
Nos. 04-16688 and 04-16720

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BETTY DUKES; PATRICIA SURGESON;
EDITH ARANA; KAREN WILLIAMSON; DEBORAH GUNTER;
CHRISTINE KWAPNOSKI; PAGE CLEO,
Plaintiffs-Appellees,

v.

WAL-MART, INC.,
Defendant-Appellant,

and

BETTY DUKES; PATRICIA SURGESON;
EDITH ARANA; KAREN WILLIAMSON; DEBORAH GUNTER;
CHRISTINE KWAPNOSKI; PAGE CLEO,
Plaintiffs-Appellants,

v.

WAL-MART, INC.,
Defendant-Appellee.

On Rehearing En Banc

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF DEFENDANT-APPELLANT AND
DEFENDANT-APPELLEE WAL-MART, INC., AND IN
SUPPORT OF REVERSAL OF CLASS CERTIFICATION**

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and free enterprise. PLF's Free Enterprise Project engages in litigation, including the submission of amicus briefs, in cases affecting America's economic vitality, and in particular in cases involving the abuse of tort and civil rights law in ways that harm businesses, burden entrepreneurialism, and stifle job creation. For example, PLF attorneys directly represented the plaintiff in this Court in *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); and has participated as amicus in this Court and others in many other cases involving civil justice, class actions, and inappropriate expansion of the judicial function. *See, e.g., In re Tobacco II Cases*, No. S147345 (Cal. Sup. Ct. filed Oct. 13, 2006); *California v. Gen. Motors Corp.*, No. 07-16908 (9th Cir. filed Oct. 17, 2007); *Soualian v. Int'l Coffee & Tea, LLC*, No. 07-56377 (9th Cir. dismissed Sept. 16, 2008); *Grimes v. Rave Motion Pictures Birmingham, LLC*, No. 08-13616 (11th Cir. amicus brief filed Nov. 26, 2008) (pending). In addition, PLF staff have published articles on the effects of tort liability on the business community. *See, e.g.,* Deborah J. La Fetra, *Freedom, Responsibility, and Risk:*

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is not appropriate for class certification because the purportedly “common” issues are not common in fact or circumstance but are “common” only in the sense that the Plaintiffs have chosen to combine them under a common label. A group of plaintiffs who suffered widely divergent injuries involving a single business—for example, a garden nursery business may see disparate claims by one person who claims to have been overcharged, another who was sold mislabeled chemicals in the pest control department, and another who slips and falls in the parking lot—could not satisfy the commonality requirement of Federal Rule of Civil Procedure 23 simply by appending a single label to their widely divergent allegations and claiming to have been “wronged” by the defendant. Yet that is precisely what happened here. A group of plaintiffs, dissimilar in their employment, their injuries, and other circumstances, and alike only as to their sex, allege various diverse injuries and seek class certification on the general ground that they have been wronged by Wal-Mart. This does not satisfy the federal rules, defeats the purpose of class certification, and deprives Wal-Mart of its right to defend itself against particular and specific allegations.

Given the remarkable breadth of the allegations, this case’s overarching goal appears to be an attempt to resolve vague “social justice” controversies against Wal-Mart, and to address long-standing complaints about the relationships between social and economic classes. But federal courts have no role in resolving general class grievances; Article III gives courts power only to redress particular injuries done to particular persons. For these reasons, the certification decision of the district court should be reversed.

ARGUMENT

I

CLASS CERTIFICATION IN THIS CASE WOULD VIOLATE THE DEFENDANT’S DUE PROCESS RIGHTS

Basic principles of fairness require that Wal-Mart must have the opportunity to defend itself against specific allegations of wrongdoing. Allegations like those in the present case that are broad and general, or that aggregate a variety of claims in spite of significant differences, do not give Wal-Mart that opportunity and thus violate the Due Process guarantee.

