

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
NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION, THE EQUAL JUSTICE SOCIETY,
AND THE LEGAL AID SOCIETY-EMPLOYMENT
LAW CENTER IN SUPPORT OF RESPONDENTS**

CYRUS MEHRI
PAMELA COUKOS
JANELLE M. CARTER*
MEHRI & SKALET, PLLC
1250 Connecticut Ave., NW
Suite 300
Washington, DC 20036
202-822-5100
JCarter@findjustice.com

REBECCA M. HAMBURG
NATIONAL EMPLOYMENT
LAWYERS ASSOC.
417 Montgomery Street
4th Floor
San Francisco, CA 94104
415-296-7629

Counsel for Amici Curiae

*Counsel of Record
(Additional counsel listed
on inside cover)

MICHAEL L. FOREMAN
THE PENNSYLVANIA STATE UNIV.
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
Lewis Katz Building
University Park, PA 16802
814-865-3832

234934



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

ADDITIONAL COUNSEL

JAMES M. FINBERG
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
415-421-7151

PAUL W. MOLLIKA
OUTTEN & GOLDEN LLP
20 S. Clark St., #1500
Chicago Illinois 60603
312-263-0272

REGINALD T. SHUFORD
EQUAL JUSTICE SOCIETY
260 California Street, Suite 700
San Francisco, CA 94111
415-288-8700

WILLIAM C. McNEIL, III
THE LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER
180 Montgomery Street, Suite 600
San Francisco, CA 94107
415-864-8848

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	iii
INTERESTS OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	8
I. TITLE VII PERMITS CLASS REMEDIES FOR DISCRIMINATORY PRACTICES, REGARDLESS OF THE LEVEL OF INTENT OR OBJECTIVITY	8
II. FEDERAL COURTS FOLLOWING <i>FALCON</i> ARE ALREADY REQUIRING PLAINTIFFS TO PROVIDE APPROPRIATE EVIDENCE OF COMMONALITY IN CASES INVOLVING SUBJECTIVE PRACTICES	19
A. The Court Below Employed an Appropriate and Rigorous Factual Analysis Consistent with this Court’s Ruling in <i>Falcon</i> , and the Practice of Other Courts of Appeal, to Determine Whether Plaintiffs Satisfied Rule 23(a)	20

Table of Contents

	<i>Page</i>
B. Since the 1991 Amendments, District Courts Have Required Plaintiffs to Provide a Substantial Factual Record in Support of Certification and Have Certified Only a Limited Number of Title VII Class Actions	29
1. The Number of Employment Discrimination Class Actions Filed And Certified Shows That Class Actions Are An Important, But Sparingly Used, Device To Confront Unlawful Employment Discrimination	30
2. While the Number of Class-Based Employment Discrimination Cases Filed Each Year Is Small, An Even Smaller Percentage Are Actually Certified	32
CONCLUSION	34
APPENDIX 1 — Total Number of Class Action Lawsuits Filed as Compared to the Number of Employment Discrimination Class Action Lawsuits Filed since 1976	36
APPENDIX 2 — Employment Discrimination Class Certification Decisions under Title VII from 2008 through 2010	37

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	29
<i>Bacon v. Honda of Amer. Mfr., Inc.</i> , 370 F.3d 565 (6th Cir. 2004)	26
<i>Bergel v.</i> <i>Metropolitan Waste Control Commission</i> , 873 F.2d 1166 (8th Cir. 1989)	15
<i>Brown v Nucor</i> , 576 F.3d 149 (4th Cir. 2009)	9, 15, 21
<i>Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)</i> 522 F.3d 6 (1st Cir. 2008)	20, 27
<i>Caridad v. Metro North Commuter R.R.</i> , 191 F.3d 283 (2d Cir. 1999)	15, 21
<i>Cooper v. Southern Co.</i> , 390 F.3d 695 (11th Cir. 2004)	21
<i>Cox v. Am. Cast Iron Pipe Co.</i> , 784 F.2d 1546 (11th Cir. 1984)	9, 17
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977)	9, 10

Cited Authorities

	<i>Page</i>
<i>East Texas Motor Freight System, Inc. v. Rodriguez,</i> 431 U.S. 395 (1977)	5
<i>Eisen v. Carlise & Jacquelin,</i> 417 U.S. 156 (1974).....	27
<i>Franks v. Bowman Transportation Co.,</i> 424 U.S. 747 (1976)	4, 8, 9
<i>Franks v. Bowman Transportation Co.,</i> 495 F.2d 398 (5th Cir. 1974)	4
<i>Garcia v. Johanns,</i> 444 F.3d 625 (D.C. Cir. 2006).....	21
<i>Gariety v. Grant Thornton, LLP,</i> 368 F.3d 356 (4th Cir. 2004)	27
<i>Gen. Tel. Co. of the Sw. v. Falcon,</i> 457 U.S. 147 (1982)	<i>passim</i>
<i>Green v. USX Corp.,</i> 843 F.2d 1511 (3d Cir. 1988).....	<i>passim</i>
<i>Green v. USX Corp.,</i> 896 F.2d 801 (3d Cir. 1990).....	4, 9
<i>Griffin v. Carlin,</i> 755 F.2d 1516 (11th Cir. 1985)	15

Cited Authorities

	<i>Page</i>
<i>Griffin v. Duggar</i> , 823 F.2d 1476 (11th Cir. 1987)	22, 24, 25
<i>Griggs v. Duke Power Co.</i> , 401 U.S. at 430	8, 9, 10, 12
<i>Hazelwood Sch. Dist. v. United States</i> , 433 U.S. 299 (1977)	8
<i>In re Hydrogen Peroxide Antitrust Litig.</i> , 552 F.3d 305 (3d Cir. 2009)	27
<i>In re Initial Public Offerings Securities Litigation</i> , 471 F.3d 24 (2d Cir. 2006)	27
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977)	4, 9, 16, 17
<i>Lewis v. City of Chicago</i> , 130 S. Ct. 2191 (2010)	<i>passim</i>
<i>McClain v. Lufkin Indus., Inc.</i> , 519 F.3d 264 (5th Cir. 2008)	3, 9, 15, 21
<i>Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Securities Litigation) (“IPO”)</i> , 471 F.3d 24 (2d Cir. 2006)	20

Cited Authorities

	<i>Page</i>
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228	3, 13, 28
<i>Ricci v. DeStephano</i> , 129 S. Ct. 2658 (2009)	7, 9
<i>Robinson v. Polaroid Corp.</i> , 732 F.2d 1010 (1st Cir. 1984)	15
<i>Rossini v. Ogilvy & Mather</i> , 798 F.2d 590 (2d Cir. 1986)	9, 17, 21
<i>Shipes v. Trinity Indus.</i> , 987 F.2d 311 (5th Cir. 1993)	9
<i>Staton v. Boeing</i> , 327 F.3d 938 (9th Cir. 2003)	9, 21, 24, 27
<i>Szabo v. Bridgeport Machines, Inc.</i> , 249 F.3d 672 (7th Cir. 2001)	27
<i>Unger v. Amedisys Inc.</i> , 401 F.3d 316 (5th Cir. 2005)	27
<i>Watson v. Ft. Worth Bank & Trust</i> , 487 U.S. 977 (1988)	<i>passim</i>

Cited Authorities

Page

STATUTES

42 U.S.C. § 2000e-2(k) 4, 10, 28

Civil Rights Act of 1991, Pub. L. No. 102-166,
105 Stat. 1071 9, 31

OTHER AUTHORITIES

Administrative Office of the United States
Courts, *available at* [http://www.uscourts.
gov/Statistics/JudicialBusiness.aspx](http://www.uscourts.gov/Statistics/JudicialBusiness.aspx) 30

Emery G. Lee & Thomas E. Willging, *The
Impact of the Class Action Fairness Act
of 2005 on the Federal Courts*, Fourth
Interim Rep. to the Jud. Conf. Advisory
Committee on Civ. Rules, April 2008 30, 31

LexisNexis CourtLink, *available at* [http://litigator.
lexisnexus.com](http://litigator.lexisnexus.com) 30

INTERESTS OF THE *AMICI CURIAE*¹

The National Employment Lawyers Association (NELA),² the Equal Justice Society (EJS)³, and the Legal

1. This brief is filed with the consent of all parties. No party or counsel for a party authored any part of this brief or made any financial contribution to its preparation or submission. Other than *amici* and their counsel, no person has made any monetary contribution to the preparation or submission of this brief.

