No. 10-277

In the

Supreme Court of the United States

WAL-MART
STORES, INC.,

Petitioner,

v.

BETTY DUKES, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2)—which by its terms is limited to injunctive or corresponding declaratory relief—and, if so, under what circumstances.

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

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Amchem Products, Inc. v. Windsor,
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Arnold v. Cargill Inc., No. 01-2086,
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Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006) 7

Bacon v. Honda of Am. Mfg., Inc.,
370 F.3d 565 (6th Cir. 2004),
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Barber v. American Airlines,
No. 110092 (Ill. filed Aug. 2, 2010) 1

Barcume v. City of Flint,
638 F. Supp. 1230 (E.D. Mich. 1986) 24

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 20

Brown v. Gen. Servs. Admin.,
425 U.S. 820 (1976) 17

Chapman v. AI Transp.,
229 F.3d 1012 (11th Cir. 2000) 18

City of Richmond v. J. A. Croson Co.,
488 U.S. 469 (1989) 4

Cooper v. Fed. Reserve Bank of Richmond,
467 U.S. 867 (1984) 14

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Cooper v. Southern Co.,
390 F.3d 695 (11th Cir. 2004) 7

Denney v. City of Albany,
247 F.3d 1172 (11th Cir. 2001) 18-19

Dukes v. Wal-Mart Stores, Inc.,
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Dukes v. Wal-Mart Stores, Inc.,
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Ellis v. Elgin Riverboat Resort,
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Garcia v. Johanns,
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Gen. Tel. Co. of the Sw. v. Falcon,
457 U.S. 147 (1982) 3-4, 6, 11-14, 16-17

Grosz v. Boeing Co., NO. SACV-02-71-CJC,
2003 U.S. Dist. LEXIS 25341
(C.D. Cal. Nov. 7, 2003),
aff'd, 136 Fed. Appx. 960 (9th Cir. 2005) 23

Gutierrez v. Johnson & Johnson,
467 F. Supp. 2d 403 (D.N.J. 2006), *app. dismissed*, 523 F.3d 187 (3d Cir. 2008) 8-9

Harris v. Mexican Specialty Foods, Inc.,
564 F.3d 1301 (11th Cir. 2009) 1-2

In re Fibreboard Corp.,
893 F.2d 706 (5th Cir. 1990) 10, 13

Johnson v. Big Lots Stores, Inc.,
561 F. Supp. 2d 567 (E.D. La. 2008) 9

TABLE OF AUTHORITIES—Continued

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Lott v. Westinghouse Savannah River Co., Inc., 200 F.R.D. 539 (D.S.C. 2000), *aff'd*, 406 F.3d 248 (4th Cir. 2005) 9

Love v. Johanns, 439 F.3d 723 (D.C. Cir. 2006) 10, 13

Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993) 14

Manning v. Chevron Chem. Co. LLC, 332 F.3d 874 (5th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004) 19

Millbrook v. IBP, Inc., 280 F.3d 1169 (7th Cir.), *cert. denied*, 537 U.S. 884 (2002) 19

People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 246 F.3d 1073 (7th Cir. 2001) 25

Philip Morris v. Jackson, No. 10-735 (U.S. filed Dec. 30, 2010) 1

Quinn v. Nationwide Ins. Co., 281 Fed. Appx. 771 (10th Cir. 2008) 14

Rowe v. GMC, 457 F.2d 348 (5th Cir. 1972) 15

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 23

Schulz v. Silver, 212 A.D.2d 293 (N.Y. App. Div. 1995), *app. dismissed*, 664 N.E.2d 506 (N.Y. 1996) 24

TABLE OF AUTHORITIES—Continued

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Smith v. Swormstedt,
57 U.S. (16 How.) 288 (1854) 6

Sperling v. Hoffmann-La Roche, Inc.,
924 F. Supp. 1346 (D.N.J. 1996) 9

Sprague v. GMC,
133 F.3d 388 (6th Cir. 1998),
cert. denied, 507 U.S. 914 (1993) 10, 13

Stastny v. S. Bell Tel. & Tel. Co.,
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Vaughan v. MetraHealth Cos., Inc.,
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Wards Cove Packing Co., Inc. v. Atonio,
490 U.S. 642 (1989) 29-30

Watson v. Fort Worth Bank & Trust,
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Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) 20

Wright v. Circuit City Stores, Inc.,
201 F.R.D. 526 (N.D. Ala. 2001) 9

Rules of Court

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Fed. R. Civ. P. 23(a) 2, 5-7, 10-11, 13, 15

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES—Continued

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Miscellaneous

Cox, W. Michael & Alm, Richard, *Myths of Rich and Poor: Why We're Better Off Than We Think* (1999) 26

Frasier: The Good Son (NBC television broadcast Sept. 16, 1993), *available at* http://www.kacl780.net/frasier/transcripts/season_1/episode_1/the_good_son.html (last visited Jan. 18, 2011) 11

Green, Tristin K., *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659 (2003) 21-22

Hayek, Friedrich A., *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (1976) 28

de Jasay, Anthony, *Justice and Its Surroundings* (2002) 27, 29

Kirk, Sarah, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163 (2009) 18

La Fetra, Deborah J., *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006) 2

La Fetra, Deborah J., *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003) 2

TABLE OF AUTHORITIES—Continued

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Levit, Nancy, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367 (2008) 19

Monahan, John, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715 (2008) 26

Nagareda, Richard A., *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) 21

Nagareda, Richard A., *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149 (2010) 23

Nat'l Ctr. for Educ. Statistics, The Condition of Education, *Table 27-1: Degrees Earned By Women*, *available at* http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=910 (last visited Jan. 19, 2011) 31