A. The Plaintiffs’ Allegations Are So Vague That the Defendant Cannot Realistically Defend Itself

The Plaintiffs’ theory of this case is that Wal-Mart operates under a business model which gives local managers discretion to make decisions regarding personnel matters such as promotions, and allows these decisions to be made on the basis of

subjective criteria, thereby exposing women to the threat of discrimination. The Plaintiffs do not claim that Wal-Mart *itself* has actually discriminated against them, but that by allowing managers to base promotion decisions on subjective criteria, it makes women “vulnerable” to discrimination.

This allegation is so imprecise that it is not amenable to a fair defense by Wal-Mart. What constitutes “vulnerability” and precisely how and under what circumstances local managers may have abused their discretion is impossible to ascertain, and therefore insusceptible of a defense. Even assuming that exposing a plaintiff to the possibility of discrimination is a cognizable injury, the circumstances in which each such incident occurred are so different depending on the individual plaintiff that aggregating them together would deprive Wal-Mart of the ability to defend itself.

Reeb v. Ohio Dep’t of Rehab. & Corr., 435 F.3d 639 (6th Cir. 2006), is particularly analogous to this case. There, the court of appeals reversed the district court’s certification of a large class of women who alleged that they were “the victim[s] of discrimination on the basis of sex as a result of the defendant’s general policy.” *Id.* at 642. The court found that such a broadly characterized allegation could not support the certification of the class. *See id.* at 645 (“[A] general policy of discrimination is not sufficient to allow a court to find commonality or typicality.”). Employment discrimination cases, the court noted, “require proof that *particular*

managers took *particular* employment actions.” (emphasis added). A trial court must “examine the incidents, people involved, motivations, and consequences regarding *each* of the named plaintiffs’ claims to determine the typicality.” *Id.* (emphasis added).

The D.C. Circuit agreed with this decision in *Love v. Johanns*, 439 F.3d 723 (D.C. Cir. 2006), which found class certification improper in a sex-discrimination lawsuit brought by women who were denied loans by the U.S. Department of Agriculture. Like the Plaintiffs here, the *Love* plaintiffs alleged that the Department “employ[ed] subjective loan-making criteria, which enabled decentralized decision-makers to discriminate amongst loan applicants on the basis of gender.” *Id.* at 725. The court found that the plaintiffs could not aggregate their diverse factual circumstances by giving all of their cases a common label. *See id.* at 728. Noting that the plaintiffs’ claims “differ[ed] widely, and . . . are interspersed with nondiscriminatory evidence and innocuous explanations,” the court found that while each plaintiff certainly had standing to bring an individual lawsuit, they could not gather together their very different fact patterns into a common claim by “[t]he bald allegation that [they] . . . are unified by a ‘common policy’ of gender discrimination.” *Id.* at 729.

Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331 (4th Cir. 1998), is also instructive here. In that case, the Fourth Circuit reversed a class action

judgment in a case brought by a group of franchisees against a franchisor. The plaintiffs complained of such a wide variety of different alleged wrongs that the Fourth Circuit described the class as “no more than ‘a hodgepodge of factually as well as legally different plaintiffs’ that should not have been cobbled together for trial.” *Id.* at 343 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996), *aff’d sub nom. Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)). Although the plaintiffs “portrayed the class at trial as a large, unified group that suffered a uniform, collective injury,” this was an illusion that covered up the differences between the individual plaintiffs and the circumstances in which they were allegedly injured. *Id.* at 345. The franchisees’ contractual rights and obligations differed, and the defendant had made different kinds of representations to different plaintiffs, who each relied on those representations to a different degree, and were damaged in different ways. Thus, the court concluded, the plaintiffs “do not ‘advance the same factual and legal arguments’ as the class they are supposed to represent. And frankly, in these circumstances, we doubt that any set of claims is common to or typical of this class.” *Id.* at 343. To group such dissimilar facts together under a common label deprived the defendants of their due process right to oppose specific allegations. The company was being unfairly “forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation.” *Id.* at 345.

