Nos. 04-16688 & 04-16720

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BETTY DUKES, PATRICIA SURGESON, CLEO PAGE, DEBORAH GUNTER, KAREN WILLIAMSON, CHRISTINE KWAPNOSKI, AND EDITH ARANA,

Plaintiffs/Appellees/Cross-Appellants,

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLANT

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Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus* states as follows:

The **Chamber of Commerce of the United States of America** has no parent corporation and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the nation's business community. Many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964. The Chamber's members devote extensive resources to developing employment practices and procedures and compliance programs designed to ensure that their employment actions are consistent with Title VII and other legal requirements. If the district court's decision stands, it will have a potentially destructive effect on the Chamber's members, who will likely face billions of dollars in new class-action claims, brought on behalf of massive putative classes that fail to satisfy the requirements of Rule 23, without any opportunity to present the evidence in their own defense. All parties have consented to the filing of this brief.

ARGUMENT

Almost five years have passed since the district court certified the class in this case. Since that time, federal courts of appeals have decided numerous cases

that directly undermine the most critical elements of the district court's certification analysis. This intervening case law makes plain that, whatever its doubtful merit in 2004, the district court's certification decision is now unsustainable as a matter of law. In particular, it is now abundantly clear that the district court's analysis of the class certification requirements in Federal Rule of Civil Procedure 23 was erroneous in multiple respects, and that any attempt to try this case as a class action would violate the requirements of Due Process, Title VII, and the Rules Enabling Act. The en banc Court should therefore reverse the district court's decision certifying the class.

I. THE DISTRICT COURT'S RULE 23 ANALYSIS WAS ERRONEOUS AS A MATTER OF LAW

Since 2004, the federal courts have clarified principles that confirm that the district court's Rule 23 analysis was manifestly erroneous in at least four critical respects. First, relying on a now roundly-discredited Second Circuit case, the court incorrectly failed to subject plaintiffs' class certification arguments to rigorous scrutiny, simply because doing so would have required some examination into the merits of plaintiffs' case. As every court of appeals to consider the question has since concluded, such a failure constitutes reversible error. Second, the court applied the wrong standards in assessing Rule 23's commonality requirement, and improperly invoked the concept of "excessive subjectivity" to find that that

requirement was satisfied. Third, the court wrongly declined to subject plaintiffs' expert testimony to a *Daubert* admissibility analysis, and wrongly failed to weigh that testimony against the contrary testimony of Wal-Mart's experts. Finally, the district court erred by certifying under Rule 23(b)(2) an unmanageable class in which claims for declaratory and injunctive relief plainly do not predominate.

A. The District Court Erroneously Failed To Scrutinize The Rule 23 Requirements

In conducting its Rule 23 analysis, the district court repeatedly refused to subject the plaintiffs' claims to rigorous scrutiny. *See, e.g., Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 142, 144, 153-55, 159-60, 164-66 (N.D. Cal. 2004). To justify its refusal, the court relied principally on the Second Circuit's opinion in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999), which (according to the court) stood for the proposition that a court should not examine the merits of the claims at the class certification stage. *See, e.g., Dukes*, 222 F.R.D. at 155 n.21, 159 n.29.

That refusal to scrutinize plaintiffs' claims was clearly erroneous. As the federal courts of appeals have subsequently consistently recognized, a district court *must* subject a plaintiff's class claims to rigorous scrutiny, even if such an inquiry overlaps with the merits – even the Second Circuit itself has disavowed any rule to the contrary. *See, e.g., In re IPO Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006)

(expressly "disavow[ing]" relevant parts of *Caridad*); *Heerwagen v. Clear Channel Commc'ns*, 435 F.3d 219, 232 (2d Cir. 2006) (noting that "[a] number of our sister circuits have determined more broadly [than *Caridad*] that an inquiry into the merits of a claim is appropriate to the extent necessary to determine whether the requirements of Rule 23 have been met," and citing cases from the Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits); *Bowe v. PolyMedica Corp.*, 432 F.3d 1, 5-6 (1st Cir. 2005) (rejecting the view that "a district court should not engage in a weighing of competing evidence at the class-certification stage," and instead agreeing with "the majority of courts of appeals" that on class certification, a district court should make "whatever legal and factual inquiries are necessary to an informed determination of the certification issues"); *Heffner v. Blue Cross of Ala., Inc.*, 443 F.3d 1330, 1337 (11th Cir. 2006).

