscaucus/dingellmaloneyreport.pdf.

[4] *See* Erika Falk and Erin Grizard, The Glass Ceiling Persists: The 3rd Annual APPC Report on Women Leaders in Communication Companies, The Annenberg Public Policy Center for the University of Pennsylvania (2003), www.annenbergpublicpolicycenter.org/.../women_leadership/2003_04_the-glass-ceiling-persists_rpt.pdf.

[5] Employment Status of Women and Men in 2005, www.dol.gov/wb/factsheets/Qf-ESWMo5.htm.

A Class Action Provides the Only Feasible Means for Women to Address Gender Inequality against the World's Largest Private Employer.

First, a class action provides the only practical means for most women in low-wage jobs to redress discrimination in pay because of such workers' often tenuous economic status. Women generally have primary responsibility for children's care, and sometimes for elders' care, as well, and nearly 50% of women shoulder these responsibilities without a spouse. [6] Women are 45% more likely to be poor than men.[7] Because of these familial obligations and their often strained finances, low-wage women particularly cannot risk leaving a job or antagonizing an employer to challenge discriminatory practices.

Second, given the vast resources available to Wal-Mart, a class action provides the only feasible means for individual women in this case to redress this economic discrimination. Without the ability to aggregate their claims, individual women are practically powerless to access accurate data to support claims of pay inequality. Given corporate policies against discussing individual pay, often women may not even be aware of the discrepancy between their own pay and their male peers. A class action provides the opportunity for women to access complete and accurate payroll data.

Moreover, the relatively small size of low-wage workers' individual pay claims makes individual litigation to resolve these disparities impracticable. A formula determination of pay and promotion claims not only provides a fair and efficient means to adjudicate the claims of the 1.5 million women who would otherwise be powerless against the largest private employer in the world, but provides the *only* practicable means by which these women will receive any remedy at all.[8] Without the ability to join their claims together and to seek redress of the violation of rights as a class action, the rights of Wal-Mart's women workers to be free of gender discrimination under Title VII are little more than an unfulfilled promise.

For the reasons stated and those set forth in Plaintiffs' brief, the Women's Chamber respectfully requests that the Court deny Defendant-Appellant's petition for rehearing en banc.

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[6] U.S. Census Bureau, Current Population Survey, 2003 Annual Social and Economic Supplement. September 2004, http://www.census.gov/population/www/socdemo/hh-fam/cps2005.html.

[7] Legal Momentum, *Reading Between the Lines: Women's Poverty in the United States 2005*, http://legalmomentum.org/legalmomentum/publications/womens_poverty/.

[8] Wal-Mart was able to promulgate and implement its policies and procedures on a nationwide basis. Plaintiffs and the class of women affected by these policies should likewise be able to seek a nationwide remedy to their discriminatory effect.

Respectfully submitted,

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PROOF OF SERVICE

I, JUDY OLASOV, declare:

I am employed in the City and County of San Francisco, California.

I am over the age of 18 years and not a party to the within cause; my business address is 601 Van Ness Avenue, Suite 2080, San Francisco, California 94102-6388.

On March 27, 2007, I served the attached

LETTER BRIEF

in said action by placing a true copy thereof, enclosed in a sealed envelope, each envelope addressed as follows:

SEE ATTACHED LIST

X **(BY MAIL)** I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at San Francisco, California.

_ **(BY PERSONAL SERVICE)** I caused each such envelope to be delivered by hand to the offices of each addressee above.

_ **(BY FAX)** I transmitted via facsimile the document(s) listed above to the fax number(s) set forth above on this date before 5:00 p.m.

I declare under penalty of perjury that the above is true and correct.

Executed March 27, 2007, at San Francisco, California.

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No. 04-16688

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

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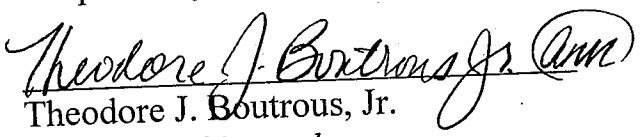
MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

Wal-Mart Stores, Inc. has petitioned for en banc review because the panel's decision conflicts with decisions of the United States Supreme Court, this Court, and other courts of appeals. At the Court's request, plaintiffs filed an opposition to Wal-Mart's petition on March 16, 2007. In their opposition, plaintiffs make several assertions that are legally and factually incorrect. In addition, the Fifth Circuit recently issued yet another decision that conflicts with the panel decision. Accordingly, Wal-Mart respectfully requests leave to file the attached short reply.

March 27, 2007.

Respectfully submitted.



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PROOF OF SERVICE

I hereby certify that on this 27th day of March, 2007, I caused two copies of the foregoing Motion for Leave to File Reply Brief in Support of Petition for Rehearing En Banc to be served by overnight commercial carrier on:

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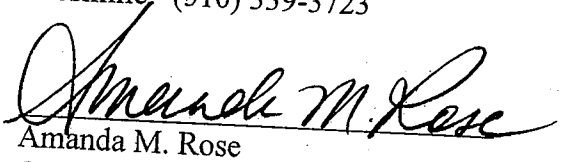

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Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

vs.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

On Appeal From The United States District Court
For The Northern District Of California

BRIEF OF *AMICI CURIAE* CONSUMERS UNION, NATIONAL CONSUMER LAW CENTER, CENTER FOR CONSTITUTIONAL RIGHTS, AND COMMUNITIES FOR A BETTER ENVIRONMENT IN OPPOSITION TO FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

None of the *amici* has a parent corporation or stock that is owned by a publicly held corporation.

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OTHER AUTHORITIES

I. INTRODUCTION

The petition for rehearing en banc should be denied because the panel opinion correctly rejected Wal-Mart's contention that the Due Process Clause gives Wal-Mart the absolute right to an individualized damage hearing for each class member. That claim is inconsistent with the long-standing reliance of courts on aggregate techniques for calculating class-wide damages in class actions generally, as well as in employment discrimination cases in particular.

Amici Curiae are public interest organizations that participate in litigation to enforce federal rights in the areas of antitrust, securities, consumer, human rights, and environmental law. If Wal-Mart's renewed contention were accepted, *amici* believe that existing class action enforcement in these areas – as well as employment discrimination – would be significantly impaired.

II. UNDER THE DUE PROCESS CLAUSE, TRIAL COURTS HAVE THE DISCRETION IN APPROPRIATE CASES TO RELY ON AGGREGATE PROOF OF DAMAGES WITHOUT THE NECESSITY FOR INDIVIDUALIZED HEARINGS.

Due process requires that a fair balance be struck between vindicating a plaintiff's interest in obtaining a remedy, avoiding an erroneous deprivation of a defendant's property, and "any ancillary interest the [Court] may have in providing the procedure or foregoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (applying balancing test enunciated in *Matthews v. Eldridge*, 424 U.S. 319 (1976) to private litigants) (applying *Doehr*).

Applying the *Doehr/Matthews* balancing test, this Court held in *Hilao v. Estate of Marcos* that due process permits statistical sampling in calculating personal injury and wrongful death damages for a class of Filipino torture victims, injuries more varied than the purely economic injuries at issue here. 103 F.3d 767, 786-87 (9th Cir. 1996). *See* discussion of *Hilao infra* at III.D.

Wal-Mart's due process contention wholly ignores the interest balancing engaged in by the trial court, which appropriately gave great weight to Wal-Mart's "extraordinarily sophisticated" computerized employee records that make possible the accurate determination of the class's losses from discrimination. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 180 (N.D. Cal. 2004). Further, Wal-Mart's petition for rehearing nowhere acknowledges the ample protections which the district court's certification order provided for Wal-Mart at any subsequent damages phase, *id.* at 172-73, and which the panel opinion ratified. *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1241-42 (9th Cir. 2007).[1]

III. AGGREGATE TECHNIQUES ARE COMMONLY USED TO CALCULATE CLASS-WIDE DAMAGES IN CLASS ACTIONS ENFORCING FEDERAL RIGHTS.

Wal-Mart's due process arguments should be viewed through the lens of the long-standing reliance by courts on aggregated damage-calculation

[1] Moreover, as the district court noted, damages are secondary to the class-wide injunctive and declaratory relief at the heart of this class action. 222 F.R.D. at 172 (discussing *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).

techniques in a variety of substantive areas of law.

A. Antitrust Actions

It is a settled practice for courts in antitrust class actions to rely upon class-wide aggregate techniques in calculating individual damages awards without individualized hearings of class member claims.[2] The Second Circuit has stated that:

> [I]f defendants' argument (that the requirement of individualized proof on the question of damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims. Such a result should not be and has not been readily embraced by the various courts confronted with the same argument.

In re VisaCheck/Mastermoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001) (quoting *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 327-38 (E.D.N.Y. 1982) and citing other cases).[3]

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[2] *See* 3 NEWBERG ON CLASS ACTIONS §10:7 n.1 (4th ed. 2006) (citing numerous cases). *See also In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 29 (N.D. Ga. 1997) (holding that aggregate proof of damages through econometric techniques is appropriate); *In re Potash*, 159 F.R.D. 682, 697 (D. Minn. 1995) ("the fact that the damages calculation may involve individualized analysis is not by itself sufficient to preclude certification when liability can be determined on a class-wide basis.").

[3] Wal-Mart was one of the named plaintiffs in this case, representing a class of approximately 5 million merchants. *See Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396 F.3d 96 (2d Cir. 2005). Apparently Wal-Mart had no argument with the use of class-wide, aggregate techniques to determine individual damages when it itself

In *In re Visa*, plaintiffs sought certification of a class of merchants and trade associations harmed by Visa's and MasterCard's "tying arrangements" that forced merchants to accept debit cards with higher per-transaction fees than other types of Visa and MasterCard cards. 280 F.2d 124, 131 (2d Cir. 2001). Defendants argued that merchants had the ability to mitigate any damages relating to the higher debit card fee, thus requiring individualized hearings on damages and rendering the case unmanageable as a class action. *Id.* at 137, 140. The Second Circuit, however, affirmed the use of a statistical formula, noting that the district court – as here – retained tools to manage individual damages issues that might arise at later stages of the litigation. *Id.* at 141.[4]

B. Securities Actions

Courts routinely employ class-wide, formula-based techniques to calculate individual damages in securities class actions. *See* 3 NEWBERG ON CLASS ACTIONS § 10:8 (4th ed. 2006). Class damage determinations in such cases generally require using complex statistical models. *See* John Finnerty & George

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was a plaintiff. The Second Circuit approved a $3 billion settlement in this case, the largest in the history of antitrust law. *Id.*

[4] The court noted that the district court had "a number of management tools" at its disposal, including: 1) bifurcating liability and damage trials, 2) appointing a special master to preside over individual damages proceedings, 3) decertifying the class after the liability phase, 4) creating subclasses, or 5) altering the class. *Id.* at 141.

Pushner, *An Improved Two-Trader Model for Measuring Damages in Securities Fraud Class Actions*, 8 Stan. J.L. Bus. & Fin. 213, 218 (2003). Finnerty and Pushner cite empirical studies showing "that investors trade the common stocks in their portfolios with different intensities," statistical estimates of which impact damages determinations differently.[5] *Id.* at 230-31

Courts regularly approve judgments of aggregate damages awards based on class-wide statistical analyses in securities cases.[6] Given the large numbers of class members involved in many securities class actions and the correspondingly large number of shares and transactions at issue, requiring individual proofs of damages would imperil enforcement of the nation's laws

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[5] Statistical models are necessary because the large volume of trades and the presence of "street name" trades (which obscure the identity of the security owner), make precise individual damages determinations infeasible or impossible. Jon Koslow, *Estimating Aggregate Damages In Class-Action Litigation Under Rule 10b-5 For Purposes of Settlement*, 59 FORDHAM L. REV. 811, 828 (1991). *See also* Michael Barclay & Frank C. Torchio, *A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation*, 64 LAW & CONTEMP. PROBS. 105, 106 (2001).

[6] *See, e.g., Harmsen v. Smith*, 693 F.2d 932, 945-46 (9th Cir. 1982) (aggregate damages need not be proved to a "mathematical certainty"); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977) (approving aggregate damages judgment), *aff'd* 444 U.S. 472 (1980); *In re Melridge, Inc. Sec. Litig.*, 837 F. Supp. 1076, 1080 (D. Or. 1993) (aggregate proof of damages by expert appropriate). *See also In re Scorpion Tech., Inc. Sec. Litig.*, No. C 93-20333 RPA, 1994 WL 774029, at *4 (N.D. Cal. Aug. 10, 1994) (individual issues regarding damages do not defeat class certification in a securities case); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 434 (N.D. Cal. 1985) (same).

against large-scale securities fraud. *Cf. Basic v. Levinson*, 485 U.S. 224, 242 (1988) (approving "fraud-on-the-market" theory in order to prevent individualized proof of reliance from impairing class action enforcement of securities laws).

C. Consumer Actions

Courts have approved of aggregate techniques for computing class-wide damages in numerous consumer class actions.[7]

In *Smilow v. Southwestern Bell Mobile Sys., Inc.*, for example, the plaintiffs alleged that the defendant's practice of charging customers for incoming cellular telephone calls constituted a breach of contract and the violation of various state and federal statutes. 323 F.3d 32, 34-35 (1st Cir. 2003). The defendant argued that the district court erred in concluding that objective data regarding the plaintiffs' loss could be extracted from defendant's computer system and analyzed through a "mechanical process." *Id.* at 40. The First Circuit credited the district

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[7] *See, e.g., In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (insurance rates); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32 (1st Cir. 2003) (cell phone charges); *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978) (credit card charges); *Occidental Land, Inc. v. Super. Ct.*, 134 Cal. Rptr. 388, 393 (Cal. 1976) (developer fraud). *See also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (stating, in a 17-million-member class action against banks and tax preparers for RICO violation, that "Rule 23 allows district courts to devise imaginative solutions to problems created by . . . individual damages issues"). *Cf. Klay v. Humana, Inc.*, 382 F.3d 1241, 1259-60 (11th Cir. 2004) ("Particularly where damages can by computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is not impediment to class certification.").

court's determination and stated that class certification should ordinarily not be denied because damages calculation issues arise. *Id.* at 40 n.8. As in *Smilow*, Wal-Mart's employment records allow mechanical application of a formula in order to generate objective evidence of damages.

D. Human Rights Actions

In *Hilao*, this Court approved statistical sampling as a means of calculating individual damages on a class-wide, aggregate basis for thousands of Filipino victims of torture. 103 F.3d at 782. In conducting the balancing required by the Due Process Clause, this Court reasoned that even if "probabilistic prediction" of aggregate damages somewhat increases the "risk of error in comparison to adversarial adjudication of each claim," that small increase was outweighed by the plaintiffs' substantial interest in obtaining a remedy.[8] *Id.* at 786. This case, therefore, is well within the scope of this Court's holding in *Hilao*.

IV. CONCLUSION

The petition for rehearing en banc should be denied. The panel opinion correctly held that an aggregate approach to damages for the equal pay

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[8] Calculating damages based on statistical sampling has been recognized in other types of cases as well. *See Bell v. Farmers Ins. Exchange,* 115 Cal. App. 4th 715, 759 (Cal. Ct. App. 2004) (overtime compensation); *Sav-on Drug Stores, Inc. v. Super. Ct.*, 17 Cal. Rptr. 3d 906, 918 & n.6, 923 & n.12 (Cal. 2004) (noting with approval the use of statistical sampling in *Bell* and aggregate techniques in other cases). *See also Manual For Complex Litig.* § 11.493 (4th ed.) (use of sampling acceptable in pretrial procedures).

claims was consistent with Rule 23 and the Due Process Clause.

Dated: March 27, 2007

Respectfully submitted,

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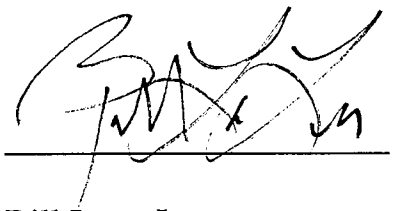
CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P.32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached petition is proportionately spaced, has a typeface of 14 points, and contains 1, 132 words, according to the counter of the word processing program with which it was prepared.

Dated: March 27, 2007



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PROOF OF SERVICE

I hereby certify that on this 27th day of March, 2007, I caused two copies of the foregoing document:

BRIEF OF *AMICI CURIAE* CONSUMERS UNION, NATIONAL CONSUMER LAW CENTER , CENTER FOR CONSTITUTIONAL RIGHTS, AND COMMUNITIES FOR A BETTER ENVIRONMENT IN OPPPOSITION TO FOR REHEARING EN BANC

to be served on the persons listed below by placing two true and correct copies thereof via regular U.S. mail, addressed as follows:

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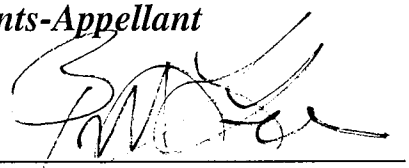

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No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,
Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,
Defendant-Appellant.

On Appeal From The United States District Court
for the Northern District of California
Honorable Martin J. Jenkins, Judge Presiding
D.C. No. C01-02252

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PLAINTIFFS-APPELLEES OPPOSING PETITION FOR REHEARING *EN BANC*

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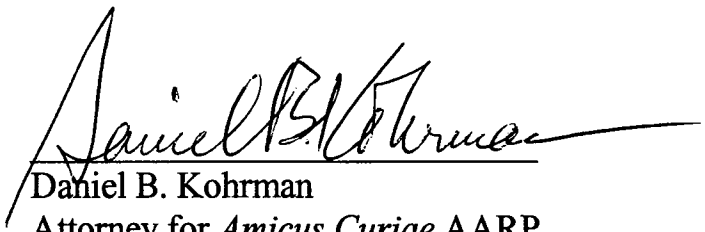
CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to the provisions of Title 29 of chapter 6 of the District of Columbia Code 1951.

Other legal entities related to *amicus curiae* AARP include AARP FOUNDATION, AARP SERVICES, INC., LEGAL COUNSEL FOR THE ELDERLY, AARP FINANCIAL, AARP GLOBAL NETWORK and FOCALYST.



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Attorney for *Amicus Curiae* AARP

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INTEREST OF *AMICUS CURIAE*

AARP is a nonprofit, nonpartisan membership organization of more than thirty-eight million people age 50 or older that is dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and public policies designed to protect their rights and to preserve the legal means to enforce them.

More than half of AARP's members remain active in the work force and most are protected by federal laws prohibiting employment discrimination, such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), which was modeled on Title VII. Consequently, the proper interpretation and application of these statutes, especially in the context of class or collective actions, are of paramount importance to the millions of workers, including older workers, who rely on them to root out, remedy, and deter invidious bias in the workplace. The availability of money damages in the form of class-wide awards of back pay and punitive damages is an important element in Congress' remedial and deterrent scheme embodied in these statutes. In this case, which involves the largest certified class in history, the panel correctly rejected Wal-Mart's assertion, renewed in its Petition for Rehearing *En Banc*, that due process requires individualized hearings to determine the relief available to each class member, a requirement which would not only completely undermine the

purpose of a class action, but also eviscerate the enforcement system designed by Congress to deter, remedy, and eventually eliminate employment discrimination. Contrary to Wal-Mart's claims, the panel's holding that "substantive law does not mandate individualized hearings and that Wal-Mart's Constitutional rights will not be violated if statistical formulas are employed to fashion the appropriate [class-wide] remedy"[1/] is unassailable. The panel's further conclusion that "the district court did not abuse its discretion when it found that the class size does not deprive Wal-Mart of its opportunity to present a defense"[2/] also is undoubtedly correct. Accordingly, AARP files this brief *amicus curiae* to urge this Court to deny Wal-Mart's Petition for Rehearing *En Banc*.

I. INTRODUCTION

When it enacted Title VII, "the Congress took care to arm the courts with full equitable powers" and, in so doing, imposed upon them the "duty to render a decree which [would] *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (emphasis added). Wal-Mart has proffered no

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[1/] *Dukes, et al. v. Wal-Mart Stores, Inc.*, 474 F.3d 1214, 1242 (9th Cir. 2007).

[2/] *Id.* at 1242.

sufficient reason that the full Court should re-examine the panel's conclusion that the district court's certification order here has complied with this mandate.

The Supreme Court has observed that "the primary objective" of Title VII is the "prophylactic one" of "'achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of white [male] employees over other employees.'" *Albemarle*, 422 U.S. at 417, (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)). As the Court has explained, "back pay has an obvious connection with that purpose." *Id.* On the other hand, "[t]he purpose of punitive damages ... is not to compensate, but to punish." *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1068 (2007) (Ginsburg, J., dissenting). They "are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages." *Philip Morris*, 127 S.Ct. at 1066 (Stevens, J., dissenting).

By punishing an employer's policies and practices exhibiting "malice [or] reckless indifference to the federally protected rights" of workers, 42 U.S.C. § 1981a(b)(1), an award of punitive damages supports the salutary purpose of Title VII. When discrimination is proved and malice or reckless indifference is shown,

"[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle*, 422 U.S. at 417-18. This conclusion applies with equal force in class as well as individual Title VII actions. If this Court were to grant Wal-Mart's Petition based on its legally unsupportable due process challenge to the panel's decision affirming the district court's order certifying the class, such a ruling would both undermine the purpose of Title VII and eviscerate the deterrent effect of class actions.

II. THE PANEL CORRECTLY HELD THAT DUE PROCESS DOES NOT REQUIRE INDIVIDUALIZED REMEDY HEARINGS.

The panel correctly rejected Wal-Mart's assertion that *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) *requires* individualized hearings to determine remedies in Title VII pattern or practice cases in order to afford defendants due process. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1238 (9th Cir. 2007). No court has so held and thus, the supposed inter- and/or intra-circuit conflict proffered by Wal-Mart on this issue as a basis for granting its Petition is non-existent.

As the panel pointed out, the teaching of *Teamsters* is that while at the remedy stage of a pattern or practice case the district court "must *usually* conduct additional proceedings ... to determine the scope of individual relief," 431 U.S. at 361 (emphasis supplied), the court "has the discretion to be flexible and to '*fashion*

such relief as the particular circumstances of a case may require to effect restitution.'" *Dukes*, 474 F.3d at 1238 (quoting *Teamsters*, 431 U.S. at 364) (internal citation and quotation marks omitted) (emphasis supplied). Further, the panel pointed out that this Court has held that "where [as here] the employer's conduct would reduce efforts to reconstruct individually what would have happened in the absence of discrimination to a 'quagmire of hypothetical judgments,'" *Id.* at 1239, (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974)), "class-wide relief is appropriate." *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984). Thus, due process does *not* require individualized hearings. Indeed, under the facts of this case they are a wholly inappropriate substitute for class-wide relief.

Similarly unavailing is Wal-Mart's reliance on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990) – a single-plaintiff Title VII "mixed motives" sex discrimination case in which there was no majority opinion – for the proposition that in a class action seeking injunctive as well as monetary relief Title VII affords employer-defendants a "right," Petition for Rehearing *En Banc* (hereinafter "Petition") at 13, to individualized damages hearings. Indeed, in the eighteen years since the *Price Waterhouse* decision, no court has construed the language cited by Wal-Mart to establish such a "right." Petition at 13, (citing 490 U.S. at 244 n. 10,

"we have ... held that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect"). Further, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 , 772 (1976), which the *Price Waterhouse* plurality cited for the aforementioned proposition, the Supreme Court concluded that "[g]eneralizations concerning such individually applicable evidence cannot serve as a justification for the denial of relief to the entire class." *Id.* at 772.

Similarly misplaced is Wal-Mart's reliance on this Court's decision in *Fadhl v. San Francisco*, 741 F.2d 1163 (9th Cir. 1984), an individual sex discrimination case that had "aspects both of rejecting an application for permanent employment and of outright termination," 741 F.2d at 1167, and which this Court simply remanded for further fact-finding. In the context of a class action the *Fadhl* language quoted by Wal-Mart – *i.e.*, "that an award of back pay ... is appropriate only if the discrimination is a but for cause of the disputed employment action ..., 741 F.2d at 1166 – should be read to support not individualized damages hearings, but class-wide relief.[3/]

Additionally, the recent decision of the U.S. Supreme Court in *Philip Morris USA*, 127 S.Ct. at 1062, in which the Court concluded that any defendant

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[3/] Of course, such relief will be warranted only if, in the first instance, the district court finds the Wal-Mart engaged in a pattern or practice of discrimination.

threatened with punitive damages must have "an opportunity to present every available defense" does not support Wal-Mart's claim that it is entitled to individualized hearings. Rather, in context, this language points in a different direction altogether, and one that does not support Wal-Mart's claims. The opinion in *Philip Morris* clearly establishes that the Court's "every available defense" language is intended merely to buttress the Court's holding that the Due Process Clause forbids states from using punitive damages "to punish a defendant for injury that it inflicts upon nonparties...those who are essentially strangers to the litigation." *Id.* at 1063. Since punitive damages may legitimately fall on a defendant for injury it inflicts on a class of plaintiffs who, of course, are all parties to the litigation, the Due Process Clause provides no barrier to class-wide relief.

Wal-Mart's reliance on still other cases that are far off-the-mark shows that it is reduced to grasping at straws in a desperate effort to overturn the panel's sound decision. For example, Wal-Mart asserts incorrectly that the Supreme Court precluded non-individualized punitive damages awards to class members when it held in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003), that such awards "must have a nexus to the specific harm suffered by the plaintiff." As pointed out by the panel, however, unlike this case, *State Farm* "involved an action brought on behalf of *one* individual under *state* law." *Dukes*, 474 F.3d at 1242.

Moreover, the context surrounding Wal-Mart's quotation suggests that the required "nexus" between punitive damages and the *Campbell* plaintiffs is geographical, not legal. Indeed, the Court's very next sentence makes clear that "nexus" refers to the fact that a jury "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* Since this requirement stands on principles of federalism, the due process concerns at issue in *Campbell* arise only when a defendant is saddled with punitive damages in one State based on its otherwise legal conduct in another. This kind of nexus requirement is therefore wholly inapplicable here, where a federal law, Title VII, uniformly governs Wal-Mart's actions in every state.

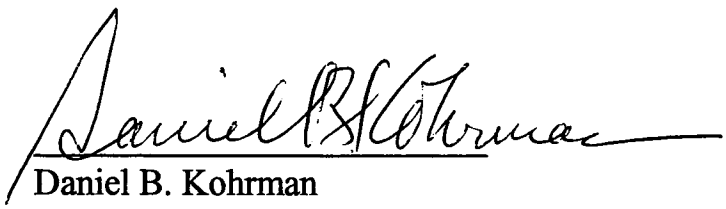
Finally, the due process concerns that caused this Court to conclude in *Beck v. Boeing Co.*, 60 Fed. Appx. 38, 39 (9th Cir. 2003), that the trial court's certification of a class for purposes of determining punitive damages was "premature," all are adequately addressed by safeguards and protections built in to the district court's carefully crafted certification order in this case. Indeed, the panel properly expressed confidence in the continued discretion of the district court, observing that "in the event that Wal-Mart faces a punitive damages award, the district court took – and presumably will continue to take – sufficient steps to

ensure that any award will comply with due process." *Dukes*, 474 F.3d at 1242. *See* Plaintiffs/Appellees' Opposition to Petition for Rehearing *En Banc* at 17.

CONCLUSION

The panel correctly concluded that, contrary to Wal-Mart's arguments, due process does not mandate individualized hearings to determine back pay and punitive damages if it is found to have engaged in a pattern or practice of sex discrimination. Since it is clear, as the panel concluded, that statistical methods may be applied to determine class-wide relief, rehearing would serve only one purpose, unconscionable delay. Wal-Mart's Petition should, therefore, be denied.

Respectfully submitted,



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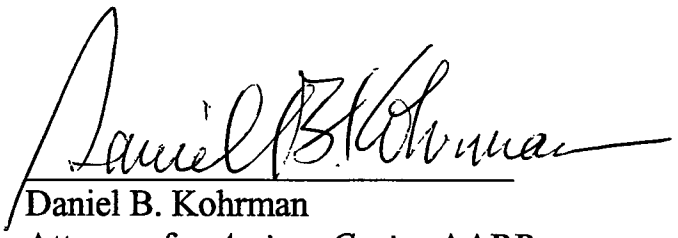
CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 1559 words. See 9th Cir. R. 35-4(a); 9th Cir. R. 40-1(a).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using WordPerfect 12 in 14 Point type, Times New Roman font.

