No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *et al.*,
Respondents.

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

BRIEF OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CHANGE TO WIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The United Food and Commercial Workers International Union ("UFCW"), the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and Change to Win ("CtW") file this brief *amici curiae* in support of Respondents.[1] The UFCW is an international labor organization with a total membership of

[1] Pursuant to Supreme Court Rule 37.3, Petitioner and Respondents have each filed with the Clerk of Court a letter granting blanket consent to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

1.3 million working men and women. The AFL-CIO is a federation of 57 national and international labor organizations with a total membership of 12.2 million working men and women. CtW is a federation of 4 national and international labor organizations with a total membership of 5.5 million working men and women. The UFCW, the AFL-CIO and CtW are each deeply committed to the eradication of all forms of unlawful discrimination in the American workplace, including gender discrimination.

SUMMARY OF ARGUMENT

I.

Our submission on the Rule 23(a)(2) commonality requirement issue presented in this case is that to satisfy this requirement in a Title VII class action lawsuit such as the one at bar, the named plaintiffs must make a sufficient factual showing to raise a "plausible" common question of law or fact as to whether the employer has an employer-wide policy or practice of discrimination against the employee members of the named plaintiffs' defined, statutorily-protected class, with the term "plausible" to be given the meaning ascribed to it by the Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). *Infra* pp. 4-5.

That proposed legal standard for satisfying the Rule 23(a)(2) commonality requirement in this context: (a) is in accord with Rule 23(a)(2)'s language and manifest gate-keeping function; (b) is supported by the recognition that Rule 23 as drafted—like Rules 8 and 12(b)(6) construed in *Twombly* and *Iqbal*—was designed to strike a balance between the legitimate litigation rights and interests of plaintiffs and defendants; and (c) provides a more than sufficient safeguard against the fear so vigorously expressed by Wal-Mart and its *amici* that certification of what they term "insubstantial" class action cases exerts

inordinate settlement pressures on class action defendants. *Infra* pp. 5-10.

II.

A. There is no merit in either of Wal-Mart's efforts, at the threshold, to dismiss the named plaintiffs' factual showing as inadequate as a matter of law.

First, Wal-Mart takes the Ninth Circuit's statement that Wal-Mart has not "promulgated" a "specific discriminatory policy" entirely out of context. In context, the court below simply was making the point that the Rule 23(a)(2) commonality requirement issue presented here is whether the named plaintiffs have adduced sufficient "reliable evidence" to raise the "common question" of whether Wal-Mart's "policy of decentralized, subjective employment decision making"—though neutral *on its face*—does *in practice* "operate to discriminate against female [store] employees." *Infra* pp. 10-11.

Second, Wal-Mart's argument based on footnote 15 of *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 159 (1982), that only "*entirely* subjective decisionmaking process[es]" are subject to attack through a Title VII class action lawsuit is utterly belied by this Court's later decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *Infra* pp. 11-14.

B. On the issue of whether the named plaintiffs' factual showing at the class certification stage was sufficient to meet the "plausibility" standard that we have shown is appropriate here, Wal-Mart does not acknowledge, much less attempt to deal with, the specifics of the named plaintiffs' robust statistical evidence, and that head-in-the-sand approach is unsurprising under the circumstances.

The named plaintiffs' evidence of a statistically-signifi-

cant, gender-based pay disparity of between 5% and 15% in each and every one of the dozens of separate in-store job classifications within each and every one of Wal-Mart's 41 separate regions across the country more than suffices to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart –wide policy or practice of discrimination against female store employees in pay determinations. *Infra* pp. 15-17.

Likewise, the named plaintiffs' evidence that, on a company-wide basis, there is a statistically significant shortfall of women being promoted into each and every one of the in-store management classifications—taken together with the named plaintiffs' evidence that Wal-Mart promotes women to in-store managerial positions at a rate dramatically lower than that of its twenty closest competitors—more than suffices to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart - wide policy or practice of discrimination against female store employees in promotion determinations. *Infra* pp. 17-19.