In perhaps the most thorough discussion of this issue to date, the Third Circuit explained that "the decision to certify a class calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3rd Cir. 2008). "Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence," and "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits –

including disputes touching on elements of the cause of action." *Id.*; *see also Oscar Private Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) ("District courts often tread too lightly on Rule 23 requirements that overlap with the . . . merits, out of a mistaken belief that merits questions may never be addressed at the class certification stage. A district court . . . must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits."). Had the district court applied these standards, it could not have certified this class.

B. The District Court's Commonality Analysis Was Erroneous

The district court also erred in its analysis of Rule 23's commonality requirement. Echoing its general refusal to subject plaintiffs' class claims to rigorous scrutiny, the district court stated that "the necessary showing to satisfy commonality is minimal." *Dukes*, 222 F.R.D. at 145 (internal quotations omitted). But courts of appeals have repeatedly rejected this assertion, holding instead that plaintiffs seeking class certification must make a "significant" showing of commonality. *See, e.g.*, *Garcia v. Johanns*, 444 F.3d 625, 632 (D.C. Cir. 2006) ("[T]o show commonality under [Rule 23(a)(2)], the plaintiff must make a significant showing to permit the court to infer that members of the class suffered from a common policy of discrimination that pervaded all of the defendant's

challenged decisions.") (internal quotations and alterations omitted). Here, plaintiffs have failed to make such a showing, as the record establishes that women at Wal-Mart were promoted and demoted for a variety of different reasons, including individual performance issues. *See* Principal Brief for Wal-Mart Stores, Inc. ("Wal-Mart Br.") at 3-7.

The district court also erred in finding that the commonality requirement was satisfied in part based on the concept of "excessive subjectivity." *Dukes*, 222 F.R.D. at 145. To begin, the very concept of "excessive subjectivity" reveals a basic misunderstanding of the relationship between subjectivity and the standards for Title VII liability. As the Supreme Court has held, and as Wal-Mart has argued throughout this case, the mere presence of subjectivity in an employer's decisionmaking processes does not in itself raise *any* inference of discriminatory conduct. *See, e.g.*, Wal-Mart Br. at 17 (citing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 992 (1988)). As a result, the notion that a decisionmaking process can be suspect because it contains "too much" subjectivity makes no sense, as no amount of subjectivity *per se* can be "excessive."

Further, the district court was plainly wrong to conclude that "the fact that Wal-Mart's compensation and promotion policies consistently permit managers to utilize a great deal of subjectivity . . . supports a finding of commonality." *Dukes*,

222 F.R.D. at 149. In fact, the courts have rejected the argument that "a common policy of discrimination exists [whenever] significantly subjective decision-making operates on a national basis with discriminatory results," *Love v. Johanns*, 439 F.3d 723, 730 (D.C. Cir. 2006) (original alterations and quotations omitted), and recognized instead that "[e]stablishing commonality for a disparate treatment class is particularly difficult where" – as in this case – "multiple decisionmakers with significant local autonomy exist." *Garcia*, 444 F.3d at 632.