Nozick, Robert, *Anarchy, State, and Utopia* (1974) 27

Paul, Ellen Frankel, *Equity and Gender* (1989) 26

Regan, Milton C., Jr. & Heenan, Palmer T., *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137 (2010) 17

TABLE OF AUTHORITIES—Continued

Page

Sandefur, Timothy,
The Right to Earn a Living (2010) 2

Selmi, Michael, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401 (1998) 14

Sobel, Russell S. & Leeson, Peter T., *The Use of Knowledge in Natural-Disaster Relief Management*, 11 Indep. Rev. 519 (2007) 17

Stempel, Jeffrey W., *A More Complete Look at Complexity*, 40 Ariz. L. Rev. 781 (1998) 6

Tsoukas, Haridimos, *The Firm as a Distributed Knowledge System: A Constructionist Approach*, 17 Strategic Mgmt. J. 11 (1996) 17

U.S. Dep't of Labor, Bureau of Labor Statistics, *2007 Current Population Survey: Table 11*, *available at* http://www.bls.gov/cps/wlf-table11-2008.pdf (last visited Jan. 18, 2011) 30

U.S. Dep't of Labor, Women's Bureau, *Quick Stats*, *available at* http://www.dol.gov/wb/stats/main.htm (last visited Jan. 18, 2011) 30

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, to address the second question presented.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys engage in research and litigation over a broad spectrum of legal issues, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuses of civil rights law and class action procedures which harm businesses, stifling entrepreneurialism and job creation. *See, e.g.*, *Philip Morris v. Jackson*, No. 10-735 (U.S. filed Dec. 30, 2010) (pending); *Barber v. American Airlines*, No. 110092 (Ill. filed Aug. 2, 2010) (pending); *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(11th Cir. 2009). PLF participated as amicus in this case before the Ninth Circuit Court of Appeals.

In addition, PLF staff have published extensively on the effects of tort liability on the business community. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* 239-55 (2010); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). PLF believes its public policy experience will assist this Court in considering whether the certification of this class is consistent with the requirements of Federal Rule of Civil Procedure 23(a).

SUMMARY OF ARGUMENT

The class certification order is inconsistent with Rule 23(a) because it does not satisfy the commonality or typicality requirements. Instead, the class consists of an aggregation of individual injuries resulting from hiring and promotion decisions made by myriad managers in thousands of Wal-Marts across the country. The Ninth Circuit allowed certification on the theory that the lack of a common employment and promotion decisionmaker *itself constitutes* a common source of injury, because it allows thousands of different types of injuries to occur. In other words, the *absence* of commonality or typicality was held to satisfy the commonality and typicality requirements. This interpretation of Rule 23(a) cannot stand.

First, it is contrary to the purpose and rationale of the commonality requirement. The purpose of class action lawsuits is not to allow plaintiffs to sue over a

spectrum of assorted harms, but to allow recovery by a large group of plaintiffs injured by a single, discrete action or policy, who would lack the economic incentives to sue individually. Rule 23 prevents the abuse of class actions by requiring plaintiffs to show that the members of the putative class suffered substantially similar injuries from a specific common source. In the employment context, this means showing that the putative class members were injured in substantially the same way by the same discrete action or process. Where this cannot be shown, the plaintiffs must sue individually for their particular harms.

Wal-Mart allows local managers to make hiring and promotion decisions for their own stores, and the plaintiffs allege that a variety of different decisionmakers, in different locations, harmed them in different ways, at different times; in each case, different factors may have influenced the decisions, and different claims and defenses may apply. There simply is no discrete common injury here; the Ninth Circuit could only label these many different incidents as a common injury by adopting an extremely broad or general approach to the notions of commonality and typicality. But that approach conflicts with the law's focus on specific harms. The law "prohibits discriminatory employment *practices*, not an abstract policy of discrimination." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982).

Second, the theory that the lack of a common hiring or employment policy itself constitutes a policy is not warranted by statutory or decisional law. The only basis for that interpretation is a dictum in footnote 15 of *Falcon*. But that footnote is better read

as allowing plaintiffs to sue when they bring forth significant proof that a business purposely delegated decisions to local managers and adopted subjective criteria for the purpose of evading antidiscrimination laws—evidence that is lacking here. *Falcon*'s reference to "excessive subjectivity" was not intended to let plaintiffs aggregate all sorts of different allegations into a "common injury," or to sue businesses for simply having a workforce that does not track the demographics of society in general.

There may be cases in which companies adopt wholly subjective employment criteria as a cover so that local managers can engage in *sub rosa* discrimination, but plaintiffs who allege that this has occurred must provide evidence of such intent. Plaintiffs cannot make out a discrimination case based simply on the facts that local employment decisions are made by local managers, and that there are statistical disparities in the workforce. As Justice O'Connor observed in a different context, illegal discrimination cannot be inferred from employment statistics that are skewed relative to the population at large, because "[t]here are numerous explanations for [a] dearth of minority participation, including . . . [individual] career and entrepreneurial choices." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 503 (1989) (opinion of O'Connor, White, JJ., and Rehnquist, C.J.).

Finally, the decision below would allow plaintiffs to resort to litigation to resolve broad social complaints that are, if anything, within the purview of the legislature. The heart of this case is a broad debate about "social justice," not a specific cognizable legal injury; to allow such litigation would enable plaintiffs to sue defendants on the basis of vague allegations

about broad social grievances. This is not the role of the courts, which should address only specific legal injuries. Even if it were, however, the plaintiffs' "social justice" arguments are fatally flawed.

The certification order should be reversed.

