No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,

v.

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

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

BRIEF OF *AMICI CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND HR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

Amicus curiae Society for Human Resources Management ("SHRM" or the "Society") is the world's

[1] Pursuant to Rule 37.6 of this Court, *amici curiae* certify that no counsel for any party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici,* their members, and their counsel made such a monetary contribution. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

largest association devoted to human resource ("HR") management. SHRM represents over 250,000 human resources professionals who make up its membership. The purposes of the Society, as set forth in its bylaws, are to promote the use of sound and ethical human resources management practices in the profession, and (a) to be a recognized world leader in human resources management; (b) to provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resources management; (c) to be the voice of the profession on human resources management issues; (d) to facilitate the development and guide the direction of the human resources profession; and (e) to establish, monitor, and update standards for the profession. As an influential voice, the Society advances the human resources profession to ensure that human resources is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.

Amicus curiae HR Policy Association represents the chief human resources officers of over 300 of the largest employers doing business in the United States. Representing every major industrial sector, HR Policy Association's principal mission has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace. To that end, the HR Policy Association provides its members, policy-makers, courts, agencies and the public with in-depth information, analysis, and opinion regarding current situations and emerging trends in labor and employment policy.

Amici's expertise and widespread knowledge of human resources practices in the United States provides them with a unique interest in, and perspective on, the human resources practices that underlie the Ninth Circuit decision below—specifically, individualized performance reviews and the impact of organization-wide diversity programs on internal culture—topics that were misunderstood, misjudged, and ignored by the Ninth Circuit here.

BACKGROUND

In granting certiorari, the Court directed the parties to address whether the certification order "was consistent with Rule 23(a)," which requires that the party seeking class certification demonstrate the existence of questions of fact or law common to the entire class. The Ninth Circuit majority found this element was satisfied despite the admitted "absence of a specific discriminatory policy promulgated by Wal-Mart" applicable to the 500,000-plus class members employed in the Company's 3,400 stores around the country. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 603 (9th Cir. 2010) (en banc).

The Ninth Circuit majority instead concluded Plaintiffs had demonstrated "a common legal or factual question regarding whether Wal-Mart's policies or practices are discriminatory" by a combination of evidence that the Company had established centralized policies and a strong corporate culture coupled with "[e]vidence" of "excessive subjectivity in personnel decisions" made at the local level. *Id.* at 600. Those combined factors, the Ninth Circuit concluded (without considering the Company's strong corporate diversity policy and program), "provides a wide

enough conduit for gender bias to potentially seep into the system." *Id*. at 601.[2]

In reaching this conclusion, the Ninth Circuit ignored the Company's reasons for its localized decision-making and its corporate-wide diversity policy and practices. Instead, the Ninth Circuit relied heavily on the testimony of Plaintiffs' sociological expert, Dr. William Bielby, who opined that "Wal-Mart has and promotes a strong corporate culture, a culture that *may* include gender stereotyping." *Id.* at 601 (emphasis added). However, Dr. Bielby never opined, and the Ninth Circuit never found, that Wal-Mart had ever adopted a policy encouraging gender stereotyping, or had ever intentionally encouraged or enabled such stereotyping. In fact, Wal-Mart's corporate-wide diversity policies and programs were directly contrary to that claim. *Id*.

Rather, Dr. Bielby opined that "gender stereotypes are especially likely to influence personnel decisions when they are based on non-formulaic factors, because substantial decision-maker discretion tends to allow people to seek out and retain stereotyping information and ignore or minimize information that defies stereotypes." *Id*. Because Wal-Mart's in-store managers make individualized pay and promotion decisions, Dr. Bielby concluded the Company's pay

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[2] The Ninth Circuit also concluded Plaintiffs had shown "expert statistical evidence of class-wide gender disparities attributable to discrimination," *Dukes*, 603 F.3d at 600, a conclusion it reached even though "over 90 percent of Wal-Mart's stores showed no statistical difference in the hourly pay rates between men and women associates with similar work-related characteristics." *Id*. at 637 (Ikuta, J. dissenting). The gross methodological errors in the statistical analysis of the Ninth Circuit majority are discussed in Wal-Mart's merits brief as well as in other *amicus* filings.

and promotion decisions are therefore "vulnerable to gender bias." *Id*.