ARGUMENT

I. The Proper Rule 23(a)(2) Legal Standard

As the parties recognize, the threshold Rule 23(a)(2) issue presented in this case is the proper legal standard for determining whether, in a Title VII class action lawsuit such as the one at bar, the named plaintiffs have made a sufficient factual showing at the class certification stage to satisfy Rule 23(a)(2)'s commonality requirement. Our submission on this Rule 23(a)(2) commonality requirement issue is this:

In order to satisfy the Rule 23(a)(2) commonality requirement in a Title VII class action lawsuit such as the one at bar, the named plaintiffs must make a sufficient factual showing to raise a "plausible" common question

of law or fact as to whether the defendant employer has an employer-wide policy or practice of discrimination against the employee members of the named plaintiffs' defined, statutorily-protected class, with the term "plausible" to be given the meaning ascribed to it by the Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937 (2009). To put the *Iqbal* Court's formulation of the applicable legal standard in terms that apply here:

> To [meet the Rule 23(a)(2) commonality requirement, the named plaintiffs must make a factual showing] that allows the court to draw *the reasonable inference* that the defendant [employer has an employer-wide policy or practice of discrimination against the employee members of the named plaintiffs' defined, statutorily-protected class]. The plausibility standard is *not* akin to a "probability requirement," but it asks for more than a sheer possibility . . . . [129 S. Ct. at 1949 (emphasis added) (citations omitted).]

A. As an initial matter, we note that Wal-Mart's Brief to this Court suggests that the Rule 23(a)(2) commonality requirement in a Title VII class action lawsuit such as the one at bar is what the *Iqbal* Court termed "a 'probability requirement'"—*i.e.*, a requirement that the named plaintiffs make a factual showing at the class certification stage that the plaintiffs probably will prevail on the merits of their class claim that the defendant employer has an employer-wide policy or practice of unlawful discrimination. *See* Pet. Br. 18-21 (positing a "significant proof" requirement in this context). That suggestion is fundamentally unsound.

It is abundantly clear from Rule 23's text that the district court's office at the class certification stage is to determine whether a proposed class action case "may be maintained" as such, *see* Rule 23(b), and *not* to conduct

any kind of mini-trial on the merits or make any kind of a decision on the merits for or against the claims that the named plaintiffs seek to bring on behalf of the proposed class—whether styled a "probable" decision, a "preliminary" decision, or otherwise. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action"); Advisory Committee Notes to the 2003 Amendments to Rule 23(c)(1) ("[A]n evaluation of the probable outcome on the merits is not properly part of the certification decision.").

2. In contrast to a "probability" standard, the *Twombly/Iqbal* "plausibility" standard that this Court has crafted as the proper standard for determining the sufficiency of a complaint attacked by the defendant through a Rule 12(b)(6) motion to dismiss is well suited—both in its rationale and in its operative terms—to be the standard for determining the maintainability of a class action case that a defendant, like Wal-Mart, has attacked at the certification stage as failing to satisfy the Rule 23(a)(2) commonality requirement.

The Court adopted the "plausibility" standard in *Twombly* for evaluating the sufficiency of a complaint attacked by a Rule 12(b)(6) motion to dismiss based on its reading of the governing Federal Rules (there, Rules 8 and 12), and its assessment that those Rules, as drafted, were designed to strike a balance between a plaintiff's legitimate interest in vindicating its rights by pursuing a colorable claim under federal law and a defendant's legitimate interest in avoiding the burdens (including the considerable discovery burdens) of defending against an insubstantial claim under federal law. *See Twombly*, 550 U.S. at 554-59. In adopting the "plausibility" standard in

that context, the *Twombly* Court took particular note of the risk of discovery abuse by plaintiffs with insubstantial claims, the difficulties confronted by the federal courts in policing such abuses, and the consequent pressure brought to bear on "cost-conscious defendants to settle even anemic cases before reaching [the next stage of litigation] proceedings." *See id.* at 559-60 & n.6. And, the *Iqbal* Court reaffirmed the applicability of the "plausibility" standard in this context, rejecting the plaintiffs' assertion in that case "that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute." *See* 129 S. Ct. at 1953.

In essence, then, the Court in *Twombly* and *Iqbal* held that Rule 12(b)(6)—read in conjunction with the Rule 8 requirement that a plaintiff plead facts that, if proven, would entitle the plaintiff to relief—plays a vital gate-keeping role in ensuring that only those claims that a plaintiff might "plausibly" succeed in proving are allowed to proceed to the succeeding stages in the litigation process that lead to an ultimate disposition on the merits.