2. The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those whose rights have been violated in the workplace. As part of its advocacy efforts, NELA supports precedent-setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized. NELA's interest in this case is to assist the Court based on its long experience with the use of Title VII to address disparate impact and pattern or practice claims and to ensure that employees retain access to class action remedies in cases involving systemic discrimination.

3. The Equal Justice Society (EJS) is a national organization of scholars, advocates, and citizens that seeks to promote equal opportunity and enduring social change through law, public policy, public education, and research. EJS has long been engaged in efforts to promote equal opportunity for women and people of color. Consistent with that effort, EJS works to overturn barriers to the protection and enforcement of the anti-discrimination protections of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and federal statutes. EJS has been at the forefront of applying social science knowledge about

Aid Society – Employment Law Center (LAS-EJC)⁴ appear as *amici curiae* to address the impact of this case on the viability of Title VII’s systemic discrimination remedies. Petitioner Wal-Mart, and various *amici* appearing in support of Wal-Mart’s position, challenge the use of Federal Rule of Civil Procedure 23 to certify claims involving subjective or discretionary employment practices. They ask this Court to establish a novel and unduly constraining standard for certifying such classes. (See, e.g., Brief of Petitioner (“Pet’r. Br.”) 10-11; *infra* at Part I, Part II.A). *Amici* organizations and their members have decades of experience protecting equal employment opportunity in the workplace, including seeking relief from systemic discrimination on behalf of classes under Title VII of the Civil Rights Act of 1964. *Amici* respectfully submit that applying a higher or different standard to class cases involving subjective decisionmaking would

discrimination to law, serving as a leader in educating courts, litigators and civil rights agencies about the mechanisms and processes of bias in the workplace and elsewhere.

4. The Legal Aid Society – Employment Law Center (LAS-ELC) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, LGBT individuals, and the working poor. The LAS-ELC’s interest in preserving the protections afforded employees by federal anti-discrimination laws is longstanding. The LAS-ELC has successfully litigated several cases against major metropolitan fire departments to provide increased opportunity for people of color and appeared before this Court on numerous occasions as counsel for plaintiffs as well as in an *amicus curiae* capacity.

be at odds with core Title VII enforcement principles. Further, it would significantly restrict the ability of employees to seek redress for valid claims involving discriminatory employment policies. It would reduce employer incentives to adopt best practices that limit or avoid the potential for bias in pay, promotion and other employment decisions. Because of these potentially far-reaching implications of the Court's disposition of this case on civil rights plaintiffs, *amici* file this brief.

SUMMARY OF ARGUMENT

When subjective or discretionary employment practices lead to systemic discrimination, Title VII allows plaintiffs to seek relief as a class. Rule 23 ensures that they can. Employment discrimination class action cases frequently involve concerns with subjective employment practices – formal policies or standard ways of doing business that encourage managers to make ad-hoc unexamined decisions about workers.⁵ When company structures allow favoritism and personal preferences to override merit in hiring, pay and promotion decisions, protected classes can end up with fewer opportunities and smaller paychecks as a result.⁶ If a corporate policy

5. *See, e.g., Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 982 (1988) (defendant “had not developed precise and formal criteria for evaluating candidates for the [relevant] positions,” but “relied instead on the subjective judgment of supervisors”).

6. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 236-37 (open-ended evaluation process for partnership decisions allowed gender-based stereotypes to influence outcome); *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 276-77 (5th Cir. 2008) (African-Americans systematically denied promotion opportunities where managers had discretion to bypass objective

delegates open-ended discretion to supervisors, and thereby limits equal employment opportunity for an entire class of employees, class actions are a key mechanism for reducing systemic discrimination in the workplace.

Claims that subjective pay and promotion practices systematically disfavor women at Wal-Mart raise common issues of law and fact under the applicable substantive law. Plaintiffs rely on two well-established Title VII liability theories that test evidence of discrimination in the context of a classwide wrong—pattern or practice and disparate impact. Under Title VII’s class-based discrimination framework, plaintiffs must show that discrimination in the workplace manifests as the company’s “standard operating procedure,” *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977); see also *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), or that specifically challenged practices have a measurable adverse effect on equal employment opportunity. *Lewis v. City of Chicago*, 130 S.Ct. 2191 (2010); 42 U.S.C. § 2000e-2(k). These doctrines formally recognize that employment practices can operate systematically to deprive workers as a class from being treated on the basis of merit—instead of because of race, gender or other protected status. Critically for the legal

seniority requirements and choose “candidate they favored”); *Green v. USX Corp.*, 843 F.2d 1511, 1527-28 (3d Cir. 1988), *relevant portion reinstated by Green v. USX Corp.*, 896 F.2d 801 (3d Cir. 1990) (significant racial disparity in hiring at workplace where applicants chosen by foreman after interviews using “unguided” and “never validated” subjective criteria); *Franks v. Bowman Transportation Co.*, 495 F.2d 398, 403 (5th Cir. 1974) (Plaintiff “watched white workers hired ‘off the street’ into higher paying positions for which he was qualified”).

dispute in this case, and contrary to the implications of Petitioner’s presentation, Title VII permits plaintiffs to address discrimination on a systemic level regardless of the degree of subjectivity or the presence of intent. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988). Applying Rule 23(a) to claims involving subjective practices requires considerable deference to this well-established Title VII law, and to traditional Rule 23 interpretive principles. When considering a class certification motion for subjective employment practices, there is no requirement that claims be “entirely subjective” to satisfy commonality, nor are there special proof or evidentiary requirements that go beyond or differ from those under Rule 23. *See* discussion *infra* at Part I.⁷

Consequently, this Court has sought to balance the recognition that discrimination claims “by their very nature” may encompass class-based wrongs, *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977), against Rule 23’s gatekeeping role. Although Title VII clearly contemplates class-based liability and relief, whether plaintiffs may proceed as a class in any particular case depends on the evidence regarding the employment practice at issue. For decades, federal courts have followed this Court’s mandate to scrutinize that evidence carefully in considering whether to certify classes in employment discrimination cases. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982). Accordingly, federal courts usually do not permit plaintiffs to proceed

7. Petitioner Wal-Mart and its *amici* argue in direct conflict with *Watson* that subjective practices claims involve special rules and forms of proof and that courts should draw distinctions between entirely subjective, partially subjective, and objective practices. *See, e.g.*, Pet’r. Br. 10-11; *id.* 19-22; *infra* at Part I.

absent a preliminary evidentiary record as to two key points: (1) the challenged employment practice applies in generally the same manner to the class as a whole and (2) there is statistical or other evidence that could support a reasonable inference of classwide discrimination, which in turn satisfies the court that a legitimate common question as to classwide harm exists. *See* discussion *infra* at Part II.A. This requirement serves to “bridge the gap” between individual claims of discrete instances of discrimination, and the existence of additional employees “fairly encompassed” within a proposed class affected by a common discriminatory policy or practice. *Falcon*, 457 U.S. at 157-58.

