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 *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NATIONAL WOMEN'S LAW CENTER, *ET AL.*, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Northern California is one of its regional affiliates. The ACLU, through its Women's Rights Project, frequently litigates cases, including class actions, concerning sex discrimination in the workplace, and has appeared before this Court in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights in all aspects of their lives. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to equal pay and promotions. NWLC has prepared or participated in the preparation of numerous *amicus* briefs in employment discrimination cases before this Court.

The ACLU and the NWLC are joined in filing this brief by 32 organizations that share a longstanding commitment to civil rights and equality in the workplace. The individual

organizations are described in the Appendix to this brief.[1]

INTRODUCTION AND SUMMARY

In support of their motion for class certification, plaintiffs presented evidence demonstrating statistically significant disparities in pay and promotions between men and women at Wal-Mart. Plaintiffs also presented evidence that Wal-Mart relies on subjective criteria to decide on pay and promotions, that those decisions are made by managers exercising largely unchecked discretion, and that managers invested with that authority have engaged in sex stereotyping at Wal-Mart stores across the nation. Together, this evidence raised the question whether Wal-Mart's policies and practices operate to discriminate against women in a manner common to the class. In addition, Wal-Mart's policies and practices prohibit employees from discussing their pay, which further entrenches gender-based disparities by making discrimination exceedingly difficult for individual women to discover or challenge. Under these circumstances, class certification is not only an appropriate mechanism for addressing

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[1] The parties have lodged blanket consents to the filing of *amicus* briefs in this case. Pursuant to Rule 37.6, counsel for *amici* attests that none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

plaintiffs' claims of employment discrimination – fully contemplated by the class action rules and consistent with Congress' intent in enacting Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (*codified as amended at* 42 U.S.C. § 2000e *et seq.*) – it is an indispensable one.

This Court has recognized that "'broad-scale action against patterns or practices of discrimination'" is "essential" to achieving the purposes of Title VII, *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 & n.22 (1984) (quoting H.R. Rep. No. 92-238, at 8, 14 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2144, 2149), because employment discrimination is a "'complex and pervasive' problem that [can] be extirpated only with thoroughgoing remedies," *id.* Federal Rule of Civil Procedure 23 advances these purposes by allowing plaintiffs to aggregate claims and collectively challenge far-reaching discriminatory practices that otherwise might go unaddressed. *See infra* Part III. Moreover, Congress has recognized that burdensome limitations on Title VII suits, such as Wal-Mart seeks here, may "ignore[] the reality of . . . discrimination" and may be "at odds with the robust application of the civil rights laws that Congress intended." Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5, § 2(2), *codified at* 42 U.S.C. § 2005-e note (2009).

Amici agree that the class of female employees at Wal-Mart was properly certified under Rules 23(a) and (b)(2) for the reasons set forth in the Brief for Respondents and do not

repeat those arguments here. Rather, this brief highlights three aspects of sex discrimination that plaintiffs' evidence indicates were present at Wal-Mart and that underscore why class treatment of their pay and promotion claims is both appropriate and important.

First, the district court found that evidence presented by plaintiffs in support of class certification demonstrates statistically significant disparities in pay and promotions throughout Wal-Mart that "support an inference of company-wide discrimination" sufficient to satisfy the commonality requirement of Rule 23(a). *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 188 (N.D. Cal. 2004), *reprinted at* App. 162a, 281a. Class actions are a traditional and necessary means of addressing such broad-based discrimination claims under Title VII. That is true both in this case and more broadly. Significant disparities persist nationwide between men's and women's wages and their representation in management positions, even when controlled for factors such as experience, employee preference, and occupation type, suggesting that ongoing discrimination is one of the culprits.

Second, evidence presented by plaintiffs indicates that outmoded sex stereotypes influence employment decisions at Wal-Mart and that women are treated as less valued employees than men, regardless of their actual performance. Declarants attested that women were repeatedly told that they should be paid less because they are not breadwinners, that they cannot be effective managers due to their family obligations,

and that certain more desirable jobs are "men's work" and off-limits to women. Social science research confirms that such stereotypes can become the basis for employment decisions where an employer delegates unchecked discretion over pay-setting and promotion decisions to local managers utilizing subjective criteria. As a matter of well-established law, subjective decisionmaking practices may be challenged through class actions when the totality of the evidence raises an inference that such practices have resulted in broad-based discrimination. Indeed, class actions are critical in these circumstances to address ongoing sex stereotyping in the workplace that would otherwise go unremedied.

Third, plaintiffs presented evidence indicating that individual women at Wal-Mart face significant barriers in challenging discrimination, including evidence showing that Wal-Mart does not allow its employees to discuss their pay and threatens those who raise questions about pay and promotion decisions. As in many workplaces, these policies and practices make it difficult for women employees even to know when they are being paid less than similarly situated male employees. Retaliation for complaining about discrimination is all too common. The class action mechanism enables women at Wal-Mart and other victims of discrimination to overcome these obstacles, thereby furthering Title VII's purpose of achieving a workplace free from discrimination.

Accordingly, and for the reasons set forth below, the district court's class certification order should be affirmed.

ARGUMENT

I. SEX DISCRIMINATION IN THE WORKPLACE, AS PLAINTIFFS ALLEGE HERE, REMAINS A SERIOUS NATIONAL PROBLEM THAT IS APPROPRIATELY ADDRESSED BY CLASS ACTIONS.

Plaintiffs presented evidence of pay and promotion disparities at Wal-Mart. They alleged company-wide discrimination and presented statistical evidence that overall, women were paid less and received fewer promotions than men, even though women on average had more seniority and higher performance ratings than their male peers. Company-wide discrimination has long been subject to challenge on a class or collective basis where, as here, the evidence raises the inference that "discrimination was the company's standard operating procedure" – not "isolated or 'accidental' or sporadic." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Such challenges remain necessary to address persistent gender discrimination, both in this case and in the workplace generally.

A. Because cases brought by and on behalf of a class of workers present a more complete picture of the employer's conduct than individual suits, and enable company-wide reforms, they have long played an essential role in promoting Title VII's goal of eradicating

discrimination in the workplace. *See*, *e.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (class action); *Teamsters*, 431 U.S. 324 (government pattern or practice case). Unfortunately, that goal has yet to be achieved with respect to women's equal pay and equal access to management positions. When Congress enacted Title VII in 1964, women working full time were paid approximately 59 percent of what men were paid, on average. U.S. Census Bureau, *Historical Income Tables – People*, tbl. P-40, *available at* http://www.census.gov/hhes/www/income/data/historical/index.html (last visited Feb. 21, 2011). At that time, one third of employers in one study openly maintained "'a double standard pay scale for men and women.'" Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. Rev. 17, 29 (2010) (*quoting* 109 Cong. Rec. 9199 (1963) (statement of Rep. Green) (debating passage of the Equal Pay Act)).

