

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WAL-MART STORES, INC., :

4 Petitioner : No. 10-277

5 v. :

6 BETTY DUKES, ET AL., :

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8 Washington, D.C.

9 Tuesday, March 29, 2011

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:19 a.m.

14 APPEARANCES:

15 THEODORE J. BOUTROUS, JR., ESQ., Los Angeles,
16 California; on behalf of Petitioner.

17 JOSEPH M. SELLERS, ESQ., Washington, D.C.; on behalf of
18 Respondents.

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1 P R O C E E D I N G S

2 (10:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-277, Wal-Mart Stores v.
5 Dukes.

6 Mr. Boutrous.

7 ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,
8 ON BEHALF OF THE PETITIONER

9 MR. BOUTROUS: Mr. Chief Justice, and may it
10 please the Court:

11 The mandatory nationwide class in this case
12 was improperly certified for two fundamental reasons.
13 First, plaintiffs failed to satisfy Rule 23(a)'s
14 cohesion requirements as reflected in the commonality,
15 typicality, and adequacy requirements of the rule.
16 Second, plaintiffs' highly individualized claims for
17 monetary relief failed to satisfy Rule 23(b)(2)'s
18 requirements for certification of a mandatory
19 non-opt-out class.

20 Regarding Rule 23(a), because the
21 plaintiffs' claims in this case hinge on the delegation
22 of discretion to individual managers throughout the
23 country, they cannot meet the cohesion requirements that
24 are reflected in -- in Rule 23(a). The delegation of
25 discretion in some ways is the opposite of cohesive

1 claims that are common to everyone in the class. The
2 common policies that the plaintiffs point to are either
3 neutral and not argued to be discriminatory or they are
4 affirmatively nondiscriminatory. The company has a very
5 strong policy against discrimination and in favor of
6 diversity.

7 CHIEF JUSTICE ROBERTS: I suppose if
8 corporate headquarters had learned that the subjective
9 decisionmaking or the delegation of decisionmaking to
10 the field was resulting in several discriminatory
11 practices or a pattern of discrimination -- in other
12 words, the decentralized process was leading to
13 discrimination -- then I suppose the company -- that
14 that could be attributed to the policy adopted by -- at
15 headquarters?

16 MR. BOUTROUS: No, Your Honor. I think that
17 in this situation, if there was a pattern, for example,
18 at a particular store where the decisionmaking unit --

19 CHIEF JUSTICE ROBERTS: No, I'm talking
20 about -- so, they've got thousands of stores, and, you
21 know, every week they get a report from another store
22 saying that, you know, there's an allegation of gender
23 discrimination. At some point, can't they conclude that
24 it is their policy of decentralizing decisionmaking that
25 is causing or permitting that discrimination to take

1 place?

2 MR. BOUTROUS: That -- I think that would be
3 an inquiry, Your Honor. I don't think it would rise to
4 a pattern or practice or a common policy that affects
5 everyone in the same way. Certainly, companies do look
6 at the -- the situation throughout the company and seek
7 to root out discrimination, but it would take more than
8 some reports, especially in -- in a company that has so
9 many stores and so many units.

10 And here, the plaintiffs' claims simply
11 aren't typical. If the three named plaintiffs stand
12 before the court, they are supposed to represent 500,000
13 or a million or more people and stand in judgment --
14 that's the words the Court used in *Hansberry v. Lee* --
15 to represent all those other people. And the claim is
16 that the individual decisionmakers in those other cases
17 exercised their discretion in a way that was biased, and
18 there's no proof of that.

19 JUSTICE GINSBURG: Did --

20 JUSTICE KENNEDY: The Chief Justice's
21 question reminds me somewhat of our rule in *Monell* under
22 1983: A city is not liable for a -- a constitutional
23 violation unless it has a policy. Would you think that
24 we could use that as an analogue to determine whether or
25 not there is a common question here?

1 MR. BOUTROUS: Yes, Your Honor. I think the
2 analogue is that if a company had a policy, a general
3 policy, of discrimination as opposed to here, where it's
4 a general policy against discrimination, and it was --
5 in the words of the Court in Feeney, saw patterns
6 throughout the company and because of sex, because of
7 gender, continued to allow the patterns to exist, that
8 would raise a different question.

9 JUSTICE KENNEDY: Suppose, following the
10 Monell analogue, there's -- it's a -- there's a showing
11 of deliberate indifference to the violation. Would that
12 be a policy?

13 MR. BOUTROUS: Your Honor, I think
14 deliberate indifference raises a different question.
15 Under a disparate treatment claim, again, in Feeney, the
16 test would be, was the company allowing the
17 discrimination to occur because of gender, because it
18 wanted there to be discrimination? There's no evidence
19 of that here.

20 JUSTICE GINSBURG: Is there any
21 responsibility if you -- the numbers are what has been
22 left out so far. The company gets reports month after
23 month showing that women are disproportionately passed
24 over for promotion, and there is a pay gap between men
25 and women doing the same job. It happens not once, but

1 twice. Isn't there some responsibility on the company
2 to say, is gender discrimination at work, and if it is,
3 isn't there an obligation to stop it?

4 MR. BOUTROUS: Your Honor, yes, there is an
5 obligation to ensure -- for a company to do its best to
6 ensure there are not wage gaps and discrimination. But
7 here, for example, if one looks at the aggregated
8 statistics that the plaintiffs have pointed to, it
9 points to a completely different issue. It does not
10 show that there were gender gaps at the stores among
11 comparable people. That's really the fundamental flaw
12 in their case.

13 Their argument is that individual
14 decisionmakers throughout the country were making
15 stereotyped decisions and that that had a common effect,
16 but they just added everything together. They haven't
17 shown a pattern across the map. They've added all the
18 data together and pointed to disparities, some of which
19 mirror some of the -- the statistics that --

20 JUSTICE SOTOMAYOR: Counsel, I thought their
21 expert didn't aggregate them together. He did it
22 regionally, not store by store, as your expert did,
23 number one; and, number two, that he performed, as
24 accepted by the district court, and affirmed by the
25 circuit court, any number of controlled variable

1 comparisons, including job history, job ratings, and
2 other things, and found that the disparity could not be
3 explained on any of the normal variables that one would
4 expect and that the disparity was significantly much
5 higher than the 10 competitors of Wal-Mart and what they
6 were paying their labor force.

7 So, what is speculative about that, number
8 one? And, two, why is that kind of statistical analysis
9 inadequate to show that a policy of some sort exists?

10 MR. BOUTROUS: Justice Sotomayor, first,
11 plaintiffs' expert did a national regression and then
12 simply estimated the regional results. He did not do a
13 regional regression. But even if he had, these
14 statistics go more to the merits. We think we have
15 strong arguments on the merits responding to those
16 statistical arguments --

17 JUSTICE SOTOMAYOR: Well, that begs the
18 legal question, which is -- you're right. Ultimately,
19 you may win and prove to a factfinder that this analysis
20 is fatally flawed, but what the district court concluded
21 was that on the basis of your expert, whom he discounted
22 because your expert was -- was basing analysis on -- on
23 premises that the court found not acceptable, that there
24 was enough here after a rigorous analysis.

25 What's the standard that the court should

1 use in upsetting that factual conclusion?

2 MR. BOUTROUS: Your Honor, the district
3 judge did not discount Wal-Mart's expert. The district
4 court found that it wasn't the stage at which to make a
5 determination between the two. The standard that we
6 think would govern would be the standard that the Second
7 Circuit adopted in the IPO case, which says there needs
8 to be a choice.