Apparently rejecting current practice as inadequate, Wal-Mart and its *amici* contend that *Falcon* adopts a novel heightened proof requirement that only applies to cases involving subjective practices.⁸ They justify this by claiming that subjective practices are inherently individualized and cannot give rise to common questions of law or fact. Whether subjective practices give rise to common questions can only be determined by a fact-specific review in each case. The view that subjective practices are *per se* inconsistent with class treatment would conflict with *Watson* and with how circuit courts have addressed this question for years. There are no special rules or exceptions from the general Rule 23 inquiry based on the type of employment practice. Nor is there any need to adopt such rules.

Based on a review of prior cases, federal courts have been highly selective about letting these cases go forward,

8. *See, e.g.*, Pet’r. Br. at 19-22; *see also infra* nn. 16, 23 and accompanying text (detailing arguments of *amici*).

with due regard to both the due process rights of employers and the interests of absent class members. *See* discussion *infra* at Part II.B. and Appendix 1 (“App. 1”), Appendix 2 (“App. 2”) (tables documenting filing and certification trends in Title VII class cases). Similarly, in this case, the district court made its ruling after considering and addressing a substantial evidentiary record in significant detail regarding the commonality and centralization of human resources practices at Wal-Mart, the prevalence of gender stereotyping in the workplace, and statistical and anecdotal evidence of gender differences in pay and promotions that could not be explained by differences in qualifications.⁹ That fact-based conclusion is clearly entitled to deference. Adopting Wal-Mart’s position would tip the balance from judicial respect for all interests under Title VII to mere acquiescence to employers. It would further erode the protection for merit-based decisions, allowing companies to tolerate workplace decisions based on favoritism.

For close to five decades, this Court has safeguarded Title VII’s promise that all Americans have access to job opportunities on the basis of talent, qualifications and expertise – and without regard to race, gender or other impermissible grounds. *Ricci v. DeStephano*, 129 S.Ct. 2658, 2674 (2009) (Court’s decisions interpreting employment discrimination doctrine “must be consistent with the important purpose of Title VII – that the workplace be an environment free of discrimination, where race is not a barrier to opportunity”). Petitioner and its supporting *amici* have utterly failed to justify a rewrite of these longstanding rules.

9. *See infra* nn. 21-22 and accompanying text.

ARGUMENT**I. TITLE VII PERMITS CLASS REMEDIES FOR DISCRIMINATORY PRACTICES, REGARDLESS OF THE LEVEL OF INTENT OR OBJECTIVITY**

Title VII does not restrict discrimination claims to one particular set of practices or contexts. *See Lewis*, 130 S.Ct. at 2198 (no specific definition of unlawful employment practice). The statute operates to prohibit all discriminatory employment practices, whether intentional or unintentional, subjective or objective, or any combination of these characteristics. *Franks*, 424 U.S. at 763 (“Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination.”). *Accord Watson*, 487 U.S. at 989. Even an apparently nondiscriminatory practice may be illegal if it systematically limits equal employment opportunity for a protected class. *See Griggs v. Duke Power Co.*, 401 U.S. at 430. (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

This Court has repeatedly concluded that Title VII prohibits discriminatory employment practices whether they are objective, subjective, or a mix of both. *See Watson*, 487 U.S. at 990 (Title VII protections extend to both subjective and objective employment practices); *Falcon*, 457 U.S. 147, 159 n.15 (1982) (noting that Title VII prohibits discriminatory practices, including subjective employment practices); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 302 (1977) (recognizing that highly

subjective hiring process in which decisionmakers were told to consider “personality, disposition, appearance, poise, voice, articulation, and ability to deal with people,” was conducive to subtle discrimination).

Federal courts and Congress have operationalized this broad coverage of all discriminatory practices in two doctrines applicable to systemic discrimination: disparate impact and pattern or practice (intentional systemic discrimination). These liability theories originated in milestone cases of this Court in the battle against racial segregation in the workplace. *See, e.g., Teamsters*, 431 U.S. 324; *Franks*, 424 U.S. 747; *Griggs*, 401 U.S. 424. Since then, the Court has applied these doctrines in cases involving sex discrimination, and to a range of contemporary employment practices involving little or no overt evidence of bias. *Lewis*, 130 S.Ct. 2191; *Ricci*, 129 S.Ct. 2658; *Watson*, 487 U.S. 977; *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Over the years and up to the current day, federal courts have followed them in cases involving subjective practices like the ones raised here. *See, e.g., Brown v Nucor*, 576 F.3d 149, 153-157 (4th Cir. 2009); *McClain*, 519 F.3d at 272; *Staton v. Boeing*, 327 F.3d 938 (9th Cir. 2003); *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir. 1993); *Green v. USX Corp.*, 843 F. 2d 1511 (3d Cir. 1988), *relevant portion reinstated by Green v. USX Corp.*, 896 F. 2d 801 (3d Cir. 1990); *Rossini v. Ogilvy & Mather*, 798 F.2d 590, 598-99 (2d Cir. 1986); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1984). Congress, in exercising its statutory authority, has approved of and expanded on these remedial frameworks. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. These doctrines continue to address discriminatory employment practices however they manifest in the workplace.

Disparate impact theory permits plaintiffs to challenge discriminatory practices on behalf of a class without any proof of discriminatory intent. Liability turns on whether a statistically-determined disparate impact exists, and whether an employer may nonetheless justify that practice based on job- or business-specific criteria. *Lewis*, 130 S.Ct. at 2198; 42 U.S.C. § 2000e-2(k). Although the doctrine originated in the context of objective practices and criteria, such as degree requirements,¹⁰ written employment tests,¹¹ or height and weight requirements,¹² it is not limited to objective practices. Indeed, this Court in *Watson* specifically held that the disparate impact doctrinal framework applies to subjective criteria. 487 U.S. at 990-91.

The subjective practices challenged in *Watson* are on all fours with the practices plaintiffs challenge on behalf of the proposed class. At issue in both cases is “whether *an employer’s practice of committing promotion decisions to the subjective discretion of supervisory employees has led to illegal discrimination.*” *Watson*, 487 U.S. at 982 (emphasis supplied). In *Watson*, the defendant “had not developed precise and formal criteria for evaluating candidates for the [relevant] positions,” but “relied instead on the subjective judgment of supervisors.” *Id.* 487 U.S. at 982. Further, the company declined to make centralized or coordinated promotion decisions, but delegated promotional authority to individual supervisors.

10. *Griggs*, 401 U.S. at 428-429.

11. *Id.*

12. *Dothard*, 433 U.S. at 332.

Despite the fact that in operation this practice involved discrete individual interactions, its legality could be evaluated exactly the way a height or weight requirement, or a written test, would be – based on its overall impact on a protected class and the need for, or benefit of that practice to, the employer:

We are also persuaded that disparate impact analysis is in principle *no less applicable to subjective employment criteria* than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices . . . If 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, 487 U.S. at 990-91 (emphasis supplied). By proposing additional hurdles for class claims involving subjective practices, Petitioner and its *amici* are effectively asking the Court to reverse its holding in *Watson*.

Watson places subjective and objective practices on the same legal footing. 487 U.S. at 990. By its holding, the Court recognized that subjective or discretionary decisionmaking can be an identifiable and measurable discriminatory **practice**, rather than just a series of unique or random events. In a disparate impact claim, all members of a proposed class are challenging the effect

of a common employment practice. Whether Wal-Mart's common pay and promotion practices systematically result in unequal opportunities for women employees is directly analogous to whether Duke Power Company's common practice of requiring high school diplomas resulted in unequal opportunities for African-American employees. *Griggs*, 401 U.S. at 431 ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."). Following *Watson*, it is not the level of subjectivity, but the question of adverse impact, that matters.

