IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-16688 & 04-16720

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

Plaintiffs/Appellees/Cross-Appellants

v.

WAL-MART STORES, INC.,

Defendant/Appellant/Cross-Appellee.

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

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 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 ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUBLIC ADVOCATES, INC., & WOMEN EMPLOYED IN SUPPORT OF PLAINTIFFS/APPELLEES/CROSS-APPELLANTS

MICHAEL FOREMAN*
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW

*COUNSEL OF RECORD

1401 NEW YORK AVENUE N.W.,
SUITE 400
WASHINGTON, D.C. 20005-2124
TELEPHONE: (202) 662-8600
FACSIMILE: (202) 783-0857

ATTORNEY FOR AMICI CURIAE
(Additional Counsel Listed on Inside Cover)

Julie Su
Asian Pacific American Legal Center
1145 Wilshire Blvd, 2nd FL.
Los Angeles, CA 90017
(213) 977-7500

Patricia A. Shiu
The Legal Aid Society -- Employment Law Center
600 Harrison Street, Suite 120
San Francisco, CA 94107
(415) 864-8848

Theodore M. Shaw
Director-Counsel
Norman J. Chachkin
Robert Stroup
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013
(212) 965-2200

Vincent A. Eng
National Asian Pacific American Legal Consortium
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036
(202) 296-2300

Dennis Courtland Hayes
Angela Ciccolo
National Association for the Advancement of Colored People
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(410) 580-5799

John T. Affeldt
Public Advocates, Inc.
131 Steuart Street, Suite 300
San Francisco, CA 94105
(415)431-7430

Melissa Josephs
Women Employed
Director of Equal Opportunity Policy
111 N. Wabash Suite #1300
Chicago, IL 60602
(312) 782-3902

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: January 7, 2005

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Counsel of Record

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INTEREST OF THE *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law, the Asian Pacific American Legal Center, the Legal Aid Society-Employment Law Center, the Mexican American Legal Defense & Educational Fund, the NAACP Legal Defense & Educational Fund, Inc., the National Asian Pacific American Legal Consortium, the National Association for the Advancement of Colored People, Public Advocates, and Women Employed are nonprofit organizations dedicated, among other goals, to eradicating workplace discrimination affecting racial and ethnic minorities, women, individuals with disabilities and other disadvantaged populations. Many of the *amici* were involved in the passage of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* and worked closely with Congress in framing the Civil Rights Act of 1991, 42 U.S.C. § 1981 ("CRA 91"). All of the *amici* represent victims of discrimination who will be adversely affected by any interpretation of the CRA 91, Fed. R. Civ. P. 23 ("Rule 23"), or Title VII of the Civil Rights Act of 1964 that narrows the avenues available for its constituencies to redress discrimination.

Since the passage of the Civil Rights Act of 1964, these *amici* have relied on class actions as an essential tool for combating unlawful discrimination in our

[1] Through an agreement between plaintiff and defense counsel, all parties have consented to the filing of this brief.

society. Class treatment is essential to the vindication of class members' rights where the amounts at stake are too small or the class simply too large to justify individual litigation. The acceptance of the arguments advanced by Wal-Mart concerning the impact of the CRA 91, and its suggestion that it is entitled to an individual hearing for each and every class member under its perverse application of *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) and the CRA 91 would destroy class actions as a tool for attacking one of our society's most insidious evils – unlawful discrimination. Accordingly, the following *amici* offer their views on this issue so essential to the constituencies they serve.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington D.C.

The Asian Pacific American Legal Center of Southern California ("APALC") was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community.

Legal Aid Society-Employment Law Center ("LAS-ELC") based in San Francisco is a non-profit public interest law firm whose mission is to protect,

preserve, and advance the workplace rights of individuals from traditionally under-represented communities.

The Mexican American Legal Defense & Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a national non-profit corporation established under the laws of the State of New York. It was formed to assist African Americans in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to African Americans suffering injustice by reason of racial discrimination.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans by providing legal public policy, advocacy, and community education on discrimination issues.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization whose fundamental missions include promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment.

Public Advocates, Inc. is one of the oldest public interest law firms in the nation. Whose mission has been to challenge the persistent, underlying causes and effects of poverty and discrimination in California and to work for the empowerment of the poor and people of color.

Women Employed is a national membership association of working women based in Chicago which since 1973 has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts.

SUMMARY OF ARGUMENT

For decades class actions have been a vital tool for confronting unlawful discrimination and making the promise of equal opportunity real. Nothing in the legislative history of the CRA 91 suggests that Congress intended to change the procedures by which class members' entitlement to relief is determined. The Act's legislative history is clear that it was to expand remedies available to victims of discrimination. The CRA 91 does not entitle Wal-Mart to an individual hearing for each and every class member.