The Ninth Circuit expressly endorsed Dr. Bielby's theory. *Id*. at 601-03. It did so even though, as Plaintiffs had conceded and the District Court acknowledged, Dr. Bielby "cannot definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart," and thus could not say that gender stereotyping occurred 95% or 0.5% of the time. *Dukes v. Wal-Mart Stores, Inc*., 222 F.R.D. 137, 154, 192 (N.D. Cal. 2004).

The Ninth Circuit paid mere lip service to the Company's systematic efforts to create and perpetuate a "strong corporate culture," *Dukes*, 603 F.3d at 597 n.18, 600-01, 612, as it never described the supposed contours of that culture. Thus, it never discussed the Company's formal diversity policy or its extensive diversity initiatives, both of which originated with senior management and were repeatedly stressed in training sessions for all employees. The Ninth Circuit simply mentioned in passing that Dr. Bielby had purported to identify unspecified "deficiencies" in those programs. *Dukes*, 603 F.3d at 601.

Likewise, the District Court never examined the contours of the Company's "corporate culture" in any meaningful way. Thus, while it acknowledged the Company "has increased its emphasis on diversity issues in the past few years," it appeared to discount those efforts, noting Dr. Bielby had criticized the utility of those efforts. *Id*. at 153-54. And while it acknowledged "Wal-Mart has earned national diversity awards . . . [and] has diversity goals. . . ," *id*. at 154, it never assessed the impact of those diversity initiatives on the Company's "corporate culture" or on its personnel decisions.

SUMMARY OF ARGUMENT

The finding of commonality that the Ninth Circuit endorsed to justify this massive class action rests largely on the following supposition: the Company (a) has a "strong corporate culture" that "may include gender stereotyping" (b) allowing in-store managers to make individualized pay and promotion decisions (c) from which it follows that its personnel decisions are "vulnerable" to discrimination. *Dukes*, 603 F.3d at 601. In other words, the Ninth Circuit endorsed the theory that the combination of centralized, company-wide culture and decentralized, individualized, non-formulaic personnel decision-making can be inherently discriminatory.

The "subjectivity leads to bias" theory, which plaintiffs' experts have employed widely in an array of class action litigation against numerous companies,[3] ironically is based on stereotyping of the very type that the federal employment laws themselves condemn. The theory assumes not only that all local decision-makers are inherently biased, but that all (men and women alike) suffer from the exact same bias—which here supposedly caused them to discriminate against women without even knowing they were doing so.

The premises underlying this theory of commonality are at odds with common sense, as well as with human resources experience and literature. First, far from being universally criticized, individualized deci-

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[3] *See* Roger Parloff, *The War Over Unconscious Bias*, Fortune, Oct. 15, 2007, at 94 ("[*Dukes*] is no aberration; it's an epitome. It shares a common skeletal structure with almost every employment discrimination action today and thus opens a telling window on a looming litigation threat to corporate America.").

sion-making is frequently essential, an insight borne out by this Court's decisions, the relevant literature, and every-day life. Indeed, virtually every United States organization relies heavily on the exercise of individual judgments by supervisors in making personnel decisions—precisely because that input is necessary, valuable, and reliable.

Second, this Court's decisions, the EEOC's recommended "Best Practices," and human resources literature all recognize the key role company-wide diversity policies play in creating and reinforcing a culture of inclusion. The Ninth Circuit, however, concluded Wal-Mart's culture rendered its personnel decisions "vulnerable" to discrimination without even considering the influence of Wal-Mart's diversity policies and programs in shaping that culture. Contrary to Dr. Bielby's and the Ninth Circuit's view, Wal-Mart's "corporate culture" was, because of its diversity initiatives, inclusive and not "vulnerable" to insidious discrimination.

There was no sound reason on this record for the Ninth Circuit to conclude that the countless individualized personnel decisions made by thousands of in-store managers over the years constituted a single, inherently discriminatory policy. That is because the Company never "promulgated" "a specific discriminatory policy," but rather had supplemented its anti-discrimination policies with a robust company-wide diversity policy to create a culture of inclusion. Thus, the Company's individualized, "subjective" personnel judgments therefore were not inherently discriminatory, but rather represented a sound and fair form of evaluation.

Moreover, the Ninth Circuit's decision "is directly contrary to the purposes underlying Title VII."