Notably, a key issue before the Court in *Watson* was the extent to which traditional expert tools used to assess the disparate impact of objective criteria could apply in the context of personal discretion. The Court had before it the views of leading social science researchers who explained how statistical evidence, psychological assessment and validation tools were as relevant to understanding discrimination that operates through subjective decisionmaking as they were to written tests or objective criteria.¹³ Thus, the conclusion that Title VII applies to practices "based on the exercise of personal judgment or the application of inherently subjective criteria..." including "an employer's undisciplined system of subjective decisionmaking," 487 U.S. at 988, 990,

13. See, e.g., Brief for American Psychological Association, *Amicus Curiae* supporting Petitioner, 1987 WL 881423 at 5 & n.7 (the "widely held view" that subjective practices are "less scientific, less quantifiable, less reliable, and less facially neutral than their objective counterparts" does not mean they cannot be systematically assessed. "It is not intrinsic in such devices to be unquantifiable.")

envisioned using exactly the kind of aggregate statistical assessment and expert evidence before the District Court in this case.

Subjective or partially subjective practices are no less capable of resulting in consistent, measurable discriminatory effects, and thus, no less actionable on a classwide basis, than claims of discrimination emanating from objective practices. This is particularly the case in the modern workforce where the “problem of subconscious stereotypes and prejudices” continues to exist. *Watson*, 487 U.S. at 990. As in the case of Ann Hopkins, employers must evaluate employees based on qualifications and merit, not improper stereotypes. *Price Waterhouse*, 490 U.S. at 251. Indeed, the record here reveals significant evidence of sex stereotyping in the workplace, and empirical evidence of the potential for subjective practices to allow stereotypes to override merit for women at Wal-Mart. (Pet. App. at 193a-94a.)

However, Petitioner and its *amici* consistently argue that subjective practices should be treated *differently* from any other Rule 23 inquiry, and that special rules and proof requirements apply only to these class actions. *See, e.g.*, Pet’r. Br. 13, 21-23; Brief of *Amicus Curiae* Pacific Legal Foundation (“PLF Br.”) 15-16. The core of their argument is the one rejected in *Watson* – one that equates subjective with random or treats it as by definition solely individualized.¹⁴ Disparate impact theory requires

14. *See, e.g.*, Pet’r. Br. 21 (where plaintiffs challenge discretionary decisions by managers it is the “antithesis” of a common policy); *id.* at 31-32 (PLF Br. at 2-3 (where company delegates hiring or promotion authority to managers by definition there is no common practice)).

conceiving of a system of delegated discretion, like that at issue in *Watson* and here, as a *system*. It tests the effect of the entire system on the class. It asks whether comprehensive defenses such as business necessity apply. To view subjective practices as inherently inconsistent with Rule 23's commonality requirement, or so much in tension that only an extremely high level of proof allows certification, is as wrong as viewing them as inherently inconsistent with disparate impact. As the Third Circuit explained in considering a related prong of Rule 23(a):

This contention rests in part upon the same rationale that USX asserts with regard to the applicability of disparate impact analysis to this case—that where subjective criteria are employed, it is necessary to evaluate each instance of discrimination independently. As we noted above, we find nothing in Title VII that requires that result. The argument is similarly unpersuasive in this context. It completely misperceives the typicality requirement of Rule 23.

See Green, 843 F.2d at 1533.

Following Petitioner's arguments to their logical extreme, and requiring a higher showing to certify cases involving subjective practices, creates an unacceptable end-run around *Watson* itself. It abrogates the Court's stated goal of avoiding loopholes in Title VII enforcement. *See Watson*, 487 U.S. at 989 ("Our decisions in *Griggs* and succeeding cases could largely be nullified" unless disparate impact applies to subjective practices). If claims involving objective criteria are easier to certify

than those involving subjective criteria, the likely result is that employers will move further away from objective measures of job performance, skills, or qualifications. That in turn will reduce employer incentives to adopt oversight mechanisms that lessen the risk that subjectivity will lead to bias. Certainly the argument that claims must be “entirely subjective” in order to be certified must fail: *Watson* treats objective, subjective, and mixed systems consistently as do virtually all the Courts of Appeal.¹⁵ This principle becomes even more significant given that Congress has now codified disparate impact theory formally into Title VII’s statutory scheme. *Lewis*, 130 S.Ct. at 2200 (“By enacting § 2000e-2(k)(1)(A)(i), Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer’s motives and whether or not he has employed the same practice in the past.”).

Similarly, whether plaintiffs’ evidence sufficiently demonstrates intent is a distinct inquiry from the issue of determining commonality. It is simply not plausible, as Petitioner and its *amici* contend, that Rule 23 requires “significant proof” of an intent to discriminate, or proof that subjective practices are a mere fig leaf for

15. *Watson*, 487 U.S. at 991. This principle has been followed in the First, Second, Third, Fourth, Fifth, Eighth, and Eleventh Circuits which treat partially subjective, objective and entirely subjective practices identically for purposes of disparate impact theory. *Brown*, 576 F.3d at 157; *McClain*, 519 F. 3d at 272; *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Bergel v. Metropolitan Waste Control Commission*, 873 F.2d 1166, 1167-69 (8th Cir. 1989); *Green*, 843 F. 2d at 1525; *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985); *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984).

intentional discrimination, or evidence that virtually all class members had been discriminated against, in order to satisfy the threshold procedural question of class certification.¹⁶ First, because Title VII forbids both facially neutral and intentionally discriminatory practices, plaintiffs could bring and win their case on the merits without ever proving an intent to discriminate at all. (Indeed, many of the briefs seeking reversal are written as if disparate impact theory never existed, or the *Watson* decision applying it to subjective practices on equal footing with objective practices, never happened.) Second, some of the scenarios provided in the briefs of Petitioner and its *amici* go beyond what is likely required to sustain a pattern or practice claim on the merits.¹⁷ It is hard to imagine how a threshold question like class certification could be limited to certain sets of facts to the exclusion of all others.

16. *See, e.g.*, Pet'r. Br. at 19-22 (*Falcon* requires “significant proof” at R.23 stage); PLF Br. at 15-16 (proposing to limit subjective practices claims to the single scenario where plaintiff has proof of employer who wants to avoid a litigation “paper trail” and deliberately adopts subjective practices as a subterfuge allowing it to hire only white males); Brief of *Amici Curiae* Altria Group, *et al.* (“Altria Br.”) at 6 (“the general policy that unites the claims must itself be one ‘of discrimination’—for example, a policy that is discriminatory on its face, or a policy adopted for the purpose of enabling discrimination.”); Brief of *Amicus Curiae* Costco Wholesale Corp. (“Costco Br.”) at 5; Brief of *Amicus Curiae* Retail Litigation Center (“Retail Lit. Ctr. Br.”) at 3, 7-10.

17. For example, in *Teamsters* itself, the proof of a discriminatory pattern or practice was based on statistical and anecdotal evidence, not on the theory that an employer adopted certain practices in order to freely discriminate without sanction. *See generally Teamsters*, 431 U.S. 324.

It may certainly be the case that ultimate recovery for the class requires strong evidence of intentional discrimination, but the decision regarding certification should only consider whether plaintiffs have raised a legitimate question as to the existence of a pattern or practice of discrimination. The pattern or practice framework is fully applicable to cases involving subjective practices. The misuse of discretionary or unstructured procedures to limit opportunities available to particular classes of employees can give rise to a workplace broadly permeated by discrimination. For example, in *Teamsters* itself, it was alleged that

[n]umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired.