Indeed, the presence of subjectivity in this case actually cuts sharply *against* a finding of commonality, given the number of different subjective decisionmakers at issue. *See* Wal-Mart Br. at 19-22. The paradigm instance of a subjective decisionmaking process potentially resulting in common injury is a wholly subjective decisionmaking process (such as a single manager with full discretion to make employment decisions) that affects multiple persons *at a single facility*, so that all the affected persons are subjected to the *same* subjective decisionmakers. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 151 (single facility), 159 n.15 (wholly subjective decisionmaking process). In this case, in contrast, the putative class members were not exposed to the subjective judgments of the same decisionmaker, but rather worked under *thousands* of *different* managers, in *thousands* of *different* stores across the country. *See Dukes*, 221 F.R.D. at 150; *see also, e.g., Stubbs v.*

McDonald's Corp., No. 04-2164-GTV, slip op. at 12-13 (D. Kan. Nov. 12, 2004). In such a situation, any finding of commonality will be difficult at best. *See Garcia*, 444 F.3d at 632.

C. The District Court's Treatment of Expert Evidence Was Erroneous

The district court also erred in its treatment of expert evidence, in at least two respects. First, it accepted plaintiffs' aggregated nationwide statistics without giving weight to Wal-Mart's disaggregated store-by-store statistical evidence. In so doing, the district court made the precise error the Third Circuit unequivocally warned against in *Hydrogen Peroxide*, where it admonished that "[w]eighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands." 552 F.3d at 323. As discussed above, courts simply "may not decline to resolve a genuine legal or factual dispute," including a dispute among experts, "because of concern for an overlap with the merits." *Id.* at 324; *see also id.* at 312-15, 325 (closely analyzing defendants' expert's rebuttal to plaintiffs' expert's testimony). Other courts now uniformly agree that a district court must weigh *all* competing evidence, and cannot simply ignore the evidence submitted by the defendant. *See, e.g., Stuebler v. Xcelera.com*, 430 F.3d 503, 512 (1st Cir. 2005); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005). Indeed, commentators have concluded that

aggregated statistics (like those offered by plaintiffs) *cannot* provide persuasive evidence of commonality in a multiple-facility class action like this one. *See* Daniel S. Klein, Note, *Bridging the* Falcon *Gap: Do Claims of Subjective Decisionmaking in Employment Discrimination Class Actions Satisfy Rule 23(a) Commonality and Typicality Requirements?*, 25 Rev. Litig. 131, 165-76 (2006).

Second, the district court erred in refusing to analyze the admissibility of plaintiffs' expert sociological evidence under *Daubert*. Since the district court's opinion was issued, multiple courts of appeals have made clear that district courts must evaluate the admissibility of expert evidence and apply rigorous standards of proof even at the class certification stage. *See, e.g.*, *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 311-14 (5th Cir. 2005); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005). In *Hydrogen Peroxide*, for example, the Third Circuit made clear that "[e]xpert opinion with respect to class certification, like any matter relevant to a Rule 23 requirement, calls for rigorous analysis." 552 F.3d at 323. "[O]pinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason"; rather, the court must consider its persuasiveness, and the persuasiveness of testimony from any opposing experts, in deciding whether Rule 23 is satisfied. *Id.*

And it is clear that the sociological evidence plaintiffs offered – the "social framework analysis" provided by Dr. William Bielby – would not stand up to this kind of scrutiny. Even the founders of social framework analysis, upon whose research Dr. Bielby relied, concluded that his testimony "in *Dukes* . . . clearly exceeds the limits of proper social framework testimony" and should have been excluded. John Monahan, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of 'Social Frameworks,'* 94 Va. L. Rev. 1715, 1745 (2008).

D. The District Court Erred in Certifying a Class under Rule 23(b)(2)

Decisions issued since the class was certified have also laid bare the district court's clear error in certifying a class under Rule 23(b)(2) in a case in which the potential punitive damages amount to *billions* of dollars. *See Dukes*, 222 F.R.D. at 171. It is undisputed that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates . . . predominantly to money damages." Fed. R. Civ. P. 23, Adv. Comm. Notes to 1966 amend.; *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) ("Rule 23(b)(2) . . . authorizes class treatment only when the plaintiff seeks predominantly 'injunctive' or 'declaratory' relief"); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195, *amended*, 273 F.3d 1266 (9th Cir. 2001).