Courts have consistently applied the procedural structure for litigating Title VII class actions laid out by the Supreme Court in *Teamsters*. The CRA 91 had no impact on *Teamsters*, which continues to govern class action procedures, and

which does not mandate individualized hearings. Once class liability has been established, courts have used the flexibility granted to them by Congress to fashion the most complete and appropriate relief possible. This flexibility has been essential to achieve the twin goals of Title VII to make victims of discrimination whole for losses suffered as a result of discrimination and to deter employers' discriminatory practices.

ARGUMENT

I. WAL-MART DISTORTS NOT ONLY THE SPECIFIC INTENT OF THE MIXED MOTIVE LANGUAGE OF THE CIVIL RIGHTS ACT OF 1991 BUT STANDS ON ITS HEAD THE OVERALL PURPOSE OF THE ACT.

Through the Civil Rights Act of 1991, Congress expanded remedies available to victims of employment discrimination. The CRA 91 was the culmination of congressional efforts to reaffirm the rights of plaintiffs in employment discrimination cases and to overturn several Supreme Court decisions that had narrowed those rights. Wal-Mart inappropriately attempts to use the CRA 91 to diminish the rights afforded to victims of discrimination. Wal-Mart's assertion that the CRA 91's "mixed motive" provision mandates that it be given the opportunity to present an individual defense with respect to each class member misrepresents the language of the statute, ignores the specific intent of the "mixed motive" language, and is inconsistent with the clearly stated congressional purpose of the Act.

A. CRA 91 Was Intended To Enhance Remedies to Victims of Discrimination – Any Interpretation of These Expanded Remedies Which Precludes Class Certification Under Title VII Contravenes This Purpose

The impetus behind the CRA 91 was to enhance the protection afforded to victims of discrimination. The "Findings" section of the Act declares that "legislation is necessary to provide additional protections against unlawful discrimination in employment." *See* Pub. L. No. 102-166, § 2, 105 Stat. 1071 (1991). To that end, Congress sought to "encourage citizens to act as private attorneys general" by arming them with expanded rights such as the availability of compensatory and punitive damages in disparate treatment cases and the right to a jury trial. H.R. Rep. No. 102-40(I) at 65 (1991) *reprinted in* 1991 U.S.C.C.A.N. 549 (hereinafter "H.R. REP. NO. 40 (I)"); 42 U.S.C. § 1981a (1994).

The Supreme Court acknowledged that the Act was intended to expand available remedies, *without* diminishing existing remedies.

> In the Civil Rights Act of 1991, Congress determined that victims of employment discrimination were entitled to *additional* remedies. Congress expressly found that additional remedies under Federal law were needed to deter unlawful harassment and intentional discrimination in the workplace without giving any indication that it wished to curtail previously available remedies.

Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001). (emphasis added) (citations omitted). The Ninth Circuit has also consistently recognized that the CRA 91 was directed at expanding the protection afforded to victims of

discrimination not contracting them. For example, in *E.E.O.C. v. Luce*, the Ninth Circuit identified the CRA 91 as an unambiguously pro-plaintiff piece of legislation stating, "[t]he Civil Rights Act of 1991 . . . was enacted to restore civil rights limited by then-recent Supreme Court decisions and to 'strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence, and adequate compensation for victims of discrimination.'" *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 747 (9th Cir. 2003), *quoting* H.R. Rep. No. 102- 40(II) at 1 (1991), *reprinted in* 1991 U.S.S.C.A.N. 549. Wal-Mart's assertion that the CRA 91, whose very drafters explain its purpose as "fill[ing] certain gaps in Title VII" so as to guarantee "full and adequate protection" from discrimination, actually narrows the avenues for redressing discrimination, lacks merit and undermines the very purpose of the CRA 91. H.R. REP. NO. 40 (II), 102d Cong., 1st Sess. at 2 (1991) *reprinted in* 1991 U.S.C.C.A.N. 549 (hereinafter "H.R. REP. NO. 40 (II)").

Title VII states that, "[i]f the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . the court may [order] . . . equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). Incredibly, Wal-Mart argues that without individualized hearings, plaintiffs are not entitled to any back pay relief, despite the fact that courts have been awarding back

pay in the Title VII class action context for over three decades.[2] *See Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 257 (Former 5th Cir. 1974). Even the cases that Wal-Mart cites do not support its fanatical position that back pay "cuts against (b)(2) certification." Wal-Mart Br. at 14; *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415-416 (5th Cir. 1998) (citation omitted) (noting that its holding is not inconsistent with *Pettway*, where the Fifth Circuit " . . . held that back pay could be sought in a (b)(2) class action because, as an equitable remedy similar to other forms of affirmative relief permitted in (b)(2) class actions, it was an integral component of Title VII's 'make whole' remedial scheme."); *See also Cooper v. Southern Co.* __ F.3d __, 2004 U.S. App. LEXIS 23495 (11th Cir. Nov. 10, 2004) ("Back pay is considered equitable relief and can therefore be awarded in a case certified under Rule 23(b)(2).").

