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 OF *AMICI CURIAE*, LAW AND ECONOMICS PROFESSORS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF *AMICI CURIAE*

The law professors named below teach and write about law and economics, class certification, empirical methods, employment discrimination law, or a combination thereof. They have spent a considerable amount of time thinking, writing, and teaching about the statistical methodologies, civil procedure, and antidiscrimination law issues before the Court. A partial list of their scholarship on these issues appears as an Appendix. Based on this expertise, *amici* argue that Petitioner has not presented a balanced picture concerning the prevalence of so-called "blackmail settlements" through class action filings, the empirical support for which does not adequately exist (Parts I & II, *infra*), and concerning the appropriate role of statistical inference in class action litigation (Part III, *infra*). *Amici* respectfully submit this brief so as to offer this Court a more balanced presentation of these two issues.[1]

SUMMARY OF ARGUMENT

Petitioner Wal-Mart and its *amici* have called into question the use of class actions in employment

[1] All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief and, other than *amici* on whose behalf this brief is submitted and their counsel, no person or entity contributed money or services to the preparation and submission of this brief.

discrimination cases. They view class certification as a vehicle for rent-seeking behavior, *i.e.*, extracting surpluses from defendants in the shadow of unmeritorious complaints, and as unnecessary for resolving employment discrimination claims among many commonly affected plaintiffs. The myth of "blackmail settlements" has led to unsubstantiated claims that, as class numerosity and the size of potential judgment awards increase, so too does the likelihood that class action plaintiffs are merely taking advantage of risk-averse defendant corporations. This assertion, however, lacks any strong basis in empirical evidence for class actions in general and, more important for the case at bar, employment discrimination class actions in particular. On the contrary, only a small fraction of classes that moves for certification is in fact certified by the federal courts, and, proposed classes overwhelmingly opt to dismiss their cases voluntarily or have them removed to state court. Combined with the steep discovery costs often needed to prevail at the certification stage, plaintiffs face little financial incentive to pursue certification without a reasonable belief in the claim's merits. The procedural and financial barriers to entry are even higher when, as in the case at bar, Respondents complain about subjective and discriminatory patterns and practices.

Similarly, Petitioner and its *amici* assert that employment discrimination claims are more accurately and more fairly adjudicated on a smaller, more individualized scale. Class actions, however, offer the courts and litigants several benefits that Petitioner

and its *amici* discount or try to refute entirely. First, aggregate resolution of common discrimination claims promote systemic efficiency, *see Blackman v. Dist. of Columbia*, No. 10-7019, 2011 WL 281036, at *13 (D.C. Cir. Jan. 28, 2011), and redress asymmetries between plaintiffs subject to the same discriminatory practices, none of whom could shoulder the burden of individual litigation, and defendants who enjoy built-in economies of scale. Second, class actions reduce the noise that attends individual, yet common, claims of employment discrimination, allowing the courts to attach liability more precisely than in the disaggregated approach favored by Petitioner and its *amici*. Third, district courts can more accurately evaluate proof of damages and compute award magnitudes through an aggregate statistical analysis. Plaintiffs are more likely to receive only the amount necessary to compensate them for discrimination harms (and no more), while defendants can avoid the excessive liability often created by individualized approaches to recovery. Hence, the federal courts long have recognized the inherent value of aggregate assessments of liability and damages. *See, e.g., McClain v. Lufkin Indus., Inc.*, 519 F.3d 264 (5th Cir. 2008); *United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984); *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974).

ARGUMENT

I. DATA INDICATE THAT CLASS CERTIFICATION IS A RARE EVENT, AND CIVIL RIGHTS CLASS ACTIONS ARE AMONG THE RAREST

Petitioner argues that the lower courts in this case erred in certifying the Wal-Mart employees as a class because the requirements set out in Rule 23(a) were not satisfied. Relying on the standards in, among other cases, *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), Petitioner denies that the original complaint demonstrates the commonality, typicality, and adequacy prongs of the Rule. Petitioner attempts to bolster its strictly legal claims that the Rule was not satisfied in this case by urging this Court, as a matter of prudence, to read class certification requirements very stringently because, Petitioner asserts, class certification has grown rampant and unchecked in the federal courts. To the contrary, complaints that begin as class actions rarely obtain judicial certification. This Court should therefore reject Petitioner's implicit assumption in light of the data on class action dispositions.