Although great strides have been made, the wage gap persists: even today, women working full time are paid only 77 percent of the salaries paid to men, on average. U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement*, tbl. PINC-05, parts 55 & 109, *available at* http://www.census.gov/hhes/www/cpstables/032010/perinc/toc.htm (last visited Feb. 23, 2011) (calculations based on 2009 annual median earnings for all male and female full-time workers). Women also continue to lag behind men in management. In 2007, 49 percent of non-managers were women, but women made up only

40 percent of managers. U.S. Government Accountability Office, *Women in Management: Analysis of Female Managers' Representation, Characteristics, and Pay* 6 (2010), *available at* http://www.gao.gov/new.items/d10892r.pdf (last visited Feb. 23, 2011).

B. Such large disparities in pay and promotions cannot be dismissed as the result of women's "employment choices" in career and family matters. *See*, *e.g.*, Br. *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioner at 26. Authoritative studies conclude that, even after controlling for factors believed to influence pay – including workers' qualifications, personal preferences, job responsibilities, occupation type, and industry – an unexplained earnings gap between men and women remains. *See* Cheryl Travis et al., *Tracking the Gender Pay Gap: A Case Study*, 33 Psychol. Women Q. 410, 410-11 (2009) (citing studies). This gap can be fairly attributed to discrimination.

The wage gap emerges as soon as students graduate from post-secondary and graduate school programs and increases over time. In the medical profession, for example, gender disparities between earnings for new female physicians and their male counterparts have increased in the past decade and remain unexplained, even after controlling for medical specialty, hours, and practice type. Anthony T. LoSasso et al., *The $16,819 Pay Gap for Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women,* 30 Health Affairs 193, 193 (2011). Similarly, women with

MBAs are paid less than men in their first post-MBA job and experience less salary growth thereafter. Nancy M. Carter & Christine Silva, Catalyst, *Pipeline's Broken Promise* (February 2010), *available at* http://www.catalyst.org/file/340/pipeline%27s_broken_promise_final_021710.pdf (last visited Feb. 21, 2011) (reporting a wage gap of $4,600 in post-MBA jobs after controlling for factors including prior experience, time since MBA, job level, region, industry, parenthood, and different aspirations). Restricting the availability of class actions will constrain courts' ability to address the type of broad-based discrimination that contributes to disparities in pay and promotion and that is alleged in this case.

C. After evaluating competing expert testimony submitted in connection with plaintiffs' class certification motion, the district court found that the statistical disparities in Wal-Mart's workforce "support an inference of company-wide discrimination in both pay and promotions" sufficient to satisfy Rule 23(a)'s requirement of commonality. App. 281a. Plaintiffs presented evidence that women working at Wal-Mart made 5% to 15% less than similarly situated men, even after accounting for factors such as seniority, turnover, and performance. J.A. 518a. Overall, women were paid $5,000 less than men, even though women on average had higher performance ratings in hourly jobs and more years of employment. J.A. 516-517a. The record also reflects statistically significant shortfalls in promotions of women to in-store management positions. App. 176a; App. 212a; J.A. 479a. And

women had to wait significantly longer for promotions than their male counterparts. App. 198a; App. 214a; J.A. 484a.

The statistical evidence proffered by plaintiffs of significant pay and promotion disparities, along with the anecdotal and other evidence they submitted, *see infra* Part II, supports their claim that women working at Wal-Mart faced the kind of broad-based employer discrimination that this Court has long recognized may be challenged by, or on behalf of, classes of employees under Title VII. *See*, *e.g.*, *Franks*, 424 U.S. 747; *Teamsters*, 431 U.S. 324. Gender discrimination in the workplace resulting in significant pay and promotion disparities remains a systemic problem that continues to demand company-wide responses.

II. SEX STEREOTYPES AND SUBJECTIVE DECISIONMAKING PRACTICES OF THE KIND ALLEGED HERE RAISE QUESTIONS COMMON TO THE CLASS AND UNDERSCORE PERSISTENT BARRIERS TO GENDER EQUALITY.

Certification of the class in this case is consistent with well-established legal principles recognizing that subjective decisionmaking processes that lead to discriminatory results can be challenged on a class-wide basis, and that the question of whether an employer's practices served to discriminate company-wide against a group of employees can be established through a combination of statistical and anecdotal evidence.

This Court, in *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988), recognized the danger that subjective decisionmaking processes may invite reliance on discriminatory stereotypes. The unfortunate persistence of sex stereotypes in the workplace, *see Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 730 (2003) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)), underscores the continued importance of class challenges to subjective practices in accomplishing Title VII's goals.

Plaintiffs have alleged that Wal-Mart's company-wide, unchecked subjective decisionmaking regarding pay and promotions led to statistically significant gender disparities by permitting managers to discriminate in making these decisions. Plaintiffs proffered, among other evidence, anecdotes of sex stereotyping that shed light on how Wal-Mart's common practice of subjective decisionmaking may have operated to discriminate against women: managers believed that women are not breadwinners, so they deserved to earn less; women are and should be family caretakers, whose family responsibilities prevent them from assuming greater management responsibility at work; and women can and should only perform certain kinds of work, and should therefore be clustered into certain jobs, with their promotion opportunities correspondingly limited. These anecdotes illustrate how Wal-Mart's subjective practices invited managers to translate the discriminatory stereotype that women have less value in the workplace than men into concrete employment decisions.

A. Research Establishes That Unchecked Subjective Decisionmaking Can Result In Discrimination.

1. This Court has long held that subjective decisionmaking that leads to discriminatory results may be challenged under Title VII as a company-wide practice. *See Watson*, 487 U.S. at 990-91; *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 301-02 (1977) (pattern or practice challenge to school district's "relatively unstructured procedures" that vested "virtually unlimited discretion" in "each school principal"). As the Court observed in *Watson*, leaving personnel "decisions to the unchecked discretion of lower level supervisors" can contribute to inequality by allowing managers to make these decisions based, not on objective criteria, but on "subconscious stereotypes and prejudices." 487 U.S. at 990. Social science research confirms that observation.

Stereotypes operate as cognitive shortcuts that shape how information is perceived, processed, and retained. *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination,* 40 Harv. C.R.-C.L. L. Rev. 481, 482 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1188-89, 1202-04 (1995). They "influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from

memory. In other words, stereotypes cause discrimination by biasing how we process information about other people." *Id.* at 1199.