A "split has developed among circuits on how a court determines whether monetary relief predominates in a Rule 23(b)(2) class suit." *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n.8 (D.C. Cir. 2006). Following the Fifth Circuit's lead in *Allison v. Citgo Petroleum, Inc.*, 151 F.3d 402 (5th Cir. 1998), at least five circuits have adopted an "incidental damages" test, which prohibits certification under Rule 23(b)(2) where plaintiffs seek monetary relief unless the relief sought will "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Id.* at 415; *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 649-50 (6th Cir. 2006); *Thorn*, 445 F.3d at 330 n.25; *Cooper v. S. Co.*, 390 F.3d 695, 720 (11th Cir. 2004); *Barabin v. Aramark Corp.*, No. 02-8057, 2003 U.S. App. LEXIS 3532, at *4-6 (3d Cir. Jan. 24, 2003) (unpublished); *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580-81 (7th Cir. 2000); *see also In re St. Jude Med., Inc.*, 425 F.3d 1116, 1121 (8th Cir. 2005).

This Court, however, has expressly "refuse[d] to adopt the approach set forth in *Allison*," rejecting the "incidental damages" test or any "particular bright-line rule." *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003). In an abrupt shift from a previously consistent line of cases, the panel's second decision in *Molski* endorsed the "ad hoc" approach adopted by the Second Circuit in *Robinson v.*

Metro-North Commuter Railroad Co., 267 F.3d 147 (2d Cir. 2001).[1] Since *Molski*, no other circuit has adopted this approach, and *Robinson* belongs to the line of Second Circuit cases disavowed by that court in *IPO*.

Here, under any standard, the conclusion that declaratory and injunctive relief predominate is simply untenable. All but two plaintiffs in this case are no longer Wal-Mart employees, and thus do not even have standing to seek declaratory or injunctive relief. *Cf. Summers v. Earth Island Inst.*, No. 07-463, 2009 U.S. LEXIS 1769 (U.S. Mar. 3, 2009). Backpay is not a form of "declaratory or injunctive" relief capable of supporting certification under Rule 23(b)(2): as the

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[1] The panel's first opinion in *Molski* cited *Allison* approvingly and held that under Ninth Circuit precedent, injunctive and declaratory relief does not predominate, and a class is therefore not certifiable under Rule 23(b)(2), unless monetary damages are merely "incidental" as defined in *Allison*. *Molski v. Gleich*, 307 F.3d 1155, 1167-68 (9th Cir. 2002) (withdrawn). It was only on rehearing that the panel withdrew its first opinion and issued an amended opinion that expressly rejected *Allison* and adopted the subjective test articulated by *Robinson*. 318 F.3d at 949-50 (citing *Robinson*, 267 F.3d at 163-64). It bears noting that the parties' own briefs at the rehearing stage in *Molski* did not address *Allison*. *See* Petition of Appellee Atlantic Richfield Company for Rehearing, Nos. 00-57099, 01-55066, and 01-55068 (filed Oct. 24, 2002); Petition for Rehearing and Petition for Rehearing En Banc Filed by Plaintiff/Appeellee Jarek Molski, Nos. 00-57099, 01-55066, and 01-55068 (filed Oct. 24, 2002). Rather, the issue was raised in a brief filed by a group of amici who urged the panel to reject *Allison* and adopt the approach set forth in *Robinson*. *See* Corrected Brief of *Amici Curiae* Equal Rights Advocates, *et al.*, 2000 U.S. 9th Cir. Briefs 57099, *1-*10 (Nov. 4, 2002). No party or amicus appears to have opposed amici's argument, so the panel's adoption of the *Robinson* approach did not benefit from the ordinary adversary process.