Dated: March 22, 2007



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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2007, an original and twenty-five copies of the foregoing Brief *Amicus Curiae* of AARP in Support of Plaintiffs-Appellees Opposing Petition For Rehearing *En Banc*, were sent via Federal Express service, to the Clerk of the Court for the Ninth Circuit and two copies to counsel listed below:

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Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

vs.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

On Appeal From The United States District Court
For The Northern District Of California

MOTION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF CONSUMERS UNION, NATIONAL CONSUMER LAW CENTER, CENTER FOR CONSTITUTIONAL RIGHTS, AND COMMUNITIES FOR A BETTER ENVIRONMENT

Pursuant to FRAP 29(b), Consumers Union, National Consumer Law Center, Center for Constitutional Rights, and Communities For a Better Environment ("Amici") seek leave to file an amicus brief in opposition to rehearing en banc. The motion should be granted for the following reasons:

1. All parties have consented to the filing of the amicus brief.

2. Amici timely filed an amicus brief on Tuesday March 27, 2007 that was deficient because it failed to include the compliance statement required by FRAP 29(a) that all parties had consented to its filing. The deficiency was inadvertent.

3. On March 28, 2007, the Clerk's Office sent a letter to undersigned counsel that the brief was deficient for the above-stated reason and required that amici submit an original and 50 copies of a motion for leave to file with proof of service on all parties. The letter is attached hereto as Attachment A.

4. This motion is filed immediately upon counsel's receipt of the Clerk's letter.

5. Amici are public interest organizations that participate in litigation to enforce federal rights in the areas of antitrust, securities, consumer, human rights, and environmental law.

6. Amici believe that existing class action enforcement in these areas – as well as employment discrimination – would be significantly impaired if Defendant/Appellant/Cross-Appellee Wal-Mart's argument that the Due Process Clause requires an absolute right to an individualized damage hearing for each class member is accepted. Accordingly, amici respectfully submit that their views may be of assistance to the Court in disposing of the petition for rehearing en banc.

WHEREFORE, the motion for leave to file an amicus brief in opposition to

rehearing en banc for the above-stated reasons by amici Consumers Union, National Consumer Law Center, Center for Constitutional Rights, and Communities For a Better Environment should be granted.

Dated: March 30, 2007

Respectfully submitted,

By: _____

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March 28, 2007

To: Bill Lann Lee, Esq.
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From: Office of the Clerk
By: Ruben Talavera, Deputy Clerk

Re: Receipt of a Deficient Brief of Appellant on March 28, 2007

USCA No. 04-16688 Dukes v. Wal-Mart Stores
04-16720 Wal-Mart Stores Inc. V. Dukes

The referenced brief cannot be filed for the following reason(s):

The proposed amici curiae brief from Consumers Union et al. did not contain a FRAP 29(a) compliance statement. Please see FRAP 29.

The brief may be filed only by order of the court. Please submit a motion for leave to file the amici curiae brief. Please see FRAP 29(b).

Please submit an original and 50 copies of your motion with a proof of service on all parties. **** DO NOT SUBMIT NEW AMICI CURIAE BRIEFS****

The following action has been taken with respect to the brief received in this office:

- *The deficiency is judged to be serious. We cannot file your brief. brief in this office does not toll the time for filing the brief while the defect is being corrected.*

When submitting corrections to your brief or a corrected brief, **please return a copy of this letter.**

PROOF OF SERVICE

I hereby certify that on this 30th day of March, 2007, I caused one copy of the foregoing:

MOTION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF CONSUMERS UNION, NATIONAL CONSUMER LAW CENTER, CENTER FOR CONSTITUTIONAL RIGHTS, AND COMMUNITIES FOR A BETTER ENVIRONMENT

to be served on the persons listed below by sending a true and correct copy thereof via regular U.S. mail, addressed as follows:

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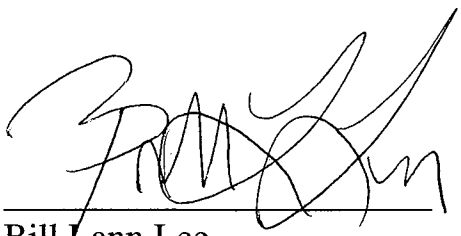

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No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF PUBLIC JUSTICE, PC, AS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANT-APPELLANT WAL-MART STORES, INC.'S PETITION FOR REHEARING *EN BANC*

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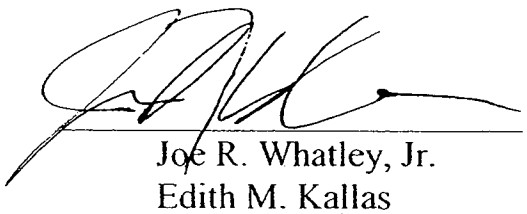
Federal Cases

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26-1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Public Justice, P.C., hereby states that it does not have any parent corporation, nor does it issue stock to the public, and that no publicly held company owns any of the stock of Public Justice.

March 26, 2007

WHATLEY DRAKE & KALLAS, LLC



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STATEMENT OF CONSENT PURSUANT TO FED. R. APP. P. 29(a)

Public Justice has obtained the consent of all parties to file this *Amicus Curiae* brief in support of plaintiffs.

INTEREST OF *AMICUS CURIAE*

This brief is filed on behalf of Public Justice, P.C. (formerly Trial Lawyers for Public Justice, P.C.), a nationwide public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.[1]

Public Justice regularly represents consumers and employees in class actions, and our experience is that the class action device often represents the only meaningful way that individuals can vindicate important legal rights. Because some of the arguments advanced by Defendant and its *amici* in this case would, if adopted, undermine the class action device in important respects, Public Justice has a significant interest in the issues before this Court.[2]

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[1] More information can be found at www.publicjustice.net.

[2] Public Justice also notes that the District Court, pursuant to its authority under *Molski v. Gleich*, 318 F.3d 937, 947-48 (9th Cir. 2003), provided for notice to the class and a right of class members to opt-out. No party raised the issue of the due process rights of the class before this Court, and in light of the notice and right to opt-out, no such issue can fairly be said to exist. Therefore, Public Justice will focus on the due process rights of the Defendant and demonstrate how those rights are not violated.

INTRODUCTION

Public Justice writes to express its position that the inclusion of punitive damages in the certification of this class does not violate the due process rights of the Defendant, Wal-Mart Stores, Inc. ("Defendant" or "Wal-Mart") for the following reasons:

First, contrary to Defendant's arguments, punitive damages will *not* be recovered by any class member who has not been harmed by Defendant's illegal conduct;

Second, there is no need for individualized determinations of the relationship between the harm caused by Defendant to individual class members and the amount of any punitive damages awarded; and

Third, it is appropriate, when determining the proper amount of punitive damages, for the fact-finder to consider the potential or likely harm, as opposed to the actual harm, caused by Defendant to the plaintiff class.

Moreover, the question of whether any punitive damages award that might be granted in this case comports with due process is prematurely asked at this stage of the litigation. An appellate court can more ably make such an evaluation after an award is granted, with the benefit of a fully-developed record and the ability to examine the amount of the actual award in light of the facts as proven at trial.

ARGUMENT

I. Non-Victims of Defendant's Conduct Will Not Recover Punitive Damages Under the Procedure Approved by the District Court

Wal-Mart argues that the District Court established a procedure that allows non-victims to recover punitive damages. That is simply wrong. The District Court ruled that any award of punitive damages would be limited to plaintiffs who were "personally harmed" by Wal-Mart's conduct:

> First, courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed toward the class. Second, as Plaintiffs propose here, courts can limit recovery of any punitive damages to those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct. Finally, courts also can ensure that any punitive damage award is allocated among the lost pay class in reasonable proportion to individual lost pay awards. Accordingly, this Court is satisfied that procedures exist that permit Plaintiffs' punitive damage claim to be managed in a manner fully consistent with the principles of *State Farm*.

Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 172 (N.D. Cal. 2004)("*Dukes I*"). The majority of the Panel was satisfied with this procedure when it affirmed the inclusion of punitive damages in the class certification. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1236-38 (9th Cir. 2007)("*Dukes III*"). Therefore, the assertion that non-victims will recover punitive damages under the District Court's decision – a premise that forms the basis of Wal-Mart's entire argument – is a figment of Wal-Mart's imagination.

II. Due Process Does Not Require Individualized Consideration of Punitive Damages with Respect to Each Class Member

Wal-Mart and its *amici* ask this Court to find that there must be individualized determinations with respect to each class member before there can be a punitive damage award with respect to the class. No court of which Public Justice is aware has held or even suggested that this is the law.

First, the cases relied upon by Defendant, including *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007), are individual cases, comparing the award of punitive damages to the potential harm to the individual plaintiff. Here, the appropriate comparison is to the potential harm to the plaintiff class.

Moreover, Wal-Mart's focus on harm to individual class members is misplaced, as punitive damages address the degree of wrongful conduct of the defendant, not the degree of harm to any individual caused by that conduct. As the Supreme Court has repeatedly recognized, compensatory damages and punitive damages serve different purposes: while compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered," punitive damages "serve a broader function; they are aimed at deterrence and retribution." *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, (2003) (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (punitive damages focus on the conduct of the defendant and the need to deter future corporate misconduct). The

questions of individual injury and punitive damages are thus subject to separate, very different analyses: "A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation." *Cooper Industries,* 532 U.S. at 432. Indeed, the fact that punitive damages may be tied to the *potential* harm that a defendant's conduct *may* cause underscores the distinction between compensatory and punitive damages.

Moreover, while there must be a "nexus" between the punitive damages and the actual or potential harm that Defendant's conduct caused or may cause the plaintiff class under *Philip Morris*, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of *the defendant's conduct.*" *State Farm*, 538 U.S. 408 (emphasis added)(citing *BMW, Inc. v. Gore,* 517 U.S. 559, 575 (1996)). Accordingly, Defendant's argument that an individualized inquiry into the harm suffered by each class member must precede a determination of punitive damages is unavailing.

Defendant's reliance on *Philip Morris* and *State Farm* for this argument is misplaced. Neither of these opinions supports a conclusion that a punitive damages award to a class requires an individualized inquiry into the actual harm suffered by each class member. In *Philip Morris*, the Supreme Court concluded that, in an *individual* action brought by the estate of a smoker against a cigarette

manufacturer, the jury had improperly based its punitive damages award, not on the actual or potential harm to the plaintiff, but on the potential and actual harm to thousands of other smokers not a party to the action. It was this punishment of conduct directed at strangers to the litigation, and against whom the defendant had not had a chance to defend itself, that was problematic for the *Philip Morris* Court. In this *class action*, the District Court has noted that "courts can ensure that any award of punitive damages to the class is based solely on evidence of conduct that was directed *toward the class.*" *Dukes I* at 172. As Defendant will have ample opportunity to defend itself against the claims of the class, the concern raised in *Philip Morris* does not pertain. The District Court's other precautions – that only "those class members who actually recover an award of lost pay, and thus can demonstrate that they were in fact personally harmed by the defendant's conduct" will be eligible for a share of punitive damages, and that the allocation of punitive damages to individual class members will be "in reasonable proportion to individual lost pay awards," *id.,* further demonstrate that, unlike in *Philip Morris*, any punitive damages award here will relate solely to conduct causing harm and potential harm to parties to the action, rather than "harm caused strangers." 127 S. Ct. at 1064.

Similarly, in *State Farm*, another individual action, the Court's concern was that the jury had "awarded punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm." 538 U.S. at 422.

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff*, not for being an unsavory individual or business.

Id. at 422-423 (emphasis added).[3] The District Court's plan does not run afoul of this legal premise, as any punitive damages awarded here will address *only* the wrongful conduct that harms and threatens to harm the class – Defendant's discriminatory employment practices – and not any other wrongful conduct Defendant may engage in as part of its general business practices.

III. Permitting the Exemplary Damages Phase to Precede A Determination of Actual Losses Is Consistent With Prior Decisions in This and Other Circuits

The procedure established by the District Court is similar to the one approved by this Court in *Hilao v. Estate of Marcos*, 103 F.3d 767, 780-81 (9th Cir. 1996). There, this Court approved the district court's decision to allow the exemplary damages phase of the trial to precede the compensatory damages phase. 103 F.3d at 782. Likewise, in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468,

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[3] While Wal-Mart's Amicus Equal Employment Advisory Council quotes *State Farm* as requiring that punitive damages be determined only after proof of liability to individual plaintiffs in a Title VII case (Letter Brief of Equal Employment Advisory Council at 4), the quoted language does not appear in that opinion, and indeed, *State Farm* dealt neither with a class action *nor* a Title VII case.

474-75 (5th Cir. 1986), the Fifth Circuit also affirmed a district court's plan for trial on punitive damages before actual damages in a class action suit. As these decisions make clear, allowing the punitive damages phase to precede a determination of actual losses is not an abuse of discretion, and does not violate due process.

As in *Hilao*, the liability stage of the litigation will provide a check on the punitive damages award that ensures that Defendant will be punished only for conduct that actually harmed class members. During that phase, the District Court will be able to determine back pay and front pay liability to the class. The District Court will then be able to review the jury's punitive damages award to determine whether it is excessive under *Gore*. *See Hilao*, 103 F.3d at 782.

Moreover, the law is clear that a jury may properly consider the "potential" or "likely" harm that may be caused by Defendant to the plaintiff class in determining an award of punitive damages, and that determination can be made by the jury without the benefit of any analysis of the actual harm to individual class members. *See, e.g., Philip Morris*, 127 S.Ct. at 1063 (it is proper to consider the "*potential* harm the defendant's conduct could have caused.") (emphasis in original); *State Farm*, 583 U.S. at 424 (same); *see also Hilao*, 103 F.3d at 780 (punitive damages depend in part upon "*the harm likely to result* from the defendant's conduct...") (*quoting TXO Production Corp. v. Alliance Resources*

Corp., 509 U.S. 443, 458 (1993)) (emphasis in original); *Simon II*, 407 F.3d at 128 (court should consider "*potential harm* to the plaintiff class") (emphasis added).

For all of these reasons, Defendant's objections to the District Court's approved procedure are misplaced.[4]

IV. Any Evaluation of Due Process Relating to the Determination of Punitive Damages Should Be Conducted Post-Trial

In any event, Defendant's due process arguments are premature for two important reasons. First, the District Court has stated that it retains the authority to revisit the issue of certification and to modify it "as circumstances require." *Dukes I*, 222 F.R.D. at 187. Based on a voluminous record and rigorous analysis, the District Court has determined at this time that all of the requirements for consideration of a punitive damage award can be satisfied. If circumstances change, the District Court remains in the best position to make any such

[4] The dissent criticized the procedure by which punitive damages would be determined by the jury because "there will never be an adjudication of compensatory damages," and "the allocation of back and front pay will follow the jury determination of punitive damages." *Dukes III*, 474 F.3d at 1248. But first, in Title VII cases, an award of punitive damages may be warranted, even where the jury does not award compensatory damages. *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 357-59 (2d Cir. 2001); *Tisdale v. Fed. Express Corp.*, 415 F.3d 516, 534-35 (6th Cir. 2005). They can instead be tied to nominal or back pay damages. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995); *U.S. EEOC v. W&O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000). Moreover, there is no requirement that back pay be calculated *before* the jury determines the amount of punitive damages. *Corti v. Storage Technology Corp.*, 304 F.3d 336, 340 (4th Cir. 2002).

determination as the case proceeds, and indeed, the District Court has indicated it intends to continue considering this issue as the case continues to develop.

Moreover, as is demonstrated in all of the Supreme Court decisions addressing punitive damages and due process cited herein, the question of whether a punitive damages determination violates due process is much better addressed by an appellate court when it has a fully-developed record and can compare the punitive damages award to Defendant's wrongful conduct and the potential harm to a plaintiff class as demonstrated at trial.

CONCLUSION

For all of the foregoing reasons, as well as the reasons stated in Plaintffs' Opposition to Defendant's Petition for Rehearing *En Banc*, the petition for rehearing with respect to the punitive damages issue should be denied.

March 26, 2007

Respectfully submitted,

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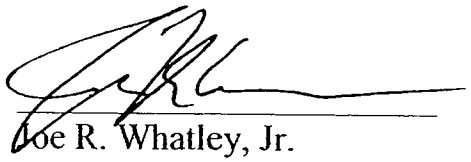
CERTFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 points or more and contains 2100 words or less.

March 26, 2007



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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* THE RETAIL INDUSTRY LEADERS ASSOCIATION IN SUPPORT OF DEFENDANT/APPELLANT/ CROSS-APPELLEE WAL-MART STORES, INC.'S PETITION FOR REHEARING *EN BANC*

January 15, 2008

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RILA'S INTEREST

The Retail Industry Leaders Association ("RILA") is the world's leading alliance of retailers, product manufacturers, and service providers, representing approximately 600 companies worldwide, including many of the largest retail employers in the United States. RILA's members together account for more than $1.5 trillion in annual sales, provide millions of jobs, and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

This case involves questions of exceptional importance to RILA's members. The Court's 2-1 panel decision of December 11, 2008 ("Decision") establishes criteria for class certification likely to adversely affect large retailers who appropriately allow local, discretionary decisionmaking while at the same time exercising centralized employee oversight.

The Decision erroneously allows certification of massive nationwide class actions stemming from employers' use of subjective criteria in connection with challenged employment decisions, when combined with (1) any kind of centralized employer policies; (2) vague, inconclusive expert testimony about gender stereotyping; (3) unsuitably aggregated statistical evidence; and (4) insignificant anecdotal evidence. These types of certifications immediately generate momentous pressure on affected employers completely unrelated to the merit of

the lawsuit. When the potential loss is stratospheric, a rational defendant will settle even the most unjust claim. Such behemoth class actions create the illusion of justice while in fact lining the pockets of lawyers rather than making true victims whole.

This unprecedented certification presents issues of grave consequence to RILA members, and deviates from standards applied by this Circuit and other United States Courts of Appeals under the commonality and typicality tests of Federal Rule of Civil Procedure 23(a). It should be reheard *en banc*.

All parties have consented to RILA's filing of this brief.

ARGUMENT

I. EFFECTIVE PERSONNEL MANAGEMENT BY RILA MEMBERS DEMANDS DECENTRALIZED, DISCRETIONARY DECISIONMAKING

The panel's holding that Wal-Mart's decentralized, subjective decisionmaking may serve as a "policy" subject to class challenge discourages the use of legitimate practices that allow a retailer effectively to administer a large number of stores. It is the norm in the retail industry to manage based on centralized policies and decentralized, store-level, case-by-case decisionmaking. Retailers rely on in-store managers, who have the best information about strengths

and weaknesses of employees under their supervision, as well as local labor markets, to make critical personnel decisions such as those involving pay and promotion.

Courts uniformly recognize that employers must be allowed to exercise their good faith business judgment in operating their enterprises, without second guessing by courts acting as "super personnel departments." *See N. L. R. B. v. Harrah's Club*, 337 F.2d 177, 180 (9th Cir. 1964). Moreover, "leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *see also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1285 (9th Cir. 2000) (the "relevance [of subjective decisionmaking] to proof of discriminatory intent is weak") (internal citations omitted). "Indeed, in many situations [subjective criteria] are indispensable to the process of selection in which employers must engage." *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986).

The Decision sets the bar for commonality and typicality so low that it interferes with the right of retailers to utilize invaluable subjective performance criteria (such as attitude or initiative) in employment decisions, and to promote a strong corporate culture, to effectively manage their enterprises. Judicially-

imposed standards for class certification should not penalize companies who exercise business judgment to implement valid organizational structures.

II. THE DECISION CONTRADICTS APPELLATE COURT JUDGMENTS DISALLOWING CERTIFICATION BASED UPON DECENTRALIZED SUBJECTIVITY IN MULTIPLE FACILITIES

In order to conclude that Wal-Mart's decentralized and subjective pay and promotion decision making process served as a common practice sufficient to fulfill the commonality and typicality requirements of Rule 23(a), the panel had to find that this process—as implemented by thousands of different decisionmakers, in 3,400 different stores, to approximately 170 different job classifications — "demonstrably affect[ed] all members of [the] class in substantially, if not completely, comparable ways." *Stastny v. So. Bell Tel. Co.*, 628 F.2d 267, 273 (4th Cir. 1980). Previous decisions of this and other appellate courts have recognized the virtual impossibility of demonstrating such a common "policy" of decentralized subjectivity when applied to numerous facilities or job types in companies far smaller than Wal-Mart.

In *Grosz v. Boeing Co.*, 136 Fed. Appx. 960 (9th Cir. Mar. 8, 2005), a panel of this Court explained that an "excessive subjectivity" class action may fail for lack of commonality when numerous job types are included in the class, given that "[d]etermining what level of subjectivity is appropriate in making employment

decisions depends greatly on what job classification is being evaluated." 136 Fed. Appx. at 962 ("diversity within job classifications, with their varying degrees of complexity and analysis, affects the determination of whether the alleged discriminatory practice, excessive subjectivity, is discriminatory or a legitimate business practice"); *see also Rhodes v. Cracker Barrel*, No. Civ.A. 4:99-CV-217-H., 2002 WL 32058462, at *58 (N.D. Ga. Dec. 31, 2002) (collecting 20 decisions denying certification where plaintiffs brought discrimination claims attacking decentralized decisionmaking).

Likewise, the Sixth Circuit has noted that where "class certification [is] sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes." *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004). As pointed out by the Fourth Circuit, although "evidence of subjectivity in employment decisions may well serve ... to bolster statistical proof of class-wide discrimination in the very facility where the autonomy is exercised, it cuts against any inference for class action commonality purposes" in a case involving multiple facilities. *Stastny*, 628 F.2d at 279; *see also Cooper v. So. Co.*, 390 F.3d 695, 716 (11th Cir. 2004) (finding a lack of commonality where the challenged compensation and promotion decisions affecting each of the named plaintiffs "were made by individual managers in disparate locations, based on the individual

plaintiffs' characteristics, including their educational backgrounds, experiences, work achievements and performance in interviews...").

The panel's holding ignores the inherent contradiction in finding commonality in a "policy" of allowing various individual supervisors to rely on facts particular to the affected employees in making personnel decisions. As the District of Columbia Circuit recently explained, "[e]stablishing commonality for a disparate treatment class is particularly difficult where . . . multiple decisionmakers with significant local autonomy exist." *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006). *See also Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006) ("the geographic dispersal and decentralized organization of the [defendant's] loan offices *cut[] against* any inference for class action commonality") (emphasis added); *Cooper*, 390 F.3d at 715 ("[w]here, as here, class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations, courts have frequently declined to certify classes"). The concerns expressed in these decisions regarding the inappropriateness of class certification in light of variations by job type, facility, and geographic location are magnified in a case of the colossal scope at issue here.

III. OTHER EVIDENCE CONSIDERED BY THE PANEL DOES NOT ESTABLISH COMMONALITY OR TYPICALITY

The panel pointed to excessive subjectivity in combination with four other categories of evidence to support its decisions on commonality and typicality: (1) factual evidence, (2) expert opinion, (3) statistical evidence, and (4) anecdotal evidence. *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720, 2007 WL 4303055, at *5 (9th Cir. Dec. 11, 2007). Each of these factors fails to transform subjective decisionmaking into a common policy sufficient for class certification under Rule 23(a).[1]

First, the panel found that Wal-Mart's "centralized company culture and policies" provided the necessary "nexus" between the "policy" of subjectivity and plaintiffs' statistics to demonstrate commonality. *Id.* at * 9. However, it is

[1] The cases cited by the panel in footnote four are inapposite. None of these cases involved discretionary decisionmaking by individual managers at thousands of facilities for every job position over a large span of years. In addition, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 287-88 (2d Cir. 1999), *overruled on other grounds by In re Initial Public Offering Sec. Litig.* ("*IPO*"), 471 F.3d 24, 39-42 (2d Cir. 2006) was based on a legal standard that has been repudiated by the Second Circuit, and thus it has no continuing validity; *Staton v. Boeing Co.*, 327 F.3d 938, 955 (9th Cir. 2003) was a settlement class, and thus did not involve the intractable manageability problems that must be considered when a case is certified for trial; and *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993) and *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir. 1986) were single- or dual-facility cases that did not present either the wide range of discretionary decisionmaking or the inherent conflicts within the class that exist in this case.

undisputed that the evidence of Wal-Mart's "centrally controlled culture" did not include practices addressing the challenged pay and promotion decisions. The "culture" at issue involved practices universally acknowledged as appropriate business management: new employee orientation, training on diversity, operations, and customer service, daily and weekly meetings addressing corporate culture, employee transfers between stores, and a central information technology system allowing for monitoring of each retail store's operations. ER 1157-1158.

The panel's determination that any type of centralized oversight leads to a class certification encourages retail employers to change their policies in ways that would undermine the goals of the employment discrimination laws. A reduction in centralized monitoring of company practices removes safeguards that serve to foster equal employment opportunities for women and minority employees. Under the panel's twisted logic, a company's nationwide equal employment opportunity program serves as evidence of a uniform policy allowing a class action discrimination suit.

Second, Plaintiffs' sociology expert, Dr. Bielby, opined that the discretionary nature of Wal-Mart's challenged decisionmaking renders Wal-Mart "vulnerable to gender bias" (ER 296). This testimony is not sufficiently probative to support class certification. *Compare Price Waterhouse v. Hopkins*, 490 U.S.

228, 235-36 (1989) (allowing social psychologist's testimony that the defendant was "*likely influenced* by sex stereotyping") (emphasis added). Plaintiffs' expert admitted that he had no studies to support his theories and no opinion on how gender stereotypes play a role in the challenged employment decisions at Wal-Mart. ER 1127, citing Bielby Dep. at 87-88; 161-162; 370-371. Further, although he asserts that Wal-Mart should have been more vigilant in its efforts, Dr. Bielby acknowledged that Wal-Mart utilized many of the practices that he believes are useful to combat discrimination. ER 1161, citing Bielby Decl. ¶¶ 52, 54, 62. This expert opinion fails to meet the standards under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and cannot support class certification.

Third, the panel believed that Plaintiffs' expert Dr. Drogin's use of aggregated statistics was "reasonable" based on his assertion that a store-by-store analysis would not capture "(1) the effect of district, regional, and company-wide control over Wal-Mart's uniform policies and procedures; (2) the dissemination of Wal-Mart's uniform compensation policies and procedures resulting from the frequent movement of store managers; or (3) Wal-Mart's strong corporate culture." *Dukes*, 2007 WL 4303055, at *7. This explanation rests upon erroneous conclusions regarding the nature of the "control" exercised by Wal-Mart, as explained above; moreover, aggregated statistics simply cannot provide persuasive

notion that discrimination was the employer's nationwide standard operating procedure.)

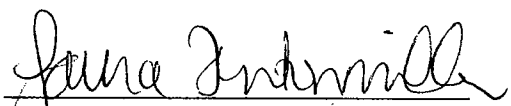
Finally, Plaintiffs' "anecdotal evidence" consists of declarations from 113 class members, representing less than 1/100th of one percent of the class of at least 1.5 million women and only about three percent of Wal-Mart's 3,400 stores. Even if these individuals have valid claims, systemic discrimination of the scope claimed in this putative class cannot reasonably be inferred from their experiences.

CONCLUSION

For the reasons set forth above, this class action certification violates Rule 23 class action criteria and should be reheard *en banc*.

January 15, 2008

Respectfully submitted,



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NO. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE EMPLOYERS GROUP IN SUPPORT OF WAL-MART STORES, INC.'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Employers Group certifies that there is no corporate parent of the Employers Group, and no publicly held corporation owns 10% or more of the Employers Group's stock.

STATEMENT OF INTEREST AND MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

The Employers Group (formerly known as "The Merchants and Manufacturers Association" and "The Federated Employers") respectfully moves for permission to file this letter brief as amicus curiae in support of Defendant-Appellant Wal-Mart Stores, Inc.'s petition for rehearing en banc. Plaintiffs-Appellees have granted their consent to the submission of this amicus curiae brief by the Employers Group.

