## IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-16688

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

Plaintiffs-Appellees

v.

WAL-MART STORES, INC.,

Defendant-Appellant.

#### On Appeal from the United States District Court For the Northern District of California

BRIEF OF AMICI CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ASIAN AMERICAN JUSTICE CENTER, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, MEXICAN AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUBLIC ADVOCATES, INC.

#### & WOMEN EMPLOYED

IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO PETITION FOR REHEARING

EN BANC

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#### Rule 26.1 Corporate Disclosure Statement

All of the *amici* are tax-exempt nonprofit organizations. None of the *amici* has any corporate parent. None of the *amici* has any stock, and therefore no publicly held company owns 10% or more of the stock of any of the *amici*.

Dated: March 23, 2007

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#### INTEREST OF THE AMICI CURIAE<sup>1</sup>

The civil rights *amici*, whose interests are set forth in their Motion For Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees' Opposition to Petition For Rehearing *En Banc*, are nonprofit organizations dedicated to, among other goals, eradicating workplace discrimination affecting racial and ethnic minorities, women, and other disadvantaged populations. Many of the *amici* were involved in the passage of the Civil Rights Act of 1964, 42 U.S.C. §2000c *et seq.*, and worked closely with Congress in framing the Civil Rights Act of 1991 ("CRA 91"). All of the *amici* represent victims of discrimination who will be adversely affected by any interpretation of Title VII or Fed. R. Civ. P. 23 ("Rule 23") that narrows the avenues available for its constituencies to redress discrimination.

Since the passage of Title VII, the *amici* and their clients have relied on class actions as an indispensable tool for combating unlawful discrimination in our society. Accordingly, the *amici* offer their views on this issue so essential to the constituencies they serve.

<sup>&</sup>lt;sup>1</sup> Through an agreement between plaintiffs' and defense counsel, all parties have consented to the filing of this brief.

#### SUMMARY OF ARGUMENT

The district court and the panel correctly balanced employees' right to work in an environment free of discrimination with the rights of employers to defend against these claims. The class action device, set out in Fed. R. Civ. P. 23, is essential to vindicating civil rights when a pattern or practice of discrimination exists. Title VII provides for this necessary class relief. The Supreme Court established logical and practical rules for proving Title VII class cases in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 n.47 (1977). For decades, courts have consistently applied these rules. The interpretation of Title VII and Rule 23(b) urged by Wal-Mart would effectively eliminate Rule 23(b) as a vehicle for attacking systemic workplace discrimination.

Neither *Teamsters* nor Title VII mandate individualized hearings.

They instead grant courts flexibility to fashion the most complete and appropriate relief possible. This flexibility is necessary for the fair adjudication of Title VII class cases. Further, Title VII does not exempt large employers from civil rights liability; nor does it limit class action certification based on the size of the class.

Under Fed. R. App. P. 35, *en banc* review of a panel decision is "not favored." This case does not merit *en banc* review because it involves a class action certified in accordance with well-established law and is unique only in the number of employees claiming to be impacted by Wal-Mart's discrimination.

#### ARGUMENT

I. THE DISTRICT COURT AND THE PANEL CORRECTLY HELD THAT NEITHER TITLE VII NOR TEAMSTERS REQUIRE INDIVIDUALIZED HEARINGS.

It is settled law that individualized hearings are not required in a pattern or practice class action, but may or may not be used under the federal courts' "broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) [of the Civil Rights Act] eliminate their discriminatory practices and the effects therefrom." *Teamsters*, 431 U.S. at 361 n.47.