Kolstad v. American Dental Assoc., 527 U.S. 526, 545 (1999). As this Court has explained, "those purposes are "advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Id*. But by certifying a massive class without even considering the impact of Wal-Mart's diversity policies on its culture and decision-making, the certification Order underestimates the value of such programs and weakens the incentives to create or maintain voluntary diversity programs.

ARGUMENT

I. INDIVIDUALIZED, DISCRETIONARY PERSONNEL DECISIONS MADE AGAINST THE BACKDROP OF A COMPANY-WIDE DIVERSITY POLICY ARE NOT INHERENTLY DISCRIMINATORY, BUT REFLECT SOUND HUMAN RESOURCES PRACTICES

A. As This Court And The Human Resources Literature Have Recognized, Individualized Personnel Decisions Are Not Inherently Discriminatory

Contrary to the Ninth Circuit's strong suspicion of decentralized, discretionary personnel decisions made by direct managers of employees, this Court has recognized that "an employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). On the contrary, "it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs

to be filled and with the candidates for those jobs." *Id*.

Indeed, "[e]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Engquist v. Oregon Dep't of Agric*., 553 U.S. 591, 604 (2008). Simply put, "[s]ubjective evaluations of a job candidate are often critical to the decisionmaking process, and . . . can be just as valid as objective reasons." *Denney v. City of Albany*, 247 F.3d 1172, 1185-86 (11th Cir. 2001).[4] *See also, Martel v. Cnty. of Los Angeles*, 56 F.3d 993, 995 (9th Cir.) (en banc) (reversal of discretionary trial decisions, such as denial of continuance, permissible "only upon the clearest showing") *cert. denied*, 516 U.S. 944 (1995).

Federal courts are not alone in recognizing the value of decentralized, decision-making that features discretionary judgment. Indeed, one can find the reliability of such decision-making confirmed in social sciences literature, human resources literature, and day-to-day life experiences. Further confirming the validity of discretionary exercise of personal managerial judgment is SHRM's survey evidence, which reports that "[a]cross all job levels, the direct supervisor had the most input into [individual employee] performance evaluation[s]," and that 96% of corporations rely heavily on input from direct supervisors in conducting employee job performance appraisals.

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[4] *See also, e.g., Sperling v. Hoffman-La Roche, Inc*. 924 F. Supp. 1346, 1363 (D.N.J. 1996) ("giv[ing] managers the discretion to make employment decisions . . . is not tantamount to a decision by a company to pursue a systematic, companywide policy of intentional discrimination").

SHRM "*2000 Performance Management Survey*," at 12.[5]

1. The Ninth Circuit, like Plaintiffs' experts, all but treat "subjectivity" as if it were inherently inappropriate. It is not. "Subjective" does not mean "whimsical," "capricious" or "biased." On the contrary, it refers to a decision-making process that relies on informed individualized judgment rather than the mechanical application of seemingly objective criteria. *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim.")

Social science literature recognizes that a fundamental distinction exists between decision-making models that rely on the "use of individualized judgment" (also referred to generally as clinical decision-making, and which Plaintiffs disparage as involving merely "subjective judgment") and those models that rely on "formulas that assign fixed weights to predetermined characteristics of the applicant (or statistical decision-making models)." Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 Yale L.J. 1408 (1978). This "distinction arises not only in the context of

[5] SHRM publishes several types of papers and research cited in this brief. SHRM's published surveys report on the results of professionally conducted surveys polling the views of a statistically significant sample of human resources professionals. white papers typically are created by human resources professionals or attorneys with expertise in the subject matter, and then peer reviewed by a panel of human resources professionals with relevant subject matter expertise and/or a member of SHRM's staff. Most of the SHRM documents cited in this brief may be found on the SHRM website, www.shrm.org, while the others may be obtained from counsel upon request.

prediction, but also in any other fact-finding process," *id*. at 1423 n.41, including personnel decisions.

Certain criticism of decision-making based on individualized judgment—similar to that urged by Plaintiffs here—is that such a "decisionmaker can respond only to a finite number of characteristics, and he inevitably weights them in accordance with . . . either []his own experience or [] a larger body of received experience." *Id*. at 1423. One powerful response to this criticism is that frequently it is impossible to anticipate by rule all the variables that will be important to any given decision, and that a decision-maker who relies on individualized judgment is therefore "free to respond to individual differences whose relevance" could not be "anticipated." *Id*.; *see also Enquist*, 533 U.S. at 604.