The Employers Group is one of the nation's oldest and largest human resources management associations, representing nearly 3,500 companies of all sizes in virtually every industry. These constituent companies employ approximately 3 million individuals. The Employers Group respectfully submits that its collective experience in employment matters, including its appearance as amicus curiae in federal and state courts over several decades, gives it a unique perspective on the short- and long-term policy implications of the legal issues under consideration in this case, particularly the likely effects of the interpretation by the district court and the panel majority of Federal Rule of Civil Procedure 23.

In addition to filing an amicus brief in support of Wal-Mart's petition for rehearing en banc of the panel's initial opinion, the Employers Group has been involved as amicus curiae in many significant cases, including, but not limited to:

Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003); *Oracle Corp. v. Falotti*, 319 F.3d 1106 (9th Cir. 2003); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997); *Rozay's Transfer v. Local Freight Drivers*, Local 208, *Int'l Bros. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 850 F.2d 1321 (9th Cir. 1988); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *Guz v. Bechtel Nat., Inc.*, 24 Cal. 4th 317 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000); *Carrisales v. Dep't of Corrections*, 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8 Cal. 4th 121 (1998); *Hunter v. UpRight, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990); *Newman v. Emerson Radio Corp.*, 48

Cal. 3d 973 (1989*); Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988); and *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379 (1987).

RULE 35 STATEMENT

Amicus Curiae agrees with and incorporates by reference the Rule 35 Statement submitted by Defendant-Appellant Wal-Mart Stores, Inc. in its petition for rehearing en banc of January 8, 2008. The petition for rehearing ably demonstrates how the panel's decision misapplies the requirements of Federal Rule of Civil Procedure 23 in ways that conflict with previous decisions of the Supreme Court, this Circuit, and other Circuits and why that decision creates issues of Circuit-wide—indeed, nationwide—importance that demand a rehearing en banc. The focus of this amicus brief is the panel majority's treatment of the typicality requirement, which it effectively eviscerated from Rule 23 in approving the certification of an unimaginably sprawling, diverse, and *untypical* class of over 1.5 million current and former employees.

ARGUMENT

I. A CLASS MAY NOT BE CERTIFIED WITHOUT SATISFYING ALL OF THE REQUIREMENTS OF RULE 23(a)

The requirements of Rule 23(a) ensure that class action representatives are "part of the class and 'possess the same interest and suffer the same injury' as the class members." *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). The Supreme Court, in turn, has emphasized the "need to carefully apply the

requirements of Rule 23(a) to Title VII class actions," and has noted the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad." *Falcon*, 457 U.S. at 161. Because of these concerns, a court is obligated to undertake a "rigorous analysis" to ensure "that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161; *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).

This "rigorous analysis" necessarily entails some inquiry into the underlying merits of the case, including how the claims and the affirmative defenses to them will be tried, even though class certification is, of course, not a decision on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). As the Supreme Court has explained, a "class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon*, 457 U.S. at 160. "Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

Like the majority's initial effort, the revised opinion fails to apply this requisite rigorous analysis. In their initial call for rehearing en banc, Wal-Mart and its *amici* correctly criticized the panel majority's refusal to consider any evidence relevant to certification that also intertwines with the merits. While the majority now concedes in a footnote that courts must "'consider evidence which goes to the

requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case.'" Slip op. at 16219 n.2 (quoting *Hanon,* 976 F.2d at 509) (alterations in original), the opinion's analysis still fails to follow this binding circuit precedent. The majority still repeatedly invokes the pre-merits posture of the case to evade dispositive challenges to class certification. It is little wonder, therefore, that by the time the opinion reaches the issue of typicality, it has again already assumed that issue away.[1]

II. RULE 23(a)(3) AND THE MAJORITY'S RULING ON TYPICALITY

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This typicality requirement serves as a guidepost for "determining whether...maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately represented in their absence." *Falcon,* 457 U.S. at 158 n.13.

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[1] Such runaway certification is very unfair to employer-defendants. Granting class status "can propel the stakes of a case into the stratosphere," putting "considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Rule 23(a) is thus critical for ensuring that class action lawsuits do not become tools to "wring settlements from defendants whose legal positions are justified but unpopular." *Id.*

The requirement of typicality can intertwine with Rule 23(a)(2)'s commonality requirement, for if there are no common questions of law or fact, it is hard to see how any named plaintiff can be typical of the class she seeks to represent. Commonality alone, however, cannot satisfy Rule 23(a)(3), because a set of named plaintiffs may insufficiently represent a group with common interests if the claims and/or defenses applicable to the named plaintiffs are not typical. *See, e.g.*, *Sperling v. Donovan*, 104 F.R.D. 4, 6–7 (D.D.C. 1984).

Here, the majority disposes of the "mandatory" typicality requirement with an afterthought discussion of less than two pages. As in its original opinion, it does so after first assuming away all difficult certification issues by focusing solely on the existence of the "alleged common practice—e.g., excessively subjective decision-making in a corporate culture of uniformity and gender stereotyping," slip op. at 16231, without giving any weight to the individualized defenses that Wal-Mart must be allowed to mount to the claims of each class member. The majority then concludes with the dubious assurance that "because the range of managers in the proposed class is limited to those working in Wal-Mart's stores, it is not a very broad class." *Id.* at 16232.

With this case involving "the largest certified class in history," *id.* at 16241—comprising over 1.5 million employees in 3,400 stores involving at least 11 types of employment positions in each store—one has to ask what the majority

would consider a very broad class. The majority shrugs off the fact that no named plaintiff held a position above low-level in-store management, even though the claims are also purportedly brought on behalf of employees holding various other positions; pays little attention to the potential conflicts among the class; ignores potential defenses unique to certain named plaintiffs; and gives no consideration as to how the unique defenses of over one million individuals could feasibly be adjudicated in the class context. *Id.* at 16232–33.

The majority makes much of this Court's dicta about "the 'permissive' typicality requirement," *id.* at 16232, but effectively erases "requirement" from that phrase (whatever its merits). Any analysis, however, approaching "rigorous," *Falcon*, 457 U.S. at 161, would reveal that the requirement of typicality is not satisfied here. Rule 23(a)(3) requires that a named plaintiff "bridge" the "wide gap" between (a) the plaintiff's individual claim of discrimination and allegations of a company's discriminatory policies, and "(b) the existence of a class of persons who have suffered the same injury" such "that the individual's claim will be typical of the class claims." *Id.* at 157–58. The majority's approach allows the plaintiffs to bridge that gap simply by alleging a general policy or practice of discrimination, regardless of how the claims and circumstances of particular individuals relate to the broader class or how those claims would be tried. But given the inordinate size and complexity of this class, certification based on broad

generalization runs counter to the Supreme Court's warning that "Title VII prohibits discriminatory *practices*, not an abstract policy of discrimination." *Id.* at 159 n.15 (emphasis in original). The majority ignores this warning. Instead, although recognizing that plaintiffs had failed to identify "a specific discriminatory policy promulgated by Wal-Mart," slip op. 16222, it nonetheless allows certification under a "social framework analysis" that merely hypothesizes that Wal-Mart is "vulnerable" to gender bias, *id.* at 16221.

Tellingly, other Courts of Appeals have refused to find typicality where "class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations." *Cooper v. Southern Co.*, 390 F.3d 695, 715 (11th Cir. 2004) (affirming denial of class certification). *See also Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619 (N.D.Ga. 2003). Adhering to *Falcon*, the Sixth Circuit, for example, recently rejected a district court's conclusion that the mere presence of "a common question of law regarding...a policy of discrimination against women satisfied...typicality." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006). Addressing a discrimination suit regarding a single facility, *Reeb* states that Rule 23(a)(3) requires the named plaintiffs to "represent an adequate cross-section of the claims asserted by the rest of the class" and demands that judges "examine the

incidents, people involved, motivations, and consequences regarding each of the named plaintiffs' claims." *Id.*

If ever a case demanded such careful examination, this is it. Wal-Mart operates over 3,400 stores. Each store has over 50 departments, including semi-autonomous "specialty departments" that operate as stores within the stores. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145–46 (N.D. Cal. 2004). The district court identified at least 11 different employment categories at the store level, *see id.* at 146, and found that district, store, and department-level managers had broad discretion in setting employee compensation and promotion. *See id.* at 146–48; 148–49. Against this factually diverse background, Wal-Mart presented the district court unrebutted expert evidence showing no statistically significant gender disparity at over 90% of its stores and no discernable class-wide pattern of promotion decisions affecting women. Wal-Mart Merits Br. at 23–24. This statistic itself suggests a fundamental lack of typicality, as any disparity would be confined to fewer than 10% of all stores. *See Beck v. Boeing Co.*, 203 F.R.D. 459, 464 (W.D. Wash. 2001), *aff'd in relevant part*, 60 Fed. Appx. 38 (9th Cir. 2003) (statistical "dissimilarities across geographic locations" defeat typicality). And this statistic, and the *absence* of discrimination it so strongly suggests, is underscored by the fact that only two of the named plaintiffs are current Wal-Mart employees, and that more than half of the class consists of former employees. The multitude

of former employees are *atypical* of current employees because they have no interest in achieving injunctive relief and in fact lack standing to seek it. *See Bates v. UPS*, 2007 U.S. App. LEXIS 29870, at *14 (9th Cir., Dec. 28, 2007) *(en banc)* ("the claimed threat of injury must be likely to be redressed by the prospective injunctive relief").[2]

The six class representatives here do not approach a cross-section of the 1.5 million women who have worked in the many different capacities at Wal-Mart's many stores. None rose above lower-level store management, only one was a salaried employee, and, as Judge Kleinfeld points out in his dissent, the six named plaintiffs' claims "are not even typical with respect to each other," let alone the millions of women in the class. Slip op. at 16252.[3] For all the attention the panel majority gives to the representatives' actual claims, plaintiffs' counsel might as well have presented an anonymous affidavit alleging a common practice of discrimination. *See* slip op. at 16231–32.

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[2] The fact both Wal-Mart *and* the plaintiffs have filed for petitions for rehearing arguing that the majority's decision conflicts with *Bates* is itself a strong indication that this case raises class certification issues of sufficient importance to warrant review and clarification by the en banc Court.

[3] Indeed, named plaintiff Betty Dukes' original EEOC charge alleged *only* race discrimination. *See* ER 29.

These facts stand in sharp contrast to *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), upon which the panel majority so heavily relies, *see* slip op. at 16231. There, the named plaintiffs represented every state and every type of vehicle involved. 150 F.3d at 1020. The liability case was simple and identical for each plaintiff—a defective car part. And the remedies sought were limited and uniform: defect-free latches and compensation for actual non-personal injuries. *Id.* Certification here presents far more daunting challenges on both liability and damages, but the majority engaged in little—and certainly not rigorous—typicality analysis. *See* slip op. at 16231–32; *compare Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (named plaintiffs "include a very broadly selected cross-section of the different categories of Boeing employees").

Even if the six class representatives constituted an adequate cross-section of the absent class members, the majority fails to assess with any rigor the "'danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). Three of the five named hourly employees were either fired, disciplined, or demoted for alleged infractions at work, *see* Wal-Mart Merits Br. at 4–7, creating the very danger of which *Hanon* warned, 976 F.2d at 508.

The majority also fails to appreciate that conflicts between named class representatives and the class as a whole can be fatal to certification. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). Five of the six named plaintiffs held managerial jobs in some capacity, see Wal-Mart Merits Br. at 4–7, raising the prospect that they could be cross-examined about whether they engaged in discriminatory conduct themselves and Wal-Mart could potentially be held liable for employment decisions by the named plaintiffs themselves. Further, as Judge Kleinfeld explained, named plaintiffs subject to defenses have greater incentive to settle, those who no longer work at Wal-Mart have less incentive to pursue injunctive relief benefiting the rest of the class, and none of the plaintiffs represent the interests of women who have been promoted and thus have "interests in preserving their own managerial flexibility." Slip op. at 16253. Concerns about class conflicts in this case are quite real. Plaintiffs' counsel has described the amended decision—which now potentially *excludes* what he estimated to be hundreds of thousands of his clients from the class—as a "welcome development," *Ninth Circuit Revises Wal-Mart Ruling, Possibly Chipping Away Some Class Members*, WORKPLACE LAW REPORT (Dec. 12, 2007) (available at http://emlawcenter.bna.com/pic2em.nsf/id/BNAP-79YMQF?OpenDocument) (last accessed on Jan. 16, 2008), an admission that recalls Judge Kleinfeld's prescient

warning that fair and vigorous representation of every member of this sprawling, conflict-ridden class will be simply impossible, *see* slip op. at 16258–59.

The panel majority simply ignores such concerns, finding typicality satisfied so long as "the named plaintiffs [are] members of the class they represent." *Id.* at 16231.[4] The panel majority mistakes necessity for sufficiency: as this case demonstrates, named plaintiffs can be a *members* of a class, but their distinct claims or unique vulnerability to affirmative defenses can—and, in this case, assuredly *do*—preclude them from being *typical*. A proper, rigorous analysis of Rule 23(a) must at least address these concerns. The panel majority does not.

CONCLUSION

The majority's treatment of typicality is but one of many troubling aspects of the panel opinion. This unprecedented decision is wrong as a matter of law and will, if left undisturbed, threaten substantial harm to the rights and welfare of employers, employees, and consumers across the nation. This Court should therefore grant rehearing en banc.

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[4] Tellingly, the majority substitutes this language for the more detailed—and demanding—test of "'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.'" *Compare* slip op. at 16231 *with Dukes v. Wal-Mart, Inc.*, No. 04-16688, slip op. at 1358 (9th Cir., Feb. 6, 2007).

Dated: January 17, 2008

Respectfully submitted,

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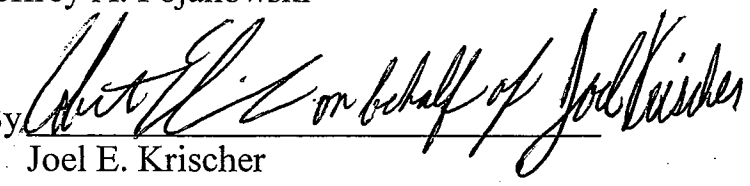
By  on behalf of Joel Krischer
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Employers Group

Signed by Robert E. Sims on behalf
of Joel E. Krischer

Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF WAL-MART STORES, INC.'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, amicus states as follows:

The Product Liability Advisory Council, Inc. is a non-profit association with no parent or subsidiary corporations. No publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit association of 122 American and international product manufacturers. A list of PLAC corporate members is attached at Tab A. Several hundred leading product liability defense attorneys are also sustaining (non-voting) members of PLAC.

PLAC seeks to contribute to the improvement and reform of law affecting product liability in the United States and elsewhere. PLAC's perspective reflects the experience of corporate members in diverse manufacturing industries. Since 1983, PLAC has filed over 800 briefs as *amicus curiae* in state and federal courts, including previously in this case, presenting the broad views of product manufacturers seeking fairness and balance in product liability litigation.

Product liability litigation increasingly involves aggregation of claims through class-action certification or similar representative actions. PLAC's members are defendants in many such "mass torts," and frequently face attempts to aggregate punitive damages. The constitutional questions this case presents directly and profoundly impact PLAC's members: does Due Process prohibit a punitive damages class action where absent class members would share in an award and the defendant cannot (1) assert available individualized defenses, or (2) inquire into individual class members' harm?

This *amicus curiae* brief is respectfully submitted to the Court to address the public importance of these issues apart from and beyond the immediate interests of the parties to this case. PLAC files this brief with the consent of all parties.

INTRODUCTION

"[T]his is the largest class certified in history." *Dukes v. Wal-Mart, Inc.*, Nos. 04-16688, 04-16720, slip op. at 16241 (9th Cir. Dec. 11, 2007). On rehearing, a divided panel has affirmed this certification without resolving Wal-Mart's Due Process challenge to the undisputed impossibility of individualized punitive damage determinations across so large a class. The majority entirely avoids the Due Process question – except to "note" unspecified "possibilities" – which "may or may not include" the trial plan from which Wal-Mart has appealed – that could be "in accordance with due process." *Dukes*, slip op. at 16243. The only "example" is a "probabilistic prediction" of **compensatory** damages from *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767, 786 (9th Cir. 1996), due to "insurmountable practical hurdles" to individual adjudications. *Dukes*, slip op. at 18246 (quoting *Hilao*).[1]

[1] *Hilao* raised no issue of individual punitive damages assessments.

The panel got it wrong – twice – and only through *en banc* rehearing can this Court correct those pervasive errors. Procedurally, the dissent correctly complains that Wal-Mart appealed "precisely" the Due Process issue that the majority ducks, so it is "incumbent" upon the *en banc* Court to decide it. *Dukes*, slip op. at 16257 (Kleinfeld, J. dissenting).

Substantively, *Philip Morris USA v. Williams*, 549 U.S. ____, 127 S.Ct. 1057, 1063-64 (2007) ("*Williams*"), establishes that Due Process prohibits not only punitive damages awards not tied to a defendant's conduct towards a particular plaintiff, but also punitive damages procedures that deprive defendants of individualized defenses. *En banc* review is appropriate given the panel majority's failure even to address this recent, controlling precedent.

Williams recognizes that punitive damages pose "risks of unfairness" –arbitrariness and lack of adequate notice – and requires procedures in such trials that ensure compliance with constitutional protections. *Id.*; *see also State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 416-417 (2003) (expressing "concerns over the imprecise manner in which punitive damages systems are administered"; discussing procedural and substantive limitations) ("*Campbell*"); *BMW of North America, Inc. v. Gore*, 517 U.S. 573, 574 (1996) ("Elementary notions of

fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice. . .of the severity of the penalty that a state may impose.").

The trial plan approved by the majority concededly does not ensure ("may or may not," slip op. at 16243) the constitutional protections required by *Williams*. The affirmance of certification of a punitive damages class contradicts the great bulk of recent precedent holding that such aggregations violate Due Process. This conflict implicates the Supreme Court decisions already discussed – *Williams*, 127 S.Ct. 1057, *Campbell*, 538 U.S. 408, and *BMW*, 517 U.S. 573 – as well as:

- Other decisions of this Court – *Beck v. Boeing Co.*, 60 Fed. Appx. 38, 40 (9th Cir. 2003).
- Other court of appeals decisions – *In re Simon II*, 407 F.3d 125, 139 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-18 (5th Cir. 1998).
- State supreme court decisions – *Johnson v. Ford Motor Co.*, 113 P.3d 82, 94-95 (Cal. 2005) (rejecting "aggregate disgorgement"); *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1265 (Fla. 2006).
- Other federal decisions. *Nelson v. Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 376 (E.D. Ark. 2007); *Colindres v. QuitFlex Manufacturing*, 235 F.R.D. 347, 378 (S.D. Tex. 2006); *O'Neal, v. Wackenhut Services, Inc.*, 2006 WL 1469348, at *22 (E.D. Tenn. May 25, 2006); *cf. EEOC v. International Profit Associates, Inc.*, 2007 WL 3120069, at *10 (N.D. Ill. Oct. 23, 2007) (Due Process prohibits mass as well as class actions for punitive damages).

Because of these conflicts and the panel's refusal to address the controlling *Williams* decision, the Court should grant *en banc* review.

ARGUMENT

I. Recovery Of Punitive Damages By Absent Class Members Is Unconstitutional Under *Williams* and *Campbell*.

Due Process limits both punitive damages procedures and the amounts of such awards. *Williams*, 127 S.Ct. at 1062. Substantively, Due Process requires that punitive damages "have a nexus to the specific harm suffered by the plaintiff," provide "fair notice. . .of the severity of the penalty," and be free from "arbitrary punishment[]" and "decisionmaker's caprice." *Campbell*, 538 U.S. at 418, 422; *BMW*, 517 U.S. at 574. Procedurally, Due Process prohibits punishing a defendant for harm to others. *Williams*, 127 S.Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

A. Due Process Prohibits Punishing A Defendant For Harm To Others.

This litigation seeks class-wide punitive damages for over a million people. Necessarily, there cannot be individualized hearings to decide if **any** particular class member was harmed – statistical sampling is the only procedural vehicle the

panel suggests.[2] Slip op. at 16243-45. There is not even a pretense that Wal-Mart would pay punitive damages reflective of conduct towards any individual. Any punitive award would be a statistical share of some postulated injury to myriads of absent class members not before the court and as to whom Wal-Mart will never be able to raise individual defenses. This is **precisely what Due Process prohibits**. In *Williams*, the Supreme Court specifically held that punitive damages may not constitutionally be awarded on a "represent[ative]" basis:

> [T]he Constitution's Due Process Clause **forbids** a State to use a punitive damages award to punish a defendant for injury that it inflicts upon **nonparties or those whom they directly represent**, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.

Williams, 127 S.Ct. at 1063 (emphasis added).

Due Process gives defendants the right to "every available defense" **before** being held liable for punitive damages. *Id.* ("the Due Process Clause prohibits a State from punishing an individual without **first** providing that individual with an opportunity to present every available defense") (emphasis added). Due Process protects individualized defenses such as a plaintiff's knowledge ("knew that smoking was dangerous") and reliance ("did not rely upon. . .defendant[]"). *Id.*

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[2] Instead of individual injury hearings, the District Court adopted a "formula approach," permitting awards to both "potential victims" and "actual victims." *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 137, 184-185 (N.D. Cal. 2004).

Aggregate punitive awards encompassing "nonparties" are necessarily "standardless" and "speculative" in violation of Due Process:

> To permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?. . . The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer – risks of arbitrariness, uncertainty, and lack of notice – will be magnified.

Id. (citations omitted). A jury therefore may not punish a defendant for harm to others. *Id.* at 1064 ("a jury may not go further. . .and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties").

Class actions are inherently "representative" litigation. Their only reason for existence is to adjudicate the claims of persons not formally before the court. After *Williams*, the conclusion that almost every other court (save the panel majority) has reached on the strength of *Campbell* is unavoidable – aggregated, class-action treatment of punitive damages is so likely disproportionate to individual harm as to violate Due Process. Because representative adjudication of punitive damages is unconstitutional under *Williams* and *Campbell*, this Court should grant *en banc* review.

B. Determination Of Punitive Damages Before Determination Of Actual Damages Violates The Nexus Requirement Of Due Process.

Assuming, contrary to *Williams*, that an aggregate trial of punitive damages could be constitutional under any circumstances, the trial plan here still violates Due Process by determining punitive damages **before** deciding Wal-Mart's back-pay liability to any class member. *E.g. Engle*, 945 So.2d at 1265 ("compensatory damages must be determined in advance"). In *Campbell* the Supreme Court found the amount (if any) of a compensatory judgment to be a constitutional predicate for excessiveness review. "[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426. "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 425. *See also BMW*, 517 U.S. at 580 (1996) (the "most commonly cited indicium of an unreasonable or excessive punitive damage award is its ratio to the actual harm inflicted on the plaintiff"; prior cases "endorsed the proposition that a comparison between the compensatory award and the punitive award is significant"). A court cannot evaluate the proportionality – let alone the numerical ratio – of a punitive award "to the general damages recovered" unless an award of general damages exists.

The Second Circuit recognized that *Campbell* precludes aggregation of punitive damages via classwide proceedings in an opinion post-dating the District Court opinion here. *Simon II* reversed certification of a punitive damages class action because any procedure that determined punitive damages before compensatory damages is unconstitutional. There was no "nexus":

> In certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms.

407 F.3d at 138. The trial plan here is in direct conflict with *Simon II*.

This Court should grant *en banc* review to resolve the conflict between the panel's affirmance, which allows prior determination of punitive damages, and the great weight of contrary precedent. *See, e.g.*, *Allison*, 151 F.3d at 417-18 ("punitive damages must be determined after proof of liability to individual plaintiffs. . ., not upon the mere finding of general liability to the class").

II. Any Procedure That Precludes Available Individual Defenses To Punitive Damages Violates Due Process.

Under *Williams* a defendant cannot be punished without first having "an opportunity to present every available defense." *Williams*, 127 S.Ct. at 1063 (citing *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). The District Court **specifically pre-**

cluded available individualized defenses during adjudication of punitive damages. *Dukes*, 222 F.R.D. at 174. But *Williams* expressly holds – as a matter of Due Process – that depriving a defendant of "an opportunity to present every available defense" is "**prohibit[ed]**." 127 S.Ct. at 1063 (emphasis added). The panel punts the issue back to the same court that committed the original error with no guidance whatever. Slip op. at 16243. *Williams*, however, "obligates [courts] to provide some form of protection" for defendants' Due Process rights whenever punitive damages are claimed. 127 S.Ct. at 1065.

The certification order here – permitting classwide punitive damages while precluding available individual defenses – blatantly violates Due Process. The panel's affirmance directly contradicts the Supreme Court's recent *Williams* decision. *En banc* review is appropriate to remedy this conflict.

CONCLUSION

To try the punitive damages claims of over a million people in one proceeding runs roughshod over any modern conception of Due Process. This case cries out for *en banc* review.

Respectfully submitted,

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Dated: January 18, 2007

NO. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF AMICUS CURIAE EMPLOYERS GROUP IN SUPPORT OF WAL-MART STORES, INC.'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Employers Group certifies that there is no corporate parent of the Employers Group, and no publicly held corporation owns 10% or more of the Employers Group's stock.

STATEMENT OF INTEREST AND MOTION FOR LEAVE TO FILE AS AMICUS CURIAE

The Employers Group (formerly known as "The Merchants and Manufacturers Association" and "The Federated Employers") respectfully moves for permission to file this letter brief as amicus curiae in support of Defendant-Appellant Wal-Mart Stores, Inc.'s petition for rehearing en banc. Plaintiffs-Appellees have granted their consent to the submission of this amicus curiae brief by the Employers Group.

The Employers Group is one of the nation's oldest and largest human resources management associations, representing nearly 3,500 companies of all sizes in virtually every industry. These constituent companies employ approximately 3 million individuals. The Employers Group respectfully submits that its collective experience in employment matters, including its appearance as amicus curiae in federal and state courts over several decades, gives it a unique perspective on the short- and long-term policy implications of the legal issues under consideration in this case, particularly the likely effects of the interpretation by the district court and the panel majority of Federal Rule of Civil Procedure 23.

In addition to filing an amicus brief in support of Wal-Mart's petition for rehearing en banc of the panel's initial opinion, the Employers Group has been involved as amicus curiae in many significant cases, including, but not limited to:

Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73 (2002); *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997); *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988); *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003); *Oracle Corp. v. Falotti*, 319 F.3d 1106 (9th Cir. 2003); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997); *Rozay's Transfer v. Local Freight Drivers*, Local 208, *Int'l Bros. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 850 F.2d 1321 (9th Cir. 1988); *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *Guz v. Bechtel Nat., Inc.*, 24 Cal. 4th 317 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83 (2000); *Carrisales v. Dep't of Corrections*, 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Green v. Ralee Eng'g Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8 Cal. 4th 121 (1998); *Hunter v. UpRight, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990); *Newman v. Emerson Radio Corp.*, 48

Cal. 3d 973 (1989*); Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988); and *Dyna-Med, Inc. v. Fair Employment & Housing Comm'n*, 43 Cal. 3d 1379 (1987).

RULE 35 STATEMENT

Amicus Curiae agrees with and incorporates by reference the Rule 35 Statement submitted by Defendant-Appellant Wal-Mart Stores, Inc. in its petition for rehearing en banc of January 8, 2008. The petition for rehearing ably demonstrates how the panel's decision misapplies the requirements of Federal Rule of Civil Procedure 23 in ways that conflict with previous decisions of the Supreme Court, this Circuit, and other Circuits and why that decision creates issues of Circuit-wide—indeed, nationwide—importance that demand a rehearing en banc. The focus of this amicus brief is the panel majority's treatment of the typicality requirement, which it effectively eviscerated from Rule 23 in approving the certification of an unimaginably sprawling, diverse, and *untypical* class of over 1.5 million current and former employees.

ARGUMENT

I. A CLASS MAY NOT BE CERTIFIED WITHOUT SATISFYING ALL OF THE REQUIREMENTS OF RULE 23(a)

The requirements of Rule 23(a) ensure that class action representatives are "part of the class and 'possess the same interest and suffer the same injury' as the class members." *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) (quoting *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). The Supreme Court, in turn, has emphasized the "need to carefully apply the

requirements of Rule 23(a) to Title VII class actions," and has noted the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad." *Falcon*, 457 U.S. at 161. Because of these concerns, a court is obligated to undertake a "rigorous analysis" to ensure "that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161; *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992).