Limited oversight of managers' decisions can allow decisions influenced by biases and stereotypes to stand without meaningful assessment or correction. *See* Barbara F. Reskin & Debra B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 Am. Soc. Rev. 210, 214 (2000) (stating that informal personnel practices "invite cronyism, subjectivity, sex stereotyping, and bias" and "when organizations allow individuals latitude in selecting managers, supervisors may consciously or unconsciously take workers' sex into account"). Unguided discretion in personnel decisions thus often yields decisions that, in the aggregate, result in significant gender disparities in pay rates and supervisory power. *See* Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 Hastings L.J. 1435, 1444 (2008); *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 460-63 (2001) (discussing how unstructured decisionmaking can exacerbate workplace bias). Using informal recruiting and employee referrals to fill positions can further exacerbate existing sex disparities, because managers select people they feel comfortable with and who share their characteristics. *See* J.A. 539a; Green & Kalev, *supra*, at 1444; Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Ill. L. Rev. 405, 418 (2006).

Subjective decisionmaking does not inevitably produce discriminatory results. Employers can counter reliance on stereotyping by adopting certain safeguards. "[R]esearch show[s] that formalized personnel systems can reduce reliance on stereotypes and favoritism." Green & Kalev, *supra,* at 1444; Susan T. Fiske et al., *Social Science Research on Trial: Use of Sex Stereotyping Research in* Price Waterhouse v. Hopkins, 46 Am. Psychologist 1049, 1051 (1991). Such systems include routinely posting opportunities for advancement, holding decisionmakers accountable for the criteria they use to make personnel decisions, monitoring and analyzing pervasive disparities, and monitoring employees' perceptions of discriminatory barriers to advancement. *See*, *e.g.*, Green & Kalev, *supra,* at 1443-44 (describing safeguards implemented in consent decrees). An employer's choice with respect to its personnel systems thus may foster or minimize discriminatory, stereotype-influenced decisionmaking.

2. The record evidence indicates that Wal-Mart utilizes employment practices that social scientists have found to facilitate reliance on stereotypes, including delegation of largely unchecked discretion to managers in pay and promotion decisions and reliance on informal, internal recruiting. As the district court found, Wal-Mart's "Home Office" establishes the minimum starting wage for hourly employees, but grants store managers discretion to depart from these rates. App. 176-77a. Store managers may depart from centrally established rates within a two-dollar per hour range, and are authorized to

exceed that, with approval from a higher level of management, for rates more than 6% above the centrally established minimum. *Id.* Higher-level managers exercise unguided discretion to set specific pay rates for lower-level managers within broad ranges set by the Home Office. *Id.*

Wal-Mart rarely, if ever, posted job vacancies during the class period, and "the parties agree that subjectivity is a primary feature of promotion decisions for in-store employees." App. 180a. Promotions are granted to employees meeting centrally established minimum criteria on the basis of a subjective "tap on the shoulder" process. App. 181a; *accord* J.A. 578-80a (employee could never find written information about the Management Training Program and promotions were made before positions were posted). One woman attested that workers must be part of the "informal network versus the formal network" to be successful because Wal-Mart is "a very cli[que]-oriented environment" in which women were referred to as "girls" and "Janie Qs." J.A. 304a. Another woman reported that her manager "ran the store like a boys' club," in which male managers regularly socialized with male hourly workers, leaving her to run the store. J.A. 927a. Another was told by a senior vice president that she would not advance because she did not "hunt, fish, or do other typically-male activities" with the "boys" in the company and was not "a part of the boys club." J.A. 741a; *accord* J.A. 595a (woman employee was told that promotion was based on "whom you knew, not what you knew").

B. Evidence Of Gender Stereotyping At Wal-Mart Sheds Light On How Subjective Decisionmaking Operated To Discriminate Against Women.

Evidence presented by plaintiffs through numerous declarations that are part of the class certification record in this case illustrates the stereotyping that supervisors at Wal-Mart engaged in, which devalued women and their role in the workforce. Kathleen MacDonald testified that her male department manager told her, "God made Adam first, and so women would always be second to men" and would "never make as much money as men." J.A. 1037a. One manager said that the role of female assistant managers was to give women associates someone to discuss their periods with. J.A. 849a. And the record is replete with instances in which women workers are referred to as "girls," J.A. 840a, J.A. 304a, "housewives," J.A. 1188a, and with degrading language, J.A. 917-18a ("squatter" "someone who squats to pee"). These declarations, which reflect the stereotype that women have less value in the workplace than men, bring the statistical evidence of gender-based disparities "convincingly to life." *See Teamsters,* 431 U.S. at 339 & n. 20. Plaintiffs submitted evidence that this stereotype was expressed in various ways at Wal-Mart.[2]

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[2] *Amici* focus here on the evidence illustrating the ways in which this stereotype operated at Wal-Mart stores. Plaintiffs also submitted evidence indicating that managers at the highest levels held such discriminatory views, that sex stereotypes were evident at company-wide functions,

1. As a general matter, it is well recognized that both women and men are subject to the stereotype that men are breadwinners for their families, while women earn "extra" money. *See*, *e.g.*, Alison A. Reuter, Comment, *Subtle but Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 Fordham Urb. L.J. 1369, 1400 (2006); Lindsay R. B. Dickerson, *Your Wife Should Handle It: The Implicit Messages of the Family and Medical Leave Act*, 25 B.C. Third World L.J. 429, 442 (2005) (book review) (discussing widely held assumption that "secondary source of income exists" for women who work). The stereotype that women do not need to work is rooted in the increasingly untrue assumption that women are not breadwinners supporting their families. *See* Heather Boushey, *The New Breadwinners*, in The Shriver Report: A Woman's Nation Changes Everything 36 (Boushey & O'Leary eds. 2009), *available at* http://www.americanprogress.org/issues/2009/10/womans_nation.html (last visited Feb. 25, 2011) (reporting that, in 2008, about 4 out of 10 mothers were breadwinners, compared with about 1 in 10 in 1967). This assumption underlies the view that men are entitled to higher pay and to managerial, career-track jobs, while women do not "need" managerial jobs or equal pay, because they do not support families on their salaries. *See*

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and that Wal-Mart had a uniform corporate culture that reinforced these stereotypes. Br. for Respondents at 15-21. *Amici* do not repeat that discussion here.

Joan Williams, *Toward A Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. Ill. U. L. Rev. 89, 113-16 (1998) (explaining the tradition of underpaying women "on the grounds that they are just working for 'pin money,'" while men are viewed as breadwinners).

Record evidence suggests that this stereotype was held by Wal-Mart managers in stores around the country who explained apparent pay disparities between men and women by saying that, for example, men make more because they "are working as the heads of their households, while women are just working for the sake of working." J.A. 1313-14a; *accord* J.A. 1188a (retail is for housewives who just need to earn extra money). Similarly, managers expressed the view that male workers are entitled to more pay because they support their families. *E.g.*, J.A. 1256a (men are paid more because they have families to support); J.A. 1001a (man was given a raise because he had a family to support); J.A. 1114-15a (District Director of Operations explained gender pay disparity, discovered accidentally when male employee left his W-2 in an office, by saying that male employee "supports his wife and his two kids"); J.A. 1037a (men would be paid more because they were the heads of household). As for promotions, a District Manager told one woman that he had selected a male employee for promotion instead of her because the male employee "deserved the position" as the "head of his household," while an unmarried woman, "did not 'need' the position." J.A. 709a.