Similar reasons counseled the district court to reject class certification in *In re Paxil Litig.*, 212 F.R.D. 539 (C.D. Cal. 2003), in which the plaintiffs brought a variety of complaints against a pharmaceutical manufacturer. The divergent nature of the injuries and symptoms that the plaintiffs complained of defeated their claim that common issues predominated. *See id.* at 548. Likewise, such injuries necessarily depended on individual physiologies, meaning that causation factors would also require individualized determinations. *See id.* at 551. In short, “[t]he putative plaintiffs are many and their circumstances, varied [T]he . . . injuries allegedly suffered by the plaintiffs vary from individual to individual . . . [and] are not described with specificity.” *Id.* at 548. Although the plaintiffs sought to group their injuries together under the label “negative psychological impacts,” this could not unify such a diverse class of plaintiffs and their claims into a single class action. *Id.* *Accord, Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988) (“[I]t became the responsibility of each individual plaintiff to show that his or her specific injuries or damages were proximately caused by [the defendant] We cannot emphasize this point strongly enough because generalized proofs will not suffice to prove individual damages.”); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 316 (5th Cir. 1998) (rejecting “group, rather than individual, determination of cause in a damage suit.”).

Precisely the same can be said of the diverse complaints grouped together in this litigation. The named Plaintiffs allege diverse factual circumstances, grouped together under a general label just as did the plaintiffs in *Broussard*. Although the class purports to be a unified group that suffered a collective injury, they are in fact an aggregate of discrete claimants who assert that they were discriminated against in various ways by Wal-Mart personnel across the country; they do not advance the same factual arguments, but present an agglomeration of complaints against each of which Wal-Mart should have the right to defend itself.¹ As the *Broussard* court warned, “courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff’s individual action would be.” 155 F.3d at 345.

¹ Other circuits have disagreed with the *per se* rule applied in *Broussard* by which the Fourth Circuit declared that the presence of facts requiring individualized defenses necessarily rendered class certification improper. *See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 n.4 (1st Cir. 2000); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002), *cert. denied sub nom. Gaylord Container Corp. v. Garrett Paper, Inc.*, 538 U.S. 977 (2003). Yet those cases did not disagree the *Broussard* court’s conclusion that a diversity of alleged harms cannot be aggregated into a class action by simply being given a common label. Indeed the *Mowbray* court made a point of noting that it agreed with the outcome of the *Broussard* decision. *See* 208 F.3d at 296 n.4.

B. The Purposes of the Class Action Procedure Are Not Served by Certification Here

The class action lawsuit was created to allow a large group of individuals who have each suffered from *the same injury* by the same defendant to group their claims together in a way that makes litigation economically efficient. See Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 477-78 (“[T]he theory of class actions is to take a weak signal and to amplify it by aggregating small claims that would not otherwise be pursued individually, lowering the cost per individual suit.”). It does not exist to allow claims of different natures and different degrees to be lumped together under a single label so as to confront a defendant with a wide variety of different allegations, thereby making defense impracticable. *That* kind of aggregation is just distortion, “the chief effect of which is to facilitate a finding of discrimination in cases where it is highly unlikely to have occurred.” *Id.* at 509.

For this reason, other circuits have taken care to avoid certifying discrimination cases in which a large class of plaintiffs allege a variety of discriminatory actions. In *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), for example, the Fifth Circuit rejected class certification when the plaintiffs alleged that they were discriminated against in a wide variety of ways. Similarly to this case, the putative class was very large, and alleged injuries dated over a period of 20 years and spread

over several business locations. *See id.* at 419. The plaintiffs tried to unite their injuries as common by describing them as “the existence of plant-wide racially discriminatory practices or policies,” but the court found that this did not overcome the “overwhelming number of individual-specific issues in this case.” *Id.* at 420. Relying on the Eleventh Circuit’s similar decision in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), the court concluded that the goal of efficiency that the class certification procedure was designed to promote would not be served by a lawsuit that “would require ‘distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination.’” *Allison*, 151 F.3d at 420 (quoting *Jackson*, 130 F.3d at 1006).