This "rigorous analysis" necessarily entails some inquiry into the underlying merits of the case, including how the claims and the affirmative defenses to them will be tried, even though class certification is, of course, not a decision on the merits. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). As the Supreme Court has explained, a "class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Falcon*, 457 U.S. at 160. "Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification." *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

Like the majority's initial effort, the revised opinion fails to apply this requisite rigorous analysis. In their initial call for rehearing en banc, Wal-Mart and its *amici* correctly criticized the panel majority's refusal to consider any evidence relevant to certification that also intertwines with the merits. While the majority now concedes in a footnote that courts must "'consider evidence which goes to the

requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case.'" Slip op. at 16219 n.2 (quoting *Hanon,* 976 F.2d at 509) (alterations in original), the opinion's analysis still fails to follow this binding circuit precedent. The majority still repeatedly invokes the pre-merits posture of the case to evade dispositive challenges to class certification. It is little wonder, therefore, that by the time the opinion reaches the issue of typicality, it has again already assumed that issue away.[1]

II. RULE 23(a)(3) AND THE MAJORITY'S RULING ON TYPICALITY

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This typicality requirement serves as a guidepost for "determining whether...maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately represented in their absence." *Falcon,* 457 U.S. at 158 n.13.

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[1] Such runaway certification is very unfair to employer-defendants. Granting class status "can propel the stakes of a case into the stratosphere," putting "considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Rule 23(a) is thus critical for ensuring that class action lawsuits do not become tools to "wring settlements from defendants whose legal positions are justified but unpopular." *Id.*

The requirement of typicality can intertwine with Rule 23(a)(2)'s commonality requirement, for if there are no common questions of law or fact, it is hard to see how any named plaintiff can be typical of the class she seeks to represent. Commonality alone, however, cannot satisfy Rule 23(a)(3), because a set of named plaintiffs may insufficiently represent a group with common interests if the claims and/or defenses applicable to the named plaintiffs are not typical. *See, e.g.*, *Sperling v. Donovan*, 104 F.R.D. 4, 6–7 (D.D.C. 1984).

Here, the majority disposes of the "mandatory" typicality requirement with an afterthought discussion of less than two pages. As in its original opinion, it does so after first assuming away all difficult certification issues by focusing solely on the existence of the "alleged common practice—e.g., excessively subjective decision-making in a corporate culture of uniformity and gender stereotyping," slip op. at 16231, without giving any weight to the individualized defenses that Wal-Mart must be allowed to mount to the claims of each class member. The majority then concludes with the dubious assurance that "because the range of managers in the proposed class is limited to those working in Wal-Mart's stores, it is not a very broad class." *Id.* at 16232.

With this case involving "the largest certified class in history," *id.* at 16241—comprising over 1.5 million employees in 3,400 stores involving at least 11 types of employment positions in each store—one has to ask what the majority

would consider a very broad class. The majority shrugs off the fact that no named plaintiff held a position above low-level in-store management, even though the claims are also purportedly brought on behalf of employees holding various other positions; pays little attention to the potential conflicts among the class; ignores potential defenses unique to certain named plaintiffs; and gives no consideration as to how the unique defenses of over one million individuals could feasibly be adjudicated in the class context. *Id.* at 16232–33.

The majority makes much of this Court's dicta about "the 'permissive' typicality requirement," *id.* at 16232, but effectively erases "requirement" from that phrase (whatever its merits). Any analysis, however, approaching "rigorous," *Falcon*, 457 U.S. at 161, would reveal that the requirement of typicality is not satisfied here. Rule 23(a)(3) requires that a named plaintiff "bridge" the "wide gap" between (a) the plaintiff's individual claim of discrimination and allegations of a company's discriminatory policies, and "(b) the existence of a class of persons who have suffered the same injury" such "that the individual's claim will be typical of the class claims." *Id.* at 157–58. The majority's approach allows the plaintiffs to bridge that gap simply by alleging a general policy or practice of discrimination, regardless of how the claims and circumstances of particular individuals relate to the broader class or how those claims would be tried. But given the inordinate size and complexity of this class, certification based on broad

generalization runs counter to the Supreme Court's warning that "Title VII prohibits discriminatory *practices*, not an abstract policy of discrimination." *Id.* at 159 n.15 (emphasis in original). The majority ignores this warning. Instead, although recognizing that plaintiffs had failed to identify "a specific discriminatory policy promulgated by Wal-Mart," slip op. 16222, it nonetheless allows certification under a "social framework analysis" that merely hypothesizes that Wal-Mart is "vulnerable" to gender bias, *id.* at 16221.

Tellingly, other Courts of Appeals have refused to find typicality where "class certification was sought by employees working in widely diverse job types, spread throughout different facilities and geographic locations." *Cooper v. Southern Co.*, 390 F.3d 695, 715 (11th Cir. 2004) (affirming denial of class certification). *See also Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619 (N.D.Ga. 2003). Adhering to *Falcon*, the Sixth Circuit, for example, recently rejected a district court's conclusion that the mere presence of "a common question of law regarding...a policy of discrimination against women satisfied...typicality." *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 645 (6th Cir. 2006). Addressing a discrimination suit regarding a single facility, *Reeb* states that Rule 23(a)(3) requires the named plaintiffs to "represent an adequate cross-section of the claims asserted by the rest of the class" and demands that judges "examine the

incidents, people involved, motivations, and consequences regarding each of the named plaintiffs' claims." *Id.*

If ever a case demanded such careful examination, this is it. Wal-Mart operates over 3,400 stores. Each store has over 50 departments, including semi-autonomous "specialty departments" that operate as stores within the stores. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 145–46 (N.D. Cal. 2004). The district court identified at least 11 different employment categories at the store level, *see id.* at 146, and found that district, store, and department-level managers had broad discretion in setting employee compensation and promotion. *See id.* at 146–48; 148–49. Against this factually diverse background, Wal-Mart presented the district court unrebutted expert evidence showing no statistically significant gender disparity at over 90% of its stores and no discernable class-wide pattern of promotion decisions affecting women. Wal-Mart Merits Br. at 23–24. This statistic itself suggests a fundamental lack of typicality, as any disparity would be confined to fewer than 10% of all stores. *See Beck v. Boeing Co.*, 203 F.R.D. 459, 464 (W.D. Wash. 2001), *aff'd in relevant part*, 60 Fed. Appx. 38 (9th Cir. 2003) (statistical "dissimilarities across geographic locations" defeat typicality). And this statistic, and the *absence* of discrimination it so strongly suggests, is underscored by the fact that only two of the named plaintiffs are current Wal-Mart employees, and that more than half of the class consists of former employees. The multitude

of former employees are *atypical* of current employees because they have no interest in achieving injunctive relief and in fact lack standing to seek it. *See Bates v. UPS*, 2007 U.S. App. LEXIS 29870, at *14 (9th Cir., Dec. 28, 2007) *(en banc)* ("the claimed threat of injury must be likely to be redressed by the prospective injunctive relief").[2]

The six class representatives here do not approach a cross-section of the 1.5 million women who have worked in the many different capacities at Wal-Mart's many stores. None rose above lower-level store management, only one was a salaried employee, and, as Judge Kleinfeld points out in his dissent, the six named plaintiffs' claims "are not even typical with respect to each other," let alone the millions of women in the class. Slip op. at 16252.[3] For all the attention the panel majority gives to the representatives' actual claims, plaintiffs' counsel might as well have presented an anonymous affidavit alleging a common practice of discrimination. *See* slip op. at 16231–32.

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[2] The fact both Wal-Mart *and* the plaintiffs have filed for petitions for rehearing arguing that the majority's decision conflicts with *Bates* is itself a strong indication that this case raises class certification issues of sufficient importance to warrant review and clarification by the en banc Court.

[3] Indeed, named plaintiff Betty Dukes' original EEOC charge alleged *only* race discrimination. *See* ER 29.

These facts stand in sharp contrast to *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), upon which the panel majority so heavily relies, *see* slip op. at 16231. There, the named plaintiffs represented every state and every type of vehicle involved. 150 F.3d at 1020. The liability case was simple and identical for each plaintiff—a defective car part. And the remedies sought were limited and uniform: defect-free latches and compensation for actual non-personal injuries. *Id.* Certification here presents far more daunting challenges on both liability and damages, but the majority engaged in little—and certainly not rigorous—typicality analysis. *See* slip op. at 16231–32; *compare Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (named plaintiffs "include a very broadly selected cross-section of the different categories of Boeing employees").

Even if the six class representatives constituted an adequate cross-section of the absent class members, the majority fails to assess with any rigor the "'danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)). Three of the five named hourly employees were either fired, disciplined, or demoted for alleged infractions at work, *see* Wal-Mart Merits Br. at 4–7, creating the very danger of which *Hanon* warned, 976 F.2d at 508.

The majority also fails to appreciate that conflicts between named class representatives and the class as a whole can be fatal to certification. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998). Five of the six named plaintiffs held managerial jobs in some capacity, see Wal-Mart Merits Br. at 4–7, raising the prospect that they could be cross-examined about whether they engaged in discriminatory conduct themselves and Wal-Mart could potentially be held liable for employment decisions by the named plaintiffs themselves. Further, as Judge Kleinfeld explained, named plaintiffs subject to defenses have greater incentive to settle, those who no longer work at Wal-Mart have less incentive to pursue injunctive relief benefiting the rest of the class, and none of the plaintiffs represent the interests of women who have been promoted and thus have "interests in preserving their own managerial flexibility." Slip op. at 16253. Concerns about class conflicts in this case are quite real. Plaintiffs' counsel has described the amended decision—which now potentially *excludes* what he estimated to be hundreds of thousands of his clients from the class—as a "welcome development," *Ninth Circuit Revises Wal-Mart Ruling, Possibly Chipping Away Some Class Members*, WORKPLACE LAW REPORT (Dec. 12, 2007) (available at http://emlawcenter.bna.com/pic2em.nsf/id/BNAP-79YMQF?OpenDocument) (last accessed on Jan. 16, 2008), an admission that recalls Judge Kleinfeld's prescient

warning that fair and vigorous representation of every member of this sprawling, conflict-ridden class will be simply impossible, *see* slip op. at 16258–59.

The panel majority simply ignores such concerns, finding typicality satisfied so long as "the named plaintiffs [are] members of the class they represent." *Id.* at 16231.[4] The panel majority mistakes necessity for sufficiency: as this case demonstrates, named plaintiffs can be a *members* of a class, but their distinct claims or unique vulnerability to affirmative defenses can—and, in this case, assuredly *do*—preclude them from being *typical*. A proper, rigorous analysis of Rule 23(a) must at least address these concerns. The panel majority does not.

CONCLUSION

The majority's treatment of typicality is but one of many troubling aspects of the panel opinion. This unprecedented decision is wrong as a matter of law and will, if left undisturbed, threaten substantial harm to the rights and welfare of employers, employees, and consumers across the nation. This Court should therefore grant rehearing en banc.

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[4] Tellingly, the majority substitutes this language for the more detailed—and demanding—test of "'whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.'" *Compare* slip op. at 16231 *with Dukes v. Wal-Mart, Inc.*, No. 04-16688, slip op. at 1358 (9th Cir., Feb. 6, 2007).

Dated: January 17, 2008

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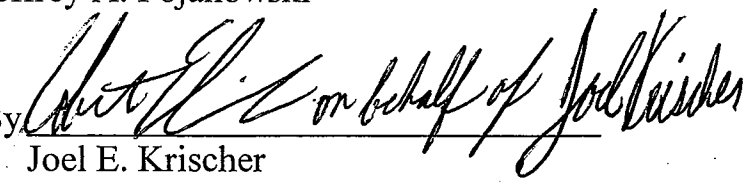
By  on behalf of Joel Krischer
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Signed by Robert E. Sims on behalf
of Joel E. Krischer

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-16688 & 04-16720

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs-Appellees,

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING *EN BANC*

INTERESTS OF *AMICUS CURIAE*

WLF is a public interest law and policy center headquartered in Washington, D.C., with supporters in all 50 states. 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 *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327 (11th Cir. 2004); *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000); and *Diamond v. Multimedia Systems v. Superior Court*, 19 Cal. 4th 1036 (1999), cert. denied, 527 U.S. 1003 (2000). WLF also filed a brief in this case when it was before the Ninth Circuit panel and again in support of the initial rehearing petition.

WLF is submitting this brief because it believes that the three-judge panel committed legal error when it failed to apply the requisite rigorous analysis as to

whether the plaintiffs had met their burden of demonstrating that the prerequisites of Fed.R.Civ.P. 23 had been satisfied, including an evaluation of the plaintiffs' proffered expert testimony under the standards articulated by the Supreme Court in *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993). WLF is concerned that if the proposed class is certified on the basis of the deficient evidence submitted by the plaintiffs, the result would be to cast 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. WLF is submitting its brief with the consent of all parties.

SUMMARY OF ARGUMENT

In 2003, 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 appellate 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. The divided panel's approach in affirming class certification here – refraining from

rigorous scrutiny of the proofs in the case and deferring an evaluation of the district court's trial plan – effectively resurrects conditional certification in the largest class action in history. Noting that "district courts retain the authority to amend or decertify a class if, based on information not available or circumstances not anticipated . . . , the court finds that either is warranted" (Slip op. at 16216 n.1), the majority left for another day answering the tough questions, such as whether plaintiffs' experts' opinions satisfied federal admissibility standards, in which party's favor competing evidence should be resolved and whether the district court's trial plan comported with Title VII, federal Constitutional due process, and the Seventh Amendment.

While the majority discarded its earlier reliance on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), to justify the district court's failure to analyze the admissibility of plaintiffs' expert's opinion pursuant to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), it continued to apply a "permissive," "minimal" and "highly deferential" form of review (Slip op. at 16218-19; Wal-Mart's Petition for Rehearing en banc, at 7), that relies on untested expert testimony to establish the Rule 23 requirements. Such an approach falls far short of the rigorous class certification analysis mandated by the Supreme Court and followed by other circuits across the country. If not reversed, the Court's

adoption of a lower admissibility threshold for expert opinion on class certification could have far-reaching, adverse effects, including making the district courts in this Circuit a magnet for the filing of class actions, certification a nearly foregone conclusion, and defendants a target of specious classwide claims. The fundamental importance of the question of what standards should be applied to class certification justifies this Court's en banc review.

In addition, the majority's failure to evaluate the district court's trial plan to ensure compliance with substantive law and due process impermissibly defers thorough evaluation of the manageability of this class action – a principle central to class certification. Moreover, the panel's suggestion that a trial plan that does not permit Defendant to rebut discrimination claims of specific individuals as provided by Title VII and Supreme Court precedent would comport with due process contradicts a long line of Supreme Court cases, including *Teamsters v. United States*, 431 U.S. 324 (1977), *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063-64 (2007), and warrants en banc review.

ARGUMENT

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

The Supreme 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). This "rigorous analysis" demands that evidence proffered in support of the Rule 23 requirements be carefully scrutinized and its admissibility and reliability be tested. *See 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); *West v. Prudential Securities, Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (court "may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits"); *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).

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"). The Supreme Court has established a standard for evaluating the reliability and admissibility of expert testimony in federal court – *Daubert*. *See Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311, 314 n.13 (5th Cir. 2005) (affirming district court's determination that plaintiffs' expert's opinion offered in support of class certification was unreliable and thus should be excluded pursuant to *Daubert*).

The majority relied on the testimony of plaintiffs' sociologist expert, Dr. William Bielby, in determining that the Rule 23 requirements had been established. As he has done against many other companies,[1] Bielby testified that

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[1] *See, e.g.*, Roger Parloff, "The War Over Unconscious Bias," *Fortune*, Oct. 1, 2007 (noting that Bielby has testified against many other companies and that plaintiffs' lawsuit "focuses mainly on three generic, almost abstract accusations that have become fixtures of nearly every contemporary employment discrimination dispute. These one-size-fits-all charges are less criticisms of Wal-Mart than of our society as a whole.")

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. *Dukes v. Wal-Mart*, 222 F.R.D. 137, 154 (2007). Nonetheless, Bielby's testimony was crucial to plaintiffs' effort to explain how millions of discretionary and subjective decisions made by thousands of individual managers at the local level could somehow be deemed to meet Rule 23's commonality and typicality requirements. While the panel appeared to suggest this testimony is scientifically reliable, no *Daubert* analysis was undertaken. Slip op. at 162221.[2]

Failure to test the reliability of plaintiff's expert testimony at the class certification stage as compelled by *Daubert* is inefficient at best and at worst

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[2] While the panel's new opinion suggested that Dr. Bielby's testimony would satisfy the full *Daubert* test, it did so without having the benefit of a hearing record or a *Daubert* analysis by the district court, which rejected Wal-Mart's argument that *Daubert* applies at the class certification stage. Slip op. at16221-22. Moreover, the panel suggests that because Wal-Mart's challenge purportedly focused on Bielby's "conclusion" rather than on his methodology or relevance, its reliance on *Daubert* is "misplaced." Slip op. at 16222. Even if this narrow view of the scope of Wal-Mart's challenge were correct, which it is not, the panel's ruling squarely contradicts the Supreme Court's decision in *General Electric v. Joiner*, 522 U.S. 136, 146 (1997) (rejecting argument that *Daubert* challenge must focus "solely on principles and methodology, not on the conclusions that they generate" because "conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.") (quoting *Daubert*).

prejudices the parties. There is no economy to be gained by considering expert testimony twice – once at the class certification stage using a lower *Daubert* standard and later using full *Daubert* review. And allowing plaintiffs two bites at the admissibility apple can be viewed as unfair both to defendants and absent class members. First, class certification dramatically raises the stakes in the litigation for defendants, often creating "insurmountable pressure . . . to settle" even weak claims. *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. 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 plaintiffs' experts' opinion testimony is ultimately excluded following a full *Daubert* review.

It is little wonder then that the Second Circuit recently embraced heightened scrutiny of the admissibility of expert opinion on class certification. *In re Public Offering Securities Litig. ("IPO")*, 471 F.3d 23, 42 (2d Cir. 2006).

The Seventh Circuit similarly endorsed a rigorous review of 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"). And now that the majority has abandoned its concerns that *Eisen* imposed a bar to consideration of issues on class certification that overlap with the merits – such as the reliability of an expert's testimony – there is no justification for not requiring the same scrutiny of expert testimony by the district courts in the Ninth Circuit.

Had the district court applied the *Daubert* standard, Dr. Bielby's proffered testimony would have been excluded because his theory has not been and cannot be tested, he relies on research that has no application to this case, and he failed to use the degree of intellectual rigor in his litigation work that he uses in non-litigation professional endeavors. *See* Def. Wal-Mart Stores, Inc.'s *Daubert* Motion to Strike Declaration, Opinion and Testimony of Plaintiffs' Expert William T. Bielby, Ph.D. Because it is inadmissible under *Daubert*, Dr. Bielby's testimony should not have been relied upon to grant or affirm class certification.

II. A TRIAL PLAN THAT DOES NOT COMPORT WITH SUBSTANTIVE LAW AND SUPREME COURT PRECEDENT VIOLATES DUE PROCESS AND FAILS TO ESTABLISH MANAGEABILITY AS REQUIRED BY RULE 23

In its new opinion, the majority declined to evaluate the district court's trial plan for compliance with settled Title VII law, due process principles, and Seventh Amendment guarantees. Slip op. at 16243. Instead, the panel mused that there are a "range of possibilities" for a trial plan that would make adjudication manageable and in accordance with due process. *Id.* The only possibility the panel identified, however, was that endorsed in *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), an inapposite case involving 10,000 Philippine nationals tortured at the hands of Ferdinand Marcos. In that case the Ninth Circuit justified adoption of an "unorthodox" trial plan because of the "extraordinarily unusual" nature of the case – a glaring example of hard facts making bad law. Slip op. at 16245 (quoting *Hilao*, 103 F.3d at 786-87). While the majority suggested that it "could see no reason why a similar procedure to that used in *Hilao* could not be employed in this case," the reason lies in well-established Supreme Court precedent, Title VII law, due process guarantees, and the Seventh Amendment.

Section 706(g) of Title VII, 42 U.S.C. § 2000(e)-5(g), provides, in relevant

part:

> No order of the court shall require . . .payment to [any plaintiff] of any back pay, if such individual . . .was [treated as he or she was] for any reason other than discrimination. . . .

That provision is given effect by Supreme Court precedent reaching back decades which makes clear that nonvictims of discrimination cannot recover and that a Title VII defendant has the right to rebut a presumption of discrimination by presenting evidence that specific class members were not in fact victims of discrimination. *See Teamsters v. United States*, 431 U.S. 324, 361-62 (1977). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n.10 (1989); *Firefighters Local 1784 v. Stotts*, 467 U.S. 561, 580 (1984); *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 404 n.9 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976); *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

Title VII likewise limits the award of punitive damages to "aggrieved individual[s]" who have been subjected to malicious or reckless discrimination. 42 U.S.C. § 1981a(b)(1). This plain language expressly bars the procedures envisioned by the trial court's trial plan and the panel majority's *Hilao*-based statistical sampling approach, both of which guarantee that non-aggrieved, non-victims will recover punitive damages. Slip op. 16258 (Klienfeld, J., dissenting).

Settled Supreme Court precedent – much of which was issued after the Court's *Hilao* opinion – also forecloses this approach as a matter of due process. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996). Specifically, these cases mandate that punitive damages be awarded only to victims of a defendant's wrongful conduct and that a defendant not be punished without first being provided "an opportunity to present every available defense." *State Farm*, 538 U.S. at 422; *Williams*, 127 S. Ct. at 1063; *Gore*, 517 U.S. at 573 n.19.

Neither the district court's trial plan, nor the trial plan endorsed in *Hilao*, comport with Supreme Court precedent or due process. The United States Supreme Court "has stated from its first due process cases [that] *traditional practice* provides a touchstone for constitutional analysis." *Honda v. Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (emphasis added); *see also Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (state civil trials must operate "according to the settled course of judicial proceedings"). It "is precisely the historical practices that define what is 'due'." *Schad v. Arizona*, 501 U.S. 624, 650 (1991). What is "due" in a Title VII action and for the recovery of punitive damages has been well-defined by the Supreme Court. A trial plan that does not

permit Wal-Mart to rebut the claims of discrimination of specific individuals by introduction of evidence that there was a non-discriminatory basis for any action taken stands that law on its head and would allow both victims and nonvictims to recover compensatory and punitive damages in this case – a result precluded by Title VII and constitutional guarantees of due process. *See Beck v. Boeing Co.*, 60 Fed. Appx. 38, 39-40, 2003 WL 683797, at *1 (9th Cir. 2003) (rejecting class certification of punitive damages claim in Title VII action where "the beneficiaries of the punitive damages would necessarily include those class members not affected by the alleged discriminatory policy as well as those who were").

The size of the putative class cannot be used as justification for short-circuiting substantive law and constitutional safeguards. As the Seventh Circuit observed in *In re Bridgestone/Firestone, Inc.*, 288 F. 3d 1012, 1020 (7th Cir. 2002): "Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *See also Elmore v. Henderson*, 227 F.3d 1009, 1012 (7th Cir. 2000) (procedural devices to achieve "economics in litigation" may not "merge the plaintiffs' rights so that the defendant loses defenses he might have had against one of the plaintiffs"). Rule 23 is merely a procedural device, it cannot be used to alter substantive law

or provide a remedy to those who would not be permitted to recover on an individual basis. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution. [Under] . . . *Amchem*, no reading of [Rule 23] can ignore the Act's mandate that rules of procedure shall not abridge, enlarge or modify any substantive right.").

Moreover, given the centrality of a manageability determination to the class certification analysis, affirmance of class certification without sufficient review of how the case will be tried in accordance with substantive law and constitutional rights ignores the mandate that class certification be rigorously scrutinized. The majority panel's decision to leave for another day determination of the propriety of the district court's proposed trial plan gives new life to "conditional certification" in direct contravention of amended Rule 23.

CONCLUSION

The Court should grant the petition for rehearing en banc.

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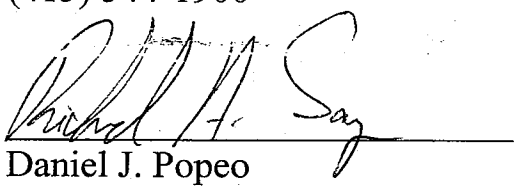

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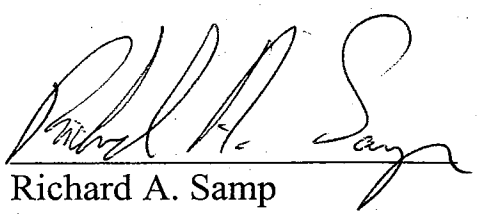
Dated: January 17, 2008

CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* Washington Legal Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 3,200, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.



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January 17, 2008

VIA FEDERAL EXPRESS

Cathy Catterson
Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Dukes et al., v. Wal-Mart Stores, Inc.*
Nos. 04-16688 & 04-16720

Dear Ms. Catterson:

Pursuant to the Circuit Advisory Committee Note to Rule 29-1, please find enclosed an original and fifty copies of the Letter Brief *Amicus Curiae* of the Equal Employment Advisory Council Supporting Petition for Rehearing *En Banc* of Defendant/Appellant/Cross-Appellee Wal-Mart Stores, Inc. and in Support of Reversal. In addition, please find enclosed a Corporate Disclosure Statement, Certificate of Compliance, and Certificate of Service.

An additional copy of the letter brief along with a self-addressed stamped envelope is enclosed. Please date-stamp and return the copy at your earliest convenience.

Thank you for your time and consideration in this matter.

Very truly yours,

Rae T. Vann

Rae T. Vann

Enclosures

cc: All Counsel Listed on the Certificate of Service

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rules 26.1 and 29(c), *Amicus Curiae* Equal Employment Advisory Council provides the following corporate disclosure statement:

1. The Equal Employment Advisory Council has no parent corporations and no subsidiary corporations.
2. No publicly held company owns 10% or more stock in the Equal Employment Advisory Council.

Respectfully submitted:

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January 17, 2008

United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

RE: *Dukes, et al. v. Wal-Mart Stores, Inc.*
No. 04-16688

Letter Brief *Amicus Curiae* of the Equal Employment Advisory Council Supporting Petition for Rehearing *En Banc* and in Support of Reversal

To the Honorable Chief Judge and Circuit Judges of the U.S. Court of Appeals for the Ninth Circuit:

Pursuant to the Circuit Advisory Committee Note to Rule 29-1 of the Circuit Rules of the United States Court of Appeals for the Ninth Circuit, the Equal Employment Advisory Council respectfully submits this letter as *amicus curiae* joining in the arguments and factual statements of Defendant-Appellant/Cross-Appellee Wal-Mart Stores, Inc. in support of Defendant/Appellant/Cross-Appellee's Petition for Rehearing *En Banc* before this Court. All Plaintiffs/Appellees/Cross-Appellants Betty Dukes, *et al.*, and Defendant/Appellant/Cross-Appellee Wal-Mart Stores, Inc. have consented to the filing of this brief.

On February 6, 2007, a panel of this Court, in a 2-1 decision, affirmed the district court's order granting plaintiffs' motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Defendant-Appellant Wal-Mart timely petitioned for rehearing *en banc*. On December 11, 2007, the panel issued a new opinion and the *en banc* petition was denied as moot. The new opinion again affirmed the class certification

decision. This brief urges the full Court to review and reverse the panel's decision affirming the district court's order granting class certification below.

Interest of the *Amicus Curiae*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 of the nation's largest private sector companies, collectively providing employment to more than twenty million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, and other equal employment statutes and regulations. Many of these companies do business within the Ninth Circuit. The panel majority's decision allowing class certification despite the district court's failure to properly apply Rule 23's stringent class certification requirements is likely to overwhelm the courts in the Ninth Circuit with massive employment discrimination claims that cannot, and were never intended to be, managed through class action processes. It also raises serious constitutional issues likely to impact any large employer defending similar class actions within this jurisdiction.