2. "Family responsibility discrimination," or caretaker discrimination, is similarly rooted in outmoded notions that women are not valuable workers. It occurs when employers deny opportunities to women, particularly pregnant women and mothers, based on the assumption that they are caretakers first and workers second and that they therefore will not be able to perform in demanding supervisory positions. A great deal of "discrimination that mothers experience in the workplace stems from stereotypes and negative assumptions about mothers' competence and commitment to the job that have nothing to do with their actual behavior." Joan C. Williams & Stephanie Bornstein, *The Evolution of 'FReD': Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 Hastings L.J. 1311, 1326 (2008). Where women are believed to be unwilling to travel, commute, or work irregular hours because of perceived caregiving commitments, they are deprived of equal opportunities for management positions, especially where there is no formal way to assess their interest in such positions. *See* Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibility Discrimination*, 41 U. S. F. L. Rev. 171, 177-78 (2006); Vicki Schultz, Life's Work, 100 Colum. L. Rev. 1881, 1894-96 (2000). Related to this is the belief that women *should* stay home and raise a family, rather than pursue a career. *See* Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination and Defang the "Cluelessness" Defense*, 7 Emp. Rts. & Emp. Pol'y

J. 401, 406 (2003) (discussing *Bailey v. Scott-Gallaher, Inc.*, 480 S.E.2d 502, 503 (Va. 1997) (employer fired a woman after she gave birth because her "place was at home with her child")); *see generally* Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 Psychol. Pub. Pol'y & L. 665 (1999).

The record contains numerous examples of Wal-Mart managers openly espousing the belief that women should stay home and raise a family. Julie Donovan was told by a senior vice president that she "should raise a family and stay in the kitchen," rather than advance her career; when she complained to her supervisor, she was told to "shrug it off." J.A. 741a; *accord* J.A. 1175a (manager told woman she should resign and "find a husband to settle down with and have children to relieve [her] work-related stress"; reporting this to superior made no difference); J.A. 337a (women "should be home barefoot and pregnant"). Melissa Howard – the only female store manager in her district – was asked by a supervisor to resign from her management position because a woman should not be running a Wal-Mart store and she "needed to be home raising [her] daughter." J.A. 931a; *accord* J.A. 1031-32a (woman who expressed interest in an overnight supervisor position was told by a manager that she could not have the job because she had children); J.A. 845a (store manager said all women should be "at home with a bun in the oven").

Women were assumed not to be able or willing to relocate – one of the company's criteria for being promoted – because of their families, App. 181a, even when that was not the case. Geanette Bell was told by her Store Manager that she would not "want to be in the Management Training Program," despite her inquiries, because she would "not want" to relocate her children. J.A. 641-43a. Another woman was told that a man in her store with less experience was asked to enter the Management Training Program because "he's a man, he doesn't have a family." J.A. 973a. A third was told that the one-year anniversary of her son's death "would not be a good time" for her to enter management training. J.A. 651-52a. And a fourth was told that it would be better to wait until after her pregnancy to enroll in a management training course. J.A. 1108-09a.

3. The stereotype that women are not competent at "male work" also underlies assumptions that women are less valuable workers. This stereotype posits that men are more competent at traditionally male work, including jobs involving physical labor and managerial skills. Williams, *The Social Psychology of Stereotyping*, *supra*, at 407, 412 & n.18 (summarizing findings of empirical social psychologists).

By contrast, "women's work" refers to labor traditionally performed by women for no pay in their own homes, or for low pay with few benefits in other peoples' homes. The "occupations . . . in which women work tend to be low paid," in part

because "the skills women perform in those jobs have been undervalued" and "are hardly seen as skills at all. Women doing work that resembles domestic work are doing what comes 'naturally.'" Rosemary Hunter, *A Feminist Response to the Gender Gap in Compensation Symposium*, 82 Geo. L. J. 147, 151-52 (1993). Paradigmatic examples include cleaning and caretaking. In the retail sector, this stereotype can appear in the belief that women are suited only to certain jobs, such as cashier, and to certain departments, such as ladies' clothing, limiting opportunities for advancement. Within departments or stores, it can determine the tasks assigned to workers. *Cf.* Green & Kalev, *supra,* at 1448 (noting that, even within the same occupations, women are more likely than their male counterparts to "hold the least valued jobs").

Record evidence suggests that such stereotypes contributed to gender segregation within Wal-Mart and limited women's opportunities. One woman reported that a Store Manager explained that he always assigned women Assistant Managers to Softlines "because that's what women know." J.A. 689-90a; *accord* J.A. 637-38a (female employee stuck in Cosmetics while men were repeatedly promoted to departments she had expressed interest in, such as Paper Goods and Chemicals). Within departments, women were "required to clean and stock," while "the boys working alongside" them were not. J.A. 674a; J.A. 1188a (store manager specified that a woman should be hired to clean employee lounge and restrooms).

Declarants stated that their expressed interests in rotating through traditionally male domains were dismissed by managers who said that women should not or could not obtain positions in those departments. When Sheila Hall asked to work in hardware, her manager responded by saying, "you're a girl, why do you want to be in Hardware?"; a male co-worker told her that hardware was a "man's job" that women should not do. J.A. 839-41a. Sales associate Alix McKenna, when passed over for a promotion in Sporting Goods for a man with less seniority, was told "You don't want to work with guns." J.A. 1073a. Others were told that women could not do certain jobs at Wal-Mart. *See* J.A. 1128-29a (manager "needed a man in the job" in Sporting Goods); J.A. 949a (management position in Electronics required heavy lifting and was a "man's job"), J.A. 1110a (lifting furniture as manager of Domestics was a man's job), J.A. 754a (retail is tough, not for women); J.A. 604-05a (told she needed experience unloading trucks, a man was hired who had no such experience); J.A. 656a (supervisors rarely allowed women to unload trucks). Dannette Brown Ballou was actively discouraged by her managers from working in the hardware, automotive, sporting goods, meat, produce, receiving and unloading, and Tire and Lube departments, with comments such as the produce department "needed men because of the lifting of heavy boxes of fruit and women could not do the work" or "what do you know about sporting goods?" J.A. 669-70a.

Segregation in stereotypically "women's" departments at Wal-Mart was pervasive: women

were more than 90% of sales associates in infant-toddlers, domestic goods, health and beauty aids, jewelry, hosiery, and ladies sportswear, and they were 30% or fewer of those employed in sporting goods, hardware, meat, maintenance, produce, or security departments. J.A. 486-487a

As illustrated above, plaintiffs presented substantial anecdotal evidence of sex stereotyping at Wal-Mart. The statistical evidence, *see* supra, Part I.C, found by the district court to "support an inference of company-wide discrimination in both pay and promotions" for purposes of commonality, App. 281a, suggests that Wal-Mart managers acted in accord with the discriminatory stereotypes class members personally encountered. *See Teamsters*, 431 U.S. at 339 n.20 (looking to similar evidence in collective action challenging discrimination). Together, this evidence fairly raises the question, common to the class, whether Wal-Mart's subjective decisionmaking practices allowed managers throughout the company to translate the discriminatory view that women are not of equal value in the workplace into concrete personnel decisions, rendering class certification appropriate in this case.