ARGUMENT

I

THE COMMONALITY REQUIREMENT OF RULE 23(a) CANNOT BE SATISFIED WHERE DIFFERENT TYPES OF ALLEGED INJURIES RESULTED FROM A VARIETY OF DIFFERENT CAUSES AND UNDER DIFFERENT FACTUAL CIRCUMSTANCES

A. Different Types of Human Resources Decisions Made by Different Managers in Different Locales for Many Different Reasons Cannot Be Treated as a Single, Common Employment Policy

Class action lawsuits exist so that where a defendant causes the same small injury to a large number of persons, each of which is too small to warrant litigation, the injured parties can combine their right to recovery and obtain redress. The prototypical case is one in which a flawed product or fraudulent service is used by many people, inflicting the same, relatively minor injury on each. The victims normally would not invest the time and money needed to bring a lawsuit, and the wrongdoer could escape prosecution. The class action device enables the victims to obtain representation together and recover

for their common injury. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1854).

Class actions are therefore the exception to the general rule that plaintiffs sue to recover for their own specific injuries. *Falcon*, 457 U.S. at 155. That limited exception lets courts treat the group of injured persons like a single party, putting aside only the legally irrelevant differences among their circumstances. It would be unjust to ignore *relevant* differences; that would, among other things, deprive defendants of the opportunity to present different defenses to different allegations. Therefore Rule 23(a) includes the commonality and typicality requirements, to allow collective treatment only of allegations that are similar enough that it is logical and equitable to treat them as a single case. These elements exist to prevent plaintiffs with *disparate* claims from papering over the differences between them and intimidating the defendant into settling. As Professor Stempel writes, class action lawsuits

> hold[] a potential *in terrorem* effect for defendants and may extract extortionate settlements for claims best described as weak . . . . The mere act of certifying the class provides significant settlement value to the claim, and by making the case a potentially crippling one that the company cannot afford to lose, the court arguably makes settlement mandatory for defendants irrespective of the merits.

Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 Ariz. L. Rev. 781, 842 (1998) (emphasis added).

In a discrimination case, Rule 23(a)'s commonality and typicality elements require the plaintiffs to show that they "all suffered an adverse effect from the same . . . [employment] policy—and their showing must be 'significant.'" *Garcia v. Johanns*, 444 F.3d 625, 633 n.10 (D.C. Cir. 2006) (citation omitted).

Common sense suggests that where hiring or promotion decisions are made by local managers exercising broad autonomy, there is less likelihood that all of the plaintiffs were harmed by a discrete company-wide policy of discrimination. *Id.* at 632 (where a class alleges harm from "multiple decisionmakers with significant local autonomy," certification is rarely appropriate). As one district court warned when refusing to certify a class, "a decentralized hiring procedure, which allows decisionmakers to consider subjective factors, supports individual claims of discrimination but cuts against the assertion that an employer engages in a pattern or practice of discriminatory hiring as a standard operating procedure." *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 424 (N.D. Ill. 2003) (citing *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980)).

Courts have generally followed this common-sense approach, refusing to manufacture commonality and typicality by blending allegations of different types of discrimination at the hands of different, autonomous local managers.

For example, in *Cooper v. Southern Co.*, 390 F.3d 695, 714-15 (11th Cir. 2004), *overruled in part on other grounds*, *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006), the Eleventh Circuit found no abuse of discretion in denying certification where the allegedly

discriminatory personnel decisions "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, among other factors."

Similarly, in *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565 (6th Cir. 2004), *cert. denied*, 543 U.S. 1151 (2005), the Sixth Circuit found no abuse of discretion in denying certification of a class of 800 past and present employees alleging racial discrimination in promotions at four separate facilities of defendant over a twenty-year period. The plaintiffs were subject to "differing promotion criteria," *id.* at 571, for a variety of different jobs, so that even if their allegations were true, they could not therefore plausibly claim to have suffered the same *type* of discrimination.

In *Gutierrez v. Johnson & Johnson*, 467 F. Supp. 2d 403 (D.N.J. 2006), *app. dismissed*, 523 F.3d 187 (3d Cir. 2008), the district court refused to certify a large class of employees in an employment discrimination case for similar reasons. Like the plaintiffs here, the *Gutierrez* plaintiffs

> [did] not challenge an express policy of [the corporate defendant]. Nor do they dispute that the employment policies and practices varied widely from operating company to company. Rather, Plaintiffs' theory of commonality is that Johnson & Johnson's policy of delegating discretion to the operating companies to implement general employment guidelines resulted in excessively subjective employment practices.

Id. at 409. This did not satisfy the commonality requirement because "Plaintiffs must identify *a specific policy* or practice of discrimination that was excessively subjective." *Id.* at 410 (emphasis added).[2]

[2] Many other courts have refused to certify classes in circumstances like this, concluding that "a decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 924 F. Supp. 1346, 1363 (D.N.J. 1996); *see also Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 579 (E.D. La. 2008) (The "diversity in individual employment situations" meant that "the Court cannot confidently adjudicate plaintiffs' claims or [defendants'] defense on the merits."); *Arnold v. Cargill Inc.*, No. 01-2086, 2006 U.S. Dist. LEXIS 41555, at *55-*56 (D. Minn. June 20, 2006) ("Plaintiffs have only established that they have individual claims of discrimination. Where the proposed class is spread across various [geographical areas] and was subject to various decision-making authority affecting promotions, compensation, and terminations, class treatment is not appropriate."); *Wright v. Circuit City Stores, Inc.*, 201 F.R.D. 526, 541 (N.D. Ala. 2001) ("The purported class is comprised of a large group of diverse and differently situated employees whose highly individualized claims of discrimination do not lend themselves to class-wide proof."); *Lott v. Westinghouse Savannah River Co., Inc.*, 200 F.R.D. 539, 552-53 (D.S.C. 2000), *aff'd*, 406 F.3d 248 (4th Cir. 2005) ("[T]he true nature of the suit is a consolidation of 99 separate accounts of individualized disparate treatment."); *Abram v. UPS of Am., Inc.*, 200 F.R.D. 424, 430 (E.D. Wis. 2001) ("The decision to permit some consideration of subjective factors is not, *in and of itself*, a discriminatory practice that provides the unifying thread necessary for 'commonality' to exist.").