Accordingly, the issues presented in the instant litigation are extremely important to the nationwide constituency that EEAC represents. Because of its interest in this matter, EEAC filed an *amicus curiae* brief supporting Defendant-Appellant Wal-Mart's interlocutory appeal to this Court, as well as letter briefs supporting its petition for interlocutory appeal and petition for panel rehearing. This letter brief reiterates many of the

arguments made by EEAC below, and addresses several problematic issues raised by the panel majority's new opinion.

Large-Scale Punitive Damages Claims Under Title VII Are Fundamentally Incompatible with Rule 23(b)(2)'s Class Certification Requirements

Because of the nature of the monetary damages claim made by the plaintiffs in this action and the extent to which individualized findings of harm will be needed in order to assess which class members are entitled to such relief, the action simply is unsuitable for class certification under Rule 23(b)(2). Plaintiffs seeking class certification are required to satisfy all four prerequisites of Fed. R. Civ. P. 23(a), and the requirements of at least one subsection of Fed. R. Civ. P. 23(b). Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001).

Rule 23(b) criteria generally look at whether conducting the case as a class action would be fair and efficient. In particular, Rule 23(b)(2) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . the party opposing the class has acted or refused to act on grounds *generally applicable to the class*, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect *to the class as a whole.*

Fed. R. Civ. P. 23(b)(2) (emphasis added).

In the context of employment discrimination class action litigation, plaintiffs seeking punitive damages must make individualized showings of harm in order to be entitled to the relief sought. *See* 42 U.S.C. § 1981a. Prior to 1991, the only statutory remedy available to Title VII litigants was equitable relief. With the passage of the Civil Rights Act of 1991 ("CRA"), 42 U.S.C. § 1981a, however, Congress greatly expanded the remedies available under Title VII by permitting compensatory and punitive damages in cases of intentional discrimination. 42 U.S.C. § 1981a(a)(1).

The CRA made punitive damages available to Title VII plaintiffs only if they could prove that the defendant intentionally discriminated against them "with malice or with reckless indifference to the federally protected rights *of an aggrieved individual.*" 42 U.S.C. § 1981a(b)(1) (emphasis added); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999). As the Supreme Court observed in *Kolstad*:

> The very structure of § 1981a suggests a congressional intent to authorize punitive awards in only a subset of cases involving intentional discrimination. Section 1981a(a)(1) limits compensatory and punitive awards to instances of intentional discrimination, while § 1981a(b)(1) requires plaintiffs to make an additional "demonstrat[ion]" of their eligibility for punitive damages. Congress plainly sought to impose two standards of liability -- one for establishing a right to compensatory damages and another, higher standard that a plaintiff must satisfy to qualify for a punitive award.

Kolstad, 527 U.S. at 534.

A finding of "pattern or practice" discrimination, while establishing general harm to the group, does not automatically entitle class members to punitive damages. Rather, assessing the availability of punitive damages requires an individual inquiry into the harm suffered by each victim of discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring). As the Fifth Circuit noted in *Allison v. Citgo Petroleum Corp.*:

> [B]ecause punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages. Thus, punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage. Moreover, being dependent on non-incidental compensatory

> damages, punitive damages are also non-incidental--requiring proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards.

Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998) (citations omitted); *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("A class-action claim for monetary relief may present common questions of liability, but, because the goal of the damage phase is to compensate the *plaintiffs* for their *individual injuries*, the claim will generally require the court to conduct individual hearings to determine the particular amount of damages to which each plaintiff is entitled").

The plaintiffs in this case are seeking billions of dollars in punitive damages on behalf of a class of nearly two million current and former employees of Wal-Mart. Because Title VII requires that an individualized showing of harm be made prior to any award of punitive damages, the court necessarily will need to conduct individual hearings to ascertain what, if any, punitive damages is owed to *each class member*. As the Fifth Circuit observed in *Allison*, "punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern and practice case, not upon the mere finding of general liability to the class at the first stage." 151 F.3d at 418. Moreover, Section 706(g) of Title VII entitles Wal-Mart to defeat a class member's right to backpay by presenting individualized evidence that the specific class member was not in fact a victim of discrimination. *See also International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

Such an individualized inquiry is fundamentally inconsistent with the very purpose and utility of class certification under 23(b)(2). "The underlying premise of the (b)(2) class—that its members suffer from a common injury properly addressed by class-wide relief—begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 413 (internal quotations, citations and footnote omitted).

Class Certification Under Rule 23(b)(2) Is Inappropriate Where, As Here, Money Damages Predominate Over Injunctive Relief

The advisory committee notes accompanying Rule 23(b)(2) provide that 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23 advisory committee's notes (Subdivision (b)(2)). Class certification thus is available under Rule 23(b)(2) only where claims of injunctive relief predominate over claims for monetary damages. *Id.*

Indeed, this Circuit and others repeatedly have held that class certification under Rule 23(b)(2) is improper unless the claim for monetary damages is merely incidental to the injunctive relief being sought. *See, e.g., Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (citing *Probe v. State Teachers Ret. Sys.*, 780 F.2d 776, 780 (9th Cir 1986)); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) (citing cases); *but cf. Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003); *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001).

While the Second Circuit in *Robinson* appears to have eschewed the bright-line, "incidental damages" approach taken by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), even it recognized:

> Although the assessment of whether injunctive or declaratory relief predominates will require an ad hoc balancing that will vary from case to case, before allowing (b)(2) certification a district court should, *at a minimum*, satisfy itself of the following: (1) *even in the absence of a possible monetary recovery*, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.

Robinson, 267 F.3d at 164 (emphasis added).

This Court in *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003), also refused to adopt the Fifth Circuit's "incidental damages" approach, but

based on vastly different facts and circumstances than are presented in the instant case. In *Molski*, the Court permitted class certification where only $5,000 of money damages was sought on behalf of a single named plaintiff. It concluded that the primary relief sought there *was* injunctive, rather than monetary, thus satisfying Rule 23(b)(2).

Unlike the class in *Molski*, the plaintiffs in this case are seeking billions of dollars in punitive damages. As they know they must under 23(b)(2), they also have made an ancillary claim for injunctive relief. While the panel majority now has conceded that more than half of the class members are former employees who are unlikely to apply for reemployment and thus lack legal standing to sue for injunctive relief, it nevertheless refused to decertify the class and erroneously left to the district court's discretion whether the scope of the class should be limited.

It found, on the one hand, that the majority of the class does not stand to benefit from injunctive relief, yet on the other, it concluded injunctive relief predominates, notwithstanding the enormity of the punitive damages sought. Because there can be no question that monetary relief predominates, the 23(b)(2) class certification is plainly improper.

Certification of the Class in This Case Raises Serious Questions of Constitutional Due Process

Permitting the plaintiffs to proceed on a class basis and seek unspecified punitive damages on behalf of the class, where individual findings of intentional discrimination will not be made and Wal-Mart will be prevented from asserting a defense to each individual claim, raises constitutional issues not adequately addressed by the district court or the panel majority below. For that reason, the Court should grant *en banc* review to fully evaluate and resolve these issues.

The U.S. Supreme Court has indicated that granting class certification status under Rule 23(b)(2) where any money damages are sought raises constitutional and due process concerns. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Indeed, the Court has strongly suggested "a substantial possibility" exists that damage claims can *never* be certified

under Rule 23(b)(2). *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

Whether a punitive damage award is constitutional depends significantly on the actual harm the defendant has caused an individual. As the Supreme Court noted in *BMW, Inc. v. Gore*, 517 U.S. 559 (1996), "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct *as well as the harm that actually has occurred.*" *Id.* at 581 (internal quotations and citations omitted; second emphasis added). *See also State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("The precise award [of punitive damages] in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff").

In this case, the plaintiffs are not seeking compensatory damages and thus there never will be a specific jury finding of intentional discrimination. Nor will there be any evidentiary hearing to determine whether, and to what extent, each of the *individual* class members is entitled to punitive damages.

Indeed, the panel majority below expressly endorsed a case management approach that would permit class liability to attach *not* based on findings of discrimination with respect to each individual class member, but rather based on a *sampling* of the class claims *as a whole*: "this procedure would allow Wal-Mart to present individual defenses *in the randomly selected 'sample cases,'* thus revealing the *approximate* percentage of class members whose unequal pay or non-promotion was due to something other than gender discrimination." *Dukes v. Wal-Mart, Inc.*, 2007 U.S. App. LEXIS 28558, at *58 n.22 (emphasis added).

This approach to determining Wal-Mart's liability for punitive damages obviously deprives the company of the opportunity – and the right – to mount a defense to every claim for which monetary relief is sought. Because the case management plan contemplated by the panel majority does not even pretend to tie an award of punitive damages to any actual harm suffered by individual class members, class certification is constitutionally suspect.

In *State Farm*, the U.S. Supreme Court observed that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. Because the plaintiffs in this case voluntarily have foregone a claim for compensatory damages (for the reasons noted above), "a ratio analysis will not be possible because punitive damages will be unanchored to compensatory damages." *Dukes v. Wal-Mart, Inc.*, 2007 U.S. App. LEXIS 28558, at *73 (Kleinfeld, J., dissenting) (footnote omitted). Therefore, there will be no reasonably reliable benchmark against which to assess whether the actual dollar amount of a possible punitive damages award comports with the Supreme Court's reasoning in *State Farm*.

As Judge Kleinfeld observed in his dissent, "[f]or the whole class, the complaint seeks punitive damages, and for a class this big, one would expect the claim to be in the billions of dollars, like a tobacco or oil spill case." *Id.* at *70. The due process challenges posed by permitting a class seeking billions of dollars in punitive damages to proceed, in circumstances where the plaintiffs are not seeking compensatory damages and no finding of intentional discrimination will be made with respect to each individual class member, improperly were given short shrift by the panel majority below. *See also Philip Morris USA v. Williams*, 549 U.S. ___, 127 S. Ct. 1057, 1063 (2007) (Due Process requires defendants be entitled to present "every available defense" before being held liable for punitive damages) (citation omitted). This Court therefore should grant full *en banc* review in order to properly consider these concerns.

The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called judicial "blackmail." *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). "Class certification magnifies and strengthens the number of unmeritorious claims" and "[a]ggregation . . . makes it more likely that a defendant will be found liable and results in significantly higher damage awards." *Id.* (citations omitted).

This is especially true for large employers like Wal-Mart, which in this case faces the potential of a multi-billion dollar punitive damages award without having been provided an opportunity to fully defend itself. The

Supreme Court has strongly cautioned that "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427 (citing *Gore v. BMW, Inc.*, 517 U.S. at 585).

Because the district court's approach permits so little evaluation of the evidence prior to class certification, it will be nearly impossible to discern whether cases certified under that approach will target actual discrimination, or merely the companies with the deepest pockets. It is likely that a number of these cases will simply move large sums of money from one party to the other.

For all of these reasons, EEAC respectfully submits that the Petition for Rehearing *En Banc* should be granted.

Respectfully submitted,

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Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR *AMICUS CURIAE* CALIFORNIA EMPLOYMENT LAW COUNCIL IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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Petitioner Wal-Mart Stores, Inc. has articulated multiple important reasons for granting rehearing *en banc*, but the California Employment Law Council[1] will focus on only one: The panel decision conflicts with Section 706(g) of Title VII, as construed in at least five U.S. Supreme Court decisions and four decisions (including one *en banc* decision) of the Ninth Circuit. The panel decision further conflicts with the Supreme Court's teaching on punitive damages.

The panel majority here approved use of "formula"[2] relief for both back pay and punitive damages to the class, which means that the defendant will not be given the opportunity, at any stage of the case, to demonstrate that particular class members are not discrimination victims. Thus, numerous class

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[1] CELC's interest in this matter is more fully set forth in the Application for Leave to File Brief *Amicus Curiae*, accompanying this brief.

[2] The dissent summarized the procedure as follows:

"The district court's formula approach to dividing of punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women who were not. Women who were fired or not promoted for good reasons will take money from Wal-Mart they do not deserve, and get reinstated and promoted as well. . . . This is 'rough justice' indeed. 'Rough,' anyway. Since when were the district courts converted into administrative agencies and empowered to ignore individual justice?" (citing *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 137, 177 (N.D. Cal. 2004) (deciding "that this 'rough justice' is better than the alternative of no remedy at all for any class member"). Slip Opinion at p. 16260.

members who are not discriminatees can recover back pay and punitive damages.[3] That approach is incompatible with Title VII and due process, as this brief demonstrates.

I. THE PANEL MAJORITY DECISION CONFLICTS WITH SECTION 706(g) OF TITLE VII, AND 30 YEARS OF SUPREME COURT CASES INTERPRETING IT.

The panel majority here affirmed certification of a nationwide class of somewhere between 1.5 million and 2 million members. The district court recognized, and the panel majority did not dispute, that the case was manageable as a class only if Wal-Mart was denied the right (i) to prove, at any phase of the trial, that particular persons (or groups of persons, such as employees at particular stores[4]) were not discriminated against, and (ii) to contest the eligibility of those individuals to back pay and punitive damages.

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[3] As the defense stated, "There will never be an adjudication, let alone an adjudication by an Article III judge and a jury, to determine whether Wal-Mart owes any particular woman the money it will be required to pay . . . . Slip Opinion at p. 16255.

[4] The parties' briefs reveal that the undisputed statistical evidence is that there is no statistically significant difference in pay between men and women at more than 90% of Wal-Mart stores nationwide, and that at 35-40% of the stores (including about 25% of the stores where a pay disparity was statistically

(continued...)

Under the trial plan approved by the panel majority, a "formula" would be used to determine the total amount of back pay, and punitive damages would be distributed pro rata in proportion to back pay. The trial plan envisions appointing a Special Master to identify the potential discriminatees, using "objective" evidence captured in Wal-Mart's personnel database (which, the court acknowledged, lacks relevant information such as the principal determinant of starting pay, prior experience, ER 1213).[5] The potential discriminatees would receive back pay and punitive damages according to formula, with no opportunity for the defendant to prove the absence of discrimination.

This procedure simply and demonstrably violates Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). The mode of adjudication of a Title VII class action has been established since *Teamsters v. United States*, 431 U.S. 324 (1977). In Phase I, plaintiffs carry the burden of demonstrating that a pattern or

(...continued)
significant) any disparity tends to favor *women*. The undisputed statistics thus suggest that the class includes hundreds of thousands of women who work at stores where women were statistically favored and thus do not appear to be even potential discriminatees.

[5] This means, for example, that a female meatcutter with one year of experience, hired at $15 per hour on the same day that a male meatcutter with 20 years of experience is hired at $16 per hour, will be statistically presumed to be a discrimination victim and entitled to back pay and punitive damages.

practice of discrimination generally exists. Each class member seeking monetary relief enters Phase II with a presumption in her favor, but the employer has an opportunity to prove that, despite the finding of a pattern of discrimination, a particular claimant was not a victim and is not entitled to relief. The district court here dispensed with Phase II, and the panel affirmed. As the dissent pointed out, this will concededly grant relief to "undeserving class members" because it will result in back pay and punitive damages going to nonvictims.

But the panel was not free to sacrifice substance in the name of procedure. Section 706(g) of Title VII provides, in relevant part:

> No order of the court shall require . . . payment to [any individual] of any back pay, if such individual . . . was [treated as he or she was] for any reason other than discrimination . . . .

Thirty years of Supreme Court cases have explained the origin and significance of that section. *Teamsters*, for example, made clear that mere membership in a disadvantaged class is insufficient to warrant judicial relief; "the [district] court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims." 431 U.S. at 371; *accord id.* at 361-62 ("to determine the scope of

individual relief" following a pattern-or-practice finding, the employer may "demonstrate that the individual . . . was denied an employment opportunity for lawful reasons").

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

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

In *Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984), the Court again considered the issue of relief to persons not shown to be discrimination victims. The statute "provide[s] make-whole relief only to those who have been actual victims of illegal discrimination," the Court stated. *Id.* at 580. The Court reviewed the legislative history, noting that Title VII's opponents had sought to scuttle the bill by speculating that employers could be ordered to grant relief to nondiscriminatees. The *Stotts* Court quoted Senator Hubert Humphrey's dispositive response in the legislative history at the time:

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

Id. (emphasis added) (quoting 110 Cong. Rec. 6549 (1964)) (remarks of Sen. Humphrey). *Stotts* also quoted "the authoritative" interpretative memorandum on the bill by Senators Clark and Case, "the bipartisan 'captains' of Title VII." *Id.* at 580 n.14. Under the proposed bill, those senators explained, "a court was not authorized to give [any relief] to nonvictims." *Id.* at 580 (quoting 110 Cong. Rec. at 7214).

Where there is a pattern or practice of discrimination, a court of course may order injunctive or other affirmative relief to put a stop to the

discriminatory practice. But individual-specific monetary or equitable relief cannot be granted to nonvictims, *Stotts* explained. The Court cited Title VII's bipartisan sponsors' newsletter: "'[N]ot even a court, much less the [Equal Employment Opportunity] Commission, could order . . . payment of back pay for anyone who is not discriminated against in violation of this title.'" *Id.* at 581-82 (quoting 110 Cong. Rec. at 14465).

Thereafter, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court considered the special problem of plaintiffs who may have been denied job benefits partly for legitimate and partly for discriminatory motives. Citing section 706(g), the Court reiterated "that Title VII does not authorize affirmative relief for individuals as to whom, the employer shows, the existence of systemic discrimination had no effect. [Citations to *Franks*, *Teamsters* and *Rodriguez* omitted.] These decisions suggest that the proper focus of § 706(g) is on claims of systemic discrimination . . . ." *Id.* at 244-45.[6] Systemic discrimination is exactly the allegation here.

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[6] The Civil Rights Act of 1991 codified *Price Waterhouse* in part and modified it in part on grounds not material here. "The 1991 Act affirmed the *Price Waterhouse* holding that mixed motive is an affirmative defense" for the employer to invoke. Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 99 & n.318 (4th ed. 2007) (quoting 42 U.S.C. § 2000e-

(continued...)

The panel majority's decision here is irreconcilable with *Teamsters*[7] and the other above-described Supreme Court cases construing

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(...continued)

5(g)(2)(B)) (permitting the employer to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor").

[7] Please compare the new panel decision with the original panel decision, filed February 6, 2007, reported as *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007) ("*Dukes I*"). After reviewing the *en banc* briefs, including a substantially similar prior version of this brief, the panel deleted numerous justifications for its decision to deny Wal-Mart the right to prove that individual back pay claimants were not discriminatees, including the following: (1) a four-paragraph section entitled "*Teamsters* Does Not Require Individualized Hearings"; (2) a section entitled "Title VII Does Not Require Individualized Hearings"; (3) a section entitled "Statistical Methods May Be Applied To Determine Relief"; (4) a section entitled "Civil Rights Act Of 1991" (which argued that the mixed-motive amendments to Title VII were not a "defense" that an employer could utilize, which conflicted directly with this court's *en banc* decision in *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003)); (5) a section entitled "Class actions involving punitive damages do not necessarily require individualized hearings"; (6) a section entitled "Due Process does not require individualized hearings"; (7) the following "formula" language quoted extensively in our prior brief:

> "[T]he district court reasoned that if, at the merits stage, Wal-Mart was found liable of discrimination, the court could employ a formula to determine the amount of back pay and punitive damages owed to the class members.";

and (8) the panel majority's extensive reliance upon *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). That 33-year-old case preceded each and every one of the Supreme Court cases explicating the significance of section 706(g) and has been repudiated within its own circuit. A comparison of the original opinion and the revised opinion can lead to only one conclusion: The extraordinary differences in reasoning between the two panel decisions represent a result in a fruitless search for a defensible legal rationale.

section 706(g).[8] Plaintiffs have contended, however, that substantive law can be ignored in order to cram a particular case into the class action device.[9] The Rules Enabling Act says otherwise. 28 U.S.C. § 2072(b). As the Supreme Court said, in discussing Rule 23:

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

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[8] The panel majority, in its revised opinion, principally relies upon *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), which it accurately describes as a class action protesting "torture, summary execution, and 'disappearance'" at the hands of Ferdinand E. Marcos, the Philippines' former president. *Id.* at 771. Since *Hilao* was not an employment discrimination case, Section 706(g) and the *Teamsters* line of Supreme Court decisions, barring relief to non-victims, were inapplicable.

[9] One fallacy, not expressed in but perhaps underlying the panel majority's decision, is that it must be "this class or no class," and that Wal-Mart because of its size is seeking an effective exemption from the law. Not so. More narrowly tailored litigation of course is possible. Here, as noted above, the undisputed store-by-store statistics show that only 10% of Wal-Mart stores had a statistically significant difference in pay (with 25% of those stores tending to favor women). If the *en banc* Court reverses class certification, the nationwide consortium of law firms representing plaintiffs surely will bring individual-store class actions at the stores where the statistics indicate that a problem may have existed in the past. Wal-Mart stores are large, and an individual-store class action would average hundreds of class members, the size of a typical, manageable Title VII class action.

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

And even if section 706(g) somehow could be dispensed with, the constitutional principle of due process cannot. Under the certification order, now affirmed, punitive damages (not just back pay) will be potentially available, dispensed by formula to persons who themselves are non-victims. That cannot be, as the Supreme Court explained in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). Punitive damages to a plaintiff must be "reasonable and proportionate to the amount of *harm to th[at] plaintiff*," the Court explained in *State Farm*, 538 U.S. at 422-26 (emphasis added); a trial lacks due process where "a defendant [is] threatened with punishment" without an "opportunity to defend against the charge, *by showing . . . that the other [putative] victim was not entitled to damages*" for reasons unique to that individual. *Philip Morris*, 127 S. Ct. at 1063 (emphasis added). "[T]he Due Process Clause prohibits . . . punishing [a defendant]

without first providing . . . an opportunity to present every available defense," the Supreme Court emphasized. *Id.* (citation and internal quotation marks omitted). But the certification order here allows victims and nonvictims alike to recover, without affording the defendant the opportunity to dispute the entitlement of the nonvictims. That is wrong, both under section 706(g) and as a matter of due process.

Especially egregious is the panel's allowance of punitive damages to class members whose claims are so tenuous they are not even eligible for formula back pay relief. With respect to allegations of promotion discrimination, some jobs were posted, and there were identifiable applicants. Under the trial court's order, all minimally qualified applicants for posted jobs, no matter how relatively unqualified, would share in any back pay or punitive damages awards. Other jobs were not posted. The district court recognized that there was no way to determine who was interested in promotions that were not posted. The district court ruled:

> As Plaintiffs have not proposed any other manageable alternative in this case, the Court declines to certify a claim for lost pay with respect to the portion of Plaintiffs' promotion claim where no objective applicant data exists.

Dukes v. Wal-Mart Stores Inc., 222 F.R.D. 137, 182 (N.D. Cal. 2004). The panel affirmed this finding that identifying even potential victims with respect to unposted promotions would be unmanageable. Slip Opinion at p. 16241 n.15 ("The district court determined that it would be unmanageable to fashion a remedy for the subset of the class for whom objective applicant data did not exist. We agree with the district court's analysis and resolution of this issue.") (citation omitted). But for this unmanageable class, where the alleged victims cannot be identified, the panel seems to authorize an award of punitive damages to these same unmanageable, unidentifiable individuals:

> With respect to Plaintiffs' promotion claim, the court's finding was mixed. The court certified the proposed class with respect to . . . liability for punitive damages . . . . however, the court rejected the proposed class with respect to the request for back pay, because data relating to the challenged promotions were not available . . . .

Slip Opinion at p. 16214.

II. THE PANEL MAJORITY OPINION CONFLICTS WITH PRIOR NINTH CIRCUIT CASES.

Until the panel decision here, this Court's cases had been faithful to section 706(g)'s text and the Supreme Court's teaching.

Only once before has a district court in the Ninth Circuit purported to solve manageability problems in a huge class action by permitting relief to nonvictims. A different panel of this Court (per curiam opinion of W. Fletcher, Kozinski, and Reavley, JJ.) unanimously held that this could not be done:

> The district court abused its discretion when it certified the class for purposes of determining plaintiffs' punitive damages claims . . . . To receive punitive damages in a Title VII case, a plaintiff must have suffered some harm as a result of a defendant's illegal behavior. . . . If the district court's certification [of punitive damages] were upheld, the beneficiaries of the punitive damages would necessarily include those class members not affected by the alleged discriminatory policy as well as those who were. *This may not be done.*

Beck v. Boeing Co., 60 Fed. Appx. 38, 39-40 (9th Cir. 2003) (emphasis added).

The rule applied there is not new in this circuit. In *Muntin v. California Parks & Recreation Department*, 671 F.2d 360, 363 (9th Cir. 1982) (per Ferguson, J., joined by Farris and Nelson, JJ.), for example, the Court explained that "the law does not contemplate an award of backpay to a plaintiff who . . . would not have been hired or promoted even in the absence of the proven discrimination." In *Fadhl v. City & County of San Francisco*, 741 F.2d 1163, 1166 (9th Cir. 1984) (per Kennedy, J., joined by Reinhardt and Hoffman, JJ.), the Court reiterated "that an award of back pay . . . is appropriate only if

the discrimination is a but for cause of the disputed employment action." If not, section 706(g) would "bar such relief," this Court held. *Id.*

Most recently, in *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002) (*en banc*; per McKeown, J.), this Court held that "Where the employer asserts that, even if the factfinder determines that a discriminatory motive exists, the employer would in any event have taken the adverse employment action for other reasons, it may take advantage of the 'same decision' affirmative defense," and demonstrate that, as to any particular individual, the same employment decision would have been made for lawful reasons. The Supreme Court affirmed. 539 U.S. 90, 94 (2003).[10]

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[10] The panel majority, in its original decision, discussed mixed motive but simply ignored the *en banc* Ninth Circuit *Costa* decision, in erroneously holding that mixed motive is not a defense that can be asserted by Wal-Mart. The panel majority in their original decision said that "[p]laintiffs have the choice to proceed under a 'single motive' theory or a 'mixed motive' theory; Wal-Mart cannot force Plaintiffs to proceed under a 'mixed-motive' theory simply because it wishes to present a 'same decision defense.'" *Dukes I*, 474 F.3d at 1241 (citation omitted). But in their revised opinion, the panel majority deleted all discussions of mixed-motive. As *Costa* held, mixed motive is a defense; as the district court held, this case would be unmanageable if Wal-Mart were allowed to take advantage of the mixed-motive defense. The obvious conclusion: substantive rights have been ignored by the panel in favor of procedure—an overbroad class action.

The panel decision here cannot be reconciled with these cases. The certification order strips Wal-Mart of the right not to pay money to nonvictims.

III. CONCLUSION

En banc review should be granted because the panel decision conflicts with Title VII's plain words, and with 30 years of the Supreme Court's – and this Court's own – teaching.

DATED: January 10, 2008

Respectfully submitted,

By: David R. Bruce
David R. Bruce

President of and Attorney for *Amicus Curiae*
California Employment Law Council

CERTIFICATE OF COMPLIANCE

PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that, pursuant to Circuit Rule 35-4 and 40-1, the attached letter brief in support of petition for rehearing en banc is proportionately spaced (in Times New Roman type style), has a typeface of 14 points, and is 15 pages in length.

Dated: January 10, 2008

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Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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The California Employment Law Council (CELC) respectfully applies for leave to file an *amicus curiae* brief in support of the petition for rehearing en banc of Wal-Mart Stores, Inc. The proposed brief is lodged concurrently with this application. Counsel for plaintiffs have represented to Wal-Mart's counsel that they consent to this filing.

CELC is familiar with the questions presented by this case, has reviewed all of the briefs filed by the parties to date in this Court and in the trial court and is familiar with the scope of presentation of the issues. CELC believes that the Court would benefit from additional argument, as specified below.

I. INTEREST OF *AMICUS CURIAE*

CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 50 private sector employers in the State of California, who collectively employ well in excess of a half-million Californians.

CELC has been granted leave as *amicus curiae* to orally argue and/or to file briefs in many of California's leading employment cases, including *Foley v.*

Interactive Data Corp., 47 Cal. 3d 654 (1988); *Cassista v. Community Foods, Inc.*, 5 Cal. 4th 1050 (1993); *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238 (1994); *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93 (1998); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Asmus v. Pacific Bell*, 23 Cal. 4th 1 (2000); *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163 (2000); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000); *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317 (2000); and *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798 (2001).