Teamsters does not guarantee Wal-Mart individualized hearings in which to respond to each class member's claims. As the panel correctly recognized, *Teamsters* held that "a district court must *usually* conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* at 361 (emphasis added). This language does not *require* any additional proceedings, nor does it specify that additional

proceedings must take the form of individualized hearings.<sup>2</sup> The district court relied upon the discretionary power granted to it under Title VII to "exercise [its] equitable powers to fashion the most complete relief possible." Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). The D.C. Circuit, correctly applying Teamsters, explained that it "should not be read as an unyielding limit on the court's equitable power to fashion effective relief for proven discrimination. The language of Teamsters is not so inflexible." Segar v. Smith, 738 F.2d 1249, 1289-90 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985). These basic principles have remained undisturbed for three decades, and were affirmed by Congress when it passed the Civil Rights Act of 1991, leaving the Teamsters framework intact and untouched.<sup>3</sup> Teamsters sets out the relevant standards for class actions under Title VII. None of the cases cited by Wal-Mart states otherwise.

<sup>&</sup>lt;sup>2</sup> Indeed, recognizing the discretion granted it, the district court left open the possibility of "additional proceedings." For example, in its discussion of the calculation of individual backpay awards, the court states that "Defendant's...data system also can facilitate that calculation of individualized damage awards...[T]he court need not decide at this time exactly how such calculations would be made. Rather, suffice it to say that the Court is confident that a fair and manageable method can be devised." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 185 (N.D. Ca. 2004)

<sup>3</sup> The central purpose of CRA 91 was to reverse a string of Supreme Court decisions, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a case repeatedly cited by Wal-Mart and its *amici*. Under *Price Waterhouse*, an employer who could establish that the same employment decision would have been made in the absence of discrimination was not liable under Title

Wal-Mart's Petition rehashes the same arguments that they made before the district court and the panel. *See* Opp'n to Pet. for Reh'g *En banc* at pp. 14-16 for a detailed response to these tired arguments.

Wal-Mart has clearly scoured federal court jurisprudence and cobbled together a few quotes that, taken out of context, could be read at best to suggest that a defendant should have an opportunity to rebut evidence of an individual's damages, an opportunity that the district court provided here. Wal-Mart has not cited a single case holding that an individualized hearing is required in a class action. The discretion granted to the district court to "fashion the most complete relief possible" is set out by *Teamsters*, *Albemarle*, *Segar*, and subsequent cases spanning 30 years. The district court's certification of the class was a proper use of that discretion, and the panel was correct in affirming its decision.

II. THE PANEL'S RELIANCE ON THIS CIRCUIT'S MOLSKI DECISION RECOGNIZED THE DISCRETION THAT MUST BE GIVEN TRIAL COURTS TO ADDRESS SYSTEMIC DISCRIMINATION IN THE WORKPLACE AND PROVIDES NO BASIS FOR EN BANC REVIEW.

VII. 490 U.S. at 253. CRA 91, and specifically § 2000(m), does nothing to change *Teamsters* and does not provide a right to individualized hearings for each class member.

<sup>&</sup>lt;sup>4</sup> The record contains workforce data that includes evidence about each individual class member. This permits Wal-Mart to rebut individual class members' claims.

In attempting to address this country's sad legacy of discrimination, Congress, through Title VII, and the Supreme Court, through its decisions interpreting Title VII, recognize that trial courts must be given discretion through the class certification process to determine how best to uncover and address systemic discrimination in the workplace. The Supreme Court's decision in *Teamsters* embodies this discretion, adopting no bright line rule on when additional proceedings are required. Indeed, any other cramped interpretation of Title VII would render it ineffective in addressing systemic discrimination.<sup>5</sup>

This Circuit's decision in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), honors Congressional intent and simply allows trial courts the flexibility, based upon the facts before them, to determine how to address alleged systemic discrimination. *Molski* established the standards for Rule 23(b)(2) class certification in cases where the class seeks both injunctive and monetary relief. The *Molski* panel acknowledged that "adoption of a bright-line rule distinguishing between incidental and non-incidental damages for the purposes of determining predominance would nullify the discretion

<sup>&</sup>lt;sup>5</sup> The Ninth Circuit recognizes this by providing an "abuse of discretion" standard for reviewing a district court's decision to certify a class. *See Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001) (review of district court's certification of a class is "very limited").

vested in the district courts through Rule 23." 318 F.3d at 950. The trial judge in this case exercised the discretion given him under Title VII and Rule 23 and the Panel correctly found that there was no abuse of this discretion.