B. Finding Commonality and Typicality Here Would Require Approaching Those Elements at Such a Level of Generality as to Render Rule 23(a)'s Requirements Toothless

Of course, as several circuits have warned, any group of allegations might be labeled as common or typical if a court ignores the details: "[A]t a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation." *Sprague v. GMC*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc), *cert. denied*, 507 U.S. 914 (1993); *accord, Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006). If the commonality and typicality elements are to have real substance, courts cannot allow plaintiffs to satisfy them by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury." *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

It was only by adopting this degree of generality—stepping away from the individual details, and into a statistical analyses and anecdotal evidence—that the Ninth Circuit was able to find a common injury. That approach transforms the commonality and typicality requirements into ineffectual, ritualistic formalities. Indeed, the procedure here is reminiscent of the dialogue in an episode of the TV series *Frasier*:

> Frasier: You know, every item here was carefully selected. This lamp by Corbusier, the chair by Eames, and this couch is an

> exact replica of the one Coco Chanel had in her Paris atelier.
>
> Martin: Nothing matches.
>
> Frasier: Well, it's a style of decorating called "eclectic." The theory behind it is, if you've got really fine pieces of furniture, it doesn't matter if they match—they will go together.[3]

This and other courts have refused to take an "eclectic" approach to the commonality and typicality requirements precisely because doing so would allow plaintiffs to evade Rule 23(a)'s requirements through a trick of language. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997) (denying certification where purported class members "were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases.").

In fact, notwithstanding the Ninth Circuit's repeated citations to *Falcon*, 457 U.S. 147, that case actually rejected just such an attempt to read the commonality and typicality requirements at a broad level of generality. *Falcon* rejected certification where the named plaintiff alleged that his employer refused to *promote* him because he was Mexican-American, and sought also to represent Mexican-Americans who had allegedly *not been hired* because of their race. *Id.* at 158-59. The distinction between these two types of discrimination was not just relevant, but critical to ensuring specific commonalities between the class

[3] *Frasier: The Good Son* (NBC television broadcast Sept. 16, 1993), *available at* http://www.kacl780.net/frasier/transcripts/season_1/episode_1/the_good_son.html (last visited Jan. 18, 2011).

members sufficient to justify treating the different claims as a single case. "Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination," the Court explained. "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." *Id.* at 159 n.15.

In other words, courts cannot automatically presume that a member of a group that has been discriminated against has suffered an injury common to, or typical of, every other member of that group. To allow class representation in *Falcon* would have required approaching Rule 23 at a broad level of generality, a breadth forbidden by the fact that the law forbids *specific discriminatory acts*, rather than abstract inequalities of outcome. *Falcon* refused to read Rule 23 at such a level of generality as to overlook the "wide gap" between, on the one hand, the plaintiff's allegation that he was discriminated against in *promotion* decisions, and, on the other hand, the conclusion that his injuries are common to, or typical of, discrimination suffered by members of the purported class who were never *hired*. *Id.* at 157.

This Court held that a plaintiff bears the burden of closing that gap by proving that both candidates for promotion and candidates for hiring were subjected to the same common discriminatory act, *see id.* at 158 (Plaintiff must show that discrimination "is reflected in [the defendant's] other employment practices . . . in the same way it is manifested in the promotion practices."). Without evidence of such a specific,

shared discriminatory act, any inference of commonality or typicality would be "tenuous." *Id.* Worse, to allow such an inference would convert "every Title VII case [into] a potential companywide class action." *Id.* at 159.

Here, that risk has been realized because the Ninth Circuit adopted the level of generality rejected by the Fifth Circuit (*Fibreboard Corp.*, 893 F.2d at 712), the Sixth Circuit (*Sprague*, 133 F.3d at 397), the D.C. Circuit (*Love*, 439 F.3d at 730), and by this Court in *Falcon*—a level of generality that would view widely different injuries as the same.

The court below held that Wal-Mart's delegation to local managers of discretion in hiring and promotion decisions constitutes a single discrete employment practice injuring the whole class in the same way because it "'provides a wide enough conduit for gender bias to potentially seep into the system.'" *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 601 (9th Cir. 2010) (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004)). But at *that* level of generality, any number of entirely different activities might be characterized as a single act or policy. Indeed, if certification is appropriate here, it is hard to imagine what action by a Wal-Mart employee would *not* qualify as a company-wide policy.

This Court need not formulate the precise level of generality that applies to Rule 23(a) to hold that the class at issue here is far outside its boundaries. The Ninth Circuit employed the broadest possible level of generality, holding that commonality and typicality are established precisely by their absence.

Under *Falcon,* plaintiffs discriminated against in promotion decisions may represent those who have suffered that type of discrimination, but cannot assert the rights of those who have been discriminated against in other ways, such as hiring decisions—just as someone who suffers one type of deception due to a lease agreement cannot represent people who were deceived in different ways, or by dissimilar lease agreements, *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14 (2d Cir.), *cert. denied*, 510 U.S. 959 (1993), and someone engaged in a contract dispute with a bank cannot represent parties whose contracts have different terms, *Quinn v. Nationwide Ins. Co.*, 281 Fed. Appx. 771, 778 (10th Cir. 2008), and persons harmed by environmental pollution cannot represent everyone exposed to the same pollution. *Amchem*, 521 U.S. at 609.