CELC also has participated in significant employment-law decisions of this Court, including *Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042 (9th Cir. 2000); *Asmus v. Pacific Bell*, 159 F.3d 422 (9th Cir. 1998); *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998); *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997); *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498 (9th Cir. 1989); and *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987).

CELC respectfully submits its views here because of the importance of this case. This case presents the question of whether substantive rules of employment law may be modified to make a case fit into the class-action device.

This Court should review this case to resolve a conflict between the panel decision and prior Ninth Circuit and Supreme Court precedent.

II. PROPOSED *AMICUS* PRESENTATION

CELC proposes to argue as follows:

1. The panel majority affirmed a class-certification order that denies the defendant an opportunity to prove that particular class members are not discrimination victims.

2. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), prohibits granting monetary relief to persons who are not themselves discrimination victims.

3. Five Supreme Court cases, relying on section 706(g), have held that class actions cannot award monetary relief to nonvictims.

4. The Supreme Court also has emphasized that due process prohibits awarding punitive damages to nonvictims, and that defendants cannot be deprived of the opportunity to present individual defenses to such damages.

5. The panel majority decision here conflicts with several prior Ninth Circuit decisions as well.

III. CONCLUSION

For these reasons, the CELC respectfully requests that leave to file be granted.

DATED: January 10, 2008

Respectfully submitted,

By: _____
David R. Bruce, Esq.

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California Employment Law Council

Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The **Chamber of Commerce of the United States of America** has no parent corporation and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e - 2000e-17 (2006). The Chamber's members devote extensive resources to developing employment practices and procedures, and developing compliance programs designed to ensure that their employment actions are consistent with Title VII and other legal requirements. If the panel's decision stands, it will have a potentially destructive effect on the Chamber's members, who will likely face billions of dollars in new claims, without any opportunity to present the evidence in their own defense. All parties have consented to the filing of this brief.

ARGUMENT

The Chamber agrees with the arguments set forth in Wal-Mart's Petition for Rehearing En Banc. It submits this brief to highlight the conflict between the

panel's decision and Supreme Court precedent, the Rules Enabling Act, and the fundamental purposes of Title VII.

Put bluntly, the panel's decision eviscerates the single most important right granted to employers by Title VII, the right to present rebuttal evidence demonstrating that particular plaintiffs have not actually suffered from discrimination. That right is the mainstay of individual employment discrimination cases, providing the critical mechanism through which employers can answer a plaintiff's prima facie case of discrimination with evidence demonstrating that the plaintiff's alleged harm was not an instance of discrimination, but rather a legitimate employment decision based on the plaintiff's lack of qualifications, failure to seek a particular promotion, or some other legitimate business rationale. Stripping defendants of this right would gut the traditional Title VII analysis, reducing it to a mere exercise in establishing a prima facie case.

Yet that is precisely what the panel's decision does. The panel's decision would permit trial under one of two trial plans: the original plan proposed by the district court (which the panel has now refused either to defend or hold unlawful), and an alternate plan that would involve trial of a an as-yet undetermined number of test cases selected at random. But both plans would deny Wal-Mart the right to present rebuttal evidence in its own defense as to all or most class members.

Under the district court's plan, plaintiffs would be permitted to present a prima facie case based on statistical evidence, and then move straight to a determination of remedies, skipping *entirely* the defendant's right to present evidence in its defense. And the panel's alternate proposal would similarly deny the defendant the right to present evidence in its own defense in all but a negligible number of test cases.

Both plans thus squarely conflict with Supreme Court precedent recognizing an employer's fundamental rights under Title VII to present rebuttal evidence in its own defense as to *each* individual who seeks monetary relief, and with the Rules Enabling Act, which mandates that substantive rights cannot be truncated simply to permit claims to be tried on a class basis. Moreover, because it permits trials in which employers have no right to present rebuttal evidence in their own defense, the panel's decision will (if not overturned) have disastrous practical effects, pressuring employers to settle huge claims regardless of their merit, and forcing them to adopt the kinds of quota-like policies that Title VII was enacted to prevent. Rehearing should therefore be granted to correct the panel's decision.

I. THE PANEL'S DECISION WOULD DEPRIVE EMPLOYERS OF THE FUNDAMENTAL RIGHT TO PRESENT KEY REBUTTAL EVIDENCE

In the face of the "largest class certified in history," slip op. 16241, the

panel's decision purports to deny Wal-Mart the right to present crucial evidence in its own defense. Under that decision, plaintiffs will (in most or all cases) be permitted to proceed directly from demonstrating a prima facie case of classwide discrimination based on statistical and anecdotal evidence to a determination of remedies, without the employer being allowed to exercise its right to submit rebuttal evidence in its own defense. That fundamental right, guaranteed both by the Due Process Clause and by Title VII, would be swept aside in the name of convenience, based on the district court's conclusion that conducting individualized hearings as to all relevant class members would be "impractical on its face." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 176 (N.D. Cal. 2004).

Convenient or not, it is well-established that every employer is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). The opportunity to present case-specific rebuttal evidence of the lawful basis for an employment action (such as job qualifications, work performance, misconduct, economic need,

or attendance) has been decisive in myriad employment discrimination cases. For example, in *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000), this Court affirmed summary judgment for an employer in an age discrimination case after the employer demonstrated that plaintiffs "were not as qualified as those employees chosen," and plaintiffs were unable to show that this justification was pretextual. *See also, e.g.*, *Lyons v. England*, 307 F.3d 1092, 1117 (9th Cir. 2002) ("whether [plaintiff was] as qualified as any of the promotion recipients is a factually intensive question best resolved by the jury"); *Bateman v. United States Postal Serv.*, 151 F. Supp. 2d 1131, 1139-40 (N.D. Cal. 2001) (plaintiff could not overcome evidence that termination was based on misconduct, not race discrimination), *aff'd*, 32 F. App'x 915 (9th Cir. 2002); *Tempesta v. Motorola, Inc.*, 92 F. Supp. 2d 973, 980 (D. Ariz. 1999) (plaintiff could not show that he had applied for any positions), *aff'd*, 21 F. App'x 915 (9th Cir. 2001).

The Supreme Court has confirmed that individualized hearings are an integral part of both individual Title VII cases and class actions, providing the employer with an opportunity to offer individualized substantive defenses to liability. In *Teamsters*, the Court explained that if plaintiffs prove that an employer has "engaged in a pattern of racial discrimination," the burden "shift[s] to the employer to prove that individuals" who claim to have suffered from

discrimination "were not in fact victims" of such discrimination. *Teamsters*, 431 U.S. at 359 (internal quotation omitted). But the fact that a plaintiff makes out a prima facie case of discrimination "d[oes] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice." *Id.* at 359 n.45. Rather, in cases where plaintiffs seek individual monetary relief, "a district court must usually conduct additional proceedings" – *i.e.*, individualized hearings – at which the employer can "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 361-62. For example, "the employer might show that there were other, more qualified persons who would have been chosen for a particular vacancy, or that the nonapplicant's stated qualifications were insufficient." *Id.* at 369 n.53. In short, the trial court "will have to make a substantial number of *individual determinations* in deciding which of the ... employees were actual victims of the company's discriminatory practices." *Id.* at 371-72 (emphasis added). *See also Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 876 (1984) (after pattern or practice finding "additional proceedings are ordinarily required to determine the scope of individual relief for the members of the class"); *Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 651 (6th Cir. 2006) ("in a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's

harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 421 (5th Cir. 1998) ("The second stage of a pattern or practice claim is essentially a series of individual lawsuits, except that there is a shift of the burden of proof in the plaintiff's favor"); *Reid v. Lockheed Martin Aero. Co.*, 205 F.R.D. 655, 687 n.35 (N.D. Ga. 2001) (employer has "the right to rebut the presumption that the adverse employment action was due to discrimination and to show that individual members of the class are not entitled to back pay").

The panel's decision in this case cannot be reconciled with *Teamsters*. As the panel's original opinion conceded, even if plaintiffs successfully demonstrated a general practice of discrimination via statistics and anecdotes, they would be entitled only to a "*rebuttable* presumption that they are entitled to relief." Slip op. 1369 (emphasis added). Yet both of the trial plans permitted by the panel's opinion would undermine this concession by denying Wal-Mart the opportunity to present rebuttal evidence in its own defense as to all or most class members. The district court's trial plan – which the panel characterized as potentially "viable" (slip op. at 16246-7 n. 23) and refused to either uphold or set aside – gives employers no opportunity *whatsoever* to "rebut" this presumption of entitlement to

relief. Instead, after the prima facie stage, the case would immediately proceed to a "remedy phase" to be resolved pursuant to a "formula" and without the individualized hearings required by *Teamsters*. *See* slip op. at 16242 n.16. In refusing to invalidate the district court's trial plan, the panel decision thus *flatly denies* Wal-Mart the fundamental right, affirmed in *Teamsters*, to demonstrate that it had lawful reasons for denying particular class members promotions or higher pay.[1]

The panel's alternative procedure would likewise deny Wal-Mart its fundamental rights under Title VII and *Teamsters*. In its new opinion, the panel

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[1] In its original opinion, the panel attempted to demonstrate that, notwithstanding its wholesale abrogation of Wal-Mart's right to present rebuttal evidence in its own defense, the district court's trial plan was consistent with *Teamsters*. In its new opinion, the panel abandons any attempt at such a defense, stating simply that it is expressing "no opinion regarding Wal-Mart's objections to the district court's tentative trial plan." Slip op. 16243.

In any event, that panel's original attempt to reconcile the district court's trial plan with *Teamsters* was entirely unpersuasive. In its prior opinion, the panel claimed that *Teamsters* only holds that courts must "*usually* conduct" individualized hearings to determine the scope of individual relief. Slip op. at 1369 (quoting *Teamsters*). But that is not true where, as here, the scope of any "individual relief" cannot be determined without individualized hearings. In those circumstances, *Teamsters* makes plain that individualized determinations of eligibility for relief are required. Indeed, in *Teamsters* itself, the Court rejected claims that the evidence demonstrated a classwide desire for the jobs at issue, and held instead that plaintiffs had to prove entitlement to relief "*with respect to each specific individual*, at the remedial hearings to be conducted by the District Court." 431 U.S. at 371 (emphasis added).

suggests that this case could also be tried using the unprecedented procedure discussed in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), which involved trial of a small number of test cases chosen by lottery. *See* slip op. at 16243-16246. As Wal-Mart explains in its Petition, this plan would likely be unworkable in light of the more than 1.5 *million* class members in this case (as opposed to the 10,000 at issue in *Hilao*). *See* Petition for Reh'g 15-18. But even apart from these difficulties, the *Hilao* trial plan is flatly contrary to *Teamsters*. The panel suggests that the *Hilao* plan "would allow Wal-Mart to present individual defenses in the randomly selected 'sample cases.'" Slip op. at 16246 n.22. *Teamsters*, however, requires that an employer have the right to present rebuttal evidence as to *each individual* seeking relief. *See Teamsters*, 431 U.S. at 361-62 (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer can demonstrates that the "*individual applicant*" was denied an employment opportunity for lawful reasons) (emphasis added). Under the *Hilao* plan, this requirement would be patently disregarded in all but a small number of randomly selected test cases, in violation not only Title VII and *Teamsters* but also fundamental principles of due process. *See, e.g.*, *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (due process requires that a defendant have "'an opportunity to present every available

defense'").

Further, by purporting to adopt plans that the panel itself concedes are "imperfect" in the name of convenience (slip op. 16246), the panel's opinion violates the Rules Enabling Act ("REA"), which provides that "general rules of practice and procedure . . . shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b) (2006). Under either the district court's trial plan or the *Hilao* plan, employers would face liability for employment decisions they could readily defend if the claims were brought in the context of an individual action. Either plan would thus fundamentally alter the substantive rights and burdens that would otherwise obtain in an individual action. That is impermissible under the REA.

II. IF ALLOWED TO STAND, THE PANEL'S DECISION WILL COERCE SETTLEMENTS AND SUBVERT THE PURPOSES OF TITLE VII

In addition to being legally incorrect, the panel's decision will have at least two destructive practical effects. First, it will create strong pressures on employers to settle, even when the lawsuits they face lack merit. Courts have long recognized that class actions may unduly pressure a defendant to settle regardless of the suit's merits. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("These settlements have been referred to as judicial blackmail."). This pressure is

intensified when an employer has no opportunity to present evidence in its own defense.

Second, the panel decision will encourage employers to adopt the kinds of quota-like policies Title VII was adopted to prevent. If employers are denied an opportunity to present evidence demonstrating that their actions were lawful, then they can only avoid liability by making it impossible for any plaintiff to establish a prima facie case of discrimination in the first place. This can only mean ensuring there is *no* way to produce *any* kind of statistical case that their policies have a statistically disparate effect. But satisfying this standard would take employers well beyond the legitimate and necessary exercise of policing their employment policies and practices for true discrimination. As a plurality of the Supreme Court has observed,

> It 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. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality op.) (citation omitted). Unable to avoid lawsuits by aggressively rooting out true discrimination, employers may be pressured to adopt "inappropriate prophylactic measures." As the plurality also observed,

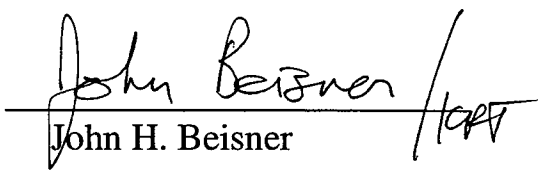
> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.

Id. at 993. This result would be intolerable, because "[p]referential treatment and the use of quotas by public employers ... can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII." *Id.* (internal quotation marks and citations omitted). Yet this intolerable result is *precisely* what the panel decision in this case will bring about. The Court should grant rehearing en banc to prevent these perverse and destructive results.

CONCLUSION

For the reasons stated, this Court should grant Defendant-Appellant's petition for rehearing en banc.

Respectfully submitted,



John H. Beisner

Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RESPONSE FOR WAL-MART STORES, INC. TO PLAINTIFFS' PETITION FOR PANEL REHEARING

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INTRODUCTION

The district court certified a class of all female Wal-Mart employees dating back a decade—now estimated by plaintiffs' counsel to include more than two million women—without regard to whether they are currently employed by the company. But four of the six remaining named plaintiffs, along with a majority of the absent class members, are *former* Wal-Mart employees who have no stake in obtaining injunctive or declaratory relief. In its appeal from the certification order, Wal-Mart objected to the use of Rule 23(b)(2)—which by its terms applies only to "final injunctive relief or corresponding declaratory relief"—to certify a class that is largely comprised of, and represented by, former employees who have no standing to seek an injunction or declaration.[1]

The panel majority agreed with Wal-Mart that former employees lack standing to secure the injunctive or declaratory relief sought in the class complaint, and concluded correctly that persons who lack standing to seek relief authorized by Rule 23(b)(2) must be excluded from a class certified under that Rule. Slip op. 16240. Contrary to plaintiffs' principal contention (Pet. 1), there is no inconsistency between that conclusion and the decision in *Bates v. United Parcel Service,*

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[1] Other errors in the certification order are addressed in Wal-Mart's separate petition for rehearing en banc. The district court case recently was reassigned to Chief Judge Walker for any further proceedings.

Inc., 511 F.3d 974 (9th Cir. 2007) (en banc). *Bates* did not address the standing question presented here and, in any event, supports Wal-Mart's arguments that the class must be decertified. Plaintiffs' other arguments are equally misplaced.

ARGUMENT

The panel majority "agree[d] with Wal-Mart to this extent: those putative class members who were no longer Wal-Mart employees at the time Plaintiffs' complaint was filed do not have standing to pursue injunctive or declaratory relief." Slip op. 16240; *see* note 2, *infra*. Plaintiffs' petition for rehearing is leveled at that statement and its ramifications.

I. Former Employees Lack Standing to Seek Injunctive or Declaratory Relief

This Court's en banc decision in *Bates* confirms that a person who does not stand to benefit from an injunction lacks Article III standing to maintain a suit for injunctive relief. 511 F.3d at 985 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)). Likewise, a person who does not stand to benefit from a declaration of rights cannot maintain a declaratory judgment action in federal court. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). The corollary in the employment context is that, absent rare exceptions not present here, continued employment is a prerequisite to maintaining suit for injunctive or declaratory relief. *See, e.g.*, *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002); *Cardenas v.*

Massey, 269 F.3d 251, 265 (3d Cir. 2001); *Amirmokri v. Balt. Gas & Elec. Co.*, 60 F.3d 1126, 1132 (4th Cir. 1995).

Thus, the panel was undoubtedly correct in "recognizing that former employees lack standing to seek injunctive relief because they 'would not stand to benefit from an injunction . . . at [their] former place of work.'" Slip op. 16240 (quoting *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006)) (ellipses added). Other courts of appeals apply the same standing rule to former employees in employment class actions. *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 16 (1st Cir. 2008); *Faibisch*, 304 F.3d at 801; *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1007 (11th Cir. 1997); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990); *Walls v. Miss. State Dep't of Pub. Welfare*, 730 F.2d 306, 325 (5th Cir. 1984).[2]

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[2] The panel majority was, however, incorrect to state that "[t]hose putative class members who were still Wal-Mart employees as of June 8, 2001 (when Plaintiffs' complaint was filed) *do* have standing to seek the injunctive and declaratory relief requested in the complaint." Slip op. 16240. The sole authority cited by the panel majority involved the "capable of repetition, yet evading review" *exception* to the standing (mootness) doctrine. *Am. Civil Liberties Union of Nev. v. Lomax*, 471 F.3d 1010, 1015, 1016-17 (9th Cir. 2006). Plaintiffs have never invoked that exception in this case, nor could they: Some of the class members (including two named plaintiffs) have remained continuously employed by Wal-Mart, and thus have standing to seek "review" of this issue. In the absence of a recognized exception, standing must be present at *all* stages of the litigation, not just when the complaint is filed. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

In their petition, plaintiffs note that "two named plaintiffs have standing to seek injunctive relief" because they "were employed at Wal-Mart on the date the complaint was filed and are still employed at Wal-Mart." Pet 4. In so stating, plaintiffs apparently admit that the remaining four named plaintiffs, who are no longer employed by Wal-Mart—not to mention the one-million-plus former employees in the class certified by the district court—lack standing to sue for an injunction or declaration. The unchallenged proposition that former employees lack standing to seek an injunction or declaration has one of two inevitable consequences for this case: Either (A) such persons must be excluded from the Rule 23(b)(2) class (as the panel majority recognized); or (B) if they were to remain class members (as plaintiffs now urge), their presence provides yet another reason, in addition to the numerous other grounds set forth in Wal-Mart's petition for rehearing en banc, that the Rule 23(b)(2) certification order must be vacated.

A. Former Employees Must Be Excluded From A Rule 23(b)(2) Class

Rule 23(b)(2) allows class certification if the defendant "has acted or refused to act on grounds that apply generally to the class, so that final *injunctive* relief or corresponding *declaratory* relief is appropriate *respecting the class as a whole*." Fed. R. Civ. P. 23(b)(2) (emphases added). Rule 23(b)(2) is limited by its terms to claims for injunctive or declaratory relief; claims for backpay and other monetary relief are not within the plain terms of the Rule. *See Ticor Title Ins. Co. v. Brown*,

511 U.S. 117, 121 (1994) (recognizing the "substantial possibility" that actions seeking monetary damages "can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not").

If a single former employee lacks standing to seek an injunction, as plaintiffs acknowledge, then a class of former employees also lacks standing to seek an injunction. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (Rule 23 "must be interpreted in keeping with Article III constraints") (citation and quotations omitted). To put the proposition differently, former employees cannot be members of a class certified under Rule 23(b)(2) because they do not stand to benefit from the only relief expressly authorized under that subsection. *See, e.g., James v. City of Dallas*, 254 F.3d 551, 569 (5th Cir. 2001); *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 979 (5th Cir. 2000); *Comer v. Cisneros*, 37 F.3d 775, 798-99 (2d Cir. 1994). Where at least half of the class lacks standing to seek injunctive or declaratory relief, such relief is not "appropriate respecting the class as whole." Fed. R. Civ. P. 23(b)(2).

Citing *Bates*, plaintiffs contend that exclusion of former employees from the class certified in this case is inconsistent with the generic principle that "so long as 'at least one named plaintiff' has standing to seek injunctive relief, the entire class has standing to seek injunctive relief." Pet. 1 (citing *Bates*, 511 F.3d at 985).

Plaintiffs' argument rests, however, on a faulty premise—*i.e.*, that the question before the Court in *Bates* was the same as the one presented here.

In *Bates*, which arose under the Americans with Disabilities Act, the district court certified a Rule 23(b)(2) class of hearing-impaired employees. After UPS's Rule 23(f) petition for interlocutory review of the class certification order was denied, the case proceeded to trial on the merits. 511 F.3d at 981-82. The district court found in favor of the certified class and awarded injunctive relief. *Id.* On appeal from the injunction order, UPS argued that the named plaintiff (a *current* employee) lacked standing to seek an injunction due to the terms of a collective bargaining agreement. The Court held that "[e]ven if UPS is correct" as to that named plaintiff, "the remaining class members are not foreclosed from attaining relief *since the class was long ago duly certified.*" *Id.* at 986 (emphasis added).

The *Bates* Court relied largely on three cases—*Sosna v. Iowa*, 419 U.S. 393 (1975), *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395 (1977)—in which the Supreme Court addressed standing problems that arose *after* a class was properly certified. As the *Bates* Court explained, drawing from these precedents, "once a class action has been certified, the class of unnamed persons described in the certification acquire[s] a legal status separate from the representative." 511 F.3d at 987 (citing *Sosna*, 419 U.S. at 399). Thus, even if the named representative lacked

standing at the time of trial and appeal, because the named plaintiffs had standing when the class was certified and, at the time of trial and appeal, at least one identified member of the class was then-qualified to bring an ADA claim, standing to seek an injunction was present. *Id.* (citing *E. Tex. Motor Freight*, 431 U.S. at 406 n.12) ("*if 'the initial certification was proper and decertification not appropriate*, the claims of the class members would not need to be mooted or destroyed *because subsequent events* or the proof at trial had undermined the named plaintiffs' individual claims'") (emphases added).

Bates did *not* address the very different issue presented here—*i.e.*, the propriety of a Rule 23(b)(2) certification order itself where it is conceded that a majority of both named plaintiffs and absent class members lack standing to seek injunctive or declaratory relief—the sole relief that Rule is intended to address. Indeed, the *Bates* Court stressed that "[i]t is not disputed that [the named plaintiff] *had standing at the time of certification*, which is the snapshot in time for determining *initial* standing." 511 F.3d at 987 (emphases added). In this case, the question is not whether a judgment can be saved when a standing defect arises after a class is duly certified and a trial has occurred, but how standing principles affect *whether* the class has been properly certified and, if so, who are its proper members. *Cf. United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 405-07 (1980); *E. Tex. Motor Freight*, 431 U.S. at 406 n.12; *Sosna*, 419 U.S. at 399.

To be sure, the *Bates* Court said that "[i]n a class action, standing is satisfied if at least one named plaintiff meets the [Article III] requirements." 511 F.3d at 985. But here, Wal-Mart has never contended—and the panel did not hold—that the *entire case* fails for lack of standing or justiciability. Rather, what the panel majority correctly recognized is that persons who lack standing to seek an injunction cannot *participate* in a Rule 23(b)(2) action for injunctive relief. That issue was neither presented to nor resolved by the en banc Court in *Bates*.

There is more than a little irony in plaintiffs' invocation of *Bates*. In that case, the en banc Court ultimately *reversed* the district court's conclusion that the named plaintiffs were qualified (and thus had standing to sue), *vacated* the order denying the employer's motion to decertify the class, and *remanded* for further consideration of the propriety of class certification. 511 F.3d at 994. The panel's decision in this case—to "remand to the district court for a determination of the appropriate scope of the class," slip op. 16241—is thus entirely consistent with the decision in *Bates*.

B. If Former Employees Are Not Excluded, The Class Must Be Decertified

Although plaintiffs agree that "the employment status of class members may be of some relevance to the question of whether certification under Rule 23(b)(2) is warranted," they assert that "the presence of former employees in the class did not, and should not, affect the district court's finding that injunctive relief was the

predominant form of relief sought." Pet 8. That is wrong. Where the majority of class members are former employees, it simply cannot be said that injunctive or declaratory relief predominate for purposes of Rule 23(b)(2) certification, or that such relief is "appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Rule 23(b)(2), by its terms, does not authorize *any* claims for monetary relief. *See Ticor*, 511 U.S. at 121; *Adams v. Robertson*, 520 U.S. 83, 85 (1997). At minimum, Rule 23(b)(2) certification is inappropriate where injunctive relief does not "predominate." *See* 1966 Adv. Comm. Notes to Rule 23(b). The courts of appeals have developed two conflicting approaches to this "predominance" analysis. The majority rule asks whether monetary relief is "incidental" to the declaratory relief requested. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 414-15 (5th Cir. 1998). The minority rule asks whether the plaintiffs would have brought suit seeking injunctive relief alone. *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003) (expressly rejecting *Allison*'s "incidental" relief test).[3]

Under *either* rule, however, where a significant portion of the class is comprised of former employees who lack standing to seek an injunction, claims for

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[3] This express and mature conflict among the courts of appeals is one of the bases for Wal-Mart's request for en banc rehearing in this case and in *Sepulveda v. Wal-Mart*, No. 06-56090 (petition filed May 16, 2008).

injunctive relief cannot be said to predominate. *Cf. In re Monumental Life Ins. Co.*, 365 F.3d 408, 416 (5th Cir. 2004) ("certification under Rule 23(b)(2) is appropriate only if members of the proposed class would benefit from the injunctive relief they request"). Thus, if former employees remain class members in this case, as plaintiffs now urge, then the Rule 23(b)(2) certification order cannot stand.

The "Incidental" Relief Approach. Until recently, this Circuit appeared to follow the *Allison* rule: "In Rule 23(b)(2) cases, monetary damage requests are generally allowable *only* if they are merely *incidental* to the litigation." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) (emphases added); *see also Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1196 (9th Cir. 2000) (citing *Allison*); *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 928-29 (9th Cir. 1982). And the "incidental" relief approach articulated in *Allison* is followed in the great majority of the courts of appeals. *See, e.g., Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649-50 (6th Cir. 2006); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580-81 (7th Cir. 2000).

Here, a clear majority of the named plaintiffs and the absent class members have no standing to seek an injunction, and would not benefit from any injunctive relief. Any monetary recovery for those individuals could not be said to be "inci-

dental" to any injunction. Likewise, if more class members are seeking *only* monetary relief than are seeking both injunctive relief and monetary relief, the injunctive and declaratory relief requests do not predominate over the monetary relief requests. Accordingly, a Rule 23(b)(2) class cannot be certified under the *Allison* rule if former employees remain in the class.

The "Reasonable Plaintiff" Approach. In *Molski*, a panel of this Court expressly rejected *Allison*'s "incidental" relief approach, and endorsed instead an "ad hoc" approach articulated in *Robinson v. Metro-North Commuter Railroad, Co.*, 267 F.3d 147 (2d Cir. 2001). No other circuit has adopted the *Molski* approach.[4]

The panel majority invoked *Molski* in focusing "predominantly on the plaintiffs' intent in bringing the suit." Slip op. 16234. In evaluating whether the predominant relief sought here is injunctive, the panel considered whether, in the *absence* of any monetary recovery, "'reasonable plaintiffs would bring the suit to obtain the injunctive relief sought and [whether] the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.'" *Id.* at 16234-35 (citations omitted). With a considerable degree of understatement, the panel recognized that "it is difficult to say that, even

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[4] Of course, one three-judge panel of this Court lacks the authority to overrule another. Moreover, *Robinson* is one of several class-action cases that since have been expressly "disavowed" by the Second Circuit. *Compare In re IPO Sec. Litig.*, 471 F.3d 24, 35-38, 42 (2d Cir. 2006), *with Robinson*, 267 F.3d at 154-55.

in the absence of a possible monetary recovery, reasonable plaintiffs who lack standing to seek injunctive or declaratory relief would nonetheless bring this suit to obtain the injunctive or declaratory relief sought." *Id.* at 16240 (quoting *Molski*, 318 F.3d at 950 n.15; *Robinson*, 267 F.3d at 164) (internal quotation marks and alterations omitted). Thus, even if the Court were to adhere to *Molski*, inclusion of former employees in this Rule 23(b)(2) class would require decertification.