B. The considerations that warranted adoption of the *Twombly/Iqbal* "plausibility" standard in the Rule 12(b)(6) context provide a warrant for adoption of that standard in determining whether, in a Title VII class action lawsuit such as the one at bar, the named plaintiffs' factual showing is sufficient to satisfy the Rule 23(a)(2) commonality requirement.

Like Rule 12(b)(6) in its domain, Rule 23 plays a vital gate-keeping role in the class action litigation context—*i.e.*, the role of determining *ab initio* whether the case "may be maintained" as such. *See* Rule 23(b). And, in discharging its gate-keeping role under Rule 23, the district court must, *inter alia*, make a determination that often (as in this Title VII case alleging a Wal-Mart -wide policy or practice of discrimination against Wal-Mart female

store employees in pay and promotion determinations) overlaps with the merits of the claims that the named plaintiffs seek to bring on behalf of the proposed class, *see General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982)—*i.e.*, the determination whether "there are questions of law or fact common to the class," *see* Rule 23(a)(2).

It follows from Rule 23(a)(2)'s manifest gate-keeping function that the Rule's dictate that there be "questions of law or fact common to the class" embodies the dictate that the named plaintiffs' assertion that the case properly is maintainable as a class action case rests on a factual showing that there are "plausible" common questions of law or fact, *Iqbal*, 129 S. Ct. at 1949, *i.e.*, a factual showing that there are common questions of law or fact that provide a fair ground for litigation of the case *as a class action case*.

Moreover, such a reading of Rule 23(a)(2)—like the Court's reading of Rule 12(b)(6) taken in conjunction with Rule 8 in *Twombly* and *Iqbal*—is supported by the same sound assessment that the Rule as drafted was designed to strike a balance between the legitimate litigation rights and interests of plaintiffs and defendants. On the one hand, named plaintiffs who at the class certification stage raise a "plausible" common question of law or fact as to whether the defendant has an unlawful policy or practice that applies to the members of the named plaintiffs' defined, statutorily-protected class—and who meet the various other requirements for the maintenance of a class action imposed by Rule 23—should by all rights be entitled to maintain the case as a class action, both for their own benefit and the benefit of all other plausibly-wronged class members. Conversely, if the named plaintiffs cannot manage at the class certification stage to raise such a "plausible" common question of law or fact,

then the case is not a case that the named plaintiffs should be entitled to maintain as a class action, and not a case in which the defendant should be made to bear the considerable litigation costs and burdens attendant to defending a class action.

We note that in striking this balance, the *Twombly/Iqbal* "plausibility" standard is different in one important respect in the present, Rule 23(a)(2) context as compared to the Rule 12(b)(6) context. In the Rule 23(a)(2) commonality requirement context, the district court is not limited to placing its sole reliance on the factual allegations in the named plaintiffs' complaint, but may require the plaintiffs to present factual matter outside the pleadings showing that there is a "plausible" common question of law or fact that justifies maintenance of the case as a class action case. *See generally Falcon*, 457 U.S. at 159-61. The opposite is true, of course, in the Rule 12(b)(6) context. That difference follows directly from the difference between the established practice in class action certification proceedings and the established practice in motion to dismiss proceedings, and makes sense in light of the added costs and burdens attendant to class action litigation. And, that established practice in class action certification proceedings provides a more than sufficient safeguard against the fear so vigorously expressed by Wal-Mart and its *amici* that certification of what they term "insubstantial" class action cases exerts inordinate settlement pressures on class action defendants.

Indeed, a key purpose and function of the *Twombly/Iqbal* "plausibility" standard as it applies in the Rule 12(b)(6) context is to relieve defendants of the pressure to settle "even anemic cases," *Twombly*, 550 U.S. at 559, by closing the door on such "anemic cases" at a threshold stage of the litigation. There is every reason to believe that the *Twombly/Iqbal* "plausibility" standard—particularly given

its application in the Rule 23(a)(2) procedural context—is fully adequate to serve the same purpose and function with respect to cases that are "anemic" *as class action cases*, and thus are not properly maintainable as such.

II. The Sufficiency of the Named Plaintiffs' Factual Showing

As we demonstrate below, the named plaintiffs' factual showing at the class certification stage was more than sufficient to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart -wide policy or practice of discrimination against Wal-Mart female store employees in pay and promotion determinations. Before turning to that demonstration, however, we begin by rebutting Wal-Mart's two efforts to dismiss as inadequate as a matter of law the named plaintiffs' factual showing on the Rule 23(a)(2) commonality requirement.