It is true that requiring specific common injuries may make it harder for class plaintiffs to sue employers for certain incidents of discrimination, but that difficulty does not justify relaxing the requirements of Rule 23. Plaintiffs are always free to bring their own individual lawsuits, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 878 (1984), and there is no reason to believe that employees have difficulty obtaining representation to press meritorious individual claims. *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401, 1427 (1998) ("Since the early 1970s, employment discrimination has been the most widely litigated form of discrimination and has received more attention from courts and commentators than other areas of civil rights.").

The question before this Court is whether the harms that would flow from diluting the commonality requirement as the Ninth Circuit did here outweigh the risk that meritorious claims will go unprosecuted due to the difficulty faced by such plaintiffs. The answer is clear: diluting Rule 23(a)'s requirements present a far greater threat to the integrity of the legal process.

II

"EXCESSIVE SUBJECTIVITY" CLAIMS SHOULD BE LIMITED TO CASES WHERE A PLAINTIFF BRINGS FORTH EVIDENCE OF AN EMPLOYER'S INTENTION TO ALLOW *SUB ROSA* DISCRIMINATION

Given the clear laws against racial discrimination in employment, a too-clever employer who wishes to discriminate on the basis of race might try to evade the law by leaving all hiring or promotion decisions to the unguided discretion of managers who are known to act in a discriminatory fashion. *See Rowe v. GMC*, 457 F.2d 348, 359 (5th Cir. 1972) ("[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed."). If, for example, a business's owners intended only to hire white males for management positions, it might try to avoid prosecution by delegating hiring decisions entirely to a manager who reliably rejects all candidates except white males, thereby ensuring that no "paper trail" exists that might form the grounds for a lawsuit.

This was the concern addressed by footnote 15 of *Falcon*, 457 U.S. at 159 n.15, where the Court explained that a plaintiff might make out a case of *sub rosa* discrimination by introducing "[s]ignificant proof that an employer operated under a general policy of discrimination." As the Court explained later, "[i]f an employer's undisciplined system of subjective decisionmaking has *precisely the same effects as a system pervaded by impermissible intentional discrimination*, it is difficult to see why Title VII's proscription against discriminatory actions should not apply." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (emphasis added).

The Ninth Circuit relied heavily on this footnote, concluding that it allows plaintiffs to bring class action lawsuits to allege general claims of systematic bias, as opposed to specific, shared incidents of discrimination. *See*, *e.g.*, *Dukes*, 603 F.3d at 596. The decision below interpreted this footnote as essentially carving out a cause of action whereby a plaintiff can leverage her own alleged injury, plus statistical disparities in the employee population, into a lawsuit on behalf of all persons who claim to have fallen victim to one or another aspect of an "overall policy." *See id.* at 596 n.16.

As explained above, that interpretation of footnote 15 would allow plaintiffs to satisfy the commonality requirement merely by artful pleading: a plaintiff alleging her own injuries would be confined to litigating on behalf of herself or others injured by the same wrongful act; but by cleverly phrasing the allegations as the consequence of an "overall policy" of discrimination, she could represent all persons who claim to have suffered any kind of discrimination, at

any time, at any place, at the hands of any manager—with no difference in the actual substance of her allegations. *Cf. Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (Congress did not intend "to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

A better reading of footnote 15, which would prevent this abuse, would be to hold that it simply closes the loophole described above and allows a plaintiff to sue an employer for using a subjective policy as a means of avoiding the law's prohibition on discrimination. To make out such a case, however, a plaintiff should be required to prove—with what *Falcon* called "significant proof"—that the business actually *intended* to use subjectivity to serve a discriminatory end.

A decentralized corporate structure that relies heavily on local managers to make decisions is a legitimate business practice. *See*, *e.g.*, Haridimos Tsoukas, *The Firm as a Distributed Knowledge System: A Constructionist Approach*, 17 Strategic Mgmt. J. 11 (1996) (decentralized management structures take advantage of local managers' better knowledge of local circumstances); Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 Fordham L. Rev. 2137, 2176-77 (2010) (same).[4] Likewise, "subjective evaluations of a job candidate are often critical to the

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[4] Indeed, Wal-Mart's decentralized management structure has many benefits. It even contributed to the fact that the company responded far more quickly and efficiently to Hurricane Katrina than did the highly-centralized government response agencies. Russell S. Sobel & Peter T. Leeson, *The Use of Knowledge in Natural-Disaster Relief Management*, 11 Indep. Rev. 519 (2007).

decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy." *Chapman v. AI Transp.*, 229 F.3d 1012, 1033 (11th Cir. 2000).

Yet the decision below empowers plaintiffs to sue companies whenever their work forces fail to conform to a pre-determined standard of "social justice," or where the corporate structure relies on local decisionmakers. Already, attorneys alleging "excessive subjectivity" frequently "argue the case to a jury using broad generalities in order to get some sweeping condemnation of the 'atmosphere' of the employer," or assert that the business had a "discriminatory culture. It is virtually impossible to defend against abstract claims of that kind." Sarah Kirk, *Ninth Circuit Discrimination Case Could Change the Ground Rules for Everyone*, 14 Tex. Rev. Law & Pol. 163, 166 (2009). This Court should put a stop to such practices by requiring proof that an employer adopted decentralization and subjectivity for discriminatory reasons.