As in *Allison* and *Jackson*, resolution of this case would require the court to inquire not only into whether Wal-Mart had a policy of deference to the promotion and payroll decisions of local managers, but also whether the women denied promotions were qualified for them; whether they had such nonquantifiable qualities of leadership, friendliness, and expertise required for a management position; whether other, more qualified candidates were available, et cetera. *Cf. Jackson*, 130 F.3d at 1006. Certification here would not serve the purposes of class action litigation. Class actions are supposed to compound a multiplicity of substantially identical claims into a single case. But here, certification would require an inefficient “resolution of . . . highly case-specific factual issues.” *Id.*

C. Statistical Sampling Mechanisms Cannot Overcome the Inherent Problems of Certifying This Class

In denying rehearing in this case, the panel dismissed concerns with such a diverse class of plaintiffs by pointing to *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996), as providing a mechanism whereby the case might be effectively managed. In *Hilao*, the court upheld the use of a statistical model to award compensatory damages to victims of the regime of Philippine dictator Ferdinand Marcos. The district court allowed a special master to depose 137 randomly selected members of a class of 9,541 plaintiffs. This master then determined the awards this group should receive, and extrapolated from those figures to recommend awards for the remaining 9,404 plaintiffs. In upholding this “unorthodox” procedure, *id.* at 786, Judges Fletcher and Pregerson acknowledged that it raised “serious questions” about due process, *id.* at 785, but found that the “extraordinarily unusual nature of this case” justified the use of statistical methods. *Id.* at 786.

Judge Rymer dissented, concluding that “[e]ven in the context of a class action, individual causation and individual damages must still be proved individually.” *Id.* at 788. This is correct. The Due Process Clause requires that defendants have an opportunity to present evidence to defend themselves against particular allegations. As the Second Circuit recently explained, plaintiffs cannot employ a procedural

mechanism “to mask the prevalence of individual issues,” because to do so “is an impermissible affront to defendants’ due process rights.” *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008). This is consistent with the due process concerns expressed by the Third Circuit in *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001): “[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.” *See also Arch v. Am. Tobacco Co., Inc.*, 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997) (statistical sampling violates due process because defendants cannot defend themselves against individualized allegations).

Statistical extrapolations simply cannot substitute for the individual weighing of the merits of specific allegations. Statistics is a helpful and precise tool in mathematics, but it relies on certain assumptions about the fungibility of cases and regularities between categories of data points that have no parallel in law, where a plaintiff is required to prove each element of her case against each defendant. *See* Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts*, 73 Iowa L. Rev. 1001, 1052 (1988) (“An abstract *ex ante* causal probability associated with some possibly applicable causal generalization is not evidence of what actually happened on the particular occasion.”). For example, the presumption of innocence in law has no counterpart in statistics. The Constitution entitles defendants to confront their

accusers and to a judicial determination of their own individual guilt or innocence. Criminal defendants could not be subjected to imputed guilt based on probabilities drawn from statistical patterns of guilt or innocence established in other cases or in hypothetical cases. The same is true of civil defendants. As the Maine Supreme Court noted over a century ago,

[q]uantitative probability . . . is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of the dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise.

Day v. Boston & M.R.R., 52 A. 771, 774 (Me. 1902). In addition, all statistical analysis contains a margin of error by which it is necessarily overinclusive or underinclusive. Making a defendant liable on such a basis necessarily conflicts with the right of all persons not to be held liable for wrongs they did not commit.

In certifying this class, the district court shrugged off problems with disparate factual circumstances and particularized defenses by saying that “the class is not required to prove that each member suffered discrimination.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 174 (N.D. Cal. 2004). It cited for this proposition *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977). But *Teamsters* does not stand for the proposition that plaintiffs in a class action may collect together a

variety of different allegedly discriminatory factual scenarios, label them all as “discrimination,” and thereby avoid the need to prove individual allegations, or deprive defendants of the opportunity to defend against particular claims. Indeed, the Supreme Court subsequently clarified that “the ‘ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.’” *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 668 (1989) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). Statistical methods such as employed in *Teamsters* apply “only when an employer has instituted a specific procedure.” *EEOC v. Fed. Reserve Bank of Richmond*, 698 F.2d 633, 639 (4th Cir. 1983), *rev’d on other grounds sub nom. Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984).