A. (1) Wal-Mart begins its attack on the legal sufficiency of the named plaintiffs' factual showing by fastening on and by repeatedly seeking to exploit, *see* Pet. Br. 6, 10, 20, 39, the Ninth's Circuit's statement that Wal-Mart has not "promulgated" a "specific discriminatory policy," *see* Pet. App. 59a—going so far as to insist that recognition of this point "should have ended the [Rule 23(a)(2) commonality requirement] inquiry" in Wal-Mart's favor, Pet. Br. 20. But Wal-Mart takes the Ninth Circuit's statement entirely out of context.

In context, the court below merely was stating the fact that Wal-Mart has not promulgated a policy that, *on its face*, explicitly or "specifically" discriminates against female store employees in pay and promotions. That unremarkable point is an irrelevancy here, rather than a dispositive point that "end[s] the [Rule 23(a)(2)] inquiry" in Wal-Mart's favor. For as the court below went on immediately to observe in its opinion, it is undisputed

that Wal-Mart *does* have a "policy of decentralized, subjective employment decision making," and that the central issue presented here is whether the named plaintiffs have adduced sufficient "reliable evidence" to raise the "common question" of whether that "policy of decentralized, subjective employment decision making"—though neutral *on its face*—does *in practice* "operate to discriminate against female [store] employees." *See* Pet. App. 59a.[2]

(2) As to the central issue framed by the court below, Wal-Mart seeks refuge in the Court's statement in footnote 15 of *Falcon* that an "*entirely* subjective decision-making process" that operates to discriminate against a class of individuals protected under Title VII would be subject to attack through a class action lawsuit. *See* Pet. Br. 11, 20 (emphasis in original). In this regard, Wal-Mart argues that the class claims here fall short because "[t]he district court found only that pay and promotion decisions are '*largely* subjective . . . and that the company maintains centralized corporate policies that provide *some* constraint on the degree of managerial discretion.'" *See id.* 21 (citing Pet. App. 192a) (first emphasis in original; second emphasis added). This line of argument is doubly flawed.

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[2] In the same vein, Wal-Mart repeatedly points to its written employment policies promoting diversity in the company's workforce, *see* Pet. Br. 3, 10, 20, while ignoring the record evidence (a) that because Wal-Mart "has not translated" these written employment policies "into practical and effective measures, there has been little actual impact on gender differentials in pay and promotion, [Declaration of Dr. William Bielby] at ¶¶ 56-57 (citing former Vice President's view that by failing to tie diversity achievement to manager's incentive pay, the company's diversity efforts remain 'lip service')"; and (b) that "although Wal-Mart regularly surveys its employees on a number of job-related issues . . ., it has never performed any kind of survey addressing diversity or gender issues. *Id.* at ¶ 61." *See* Pet. App. 194a-195a.

To begin with, it is plain that footnote 15 of *Falcon* cannot be read as suggesting, much less holding, that *only* those decisionmaking processes that are "*entirely*" subjective are subject to attack through a Title VII class action lawsuit. Indeed, Wal-Mart's argument to the contrary cannot be squared with this Court's subsequent decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), "that disparate-impact analysis may be applied to [Title VII] claims of discrimination caused by subjective or discretionary selection processes." *Id.* at 1000 (Blackmun, J., concurring in part and concurring in the judgment). The plurality opinion in *Watson* takes note of the reality that employer decisionmaking processes often "combine[ ]" subjective and objective criteria, *see id.* at 994 (O'Connor, J.); *see also id.* at 989, and goes on to state that "in [such] cases," rather than having their claim dismissed as inadequate as a matter of law, "the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities," *see id.* at 994.

Thus, under *Watson*, a Title VII class claim will lie if the named plaintiffs make an adequate factual showing that the subjective elements of an employer decisionmaking process that "combines" subjective and objective criteria are "responsible for" a statistically-significant discriminatory impact on a protected class, and the mere fact that the employer's decisionmaking process is not "*entirely*" subjective will not serve to defeat the plaintiffs' claim.