Teamsters, 431 U.S. at 338. *See also, e.g., Cox*, 784 F.2d at 1551-52 (word of mouth hiring led to pattern or practice of sex-based discrimination in promotions); *Rossini*, 798 F.2d at 599 (class could pursue pattern or practice claims where employer's subjective promotions practices discriminated against women). Plaintiffs must provide sufficient evidence to satisfy a court that a legitimate question as to intentional discrimination exists; they will be able to show more than a discriminatory effect, and; this question is common to the class.

In a comparable case involving objective practices, all of these objections to certification would clearly fail. Suppose that instead of giving store managers undisciplined discretionary authority to set pay rates, Wal-Mart determined salaries based solely on level of education. And suppose that aggregate statistical evidence showed this policy systematically resulted in women being paid less than otherwise comparable men. Even under Petitioner’s view of the law, plaintiffs could move to certify a class, present their evidence of impact, and require Wal-Mart to justify its policy. Plaintiffs clearly do so regardless of whether measurable statistical disparities existed at each individual store, or whether women were merely somewhat disfavored versus completely shut out of higher paid opportunities, or whether Wal-Mart chose that criteria deliberately in order to exclude women. Because under Title VII, there is “in principle” no distinction between these two systems, *Watson*, 487 U.S. at 990, under Rule 23 there should not be either.¹⁸

Certifying a class in a case challenging subjective decisionmaking requires satisfying Rule 23—nothing more and nothing less. The requirements of Rule 23(a) are the same for subjective or objective practices. Rule 23(a) requires plaintiffs, to establish, *inter alia*, that there are questions of law or fact common to the class. Title VII requires the federal enforcement power to apply consistently across all employment practices. And

18. Such a distinction would also be flatly inconsistent with Congress’ decision in 1991 to expand available remedies in all cases – class and individual – without distinction. Congress took this step despite the decline of extreme workplace race and gender segregation and the decline of explicit racism and sexism in society between 1964 and 1991.

so we must turn from the relationship between Title VII and Rule 23, to the specifics of how to establish Rule 23 requirements in subjective practices cases and all other cases.

II. FEDERAL COURTS FOLLOWING *FALCON* ARE ALREADY REQUIRING PLAINTIFFS TO PROVIDE APPROPRIATE EVIDENCE of COMMONALITY IN CASES INVOLVING SUBJECTIVE PRACTICES

The district court's class certification ruling in this case rests on the application of widely accepted legal principles and an ample supporting factual record. Federal courts regularly certify similar classes in cases challenging subjective employment practices as discriminatory, and regularly decline to certify such cases, after a careful review of the specific claims at issue and the evidence as to the elements of Rule 23 presented by the plaintiffs and defendant. Where there is evidence permitting an inference that a common policy of subjective decisionmaking has resulted in class-wide harm, commonality is satisfied. Under this approach, federal courts typically consider less than 100 Title VII class action cases each year, and certify only a handful of them. Following *Falcon's* "rigorous analysis" evidentiary requirements, district courts have exercised their gatekeeping role to deny class certification in the majority of contested cases.

A. The Court Below Employed an Appropriate and Rigorous Factual Analysis Consistent with this Court’s Ruling in *Falcon*, and the Practice of Other Courts of Appeal, to Determine Whether Plaintiffs Satisfied Rule 23(a)

In applying Rule 23(a) to class claims under Title VII, circuit courts generally require evidence of a common policy or practice, supported by statistical or other evidence, following this Court’s ruling in *Falcon*, 457 U.S. 147 (1982). As this Court held, trial courts must apply a “rigorous analysis” to each element of Rule 23 when considering whether to certify a class. A rigorous analysis may require courts to “probe behind the pleadings” to evaluate the factual and legal issues of the cause of action, in order to determine whether the putative class is in actual conformance with the requirements of Rule 23(a).¹⁹ *Falcon*, 457 U.S. at 160. This framework, established by this Court nearly three decades ago, was followed by the Ninth Circuit, and guided the trial court in reaching its class certification decision. Both the district court and the Ninth Circuit allowed only a putative class meeting the specific requirements of Rule 23 and demonstrating a reasonable inference of discrimination on the merits to be certified.

Similarly, consistent with the “rigorous analysis” required under *Falcon*, the circuits, in applying Rule

19. Courts make this analysis without regard to whether it overlaps with the merits inquiry, and the analysis often involves the examination of extensive evidence and tests factual and legal theories. *E.g.*, *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)* 522 F.3d 6, 25-26 (1st Cir. 2008); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Securities Litigation)* (“IPO”), 471 F.3d 24, 41 (2d Cir. 2006).

23(a) to claims involving subjective practices, typically test evidence in support of class certification against two key elements:

- (1) Whether the defendant has a common employment policy or practice permitting subjective or discretionary decisionmaking that applies in generally the same manner to the class;
- (2) Whether the plaintiffs have proffered competent, admissible statistical and/or other evidence at the class certification phase that can support a reasonable inference of discrimination against the class.

Brown, 576 F.3d at 157; *McClain*, 519 F. 3d at 272; *Staton*, 327 F.2d at 954; *Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 291-93 (2d Cir. 1999); *Rossini*, 798 F.2d at 598-99; cf. *Green*, 843 F. 2d at 1533.²⁰

These elements allow a court to be satisfied both that a legitimate question of law or fact exists as to defendant's discriminatory conduct, and that this question is "common to the class" as Rule 23(a) requires. Requiring plaintiffs to proffer competent, admissible evidence that can support an inference of classwide discrimination raises the question -- beyond mere pleading or allegations.

20. Courts have treated the failure on one or both of these elements as fatal to a plaintiff's certification motion. *See, e.g., Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004) (policies differed by unit); *Garcia v. Johanns*, 444 F.3d 625 (D.C. Cir. 2006) (plaintiff offered simplistic statistics without major variables).

Cf. Griffin v. Duggar, 823 F.2d 1476, 1489 (11th Cir. 1987)(“Falcon requires more than mere allegations and an intent to rely on statistics as proof.”) Courts must further consider evidence that the question being raised is likely to be one that is common to the class, such as the company’s practice, structure, organization, knowledge, or culture. This was the approach of the District Judge here. In addition to statistical and anecdotal evidence of discrimination, Plaintiffs presented evidence of common employment policies and practices governing pay and promotions that allowed subjective and/or discretionary decision-making to apply to the class in the same manner.²¹ This was bolstered by a detailed proffer of statistical evidence supporting a reasonable inference of discrimination against the class through the use of such common employment practices.²² The district court

21. Plaintiffs submitted extensive evidence of Wal-Mart’s common personnel structure across all stores (Pet. App. 173a-175a); uniform pay structure for all hourly employees and common compensation policies for salaried in-store management, including the broad range of discretion built into the compensation structure for each position (Pet. App. 176a-180a); lack of guidelines for District and Regional Managers making promotion decisions and the lack of monitoring of these promotion decisions (Pet. App. 180a-182a), and; Defendant’s general practice of not posting promotion opportunities (Pet. App. 182a-183a.)

22. Plaintiffs’ preferred expert, statistician Dr. Drogin, concluded that there were statistically significant gender-based disparities in compensation and promotions across all Wal-Mart regions. (Pet. App. 196a, 200a.) Dr. Drogin’s regression analysis showed that Wal-Mart’s women employees were paid 5-15% less than their male counterparts. (Pet. App. 200a.) He further concluded that women took longer to enter into management positions and that the percentage of women in management declined the higher the ranks. (Pet. App. 198a-99a.)

considered this evidence and concluded that plaintiffs satisfied Rule 23, applying these settled legal rules to reach a fact-based conclusion entitled to deference.