Thus while statistical models may contribute to the plaintiffs’ claim that discrimination is at work, the plaintiffs must still demonstrate that “the application of a specific or particular employment practice . . . has created the disparate impact under attack,” and must still prove causation—an individualized and particular inquiry. *Wards Cove*, 490 U.S. at 657. To establish liability, the class *is required* to prove that each member of the class suffered, *i.e.*, was caused an injury by the Defendant’s discriminatory acts.

Indeed, the Supreme Court recently reiterated that the Due Process Clause requires a court to focus on the liability of particular defendants to particular

plaintiffs, and does not allow a court to base its decisions on wrongs allegedly done to others. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). See also Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After Philip Morris v. Williams*, 2 Charleston L. Rev. 433, 450 (2008) (“[W]hile statistical sampling may provide more detailed evidence of harm to others for purposes of the reprehensibility analysis, incorporating that information may ultimately be more prejudicial than probative to a jury likely to mistakenly infer they can punish for harm to others.”). And in *Summers v. Earth Island Inst.*, No. 07-463, 2009 WL 509325 (U.S. Mar. 3, 2009), the Court rejected the use of statistical probabilities in establishing harm for purposes of Article III standing. The Court emphasized that the federal judiciary can resolve only *actual* disputes between *actual* persons, and that substituting statistical probabilities for a showing of real injuries would “make a mockery of our prior cases.” *Id.* at *7. The possibility or even “probabilistic” likelihood that an individual has been injured in a concrete and particularized way “does not suffice” to show an actual injury. *Id.* at *8.

Even if *Hilao* was correct, it is hardly applicable to this case. The *Hilao* decision was rendered after a judgment that the Marcos estate was liable for atrocious and brutal crimes against the people of the Philippines. There was no serious doubt that the Marcos regime was a brutal dictatorship guilty of torture, imprisonment, censorship, and routine violations of the human rights of life, liberty, and property.

Nor was there any doubt that the estate's liability for these crimes would exceed the estate's assets. 103 F.3d at 786. The Marcos estate had waived its right to challenge the procedures employed in that case. *Id.* at 784 n.11. Most importantly, the court found that it would be "wasteful" to require some 10,000 separate trials, given "[t]he similarity in the injuries suffered by many of the class members." *Id.* at 786.

Hilao therefore differs radically from this case. Wal-Mart has not been found liable for any of the allegations at this stage—much less allegations that rise to anything like the severity of the allegations against the Marcos estate. Nor can Wal-Mart's liability be taken for granted as could Marcos' liability. Finally, the injuries alleged in this case are not so similar as to render separate fact-finding unnecessary or wasteful. This case simply does not parallel the "extraordinarily unusual" circumstances presented in *Hilao*.

II

FEDERAL COURTS ARE NOT THE PROPER FORUM FOR REDRESSING BROAD SOCIAL JUSTICE CLAIMS OR DISPUTES BETWEEN SOCIAL CLASSES

As the Third Circuit observed when decertifying an improper class, "[e]very decade presents a few great cases that force the judicial system to choose between forging a solution to a major social problem on the one hand, and preserving its institutional values on the other. This is such a case." *Georgine*, 83 F.3d at 617. This, too, is such a case. The Plaintiffs here claim that alleged discrimination results,

not from any actual discriminatory policy by Wal-Mart, but from the uncoordinated decisions of Wal-Mart managers who purportedly have too much discretion. Given the breadth of this allegation, the Plaintiffs' complaint is better seen not as a particular dispute between individuals, but as a general complaint about the disparities resulting from millions of negotiations between Wal-Mart and its employees. The Plaintiffs are essentially arguing that women are treated unfairly by Wal-Mart, not because of any specific action by Wal-Mart, but because an enormous number of individual hiring, promotion, and payroll decisions have resulted in a statistical inequality between men and women. Yet such disparities are (a) not proof of any unjust act by Wal-Mart, and (b) are too general to qualify as a case or controversy between persons over which courts have any jurisdiction.