9 When you're talking about discretionary
10 decision around the country by different decisionmakers,
11 there has to be some demonstration that there's a common
12 effect throughout the system. Our expert's report and
13 testimony showed that at 90 percent of the stores, there
14 was no pay disparity. And that's the kind of -- and
15 even putting that aside, the plaintiffs needed to come
16 forward with something that showed that there was this
17 miraculous recurrence at every decision across every
18 store of stereotyping, and the evidence simply doesn't
19 show that.

20 The -- the other problem on the -- on the
21 cohesion analysis is that -- again, the typicality
22 inquiry. Each of the plaintiffs have very different
23 stories. One of them was promoted into a managerial
24 position. One was terminated for disciplinary
25 violations. One was promoted and then had a

1 disciplinary problem and then was demoted. In each of
2 these cases, if this were an individual case, they would
3 have to show that they were treated differently than
4 people who were situated just like them, with the same
5 supervisor, the same department, the same situation.

6 JUSTICE ALITO: What do you think is the
7 difference between the standard that the district court
8 was required to apply at the certification stage on the
9 question whether there was a company-wide policy and the
10 -- the standard that would be applied on the merits?

11 MR. BOUTROUS: At the certification stage,
12 Justice Alito, the plaintiffs did not have to prove that
13 there was an actual policy of discrimination and that
14 that was the company's policy, but they at least needed
15 to point to a policy that was common and that linked all
16 of these disparate individuals and disparate locations
17 and different people together. And -- and one -- their
18 argument is that the common policy is giving tens of
19 thousands of individuals discretion to do whatever they
20 want. That is not commonality. It's the opposite.

21 JUSTICE KAGAN: I don't think that's quite
22 fair, Mr. Boutrous. I think their argument was that the
23 common policy was one of complete subjectivity, was one
24 of using factors that allowed gender discrimination to
25 come into all employment decisions. And in Watson, we

1 suggested that that was a policy, a policy of using
2 subjective factors only, when making employment
3 decisions. That's exactly the policy that was alleged
4 here.

5 MR. BOUTROUS: Justice Kagan, they do not
6 argue that it was an entirely subjective process. As
7 the Court suggested in Falcon, entirely subjective
8 would -- would be a different issue. They argue that it
9 was excessive subjectivity and that there were general
10 overarching company standards that exerted control.

11 On page -- I think it's on page 13 of their
12 brief, they say the discretion was unguided. Three
13 pages later they say it was guided by these
14 nondiscriminatory policies. So, it's really an
15 incoherent theory that does not have -- pose the kind of
16 situation you're suggesting.

17 JUSTICE KAGAN: I -- I guess I'm just a
18 little -- a little bit confused as to why excessive
19 subjectivity is not a policy that can be alleged in a
20 Title VII pattern and practice suit or in a Title VII
21 disparate impact suit.

22 MR. BOUTROUS: Your Honor, in Watson, the
23 Court did suggest -- did state and -- and hold that
24 subjective decisionmaking could be challenged in a
25 disparate impact case, but Justice O'Connor's opinion

1 went on to say there needs to be the identification of a
2 specific practice within that policy.

3 As the Court said in Falcon, Title VII does
4 not govern policies; it governs practices. And
5 subjectivity is not a practice if it were a policy. And
6 there was a -- like most companies, Wal-Mart has a
7 combination of objective and subjective standards.
8 Within that, the plaintiffs -- if they had pointed to
9 some particular criteria, people with a great
10 personality, they're going to -- they're -- they're the
11 ones we're going -- we're going to push up, and they --
12 they were trying to tie that to a disparate impact or
13 disparate treatment, that would be --

14 JUSTICE GINSBURG: Mr. Boutrous, there was a
15 case, it was in the '70s, and it was a class action
16 against AT&T for, I think, promotion into middle
17 management. What was at issue there was a part -- a
18 test, part objective, but then in the end, the final
19 step was a so-called total person test, and women
20 disproportionately flunked at that total person.

21 And the idea wasn't at all complicated. It
22 was that most people prefer themselves; and so, a
23 decisionmaker, all other things being equal, would
24 prefer someone that looked like him. And that was
25 found, that total -- the application of that total

1 person concept was found to be a violation of Title VII.

2 This sounds quite similar. I mean, it's not
3 just -- it's not subjective. You have an expert -- I
4 know you have some questions about that expert -- but
5 the expert saying that gender bias can creep into a
6 system like that simply because of the natural
7 phenomenon that people tend to feel comfortable with
8 people like themselves.

9 MR. BOUTROUS: Your Honor, this -- this is
10 not like the total person test, but I think that is a
11 very good example of something that could be a -- a
12 practice inside the -- the overarching policies, and if
13 you had a case where a particular decisionmaking unit
14 applied the total practice test, and you had disparate
15 results in that particular unit, that group of people
16 could -- could -- would have a much stronger case for a
17 class action.

18 But as Your Honor points out, the -- the
19 sociologist here, who is the glue that's supposed to
20 hold this class together, said he couldn't tell if
21 stereotyping was occurring one-half of 1 percent or 95
22 percent or at all.

23 And this is a class action. The question
24 here is whether that we can assume that every
25 decisionmaker acted in the same manner in a way that had

1 in this Court's words the same injury, caused -- the
2 plaintiffs had the same interest and the same injury,
3 that's the way the Court put it in Amchem, by their own
4 expert accepting all of their proof, the answer is no.
5 That assumption is not supported by the record. That's
6 why there's not the kind of cohesion that's necessary to
7 protect the rights of the absent class members and the
8 defendant.

9 The -- the -- the other --

10 JUSTICE KAGAN: Mr. Boutrous, I think that
11 that suggests that the plaintiffs would have to
12 demonstrate discrimination in every individual case, and
13 that's never been the law. All that the plaintiffs have
14 to demonstrate and, especially at this stage in the
15 proceedings, is that there is a practice, a policy of
16 subjectivity that on the whole results in discrimination
17 against women, not that each one of these women in the
18 class were themselves discriminated against.

19 MR. BOUTROUS: That's correct, Your Honor.
20 At the phase one, we're not arguing that a plaintiff
21 would have to come forward and show that every class
22 member was discriminated at that point. Under the
23 Teamsters' analysis, there must be proof of a standard
24 operating procedure of discrimination.

25 Here, it's undisputed that Wal-Mart's

1 policy -- and it wasn't just a written policy; it was
2 implemented and enforced rigorously -- that was
3 antidiscrimination. But, Your Honor, you're correct,
4 that each person doesn't have to come forward in phase
5 one.

6 The big -- the other big problem here is
7 that the district judge said in phase two, under
8 Teamsters, Wal-Mart would not be entitled to put on its
9 individual defenses. Women who thought they had a claim
10 would not be able to come forward if a -- in this
11 process, the paper records suggested they didn't have a
12 claim, and come into court and have their day in court
13 and argue that they should be compensated.

14 The plaintiffs are trying to cut off half of
15 the Teamsters' framework, which is fundamental both to
16 due process and to Title VII because Title VII's section
17 706(g) states very clearly that only victims of
18 discrimination may recover.

19 CHIEF JUSTICE ROBERTS: What -- what happens
20 to the damages claim of an individual woman who is part
21 of this class if that class prevails?

22 MR. BOUTROUS: If the class prevails, then
23 the -- the claim would be resolved in this manner
24 under -- it's very unclear what the District Court had
25 in mind.