Wal-Mart also makes this argument despite the fact that subsection (b)(2) was deliberately added to Rule 23 in 1966 in order to facilitate civil rights class actions. *Wetzel v. Liberty Mutual Insurance Co*., 508 F.2d 239, 250 (3rd Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *Barefield v. Chevron U.S.A., Inc*, 48 F.E.P. Cases 907, 910 (N.D. Cal. 1988). And has been used as the primary basis

[2] *Amici* focus on Wal-Mart's contention that the seeking of back pay here precludes class certification. *Amici* understand there is also a claim for punitive damages, but will not be addressing Wal-Mart's assertions as it pertains to punitive damages since these have been addressed in detail in Appellees brief.

for certifying civil rights class action cases. *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997) (citing civil rights cases as a chief example of Rule 23(b)(2) class action).

The logical consequence of Wal-Mart's assertion is that the only large civil rights class actions that can be certified are those seeking purely injunctive relief and waiving all claims to back pay or compensatory and punitive damages. This cannot be reconciled with the broad remedial purposes of Title VII, which class actions achieve. Wal-Mart unconvincingly implies that Congress really intended that the changes through CRA 91 made it more difficult for victims of employment discrimination to obtain class certification – even though in doing so Congress never even mentioned Rule 23 in its debates. What Wal-Mart argues cuts directly against the congressional intent behind the CRA 91.

B. The Change Made Through Section 107 of the CRA 91 Was a Targeted Response to *Price Waterhouse* and Has No Applicability to Class Action Cases

Nothing in the "mixed motive" language of the CRA 91, or the CRA 91 in general, supports Wal-Mart's proposition that class-wide back pay relief cannot be awarded on a formula basis because the employer is entitled to an individualized "same decision defense" for each and every class member. Wal-Mart Br. 43-44. Courts have rejected this reading of the "mixed motive" remedies provision, which

would otherwise effectively translate into few – if any – large civil rights class actions ever being certified; which squarely contradicts the intent of Congress.[3]

1. The "Mixed Motive" Provision of the CRA 91 Was a Targeted Response to *Price Waterhouse*

Section 107 sets forth the CRA 91's approach to "mixed motive" cases and reverses key aspects of the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). While the House Reports of both the Judiciary Committee and the Education and Labor Committee and the respective dissents offer different perspectives on the merits of Section 107, they resoundingly agree that its central purpose was to reverse *Price Waterhouse*, an individual Title VII cases. *See* H.R. REP. NO. 40 (I); H.R. REP. NO. 40 (II), supra note 2 (1991). The House Reports of the Judiciary Committee and Education and Labor Committee characterized *Price Waterhouse* as allowing an employer to escape liability for a discriminatory employment decision if it can persuasively contend "that the same decision would have been made for nondiscriminatory reasons." H.R. REP. NO. 40 (II) at 2 (1991). Both Committees found that the law was well settled prior to 1989, and sought to "restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to

[3] No other court had endorsed the argument Wal-Mart puts forth, until the district court's holding in *Grosz v. Boeing Co.*, which is now on appeal. 2003 U.S. Dist. LEXIS 25341 (C.D. Cal. Nov. 7, 2003), *permission to appeal granted*, No. 04-55428 (9th Cir. Mar. 11, 2004).

play a role in a contested employment decision may be the subject of liability." *See* H.R. REP. NO. 40 (II) at 18; H.R. REP. NO. 40 (I) at 48. Nowhere does the legislative history support Wal-Mart's argument that this targeted fix provides a right to an individualized defense for each and every member of the class in a class case.

The mixed motive provision of the CRA 91 should be viewed exactly as it was intended: a targeted response to *Price Waterhouse* and not as overture to courts to narrow the procedural avenues and remedies available to victims of discrimination in a class case. *Price Waterhouse* was not a class action case, it involved one woman, Ann Hopkins, who the trial court found was passed over for partnership because of both legitimate concerns about her interpersonal skills and because of "an impermissibly cabined view of the proper behavior of women." 490 U.S. at 236-37. The language of the "mixed motive" provisions of the CRA 91 makes no reference to class actions nor does it specify how an individual's entitlement to remedies must be proven in a class action. Obviously, it was not intended to apply to class cases.