A great deal of research has addressed the comparative individualized and statistical decision-making models. Some studies favor one model, while others favor the other. But the fair conclusion is that neither model can be deemed superior, let alone exclusively appropriate, in all circumstances. Underwood, 88 Yale L. J. at 1423-25.

In fact, as industrial organizational psychology recognizes, it is virtually impossible to construct a complex decision-making process that does not include a measure of subjectivity. James T. Austin & Peter Villanova, *The Criterion Problem*: *1917-1992*, 77 J. Applied Psychol. 836 (1992). Even if seemingly objective decision-making criteria could be identified and isolated, the process of inputting and evaluating so-called objective data is inherently influenced by subjective factors. Jeffrey R. Spence & Lisa M. Keeping, *The Impact of Non-performance Information*

on Ratings of Job Performance: A Policy-capturing Approach, 31 J. Org'l Behav. 587, 588 (2010).

Even more specifically, it is impossible to identify completely objective decisional criteria for use in making comparative personnel decisions. That is because relative merit or job performance cannot be reduced solely to objective criteria that require no individualized analysis. Warren Thorngate et al., *Judging Merit*, (Psychology Press, 2009).

2. Every employer utilizes some form of employee performance appraisal system in making hiring, pay, and promotion decisions. As the human resources literature indicates, these systems—from creation to implementation—necessarily include evaluative components that Plaintiffs would characterize as "subjective."

To begin with, companies use many different methodologies for conducting performance appraisal reviews. Simply put, one size does not fit all. Rather, "a company must design the evaluation process carefully" and "determine which aspects of performance to evaluate." Most companies tailor their appraisal systems to their own specific needs and industry. *Encyclopedia of Business and Finance*, (Gale Publishers, 2d ed.) at 584; SHRM "*2000 Performance Management Survey,*" at 8-12.

The literature has identified, however, certain fundamental characteristics that appear in virtually any sound performance appraisal system. First, as informed commentators widely agree, the appraisers must be adequately trained. *E.g.*, Robert L. Greene, *Effective Performance Appraisal: A Global Perspective*, SHRM White Paper 4/1/05 at 3.

Second, the performance review appraisal should be tailored to the specific job and job performance. *Id*. This insight appears in the EEOC's guide to "Best Practices for Employers and Human Resources/EEO Professionals," which states that performance appraisals should be based on "job-related qualification standards related to [the job's] duties, functions and competencies."[6]

Focusing the performance review on job performance specifically also may play a critical role in eliminating potential bias from the appraisal process. As one commentator notes, "It is easy for managers to allow their impressions of employees or their personal feelings about them to dominate the performance rating process. Focusing on the specific job and predetermined criteria and standards is the best tool for avoiding bias." *Managing Employee Performance*, SHRM Research Article, 6/15/09 at 8.

A third element of some performance appraisals is to evaluate, "employees . . . by members of management most familiar with the employees' job tasks and performance objection," which typically "means that an employee's immediate supervisor should conduct the performance appraisal." Ronald L. Adler & Tom

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[6] Available at wwl.eeoc.gov//eeoc/initiatives/e-race/bestpracticesemployers.cfm?renderforprint=1. The "Best Practices" guide recommends that such job-related standards be "objective." From the context of the recommendations, it is evident that the EEOC is using "objective" standards to mean "job-related" standards, and conversely uses "subjective" standards to mean personal biases. That is not the same way in which those terms are used in the social sciences literature or in this brief, where "subjective" decision-making is used to refer to an individualized judgmental process that considers all relevant (i.e., job-related) factors.

Coleman, *Job Performance Management Profile: Example Audit of HR Function*, SHRM White Paper, 4/1/99 at 5. SHRM's research confirms that "[a]cross all job levels, the direct supervisor had the most input into [individual employee] performance evaluation[s]." SHRM "*2000 Performance Management Survey*," at 12.

The reasons for heavy reliance on performance input from direct supervisors are obvious. Supervisors "usually are in the best position to know and observe the employees job performance" and "are also responsible for employees' work." *Encyclopedia of Business and Finance*, at 584. Moreover, "[t]heir evaluation is a powerful tool in motivating employees to achieve successful and timely completion of tasks." *Id*. Their knowledge of job requirements, direct observation of performance, and daily contact with employees thus place them in an ideal position to make sound subjective (i.e., informed by all relevant data) appraisals of individual employee performance.