While the foregoing is dispositive with regard to Wal-Mart's misuse of *Falcon*'s footnote 15, we would be derelict if we failed to add that there is no reality in its suggestion that Wal-Mart has not, in practice, committed pay and promotion decisions at the store level to what is effectively "the unchecked discretion of lower level

supervisors." *Watson*, 487 U.S. at 990. The district court made a series of factual findings on this point that stand unchallenged by Wal-Mart, including the finding "that subjectivity is a *primary* feature of [both 'salary decisions' and] promotion decisions for in-stores employees," and that in *both* settings the ultimate employment decision is made by a lower level manager "with little guidance and limited oversight" from above. *See* Pet. App. 176a-183a (emphasis added).[3]

This Court's decision in *Watson* approving the use of disparate-impact analysis in this context is precisely in point here. For *Watson* rests on the recognition that a corporate policy of allowing lower level managers such substantial discretion in making employment decisions may well operate to discriminate against protected groups in a manner that cannot "be adequately policed through disparate treatment analysis," inasmuch as employment decisions made under such a policy are prone to being infected by "subconscious stereotypes and prejudices." *See* 487 U.S. at 990. Indeed, this is an inherent "problem," *id.*, with excessively subjective decision-making processes that has been widely recognized,[4] and

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[3] To state the two most pertinent examples of record: (a) store managers "are granted substantial discretion" to set the pay of hourly employees within a "broad," two-dollar per hour range that is especially noteworthy and "significant" given the relatively low earnings of hourly Wal-Mart in-store employees, *see id.* 177a-178a, 180a; and (b) admittance to the Management Training Program at Wal-Mart is through a process so laden with subjectivity that it "is fairly characterized as a 'tap on the shoulder' process," *see id.* 181a. Moreover, "[t]he subjective nature of [Wal-Mart's] promotion practices is further compounded by the fact that the company does not monitor the promotion decisions being made or otherwise systematically review the grounds on which candidates are selected for promotion." *Id.* 182a.

[4] *See e.g.* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 745 (2005) ("Extensive social psychological literature documents the ways in which uncon-

that was the subject of uncontroverted testimony in the district court by the named plaintiffs' social science expert, Dr. William Bielby.[5]

B. While launching these misplaced legal attacks on the named plaintiffs' factual showing, Wal-Mart does next to nothing to attack the named plaintiffs' statistical evidence bearing out the likelihood that Wal-Mart's highly-subjective decisionmaking policies and practices with respect to pay and promotions are infected

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scious racism and sexism, and the consequent stereotyping, operate in employment decisionmaking" characterized by "excessive subjectivity."); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972) (""[P]romotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.").

[5] *See* Pet. App. 193a-194a (summarizing Bielby's testimony that where, as with Wal-Mart, managers are allowed to "make decisions with considerable discretion and little oversight," those subjective decisions "are likely to be biased," inasmuch as "substantial decision-maker discretion tends to allow people to 'seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes'").

To be sure, Wal-Mart takes aim at Dr. Bielby's uncontroverted testimony on this point by seizing on (and belaboring) Bielby's "conce[ssion] that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking" and Bielby's inability to do more than "critique Wal-Mart's equal employment policies and pay and promotion systems as potentially 'vulnerable' to [gender] discrimination." *See* Pet. Br. 7, 28-29. But that self-acknowledged limitation on Dr. Bielby's expert testimony merely reflects the reality that Bielby is a social scientist and not a statistician, and thus, unsurprisingly, claimed no competency to testify as to the actual discriminatory impact of Wal-Mart's policy of allowing its managers to make pay and promotion decisions "with considerable discretion and limited oversight." Pet. App. 193a-194a.

by, and distorted by, "subconscious stereotypes and prejudices" against female employees. Wal-Mart's head-in-the-sand approach with regard to the named plaintiffs' statistical evidence is unsurprising, because that evidence is more than sufficient to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart -wide policy or practice of discrimination against female store employees in pay and promotion determinations.