Collecting and analyzing data on the universe of class actions traditionally has been difficult given the diversity of legal issues and the frequent removal of state cases to federal court. INST. FOR CORP. JUSTICE, RAND INST., ANATOMY OF AN INSURANCE CLASS ACTION 1 (2007) ("Courts do not generally track and report on class actions, and, often, only the attorneys involved

know the outcomes of settlements. Almost all that is empirically known is based on the few cases in which a judge certifies the absent plaintiffs as a class."). Fortunately, social scientists are beginning to shed light on actual practices and provide a more accurate description of class action dispositions. Two recent studies conducted by the Federal Judicial Center indicate rather clearly that Petitioner's claims about class action patterns have little grounding in empirical fact. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IMPACT OF THE CLASS ACTION FAIRNESS ACT ON THE FEDERAL COURTS: PRELIMINARY FINDINGS FROM PHASE TWO'S PRE-CAFA SAMPLE OF DIVERSITY CLASS ACTIONS 2 (2008) [hereinafter LEE & WILLGING I]; EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2008) [hereinafter LEE & WILLGING II].

First, reported data usually distinguish the broader category of filings of proposed class actions from the outcomes of interest in this case: class certifications. One investigation of 748 claims filed against insurance companies between 1993 and 2002 reports striking results. Over the period analyzed the absolute number of attempted class actions increased almost seven-fold. INST. FOR CORP. JUSTICE, *supra*, at 1. Yet, among the 564 class actions in which plaintiffs *sought* certification that had closed at the time of the study, only 78 (14%) *were certified* for class treatment.

Id. at 2. Of the remainder, 37% were subject to a pretrial ruling for the defense and another 27% were voluntarily dismissed by the plaintiff. Thus, Petitioner's subtle intimations that class action certification has become commonplace, at first glance, seem to be without merit.

Second, studies covering a wider array of litigation matters provide little support for the hypothesis that the federal courts have shown a pro-certification bias. Just as in the insurance industry report, an investigation of 231 diversity cases found that plaintiffs ultimately filed motions to certify a class for litigation purposes in fewer than one in four lawsuits that had been originally filed as proposed class actions. LEE & WILLGING I, *supra*, at 2. Among other empirical facts, the report's authors concluded that:

- Parties proposed class settlements in 21, or 9%, of the 231 class actions;
- Voluntary dismissal was the most frequent disposition of cases not remanded, occurring 38% of the time; and
- One in five cases was terminated by the court granting a dispositive motion [for the defendants]. *Id*.

After voluntary dismissals, the most frequent outcome among the sampled cases was a remand to state court (30%) or a judicial ruling dismissing the entire complaint (20%). *Id*. at 6 tbl. 6. Thus over three-quarters of all the class actions studied were either

dropped by the complaining party or removed from the federal courts.

The evidence from these objective examinations undercuts the notion that, once a potential set of plaintiffs achieves requisite numerosity, district courts routinely or automatically find that the other requirements of Rule 23 are satisfied. Although Petitioner does not claim outright that class certification in general has outpaced what proper application of the law would predict, it certainly argues that certification was inappropriate in the case at bar and suggests a broader problem, while its *amici* have quite openly posited that the floodgates on class certification would open if this Court affirmed the ruling below. An examination of the record here demonstrates that compelling econometric data in Respondents' expert reports, examined at length by the district court, provided a more than adequate basis for finding of typicality and commonality here. Moreover, if the courts below committed "multiple and manifest errors in allowing the case to proceed as a class action," then we would expect other courts faced with similar factual records to "mistakenly" order class certification. That the incidence of certification is so rare, combined with the reliable statistical inference performed by Respondents' experts, suggests that the courts below favored certification in this case for legally valid reasons.