Therefore, former employees may not be included in a Rule 23(b)(2) class for injunctive relief; if such former employees are included in the class, it may not be maintained under Rule 23(b)(2) because injunctive and declaratory relief do not predominate and are not appropriate respecting the class as a whole. Those are the necessary and unavoidable consequences of the panel's unchallenged and plainly correct conclusion that the former employees in this case lack standing to seek injunctive and declaratory relief. Any contrary result would violate the Rules Enabling Act's mandate that an individual is entitled to no greater—or lesser—rights or protections when she seeks relief through the vehicle of a class action. *Ortiz*, 527 U.S. at 845; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); 28 U.S.C. § 2072(b).

II. Plaintiffs' Remaining Arguments Are Unavailing

Plaintiffs contend that excluding former employees from this Rule 23(b)(2) class (or, in the alternative, decertifying the class if they are included) is somehow

inconsistent with Title VII and Rule 23. On both counts, plaintiffs are wrong. Contrary to the hyperbole of plaintiffs and their amicus, any women with valid claims of sex discrimination would continue to have legal recourse, including through appropriate class actions, under the panel majority's approach to the standing question in this case.

Plaintiffs' suggestion that the panel's decision will encourage employers to engage in retaliatory termination, as a means of limiting the size of a later discrimination class (Pet. 6-7; *see also* NAACP Amicus Br. 18) is far-fetched, given that any such retaliation itself would be "actionable" discrimination. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). Plaintiffs here have made no allegation that a single class member was terminated in retaliation for this lawsuit or any other attempt to invoke the legal process.

Plaintiffs' intimation that the panel's approach to the standing question is inconsistent with Title VII's EEOC charge requirement is even wider off the mark. The vast majority of absent class members did not timely invoke the administrative process; even if they suffered discrimination in pay or promotion (which Wal-Mart sharply disputes), they cannot now seek to hold Wal-Mart liable, therefor. *See Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2168 (2007) ("A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences"). Although

plaintiffs suggest that such lapsed claims can be revitalized via the class device (*see* Pet. 6 n.3 (citing *Williams*, 665 F.2d at 923 n.2), any such rule would violate Title VII itself (*cf. Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1159 (2008)), basic class action principles (*see Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 550 (1974)), the Rules Enabling Act (*Ortiz*, 527 U.S. at 845; *Amchem*, 521 U.S. at 613; 28 U.S.C. §2072(b)), and due process (*Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930); *see also Ledbetter*, 127 S. Ct. at 2170).

Most importantly, former employees are not, as plaintiffs suggest, "ineligible" for class membership. Pet. 7. Instead, such persons will by definition be seeking redress through money, but a Rule 23(b)(2) *injunctive*-relief class is an inappropriate vehicle for persons asserting such claims. Claims for monetary relief, like these plaintiffs', must proceed under Rule 23(b)(3), which requires notice to absent class members, allows opt-outs, and imposes strict requirements of predominance, superiority, and manageability. *See Amchem*, 521 U.S. at 614-17; *Reeb*, 435 F.3d at 651. Yet plaintiffs in this case did not even request (b)(3) certification, implicitly acknowledging (as they must) that this case never could have been certified under that subsection. Instead, they invoked only (b)(2). This tactic contravenes the Supreme Court's recognition that Rule 23's "growing edge . . . would be the opt-out class authorized by subdivision (b)(3)," not the mandatory

classes allowed under other subdivisions of the rule. *Ortiz*, 527 U.S. at 862. Former employees are not "ineligible" for class membership.

Perhaps recognizing that the standing issue is fatal to Rule 23(b)(2) certification, plaintiffs contend that Wal-Mart waived it. But standing cannot be waived by the parties, or ignored by the Court. *Bates*, 511 F.3d at 985 ("Standing is a threshold matter central to our subject matter jurisdiction. We must assure ourselves that the constitutional standing requirements are satisfied before proceeding to the merits."). In any event, Wal-Mart raised this precise issue in its briefing. *See* Wal-Mart 23(f) Pet. 16 (explaining that under *City of Los Angeles v. Lyons*, 461 U.S. at 102, "the former employees have no Article III standing to seek injunctive or declaratory relief"); Wal-Mart Principal Br. 52-53 (explaining that former employees "not only would not, but *could not*, pursue this suit in the absence of any monetary relief; that fundamental principle of constitutional law cannot be ignored simply because this purports to be a class action"); Wal-Mart (First) Pet. for Reh'g 11 (filed Feb. 20, 2007). The panel correctly addressed standing.

Plaintiffs' petition for rehearing is itself powerful evidence that this case is all about money—and not injunctive relief. If the class (and its counsel) were primarily interested in securing an injunction against Wal-Mart, then it would not matter that the class would have to be limited to current employees. The exclusion about which plaintiffs complain so much affects only the claims for *monetary*

relief. By arguing so vigorously that such persons should be included in the class, plaintiffs' petition thus serves only to confirm that what they seek is money, and thus the impropriety of Rule 23(b)(2) certification in this case.[5]

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[5] The errors of invoking Rule 23(b)(2) in this case are not limited to the predominance of monetary relief. *See* slip op. 16254 (Kleinfeld, J., dissenting). For example, because the former-employee plaintiffs have no experiences with the *current* policies at Wal-Mart, their experiences are not probative as to whether injunctive relief is warranted or necessary today. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d at 15; *Dole*, 899 F.2d at 1401. As a result, their experiences are not typical of those of the current-employee class members eligible to seek injunctive relief. *See E. Tex. Motor Freight*, 431 U.S. at 403-04. Likewise, their experiences are not common to the current employees, having occurred years before most of the class became employed by Wal-Mart, when entirely different pay and promotion systems were in place. *Cf.* Pet. 4 n.1 (noting that turnover rate in retail is over 50% per year). And as former employees, all but two of the named plaintiffs are inadequate class representatives, as they are not members of the reconstituted class. *See Sosna*, 419 U.S. at 403 (a class representative "must be a member of the class which he or she seeks to represent at the time the class action is certified"). Thus, former employees are neither appropriate class members nor class representatives under the standards set forth in Rule 23(a), where the class seeks injunctive relief. Moreover, the alleged (if misnamed) "excessive subjectivity" at issue in this case similarly spans multiple facilities and job types, with widely disparate results, making certification improper for lack of commonality and typicality. *See, e.g., Grosz v. Boeing Co.*, 136 F. App'x. 960 (9th Cir. 2005); *Cooper v. S. Co.*, 390 F.3d 695, 715 (11th Cir. 2004); *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 571 (6th Cir. 2004); *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006); *Love v. Johanns*, 439 F.3d 723, 730-31 (D.C. Cir. 2006); *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980). For the same reason, plaintiffs cannot establish that Wal-Mart has acted on grounds generally applicable to the class, or that the class itself is "cohesive." *Cf. In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998). These problems, and others, merit decertification even if former employees are excluded from the class.

CONCLUSION

Plaintiffs' petition for rehearing should be denied.

Dated: July 14, 2008

Theodore J. Boutrous, Jr. / by RAB

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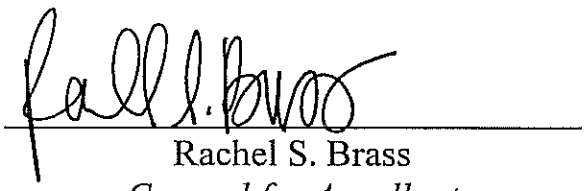
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Court Rules 35-4 and 40-1(a) because it contains 4,195 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point font size and Times New Roman type style.



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BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, and EDITH ARANA

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Defendant/Appellant.

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I. INTRODUCTION

The district court certified this employment discrimination class action under Federal Rule of Civil Procedure 23(b)(2), finding that "significant evidence of company-wide corporate policies and practices" raised "an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in a common manner." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 166 (N.D. Cal. 2004). The court's determination that the case satisfied Rule 23(b)(2), twice affirmed by the panel, was firmly grounded in well-settled Ninth Circuit precedent. Wal-Mart's petition for *en banc* review challenges two aspects of that conclusion but neither issue demonstrates the exceptional circumstances that would warrant *en banc* review.

First, Wal-Mart argues that the Rule 23(b)(2) standard for certifying cases seeking both injunctive and monetary relief – established by this Court in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003) – should be overruled. In adopting this standard, this Court evaluated alternative approaches used by the Fifth and Second Circuits and chose the latter. *Id.* at 949-50. Compare *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) with *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). Wal-Mart urges this Court to revisit *en banc* its decision to embrace the *ad*

hoc Robinson test over *Allison*'s bright line rule.

There are two critical reasons not to do so. *Dukes* does not squarely present the inter-circuit conflict raised by *Allison* and *Robinson*, as plaintiffs do not seek compensatory damages. Perhaps more importantly, *Molski* was correctly decided. The *Allison* bright line test is at odds with the language and intent of Rule 23 and, as predicted by this Court, has undermined the use of class actions in employment discrimination cases.

Wal-Mart also seeks *en banc* review of the district court's proposed trial plan on constitutional grounds. At this interlocutory stage, the trial plan is necessarily tentative and may well evolve as the case develops.[1] *En banc* review should be reserved for fully developed legal conflicts, not interim procedural orders that may be modified or mooted as the litigation progresses.

More importantly, Wal-Mart's legal theory – that due process mandates individual Stage II hearings in all class actions – presents neither an intra- or inter-circuit conflict because no court has *ever* accepted this notion. Wal-Mart fails to acknowledge controlling circuit authority, which holds that courts may use statistical methods to determine individual remedies in a Title VII class action. *See Domingo v. New England Fish Co.,*

[1] With the elevation of Judge Jenkins to the California Court of Appeal in April 2008, this case was reassigned to Judge Vaughn Walker.

727 F.2d 1429, 1444-45 (9th Cir. 1984); *McClain v. Lufkin Industries,* 519 F.3d 264, 280-81 (5th Cir. 2008); and see cases at n.15 *infra*. Nor does this case present any risk that an award of punitive damages would violate Wal-Mart's due process rights because the trial plan includes significant procedural safeguards, in addition to those already incorporated into Title VII, which will ensure that any award will be based solely upon conduct that injured the class and will compensate only actual victims.

II. THIS CIRCUIT'S STANDARD FOR RULE 23(B)(2) CERTIFICATION IS SOUND AND DOES NOT WARRANT *EN BANC* REVIEW

A. The District Court and the Panel Correctly Applied *Molski*

Wal-Mart concedes that the district court and the panel followed *Molski*'s mandate but disputes the relative weight accorded both the injunctive and monetary relief.

Injunctive Relief– Wal-Mart wrongly asserts that injunctive relief cannot be the predominant form of relief sought, when the class includes former employees.[2] Nothing in *Molski* suggests that the court should employ a headcount to ascertain the relative importance of injunctive relief.

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[2] Wal-Mart asserts, without citation, that "more than half the absent class members are former employees." Petition at 10. Having failed to make this argument below or offer evidence of the number of former employees in the class, Wal-Mart has waived this point. *See* Wal-Mart Stores Inc.'s Opp. to Plaintiffs' Motion for Class Certification, at 44-50; *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 887 (9th Cir. 2002).

Virtually every employment class action will include former employees; a purely quantitative approach would encourage employers to delay class certification proceedings and even to fire putative class members.[3] Wal-Mart's "math" also fails to account for the value of injunctive relief to *future employees*, who are part of the class. The district court found that the injunctive relief sought would "achieve very significant long-term relief" for "not only current class members, but all future female employees as well." *Dukes*, 222 F.R.D. at 171.

Punitive Damages – Wal-Mart disputes that injunctive relief can predominate when plaintiffs seek "billions" in punitive damages. Petition at 1, 10. There is *no evidence* in the record of the amount of punitive damages plaintiffs will request, nor could any estimate properly be made at this pre-trial stage. Wal-Mart's oft-repeated claim is empty rhetoric, not fact.

More importantly, the point illustrates why the district court and the panel correctly concluded that the weight accorded monetary remedies in certifying a Rule 23(b)(2) class cannot be a quantitative assessment. *Dukes*, 222 F.R.D. at 171; *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1186 (9th Cir. 2007). A jury may award punitive damages, if at all, in the amount that it

[3] Even then such a count would be misleading, since former employees may benefit from injunctive relief if they have a continuing interest in returning to Wal-Mart. *Cf. Gratz v. Bollinger*, 539 U.S. 244, 262 (2003).

believes necessary to punish the wrongdoer and deter future misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Therefore, the more widespread and egregious defendant's conduct, the larger the award likely will be. Nothing in Rule 23 suggests that (b)(2) certification should turn on the extent of culpability, nor be unavailable against the worst or largest discriminators.[4]

B. There is No Conflict Within the Ninth Circuit About the Proper Standard for Rule 23(b)(2) Certification

Wal-Mart fails to identify any Ninth Circuit authority at odds with *Molski* that would create an intra-circuit conflict justifying *en banc* review. Neither *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) nor *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188, 1196 (9th Cir. 2000), addresses the Rule 23(b)(2) standard, much less conflict with *Molski*.[5]

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[4] Wal-Mart disputes that plaintiffs challenge conduct "generally applicable to the class," relying solely on its expert's decision to analyze statistical data in a disaggregated, rather than aggregated manner. Petition at 7-8. The district court made comprehensive findings, based upon a large factual record, about the company-wide nature of the practices challenged. *Dukes*, 222 F.R.D. at 166. Wal-Mart's argument confuses Rule 23(b)(2) certification with a determination "whether Plaintiffs will ultimately prevail." *Dukes*, 509 F.3d at 1186.

[5] *Kanter* was an appeal of an attorneys' fee award arising from the improper removal of a state court class action to federal court based on diversity. The question presented was whether an incidental request for injunctive relief would satisfy the amount in controversy. *Kanter*, 265 F.3d at 860. *Smith* affirmed the dismissal of a Rule 23(b)(2) class action where the request for injunctive relief was mooted by an intervening ballot

Wal-Mart also argues *Molski* conflicts with the unpublished disposition in *Beck v. Boeing,* 60 Fed. Appx. 38 (9th Cir. 2003). *Beck* did not address whether punitive damages were appropriate under Rule 23(b)(2). Instead, the *Beck* Court vacated the certification of class-wide punitive damages because the district court had not certified class claims for back pay. *Id.* at 40. Here, the district court certified back pay claims. *Dukes,* 222 F.R.D. at 188.

C. The *Allison-Robinson* Circuit Conflict Should Not Be Revisited

The Fifth Circuit held in *Allison* that a class action seeking (b)(2) certification could only be certified if the monetary relief sought was incidental to the injunctive relief and flowed directly from the liability finding. *Allison*, 151 F.3d at 415. The *Allison* court concluded that neither compensatory nor punitive damages in that case flowed directly from the liability finding. It reasoned that the compensatory damages sought were "an individual, not class-wide, remedy," that punitive damages were "dependent on" compensatory damages, and therefore punitive damages must be an individual, non-incidental remedy.[6] *Id.* at 417-18.

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initiative. *Smith*, 233 F.3d at 1196. While plaintiffs had also sought to certify damage claims under either Rule 23(b)(2) or (b)(3), the panel concluded that the decision not to certify damages was not appealable. *Id.*

[6] Since the *Allison* decision, the Fifth Circuit has ruled that a trial court may permit an award of punitive damages in a Title VII action, even in

But *Allison* had two important caveats, each of which precludes a conflict with *Dukes*. *First*, it held that back pay could properly be treated as incidental damages and thus was consistent with Rule 23(b)(2) certification. *Id.* at 415. *Second*, it acknowledged that, if "punitive damages may be awarded on a class-wide basis, without individualized proof of injury," they also could be consistent with Rule 23(b)(2) certification as a group remedy. *Id.* at 417.

The Second Circuit rejected the *Allison* bright-line approach in *Robinson*, adopting instead an *ad hoc* test.[7] In *Robinson*, as in *Allison*, the plaintiffs sought compensatory damages, in addition to back pay. *Robinson*, 267 F.3d at 155. *Molski*, which rejected *Allison* in favor of *Robinson*, similarly involved compensatory damage (emotional distress and property

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the absence of nominal, back pay or compensatory damages, due to the "high threshold of culpability" established by the statutory requirement of showing "malice or . . . reckless indifference to the federally protected rights" of plaintiff. *Abner v. Kansas City Southern R.R. Co.*, 513 F.3d 154, 163-64 (5th Cir. 2008).

[7] Wal-Mart implies that the decision in *In re Initial Public Offering ("IPO") Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), rejected this holding of *Robinson*. Petition at n.2. It did not. Second Circuit courts still employ the *Robinson* standard for determining the propriety of Rule 23(b)(2) certification. *See Velez v. Novartis Pharmaceuticals Corp.*, 244 F.R.D. 243, 270-71 (S.D.N.Y. 2007); *Hnot v. Willis Group Holdings Ltd.*, 241 F.R.D. 204, 211 (S.D.N.Y. 2007) ("*In re IPO* is entirely inapposite to the Court's determination under Rule 23(b)(2)."); *Norflet v. John Hancock Life Ins. Co.*, 2007 WL 2668936 (D. Conn. 2007).

1966 Advisory Committee Notes. By adopting a rigid test that bears no resemblance to the flexible standard of Rule 23, *Allison* "nullif[ies] the discretion vested in the district courts through Rule 23." *Molski,* 318 F.3d at 950.[9]

Similarly, *Allison* fails to recognize the singular importance of injunctive relief in civil rights cases. In order to eliminate systemic discrimination, federal courts often must impose broad and comprehensive injunctive relief, subject to monitoring over the course of several years. *See, e.g., Commonwealth of Pennsylvania v. Local Union 542, Int'l Union of Operating Engineers,* 502 F. Supp. 7 (E.D. Pa. 1979), *aff'd,* 648 F.2d 922 (3rd Cir. 1981) and 807 F.2d 330 (3d Cir. 1986). *Robinson* and *Molski* correctly place the primary focus of the (b)(2) analysis on the importance of the injunctive relief needed to change the discriminatory practices.

Molski warned that the *Allison* bright-line rule "holds troubling implications for the viability of future civil rights actions, particularly those under the Civil Rights Act of 1991." *Molski,* 318 F.3d at 950. Its prediction has proven disturbingly accurate. "Few employment discrimination class

[9] Wal-Mart miscites *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 862 (1999) for the proposition that damages are only available in Rule 23(b)(3) class actions. Petition at 4. The language it omitted with strategic ellipsis demonstrates that the Court was referring to a preference for bringing "mass tort actions" under Rule 23(b)(3) rather than Rule 23(b)(1), which was the approach used unsuccessfully in *Ortiz. Id.*

actions have been certified in the Fifth Circuit since *Allison*." *Colindres v. QuietFlex Mfg.*, 235 F.R.D. 347, 371-72, n.10 (S.D. Tex. 2006).

This Court correctly entrusted district courts with the discretion to determine whether a particular case, with its unique facts and mix of remedies, could properly be certified under Rule 23(b)(2).[10]

III. WAL-MART'S THEORY THAT INDIVIDUALIZED HEARINGS ARE MANDATORY AT THE REMEDIES STAGE DOES NOT WARRANT *EN BANC* REVIEW

A district court is not required to adopt a trial plan at the class certification stage. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n.4 (9th Cir. 2005). Nonetheless, Judge Jenkins weighed manageability and due process concerns and outlined a tentative trial plan. *Dukes*, 222 F.R.D at 173-87. The district court concluded that, despite its size, the case could be managed consistent with due process, but for one narrow exception for certain back pay claims arising from promotion discrimination, which were not certified. *Id.* It imposed specific safeguards to ensure that any award of

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[10] Even if this Court were to adopt the *Allison* rule for certification under Rule 23(b)(2), the decision would not resolve the question of whether this case could be certified under Rule 23. The case could alternatively be certified either under Rule 23(b)(3), under a hybrid approach, or by means of issue certification under Rule 23(c)(4). *See Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 471-72 (7th Cir. 2004); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999). Contrary to Wal-Mart's factually inaccurate statement (Petition at 4), plaintiffs *did* seek certification of this case under Rule 23(b)(3). *See* Plaintiffs' Mem. in Supp. of Class Certification at 47.

punitive damages comported with due process.[11]

The panel in turn affirmed that there are multiple approaches available to manage this case, including the lower court's provisional road map. *Dukes,* 509 F.3d at 1191-93 & n.23. It explained that this Court's decision in *Hilao v. Estate of Marcos,* 103 F.3d 767, 782-87 (9th Cir. 1996), offered one possible method for managing a jury trial in a complex class action.[12] Because there were a "range of possibilities" that could satisfy manageability and due process concerns, the panel correctly declined to rule on a tentative trial plan at this preliminary, pre-merits stage. *Id.*; *see Allen,* 358 F.3d at 472 ("Whether full class treatment of damages issues would be

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[11] Punitive damages could only be awarded based on "evidence of conduct that was directed toward the class." *Dukes,* 222 F.R.D. at 172. Only class members who recover an award of lost pay would be eligible for a share of the punitive damages, and that share would be "in reasonable proportion to individual lost pay awards." *Id.* Finally, the district court ordered that class members receive notice and the right to opt out, should any of them wish to pursue a claim of compensatory damages individually. *Id.*

[12] As *Hilao* involved individual compensatory damage claims, it addressed and rejected significantly more complex due process challenges than the back pay and class award of punitive damages sought here. *Hilao,* 103 F.3d at 783. In doing so, *Hilao* endorsed the long-standing principle that due process is a flexible concept that must accommodate the particular circumstances of a case. *Hilao,* 103 F.3d at 786-87, *citing Connecticut v. Doehr,* 501 U.S. 1, 10 (1991) (requiring a balancing of interests). This Court's decision in *In re Exxon Valdez,* 270 F.3d 1215, 1225 (9th Cir. 2001) (Kleinfeld, J.) endorsed yet another multi-phased approach to the trial of a complicated class action, approving the "masterful job" of the district court in managing the case.

manageable is too fact-sensitive, and too much of a judgment call, to warrant interlocutory review in this court."). Rule 23 vests the trial court with broad discretion to respond to manageability issues in a class action as they arise, and to decertify the class if the challenges prove insurmountable. Fed. R. Civ. P. 23(c)(1)(C); *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 148-49 (C.D. Cal. 2007).[13]

Wal-Mart posits that the only legally acceptable method to adjudicate the remedies proceedings in this case is through individual Stage II trials. Wal-Mart's choice of process, however, would inevitably render this (and most Title VII class actions) unmanageable. Wal-Mart points to neither an intra- nor inter-circuit conflict on this point as *no court has ever reached this conclusion*. Indeed, its theory is at odds with more than 30 years of well-settled Title VII jurisprudence.

In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), the Supreme Court established the standards for bifurcated litigation of Title VII "pattern or practice" cases. *Teamsters* noted that, after a liability determination, "additional proceedings" will "usually" be

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[13] That the trial plan is subject to future modification, however, does not mean that the panel permitted "conditional" certification as Wal-Mart contends. Petition at 15. Judge Jenkins determined that all Rule 23 requisites were met. A fully developed and final trial plan is not a Rule 23 requirement. *Chamberlan,* 402 F.3d at 961 n.4.

necessary. *Id.* at 361. Wal-Mart argued unsuccessfully below that this language must be read to require *individualized* hearings in *every* case, an interpretation at odds with its plain meaning and *Teamsters'* mandate that district courts "fashion such relief as the particular circumstances of a case may require to effect restitution." *Teamsters,* 431 U.S. at 364 (quoting *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 764 (1976)).[14]

The Ninth Circuit and six other circuit courts have held that individual remedies hearings may be inappropriate when the employer's practices make it "difficult to determine precisely which of the claimants would have been [in a more favorable position] absent discrimination, but it is clear that many should have." *Domingo,* 727 F.2d at 1444-45.[15] Where the employer's system has been infected with subjective decision-making and the employer

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[14] Wal-Mart also claims that sections of Title VII added in 1991 to expand the remedies available to victims of discrimination overruled, *sub silencio,* 30 years of Title VII class action jurisprudence. Petition at 16. Nothing in the 1991 Civil Rights Act indicates that the new "mixed motive" provision or the "person aggrieved" punitive damages language was intended to limit the use of class actions or require that remedies be determined on an individual basis. *Desert Palace v. Costa,* 539 U.S. 90, 94 (2003); *Paige v. Cal.,* 102 F.3d 1035, 1041 (9th Cir. 1996).

[15] *See Shipes v. Trinity Indus.,* 987 F.2d 311, 318 (5th Cir. 1993); *Pitre v. W. Elec. Co.,* 843 F.2d 1262, 1274, (10th Cir. 1988); *Hameed v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers,* 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp.,* 542 F.2d 445, 452-53 (7th Cir. 1976); *Pettway v. Am. Cast Iron Pipe Co.,* 681 F.2d 1259, 1266 (11th Cir. 1982); *Segar v. Smith,* 738 F.2d 1249, 1289-91 (D.C. Cir. 1984).

Respectfully submitted,

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July 11, 2008

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached response to Wal-Mart's petition for rehearing en banc is proportionately spaced and has a typeface of 14 points. It is printed in Times New Roman, 14 point font. It contains 4189 words.

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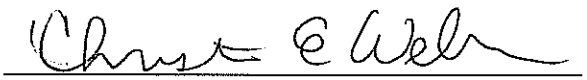

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No. 04-16688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, et al,
Plaintiffs/Appellees

v.

WAL-MART STORES, INC.,
Defendant/Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AND THE LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER IN SUPPORT OF PLAINTIFFS/APPELLEES AND IN SUPPORT OF DENIAL OF PETITION FOR *EN BANC* REVIEW

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STATEMENT OF INTEREST OF THE AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

Amici curiae the National Employment Lawyers Association (NELA)[1] and the Legal Aid Society-Employment Law Center[2] ("*amici*"), who collectively have decades of experience in protecting equality in the workplace, file this brief in opposition to the petition for rehearing *en banc*. *Amici* address the erroneous characterizations of prevailing law advanced by Wal-Mart and its *amici curiae* the Retail Industry Leaders Association ("RILA") and The Employers Group ("TEG"). According to Wal-Mart and its *amici*, challenges to companywide policies delegating authority to make subjective and discretionary employment decisions

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[1] NELA is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

[2] The Legal Aid Society – Employment Law Center ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in California workplaces, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, lesbian, gay, bisexual and transgendered people, and the working poor, and specializes in, among other areas of the law, sex discrimination and sexual harassment. The LAS-ELC has appeared before this Court, and the United States Supreme Court, on numerous occasions, both as counsel for plaintiffs as well as in an amicus curiae capacity.

violate Rule 23's commonality and typicality requirements – particularly in cases involving multi-facility classes. *See, e.g.*, RILA Br. at 4 ("virtual impossibility" of certifying multi-facility classes); TEG Br. at 5-6; Wal-Mart Br. at 9. Decades of rulings in Title VII cases conclude otherwise.

The lower court's analysis of commonality and the Panel's affirmance rest on the application of widely accepted legal principles and an ample supporting factual record. Courts inside and outside of this Circuit regularly certify class-wide claims of discriminatory subjective employment practices, including cases involving multi-facility classes. Where a consistent corporate policy permits highly subjective determinations, and there is preliminary evidence the exercise of discretion or subjectivity has resulted in class-wide harm, commonality is satisfied. Further, class-wide challenges to subjective employment practices can easily satisfy Rule 23(a)'s typicality requirement.

Significant departures from these well-settled legal principles may endanger the use of the class action device as an effective procedure to address systemic employment discrimination. The Court should decline *en banc* review.