III. SYSTEMIC BARRIERS TO INDIVIDUAL ACTIONS REINFORCE THE APPROPRIATENESS OF A CLASS ACTION TO CHALLENGE THE KIND OF DISCRIMINATION ALLEGED IN THIS CASE.

Major obstacles frequently prevent individual women from going to court to challenge discrimination in pay and promotions. The evidence submitted by plaintiffs about Wal-Mart provides a textbook example of how such obstacles operate. For example, evidence was presented of subjective decisionmaking, a pay secrecy policy, and job segregation, all of which operated to make it difficult for a female employee to know whether a similarly situated male employee was being treated differently. The class action mechanism of Rule 23 allows individual women employees to overcome these and other barriers by joining together and presenting systemic evidence of discrimination.

A. Individual Employees Face Difficulties In Learning About Pay Discrimination.

The record indicates that pay practices utilized by Wal-Mart ensured that employees knew little about their peers' salaries and were not well positioned to draw conclusions about disparities.

1. Plaintiffs submitted evidence that subjective, discretionary pay decisions were common practice at Wal-Mart. *See supra* Part II.A.2. In the absence of "an established

compensation system," employees frequently remain in the dark about the decisionmaking process, and "records of the reasons underlying pay decisions rarely exist." Eisenberg, *supra*, at 50. Information about wages and any rationale for disparities between employees' wages lies directly, and often exclusively, with the employer. If an employee learns of pay disparities at all, it is likely through "information suggestive of discrimination that trickles in piecemeal, in anecdotal fashion, through the sharing of experiences with colleagues." Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. Rev. 859, 891 (2008).

2. Plaintiffs also presented evidence that Wal-Mart maintains a pay secrecy policy, which operated to deter discussions of pay. J.A. 1054a (female assistant manager learned a newly hired male assistant manager made $6,000 more than she was paid, but "had always been told [she] would be fired for discussing salary issues so [she] never discussed this pay difference with anyone for fear that [she] might lose [her] job"); *accord* J.A. 1036-37a ("[I]t is against Wal-Mart policy to discuss pay."). Women employees reported learning of pay differences only through word-of-mouth or by sheer accident. *See, e.g.*, J.A. 1073-74a (female employee learned, when a male employee confided in her, that he had received a more generous raise, although both had received identical promotions and had worked in the same departments); J.A. 1036-37a (female employee realized that she received a lower rate of pay because "many male associates [at her store]

brag[ged] about their pay"); J.A. 1114a (female assistant manager discovered that a less-experienced male assistant manager's salary was $10,000 more than hers when someone found his misplaced W2 and gave it to her).

These practices can limit employees' ability to uncover discrimination. Employees frequently have little or no information about their co-workers' wages and salaries. Employer pay scales are often confidential and, in many workplaces, explicit rules and workplace social norms forbid disclosure of pay. *See* H.R. Rep. No. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, "*Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004). One third of private sector employers have rules prohibiting employees from discussing pay with their co-workers. *Id.* at 168; Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. Pa. J. Lab & Emp. L. 121, 125 (2003) (reporting results of online survey). In a recent survey of private and public sector employees, 50 percent of respondents, and 61 percent of private sector employees, reported that discussing pay was prohibited or discouraged in their workplace. Only 27 percent of those surveyed reported that pay information was public. Institute for Women's Policy Research, *Press Release: Pay Secrecy and Paycheck Fairness* (November 2010), *available at* http://myopenworkplace.com/wp-content/uploads/2010/11/PressRelease_PaySecrecy_16Nov2010.pdf (last visited Feb. 23, 2011). And

labor cases confirm that many employers maintain formal or informal policies prohibiting discussions of compensation.[3]

Even when discussion of pay is not explicitly prohibited by an employer, an informal "code of silence" surrounding pay in many workplaces poses a substantial practical barrier to gaining information about coworkers' compensation. Bierman & Gely, *supra*, at 175. The difficulty in learning about coworkers' pay rates is heightened for new employees, who typically lack the knowledge of workplace culture and the informal connections with coworkers that allow some workers ultimately to penetrate the code of silence regarding compensation.

Without access to data for pay practices across an organization, it is difficult for individuals to recognize or confirm discrimination. Social psychology research explains that, as a result, "people are more likely to hypothesize nondiscriminatory reasons for

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[3] Examples of such policies include rules explicitly prohibiting discussions of wages, *e.g., NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66 (2d Cir. 1992); *Jeanette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976), a broad confidentiality policy that could be construed to cover discussions of wages, *Cintas Corp. v. NLRB*, 482 F.3d 463, 465-66 (D.C. Cir. 2007), manager statements that employees could not discuss wages, *NLRB v. Main Street Terrace Care Ctr.*, 218 F.3d 531, 534 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993), and a prohibition against opening paychecks on the work site, *id. at* 1510.

individual disparities and less likely to perceive discrimination." Brake & Grossman, *supra*, at 891-92. This is a manifestation of a well-documented "minimization bias," in which targets of discrimination resist perceiving and acknowledging it as such. *See* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 25-28 (2005); Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. Chicago L. Rev. 797, 841 & n.173 (2009).

Relatedly, unless an employer actually cuts an employee's pay, the decision to grant her a particular salary is seldom experienced as adverse, unlike a firing or a refusal to hire an employee. Pay discrimination often occurs not because a female employee is denied a raise, but because male employees receive larger raises. "Having received a pay increase, the female employee is unlikely to discern at once that she has experienced an adverse employment decision." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 650 (2007) (Ginsburg, J. dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, codified at 42 U.S.C. § 2000e-5. When an employee does not recognize a pay decision as adverse, she is less vigilant for indicators of discrimination. For example, she is unlikely to seek an explanation from the employer, evaluate it for pretext, or make particular note of any comments suggestive of stereotyping or bias. This further obscures individuals' ability to identify and challenge pay discrimination.

Pay discrimination cases confirm the significant barriers employees face in gathering the information that suggests discrimination. For example, Lilly Ledbetter learned that her male counterparts earned higher salaries via an anonymous letter. *See* Eisenberg, *supra*, at 64 n. 331; *see also Ledbetter*, 550 U.S. at 649-650 (Ginsburg, J., dissenting) (describing barriers to discovering "[c]ompensation disparities"); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 785 (7th Cir. 2007) (plaintiff learned of disparities only when she "accidentally left her pay stub in plain view, and some of her colleagues began laughing and making negative remarks about her pay"); *Goodwin v. General Motors Corp.*, 275 F.3d 1005, 1008-09 (10th Cir. 2002) (plaintiff learned of a pay disparity when a printout listing her own and co-workers' salaries mysteriously appeared on her desk); *McMillan v. Mass. Soc'y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 296 (1st Cir. 1998) (plaintiff discovered a pay disparity when her salary and the salaries of other department heads were published in a newspaper).