Even if one were to analyze the class action data at a higher level of generality, the conclusion would remain the same: class actions are dwindling in

frequency as a method of resolving multiple plaintiffs' claims in employment discrimination suits. A study of the Class Action Fairness Act's (CAFA) effect on plaintiff behavior concluded that, although CAFA had spurred more class actions overall filed in or removed to federal court (as was Congress's intent), the 72% growth in diversity class actions across 88 district courts stemmed from a higher incidence of contracts, consumer protection/fraud, and torts-property damage claims. LEE & WILLGING II, *supra*, at 2. Over the same time period

> civil rights class actions [of which employment discrimination class actions are a subset] declined in absolute numbers, from 195 in July-December 2001 to 162 in January-June 2007, a decrease of 17 percent. Civil rights class actions constituted 6.9 percent of total class action filings and removals in January-June 2007, compared with 14.2 percent in July-December 2001.

Id. at 5. Note that class actions here are defined not as the subset of complaints that achieve Rule 23(a) certification. They encompass more broadly all complaints brought as proposed class actions. Thus, the decline in civil rights cases represents not only a conservative estimate for the decline in civil rights class certifications but, more important, the waning of employment discrimination class action certifications, a subset of all civil rights certifications.

II. THE EMPIRICAL EVIDENCE ON CLASS ACTIONS PROVIDES NO SUPPORT FOR A "BLACKMAIL SETTLEMENT" ARGUMENT AGAINST CERTIFICATION

Petitioner and its *amici* also argue that a certified class action imposes an undue burden on defendants, especially those averse to the risk of liability at trial. The myth of compelled settlement through class actions comes in many guises. Some courts have referred to "legalized blackmail," *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980) (citing Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974)), or "blackmail settlements," *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). Regardless of the label, such class actions are viewed as generating "settlements induced by a small probability of an immense judgment in a class action." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973). There are, however, no empirical data that substantiate the view that defendants regularly make offers in excess of their best estimate of expected liability, simply because they fear low probability, but extremely high, judgment awards.

Petitioner and its *amici* suggest one can infer that a class has obtained a blackmail settlement, in part, because of high civil litigation settlement rates generally. But one also would have to believe that settlement is common only when there are special reasons attributable to class certification for defendant

risk aversion for such an inference to be plausible. The data indicate, however, that high settlement rates are ubiquitous in civil litigation; settlement rates in class action suits closely parallel settlement rates in litigation brought by individual parties more generally. *See* Robert G. Bone & David S. Evans, *Class Certification and Substantive Merit*s, 51 DUKE L.J. 1251, 1285 n.129 (2002); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1401-02 (2003).

The reason that we might observe more settlements in discrimination suits brought by groups than in those brought by individuals is that, individual employment discrimination plaintiffs might not be able to bear the costs required to prove a defendant's liability, so the expected value of litigation falls short of the expected value of recovery based on the underlying merits of the suit. But, more generally, when individuals bring suits that are viable as individual actions, *i.e.*, where expected damages exceed suit costs, settlement rates are just as high as they are in class action cases. Thus, the different cost structures for substantiating employment discrimination claims brought by groups or individuals implies that class plaintiffs without a valid claim have little financial incentive to move for certification solely to obtain a settlement award.

Petitioner contends that blackmail settlements are an inherent element of sizeable class actions, if not all class actions, in employment discrimination cases such as the one before this Court. To the contrary,

commentators reject the idea that both blackmail and "sweetheart" settlements (whereby the principal-agent problem drives a wedge between the plaintiff class's and counsel's interests) are necessarily linked to certification. The myth has been overstated. Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1379 (2000). Formal empirical review undermines the proposition of blackmail settlements because there is no factual reason to believe that settlements are not tied to a claim's merits rather than the size of the award sought. *See* Silver, *supra*, at 1359. The magnitude of potential damages does not pose a threat of blackmail so long as defendants settle based on the odds of their losing and their potential liability as grounded in a defensible quantitative analysis, as has been conducted in the case before this Court. *See id*. at 1367 ("Companies that break billion-dollar promises should face billion-dollar losses at trial. . . . A civil justice system in proper working order should therefore always cause a person with an enormous legal obligation to fear losing an enormous sum at trial."). In addition, this Court has recognized that aggregating plaintiffs into a certified class, *without more*, should not be viewed as a settlement threat by defendants. The class action device simply solves a collective action problem. *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to

bring a solo action prosecuting his or her rights.") (internal quotation marks omitted).