1 CHIEF JUSTICE ROBERTS: Would -- would she
2 be eligible for only back pay or compensatory damages as
3 well?

4 MR. BOUTROUS: Yes, Your Honor, she would
5 only be eligible for back pay. The plaintiffs retained
6 their compensatory--

7 CHIEF JUSTICE ROBERTS: I'm sorry. Go
8 ahead.

9 MR. BOUTROUS: -- their compensatory damage
10 claims for themselves but waived those for the class
11 members in order to get a class certified, which I think
12 is a fundamental, crucial violation.

13 CHIEF JUSTICE ROBERTS: All right. But
14 would -- would the -- would the women with a claim for
15 compensatory damages be able to sue that after the class
16 prevails in this case?

17 MR. BOUTROUS: Our view is that she would
18 not be because that would have been part of the core
19 nucleus of facts in the case.

20 CHIEF JUSTICE ROBERTS: Even -- even though
21 she could have not received notice and not had an
22 opportunity to opt out?

23 MR. BOUTROUS: That's the -- that's the
24 problem -- that goes to the problem with this (b)(2)
25 certification, that this case, if it -- if it were going

1 to be certified at all, needed to be looked at under
2 Rule 23(b)(3). Rule 23(b)(3) was -- was created for
3 precisely this sort of circumstance, the growing edge of
4 the law where individualized monetary claims are at
5 stake. The -- the language of Rule 23(b)(2) speaks of
6 injunctive and declaratory relief.

7 JUSTICE SOTOMAYOR: Counsel, would --

8 JUSTICE KAGAN: I thought your position was
9 that this could not be certified under Rule 23(b)(3),
10 either; is that correct?

11 MR. BOUTROUS: Our view is the plaintiffs
12 will -- will not be able to satisfy those -- those
13 provisions, but that's why they brought it under Rule
14 23(b)(2), to circumvent the procedural protections of
15 superiority, predominance, and the like.

16 JUSTICE SOTOMAYOR: Would that bar the
17 (b)(2) class? Meaning if their claim is, as they state
18 it, that they're seeking injunctive and declaratory
19 relief against a discriminatory impact or -- case or a
20 pattern and practice case, wouldn't that have value and
21 wouldn't that value be, standing alone without the
22 damages component, be that the plaintiffs who come in
23 later have a presumption that discrimination affected
24 them and the burden shifts to Wal-Mart to prove that
25 there was a nondiscriminatory reason?

1 MR. BOUTROUS: There certainly could be a
2 benefit from an injunction if -- if the plaintiffs met
3 all the standards. The problem here is that the -- the
4 individualized damage claims, the back pay claims,
5 engulfed and overwhelm the injunctive relief --

6 JUSTICE SOTOMAYOR: Even if they did, why
7 couldn't you separate out the (b)(2) issue from the
8 (b)(3) question of whether monetary damages have enough
9 common facts and law to warrant a certification under
10 (b)(3)?

11 MR. BOUTROUS: Your Honor, some courts have
12 done that, looked at the injunctive relief claims under
13 -- under the (b)(2) standard and the monetary reliefs
14 under a (b)(3) standard. That can raise other
15 complications, especially here the plaintiffs are
16 seeking punitive damages as well, but that's at least a
17 possibility. It would certainly be better than this,
18 shoe-horning these monetary relief claims that are so
19 individualized.

20 JUSTICE SOTOMAYOR: So, would you address
21 the -- address them separately for me, and tell me why a
22 (b)(2) class couldn't exist only on injunctive relief?
23 And if it can, if you're conceding it can, then is your
24 attack merely that the monetary component of this, the
25 back pay -- which, you know, I know the dispute on

1 whether that's equitable relief or compensatory relief
2 or not -- why that just can't be separated out and put
3 into the (b)(3) claim?

4 MR. BOUTROUS: Your Honor, our view is that
5 the injunctive relief claim still has significant
6 problems concerning cohesion, adequacy, typicality,
7 commonality. On the adequacy point, this case includes
8 at least 544 store managers who are alleged to be
9 discriminators and victims. If that's not a conflict
10 under Amchem and the adequacy test in Hansberry v. Lee,
11 I don't know what is. The -- the women who are
12 compelled to be in the class -- they can't opt out,
13 they're current employees, they're former employees,
14 they cut across every position in the country, and
15 there's no demonstration that they're being affected in
16 a common way. So, I think there would still be those
17 commonality, typicality, cohesion problems because of
18 the nature of the plaintiffs' case here, the notion of
19 the common policy being giving -- giving discretion and
20 -- and independent judgment.

21 JUSTICE GINSBURG: I thought that -- correct
22 me if I'm wrong, but I thought that this district judge
23 said that -- that the absent class members would get
24 notice and have an opportunity to -- to opt out. So, a
25 -- a plaintiff, a member of the class who wants to go

1 for compensation instead of just back pay could opt out.

2 MR. BOUTROUS: The district court, Justice
3 Ginsburg, limited that ruling to the punitive damage
4 claim, and the Ninth Circuit made clear it was viewing
5 it that way. It said under its ruling, which sent
6 punitive damages back, that would simplify things
7 because then there wouldn't have to be notice and an
8 opportunity to opt out under back pay. And back pay is
9 monetary relief for individuals. To bind people based
10 on a balancing test under (b)(2) to a judgment to which
11 they were not a party -- in Taylor v. Sturgell, this
12 Court talked about the fundamental rule that an
13 individual is not bound by a judgment to which they're
14 not a party and said we need crisp rules with sharp
15 corners in this area where such a fundamental right is
16 at stake. And that's why we think it needs to be Rule
17 23(b)(3) when individual monetary relief is at stake.

18 JUSTICE SOTOMAYOR: That begs my question.
19 Are you talking about any monetary relief? You're --
20 you're claiming, I'm assuming, that monetary relief
21 includes equitable relief.

22 MR. BOUTROUS: Yes, Your Honor.

23 JUSTICE SOTOMAYOR: The Fifth Circuit has
24 described a test where it doesn't use the predominant
25 question; it uses the incidental test. What's wrong

1 with that test?

2 MR. BOUTROUS: That test is much better than
3 the test that was applied below. The plaintiffs have
4 walked away from the two tests that were applied in the
5 lower court. They have never contended they could meet
6 the incidental damages test. And under the Fifth
7 Circuit's case, the Allison case, only automatic back
8 pay that goes to the group as a whole would qualify for
9 that. Here, this is individualized relief.

10 JUSTICE SOTOMAYOR: I -- that's where I'm
11 going to. Would you accept that incidental test as
12 appropriate to the question of when monetary damages
13 predominate or don't?

14 MR. BOUTROUS: Your Honor, the text of Rule
15 23(b)(2) is very clear. It talks about injunctive and
16 declaratory relief. The only ambiguity that's created
17 is from the advisory committee note, and as this Court
18 said three weeks ago in the Milner case, we don't look
19 to legislative history to try to create ambiguities.
20 The -- the other parts of the advisory committee notes
21 make very clear that the drafters were concerned about
22 the historical antecedents where it was an
23 injunctive-only case to -- of -- to desegregate and the
24 like. I think the drafters of Rule 23(b)(2) would have
25 been shocked if they had learned that this case that

1 involves millions of claims for individualized monetary
2 relief were -- were being sought to be included in a
3 (b)(2) class.

4 That said, Your Honor, the incidental damage
5 test is -- is I think far superior because it's at least
6 clearer and would be closer to a sharp, bright-line
7 rule, which is required in this context.