A. Unequal Results from Free Transactions Are Not Unjust

In *Teamsters*, the Supreme Court asserted that "it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community." 431 U.S. at 339 n.20. This assertion was not only sociologically naive, but also likely to lead to a mistaken assumption about justice between parties who are free to negotiate between themselves. First, the assumption is naive because it is not true that nondiscriminatory practices will result in a workforce that reflects the general public. Many social, cultural, historical, educational, and economic factors

influence the decisions of individuals and businesses with regard to employment. Many women choose to remove themselves from the workforce for significant amounts of time to devote themselves to raising children, which means men tend to have more seniority and thus higher wages and better access to promotions. *See, e.g.,* Ellen Frankel Paul, *Equity and Gender* 49 (1989). Also, many women in the workforce are less interested in higher-level responsibilities than men; research in the mid-1990s found that only 14% of women aspired to become their company's CEO, while 46% of men did. W. Michael Cox & Richard Alm, *Myths of Rich and Poor: Why We're Better Off Than We Think* 81 (1999). As Justice O'Connor wrote,

[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (plurality opinion) (citation omitted).

Statistical outcomes can be misleading in a more abstract way, also. Although it is often assumed that inequalities of result are evidence of injustice, unequal outcomes of noncoercive exchanges between individuals cannot be characterized as unjust. Injustice is the result of unjust actions, but where no injustice intrudes in a series of transactions, the outcome of those transactions, even if unequal, must be

just. See Anthony de Jasay, *Justice and Its Surroundings* 142-69 (2002). Philosopher Robert Nozick put this point in a famous analogy: if everyone in a city were made exactly equal in monetary terms on one day, and the next day half of the people chose to pay a dollar to see Wilt Chamberlain play basketball, Chamberlain would end up with far more money than any one of them, and yet no person was subjected to any unjust act; the resulting inequality cannot be described as “unjust.” Robert Nozick, *Anarchy, State, and Utopia* 160-64 (1974). Quite to the contrary, using coercion against individuals who have chosen consciously to engage in trade—to take Chamberlain’s earnings away from him, in that example—would be to commit an injustice against an innocent person. See de Jasay, *supra*, at 157 (“Unless it can be successfully argued that the involuntary, coerced obligors are in fact responsible for the basic needs of others being unmet . . . it is an injustice to coerce them to provide redress and serve these putative rights.”).

In the context of this case, the mere statistical fact that Wal-Mart employs fewer women than men in management positions cannot suffice to demonstrate the existence of any unjust act. This is not only because there may be any number of nondiscriminatory explanations for this disparity, but also because the noncoerced choices of individual managers and employees with regard to their pay and promotions are the product of their own cost-benefit analyses in the same way as the

audience at Nozick's hypothetical basketball game. Those choices may lead to disparate results, but those results are not indicative of any injustice.

There is another reason that the Court should reject the proposition that statistical imbalances are proof of systematic injustice by Wal-Mart. As Nobel laureate Friedrich Hayek explained, the term "social justice" is actually a meaningless term. *See* 2 Friedrich A. Hayek, *Law, Legislation, and Liberty: The Mirage of Social Justice* (1976). First, justice can apply only to the acts of individuals, and not to the results of their just actions, which will always be unequal. *See id.* at 70. Second, rewards can only arise through exchange with particular people, so that it cannot be said that a person's activities have a "value to society" as a whole." *See id.* at 75. To speak of a person getting what she "deserves" from society is therefore meaningless, since a person is "due" only what she has bargained for and freely exchanged with others. In addition, while "social justice" is often used as a synonym for equality, it fails to specify the relevant category of equality, and making people equal in one way often makes them unequal in other ways. *See id.* at 81-82. Most of all, imposing economic equality requires the state to deprive innocent persons of their rights, thus imposing an injustice on them. *See id.* at 82.