Some appellate courts already essentially require plaintiffs to prove that the employer adopted a subjective policy with an illicit intent. In *Denney v. City of Albany*, 247 F.3d 1172 (11th Cir. 2001), firefighters alleging that they were passed by for promotions because of their race proffered evidence of statistical disparity in the racial makeup of successful candidates, and showed that decisionmaking was largely subjective. But the court rejected the plaintiffs' argument, holding that "nothing in our precedent establishes that an employer's reliance upon legitimate, job-related subjective considerations suggests in its own right an intent to facilitate

discrimination." *Id.* at 1186. Instead, a plaintiff must prove that the employer selected those criteria or chose to focus on them for the purpose of discriminating. *Id.* "Absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII or other federal employment discrimination statutes." *Id.* at 1185. *Accord*, *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1176 (7th Cir.), *cert. denied*, 537 U.S. 884 (2002); *Manning v. Chevron Chem. Co. LLC*, 332 F.3d 874, 882 (5th Cir. 2003), *cert. denied,* 540 U.S. 1107 (2004). Likewise, in *Vaughan v. MetraHealth Cos., Inc.*, 145 F.3d 197, 204 (4th Cir. 1998), the court rejected an age discrimination case in which the plaintiff contended that promotion decisions were "too haphazard and subjective," because without evidence of "age animus," subjectivity alone could not support a finding of illegal discrimination.

The theory applied by the Ninth Circuit here—which "is inevitably in tension with the class requirements of commonality and predominance"—would "permit[] sweeping challenges to company-wide practices and make[] class lawsuits more likely." Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. Rev 367, 377 (2008). Plaintiffs could sue businesses for widely different, ill-defined harms, all grouped together strategically, but without any principled likeness, as a single common source of injury. This is such a case; plaintiffs are exploiting the discrimination laws not to redress specific, individualized harms, but to vindicate ideological preconceptions about the "proper" outcome of a company's hiring and promotion decisions.

It is well within this Court's authority to adopt pleading requirements that outline the statutory elements of a cause of action and bar meritless claims. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), for example, the Court held that plaintiffs alleging predatory pricing must also prove that the defendant was reasonably likely to recoup its losses as part of its strategy. In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), it held that plaintiffs in federal takings cases against states must first seek compensation through adequate state procedures. This Court should likewise require plaintiffs to demonstrate "significant proof" that an employer intended to exploit subjectivity and local autonomy to achieve forbidden discriminatory ends. This would bar meritless claims of discrimination against businesses that simply use decentralized decisionmaking policies so as to benefit from local managers' clearer grasp of facts on the ground, or legitimately include an element of subjectivity in promotion and hiring decisions.

III

THE DECISION BELOW WOULD ALLOW PLAINTIFFS TO SUE BUSINESSES FOR GENERAL "SOCIAL JUSTICE" GRIEVANCES INSTEAD OF ACTUAL INJURIES

A. Generalized "Social Justice" Disputes Like This One Do Not Belong in the Federal Courts

At bottom, this lawsuit is an attempt to litigate a general social grievance that the demographics of

Wal-Mart's work force does not align with what the plaintiffs and their allies think desirable. Unable to prove any actual concrete discriminatory policy, the plaintiffs have proven only that Wal-Mart relies on local managers to make hiring and promotion decisions, that some degree of subjectivity factors into those decisions, and that there are statistical disparities in the outcome. None of these is illegal or wrongful. Thus the case boils down to a sociological argument that Wal-Mart's workforce subtly incorporates inequalities that are allegedly inherent in American society. As Professor Nagareda wrote, lawsuits like this are attempts "to alter the meaning of discrimination under Title VII to accord with an emerging body of research that draws on statistical analysis informed by sociology." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 134 (2009).

The plaintiffs essentially argue that Wal-Mart incorporates American society's discriminatory attitudes; this they characterize as a legal harm to be remedied, presumably by the adoption of central employment policies—*i.e.*, quotas—which will ensure "satisfactory" outcomes. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 688 (2003) (lawsuits like this case "seek . . . organizational change" to eliminate "subtle, often unconscious bias in individuals"). As Professor Green explains, the "excessive subjectivity" rationale is intended to "alter the specific organizational structures or institutional practices that may continue to enable ongoing discrimination," rather than to redress any concrete or particular injury; this rationale "does not depend, in

other words, on influencing individual decision makers." *Id.* at 711.

Although Green acknowledges that "modern-day organizations do not subscribe to decentralized, subjective decision-making systems to discriminate" *intentionally*, she contends that decentralized procedures result in disparate outcomes "because workers are influenced more subtly on a day-to-day basis by forms of cognitive and motivational bias." This subconscious discrimination, she argues, must "be understood as a contextual problem that depends on cultural and structural variables that may vary from institution to institution." The "complexity" of this "problem of institutionally enabled discrimination" demands "an equally complex, contextual remedial process." *Id.* at 713-14.

By allowing a class with completely different injuries under a variety of diverse circumstances to cast their claims as the result of a common "excessive subjectivity" injury, the Ninth Circuit's decision empowers plaintiffs to challenge the unintended outcome of millions of independent transactions as if those outcomes were proof of a single discriminatory policy.

> [O]n plaintiffs' own evidence, the disparities at Wal-Mart essentially replicate the disparities in pay and promotion along the dimension of sex across the United States economy as a whole. On plaintiffs' account, this is precisely the point . . . . Indeed, an emerging scholarly literature urges a reconceptualization of the meaning of discrimination under Title VII to encompass

> accounts in the nature of "structural discrimination" on conduit-like lines.

Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 167 (2010). Federal courts exist to remedy concrete, particularized, individual injuries, not to settle social debates. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218-19 (1974).