3. Plaintiffs also submitted evidence of workplace segregation, whereby women were concentrated in departments stereotypically viewed as "women's work" and excluded from those departments viewed as "men's work." *See supra* Part II.B.3. Workplace segregation exacerbates the problem of inadequate information, because women concentrated in one part of an employer's workforce tend to compare their treatment and pay only with the treatment and pay of other women with whom they work.

See Brake & Grossman, *supra*, at 892-93 (describing the "generalized tendency" of employees to use same-gender comparisons to evaluate the fairness of their pay, leading women to expect lower pay and men to expect high pay, and emphasizing that tendency means the very fact of widespread discrimination against women can make it less likely that women will perceive discrimination).

B. The Fear Of Retaliation Leads Employees To Remain Silent About Discrimination Of Which They Are Aware.

Plaintiffs presented evidence that women complaining of discrimination at Wal-Mart faced the prospect of retaliation, despite Wal-Mart's "Open Door" policy that purported to allow employees to share concerns without repercussions. One woman who worked at Wal-Mart for twenty-five years reported that a representative from the company's Home Office told her and other female employees who made complaints of sex and race discrimination, "Don't bother using your quarter to call us. I can fire you, without taking any steps, for using the open door." J.A. 973-74a; *accord* J.A. 693a ("I realized that the Open Door policy at Wal-Mart was a façade and resulted only in retaliation.").

As this Court recognized in *Crawford v. Metro. Gov't of Nashville & Davidson County*, the "[f]ear of retaliation is the leading reason" why many victims of pay and other discrimination "stay silent." __ U.S. __, 129 S. Ct. 846, 852 (2009) (quoting Brake, *supra*, at 20). This fear is

well-founded. People who challenge discrimination against them are often branded as hypersensitive troublemakers. *See* Brake & Grossman, *supra*, at 904 n. 236. This problem is especially serious for employees who wield little power in their workplace, such as low-wage female workers. *See* Brake, *supra*, at 36.

Those experiencing discrimination are especially apt to remain silent where an employer has a policy discouraging or prohibiting discussion of wages. Because such policies may lead employees to fear retaliation if they complain of discrimination based on wage disclosures, they can have a "chilling effect" on employees, *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992), or be "coercive," *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 538 (6th Cir. 2000), and in certain circumstances have been deemed an "unfair labor practice" under the National Labor Relations Act, *see, e.g.*, Gely & Berman, *supra*, at 126-128 (discussing cases).

Employer retaliation sends a chilling message to others in the workplace and suppresses future challenges to discrimination by other individuals. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, __ U.S. __, 131 S. Ct. 863, 868 (2011) (asserting that fear of retaliation operates to "dissuade[] [employees] from engaging in protected activity"). Low-wage workers are particularly vulnerable to the threat of retaliation, both because they are more likely to live paycheck-to-paycheck and thus less able to absorb the impact of a job loss, and because, to the extent they work in low-skilled jobs, their

employer may perceive them as easily replaceable.

C. The Small Stakes Of Many Claims Hinder Individual Challenges To Employer Discrimination.

For low-wage workers in particular, while the stakes in discrimination cases are high to the individual, they are low in absolute terms. For example, the average claim for an hourly Wal-Mart worker is estimated to be approximately $1,100. J.A. 475a. This can make it prohibitively difficult to find legal representation for these claims, particularly against large employers who have vast legal resources at their disposal. Individuals who proceed *pro se* are nearly "three times more likely to have their cases dismissed [than those with counsel], are less likely to gain early settlement, and are twice as likely to lose on summary judgment." Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination in the Post Civil Rights United States,* 7 J. Empirical Legal Stud. 175, 188 (2010). Moreover, the relatively small dollar amounts of many discrimination claims can lead individuals to determine that the costs of challenging discrimination, in the form of social stigma and possible employer retaliation, simply are not worth the potential benefits of proceeding.

D. Class Actions Are Intended To Overcome These Obstacles To Redressing Discrimination.

In the absence of class actions, the barriers women at Wal-Mart and elsewhere face in bringing discrimination claims would threaten to undermine Title VII's reliance on private attorneys general to challenge discrimination and achieve the purposes of the statute. Thus, employees seeking to vindicate their Title VII rights have routinely done so on a class basis. *See, e.g., Lewis v. City of Chicago,* __ U.S. __, 130 S. Ct. 2191 (2010); *Int'l Union, United Auto., Aerospace & Ag. Imp. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Watson*, 487 U.S. 977; *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). This Court has likewise recognized the importance of class actions in removing structural barriers to litigation in other contexts. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

Class actions remove obstacles to systemic discriminatory practices in the following ways:

Collection of pay information. When employees obtain information about their pay and the pay of some comparator coworkers sufficient to initiate a class action, the class mechanism subjects discriminatory pay practices and organization-wide pay data to judicial scrutiny. This is so regardless of whether each employee has been able to gather sufficient information to determine whether she has suffered pay

discrimination or whether the individuals had reason to suspect at the time that the decisions were discriminatory.

Protection against retaliation. A particular virtue of class actions for challenging discrimination is that the class nature of the proceeding substantially reduces the likelihood of retaliation and the social costs of coming forward with complaints of discrimination. *See, e.g.*, *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999) (approving the district court's presumption that class members still working for the employer might be unwilling to sue individually for fear of retaliation); *Simmons v. City of Kansas City*, 129 F.R.D. 178, 180 (D. Kan. 1989) (certifying class of police officers challenging discrimination in part to minimize the likelihood of retaliation against individual class members). Class membership gives those individuals who want to speak out against discrimination support and protection, as they are less likely to be individually targeted when they are one of many challenging an employer's practice.

Aggregation of small claims. Class actions make it economically possible for individuals and attorneys to pursue claims for relatively small amounts of backpay that would otherwise go unremedied. *Amchem Prods., Inc.*, 521 U.S. at 617 (noting that the "'policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights'")

(quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *Phillips Petroleum Co.*, 472 U.S. at 809 ("Class actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually"); *Deposit Guar. Nat'l Bank*, 445 U.S. at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device."). This aggregation of claims conserves judicial resources, allowing a pay practice affecting many individuals to be tested in a single proceeding, rather than numerous proceedings, and avoiding inconsistent results.