It is sometimes alleged that the outcomes of just transactions result in injustice because of historical deprivations or lack of opportunities given to women or other minority groups in the past. But this assertion overlooks the infinitely complicated

web of historical and sociological deprivations against any and all groups—deprivations that cannot be practically remedied at this date. Such an argument also establishes no principled limit on the degree or nature of intervention by the government in rearranging relationships to “remedy” vaguely understood past injustices. At no point can such a remedy be completed; redistribution will inevitably be followed by new inequalities, which will be subjected to another round of rearrangements in the name of social justice, and so on. *See de Jasay, supra*, at 202-03 (“[T]he desired end-result must be *continuously enforced*, and as one unjust head is chopped off, two grow in its stead.”).

For these reasons, the Supreme Court in *Wards Cove* severely narrowed the use of statistical disparities referred to in *Teamsters*. It noted that there are many “‘innocent causes that may lead to statistical imbalances in the composition of their work forces.’” 490 U.S. at 657 (quoting *Watson*, 487 U.S. at 992). The *Wards Cove* case parallels this one in that the plaintiffs “alleged that several ‘objective’ employment practices . . . as well as the use of ‘subjective decision making’ . . . have had a disparate impact on nonwhites.” *Id.* But the Court found that “even if on remand respondents can show that nonwhites are underrepresented in the at-issue jobs . . . this alone will not suffice to make out a prima facie case of disparate impact,” because the plaintiffs must also show “that the disparity they complain of is *the result of one or more of the employment practices . . . specifically showing that*

each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.” *Id.* (emphasis added). Thus plaintiffs in a discrimination suit may not avoid the need to prove that employers have committed specific unjust acts that have harmed them in specific ways.

What’s more, statistical evidence shows that alleged imbalances between men and women in the workforce are largely a thing of the past. The U.S. Department of Labor reports that women account for 51% “of all workers in the high-paying management, professional, and related occupations,” outnumbering men in management roles in human resources, finance, medical and health services, and other occupations.² The Bureau of Labor Statistics reports that women make up 50.6% of all management, professional, and related occupations. The rates of men and women differ depending on the industry: only 8.1% of managers in the construction industry are female, for instance, but women account for 64.1% of education administrators and 70.3% of human resources managers. And although women account for 42.6% of managers in retail sales, they account for 73.4% of managers in office and administrative support work.³ Similar statistics show that women outnumber men in

² U.S. Dep’t of Labor, Women’s Bureau, *Quick Stats 2007*, available at <http://www.dol.gov/wb/stats/main.htm> (last visited Mar. 3, 2009).

³ U.S. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* (Dec. 2008), Table 11: Employed Persons by Detailed Occupation and Sex, 2007 Annual Averages, available at <http://www.bls.gov/cps/wlf-table11-2008.pdf> (last visited Mar. 3, 2009).

obtaining higher education, as well. Women earned 58% of all bachelor's degrees, and 60% of master's degrees in 2006. They particularly dominate in medicine and psychology, where women earned more than 70% of all doctoral degrees.⁴ Thus while disparities between men and women do persist, it is simply unrealistic to believe that these disparities are the result of historical handicaps or systematic lack of opportunity. These disparities are not evidence of injustice but of different choices by diverse people pursuing different goals.

The Plaintiffs in this case do not allege that they were subject to particular unjust acts by Wal-Mart, but rather that Wal-Mart allows employers discretion to make payroll and promotion decisions, and that this exposed them to the risk of being treated unfairly. They point to statistical disparities in the number of women managers at Wal-Mart, but these disparities cannot establish either as a legal or philosophical matter that Wal-Mart has acted unjustly. The allegations here are so general that the complaint is better seen as a critique of Wal-Mart in "social justice" terms. But that critique cannot translate into actual claims of injustice or allegations of illegality, and finds no basis in broader social trends and statistics. If the Plaintiffs wish to pursue individual claims of actual discrimination by Wal-Mart, they should

⁴ Nat'l Ctr. for Educ. Statistics, *Student Effort and Educational Process, Degrees Earned By Women*, available at <http://nces.ed.gov/programs/coe/2008/section3/indicator27.asp> (last visited Mar. 3, 2009).

have that opportunity; but they may not use statistical imbalances to set forth a system-wide attack on Wal-Mart's operations. *See further* John Monahan, et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 Va. L. Rev. 1715, 1719 (2008) (creators of statistical method used by the district court in this case explaining why that method was misused in *Dukes* and "exceeded the limitations . . . [of] both the original and revised proposal of what constitutes 'social framework' evidence").