Again, this conclusion should come as no surprise. Presumably, the Members of this Court would not evaluate the performance of their law clerks based solely on objective metrics such as the number of hours worked. The Justices would more likely focus on individualized assessments of factors—such as quality of analysis, quality of writing, initiative, and collegiality—that cannot readily be measured quantitatively. Thus, what the Ninth Circuit and Plaintiffs would call a "subjective" appraisal is, in fact, one that is informed by all relevant information.

Subjective evaluation is also an inevitable and necessary component in hiring. In a recent SHRM survey, 55% of responding human resources professionals report that their employers utilize

behavioral interviews based on job-specific interview questions. SHRM *Weekly Online Survey: March 15, 2005*, at 3. In contrast, most organizations choose not to employ highly objective hiring techniques; 83% do not employ scoreable job applications in which numeric values are placed on experience, skills, etc. *Id*. at 4, 6.

3. In daily life we value the necessity of informed clinical judgment, which Plaintiffs would disparage as "subjective decision-making." The need for this judgment in making complex decisions is obvious. To take but one example, we naturally expect our physicians to conduct those tests that yield essential objective data. But we also know that complex diagnoses often cannot be made from objective metrics alone. Rather, we count on our physicians to exercise sound clinical judgment based on their informed, but inherently subjective, evaluation of all relevant factors.

The same is true of parenting. Many parents have a well-developed philosophy of parenting, possibly acquired from experience or reading, which they employ in making day-to-day parental decisions. But virtually all parents also know that frequently, if not daily, they must make decisions on factors that cannot be reduced to objective formula. Rather, informed, individualized decision-making is required. The same is true in the workplace.

4. The Ninth Circuit certified the massive class here because it concluded that Wal-Mart's strong corporate culture, coupled with "[e]vidence" of "excessive subjectivity in personnel decisions," "provides a wide enough conduit for gender bias to potentially seep into the system." *Dukes*, 603 F.3d at 601. But as just shown, the Ninth Circuit's sweeping suspicion of

decentralized, subjective decision-making is at odds with this Court's prior pronouncements, with relevant literature from the social sciences and the human resources field, and with our collective experiences in daily life.

It also makes no sense on this record. Given the widespread reliance on supervisor input throughout American business, it is neither surprising nor troublesome that Wal-Mart relies on in-store managers and supervisors to make pay and promotion decisions. That reliance flows naturally from Wal-Mart's longstanding and highly successful business philosophy of "push[ing] down to the manager of the facility level, the responsibility to run those stores right." *Dukes*, 222 F.R.D. at 148.

Moreover, in exercising their discretionary authority, the Company's managers focus on job-related factors necessary to the success of their particular store or department. Thus, Wal-Mart has introduced declarations from numerous managers who made clear that in making discretionary pay or promotion decisions they considered only job-related factors such as the following: "additional experience, education, or special skills," "competitive market factors," "supervisory experience with a competitor," "experience in a particular department or . . . supervisory experience with a competitor," "experience, productivity, supervisor recommendations, and attendance," and "the associate's skills and prior experience." 1609a, 1616a, 1627-28a, 1635-36a, 1644a, and 1650a; *see also* J.A. 1576a-1596a (Porter Decl.); C.A.App. 677-683 (Diversity statement); 699-818 (Management Policy Workshop booklet).

Thus, it was entirely unwarranted for the Ninth Circuit to conclude that the thousands of "subjective"

personnel decisions made by Wal-Mart supervisors were inherently "vulnerable" to discrimination solely because Wal-Mart has a centralized firm-wide culture. Such employment practices are not the hallmarks of a discriminating employer, but rather of a progressive, nondiscriminatory employer. Indeed, an employer's most obvious alternatives to exercising individualized judgment—mechanically applying "objective" scoring to judge employee performance or establishing quotas to prevent charges of discrimination—are themselves "far from the intent of Title VII." *Watson*, 487 U.S. at 993.

Thus, good public policy and common sense demand the conclusion that there is nothing inherently suspect about employment decision-making that relies upon the decision-makers' individualized judgment about an employee or applicant. Such "subjective" decision-making is not only inevitable, but sound and fair.