8 I'd like to go back briefly to the point I
9 made earlier about individual relief and taking away the
10 rights of both Wal-Mart and the absent class members.
11 The procedures that would be used here -- the Ninth
12 Circuit proposed a statistical sampling method. The
13 plaintiffs do not defend that. They do not mention
14 the Hilao case, which was the cornerstone of the -- the
15 Ninth Circuit's ruling, which would allow sort of a
16 prediction about who might have been hurt, how many
17 people might have been hurt, and then a divvying up of
18 -- of moneys based on that.

19 The district court precluded the fundamental
20 Teamsters hearings, which would allow, once a
21 presumption, if one was to arise, of discrimination
22 occurred in a pattern of practice -- would allow the
23 defendant to then show that it didn't discriminate on --
24 on an individual basis, and it would allow the
25 individuals to come in and have their day in court.

1 That violates Title VII. It violates the Rules Enabling
2 Act, and -- and we think it really shows some of the
3 core flaws in this case.

4 CHIEF JUSTICE ROBERTS: What if the class
5 does -- does not prevail; it loses? Does that bar an
6 individual woman at a particular Wal-Mart from bringing
7 these same claims?

8 MR. BOUTROUS: Yes, Your Honor. There's a
9 presumption in -- in the world of class actions --
10 there's two that I think the plaintiffs are -- are
11 relying on. One is that class actions are always good,
12 and the bigger the class action, the better, and that
13 the class will win. None of those presumptions can be
14 counted on. If the plaintiffs lose, and they -- and
15 here their compensatory damages claims, I think, would
16 be gone because the named plaintiffs are asserting them.
17 If they tried to bring a case as pattern or practice or
18 pay or promotion, there would be significant questions
19 of res judicata and collateral estoppel. And it's not
20 fair to anyone to put this all into one big class.

21 JUSTICE KAGAN: But you're not suggesting
22 that they would be precluded on individual
23 discrimination claims, are you?

24 MR. BOUTROUS: No, Your Honor, if they had
25 individual claims that were separate from the nucleus of

1 operative facts here, that might pose a different
2 question.

3 CHIEF JUSTICE ROBERTS: But what if it were
4 the same theory, that the reason this person was able to
5 discriminate was because he had total subjective
6 discretion in his hiring?

7 MR. BOUTROUS: Then I -- then there would be
8 a real problem of collateral estoppel or res judicata,
9 Your Honor.

10 Mr. Chief Justice, I'd like to reserve my
11 remaining time for rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. BOUTROUS: Thank you.

14 CHIEF JUSTICE ROBERTS: Mr. Sellers.

15 ORAL ARGUMENT OF JOSEPH M. SELLERS

16 ON BEHALF OF THE RESPONDENTS

17 MR. SELLERS: Mr. Chief Justice, may it
18 please the Court:

19 This case follows from the -- the Teamsters
20 and Watson models of theories of discrimination, and as
21 a consequence, there is no requirement to have a formal
22 policy of discrimination here. It can be --

23 JUSTICE SOTOMAYOR: What would the
24 injunction look like in this case?

25 MR. SELLERS: The injunction would look like

1 a series of remedial measures that would direct Wal-Mart
2 to provide for detailed criteria by which to make pay
3 and promotion decisions that are job-related in a way
4 that hasn't been true up until now. It would provide
5 for it to hold managers accountable for the decisions
6 they make; it would ensure effective oversight of the --
7 of these pay and promotion decisions in a way that the
8 company had -- while the company did have, by the way,
9 information regularly submitted to it about pay
10 decisions, it took no action, and it did not effectively
11 monitor -- allowed these problems to fester.

12 CHIEF JUSTICE ROBERTS: All right. Is it
13 your position that on this scale subjective
14 decisionmaking processes are necessarily illegal?

15 MR. SELLERS: No, not at all, Mr. Chief
16 Justice.

17 CHIEF JUSTICE ROBERTS: So, if this were --
18 how many stores are we talking about, a thousand stores?

19 MR. SELLERS: Several thousand stores.

20 CHIEF JUSTICE ROBERTS: Several thousand
21 stores. How many examples of abuse of the subjective
22 discrimination delegation need to be shown before you
23 can say that flows from the policy rather than from bad
24 actors? I assume with three -- however many thousands
25 of stores, you're going to have some bad apples.

1 MR. SELLERS: Well, Mr. Chief Justice, we
2 have some examples in the record. As Teamsters --

3 CHIEF JUSTICE ROBERTS: No, I know there are
4 examples. How many do you need to have?

5 MR. SELLERS: I --

6 CHIEF JUSTICE ROBERTS: Surely it won't be
7 -- if somebody sends one letter in saying the guy at
8 this plant -- is -- plant -- this store is
9 discriminating, that can't be enough to support your
10 theory.

11 MR. SELLERS: That's correct. We don't
12 submit that. There is no minimum number that this Court
13 has ever set. Teamsters, as an example in Teamsters,
14 the Court had before it about 40 examples, but
15 significantly they weren't required. In order to
16 establish a pattern and practice of liability -- and we
17 have more than that, of course -- but in order to
18 establish a pattern and practice of liability or at
19 least a prima facie case, Teamsters holds that what you
20 need to do is show that there were disparities
21 sufficiently substantial to create an inference of
22 discrimination with respect to a discrete practice.

23 CHIEF JUSTICE ROBERTS: Is it -- is it true
24 that Wal-Mart's pay disparity across the company was
25 less than the national average?

1 MR. SELLERS: Mr. Chief Justice, the
2 position -- I don't know that that's a fair comparison.
3 The position that Wal-Mart has advanced makes no -- the
4 comparison it makes is with the general population, not
5 with people in retail.

6 Wal-Mart's obligation under Title VII is to
7 ensure that its managers do not make pay decisions
8 because of sex, and the comparison that's relevant is
9 between men and women at Wal-Mart, not the general
10 population that includes people in retail, but includes
11 railroad workers and all kinds of other people. That's
12 not the appropriate comparison.

13 JUSTICE KENNEDY: It's not clear to me:
14 What is the unlawful policy that Wal-Mart has adopted,
15 under your theory of the case?

16 MR. SELLERS: Justice Kennedy, our theory is
17 that Wal-Mart provided to its managers unchecked
18 discretion in the way that this Court's Watson decision
19 addressed that was used to pay women less than men who
20 were doing the same work in the same -- the same
21 facilities at the same time, even though -- though those
22 women had more seniority and higher performance, and
23 provided fewer opportunities for promotion than women
24 because of sex.

25 JUSTICE KENNEDY: It's -- it's hard for me

1 to see that the -- your complaint faces in two
2 directions. Number one, you said this is a culture
3 where Arkansas knows, the headquarters knows, everything
4 that's going on. Then in the next breath, you say,
5 well, now these supervisors have too much discretion.
6 It seems to me there's an inconsistency there, and I'm
7 just not sure what the unlawful policy is.

8 MR. SELLERS: Well, Justice Kennedy, there
9 is no inconsistency any more than it's inconsistent
10 within Wal-Mart's own personnel procedures. The company
11 provides to its managers this discretion, which, by the
12 way, is very discrete. It is not the broad kind of --
13 we're not attacking every facet of the pay and promotion
14 decisions. The District Court found specific features
15 of the pay and promotion process that are totally
16 discretionary. There's no guidance whatsoever about how
17 to make those decisions.