Briefs filed by Petitioner's *amici* suggest that employment discrimination plaintiffs can move to have a class certified, thereby threatening the possibility of very large judgments, almost without any cost. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 16, Wal-Mart v. Dukes, No. 10-277 (Jan. 2011) ("The decision below interpreted [precedent] 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.' "). In the antidiscrimination arena, however, it is typically costly for plaintiffs' lawyers to establish the existence of a class. This barrier to entry for individual plaintiffs is true even when plaintiffs complain solely about a fairly well-specified, narrow practice (*e.g.*, the use of a particular screening device for hiring or promotion that might either have been consciously adopted to restrict a protected group's access or might simply have unjustified disparate impact) given that they still will have to establish some sort of commonality in the impact that the practice had on the plaintiff group. The barrier is *especially* high, though, when – as in this case – Respondents complain about a range of specific and more generalized practices, namely related to undue subjectivity and corporate culture.

While class action plaintiffs do not have to present statistical evidence at the certification stage sufficient for them to prevail on the merits, they usually need to obtain and analyze statistical evidence (at great cost) for the court to make a reasonable inference that common issues will predominate in assessing allegedly discriminatory practices. The argument that class certification will open up the floodgates to blackmail suits depends on the unwarranted assumption that plaintiffs' lawyers will be willing to bear these high upfront costs of pursuing litigation absent strong reason to believe they can prevail on the merits, *i.e.*, by showing disparities in pay or promotion rates relative to industry-comparable employers, observed features of corporate culture that are typical of employers whose behavior has been found to violate Title VII strictures in the past. Even if plaintiff's lawyers were willing to engage in expensive discovery and motion practice in pursuing a weak case – which is not very plausible – the district courts would typically find through "first-round" statistical evidence that there is often no reason to believe that the plaintiffs have identified any unifying practices that impact pay or promotion, corrected for distinctions in relevant traits. This reasoning comports with the empirical findings on judicial decisions not to certify proposed classes noted *supra*.

Finally, as a matter policy, this Court has acknowledged that the costs of litigation or settlement raise important issues, but altering the standards under the Federal Rules is not the appropriate solution.

Cf. Reiter v. Sonotone Corp., 442 U.S. 330, 344-45 (1979) ("[R]espondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court."); *see also* Brief for the United States as Amicus Curiae at 8, Erica P. John Fund, Inc. v. Halliburton, Co. No. 09-1403 (Dec. 2010) ("None of those rationales links proof of loss causation to the prerequisites for class certification under Rule 23. . . . [T]he . . . view that class actions bestow 'extraordinary leverage' upon plaintiffs does not authorize it to impose requirements above and beyond those specified in Rule 23.") (internal citation omitted). Thus, even if Petitioner were to offer evidence supporting the blackmail settlement hypothesis – which it has not – denying certification for Respondents would not be the appropriate remedy for a systemic failure in civil procedure.

III. AGGREGATING INDIVIDUAL CLAIMS THROUGH THE CLASS CERTIFICATION PROCESS REDUCES ERROR COSTS AND PROMOTES SOUND INFERENCE REGARDING PATTERN AND PRACTICE DISCRIMINATION IN THE WORKPLACE

The efficiencies with respect to litigation costs, accuracy in determining liability, and the more efficient calibration of damages all are promoted by the

aggregation of individual workplace discrimination claims into a certified class action.

A. Class Actions Promote the Fair and Efficient Adjudication of Large-Scale Claims

First, the federal courts have recognized the cost-saving and efficiency gains advanced by class actions. *See, e.g., Blackman v. Dist. of Columbia*, No. 10-7019, 2011 WL 281036, at *13 (D.C. Cir. Jan. 28, 2011) ("Class actions offer the possibility of economies of scale in litigation by resolving the claims of many similarly situated parties in one action rather than forcing each individual claim to be brought as a separate action."). Moreover, in some cases, individual plaintiffs would find the cost of separate litigation so onerous as to preclude satisfactory resolution of the claim. *See In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d Cir. 1998) ("[O]ne of the primary rationales for class actions is allowing access to the courts for parties whose individual claims are so small that it would be economically infeasible to pursue them individually.")