B. Organization-Wide Diversity Policies Play A Key Role In Creating And Reinforcing A Culture Of Inclusion

The Ninth Circuit characterized Wal-Mart's strong, centralized culture as the "nexus" supporting its conclusion that Wal-Mart's decentralized, discretionary personnel decisions were inherently gender-biased. *Dukes*, 603 F.3d at 612. The Ninth Circuit concluded, in other words, that something in the Company's culture permitted an inference that its managers were likely to discriminate against women.

The Ninth Circuit never explained the basis for this belief, beyond quoting with approval Plaintiffs' expert's view that the Company's culture "may include gender stereotyping" because "gender stereo-

types are especially likely to influence personnel decisions when they are based on subjective factors." *Dukes*, 603 F.3d at 601. The Ninth Circuit never discussed or evaluated the systematic, company-wide policies and initiatives the Company has undertaken to promote diversity as part of its corporate culture. This omission is significant, since this Court, the EEOC, and human resources professionals have all recognized the key role that organization-wide diversity policies and initiatives play in creating and reinforcing a culture of inclusion.

1. This Court has strongly emphasized the importance of diversity programs and training to achieve the purposes underlying Title VII. The Court has long recognized that the statute's "primary objective" is "a prophylactic one," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975), and that Title VII aims chiefly "not to provide redress but avoid harm." *Kolstad*, 527 U.S. at 545.

In the specific context of harassment, this Court has explained that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524. U.S. 742, 764 (1998). Concluding that judges must therefore "give credit . . . to employers who make reasonable efforts to discharge their duty to affirmatively prevent violations," this Court held a plaintiff "who unreasonably failed to avail herself of the employer's preventive or remedial apparatus" may not recover damages for workplace harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998).

This Court has likewise recognized the need to encourage employer-created diversity training programs. As it has explained, "the purposes

underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies *and to educate their personnel on Title VII's prohibitions*." *Kolstad*, 527 U.S. at 545 (emphasis added). Thus, to avoid "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace," the Court held that punitive damages may not be assessed against employers for those discriminatory decisions of managerial employees that "are contrary to the employer's good-faith efforts to comply with Title VII." *Id*.

Nonetheless, some sociologists, such as Dr. Bielby, Plaintiffs' expert here, tend to dismiss "diversity training [as] mere window-dressing." *See, e.g*., Susan Bissom-Ramp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 Berk. J. Emp. & Lab. L. 1, 23-24 (2001). This view denigrates not only the view of human resources professionals discussed in Part B-2 below, but also this Court's recognition of the importance of encouraging employers "to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Kolstad*, 527 U.S. at 545.

2. Such views are also out of step with the EEOC. The EEOC has published what it considers "Best Practices for Employers and Human Resources/EEO Professionals." See n. 6, *supra*. Several of its specific recommendations as to "how to prevent race and color discrimination" center on the creation and implementation of company-wide diversity programs:

— "Train Human Resources managers and all employees on EEO laws;

— "Implement a strong EEO policy that is embraced at the top levels of the organization;

— "Train managers, supervisors and employees on its contents, enforce it, and hold them accountable;

— "Promote an inclusive culture in the workplace by fostering an environment of professionalism and respect for personal differences; and

— "Foster open communication and early dispute resolution."

EEOC "Best Practices: How to Prevent Race and Color Discrimination."

The EEOC's regulations likewise emphasize the value of employer-initiated efforts to avoid discrimination: "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods sensitive to all concerned." 29 C.F.R. § 1604.11(f).

Consistent with its stated position, the EEOC requires diversity training in consent decrees, as recent cases described on the EEOC's website exemplify: *e.g., EEOC v. Black Gaming LLC and CasaBlanca Resort & Casino*, Case No. 2:10-cv-02216 (D. Nev. Dec. 21, 2010) (company must provide annual age discrimination training for supervisory and human resources staff); *EEOC v. Omnicare, Inc.*, Case No. 10 cv 364 (W.D. Wisc. Dec. 21, 2010) (mandatory sexual harassment training for employees); *EEOC v. Crothall*

Healthcare, Case No. 4:10 CV 1221 (E.D. Ark. Dec. 23, 2010) (mandatory training for managers and supervisors plus semi-annual compliance reports); and *EEOC v. Haven Manor*, Case No. 4:10-CV-03108 (D. Neb. Dec. 28, 2010) (mandatory training for management and supervisory employees). Available at www.eeoc.gov/eeoc/newsroom/index.cfme.