Fourth Circuit recently explained, 23(b)(2) certification is "improper when the predominant relief sought is not injunctive or declaratory, even if the relief is equitable in nature." *Thorn*, 445 F.3d at 331. And, perhaps most obviously, the massive amount of monetary punishment plaintiffs seek in this case flatly belies any claim that pecuniary claims are "incidental" to their case, or that their requests for injunctive relief are predominant. The due process concerns raised whenever (b)(2) certification involves monetary relief, *Lemon*, 216 F.3d at 581, are heightened where, as here, a plaintiff class seeks penalties. *See Allison*, 151 F.3d at 418 ("punitive damages are . . . non-incidental – requiring proof of how [harm] was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards").

Recent decisions also highlight the district court's error in failing to recognize the insurmountable manageability problems presented by trying to resolve the liability and damages claims in the putative 23(b)(2) class. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 319-20. This class already included 1.5 million women over a 5-year period when it was certified in 2004. Now, in 2009, the class has vastly expanded, and is still growing, along with its potential damages. Further, determination of punitive damages is an inherently particularized inquiry not susceptible to classwide determination, which will give rise to the need for tens

of thousands, if not millions, of individualized hearings to determine eligibility for damages. Since the district court issued its opinion, courts of appeals have recognized that the manageability problems presented by analogous (though far smaller and less unwieldy) classes are insurmountable. *See, e.g.*, *In re Allstate Ins. Co.*, 400 F.3d 505, 508 (7th Cir. 2005) (reversing 23(b)(2) certification based in part on the prospect of "more than a thousand individual hearings" on entitlement to damages); *St. Jude*, 425 F.3d at 1121-22 (recognizing that 23(b)(2) classes "must be cohesive"); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) (applying the standard in the *less stringent* Rule 23(b)(3) context).

II. THE PROPOSED TRIAL PLANS WOULD VIOLATE DUE PROCESS, TITLE VII, AND THE RULES ENABLING ACT

The district court's certification order should also be reversed because its proposed trial plan would violate the requirements of Due Process, Title VII, and the Rules Enabling Act. Simply put, the district court's proposed trial plan purports to eliminate Wal-Mart's right to present individualized defenses at trial. As the Chamber has repeatedly argued in this proceeding, *see, e.g.*, Brief of Amicus Curiae Chamber of Commerce of the United States in Support of Defendant/Appellant's Petition for Rehearing En Banc ("Chamber Br.") at 3-10 (Jan. 18, 2008), it is well-established that every employer is entitled to put on evidence showing that particular plaintiffs are not entitled to relief because they

were "denied an employment opportunity for lawful reasons." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977); *see also Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000) ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision").

Under the district court's decision, however, plaintiffs will be permitted to proceed directly from demonstrating a prima facie case of classwide discrimination based on statistical and anecdotal evidence to a "remedy phase" that addresses injunctive relief and calculates back pay pursuant to a "formula" – all without the individualized hearings required by *Teamsters*. *See Dukes*, 222 F.R.D. at 174-78; *Dukes*, 509 F.3d 1168, 1190 n.16 (9th Cir. 2007). The district court's trial plan thus affords Wal-Mart no opportunity whatsoever to put on individualized evidence in its defense.

The alternative "procedure" proposed in the panel's revised opinion would similarly deny Wal-Mart this fundamental right. In that opinion, the panel suggests that this case could be tried using the unprecedented procedure discussed in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996). *See Dukes*, 509 F.3d at 1191-93. According to the panel, the *Hilao* plan "would allow Wal-Mart to present individual defenses in the randomly selected 'sample cases.'" *Id.*

at 1192 n.22. Setting aside the myriad problems in the *Hilao* decision, *see* Wal-Mart Petition at 15-17, *Teamsters* alone requires that an employer have the right to present rebuttal evidence as to *each individual* seeking relief, which the panel's proposal does not permit. *See Teamsters*, 431 U.S. at 361-62 (where plaintiffs seek individual monetary relief, a district court must conduct individualized hearings at which an employer can demonstrates that the "*individual applicant*" was denied an employment opportunity for lawful reasons) (emphasis added); *see also Reeb*, 435 F.3d at 651 ("[I]n a Title VII case, whether the discriminatory practice actually was responsible for the individual class member's harm, the applicability of nondiscriminatory reasons for the action, showings of pretext, and any affirmative defense all must be analyzed on an individual basis."); *Thorn*, 445 F.3d at 324 (affirming denial of class certification because a statute of limitations defense required "individualized adjudication," and emphasizing that "to protect . . . the right of the defendant to present facts or raise defenses that are particular to individual class members, district courts must conduct a 'rigorous analysis' to ensure compliance with Rule 23").