18 But with respect to the discretion, every
19 store, the District Court found, is provided -- managers
20 are provided with the same level of discretion. But the
21 company also has a very strong corporate culture that
22 ensures that managers, not just with respect to the
23 practices we're challenging, but in all respects, what
24 they call the Wal-Mart way, and the purpose of that is
25 to ensure that in these various stores that, contrary to

1 what Wal-Mart argues, that these are wholly independent
2 facilities, that the decisions of the managers will be
3 informed by the values the company provides to these
4 managers in training --

5 JUSTICE KENNEDY: Well, is that disparate
6 treatment?

7 MR. SELLERS: It is disparate treatment. It
8 is a form of disparate treatment because they are making
9 these decisions because of sex, and they -- and they are
10 doing so with -- we have evidence that we think, through
11 the stereotyping evidence we have here, as well as the
12 statistical results --

13 JUSTICE SCALIA: I don't -- I'm getting
14 whipsawed here. On the one hand, you say the problem is
15 that they were utterly subjective, and on the other hand
16 you say there is a -- a strong corporate culture that
17 guides all of this. Well, which is it? It's either the
18 individual supervisors are left on their own, or else
19 there is a strong corporate culture that tells them what
20 to do.

21 MR. SELLERS: Well, Justice Scalia, there is
22 this broad discretion given the managers.

23 JUSTICE SCALIA: Right.

24 MR. SELLERS: But they do not make these
25 decisions in a vacuum. They make the decisions within a

1 company where they are heavily --

2 JUSTICE SCALIA: So, there's no discretion;
3 is that what you're saying?

4 MR. SELLERS: No, I'm not. I'm suggesting
5 they are given this discretion, but they are informed by
6 the company about how to exercise that discretion. So,
7 it's effectively saying --

8 JUSTICE SCALIA: If somebody tells you how
9 to exercise discretion, you don't have discretion.

10 MR. SELLERS: Well, all right. That's
11 another -- it's certainly -- the bottom line is, they
12 didn't, and the results show it. There was consistent
13 disparities in every one of the regions, 41 regions.

14 JUSTICE SCALIA: What do you know about --
15 about the unchallenged fact that the central company had
16 a policy, an announced policy, against sex
17 discrimination, so that it wasn't totally subjective at
18 the managerial level? It was, you make these hiring
19 decisions, but you do not make them on the basis of sex.
20 Wasn't that the central policy of the company?

21 MR. SELLERS: That was a written policy.
22 That was not the policy that was effectively
23 communicated to the managers.

24 JUSTICE SCALIA: Now, how was -- how was
25 that established?

1 MR. SELLERS: Well, what we have, as I said
2 before, is evidence of -- for instance, at the -- at the
3 Sam Walton Institute, where every manager has to be
4 trained before they become a manager, they provide as a
5 question -- a response to a standard question: Why are
6 women so underrepresented, or so few women in
7 management? And the response given was, because men
8 seek advancement, are more aggressive in seeking
9 advancement.

10 Now, that's a typical, stereotypical
11 statement provided to every person going through the
12 management training program, that they then go off and
13 inform -- that informs their decisions when they make --
14 when they have this discretion to make promotions.

15 JUSTICE SCALIA: And that causes them
16 intentionally to discriminate on the basis of sex?

17 MR. SELLERS: That's -- that is --

18 JUSTICE SCALIA: That causes -- how could
19 that possibly cause them to intentionally discriminate
20 on the basis of sex?

21 MR. SELLERS: Well, they -- they have --
22 they have an intent to take sex into account in making
23 their decisions; that is -- that is, they apply a
24 stereotype about that women are less aggressive when it
25 comes to assessing their suitability for promotions.

1 JUSTICE SCALIA: That -- that's just an
2 assessment of why the percentage is different. They
3 differ not only at Wal-Mart, but at -- throughout the
4 industry. To say that that's the explanation is not to
5 tell your people: Don't promote women.

6 MR. SELLERS: Right.

7 JUSTICE SCALIA: If you have an aggressive
8 woman, promote her.

9 MR. SELLERS: I understand that, and there
10 were -- there have been women promoted. But Justice
11 Scalia, first of all, we think that that is -- the
12 questions you are raising are ones that Wal-Mart can
13 raise at trial. The question at this juncture is
14 whether there are -- there are questions common to the
15 class.

16 We've identified what has been recognized as
17 a -- a common policy, that there's no dispute this
18 policy applies throughout the company. And the fact
19 that we, at this juncture, are -- I mean, and we have
20 shown, as we think we have to in order to satisfy
21 commonality, that there are disparities adverse to
22 women. And we have the means to show, through the
23 testimony of Dr. Bielby and other evidence, that we can
24 provide this -- connect these two through --

25 JUSTICE SCALIA: Have you sufficiently

1 shown -- despite the fact of an explicit written central
2 policy of no discrimination against women, do you think
3 you've adequately shown that that policy is a fraud, and
4 that what's really going on is that there is a
5 central -- a central policy that promotes discrimination
6 against women? Do you really think --

7 MR. SELLERS: We -- we have testimony in the
8 record from the vice president of the company that that
9 policy was lip service at the company. We have
10 testimony from -- from the expert in this case --

11 JUSTICE GINSBURG: Isn't this something that
12 would be -- I mean, this -- we're not just talking about
13 getting your foot in the door. We're talking about
14 certifying the class, and you may well lose on every one
15 of these points, but -- but the 23(a) standards, they're
16 not supposed to be very difficult to overcome. It's
17 just a common question of fact --

18 MR. SELLERS: That is --

19 JUSTICE GINSBURG: -- that dominates at
20 that --

21 MR. SELLERS: I'm sorry.

22 JUSTICE GINSBURG: But what seems to me is a
23 very serious problem in this case is: How do you work
24 out the back pay? You say -- we get through the 23(a)
25 threshold. We got class certified under 23(b)(2). And

1 the judge says, there's no way I could possibly try each
2 of these individuals. So, we're going to do it how?
3 How are they going to calculate the back pay?

4 MR. SELLERS: Well, the -- the approach that
5 the District Court endorsed, an approach we recommended,
6 and which has been endorsed by seven circuits over a
7 period of 40 years, is in circumstances here -- like
8 here, which are, admittedly, the exception to the rule,
9 where the company had no standards by which to make
10 promotion and pay decisions, they had kept no records of
11 who -- the reasons for people being promoted and the
12 reasons why they pay people certain amounts, that as a
13 consequence of that, the Albemarle decision and the
14 Teamsters decision make clear that the obligation of the
15 District Court upon finding of liability is to attempt
16 to reconstruct the decisions that would have been made
17 in the absence of discrimination.

18 And the District Court found here -- and we
19 submit it's not clearly erroneous -- that the more
20 reliable method for doing so is to use a formula relying
21 on Wal-Mart's robust database in which it captures
22 performance, seniority, and a host of other job-related
23 variables, factors that bear on pay and promotion
24 decisions, and permits a comparison, a very precise
25 comparison, in a way that having individual hearings

1 relying on hazy memories, post hoc rationalizations,
2 doesn't.

3 CHIEF JUSTICE ROBERTS: What if you had a
4 situation where you had a company with a very clear
5 policy in favor of equal treatment of men and women?
6 You know, the answer to your -- the answer to your
7 question was women don't have as many positions because
8 managers discriminate against them in -- in hiring and
9 in promotion, yet you still have the same subjective
10 delegation system.

11 Could you have a class of women who were
12 harmed by this subjective policy, even though it was
13 clear that the policy of the corporation favored equal
14 employment opportunity?

15 MR. SELLERS: Well, I think if the -- if
16 there were -- as clear as your hypothetical suggest,
17 that the company had a policy of that sort, it would be
18 appropriate for it to seek summary judgment.