As Professors Hay and Rosenberg have observed, if plaintiffs were forced to litigate their common claims separately, "a defendant facing a large number of plaintiffs generally has an enormous, and unwarranted, upper hand over the plaintiffs. The defendant firm, but not the plaintiffs, can take advantage of economies of scale in case preparation, enabling it to

invest far more cost-effectively in the litigation." Hay & Rosenberg, *supra*, at 1379.

Second, class actions help courts pinpoint liability much more accurately than several individual suits brought by aggrieved employees. Consider an example from the world of law school admissions testing.

Assume, for the sake of argument, that law schools admit students entirely on the basis of their performance on the Law School Admission Test (LSAT); admission to law school thus is analogous to a workplace "promotion." The LSAT is centrally administered, just as we are assuming, again, for argument's sake, that Petitioner's promotion policies are entirely centrally administered. The central office – the Education Testing Service (ETS) for the LSAT case and Wal-Mart corporate headquarters in the case at bar – "scores" all candidates for "promotion." In the LSAT case, assume each law school (the equivalent of a local store) accepts (promotes) 100 of its 200 applicants, and the applicant pool is evenly divided between men and women. Fifty female and 50 male applicants have a "true" LSAT score of 170. *i.e.*, if they took the test often enough, their individual average scores would converge to 170, and the other 50 female and 50 male applicants have a "true" LSAT of 168. Of course, the tests are a bit random (just as promotion decisions contain random error): test scores around the mean have a standard deviation of 4 points.

Now imagine that ETS engages in blatant sex discrimination; it reduces the reported score of each

woman by 1 point (a quarter of a standard deviation.) Such action will not preclude women from admission to any law school or the law school of their choice, but it will lower the probability that any woman with the same underlying qualifications as a man will gain admission. In the employment discrimination context, most "pattern and practice" sex discrimination cases work in the same way. For instance, failing to use a public posting system does not preclude women from learning about job vacancies, but women are less likely to be aware of them. The key question, then, is whether we will observe this blatant sex discrimination if we merely look at schools with admissions classes of 100: the answer decidedly is no. Although absent the discrimination, we would expect to observe (over a very large number of cases) equal representation for men and women in first-year cohorts, we actually would observe statistically significant sex discrimination in only 26% of cases. Moreover, we would observe more women than men in roughly 7% of the entering law school classes, even though women are not more qualified and actually are the victims of blatant discrimination.

Finally, an aggregate approach to recovery can better calibrate the damages a defendant pays to reflect *only* the harm and *all* of the harm that the defendant causes. Consider a claim for lost wages based on a discriminatory failure to promote women. Imagine further that men received promotion to 60 supervisory positions and that 100 women were both eligible for those positions and better qualified than

the 60 men who were promoted. In an individualized litigation strategy, each of the women would have a good chance of prevailing. After all, the odds alone would suggest that, absent discrimination, each woman would have been promoted; each faced a greater than 50% chance. The cumulative effect of these individual determinations could be excessive liability. The employer would have to pay lost wages to all 100 women although we know with certainty only 60 of them suffered harm. *See, e.g., Kraszewski v. State Farm Gen. Ins. Co*., No. C-70-1261 TEH, 1986 WL 11746, at *1 (N.D. Cal. July 17, 1986). The converse could occur as well. If, say, only 40 of the 100 women would have been promoted, because 20 men were more qualified than the group of 100 equally qualified women, no individual woman might satisfy the preponderance of evidence standard in litigation even if a statistical analysis could establish with a great degree of certainty – much greater than the preponderance of evidence standard – both that discrimination had occurred and that a certain number of women in the aggregate suffered resulting harm. The sorts of high error costs under an individualized approach to damage calculations can lead, respectively, to excessive or insufficient deterrence, imposing significant social costs. *See* Joshua P. Davis, Class-Wide Recoveries 18-23 (unpublished manuscript, available at http://ssrn.com/abstract=1768148).