In this regard, it is telling that Wal-Mart does not even acknowledge in its Brief, much less attempt to deal with, the *specifics* of the testimony given by the named plaintiffs' statistical expert, Dr. Richard Drogin, bearing on that "'plausible' common question" issue.[6] In brief compass, those *specifics* are as follows:

1. With respect to the "'plausible' common question" issue as it relates to pay determinations, Dr. Drogin "performed separate regression analyses for hourly and salaried employees for each" of Wal-Mart's 41 separate regions across the country, and those multiple regression analyses

> showed statistically significant gender-based disparities for *all* [*of the dozens of*] *in-store job classifications in all 41 Wal-Mart regions*. . . . Specifically, total earnings paid to women ranged between 5 and 15 percent less than total earnings paid to similarly situated men in each year of the class period. . . . Dr. Drogin's regression analyses included seniority, turnover, performance, and other factors, none of which accounted for the disparities, thereby leaving him to conclude that *gender is the only explana-*

[6] Likewise, Wal-Mart wholly ignores a "benchmarking" study proffered by the named plaintiffs that buttresses Dr. Drogin's testimony on that issue. *See infra* pp. 17-18.

tory factor. [Pet. App. 200a-201a (emphasis added) (citations omitted).][7]

Wal-Mart does nothing in its Brief to substantiate its stated, *ipse dixit* conclusion that the foregoing statistical analysis proffered by the named plaintiffs "is a failure of proof at the most basic level." Pet. Br. 24. But in the court below, Wal-Mart argued, and the dissenters agreed, that the fatal flaw in the plaintiffs' evidence is that, "[a]s Wal-Mart's statistical expert, Dr. Joan Haworth, explained," the demonstrated statistical disparities within a particular Wal-Mart region "could be due to decisions made at only a small percentage of Wal-Mart stores" within that region. *See* Pet. App. 130a (Ikuta, J., dissenting).

The difficulty with this rejoinder is that Dr. Haworth did not testify, and it defies reason to conclude, that the named plaintiffs' evidence of a statistically-significant, gender-based pay disparity of between 5% and 15% in each and every one of the dozens of separate in-store job classifications within each and every one of Wal-Mart's 41 separate regions across the country can be explained away on this basis. That being so, Dr. Drogin's statistical analysis more than suffices to raise

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[7] The fact that Dr. Drogan performed multiple regression analyses on the data to rule out other, non-gender-related causes of the aggregated disparities shown by that data, belies Wal-Mart's effort to attribute to the named plaintiffs the "suggestion that liability can be premised on aggregated disparities" standing alone. Pet. Br. 27. Indeed, on this point, Wal-Mart overlooks the district court's apt observation that "[e]vidence that certain disparities exist, however, does not, by itself, explain *why* they exist. Accordingly, Plaintiffs also present inferential statistical evidence in the form of multiple regression analysis to demonstrate that the above disparities can be explained only by gender discrimination and not by chance or other neutral variables." Pet. App. 199a (emphasis in original).

a "plausible" common question as to whether Wal-Mart has a Wal-Mart -wide policy or practice of discrimination against female store employees in pay determinations.[8]

2. With respect to the "'plausible' common question" issue as it relates to promotion determinations, one component of the named plaintiffs' factual showing was that

> Dr. Drogin conducted a statistical analysis of Wal-Mart's internal promotion data during the class period, and concluded that, on a company-wide basis, there is a statistically significant shortfall of women being promoted into *each of the in-store management classifications* over the entire class period. [Pet. App. 212a (emphasis added).]

Moreover, in this instance, the named plaintiffs undertook to "buttress" Dr. Drogin's testimony by introducing a "benchmarking analysis" by labor economist Dr. Marc Bendick in which Dr. Bendick "compared, or 'benchmarked,' Wal-Mart against twenty other large general merchandise retailers by comparing workforce data pro-

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[8] In an effort to avoid this conclusion, Wal-Mart points to statistical evidence of its own purporting to show that "'more than 90% of [its] stores had no pay rate differences between men and women that were statistically significant.'" Pet. Br. 7 (quoting Dr. Haworth's testimony, J.A. 1344a). But in this regard, Wal-Mart elides all reference to two highly-relevant facts taken note of by the district court: (a) Dr. Haworth's purported "store-by-store statistical analysis," *id.* 24, was in fact a "store sub-unit" by "store sub-unit" statistical analysis utilizing store "sub-unit" departmental groupings unilaterally selected by Wal-Mart; and (b) unlike Dr. Drogin, Dr. Haworth "did *not* perform regression analyses for most salaried positions." Pet. App. 201a (emphasis in original). Thus, at bottom, Dr. Drogin and Dr. Haworth offered "apples to oranges" statistical analyses, neither one of which is sufficient to discredit the testimony of the other and the reasonable inferences to be drawn therefrom.