19 CHIEF JUSTICE ROBERTS: No, no, no, they
20 still -- well, then you're saying it is not enough that
21 it be a subjective decision. This company has a
22 thousand stores, and sure enough in a thousand stores
23 you're going to be able to find a goodly number who
24 aren't following the company's policy, who are
25 exercising their subjective judgment in a way that

1 violates the right to equal treatment.

2 Couldn't you bring a class of people
3 subjective to discrimination as a result of that
4 subjective policy?

5 MR. SELLERS: You could bring a class case
6 on behalf -- if I understand your hypothetical -- on
7 behalf of women -- I'm sorry -- who were subject to
8 discrimination as a consequence of that unchecked
9 discretion.

10 I -- I want to be clear that we shouldn't
11 lose sight of the fact that we have evidence here of
12 results from this that are, that are really
13 extraordinary.

14 JUSTICE BREYER: Is the -- is the common
15 question of law or fact whether, given the training
16 which central management knew --

17 MR. SELLERS: Right.

18 JUSTICE BREYER: -- given the facts about
19 what people say and how they behave, many of which
20 central management knew, and given the results which
21 central management knew or should have known, should
22 central management under the law have withdrawn some of
23 the subjective discretion in order to stop these
24 results?

25 MR. SELLERS: That -- that is a fair way to

1 put it.

2 JUSTICE BREYER: If that is a fair way to
3 put it, is that a question that every one of the women
4 in this class shares in common?

5 MR. SELLERS: I -- I believe so, Justice
6 Breyer, because they've all been the subject in every
7 one of these stores to this very broad discretion.

8 JUSTICE GINSBURG: The district judge didn't
9 think so. Didn't the district judge say that in
10 awarding back pay some would get a windfall and others
11 would be uncompensated?

12 MR. SELLERS: Actually, Justice Ginsburg,
13 I -- I think the district judge did not find that. What
14 he found was that the formula, and I can assure you the
15 formula we intend -- would tend -- tend to use is a
16 regression analysis that would permit a comparison
17 between each woman and the amount she was paid and
18 similarly situated men, taking into account, as I said,
19 performance and seniority and the like, and you will
20 find there are women that were not underpaid and the
21 formula will show that they should get no back pay.

22 I think that the district court --

23 JUSTICE GINSBURG: I thought -- I thought
24 his point was not simply that some women were not
25 underpaid, but women, if you had an individual case, the

1 employer might show this person could have been fired,
2 disciplined, and wasn't owed any back pay, not that she
3 compares favorably to a -- a male peer, but that she
4 wouldn't have gotten any pay at all.

5 MR. SELLERS: Well, Justice Ginsburg, the
6 kind of factors that are entered into this -- this
7 economic model, performance in particular, should
8 capture whether somebody should have been fired.
9 That -- that is a very important part of the model here
10 that permits people to -- and we found -- the evidence
11 shows that women were, in fact -- had higher performance
12 than men and were nonetheless still underpaid.

13 JUSTICE SCALIA: Can I just say something
14 here? Doesn't your class include both those women who
15 were underpaid and both -- and those women who weren't
16 underpaid?

17 MR. SELLERS: That's --

18 JUSTICE SCALIA: Doesn't your class include
19 both?

20 MR. SELLERS: As every --

21 JUSTICE SCALIA: Is that commonality?

22 MR. SELLERS: As every class does, Justice
23 Scalia. Every class has some portion of its members who
24 are not harmed by the discrimination. As the Teamsters
25 case recognized, what is common about them is they were

1 all subject to the same highly discretionary
2 decisionmaking, even if some of them weren't harmed by
3 it. That still presents a question common to the class.

4 JUSTICE KENNEDY: Well, correct me if I'm
5 wrong, I thought the Teamsters case was an action by the
6 government that wasn't a class action case.

7 MR. SELLERS: That -- that is correct, but
8 it -- it -- it is the paradigm we use for determining
9 what you need to establish a pattern or practice of
10 discrimination.

11 JUSTICE KENNEDY: Pattern or practice,
12 that's correct.

13 Help me, if you can, with this. Let's --
14 let's suppose that experts' testimony, sociologists and
15 so forth, establish that in industry generally and in
16 retail industry generally, women still are discriminated
17 against by a mathematical factor of X. You have a
18 company that has a very specific policy against
19 discrimination, and you look at their -- the way their
20 employees are treatment -- are treated, and you find a
21 disparity by that same mathematical factor X, does that
22 give you a cause of action?

23 MR. SELLERS: If the -- I'm sorry -- if
24 the -- it, the disparity --

25 JUSTICE KENNEDY: The -- the -- the

1 disparity with -- that women are subjected to are the
2 same in the company as they are --

3 MR. SELLERS: Outside the company.

4 JUSTICE KENNEDY: -- society wide, but the
5 company does have a policy against discrimination.

6 MR. SELLERS: Right. I -- I would say that
7 the company's responsibility under Title VII is to
8 ensure its managers do not make pay and promotion
9 decisions because of sex. If the comparison between the
10 pay women receive, for instance, who are similarly
11 situated to men within the company is such that they are
12 underpaid compared to similarly situated men in the
13 company, then -- then the company would have legal
14 responsibility under Title VII, regardless of what
15 happens in the rest of the industry, what happens in the
16 rest of the world.

17 JUSTICE KENNEDY: Would that be true even if
18 you could not show deliberate indifference?

19 MR. SELLERS: Well, I don't know that the --
20 the respect that the standard is deliberate
21 indifference. I think that under this Court's decision
22 in Heller --

23 JUSTICE KENNEDY: Where there's no
24 deliberate indifference and a specific policy
25 prohibiting the discrimination, can you still proceed?

1 MR. SELLERS: I -- well, I would submit you
2 still can proceed. If -- if the policy -- announcing a
3 policy saying don't discriminate were to be effective
4 in -- in immunizing companies against liability in class
5 actions, imagine every company in the country would
6 publish that policy and have free license to go
7 discriminate as much as it wanted to.

8 JUSTICE ALITO: I understand your answer to
9 Justice Kennedy's question to be that this typical
10 company would be in violation of Title VII; is that
11 correct?

12 MR. SELLERS: That's correct.

13 JUSTICE ALITO: That's what the -- and
14 that's what the academic literature on which your theory
15 is based includes; isn't that right?

16 MR. SELLERS: With -- Justice Alito, I think
17 it's not just academic literature, I think it's the
18 precedents from this Court. I think that's the --
19 that's the premise behind Teamsters, that the -- you
20 look to in Hazelwood, which makes very clear that you
21 don't look to populations outside the company in making
22 comparisons.

23 JUSTICE ALITO: So, you have the company
24 that is absolutely typical of the entire American
25 workforce, and let's say every single -- there weren't

1 any variations. Every single company had exactly the
2 same profile. Then you would say every single company
3 is in violation of Title VII?

4 MR. SELLERS: It -- that could very well be
5 the case. If -- if the -- I think that Title VII holds
6 companies responsible for the actions they take with
7 respect to their employees. There certainly are
8 industries, and there were 30 years -- many more 30 or
9 40 years ago when Teamsters was decided, where the
10 entire industry might have had evidence of
11 discrimination. That would not -- there is not a
12 negligence standard under this statute that immunizes
13 companies because they follow the same standards as
14 others.

15 JUSTICE SCALIA: What -- what -- what --
16 what's -- what's your answer assumes is if there is a
17 disparity between the advancement of women and the
18 advancement of men, it can only be attributed to sex
19 discrimination --

20 MR. SELLERS: No.

21 JUSTICE SCALIA: Well, otherwise, how could
22 you say that all -- all of the companies are -- are --
23 are presumptively engaging in sex discrimination?