The obstacles to individual enforcement actions present in the workplace generally and illustrated by the evidence plaintiffs proffered regarding Wal-Mart, threaten to make Title VII's goal of ending employment discrimination merely aspirational. The class action device provides a vehicle for overcoming these obstacles and promotes "the robust application of the civil rights laws that Congress intended." Lilly Ledbetter Fair Pay Act of 2009, 123 Stat. 5, §2(2).

CONCLUSION

For the reasons set forth above, the class certification order should be affirmed.

Respectfully Submitted,

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APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF AMICI CURIAE

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by disparities in pay compared to their male co-workers, sex discrimination including failure to promote and advancement decisions based on gender stereotypes, the long-term negative effects on their and their families' economic well-being of these pay disparities and discrimination, and the difficulties of seeking and achieving redress for all these issues. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic security. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

A Better Balance: The Work & Family Legal Center is a legal advocacy organization dedicated to promoting fairness in the workplace and helping workers across the

economic spectrum care for their families without risking their economic security. In particular, A Better Balance is dedicated to advancing laws and policies which seek to strengthen our national and state equal pay and other anti-discrimination laws. As is well-documented in the Walmart case, unfair pay is borne not only of sex discrimination but also maternal bias-- this type of bias is one of the most overt forms of discrimination against women in the workplace, often holding them back at work and endangering their long-term economic security. As long as policymakers fail to address these issues, litigation is one of the only remaining avenues to address them and must be pursued.

For 130 years, the *American Association of University Women (AAUW)*, an organization of over 100,000 members and donors, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,000 branches across the country, AAUW members work to break through barriers for women and girls. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is economic security for all women. Therefore, AAUW supports efforts to ensure pay equity, fairness in compensation, equitable access and advancement in employment, as well as vigorous enforcement of employment antidiscrimination statutes.

The *California Women's Law Center (CWLC)* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the California Women's Law Center works in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Dukes v. Wal-Mart* case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in this case.

The *Coalition of Labor Union Women (CLUW)* is America's only national membership organization for all union women based in Washington, DC with chapters throughout the country. Founded in 1974 it is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. From its inception CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on public policy issues such as equality in employment and

educational opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom, and increased participation of women in unions and in politics. Through its 46 chapters throughout the United States, CLUW members work to end discriminatory laws and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination. CLUW has provided educational and training programs for many years to educate and inform workers, union leaders and employers about issues of gender equality in the workplace.

The *D.C. Employment Justice Center (EJC)* is a non-profit organization whose mission is to secure, protect, and promote workplace justice in the D.C. metropolitan area. EJC provides legal assistance on employment law matters to the working poor and supports a local workers' rights movement, bringing together low-wage workers and advocates for the poor. Established on Labor Day of 2000, EJC advises and counsels well over 1000 workers each year on their rights in the workplace. In 2010, more than 40% of the workers served by EJC were women, and a significant number of those claims involved violations of the women's rights through sex-based discrimination in the workplace. It is critically

important that all women be afforded a meaningful opportunity to protect their civil rights.

The *Feminist Majority Foundation (FMF)*, a 501(c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially and politically. FMF advocates for full enforcement of Title VII and other laws prohibiting discrimination and advancing workplace equality for women, including in pay and promotions.

Hadassah, the Women's Zionist Organization of America, Inc., is the largest women's and the largest Jewish membership organization in the United States, with nearly 300,000 members. While traditionally known for its role in funding health care and other initiatives in Israel, Hadassah also has had a longstanding commitment to the protection of women's rights in the United States. In particular, Hadassah recognizes the need to eliminate wage discrimination and has been a long-time supporter of measures to achieve economic equality and security for women. The availability of class actions to assert claims of discrimination against women in the workplace is necessary to combat such discrimination and bring about real economic equity for women.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for forty years by using the power of the law and creating innovative public policy. Assuring women's equality in the workplace is central to Legal Momentum's mission. Legal Momentum has litigated cases to secure full enforcement of laws prohibiting sex discrimination, harassment, and retaliation, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), *Northern Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

Legal Voice is a regional non-profit public interest organization that works to advance the rights of all women in Washington, Alaska, Montana, Idaho and Oregon, through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Toward that end, Legal Voice has participated as counsel and as *amicus curiae* in cases involving workplace gender discrimination throughout the Northwest and

the country. Legal Voice serves as a regional expert advocating for robust interpretation and enforcement of anti-discrimination laws protecting women.

The *National Association of Commissions for Women (NACW)* is a non-partisan organization committed to equality and justice for women by increasing the effectiveness of member commissions and serving as their national voice. The NACW has passed several resolutions over the years in support of pay equity for women.

Established in 1955, the *National Association of Social Workers (NASW)* is the largest association of professional social workers in the world with 145,000 members and 56 chapters throughout the United States and internationally. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession.

NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general.

NASW has long been committed to working toward the elimination of all forms of discrimination against women. The NASW Code of Ethics directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of . . . sex." NASW policies support "legislative and administrative strategies that address pay equity and comparable worth initiatives for increasing women's wages….breaking the "glass ceiling," the "Lucite ceiling" for women of color, and the "maternal wall" that affects mothers in the paid labor force…" and "ending sexual harassment and occupational segregation, which clusters women in low-paying, "pink-collar" occupations." NATIONAL ASSOCIATION OF SOCIAL WORKERS, Women's Issues, SOCIAL WORK SPEAKS, 367, 370 (8th ed., 2009).

Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

The *National Association of Women Lawyers (NAWL),* founded in 1899, is the

oldest women's bar association in the country. NAWL is a national, voluntary organization with members in all fifty states, devoted to the interests of women lawyers, as well as all women. Through its members, committees and the Women Lawyers Journal, it provides a collective voice in the bar, courts, Congress and the workplace. NAWL stands committed to ensuring equality in the workplace. NAWL joins as an *amicus* only to the extent that this brief addresses the general use of the class action vehicle to advance claims of discrimination against women.

The *National Campaign to Restore Civil Rights (the Campaign)* is a non-partisan movement of more than one hundred civil rights and social justice organizations and individuals working to ensure that our courts protect and preserve equal justice, fairness, and opportunity. The Campaign is interested in *Dukes v. Wal-Mart*, because this case directly implicates the Campaign's mission to preserve equal justice and defend against the erosion of civil rights protections. Since the beginning of the Civil Rights Movement, class action lawsuits have been an effective and powerful tool for protecting rights and enforcing civil rights laws. From *Brown v. Board of Education* through the instant case, class action lawsuits have been used to promote civil rights and equal justice. A decision in Wal-Mart's favor will have harmful effects on civil rights and social justice advocates' ability to use litigation to prevent

discrimination and promote equality. These effects will be far-reaching and impact many of the Campaign's partner organizations, including racial justice, immigrants', and disability rights organizations, and advocates working on housing, the environment, access to health care, education, employment, and the rights of the aging, women's rights, and the rights of people who are LGBTQ. The Campaign is interested in protecting access to the courts.