A robust statistical analysis can be used to gauge the total harm to the class with great confidence even if we cannot be sure with similar confidence which of

the class members suffered individual harm. An individualized approach to recovery, therefore, can give rise to excessive liability or inadequate damages. A class-wide approach, in contrast, could calibrate liability at just the right amount. If 60% of a class of 100 women failed to receive promotion because of sex discrimination, the employer could be forced to pay the wages lost by that percentage of the class for a total liability of $600,000, precisely the harm the legal violation caused. If 40% of the class failed to receive promotion, awarding $400,000 would have the same effect. For purposes of liability and deterrence – that is, from the perspective of employer – the court could award just the right amount. *Id*.

Further, under an appropriate aggregate approach to liability made possible by class certification, a defendant's liability will not be affected by the class containing some members who were not injured, nor should it be as discussed *infra*. Multivariate regression analysis, for example, can be used to assess the total lost wages to a class as a whole. If class members are included who suffered no harm, their presences would not increase the total harm calculated; it would just decrease the average harm per class member. A statistical analysis, if done properly, will capture the total harm done to the class, *id*. at 39-40, and also can provide individualized damages calculations for allocation among class members.

Additionally, under an aggregate approach to recovery, evidence that any particular class member was not harmed should have no effect on a defendant's

overall liability. If there is evidence, for example, that a particular class member would not have promoted – even decisive evidence – that would simply increase the likelihood that other women in the class would have been promoted but for discrimination. *Id*. at 34.

The federal courts have recognized the value of establishing proof of damages in the aggregate rather than through piecemeal, individual adjudications. In *United States v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999), the 11th Circuit reaffirmed its belief that awarding remedial backpay in an employment discrimination suit "is appropriate when fashioning an individualized remedy would create a quagmire of hypothetical judgment[s] as to which individuals, out of a large class, should receive remedial relief." *Id.* at 1299 (internal quotation marks omitted). The court's preference for class-based relief would "avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class . . . too narrowly." *Id*. at 1299-1300 (quoting *Pettway v. Am. Cast Iron Pipe Co*., 494 F.2d 211, 262 n.152 (5th Cir. 1974)); *see also McClain v. Lufkin Indus., Inc*., 519 F.3d 264, 281 (5th Cir. 2008) ("In this case, the district court concluded that the size of the class and the inherent uncertainty of the individual claims contraindicates the use of an individualized approach. We agree."); *Segar v. Smith*, 738 F.2d 1249, 1290 (D.C. Cir. 1984) ("We perceive no error in the District Court's finding that it would be impossible to reconstruct the employment histories of DEA's senior black agents. Examination of discrete

promotion decisions, as difficult as even that might be, will not suffice.").

Despite these justifications for aggregation, Petitioner and its *amici* would have this Court require some division of the class certified by the courts below into subunits for separate disposition. One argument in favor of subdivision, advanced by Petitioner and its *amici*, is that a class as large as the one certified by the courts below in this case is inherently too expansive. But this Court has held otherwise:

> Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule. Since the class here was certified in accordance with Rule 23(b)(2), the limitations on class size associated with Rule 23(b)(3) actions do not apply directly. Nor is a nationwide class inconsistent with principles of equity jurisprudence, since the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class. If a class action is otherwise proper, and if jurisdiction lies over the claims of the members of the class, the fact that the class is nationwide in scope does not necessarily mean that the relief afforded the plaintiffs will be more burdensome than necessary to redress the complaining parties.

Califano v. Yamasaki, 442 U.S. 682 (1979) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 414-420 (1977)).

Scholars also have devoted attention to the issue of class subdivision and its relationship to prima facie showings of employment discrimination They point out that, in response to class certification motions, defendants typically argue that the analysis should take place at some disaggregated level, where subunits (*e.g.*, geographic regions, individual stores, specialty departments) are compared to each other rather than analyzing all employees forming the company's employment base. *See, e.g., Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 288 (2d Cir. 1999) (describing how defendant's expert's main rebuttal to the plaintiffs' report was that the analysis "was done on a company-wide basis and not on a position-by-position basis" and therefore the report "had created a statistical illusion of disparity by aggregating data across many different job titles."); *Krueger v. N.Y. Tel. Co.*, 163 F.R.D. 433, 440 (S.D.N.Y. 1995) (recounting how defendants countered plaintiffs' framing of the challenging employment action as "most assuredly *not* a single event which can be analyzed in the aggregate" and rather that "the plaintiff class members [were] scattered across forty-three of the sixty-nine banding entities, each subject to dissimilar treatment in almost every respect"). One simulation exercise even prompted the conclusion that

> courts should become more critical of statistical expertise purporting to test for subunit differences, particularly when offered at the class certification phase of the case. Under some circumstances, the statistical approach often used to oppose class certification in

> employment discrimination litigation is guaranteed to support the defendant's position, *regardless of the actual facts of the case*.