The Ninth Circuit's theory expands the scope of potential class action lawsuits in a way that allows plaintiffs to sue businesses for the abstract "unfairness" of their corporate structures. As one district court put it, "'[e]xcessive subjectivity' . . . is a criticism, not an actual company-wide policy or practice. Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the requisite commonality." *Grosz v. Boeing Co.*, No. SACV-02-71-CJC, 2003 U.S. Dist. LEXIS 25341, at *16-*17 (C.D. Cal. Nov. 7, 2003), *aff'd*, 136 Fed. Appx. 960 (9th Cir. 2005) (citation omitted).

Plaintiffs who suffer specific injuries are right to invoke the court's jurisdiction. But plaintiffs whose claims are based on socio-economic patterns and a desire to reshape society should find no traction in Article III courts. These are matters to be addressed, if at all, by legislatures, which are better suited to hear and balance the interests of constituents whose rights might be overlooked in a judicial proceeding. Moreover, voters can check a legislature that sets priorities wrongly, a power they do not have over courts. Legislatures can also prioritize social concerns in light of budgetary constraints and the urgency of resolution.

In *Barcume v. City of Flint*, 638 F. Supp. 1230 (E.D. Mich. 1986), the City of Flint chose to implement an affirmative action program in its firefighter promotions for minorities, but not for women. When the women sued, the court determined that "Flint was not constitutionally obligated to deal with every problem concurrently and with equal vigor nor was it obligated to remedy every aspect of the problem." *Id.* at 1235. Instead, the city "had the right to balance the constraints of limited resources against the evils which needed to be corrected." *Id.* The court explicitly noted that allowing the women to challenge the racial affirmative action program without offering proof of discriminatory purpose "would require the Court to engage in the social and political analysis necessary to decide which group is entitled to participate in the [program]. This would essentially require the Court to engage in social engineering—a task which does not lie within the judicial competence." *Id.* at 1236. Similarly, in *Schulz v. Silver*, 212 A.D.2d 293 (N.Y. App. Div. 1995), *app. dismissed*, 664 N.E.2d 506 (N.Y. 1996), the court refused to issue a writ ordering the legislature to act upon the Governor's proposed budget because "[i]n approving or disapproving the Governor's proposed expenditures, the Legislature is faced with the ordering of socioeconomic priorities which clearly are matters of discretionary judgment constituting a function of the political process and, as such, are not the subject of judicial review." 212 A.D.2d at 296. The same principles should apply here.

The allegations in this case to not specify a legal wrong; merely that Wal-Mart defers to the decisions of on-the-spot managers in human resources matters, and the claimed existence of a wage gap and a glass ceiling. These assertions do not provide courts with a basis for

remedying any specific injuries. This Court should follow the example of the Seventh Circuit in *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 246 F.3d 1073 (7th Cir. 2001). In that case, parents of minority students sought continued federal court control over the school district to remedy alleged vestiges of discrimination. But as the court explained,

> [t]he reality is that until minority students achieve parity of educational achievement with the white students in the Rockford public schools, the plaintiffs will contend that the minority students are victims of the unlawful discrimination of an earlier period in Rockford's history. Yet it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents' education and employment, family size . . . . The board has no legal duty to remove those vestiges of societal discrimination for which it is not responsible . . . [and] no duty that a federal court can enforce to help those students catch up. It may have a moral duty; it has no federal constitutional duty.

Id. at 1076. The same applies here. Allegations of specific discriminatory acts are appropriate for judicial resolution, but large-scale class resolution of social justice concerns is not.

B. Unequal Outcomes of Just Transactions Are Not Unjust

Even if this Court were to consider the plaintiffs' sociological complaints, the basic premise behind their effort at "reconceptualizing" discrimination law is

flawed: it is not necessarily true that the disparity between the sexes in the workforce is the result of injustice.[5]

Many social, cultural, historical, educational, and economic factors influence the decisions of individuals and businesses with regard to employment choices. As Justice O'Connor wrote, 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," because this would ignore "the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Watson*, 487 U.S. at 992 (plurality opinion).

Many women choose to remove themselves from the workforce for significant amounts of time to devote themselves to raising children, which means men tend to have more seniority and thus higher wages and better access to promotions. *See*, *e.g.*, Ellen Frankel Paul, *Equity and Gender* 49 (1989). Many women in the workforce are less interested in higher-level responsibilities than men; research in the mid-1990s found that only 14% of women aspired to become their company's CEO, while 46% of men did. W. Michael Cox & Richard Alm, *Myths of Rich and Poor: Why We're Better Off Than We Think* 81 (1999).

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[5] Significantly, the creators of the statistical method on which the district court relied in this case have published an article explaining that the district court misused that method, and reached conclusions that "exceeded the limitations . . . [of] both the original and revised proposal of what constitutes 'social framework' evidence." John Monahan, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1719 (2008).

Statistical outcomes can be misleading in a more abstract way, also. Although it is often assumed that inequalities of result are evidence of injustice, unequal outcomes of non-coercive exchanges between individuals are not unjust. Injustice is the result of unjust actions, but where no injustice intrudes in a series of transactions, the outcome of those transactions, *even if unequal*, must be just. *See* Anthony de Jasay, *Justice and Its Surroundings* 142-69 (2002). Philosopher Robert Nozick put this point in a famous analogy: if everyone in a city were made exactly equal in monetary terms on one day, and the next day, half of the people chose to pay a dollar to see Wilt Chamberlain play basketball, Chamberlain would end up with far more money than any one of them, and yet no person was subjected to any unjust act; the resulting inequality cannot be described as "unjust." Robert Nozick, *Anarchy, State, and Utopia* 160-64 (1974).