This disregard of defendant's right to present individualized defense – evident in both the district court's and the panel's trial plans – violates Title VII, *Teamsters*, and fundamental principles of due process. *See, e.g., Philip Morris*

USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (due process requires that a defendant have "'an opportunity to present every available defense'"); Chamber Br. at 3-10; *see also id.* at 11-12 (explaining that both the district court's and the panel's decisions would encourage employers to adopt the kinds of quota-like polices Title VII was adopted to prevent). Further, because these plans would impose liability for employment decisions Wal-Mart could readily defend if the claims were brought in the context of an individual action, they would fundamentally alter the substantive rights and burdens that would otherwise obtain in an individual action. That is impermissible under the Rules Enabling Act, which provides that "general rules of practice and procedure" – such as the class action device – "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)-(b) (2006).

This conclusion is confirmed by the Second Circuit's recent decision in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), which rejected a proposed aggregated method for awarding damages to a class of tobacco users. In that case, the district court's trial plan called for the total number of class members injured and the total amount of damages to be determined in a single class-wide adjudication, and then for individual damages to be awarded through a "simplified proof of claim procedure." *Id.* at 231 (quoting district court). But as

the Court of Appeals explained, "such an aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.* As such, the court concluded, the plan offended the Rules Enabling Act and violated Due Process. *Id.* at 231-32.

The district court in this case opined that Wal-Mart is not entitled to individualized hearings because its allegedly discriminatory decisions were "largely subjective." As a result, the court reasoned, it would be "virtually impossible" to determine which actions were in fact discriminatory, and there would thus be "little point in going through the exercise of individual hearings." *Dukes*, 222 F.R.D. at 176-77. But numerous courts of appeals have since rejected the misplaced notion that subjective decisionmaking alone is sufficient to deprive defendants of their right to present individualized defenses. *See, e.g.*, *Browning v. Dep't of the Army*, 436 F.3d 692, 696-97 (6th Cir. 2006) (plaintiff must demonstrate a discriminatory motive on the part of the employer, and "reliance on subjective matrix criteria does not support an inference of discrimination"); *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769 (11th Cir. 2005) ("subjective evaluations" are "properly articulated as part of the employer's burden to produce

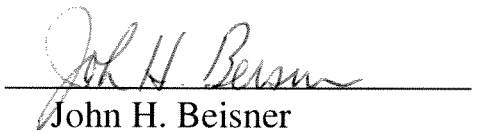
a legitimate race-neutral basis for its decision"); *Green v. New Mexico*, 420 F.3d 1189, 1195-96 (10th Cir. 2005) ("we have consistently recognized that [subjective] criteria 'must play some role' in certain management decisions and accordingly have reviewed the use of subjective factors on a case-by-case basis").

Finally, even if individualized hearings were not required as to Title VII injunctive relief and back pay, they are indisputably required as to punitive damages. *See, e.g., In re Simon II Litig.*, 407 F.3d 125, 139 (2d Cir. 2005) (recognizing that due process counsels against imposition of punitive damages with respect to acts of a "broad . . . scope" as to a class of plaintiffs); *Williams*, 127 S. Ct. at 1063 (punitive damages may not be imposed unless the defendant has an "opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary"). Accordingly, the district court plainly erred in concluding that such damages could be awarded absent an individualized determination of entitlement to relief.

CONCLUSION

For the reasons stated, this Court should reverse the district court's decision certifying a class.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Court Rules 29-2 and 35-4 because it contains 4405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point font size and Times New Roman type style.

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