3. A substantial secondary literature likewise encourages the adoption of organization-wide diversity programs and training. *E.g*. Peter L. Bye, *Realizing Full Potential of Diversity and Inclusion As a Core Business Strategy*, *SHRM* White Paper, 6/1/07, at 5-8. *See also Six Steps to Improve Diversity Initiatives*, Diversity Magazine, Sept. 17, 2008 (recommending "enlist[ing] top leadership" and creating "a system of accountability").

4. The value of such diversity programs is not open to principled doubt. As the EEOC's inclusion of mandatory training and other diversity-promoting measures in consent decrees underscores, diversity programs can transform corporate culture with consequent diversity gains. *E.g*., Alexandra Kalev *et al., Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policy*, 71 American Soc. Rev. 589 (2006); Frank Dobbin *et al*., *Diversity Management in Corporate America*, 6 Contexts (2007). Such programs can influence the culture by introducing such discrimination-disabling norms as process accountability and performance appraisals focused on job-performance criteria.[7] And

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[7] *See generally* Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination*?, 29 Res. Org'l Behv. 3, 16-18 (2009); Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 Psychol. Bull. 255 (1999).

sociological literature indicates that having information about the talents and abilities of a particular employee has a greater impact on managerial judgments and decisions than having information about that employee's race or gender.[8]

5. Consistent with the foregoing, many American organizations have implemented organization-wide diversity programs for various reasons, including "improv[ing] public image," "decreas[ing] complaints and litigation," and "ret[aining] . . . a diverse workforce." SHRM, *Workplace Diversity Practices: How Has Diversity and Inclusion Changed Over Time? A Comparative Examination*: 2010 and 2005, at 5. That same SHRM survey indicates that "in 2010, 68% of organizations indicated that they have practices in place that address workplace diversity." *Id*. at 4, 7. And, diversity training is an increasingly important component of such diversity initiatives. SHRM's 2010 survey discloses that "among companies with diversity practices in place, the percentage offering training opportunities increased slightly from 67% in 2005 to 71% in 2010." *Id*. at 4.

6. In sum, by changing the contours of the corporate culture, diversity programs and training can discourage discrimination in day-to-day decision-making. Thus, it is inexplicable that the Ninth Circuit characterized Wal-Mart's culture as "vulnerable" to discrimination without even considering the

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[8] Ziva Kunda & Steven J. Spender, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application,* 129 Psychol. Bull. 522 (2003); Frank J. Landy, *Stereotypes, Bias, and Personnel Decisions: Strange and Stranger*, 1 Industrial & Org'l Psychol.: Perspectives on Sci. & Practices, 379, 382-83 (2008).

impact of its company-wide diversity program on that culture.

Wal-Mart's longstanding diversity policy and program, expressly premised on respect for the individual, is representative of the programs that Title VII and this Court's decisions contemplate. Wal-Mart's anti-discrimination stance is clearly stated, and without qualification. 1577-1580a ¶¶ 4, 9-11. Wal-Mart's message has gone out to all employees in numerous documents that expressly identify the policy as emanating from senior management. 1580-1585a ¶¶ 12-24.

Moreover, in implementing its diversity policy, Wal-Mart's senior management set specific, measurable diversity goals. To follow up on its plan, Wal-Mart then employed management-performance report cards to track progress in achieving diversity goals; trained all in-coming employees on diversity goals; frequently discussed diversity throughout the company in regular "culture" sessions; and encouraged employees to bring any discrimination concerns to their supervisors, who in turn were directed to be responsive. 1585-1594a ¶¶ 25-27. Not surprisingly, the Company's diversity policy has won many awards. 1578a ¶ 8, 1584 ¶18.

This Court has made clear that "dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Kolstad*, 527 U.S. at 545. Rather, those purposes are "advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions." *Id*.

For Title VII to realize its full potential, strong uniform diversity policies should be encouraged. But by certifying an immense class without even considering the impact of Wal-Mart's diversity policies on its culture and decision-making, the Ninth Circuit Order does just the opposite. The certification Order effectively teaches that the maintenance of an organization-wide diversity program—no matter how strong—is not relevant to potentially ruinous class litigation. The Order thus weakens the incentives to implement and maintain such programs and grossly underestimates their value, "directly contrary to the purposes underlying Title VII." *Kolstad*, 527 U.S. at 545.

CONCLUSION

For the reasons stated above, the class certification Order should be reversed.

Respectfully submitted,

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