Quite to the contrary, using coercion against individuals who have agreed to a transaction—to take Chamberlain's earnings away from him, in that example—would be to *commit* an injustice against an innocent person in the service of some allegedly higher good. *See* Jasay, *supra*, at 157 ("Unless it can be successfully argued that the involuntary, coerced obligors are in fact responsible for the basic needs of others being unmet . . . it is an injustice to coerce them to provide redress and serve these putative rights.").

In the context of this case, the statistical fact that Wal-Mart employs fewer women than men in management positions cannot suffice to demonstrate the existence of any injustice. This is not only because there may be any number of non-discriminatory

explanations for this disparity, but also because the non-coerced choices of individual managers and employees with regard to their pay and promotions result from their own cost-benefit analyses in the same way as the audience at Nozick's hypothetical basketball game. Those choices may lead to disparate outcomes, but those results are not indicative of any injustice.

Finally, as Nobel laureate Friedrich Hayek explained, the term "social justice" is actually meaningless. *See* Friedrich A. Hayek, *Law, Legislation and Liberty, Volume 2: The Mirage of Social Justice* (1976). First, justice can apply only to the acts of individuals, and not to the results of their just actions, which will virtually always be unequal. *See id.* at 70. Second, rewards can only arise through exchanges with particular people, so that it cannot be said that any person's activities have a 'value to society as a whole.' *See id.* at 75. One's activities have value only to particular persons. To speak of a person getting what she "deserves from society" is a solecism, since a person only "deserves" what she bargains for and freely exchanges with others. In addition, while "social justice" is often used as a synonym for equality, it does not specify the relevant category of equality, and making people equal in one way often makes them unequal in other ways. *See id.* at 81-82. Most of all, imposing economic equality requires the state to deprive innocent persons of their rights, thus imposing injustice on them. *See id.* at 82.

It is sometimes alleged that the outcomes of just transactions result in injustice because of historical deprivations or lack of opportunities given to women or other minority groups in the past. But this assertion

overlooks the complicated web of historical and sociological deprivations against any and all groups—deprivations that cannot be practically remedied at this date. Such an argument also establishes no principled limit on the degree or nature of intervention by the government to "remedy" vaguely understood past injustices by rearranging relationships. At no point can such a remedy be completed; one redistribution, or the establishment of one hiring quota, will inevitably be followed by new inequalities, which will be subjected to another round of interventions in the name of social justice, and so on. *See* Jasay, *supra*, at 203 ("The desired end-result must be *continuously enforced*, and as one unjust head is chopped off, two grow in its stead.").

These were the reasons that this Court severely narrowed the use of statistical disparities in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989). Like the plaintiffs here, the plaintiffs in *Wards Cove* "alleged that several 'objective' employment practices . . . as well as the use of 'subjective decision making' . . . have had a disparate impact on nonwhites." 490 U.S. at 657. But noting that there are many "'innocent causes that may lead to statistical imbalances in the composition of their work forces,'" *id.* at 657 (quoting *Watson*, 487 U.S. at 992), this Court found that "even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs . . . this alone will *not* suffice to make out a prima facie case of disparate impact," because the plaintiffs must also show "that the disparity they complain of is the result of one or more of the employment practices . . . *specifically showing that each challenged practice* has a significantly disparate impact on employment opportunities for whites and nonwhites."

Id. (emphasis added). Thus plaintiffs in a discrimination suit may not avoid the need to prove that employers have committed *specific* unjust acts that have harmed them in *specific* ways.

Statistical evidence shows that discrimination against women in the workforce is largely a thing of the past. The U.S. Labor Department reports that women account for 51% "of all workers in the high-paying management, professional, and related occupations," outnumbering men in management roles in human resources, finance, medical and health services, and other occupations.[6] The Bureau of Labor Statistics reports that women make up 50.6% of all management, professional, and related occupations. The rates of men and women differ depending on the industry: only 8.1% of managers in the construction industry are female, for instance, but they account for 64.1% of education administrators, and 70.3% of human resources managers. And although women account for 42.6% of managers in retail sales, they account for 73.4% of managers in office and administrative support work.[7] Similar statistics show that women outnumber men in obtaining higher education, as well. Women earned 57.5% of all bachelor's degrees, and 60% of master's degrees in 2006. They particularly dominate in medicine and

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[6] U.S. Dep't of Labor, Women's Bureau, *Quick Stats*, *available at* http://www.dol.gov/wb/stats/main.htm (last visited Jan. 18, 2011).

[7] U.S. Dep't of Labor, Bureau of Labor Statistics, *2007 Current Population Survey: Table 11*, *available at* http://www.bls.gov/cps/wlf-table11-2008.pdf (last visited Jan. 18, 2011).

psychology, where women earned more than 72% of all doctoral degrees.[8]

Thus while disparities between men and women do persist, it is simply unrealistic to believe that they are the result of systematic lack of opportunity. Remaining disparities are more readily explained by the different choices of diverse people pursuing diverse goals.

The allegations here are so general that the complaint is better seen as a "social justice" critique of Wal-Mart. But that critique cannot entitle the plaintiffs to legal relief, does not withstand scrutiny in philosophical terms, and finds no basis in broader social trends and statistics. If the plaintiffs wish to pursue individual claims of actual discrimination by Wal-Mart, they have that opportunity; but they may not use statistical imbalances to sue Wal-Mart over its institutional structure.

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[8] Nat'l Ctr. for Educ. Statistics, The Condition of Education, *Table 27-1: Degrees Earned By Women*, *available at* http://nces.ed.gov/programs/coe/2008/section3/table.asp?tableID=910 (last visited Jan. 19, 2011).

CONCLUSION

The decision of the Ninth Circuit should be *reversed*.

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Respectfully submitted,

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