Ignoring the discretion granted to the trial judge and the standard of review, Wal-Mart argues for a standard adopted by another circuit in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). The logic of *Allison* would exclude most claims seeking backpay from Fed. R. Civ. P. 23(b)(2) certification. This logic would turn Rule 23(b)(2) on its head, depriving victims of discrimination of an important form of equitable relief. *See Molski*, 318 F.3d at 950.

Essentially, Wal-Mart argues that in order for a victim of discrimination to take advantage of the relief now available under the Civil Rights Act of 1991, the victim must give up the ability to attack the discrimination through a Rule 23(b)(2) class action. Congress expressed no such intent. The panel correctly rejected this perverse interpretation. *Molski* not only recognizes Title VII's flexibility to address systemic discrimination, but applies Rule 23(b)(2) in the way it was intended. Congress added subsection (b)(2) to Rule 23 to facilitate bringing civil rights actions. *See* Fed. R. Civ. P. 23(b)(2) Advisory Committee Notes. Indeed, the drafters of

Rule 23(b)(2) specifically contemplated using this rule as a device for attacking systemic employment discrimination. *See Domino v. New England Fish Co. (Domino II)*, 727 F.2d 1429, 1443 n.11 (9th Cir. 1984). The Ninth Circuit has had nine years to adopt the *Allison* test and it has declined to do so because the *Molski* standard guarantees district courts the flexibility necessary for the vindication of Title VII.

# HI. WAL-MART AND ITS AMICI'S CONTINUED REFERENCE TO THE NUMBER OF CLASS MEMBERS AND THE POTENTIAL FOR SIZEABLE RELIEF IS NO BASIS FOR EN BANC REVIEW.

Wal-Mart and its *amici* suggest that the size of the class should somehow be a bar to certification or require extra scrutiny of the class certification requirements. Wal-Mart concedes that Rule 23's numerosity requirement is satisfied. Astoundingly, it seems to simultaneously argue that the very numerosity rendering this lawsuit a prime candidate for class action treatment bars certification because the class of employees experiencing discrimination is simply too large.

There is no exemption for large employers in Title VII. Nothing in Rule 23 has been interpreted to prohibit large employment discrimination classes from certification. *See Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977), *aff'd in part sub nom.*, *Califano v. Yamasaki*, 442 U.S. 682 (1979) (rejecting the argument that "a class should not be designated

because it is too large"); see also Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation"). In fact, it would be nonsensical to limit civil rights laws to smaller employers because they discriminate against a comparatively smaller number of employees.

Insulating the larger employers from civil rights liability impedes the goal of Title VII and the purpose of Rule 23.

Moreover, it is disingenuous for Wal-Mart to decry the size of a class consisting of its own employees. Wal-Mart chose to become the largest private employer in the country. It reaps unparalleled financial rewards stemming from its size. It cannot then avoid legal ramifications on that same scale when it violates the civil rights of its employees. The extent of Wal-Mart's liability, if discrimination is proven, is the predictable consequence of Wal-Mart's decision to implement a company-wide policy that discriminates against millions of its workers. Denying certification merely because of its size promotes the absurd result that where there is too much discrimination there will be too little justice.

#### CONCLUSION

En banc review is reserved for those rare situations where a case presents an intra-circuit conflict or a question of exceptional import. Wal-

Mart and its supporting *amici* have not presented such a conflict or question. Rather, they digress into hyperbole about the consequences of applying longstanding Title VII class action procedures to Wal-Mart. These arguments amount to nothing more than a mere disagreement with well-settled Title VII class action precedent. Tellingly, the *amici* almost uniformly ignore the *en banc* standard because they cannot meet it. The Title VII law that has been in place for decades is essential to the vindication of employees' civil rights. The panel properly applied this law and *en banc* review is not warranted.

Dated: March 23, 2007

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#### CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 29 AND 32(a)(7)(B) & CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 29 and 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached *amicus* brief is proportionally spaced, has a typeface of 14 point Times New Roman and according to Microsoft Office XP 2002 contains 2,085 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: March 23, 2007

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