vided by the companies to the [EEOC]." Pet. App. 222a.[9] As summarized by the district court, the essential conclusions of that benchmarking analysis were as follows:

> Dr. Bendick . . . found that a short-fall in female managers was present in 79.5 percent of all Wal-Mart stores . . . [and that] . . . "it is virtually impossible for [such a] pattern to be geographically localized." . . . He further concluded that while the in-store managerial workforce at the comparison stores was 56.5 percent female, it was only 34.5 percent female at Wal-Mart. Dr. Bendick determined that this differential is highly statistically significant (47 standard deviations).
>
> . . . .
>
> Based on his determination that Wal-Mart has a shortfall of women being promoted to in-store management positions [in comparison to its twenty closest competitors], Dr. Bendick also concludes that the shortfall cannot be explained in terms of lack of qualifications, interest, or availability among female employees. [Pet. App. 223a-225a (citations omitted).]

In this instance, Wal-Mart again assails Dr. Drogin's data on the ground that it is aggregated at a level above the store level, but at the same time, Wal-Mart says nothing at all about Dr. Bendick's complementary benchmarking study. Taken together, however, these complementary statistical analyses are more than sufficient to raise a "plausible" common question as to whether Wal-Mart has a Wal-Mart -wide policy or practice of discrimination against female store employees in promotion determinations.

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[9] "The practice of benchmarking one company's performance against its competitors is a standard management technique used throughout the private sector and *by Wal-Mart itself*." Pet. App. 222a (emphasis added).

Indeed, in its Brief to this Court—as in the courts below—Wal-Mart is unable even to tender an innocent explanation for why, according to the Drogin analysis, there is, on a company-wide basis, a statistically significant shortfall of women being promoted into each and every one of Wal-Mart's in-store managerial classifications, and for why, according to the Bendick analysis, Wal-Mart promotes women to in-store managerial positions at a rate so dramatically lower than that of its twenty closest competitors.[10]

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[10] Although Wal-Mart itself does *not* challenge the named plaintiffs' use of the Bendick benchmarking study to "buttress" Dr. Drogin's testimony, one of Wal-Mart's *amici* vigorously attacks that usage on the ground that it is at odds with a number of court of appeals' decisions—including a prior Ninth Circuit decision—purportedly "recogniz[ing]" that in a Title VII case such as this, "the relevant [labor] pools" for comparative purposes "are *internal* pools, not external pools such as those measured by the Bendick benchmarks." *See* Brief of Costco Wholesale Corporation As *Amicus Curiae* In Support Of Wal-Mart Stores, Inc., at 14-15 (emphasis in original). This attack by Costco fails at every level.

The prior Ninth Circuit case highlighted by Costco, *Paige v. California*, 291 F.3d 1141 (9th Cir. 2002), was decided at the summary judgment stage, not the class certification stage, and the court's limited holding in *Paige* was that the use of external pool data as the named plaintiffs' *sole method* of proving disparate impact at the summary judgment stage (as distinct from using such external pool data to "buttress" a statistical analysis based on internal pool data at the class certification stage, as here) was improper, not as a general rule, but under the particular factual circumstances of "this case." *See* 291 F.3d at 1146.

Moreover, the Costco *amicus* brief mischaracterizes the decision in *Morgan v. UPS*, 380 F.3d 459 (8th Cir. 2004): the named plaintiffs in *Morgan* did not rely on "expert opinion that the percentage of UPS's black division managers was significantly below the representation of blacks in the general population" (which is not the nature of the benchmarking study at issue here in any event); and, accordingly, the *Morgan* court did not treat with, much less "reject[ ]," such an expert opinion, as Costco asserts. [contd.]

CONCLUSION

For the foregoing reasons, and those stated in the Respondents' Brief and the Briefs of Respondents' other *amici*, this Court should uphold the class action certification decision in this case.

Respectfully submitted,

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Likewise, neither of the court of appeals' decisions cited at p.15 n.10 of Costco's brief—*United v. City of Miami*, 115 F.3d 870 (11th Cir. 1997) and *Middleton v. City of Flint*, 92 F.3d 396 (6th Cir. 1996)—address a benchmarking study of the kind at issue here, much less "specifically reject" the use of such a study in any and all circumstances for any and all purposes, as Costco would have it.