Nevertheless Wal-Mart and its *amici* propose this Court go beyond the existing requirement that plaintiffs prove they satisfy Rule 23. They argue for adoption of a novel heightened standard for class claims involving subjective practices only, wrongly claiming it is mandated by *Falcon*, 457 U.S. at 159 n.15. Petitioner claims Plaintiffs *must* show “‘significant proof that an employer operated under a general policy of discrimination’ that was implemented through ‘entirely subjective decisionmaking processes’ in a manner that affected all class members.” (Pet’r. Br. 19.)²³ However, *Falcon* itself requires neither “significant proof” nor does it hold that the challenged practice be “entirely subjective.” More importantly, their proposed standard conflicts with established Title VII law and violates any reasonable conception of a separation between class and merits proof.

In *Falcon*, this Court reversed and remanded the certification of a class consisting of Mexican-American applicants for employment, and also employees who had been turned down for promotion where the named plaintiff had been hired and promoted. 457 U.S. at 150-51. The Court, in looking beyond the pleadings, found that the trial court did not conduct a rigorous analysis to

23. *See also, e.g.*, Altria Br. at 4 (claiming *Falcon* holds that discrimination claims involving subjective practices “may not proceed as a class action absent ‘significant proof’ of a ‘general policy of discrimination’); Retail Lit. Ctr. Br. at 3, 7-10 (*Falcon* only allows certifying classes where practices are “entirely subjective”).

determine whether the named plaintiff's allegations of discrimination in the denial of a promotion were sufficient to support an across-the-board claim of discrimination against Mexican-American applicants that were not hired and employees not promoted. *Falcon*, 457 U.S. at 158-59. In the particular footnote number 15 that Wal-Mart uses to argue for limited class remedies, the Court actually goes on to make clear the contexts where even across-the-board classes could be viable. As this Court noted, carefully setting limits on the *Falcon* holding itself:

[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, *such as* through entirely subjective decisionmaking processes.

Falcon, 457 U.S. at 159 n.15. (emphasis supplied). The use of the prepositional phrase "such as" requires the conclusion that "entirely subjective" is merely a demonstrative example. *Accord Staton*, 327 F.3d at 955; *Griffin*, 823 F.3d at 1490. Moreover, the footnote simply suggests that "significant proof" could be used to "justify a class of both applicants and employees" – hardly a mandate regarding the level of proof applying to a narrower class such as the one in this case. Moving from examining a single footnote describing the exception to the text of the opinion which lays out the rule reveals the weakness of Petitioner's interpretation.

The claim that a different and higher requirement of "significant proof" applies only to certifying cases

involving subjective practices²⁴ misunderstands the essential concern in *Falcon*. Plaintiffs seeking class certification must “bridge the gap” between the existence of individual and class-wide claims, “such that the individual’s claim and the class claims will share common questions of law or fact and that the individual’s claim will be typical of the class claims.” *Falcon*, 457 U.S. at 157. The text of the opinion provides specific scenarios where the gap may be bridged and a court can be satisfied that the claims of the proposed class are “fairly encompassed” by those of the named plaintiff. *Id.* at 158. One listed example, which involves no mention of “entirely subjective” or “significant proof” is by a showing that the representative plaintiff’s promotion claim is typical of the Company’s promotion practices. *Id.* at 159. Another is by showing that discrimination in one practice is manifested in the same way as in other practices. *Id.* at 158. Within this larger context it becomes even more clear the footnote is just one scenario among many rather than the sole path to class certification.

To address the real concern in *Falcon*, the federal courts are appropriately requiring some evidence that an aggrieved class may exist. Under this practice, the gap can be bridged by the plaintiff’s presentation of statistical and/or other evidence which creates a reasonable inference that the anecdotal evidence of the representative plaintiff’s discriminatory treatment is typical of that permitted by the Company’s employment policies or practices. *Falcon* requires that plaintiffs must be put to some threshold test of whether their case may involve more than isolated or individual claims. *Griffin*, 823 F.2d at 1489 (*Falcon* sought to eliminate relying on pleadings and mandate a

24. Pet’r. Br. 19-21.

consideration of evidence regarding Rule 23 requirements). Courts are in fact putting plaintiffs to that test.

Going further than *Falcon's* requirement of testing the existence of common questions risks undercutting essential elements of Title VII. For example, as set forth above, proposing a novel heightened standard for cases involving subjective employment practices, and restricting class remedies solely to those cases involving “entirely subjective” systems is in direct conflict with the subsequent decision in *Watson*. Almost every Circuit that has considered the question has treated systems that combine objective and subjective factors the same way as fully subjective systems for purposes of Title VII – and Rule 23.²⁵ The very idea that the class certification standard should turn on either the level of subjectivity, or intent, rather than the level of commonality, violates the core principle that Title VII applies to any discriminatory practice.

Going further also risks a mandate that courts impermissibly reach a determination of merits issues. It is one thing to evaluate plaintiffs’ evidence that a common question exists under an appropriately rigorous standard, quite another to answer it. The standard for certifying a class action, the prevalent standard in most Circuits, following *Falcon*, requires a rigorous analysis of factual evidence supporting each element of Rule 23. *Falcon*, 457 U.S. at 160. In *IPO*, the Second Circuit established

25. See *supra* at n. 15 and accompanying text. Cf. *Bacon v. Honda of Amer. Mfr., Inc.*, which departs from *Watson* and *Falcon* by requiring a showing of an entirely subjective decisionmaking process. 370 F.3d 565 (6th Cir. 2004).

more specific guidelines for determining whether the elements of Rule 23 have been met. *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 33 (2d Cir. 2006). *IPO* holds that trial courts must examine enough factual evidence to determine whether each requirement of Rule 23 has been met without regard to whether such an examination overlaps with the consideration of the merits of the case. *Id.* at 41. In addition to the Ninth Circuit, the First, Fourth, Fifth, and Seventh Circuits have adopted a similar standard. *Brown v. Am. Honda (In re New Motor Vehicles Canadian Export Antitrust Litig.)* 522 F.3d 6, 25-26 (1st Cir. 2008); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001). See also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2009); *Staton*, 327 F.3d at 954.

The significant proof standard proposed by Wal-Mart and its *Amici* extends well beyond asking if plaintiffs' claims raise legitimate common questions of law or fact. It essentially argues that class treatment should be reserved for only the most outrageous cases. In *Eisen*, this Court stated: "We find nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlise & Jacquelin*, 417 U.S. 156, 177 (1974). While the Court further explains that a rigorous factual inquiry that overlaps with a merits inquiry to determine whether the elements of Rule 23 have been met is appropriate, the adoption of a "significant proof" standard would cross over into an analysis of the merits for its own sake. Such an inquiry is indeed improper and

prejudicial at the class certification stage of litigation. *See id.* at 178.

The prevailing approach to Title VII class actions in federal court balances employer concerns against the federal policy interest in preserving equal employment opportunity. *Price Waterhouse*, 490 U.S. at 239 (“Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers’ freedom of choice. . . . [striking a] balance between employee rights and employer prerogatives”). As plaintiffs must do more than merely allege classwide harm to satisfy Rule 23, and as courts are requiring statistical or other evidence of discrimination at the class certification stage, there is no generalized liability for merely having subjective employment practices. Employers have the opportunity under existing law to defend the need for subjectivity.²⁶ Where an employer’s existing way of doing business or chosen practices cause genuine harm to a protected class, however, federal law properly requires a searching review of the justification and incentivizes improvements and safeguards. Ultimately, allowing federal courts to continue evaluating class actions on a case-by-case basis, and requiring no more and no less than a rigorous analysis of Rule 23 requirements, is the best mechanism for balancing all of the important interests at stake.

26. Under disparate impact theory, an employer may defend against an impact by showing an appropriate justification – such as particular job requirements or business needs. *Lewis*, 130 S.Ct. at 2198; 42 U.S.C. § 2000e-2(k). Plaintiffs may also propose less discriminatory alternative mechanisms to meet the business need.