24 MR. SELLERS: Well, Justice Scalia, I --
25 I -- I want to deal with the -- in this instance, we

1 have -- it's not just any old analysis that we're --
2 that we're using. We have statistical regression
3 analysis that isolates and takes into account the
4 factors such as performance and -- and seniority.

5 JUSTICE SCALIA: See, I wasn't talking about
6 this case. I was talking about your answer to Justice
7 Alito --

8 MR. SELLERS: I'm sorry.

9 JUSTICE SCALIA: -- which said that, you
10 know, it may well be that every industry in the United
11 States is guilty of sex discrimination --

12 MR. SELLERS: Well, I --

13 JUSTICE SCALIA: -- unless there -- you
14 know, there -- there's equality of promotion for men and
15 women.

16 MR. SELLERS: No, I -- I don't -- I don't
17 take that position, Justice Scalia. What I was trying
18 to make clear is that the fact that there are other
19 companies in the same industry where the same problems
20 may arise, which, by the way, wasn't true here, where
21 Wal-Mart was behind the other large retailers, doesn't
22 mean that a company is any less liable for the
23 discrimination practiced in its own workplace.

24 I can't speak for the rest of society, I
25 don't have any reason to think the entire society is

1 engaging in employment discrimination.

2 JUSTICE SOTOMAYOR: Counsel --

3 JUSTICE KAGAN: Mr. Sellers, could I take
4 you back to the remedial question here --

5 MR. SELLER: Yes.

6 JUSTICE KAGAN: -- and when you think it is
7 that individualized hearings are required? You've
8 described a kind of formula that you would use. When --
9 when -- when is the formula approach right and when is
10 the individual hearings approach right?

11 MR. SELLERS: Well, I think it's a -- it's a
12 call that, of course, we leave -- we should leave to the
13 district court in the first instance, but factors that
14 could weigh in the balance would include whether or not
15 you have available the kind of information that we do
16 here from database with which to be able to more
17 reliably construct the -- the kinds of decisions that
18 would have been made in the absence of discrimination.

19 Likewise, there may be companies where they
20 have kept better records or kept any records or have
21 more substantial standards that would permit the
22 reconstruction of those decisions through individual
23 hearings. I don't think this is something that -- I'm
24 not contending that under -- that you could always use a
25 formula-like approach in connection with these cases.

1 This is an extraordinary case with evidence that is --
2 that they have kept really no standards and no records.

3 JUSTICE GINSBURG: I thought, didn't the
4 district judge say because of the numbers we couldn't --
5 couldn't possibly have the hearing in each case on
6 whether the particular woman was owed back pay? They
7 did say something about this.

8 MR. SELLERS: The district -- I'm sorry, the
9 district court did make the comment that the sheer
10 number of class members would make the administration of
11 individual hearings difficult, but the district court
12 went on, very importantly --

13 JUSTICE GINSBURG: I thought he said
14 "impossible."

15 MR. SELLERS: Sorry?

16 JUSTICE GINSBURG: I thought he said more
17 than difficult.

18 MR. SELLERS: Well, he may have said
19 impossible, but the important point is that he went --
20 the district court went ahead and made specific findings
21 about the extent to which the -- the particular record
22 here shows that the use of a formula would be more
23 reliable than individualized hearings.

24 JUSTICE SOTOMAYOR: Counsel, I'm -- I'm a
25 little confused, all right?

1 MR. SELLERS: Okay.

2 JUSTICE SOTOMAYOR: Because you're saying an
3 individualized hearing is impossible, but that's exactly
4 what you're saying you're going to do, only through
5 statistics.

6 MR. SELLERS: That's --

7 JUSTICE SOTOMAYOR: You're going to say
8 through my statistical model, I will be able to identify
9 those women in the class who are deserving of pay
10 raises. What that doesn't answer is when in this
11 process is the defendant going to be given an
12 opportunity to defend against that finding?

13 MR. SELLERS: Right.

14 JUSTICE SOTOMAYOR: Because you're -- are
15 you suggesting that the district court would
16 appropriately bar a defendant where there's no proof of
17 intentionality with respect to not keeping records, that
18 it was intended to stop these women from collecting
19 money, et cetera? When are they going to get a chance?

20 MR. SELLERS: Well --

21 JUSTICE SOTOMAYOR: And if they're going to
22 get a chance, isn't that an individualized hearing?

23 MR. SELLERS: Yes. Effectively Wal-Mart
24 will have ample opportunity through the arguments over
25 which variables which to use. There was a very robust

1 debate below already about which variables to use, that
2 will have a significant impact on whether women are
3 shown to be underpaid or underpromoted compared to men.
4 So, Wal-Mart will have that opportunity, and frankly --

5 JUSTICE SOTOMAYOR: No, no, no. That sounds
6 like you're saying their only opportunity will be on the
7 model.

8 MR. SELLERS: I'm --

9 JUSTICE SOTOMAYOR: They will be precluded
10 from attempting to show any particular evidence that a
11 particular decision was not made?

12 MR. SELLERS: If Wal-Mart -- if Wal-Mart,
13 Justice Sotomayor, if a Wal-Mart comes forward below and
14 it hasn't done so, so far, and is able to persuade the
15 district court that it can, consistent with some kind
16 of -- in a way that's consistent with a reliable
17 determination of who should have been paid what and
18 promoted in the absence of discrimination --

19 JUSTICE SOTOMAYOR: You're not answering me.

20 MR. SELLERS: I'm trying to.

21 JUSTICE SOTOMAYOR: You're -- what you're
22 saying is we're going to preclude them from doing
23 anything but offering a mathematical model --

24 MR. SELLERS: I'm -- I'm --

25 JUSTICE SOTOMAYOR: -- because otherwise

1 it's going to be too hard to have individual hearings.

2 MR. SELLERS: I -- I'm -- let me answer you
3 directly. I'm not saying that. Wal-Mart has an
4 opportunity to make the case that with whatever showing
5 it wishes to make it can reconstruct these decisions
6 more reliably, and in an entirely subjective
7 environment, and if it does, it can offer evidence in
8 certain circumstances; but it hasn't done so; and I
9 don't submit it's going to be able to do so here.

10 JUSTICE SCALIA: This -- this takes
11 evidence, to establish that -- that it's more reliable
12 to have a hearing with evidence on the particular
13 promotion or dismissal of the individual, that that is
14 more reliable than using -- I don't care how admirable a
15 statistical guess you make; I mean is that really a
16 question?

17 MR. SELLERS: I think it is, Justice Scalia,
18 because the --

19 JUSTICE SCALIA: We must have a pretty bad
20 judicial system then.

21 MR. SELLERS: Well, I think it's not the
22 judicial system, it's the recordkeeping of the company,
23 and the standardlessness of its -- of the pay and
24 promotion processes that basically mean 10 years later,
25 these managers are going to be coming forward to

1 speculate about what they did 10 years earlier, with no
2 records to cross-examine them on. That is not the --
3 the model for a reliable adjudication.

4 CHIEF JUSTICE ROBERTS: Counsel --

5 JUSTICE SCALIA: We should use that in jury
6 trials, too, for really old cases. We should just put a
7 statistical model before the jury and say, you know,
8 this stuff is too old; so, we'll --

9 MR. SELLERS: Well --

10 JUSTICE SCALIA: -- we'll do it on the basis
11 of -- is this really due process?

12 MR. SELLERS: I -- Justice Scalia, I submit
13 it is; and the circuits that have been considering this
14 for 40 years have so held. In the narrow set of
15 circumstances that we have here, where there are
16 standardless, recordless decisions at issue.