The *National Committee on Pay Equity (NCPE)*, founded in 1979, is a coalition of women's and civil rights organizations; labor unions; religious, professional, legal, and educational associations, commissions on women, state and local pay equity coalitions and individuals working to eliminate sex- and race-based wage discrimination and to achieve pay equity. NCPE supports efforts to ensure pay equity, fairness in compensation, equitable access, and advancement in employment, as well as vigorous enforcement of employment antidiscrimination statutes.

The *National Council of Jewish Women (NCJW)* is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that "equal rights and equal

opportunities for women must be guaranteed" and "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated" and the organization endorses and resolves to work for "employment laws, policies, and practices that provide equal pay for work of comparable worth and equal opportunities for advancement." Consistent with our Principles and Resolutions, NCJW joins this brief.

The *National Education Association (NEA)* is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly opposed to employment discrimination, especially discrimination against women in the workplace, and firmly supports the vigorous enforcement of Title VII.

The *National Employment Law Project (NELP)* is a non-profit organization that advocates on behalf of low income and unemployed workers. NELP believes that work should be a ladder of economic opportunity and a sure path to middle-class financial security. NELP has a long-standing commitment to the enforcement of the nation's civil rights laws, and the use of all tools necessary to vindicate the individual and collective rights of workers, such as women, who are in legally protected classes.

The *National Organization for Women Foundation (NOW)* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist grassroots organization in the United States, with hundreds of thousands of supporters and contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included eliminating all forms of sex discrimination in the workplace.

Since 1966, the *National Organization for Women Foundation (NOW) NYC* has worked to advance the women and girls of New York through public education, grassroots organizing, lobbying, action, and advocacy. Since our inception, NOW-NYC has worked to create a culture where America's most valuable untapped resource- women- can succeed in all realms. NOW-NYC aims to end violence against women, advance women in the workplace, promote reproductive freedom and transform images of women in the media. Our sister organization, The Service Fund of NOW-NYC provides unemployment discrimination clinics.

The *Older Women's League (OWL)* is a non-profit, non-partisan organization that accomplishes its work through research,

education, and advocacy activities conducted through its chapter network. Now in its 30th year, OWL provides a strong and effective voice for the more than 70 million women age 40 and over in America. OWL has long advocated for equality and economic security, and believes that all persons should be free from all forms of discrimination in the workplace, including in pay and promotions.

People for the American Way Foundation (PWAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues through public education and legal

advocacy as amicus curiae before state and federal courts, including the United States Supreme Court in *Thompson v. North American Stainless, Burlington Northern & Santa Fe Railway Co. v. Sheila White, BCI Coca-Cola Bottling Co. v. EEOC, Ledbetter v. Goodyear Tire & Rubber Company, Inc.* and *AT&T v. Hulteen.*

The *Sargent Shriver National Center on Poverty Law (Shriver Center)* champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's access to high-wage employment. Discriminatory employment policies and practices have a negative impact on women's immediate and long-term employment and economic security. Nondiscrimination in all industries and occupations is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices that limit women's economic opportunities and serve as a barrier to economic equity.

The *Union for Reform Judaism (URJ)* includes 900 congregations in North America, encompassing 1.5 million Reform Jews. The URJ comes to this issue out of our longtime commitment to asserting the principle, and furthering the practice, of the full equality of women on every level of life. We oppose discrimination against all individuals, and recognize the need to end sex discrimination in the workplace, including in pay and promotions.

The *Washington Lawyers' Committee for Civil Rights and Urban Affairs* is a non-profit civil rights organization that works to eradicate discrimination by litigating under our nation's civil rights laws. In the Committee's 40-year history, its attorneys have represented tens of thousands of individuals who have experienced discrimination on the basis of their gender, race, national origin, disability and/or other protected characteristic. The Committee's Equal Employment Opportunity Project has successfully prosecuted hundreds of employment discrimination cases, including more than sixty class actions. Although the Project's cases invoke a wide range of civil rights laws, the Project has focused its efforts on enforcing Title VII of the Civil Rights Act of 1964. From this extensive employment discrimination and class action litigation history, the Committee has amassed expertise regarding the questions of law and procedure raised in the present matter, and accordingly

hopes to assist the Court in resolving these questions.

Wider Opportunities for Women (WOW) works nationally and in our home community of Washington, DC, to help women achieve economic security and equality of opportunity for themselves and their families at all stages of life. Providing equal opportunities for women in the workplace and providing career paths to earning self-sufficiency wages and benefits are key to women's ability to meet the financial needs of themselves and their families. WOW has developed indexes of income needed to cover basic needs at the county level and for different family types and ages to measure that goal. Establishing real opportunities for female employees, creating a workplace free of discrimination and harassment and providing redress for female employees who have been discriminated against are basic values under consideration in this case.

Women Employed is a national organization based in Chicago whose mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has fought to outlaw pay discrimination, pregnancy discrimination and sexual harassment and to strengthen federal equal opportunity policies and work/family benefits. Women Employed strongly believes that pay discrimination is one of the main barriers to achieving equal

opportunity and economic equity for women in the workplace and that class actions are an indispensable tool for eradicating illegal, company-wide employment discrimination.

Women Lawyers of Sacramento ("WLS"), founded in 1962, is the leading women's bar association in the Sacramento Valley of California. WLS supports and encourages every woman lawyer in her career aspirations and helps promote a society that places no limits on where a woman's skills and talent can take her. WLS is dedicated to (1) promoting the full and equal participation of women lawyers and judges in the legal profession, (2) maintaining the integrity of our legal system by advocating principles of fairness and equal access to justice, (3) improving the status of women in our society, and (4) advocating for equal rights, reproductive choice, equal opportunity and pay for women, and current social, political, economic, or legal issues of concern to its members. WLS is premised on the belief that women deserve equal rights, respect, and opportunities in the workplace and society at large. To that end, WLS has a strong interest in the present case, since the Court's decision will have wide-ranging impacts on women nationwide who suffer discrimination in the workplace, including their ability to bring claims and obtain effective relief. The decision will also affect the status of women in society and their ability to achieve equality in the workplace.

Women's City Club of New York (WCC) supports the rights of all disadvantaged people to seek redress through all possible avenues. The class action lawsuit is an important way for individuals to seek justice. Denying them the creation of the class is tantamount to denying them access to justice as they will not be able to afford the cost or time involved in pursuing individual claims. If the Supreme Court reverses the Ninth Circuit decision to allow the class action to proceed, it would not only adversely affect female employees at Wal-Mart. It would hereafter deal a broad blow to women and other victims of discrimination. The WCC cannot be silent about such profound consequences.

The *Women's Law Center of Maryland, Inc.* is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services, including an Employment Law Hotline, and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure gender equality in the workplace.

The *Women's Law Project (WLP)* is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance

the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of the law to ensure equal treatment in the workplace.