William T. Bielby & Pamela Coukos, *"Statistical Dueling" with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions*, 56 EMORY L.J. 1563, 1565 (2007) (emphasis added). In both *Krueger*, the case that introduced the phrase "statistical dueling" into the legal lexicon, and *Caridad*, federal courts rejected a subunit approach and ordered class certification.

B. Aggregation Reduces the Noise Surrounding Individual Experiences of Employment Discrimination and Increases Sound Inferences about Discriminatory Patterns and Practices

The very nature of discrimination calls for the statistical inferences that can be achieved only through aggregate analysis. When we describe some centralized rule or practice that emerges from the combination of central mandates and local practice, we include not only practices with binary outcomes (*e.g.*, no women are promoted, all women receive lower wages relative to men), but ones with *probabilistic* features.

Assume, for example, that a company's practice of failing to post the availability of promotion opportunities reduces the proportion of women, relative to men, who learn of these opportunities because men

are more connected to informal informational networks. The claim is not that no women will learn of these opportunities or receive promotions, only that a lower percentage of equally qualified women likely will be promoted because a lower proportion even learns of opportunities. Or assume, for example, a woman who actually has been late a certain number of times is more likely to be denied a promotion on account of lateness than a man who actually has been late the same number of times. This may be true if discrimination works in the ways that most conventional modern social psychological theories of discrimination assert discrimination operates. Supervisors may actually notice and recall the negative actions taken by "out-group" members more than they recall those taken by "in-group" members. These supervisors may also be more prone to think the negative actions of an out-group member reflects a persistent bad characteristic rather than bad luck, and they may show some degree of simple preference for members of the in-group. For explanations of these phenomena and experimental and observational data suggesting their ubiquity, *see, e.g.,* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination, in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert, S.T. Fiske & and Gardner Lindzey eds., 4th ed. 1998); John W. Howard & Myron Rothbart, *Social Categorization and Memory for In-Group and Out-Group Behavior*, 38 J. PERSONALITY & SOC. PSYCHOL. 301 (1980); Bernadette Park & Myron Rothbart, *Perception of Out-Group Homogeneity and Levels of Social Categorization: Memory for the Subordinate*

Attributes of In-Group and Out-Group Members, 42 J. PERSONALITY & SOC. PSYCHOL. 1051 (1982); Janet K. Swim & Lawrence J. Sanna, *He's Skilled, She's Lucky: A Meta-Analysis of Observers' Attributions for Women's and Men's Successes and Failures*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 507 (1998). Still, these phenomena do not imply that women who are late never get promoted or that men who are late never suffer on account of their lateness. These biases simply may mean that a woman who has been late for work x times in the last year may face an 80% chance of losing out on a promotion, whereas a man's chances are only 70%. Given that most modern discrimination is probabilistic rather than a simple choice between taking prohibited action and not, class certification helps courts with fact-finding.

Respondents' core substantive claim – that the centralized policy that harms female workers the most is undue discretionary delegation – suggests that there are almost surely some differences across "units," however finely those units are defined. Petitioner's centralized policies, which impact all female employees, in fact almost certainly permit some local variation. Whether the expectation is to find variations in *statistics* across localities above what mere chance would generate depends in part on the size of "localities" and the nature of local discretion-based discrimination.