B. General Socio-Economic Complaints Against Wal-Mart Are Not Subject to Judicial Resolution

Courts have a limited function in our tripartite government, particularly when it comes to effecting social change through the imperfect, party-based vehicle of litigation. Plaintiffs who have suffered a specific injury are right to invoke the court's jurisdiction over their claims against the particular defendant who caused the injury. But plaintiffs whose claims are based on socio-economic patterns and a desire to reshape society should find no traction in Article III courts. These are matters to be addressed, if at all, by the Legislature. Legislatures are more able to hear from and to balance the interests of, diverse groups whose interests might be overlooked in a judicial setting. Moreover, the voters can check a Legislature that sets its priorities wrongly, a power they do not have over courts.

Legislatures may choose to prioritize social concerns in light of budgetary constraints and the urgency of resolution. For example, in *Barcume v. City of Flint*, 638 F. Supp. 1230 (E.D. Mich. 1986), the City of Flint chose to implement an affirmative action program in its firefighter promotions for minorities, but not for women. When the women sued, the court determined that “Flint was not constitutionally obligated to deal with every problem concurrently and with equal vigor nor was it obligated to remedy every aspect of the problem. Clearly, Flint had the right to balance the constraints of limited resources against the evils which needed to be corrected.” *Id.* at 1235. The court explicitly noted that allowing the women to challenge the racial affirmative action program without offering proof of discriminatory purpose “would require the Court to engage in the social and political analysis necessary to decide which group is entitled to participate in the [program]. This would essentially require the Court to engage in social engineering—a task which does not lie within the judicial competence.” *Id.* at 1236. Similarly, in *Schulz v. Silver*, 212 A.D.2d 293 (N.Y. App. Div. 1995), *app. dismissed*, 664 N.E.2d 506 (N.Y. 1996), the court refused to issue a writ ordering the Legislature to act upon the Governor’s proposed budget because “[i]n approving or disapproving the Governor’s proposed expenditures, the Legislature is faced with the ordering of socioeconomic priorities which clearly are matters of discretionary judgment constituting a function

of the political process and, as such, are not the subject of judicial review.”
212 A.D.2d at 296.

As noted above, the allegations in this case do not specify any particular “wrong” except for Wal-Mart’s deference to the decisions of on-the-spot managers in human resources matters, and the claimed existence of a wage gap and a glass ceiling. To the extent these labels have meaning beyond political slogans, they do not provide the Court with a basis for certifying a class to remedy these amorphous injuries. This Court should follow the example of the Seventh Circuit in *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 246 F.3d 1073, 1076 (7th Cir. 2001). In that case, parents of minority students sought continued federal court control over the school district to remedy alleged vestiges of discrimination. But as the court explained,

[t]he reality is that until minority students achieve parity of educational achievement with the white students in the Rockford public schools, the plaintiffs will contend that the minority students are victims of the unlawful discrimination of an earlier period in Rockford’s history. Yet it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents’ education and employment, family size The board has no legal duty to remove those vestiges of societal discrimination for which it is not responsible . . . [and] no duty that a federal court can enforce to help those students catch up. It may have a moral duty; it has no federal constitutional duty.

Id. The same is true in this case. Allegations of specific discriminatory acts by particular plaintiffs are appropriate for judicial resolution in discrete lawsuits. But

large-scale class resolution of social justice concerns is not an appropriate role for the federal courts.

CONCLUSION

The decision of the district court should be *reversed*.

DATED: March 5, 2009.

Respectfully submitted,

DEBORAH J. LA FETRA
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By s/ Timothy Sandefur
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FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBERS 04-16688 and 04-16720

Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: **(check appropriate option(s))**

__ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32.1, the attached opening/answering/reply/cross-appeal brief is

- Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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✓ 4. *Amicus Briefs*

- ✓ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

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DATED: March 5, 2009.

s/ Timothy Sandefur
TIMOTHY SANDEFUR

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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