Counsel for Plaintiffs/Appellees and counsel for Defendant/Appellant have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

ARGUMENT

I. Plaintiffs' Excessive Subjectivity Challenge Satisfies Commonality

As the court below correctly held, and the panel properly affirmed, Plaintiffs' class-wide challenges to Wal-Mart's excessively subjective pay and promotion practices satisfy commonality. It is clear that Title VII protections fully extend to subjective employment practices. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988); *Staton v. Boeing,* 327 F.3d 938, 955 (9th Cir. 2003). Contrary to Wal-Mart's contention, this and other Circuits have further established that an employer may not be insulated from class-wide challenges to its subjective employment practices simply because such practices are implemented in multiple facilities or across job titles. *See, e.g., Staton,* 327 F.3d at 954-56; *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Shipes v. Trinity Industries,* 987 F.2d 311, 316 (5th Cir. 1993); *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1557 (11th Cir. 1986); *Green v. USX Corp.*, 843 F.2d 1511, 1525-26 (3d Cir. 1988), *relevant portion reinstated by Green v. USX Corp.*, 896 F.2d 801, 807 (3d Cir. 1990) (similar analysis under typicality prong of 23(a)). To the extent subjective or discretionary employment practices result in systemic discrimination, Federal Rule of Civil Procedure 23 permits plaintiffs to challenge them on a class-wide basis. Indeed, such an approach balances the anti-discrimination policy goals of Title VII with the protection of legitimate business

practices. It maximizes the incentives for companies relying on subjective practices to also use the kind of safeguards that can minimize bias.

A. Title VII Permits Challenges to Subjective Employment Practices

Title VII operates to prohibit discriminatory employment practices, whether objective or subjective. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (U.S. 1971) ("Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."). The Supreme Court has consistently pronounced that Title VII provides a remedy for subjective employment practices that are discriminatory. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (finding that Title VII protections extend to both subjective and objective employment practices); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) (noting that Title VII prohibits discriminatory practices, including subjective employment practices); *Hazelwood Sch Dist.v. United States*, 433 U.S. 299, 302 (1977) (recognizing that highly subjective hiring process in which decisionmakers were told to consider "personality, disposition, appearance, poise, voice, articulation, and ability to deal with people," was conducive to subtle discrimination).

In *Watson*, the Supreme Court made clear that subjective practices, like objective employment practices, can have consistent and measurable effects

detrimental to a protected class. There, the defendant "had not developed precise and formal criteria for evaluating candidates for the [relevant] positions," but "relied instead on the subjective judgment of supervisors." *Watson*, 487 U.S. at 982. *Watson* firmly held that "[h]owever one might distinguish 'subjective' from 'objective' criteria, it is apparent that selection systems that combine both types would generally have to be considered subjective in nature." *Id.* at 989. Thus, Title VII applies to practices "based on the exercise of personal judgment or the application of inherently subjective criteria...," including "an employer's undisciplined system of subjective decisionmaking." *Id.* at 988, 990. This principle has been followed in this and other Circuit Courts. *See, e.g., Staton,* 327 F.3d at 955; *Caridad,* 191 F.3d at 291-93; *Shipes,* 987 F.2d at 316; *Cox,* 784 F.2d at 1557. There is no reason to disturb the well-settled principle that Title VII permits challenges to subjective employment practices.

Employment practices like Wal-Mart's here give ample reason to be concerned about the potential for subjective practices to result in discrimination. Both the lower court and the Panel rightly looked skeptically at Wal-Mart's highly discretionary decision-making structure, given the evidence of gender stereotyping, statistical patterns of gender-based disparities in the workforce, and the absence of effective accountability structures to address those disparities. The District Court described the unfettered discretion consistently embedded in Wal-Mart's common

pay and promotion practices to include "'tap on the shoulder'" promotions, a widespread failure to post job openings, and compensation policies providing "substantial discretion" alongside "little guidance." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146-49 (N.D. Cal. 2004). The record includes expert evidence that these "[s]ubjective and discretionary features of the company's personnel policy and practice make decisions about compensation and promotion vulnerable to gender bias." Declaration of William T. Bielby, Ph.D ("Bielby Decl."), ¶ 10, SER at 96. Extensive social science research findings, submitted on the record in this litigation, support that conclusion. *Id.* at ¶¶ 27-36, SER at 106-112. As the Panel explained, courts should "scrutinize" subjective practices to ensure they do not operate to deny equal opportunity in the workplace. *Dukes v. Wal-Mart Stores, Inc.*, 509 F.3d 1168, 1183 (9th Cir. 2007).

B. Wal-Mart's Excessively Subjective Practices and Evidence of the Discriminatory Effect of Such Practices Present Common Questions of Fact and Law

Plaintiffs' challenges to Wal-Mart's "consistent corporate policy" of delegating subjective decision-making authority, along with evidence submitted by Plaintiffs "giving rise to an inference of discrimination," present common questions of law and fact. *Dukes*, 222 F.R.D. at 149-50 *aff'd* 509 F.3d 1168, 1183 (9th Cir. 2007). The Panel's affirmance of the lower court's finding of

commonality is supported by extensive legal authority and an ample factual record. It presents no threat of an intra- or inter-Circuit conflict.

For decades, courts have certified classes, finding commonality satisfied, in cases challenging subjective employment practices similar to Wal-Mart's promotion and pay policies at issue here. *See, e.g., Staton,* 327 F.3d at 954-56; *Caridad,* 191 F.3d at 291-93; *Shipes,* 987 F.2d at 316; *Cox,* 784 F.2d at 1557; *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 616 (5th Cir. 1983); *see also Green v. USX Corp.*, 843 F.2d 1511, 1525-26 (3d Cir. 1988), *relevant portion reinstated by Green v. USX Corp.*, 896 F.2d 801, 807 (3d Cir. 1990) (similar analysis under typicality prong of 23(a)).[3]

Wal-Mart wrongly asserts that there is a conflict among Circuits as to whether excessively subjective employment practices can form a common policy for class purposes. Class certification determinations are necessarily fact-specific and left to the discretion of lower courts. Unsurprisingly, different courts have reached different conclusions looking at different fact patterns – hardly a situation worthy of *en banc* review. Moreover, some of the very cases cited by Wal-Mart

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[3] *Accord Smith v. Nike*, 234 F.R.D. 648, 661-662 (N.D.Ill. 2006); *Satchell v.Fedex Corp.*, 2005 WL 2397522 at *5-7 (N.D.Ca., Sept. 28, 2005); *Anderson v. Boeing,* 222 F.R.D. 521, 536-37 (N.D.Ok. 2004); *McReynolds v. Sodexho Marriott*, 208 F.R.D. 428, 441, 443 (D.D.C. 2002); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 697- 98 (N.D.Ga. 2001); *Beckmann v. CBS,* 192 F.R.D. 608, 613-14 (D.Minn. 2000); *Shores v. Publix Super Mkts., Inc.*, 1996 WL 407850 at *6-*7(M.D.Fla., Mar. 12, 1996); *Butler v. Home Depot*, 1996 WL 421436 at *1, *3 (N.D.Ca. Jan. 25, 1996); *Morgan v. UPS,* 169 F.R.D. 349, 356 (E.D.Mo. 1996).

affirm the legal principle that the mere fact that members of a class span multiple job types or facilities is not sufficient to defeat class certification. *Grosz v. Boeing Co.*, 136 Fed. Appx. 960, 962 (9th Cir. 2005) ("Diversity of occupations alone is not sufficient to defeat certification."); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. N.C. 1980) (A pattern or practice of discrimination "may of course be sufficiently shown in a multi-facility setting."). The Circuits are in agreement that district courts have discretion to certify such claims in appropriate cases. Those courts simply exercised their discretionary authority to decide the issue of class certification based on the specific facts before them.[4]

This Circuit has explicitly confirmed the principle that decentralization of employment operations does not *per se* defeat commonality. In *Staton*, the lower court certified a nationwide class of Boeing's 15,000 African American employees, located at facilities in 27 different states. In upholding class certification, this Court specifically rejected the position that commonality cannot be established in multi-facility cases involving delegated decisionmaking:

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[4] In *Cooper v. Southern Co.*, 390 F.3d 695, 716 (11th Cir. 2004), the Eleventh Circuit held that commonality did not exist because employment decisions at issue were made by different managers implementing different policies. To the extent that the Eleventh Circuit was suggesting that subjective practices inherently involve individual rather than class-wide decisions, such a conclusion would depart significantly from the Supreme Court's holding in *Watson* and the Ninth Circuit ruling in *Staton*. It would be more prudent to read *Cooper* as simply deferring to a District Judge's determination that under the facts presented in that case, Rule 23(a) was not met.

> [O]bjectors contend that decisionmaking at Boeing is too decentralized to permit a class that combines plaintiffs from disparate locales .... The unsurprising fact that some decisions are made locally does not allow a company to evade responsibility for its policies.

Staton, 327 F.3d at 955-56. Where common employment practices exist throughout decentralized operations, commonality is satisfied. Any other outcome would improperly insulate these employment practices from systemic discrimination claims.

Ample evidence supports the District Court's conclusion that classes like the one in question here meet the commonality test. As the District Court found, there was extensive evidence to establish that "Wal-Mart's policies governing compensation and promotions are similar across all stores, and build in a common feature of excessive subjectivity which provides a conduit for gender bias that affects all class members in a similar fashion." *Dukes*, 222 F.R.D. at 145. Given the lower court's "'rigorous analysis' of the conflicting evidence presented on the commonality question," it was well within its discretion in finding that commonality was satisfied. *Dukes*, 509 F.3d at 1178 n.2. As the Panel concluded in its opinion on rehearing:

> Plaintiffs' factual evidence, expert opinions, statistical evidence, and anecdotal evidence demonstrate that Wal-Mart's female employees nationwide were subjected to a *single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title

> VII. Evidence of Wal-Mart's subjective decision making policies provide further evidence of a common practice of discrimination.

509 F.3d at 1183.

C. Employers Can Avoid Discrimination Through The Use of System-Wide Controls To Check Subjectivity

Excessively subjective employment practices, like those used by Wal-Mart, can allow improper bias to factor into employment decisions. Wal-Mart's subjective employment practices, granting significant discretion in setting salaries and awarding promotions, create a risk that unlawful gender bias infected employment decisions, and in a merits determination, may be found to have caused disparities in pay and promotions of women. Indeed, the lower court explained the potential relationship between excessive subjectivity and the merits issue of class-wide discrimination:

> [T]he evidence indicates that in-store pay and promotion decisions are largely subjective and made within a substantial range of discretion by store or district level managers, and that this is a common feature which provides a wide enough conduit for gender bias to potentially seep into the system.

Dukes, 222 F.R.D. at 152.

There are two ways that discretionary or subjective practices can lead to a statistical disparity between a majority group and a protected class: overt discrimination and implicit bias. In cases of overt discrimination, the zone of discretion permits managers to explicitly base promotion, compensation, or other

decisions on illegal criteria such as race or gender. In cases of implicit bias, the zone of discretion allows managers to rely on subconscious biases or stereotypes that disfavor protected groups. In either instance, it is the fact that the policy leaves a certain range of decisions entirely to individual judgment, even if it also incorporates certain objective factors, which ultimately causes discrimination to influence the decision.

Courts have regularly critiqued excessive subjective employment practices that are susceptible to being infected by discrimination. *See, e.g., Coleman v. Quaker Oats*, 232 F.3d 1271, 1285 (9th Cir. 2000)(subjective evaluations "can be used as a cover for illegal discrimination"); *Antonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1481 (9th Cir. Wash. 1987)("subjective practices are particularly susceptible to discriminatory abuse"); *Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986)("subjective practices may provide 'ready mechanisms for discrimination'")(citation omitted). To be sure, excessive subjectivity is not *per se* discriminatory, but is subject to the same legal standards as objective employment practices. *Green*, 843 F.2d at 1525 ("Although we recognize the reasonableness of an employer's use of subjective criteria to help make hiring or promotion decisions, nothing in the Supreme Court's analysis in *Griggs*, or that we can find in Title VII, suggests that these criteria should be insulated from scrutiny under impact analysis.").

While subjective decisionmaking may be an appropriate business and personnel model, it also can impair fair, merits-based determinations. It presents risks of adverse outcomes that should be addressed through appropriate safeguards. Bielby Decl. ¶ 49, SER at 122. *Id.* at ¶¶ 48-63, SER at 122-132 (describing mechanisms for limiting the potential influence of bias on subjective practices). And when subjective practices lead to significant disparities, they are actionable under Title VII. Wal-Mart did not provide such safeguards nor monitor their decisionmaking process for potential adverse outcomes. *Id.* Upholding the lower court decision will not improperly constrain business decisionmaking. Rather, it will require it to conform to legal mandates for equal employment opportunity.

II. There Is No Reason to Revisit the Panel's Determination on Typicality

Although Wal-Mart has not specifically objected to the Panel's analysis of the Rule 23(a) typicality requirement, its *amici* RILA and TEG have raised this issue in their submissions. However, the arguments they present to the Court are unavailing. Both the District Court and the Panel properly concluded the proposed class satisfied typicality. Further, in large measure these "typicality" complaints are mere warmed-over commonality arguments, and ones which the Panel appropriately rejected in that context. They are no more persuasive applied to the third element of Rule 23(a) than the second. Finally they raise no real intra-Circuit

or inter-Circuit conflict. Thus these arguments do not present valid grounds for granting *en banc* review.

As both the District Court and the Panel determined, the proposed class easily meets the typicality requirement. Every class representative asserts claims of systemic gender discrimination against Wal-Mart, and every class representative proposes to rely upon the same core legal theories and key pieces of evidence that form the lynchpin of the class claims. *See* 509 F.3d at 1184-85; 222 F.R.D. 166-68. Typicality is not a high bar – it does not require identical claims. Rather, typicality ensures both judicial economy and due process by testing for a reasonable alignment between the core issues presented by the claims of the class representatives and the claims of the class. *See Falcon*, 457 U.S. at 157 n.13.

The Third Circuit, confronted by identical claims that subjective practices violated Rule 23(a)'s typicality requirement because the employer was entitled to present an individual defense to each instance succinctly dismissed this kind of argument:

> USX asserts that, because its personnel who were charged with hiring responsibility based their decisions upon varied subjective criteria, each instance of alleged discrimination was necessarily distinct and, therefore, that the certification of the class was improper. This contention . . . . completely misperceives the typicality requirement of Rule 23.

Green, 843 F.2d at 1533. This Circuit should similarly reject the highly restrictive reading of the typicality requirement urged by Wal-Mart's *amici*. There is no

reason to revisit the widely-accepted legal principles applied to determine typicality in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court deny the petition for rehearing *en banc*.

Dated: July 23, 2008

RESPECTFULLY SUBMITTED,

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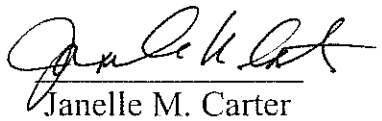
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations in Circuit Rule 40-1 and the limitations of FRAP 29(d) applicable to a Brief *Amicus Curiae*. Pursuant to these rules, this brief (including the Statement of Interest and Authority to File of the *Amicus Curiae*, the Argument and Citation of Authority, and the Conclusion, but excluding the Table of Contents, the Table of Authorities, this Certification and the Certificate of Service) is 3,055 words long.



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Molly Dwyer
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *Betty Dukes, et al. v. Wal-Mart Stores, Inc.*, No. 04-16688

Dear Ms. Dwyer:

On behalf of Wal-Mart, we are responding to plaintiffs' letter regarding *Parra v. Bashas', Inc.*, No. 06-16038 (9th Cir. July 29, 2008), which held that a district court had erred in finding that lack of commonality precluded certification of an employment class.

The Hispanic plaintiffs in *Parra* challenged a specific employment policy—the use of differential pay scales at three grocery-store chains operated by the same company. *See* slip op. 9641 (defendant "conceded" that "the pay scales at Bashas' and A.J.'s stores were higher than those at Food City [stores] during the [challenged] period"). As the panel explained, "[t]hese pay scales were common for all Bashas, Inc. employees and provided for different pay for similar jobs based only on the store where the employee worked." *Id.* at 9642.

In contrast to the differential pay scales challenged in *Parra*, plaintiffs here challenge *no* specific policy. Indeed, although the Supreme Court has "stressed the need to identify with care the specific employment practice that is at issue" (*Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2167 (2007)), the

panel majority *acknowledged* "the absence of a specific discriminatory policy promulgated by Wal-Mart." Slip op. 16222. "The only common question plaintiffs identify with any precision is whether Wal-Mart's promotion criteria are 'excessively subjective.' This is not a commonality with any clear relationship to sex discrimination in pay, promotions or terminations." *Id.* at 16249 (Kleinfeld, J., dissenting); *see, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). Given the size of the class, its geographic and temporal dispersal, and the diversity of persons and positions within it, plaintiffs could not prove the "defining element" of discriminatory intent (*Ledbetter*, 127 S. Ct. at 2167) on a common basis under their own theory of "excess subjectivity." *Grosz v. Boeing Co.*, 136 Fed. Appx. 960, 962 (9th Cir. 2005); *see* Pet. 9 (citing cases).

Moreover, even if commonality could be satisfied, this class does not fit within Rule 23(b)(2) and would fail the predominance and superiority requirements of Rule 23(b)(3). *Parra* did not involve these points. Slip op. 9639 n.1.

Respectfully submitted,

Theodore J Boutrous, Jr. /jdb

Theodore J. Boutrous, Jr.

TJB/jdb
Enclosure

cc: All counsel

Attachment as stated

GIBSON, DUNN & CRUTCHER LLP

DECLARATION OF SERVICE

I, Robin Bradford, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery St., Ste. 3100, San Francisco, in said County and State. On August 19, 2008, I served the following document(s):

FRAP 28(j) LETTER TO CLERK OF THE COURT

on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Plaintiffs contend that the certification order "was firmly grounded in well-settled *Ninth Circuit* precedent." Opp. 1 (emphasis added). As demonstrated below, however, both the certification order and the panel majority's decision are inconsistent with a number of Ninth Circuit decisions. In addition, the panel majority's decision conflicts in numerous ways with decisions of the Supreme Court and the other courts of appeals. Finally, the case involves recurring issues of widespread importance, and to remand it for further proceedings in the district court at this juncture, without review and correction of the panel majority's conclusions, would jeopardize the statutory and constitutional rights of both Wal-Mart and millions of absent class members. Slip op. 16248 (Kleinfeld, J., dissenting). Accordingly, en banc rehearing should be granted.

ARGUMENT

1. Plaintiffs assert that "[t]he drafters of Rule 23 clearly contemplated that hybrid injunctive and damage actions could be pursued under section (b)(2) so long as damages claims did not predominate." Opp. 8. But because the *text* of Rule 23(b)(2) authorizes *only* class claims for injunctive or declaratory relief, class claims for monetary relief can *never* be certified under Rule 23(b)(2)—predominant or not. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (reserving the question); *Adams v. Robertson*, 520 U.S. 83, 85 (1997) (same).

Moreover, plaintiffs acknowledge a circuit split on the standard for evaluating whether monetary claims "predominate" so as to preclude (b)(2) certification even under their reading of Rule 23. *Manual for Complex Litigation, Fourth* § 21.221 ("The circuits have divided on the issue, which arises most often in employment discrimination class actions"). Most courts follow *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), under which monetary claims can be certified only if "incidental" to injunctive or declaratory relief; this Court has expressly rejected *Allison*. *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003). Plaintiffs contend that this inter-circuit conflict is not "squarely presented" because they "do not seek compensatory damages." Opp. 2. But this class could not have been certified under *Allison*, and plaintiffs do not contend otherwise. Thus, the conflict is clearly presented here. Moreover, (b)(2) certification was inappropriate even under the erroneous *Molski* approach.

Plaintiffs assert that "*Allison*, *Robinson* and *Molski* are in accord that back pay is permissible in a Rule 23(b)(2) action." Opp. 8. But "Plaintiffs' request for back pay weighs *against* certification under Rule 23(b)(2)." Slip op. 16236. Backpay is not *injunctive* or *declaratory*, and thus does not fit within Rule 23(b)(2). *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006); Pet. 12-13.

Plaintiffs also assert that *Allison* recognized that punitive damages could be awarded "as a group remedy . . . consistent with Rule 23(b)(2)." Opp. 8. But *Allison* held that "because punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages." 151 F.3d at 417-18 (citations omitted). Indeed, the Supreme Court has consistently rejected the use of punitive damages "as a group remedy," insisting instead that punitive damages be based upon the harm suffered by the *individual* plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007); *see also Beck v. Boeing Co.*, 60 F. App'x 38, 40 (9th Cir. 2003); Pet. 11-12, 16.

Plaintiffs' claims "may amount to billions of dollars." Slip op. 16235. Although plaintiffs call this figure "empty rhetoric, not fact" (Opp. 4), it is *their* empty rhetoric. *See, e.g.*, Morrison, *Like Clock Work*, The Northwest Arkansas Morning News, June 21, 2008 ("'[I]t didn't take any mental gymnastics to get to the billion dollar range,' Seligman said. 'I'm sure it is more now.'"). And although plaintiffs claim that their quest for billions is subordinate to the request for injunctive relief, most of the putative class members seek *only* money. The majority of the class members are former employees. Slip op. 16240; *see* Pls. Pet. 4 n.1

(annual turnover in retail industry exceeds 50%). As explained in Wal-Mart's response to plaintiffs' rehearing petition (at 2-8), such persons lack standing to participate in a (b)(2) class seeking injunctive or declaratory relief. Likewise, plaintiffs' attempt to include hypothetical future employees to bolster "predominance" (Opp. 4) violates Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 & n.20 (1997); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 15-16 (1st Cir. 2008). Plaintiffs' monetary claims clearly predominate over any justiciable claims for injunctive or declaratory relief.[1]

2. A district court is required to determine which "class claims, issues, or defenses" can actually be tried—and *how*—before certifying a class. Fed. R. Civ. P. 23(c)(A)(B); *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179, 184-87 (3d Cir. 2006). Yet the panel *abandoned* any attempt to defend the district court's trial plan. Slip op. 16243; *see* Pet. 14-15.

Plaintiffs argue that "the panel correctly declined to rule on a tentative trial plan at this preliminary, pre-merits stage." Opp. 11. But if not now, when? The Supreme Court adopted Rule 23(f) precisely to allow appellate review of class-certification decisions before trial on the merits. Adv. Comm. Notes to 1998

[1] Plaintiffs' suggestion that this case could be certified under 23(b)(3) (*see* Opp. 10 n.10) would require a remand to allow Chief Judge Walker to consider the demanding requirements of predominance and superiority, neither of which plaintiffs could show on this record.

amend.; *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957-60 (9th Cir. 2005). It is nonsensical to argue, as plaintiffs do, that pretrial interlocutory review should not encompass the procedures by which the district court proposes to try the certified claims.[2]

Plaintiffs concede that no court has ever followed *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), which was wrong then and is wrong today. *Id.* at 788 (Rymer, J., dissenting); Pet. 16-18. Nor do they refute the showing that *Hilao*'s procedure cannot be followed in this (or any) Title VII case. Pet. 16; CELC Br. 2-12; PLAC Br. 2-5; Chamber Br. 10-12. Congress expressly barred the award of monetary relief to individuals who are not victims of discrimination. 42 U.S.C. § 2000e-5(g)(2)(A)-(B) (Section 706(g) of Title VII); Wal-Mart Br. 13-15 (citing cases); Pet. 16. Congress also provided employers the *right* to prove that particular class members are not "aggrieved individual[s]" entitled to punitive damages. 42 U.S.C. § 1981; *Beck*, 60 F. App'x at 40.

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[2] The district court refused to resolve a number of issues because that they went to the "merits" of the parties' dispute. Pet. 7-9. And plaintiffs continue to argue that Wal-Mart "confuses Rule 23(b)(2) certification with a determination whether Plaintiffs will ultimately prevail." Opp. 5 n.4. That is wrong: Disputes *must* be resolved on certification, even if they relate to the merits, when determinative of whether Rule 23 is satisfied. *In re IPO Sec. Litig.*, 471 F.3d 24, 35-38, 42 (2d Cir. 2006); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992); Pet. 7-9; WLF Br. 5-10.

First plaintiffs, then the district court, and now the panel majority have failed to articulate *any* method by which the claims of a class of millions of women could ever manageably be tried, given the substantial individualized inquiries necessary to determine whether any particular individual's pay or promotion decision was even timely challenged (*see Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2165 (2007)), much less tainted by discrimination. Instead, *every* plan proposed has required that the court curtail or eliminate these Title VII rights and, in turn, violate the Rules Enabling Act and due process. *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

Plaintiffs' punitive damages claim magnifies these shortcomings by failing to ensure a nexus between the award of punitive damages and the specific harm suffered (*State Farm*, 538 U.S. at 422; *Beck*, 60 F. App'x at 40), and depriving Wal-Mart of its right to "present every available defense." *Philip Morris*, 127 S. Ct. at 1063. Plaintiffs assert that "[t]he risks in these cases [*Philip Morris* and *State Farm*] are not present in a class action," and that these cases were not "intended to require individual Stage II hearings for punitive damages in a class action." Opp. 14-15. Plaintiffs, like the panel majority, thus insist on elevating the class device over substantive rights, in plain derogation of the Rules Enabling Act. 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). Wal-Mart is statutorily and constitutionally entitled to a full and fair hearing to deter-

mine whether a discriminatory pattern or practice existed and, if found, a right to contest liability and backpay as to any particular individual. Only then could the court proceed to the punitive damages stage. *Accord BMW of N. Am. v. Gore*, 517 U.S. 559, 573 n.19 (1996); *Cooper v. S. Co.*, 390 F.3d 695, 721 (11th Cir. 2004).[3]

Plaintiffs attempt to defend eliminating individualized hearings because such hearings would result in a "quagmire of hypothetical judgments." Opp. 14 (quoting *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984)). But using the class devise would not eliminate any potential "quagmire"; it would deepen it, making the judgment entirely speculative and arbitrary. Pet. 11-12, 16-18. Although plaintiffs assert that *Domingo* "holds that courts may use statistical methods to determine individual remedies in a Title VII class action" (Opp. 2), the Court actually said only that a formula could be used to facilitate the calculation of

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[3] Plaintiffs note that the Supreme Court "recently affirmed an *aggregate* jury award of punitive damages to a *class* of 32,000 individuals affected by the Exxon Valdez oil spill." Opp. 15 (citing *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008)). The propriety of class certification was not in issue, however, because *Exxon* requested class treatment of the punitive damages issue (after stipulating to liability and money damages). 128 S. Ct. at 2613. Here, by contrast, Wal-Mart *has* challenged both certification and the awardability of punitive damages on a class basis, and has not waived any substantive or procedural rights. Although plaintiffs *assume* that the rights of Wal-Mart and absent class members can be protected (*see* Opp. 11), they offer no legal or factual basis for that assumption. For example, although plaintiffs state that "many courts" have "approved" opt-out rights in (b)(2) classes (Opp. 8 n.8), Rule 23 does not authorize opt-outs in (b)(2) actions and there is no basis for rewriting Rule 23 in this manner. *Ortiz*, 527 U.S. at 831.

"the *measure* of back-pay." 727 F.2d at 1444 (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974)) (emphasis added). The employer could then "prov[e] that the applicant was unqualified or show[] some other valid reason why [a particular] claimant was not, or would not have been, acceptable." *Id.* at 1445 (citing *Teamsters v. United States*, 431 U.S. 324, 362 (1977)). Such proof of a nondiscriminatory reason for taking an employment action is sufficient to defeat monetary liability absent a showing of pretext. Pet. 17 (citing cases). Wal-Mart's right to present such proof cannot be abridged by the class procedure, particularly where punitive damages are sought. *Allison*, 151 F.3d at 418.[4]

The Second Circuit recently decertified a class because it could lead to a damages award untethered to any individualized harm. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). This Court, similarly, has held that a class "may not" be certified if it would result in an award of punitive damages to non-victims. *Beck*, 60 F. App'x at 40. Plaintiffs do not dispute that "[t]he district court's formula approach to dividing up punitive damages and back pay means that women injured by sex discrimination will have to share any recovery with women

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[4] For example: Named plaintiff Betty Dukes was disciplined for violating store policy. ER 377-78, 383-87. That is a valid (and, if proven, complete) defense against her claim that she was denied promotion because she is a woman. Yet, under the district court's trial plan, Wal-Mart would be foreclosed from defending itself by showing the non-discriminatory bases for employment decisions affecting Dukes or any other class member.

who were not." Slip op. 16260 (Kleinfeld, J. dissenting). Yet they have no answer to *McLaughlin* or this holding of *Beck*. *See* Opp. 6. This conflict, like the others, warrants review.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted.

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