This is not to say that the class action device is inconsistent with learning more about local practices. Professors Bielby and Coukos rightly suggest that, at

the merits stage, we might use multilevel models to account for heterogeneity, across stores or functional units (both in terms of discrimination effects and covariates). In fact, unless the court certifies the whole class and tries an employment discrimination suit in one venue and at one time, it is unlikely that we will be able to account for this heterogeneity. Aggregating the data is precisely what permits us to know when decision-making is in fact less uniform. But "[c]onsideration of this level of factual nuance at the class certification stage of the case is inconsistent with preserving a real boundary between procedural hurdles and merits adjudication." Bielby & Coukos, *supra*, at 1608. This last point hints at a seemingly "neutral" reason, *i.e.*, neither favorable to plaintiffs or defendants, to embrace aggregation. Petitioner would ask this Court to break up "discriminatory units" such that their magnitudes are small enough that we could not distinguish true discrimination from chance variation in expected pay or promotion levels.

There are defenses Petitioner might raise, for which the plausibility of the defense can *only* be verified in the context of a broad class action. Thus, employers gain advantages from class actions as do employees. Consider the possibility that, when observing all of the store's departments, a very weak wage or promotion bonus for experience emerges in a particular department, separate from experience at the company more generally. If one analyzed the data at the level of Sub-department *S*, though, experience becomes a highly predictive factor for wage increases

and promotion opportunities.[2] As a result, the wage-predicting regression equation for the company as a whole is distinct from the regression equation for Sub-department *S*.

Finally, imagine either of the following: (1) women are unduly concentrated in departments in which they lack a positive trait that either sex must possess in order to advance in that department; or (2) if the aggregate wage decomposition regression equation is affected by each department's rules, the mismatch between relevant traits and sex is pronounced (*e.g.*, although women have little experience in Sub-department *S*, the only place it actually matters, women will possess intra-department experience in other irrelevant departments). Ironically for Petitioner's case, if the class were not certified, it would not be able to demonstrate this fact. One cannot fit a regression equation with any persuasive power to Department *D* at a single store. Thus, even if experience in Department *D* is critical, it could not be so observed; one can only draw this conclusion by examining a sufficient number of entities. Nor could we determine if women are "mismatched" to the needs of subunits within the company without investigating matching patterns across a wide swath of departments and stores. Only by looking at the class

[2] In this hypothetical, one would also imagine that there exists one or several traits in each sub-department important only in the one department and have little impact on store-wide prediction.

could we evaluate the claim that women are missing locally critical traits that either matter very little when viewing the company's operation across the board or that they atypically lack them in the very situations where those traits matter greatly.

CONCLUSION

This Court should affirm the certification of the class.

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APPENDIX

Each of the *amici* has written about class action, statistical inference, or employment discrimination issues. The affiliations and selected scholarship of the *amici* are:

CHRISTOPHER L. GRIFFIN, JR., J.D.

Affiliation

Visiting Assistant Professor of Law
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Two Publications on Related Topics

Disability-Selective Abortion and the Americans with Disabilities Act, 2009 UTAH L. REV. 845 (with Dov Fox)

Assessing Post-ADA Employment: Some Econometric Evidence and Policy Considerations (John M. Olin Ctr. for Studies in Law, Econ., & Pub. Policy, Research Paper No. 358, 2008), *available at* http://ssrn.com/abstract=1282307 (with John J. Donohue, Michael Ashley Stein & Sascha Becker) (under review with the *Journal of Empirical Legal Studies*)

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Four Publications on Related Topics

Class-Wide Recoveries (Feb. 2011) (unpublished manuscript, *available at* http://ssrn.com/abstract =1768148)

Antitrust, Class Certification, and the Politics of Procedure, 18 GEO. MASON L. REV. 969 (2010) (with Eric L. Cramer)

Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases, 41 RUTGERS L.J. 355 (2009) (with Eric L. Cramer)

Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug, 39 U.S.F. L. REV. 141 (2004) (with David F. Sorensen)

MARK G. KELMAN, J.D.

Affiliation

James C. Gaither Professor of Law and Vice Dean Stanford Law School, Stanford University

Three Publications on Related Topics

Defining the Antidiscrimination Norm To Defend It, 43 SAN DIEGO L. REV. 735 (2006)

Market Discrimination and Groups, 53 STAN. L. REV. 833 (2001)

Concepts of Discrimination in "General Ability" Job Testing, 104 HARV. L. REV. 1157 (1991)