B. Since the 1991 Amendments, District Courts Have Required Plaintiffs to Provide a Substantial Factual Record in Support of Certification and Have Certified Only a Limited Number of Title VII Class Actions

The approach of requiring evidence that an employment practice may affect an entire class has resulted in a significantly limited number of Title VII class actions being certified. A historical review of class certification practices over the last three decades shows that district courts act carefully in deciding whether to certify a class. Although Petitioner implies that federal district courts are simply rubber-stamping requests for class treatment, the reality is quite different. Despite Wal-Mart's assertions that *Dukes* facilitates a flood of employment discrimination claims,²⁷ few such claims are ever filed. *See* App. 1 (Tables 1-3). In fact, the *Dukes* decision reflects the thoughtful and measured approach currently used by federal district court judges, incorporating the mandates of Rule 23(a) and *Falcon's* "rigorous analysis" requirement. 457 U.S. at 160. Because of the constraints imposed on class claims by Congress²⁸ and in cases like *Falcon* and *Amchem*, *see* 521 U.S. at 613, the volume of employment discrimination

27. Petitioners argue in their brief that "[a]s this case well illustrates, the rulemakers' prescriptions for class actions may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the Rule with distaste." Pet'r. Br. 39-40 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997)) (internal quotations omitted).

28. To the extent that there have been perceived abuses of the class action device, Congress has stepped in to address these concerns; for example, Congress passed the Class Action Fairness Act of 2005 to prevent class action lawsuit abuse. Pub. L. No. 109-2, 119 Stat. 4.

class actions has declined drastically over the past several decades. The low rate at which employment discrimination cases are actually certified demonstrates how thoroughly the courts approach class certification. *See* App. 2. The district court should be permitted to manage this case, applying the discretion granted to it under Rule 23 and Title VII, just as the courts have done for over four decades.

1. The Number of Employment Discrimination Class Actions Filed And Certified Shows That Class Actions Are An Important, But Sparingly Used, Device To Confront Unlawful Employment Discrimination

Over the years, the number of employment discrimination class action lawsuits filed in federal courts has fallen precipitously.²⁹ App. 1. In 1976, 1,174

29. This data is taken from information gathered by the Administrative Office of the United States Judiciary and from CourtLink. The Administrative Office of the United States Judiciary has this information publicly available from 1997-2004. CourtLink, an electronic service offered by LexisNexis, was used to collect the figures and to compile the class action data for 2005 through 2010. CourtLink, as the Federal Judiciary Center notes, identifies class actions via PACER docket records by searching for the terms “similarly situated” or “representative of the class” among the parties’ names in the case caption. *See* Emery G. Lee & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Fourth Interim Rep. to the Jud. Conf. Advisory Committee on Civ. Rules, April 2008, at 15 n.10. Additionally, CourtLink electronically searches the first five docket entries of each docket sheet for the term “class action complaint.” Finally, CourtLink compiles data for civil rights-employment cases and does not limit the search to only Title VII cases. This Data is summarized in Appendix 1, attached (charting totals from 1976 until 2010).

employment discrimination class actions were filed in federal district court. *Id.* By 2010, however, that number had fallen to 114, more than a 90 percent drop. *Id.* In 1981, the year before *Falcon* was decided, the number of employment discrimination class actions filed had fallen to 301. *Id.* The total number of employment discrimination filings reached its lowest point in the early 1990s, when 32 employment discrimination class claims were filed. The number increased slightly following the enactment of the Civil Rights Act of 1991. Notwithstanding arguments that the 1991 amendments caused a dramatic increase in these filings,³⁰ by the end of the decade, the rate of employment discrimination class actions filed continued to hold fairly steady, averaging approximately 90 per year. This relatively low level of class filings is remarkable given that Congress in passing the 1991 Amendments made compensatory and punitive damages available under Title VII.

Despite a rise in the number of all class action lawsuits filed in or removed to federal court over the last six years,³¹ employment discrimination class claims have increased only marginally.³² Currently, employment discrimination class action lawsuits continue to make up only a very

30. See Brief of *Amici Curiae* Equal Employment Advisory Council (“EEAC Br.”) 11-12.

31. See App. 1. See generally Lee, *supra*, at n.28 (Noting that the number of class action lawsuits filed nationally increased after the passage of the Class Action Fairness Act of 2005).

32. See App. 1. From 1997 until 2004, the last year that the Administrative Office of the United States Judiciary publically released the number of class action lawsuits filed annually, the average number of employment discrimination class actions filed was 78.4. From 2005 until 2010, the average rose to 104.8.

small percentage of the total amount of class actions filed. For example, during the 12-month period ending on September 30, 2004, 2,693 class action lawsuits were filed in the district courts, with only 96 designated as employment discrimination suits. App. 1. That represents only 3.5% of all class actions filed in this period. In 2010, the percentage of employment discrimination class actions filed dropped significantly, accounting for only 1.9% of the total number of class actions filed.³³ There is simply no factual support for the contention that there has been an abuse of Rule 23 certification in the employment discrimination context.

2. While the Number of Class-Based Employment Discrimination Cases Filed Each Year Is Small, An Even Smaller Percentage Are Actually Certified

In addition to the consistently low number of employment discrimination class action lawsuits filed, courts are rigorously applying Rule 23 to certify a very small number of these cases. For example from 2008 through 2010, of the 31 Title VII decisions addressing class certification, courts granted class certification in 8 and denied it in 23,³⁴ a certification rate of just 25.8%.

³³. According to the information found on CourtLink, of the 6,059 class action lawsuits filed in 2010, only 114 were classified as employment discrimination, representing only 1.9% of all class actions. *See* App. 1.

³⁴. In compiling the data for this three-year period, Westlaw and LexisNexis search engines were used. The following search terms were used: Class /3 certif! & "Title VII"; Class /5 certif! & "Title VII"; Class /7 certif! & "Title VII"; Class /10 certif! &

App. 2. Courts deny far more class certification motions than they grant. The low rate of class certifications in the employment discrimination context further demonstrates the rigor that courts apply when determining whether to certify an employment discrimination class. The fact that the district court in *Dukes*, based upon a voluminous record, determined that class certification was appropriate is not a reason for this Court to restrict the discretion that Rule 23 grants to the district courts.

“Title VII”; “Class action” & “Title VII”; “Class certification” & “Title VII.” The use of other search parameters provided the same group of cases. The resulting data is limited to Title VII cases where the courts either granted or denied class certification (excluding cases that were either dismissed or granted summary judgment). Additionally, to the extent that a court either granted or denied class certification and a subsequent Court of Appeals decision reversed the ruling, this information is also captured. As reflected in App. 2 there were two cases where the court granted certification as to some claims but denied it as to others. These have been included in the list of cases but were not used in calculating certification rates.

CONCLUSION

The decision certifying the class should be affirmed.

Respectfully Submitted,

CYRUS MEHRI
PAMELA COUKOS
JANELLE M. CARTER*
MEHRI & SKALET, PLLC
1250 Connecticut Ave., NW
Suite 300
Washington, DC 20036
202-822-5100
JCarter@findjustice.com

REBECCA M. HAMBURG
NATIONAL EMPLOYMENT
LAWYERS ASSOC.
417 Montgomery Street
4th Floor
San Francisco, CA 94104
415-296-7629

MICHAEL L. FOREMAN
THE PENNSYLVANIA STATE UNIV.
DICKINSON SCHOOL OF LAW
CIVIL RIGHTS APPELLATE CLINIC
Lewis Katz Building
University Park, PA 16802
814-865-3832

Counsel for Amici Curiae
*Counsel of Record

JAMES M. FINBERG
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
415-421-7151

PAUL W. MOLLIKA
OUTTEN & GOLDEN LLP
20 S. Clark St., #1500
Chicago Illinois 60603
312-263-0272

REGINALD T. SHUFORD
EQUAL JUSTICE SOCIETY
260 California Street, Suite 700
San Francisco, CA 94111
415-288-8700

WILLIAM C. McNEIL, III
THE LEGAL AID SOCIETY-
EMPLOYMENT LAW CENTER
180 Montgomery Street,
Suite 600
San Francisco, CA 94107
415-864-8848

APPENDIX 1

Total Number of Class Action Lawsuits Filed as Compared to the Number of Employment Discrimination Class Action Lawsuits Filed since 1976³⁵

Table 1.