17 JUSTICE KENNEDY: Well, if it's standardless
18 and -- and recordless, then why is there commonality?
19 It seems to me that what you -- your answer that you
20 just gave really is a -- shows a flaw in your case on
21 commonality.

22 MR. SELLERS: No, Justice Kennedy, the --
23 the standardless and recordless aspect is with respect
24 to trying to reconstruct these decisions years later.
25 As I said before, we have a common policy here; it

1 presents a common question. We've shown evidence that
2 would probably create a prima facie case of pattern or
3 practice under Teamsters, and we think we've satisfied
4 the three components of commonality that we think need
5 to be addressed.

6 JUSTICE GINSBURG: One thing you haven't
7 touched on is to -- to have, first of all the question
8 of whether (b)(2) is limited to injunction and
9 declaratory relief.

10 MR. SELLERS: Yes.

11 JUSTICE GINSBURG: But if -- if you follow
12 the advisory committee's note, then if dollars -- if
13 damages predominates -- if damages predominate, then you
14 can't use (b)(2). You have to make your case under
15 (b)(3); and the one factor here is that about half the
16 class is gone, so -- they're not interested in
17 injunctive relief, but everybody's interested in money.
18 So, why isn't the money -- why do you say that the --
19 that the injunction -- injunctive relief is the thing
20 and the damages are lesser, rather than the other way
21 around?

22 MR. SELLERS: Well --

23 JUSTICE SCALIA: In fact it's more than half
24 the class that's gone, isn't it?

25 MR. SELLERS: Well, I don't -- nobody knows

1 that, because they continue to have more employees
2 adding -- added at the company. So, I wouldn't
3 presume --

4 JUSTICE SCALIA: But nobody's leaving yet.

5 MR. SELLERS: Well, there are people
6 leaving, but the point -- but more importantly, the
7 advisory committee note with respect to Rule 23(b)(2)
8 makes clear that there is a -- that the -- whether or
9 not an action or inaction is taken with respect to the
10 class which is the predicate to (b)(2) certification, it
11 depends on -- it doesn't depend on the number of people
12 who are adversely affected by that action.

13 And so, as a consequence where the former
14 employees are -- that they -- if they would be included
15 in the class under (b)(2) because that -- the question
16 is not on a day-to-day basis who should have been in a
17 position to seek injunctive relief and who's employed
18 and who's not.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. SELLERS: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Boutrous, you
22 have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,

24 ON BEHALF OF THE PETITIONER

25 MR. BOUTROUS: Thank you, Mr. Chief Justice.

1 Let me begin with this question of back pay
2 because Mr. Sellers has made clear under their vision
3 Wal-Mart would never have an opportunity to prove that
4 it didn't discriminate against a woman who was seeking
5 back pay; and the district court did not suggest that it
6 might be difficult, as Mr. Sellers suggested. The
7 district court, as Justice Ginsburg suggested, said that
8 he found it would be impossible; not just because of the
9 number of people, but because of the nature of the
10 claims, that discretionary decisions were being
11 implemented in a way that affected different people
12 differently.

13 The -- the problem here Mr. Sellers says is
14 that the records are not available. Then he says we're
15 going to have a -- a proceeding where the district judge
16 relies only on the records, that he says are inadequate,
17 to allow a reconstruction of the decision. That is not
18 a process known to our jurisprudence. It doesn't
19 comport with due process. It takes away Wal-Mart's
20 rights under Title VII; it injures the rights of the
21 individual women, who the record --

22 JUSTICE SOTOMAYOR: You don't -- you don't
23 seriously contend that if a plaintiff, if a policy were
24 found or practice of discrimination that a woman
25 couldn't come in and say they put X in, I had a longer

1 history at Wal-Mart, I had far superior job ratings, I
2 had no criticisms of my work, and I wasn't promoted.
3 Wouldn't that be enough for her to show that that policy
4 influenced her lack of selection?

5 MR. BOUTROUS: I agree with you, Justice
6 Sotomayor. Except --

7 JUSTICE SOTOMAYOR: And your personal
8 database has all that information. So, why is it
9 impossible to try these cases other than because of
10 their large numbers? That's a different issue.

11 MR. BOUTROUS: Yes, Your Honor, what you've
12 just outlined, we agree that a woman should be able to
13 come in and say that, and she may say well, the records
14 don't show what really happened. I -- I had more
15 experience; I was a much better employee than the guy
16 working next to me. Under the plaintiff's theory in
17 order to get a class here, they have thrown that out the
18 window; that woman would not be able to come and
19 testify. Wal-Mart wouldn't be able to say this person
20 was a terrible employee, this person was a great
21 employee. On the record, it's not impossible to
22 recreate these decisions. The record is filled with
23 declarations from managers who remember very well that
24 Ms. Dukes violated company policy, that Ms. Arana was
25 fired for infractions regarding how she kept her hours.

1 JUSTICE BREYER: If you just spend one
2 second, remember my question. We've got a common issue.
3 Why isn't that enough at least to support a (b)(2)
4 injunctive action?

5 MR. BOUTROUS: Your Honor, the -- the
6 scenario you outline -- there's no dispute about the
7 policies that existed at the time, that there were --

8 JUSTICE BREYER: That sounds like the merits
9 you're getting to. His point, remember, is this is just
10 certification. So, my question is: Assuming they can
11 support it with evidence, why can't they have their
12 (b)(2) class, at least on an injunctive relief?

13 MR. BOUTROUS: Because, Your Honor, the --
14 the common policy is one that affects everyone
15 differently by definition. Therefore, these plaintiffs
16 are not typical, and they are not arguing that everyone
17 was affected the same way by the common policy. Many
18 women thrived. Maybe some men stereotyped or some women
19 stereotyped the other direction. Five hundred and
20 forty-four of the plaintiffs are female store managers.
21 So, it's impossible to make these sweeping
22 generalizations, which, of course, is what stereotyping
23 is supposed to prevent. And so, it's -- there's
24 absolutely no way there can be a fair process here.

25 On the policy question, the policy -- the

1 plaintiffs point to the general policies and the central
2 control, but the one policy they do not want to confront
3 is the policy against discrimination. It was not just a
4 written policy on paper.

5 In fact, the -- there's a declaration at
6 page 1576 of the Joint Appendix that lays out the very
7 aggressive efforts the company --

8 JUSTICE SCALIA: What about the vice
9 president that said it was just window dressing or
10 something like that?

11 MR. BOUTROUS: I'm glad you asked about
12 that, Justice Scalia. Here's what he said. He
13 testified about the diversity goals of the company at
14 the time, the effort to get more women into management,
15 and he said in his view, until the company linked
16 diversity goals to compensation of managers, it would be
17 lip service.

18 He wasn't saying the whole program was lip
19 service. He was one of the advocates for diversity in
20 the company. He wanted to be more aggressive. He said
21 his -- his goals were 20 percent and other people's were
22 10. So -- so, it's completely misleading to suggest he
23 was -- he was denigrating the entire policy.

24 JUSTICE SOTOMAYOR: I think he's just making
25 your -- their point, which is if they started paying

1 women the same as men, they might get more diversity.

2 MR. BOUTROUS: They do pay the same as men,
3 Your Honor. The record reflects that.

4 JUSTICE SOTOMAYOR: Well, that's the whole
5 issue that's in dispute.

6 MR. BOUTROUS: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.

9 (Whereupon, at 11:20 a.m., the case in the
10 above-entitled matter was submitted.)

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