	1976	1981	1986	1991	1993	1996
Total #	N/A	N/A	N/A	N/A	N/A	N/A
Em. Disc.	1,174	301	68	32	39	68
Percentage	--	--	--	--	--	--

Table 2.

	1997	1998	1999	2000	2001	2002	2003	2004
Total #	1,476	1,881	2,133	2,393	3,092	2,916	2,148	2,693
Em. Disc.	70	85	74	79	73	74	76	96
Percentage	4.7%	4.5%	3.5%	3.3%	2.4%	2.5%	3.5%	3.2%

Table 3.

	2005	2006	2007	2008	2009	2010
Total #	5,394	5,351	6,957	7,315	7,065	6,059
Em. Disc.	86	94	110	99	126	114
Percentage	1.5%	1.8%	1.6%	1.4%	1.8%	1.9%

³⁵ The data in Tables 1 and 2 come from the Administrative Office of the United States Courts, available at <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx>. The data in Table 3 is from CourtLink. See LexisNexis CourtLink, available at <http://litigator.lexisnexis.com>.

APPENDIX 2

Employment Discrimination Class Certification Decisions under Title VII from 2008 through 2010³⁶

Class Certification was Granted in the Following 8 Cases:

- *Walker v. E. Allen Cnty. Sch.*, No. 1:08 CV 32 PPS, 2008 WL 4367579 (N.D. Ind. Sept. 19, 2008)
- *Curtis-Bauer v. Morgan Stanley & Co.*, No. C06-3903, 2008 U.S. Dist. LEXIS 85028 (N.D. Cal. Oct. 22, 2008)
- *United States v. City of New York*, 258 F.R.D. 47 (E.D.N.Y. 2009)
- *Brown v. Nucor Corp.*, No. 08-1247, 2009 U.S. App. LEXIS 22224 (4th Cir. Aug. 7, 2009)
- *Wood v. City of San Diego*, No. 03cv1910-MMA(WMc), 2010 U.S. Dist. LEXIS 123788 (S.D. Cal. Nov. 22, 2010)
- *Easterling v. Conn. Dep't of Corr.*, 265 F.R.D. 45 (D. Conn. 2010)
- *NAACP v. N. Hudson Reg'l Fire & Rescue*, 255 F.R.D. 374 (D.N.J. 2010)
- *Card v. City of Cleveland*, 270 F.R.D. 280 (N.D. Ohio 2010)

Class Certification was Denied in the Following 23 Cases:

- *Remien v. EMC Corp.*, No. 04 C 3727, 2008 U.S. Dist. LEXIS 74174 (N.D. Ill. Aug. 28, 2008)
- *Marable v. Dist. Hosp. Partners*, No. 01-02361, 2008 WL 5501106 (D.D.C. Dec. 1, 2008)
- *Sherman v. Westinghouse*, 263 F. App'x. 357, 368 (4th Cir. 2008) (per curiam) (“[B]ecause none of the plaintiffs [] made meritorious disparate impact claims . . . they cannot constitute proper class representatives, and the issue of whether the district court abused its discretion in denying class certification [was] moot.”)
- *Curry v. SBC Comm'ns, Inc.*, 250 F.R.D. 301 (E.D. Mich. 2008)

³⁶ In compiling the data for this three-year period, January 1, 2008 through December 31, 2010, Westlaw and LexisNexis search engines were used. The following search terms were used: Class /3 certif! & “Title VII”; Class /5 certif! & “Title VII”; Class /7 certif! & “Title VII”; Class /10 certif! & “Title VII”; “Class action” & “Title VII”; “Class certification” & “Title VII.” The use of other search parameters provided the same group of cases. The resulting case list is limited to Title VII cases where the courts either granted or denied class certification (excluding cases that were either dismissed or granted summary judgment). Additionally, to the extent that a court either granted or denied class certification and a subsequent court of appeals decision reversed the ruling, this information is also captured. See n. 34.

- *Serrano v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2009 WL 910702 (E.D. Mich. Mar. 31, 2009)
- *Haliye v. Celestica Corp.*, No. 06-CV-4769 (PJS/JJG), 2009 U.S. Dist. LEXIS 49051 (D. Minn. June 10, 2009)
- *Boyd v. Interstate Brands Corp.*, 256 F.R.D. 340 (E.D.N.Y. 2009)
- *Schanfield v. Sojitz Corp. of Am.*, 663 F.Supp. 2d 305 (S.D.N.Y. 2009)
- *Jackson v. SEPTA*, 260 F.R.D. 168 (E.D. Pa. 2009)
- *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450 (N.D. Ill. 2009)
- *Atwell v. Gabow*, 248 F.R.D. 588 (D. Colo. 2009)
- *Nieman v. Nationwide Mut. Ins. Co.*, No. 09-3304, 2010 U.S. Dist. LEXIS 17499 (C.D. Ill. Feb. 26, 2010)
- *Randall v. Rolls-Royce Corp.*, No. 1:06-cv-860-SEB-JMS, 2010 U.S. Dist. LEXIS 23421 (S.D. Ind. Mar. 12, 2010)
- *Berndt v. Cal. Dep't of Corr.*, No. C 03-3174 VRW, 2010 U.S. Dist. LEXIS 57833 (N.D. Cal. May 19, 2010)
- *Badger v. Stryden, Inc.*, No. 09-3619, 2010 U.S. Dist. LEXIS 77323 (E.D. Pa. July 29, 2010)
- *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 05-C-6583, 2010 U.S. Dist. LEXIS 80002 (N.D. Ill. Aug. 9, 2010)
- *Kennedy v. Va. Polytechnic Inst. & State Univ.*, No. 7-08-cv-00579, 2010 WL 3743642 (W.D. Va. Sept. 23, 2010)
- *Rollins v. Ala. Cmty. Coll. Sys.*, No. 2:09cv636-WHA, 2010 WL 4269133 (M.D. Ala. Oct. 25, 2010)
- *Syrja v. Westat, Inc.*, No. PJM 09-1956, 2010 U.S. Dist. LEXIS 118085 (D. Md. Nov. 2, 2010).
- *Martinez v. City & County of Denver*, No. 08-cv-01503-PAB-MJW, 2010 U.S. Dist. LEXIS 133866 (D. Colo. Dec. 10, 2010)
- *DeRosa v. Mass. Bay Commuter Rail Co.*, 694 F.Supp. 2d 87 (D. Mass. 2010)
- *Gutierrez v. Johnson & Johnson*, 269 F.R.D. 430 (D.N.J. 2010)
- *Moore v. Napolitano*, 269 F.R.D. 21 (D.D.C. 2010)

Class Certified was Denied in Part and Granted in Part in the Following 2 Cases:

- *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264 (5th Cir. 2008) (Upholding the district court's decision to deny certification of plaintiffs' disparate treatment claims; previously the district court had certified a class on the disparate impact claims)

- *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86 (S.D.N.Y. 2010)
(Granting certification for injunctive and declaratory relief but denying without prejudice certification for front pay, back pay, and other money damages)