2. Neither the Statutory Language of the "Mixed-Motive" Provision nor Title VII Class Action Jurisprudence Supports Wal-Mart's Claim That It Is Entitled to Present a "Same Decision Defense" Against Each Class Member

Nothing in the language of the statute supports Wal-Mart's claim that it is entitled to present a "same decision defense" against each class member. It is therefore not surprising that only one district court has ever accepted this reading of the "mixed motive" remedies provision. *See supra* footnote 3.

Wal-Mart erroneously cites the Ninth Circuit decision in *Costa*, an individual Title VII case, to bolster its argument that the CRA provides it with an undeniable entitlement to a "same decision defense" in this class case. Wal-Mart Br. at 44. Actually, the Ninth Circuit in *Costa* made clear, "[i]n some cases, the employer may be entitled to the 'same decision' affirmative defense instruction. In others, it may not." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 857 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003). Wal-Mart's argument that the CRA 91 nonetheless mandates that it be given the opportunity to present an affirmative "same decision defense" in the form of individualized hearings against each and every class member before any monetary relief can be levied against it is not supported by statutory language or by *Costa*.

Wal-Mart's argument that the CRA 91 mandates an "individualized inquiry" thereby precluding class formula remedies, misleadingly suggests that the CRA provides a "same decision defense" in class cases. Wal-Mart Br. at 44. In drawing its erroneous conclusion, Wal-Mart confuses the language and distorts the intent of the CRA 91. The statute unambiguously states that the court should not award

damages, if the defendant proves that it would have taken the same action, "on [ ] claim[s] in which an *individual* proves…" unlawful discrimination. 42 U.S.C. 2000e-5(g)(2)(B)(ii) (emphasis added). While the courts have endorsed this interpretation for individual Title VII claims, such as in *Costa*, they have not done so for Title VII class action suits. The statutory language that Wal-Mart relies on makes no reference to class actions. Wal-Mart's assertion that presenting a successful "same decision defense" would preclude an award of monetary damages simply does not apply to class cases.

There is a large body of case law, including the Supreme Court's decision in *Teamsters*, establishing that Title VII violations can be proven on a class-wide basis. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (subjective decision-making can be challenged in a class disparate impact case); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984) (failure to prove discriminatory pattern and practice does not preclude individual claims for discrimination); *Franks v. Bowman Transportation*, 424 U.S. 747 (1976) (finding a pattern and practice of liability gives rise to presumption that individual class members were victims of discriminatory pattern). The CRA 91 did not throw *Teamsters'* procedural structure for litigating Title VII class actions out the window. The Supreme Court's *Teamsters* model continues to govern class action procedures, and like the CRA 91 does not mandate individualized hearings.

II. THE DISTRICT COURT PROPERLY APPLIED THE *TEAMSTERS* ANALYSIS, WHICH HAS BEEN USED BY THIS NATION'S COURTS FOR DECADES AND WHICH DOES NOT REQUIRE INDIVIDUALIZED HEARINGS

The CRA 91 had no impact on *Teamsters*. Nothing in the legislative history of the CRA 91 suggests that Congress intended to change the procedures by which class members' entitlement to relief is determined. Since the CRA 91 provides no support for Wal-Mart's argument that it is entitled to an individualized hearing for each and every class member, it is left with unpersuasively attempting to maintain that *Teamsters* provides it that right. Decades of litigation under *Teamsters* shows it does not.

A. *Teamsters* Does Not Require Individualized Hearings

Wal-Mart wrongly argues that *Teamsters* entitles it to an absolute right to mount an individualized defense with respect to each class member. *Teamsters* established the procedural structure for the litigation of pattern-and-practice cases, including Title VII class actions. In this first stage the class is not required to prove that each member suffered discrimination, but rather that the "discrimination was the company's standard operating procedure." *Teamsters*, 431 U.S. at 360, 336. The focus is on the organization-wide pattern or practice of discrimination against the class. Evidence at the liability stage must by definition address the organization-wide policies and practices that affect the class as a whole. The class is not required to prove that each member suffered

discrimination. *Teamsters*, 431 U.S. at 360 ("At the initial, "liability" stage of a pattern-or practice suit the [plaintiff class] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed.") Further, *Teamsters* clearly articulates the scope of the permissible defense in Stage I liability proceedings: "The employer's defense must, of course, be designed to meet the prima facie case of the Government." 431 U.S. at 360 n.46. This prima facie case in no way requires the plaintiff to prove that each class member suffered from the employer's discriminatory policy or practice, rather the focus is on the company-wide policy or practice itself.[4]

If plaintiff prevails in Stage I proceedings by proving that the defendant engaged in a pattern or practice of discrimination against the class, then the court can order class-wide remedies. Wal-Mart consistently ignores the fact that before the court would get to a determination of the relief appropriate for a nationwide class, it would have had to find in Stage I liability proceedings that Wal-Mart had a discriminatory policy that affected the nationwide class. In *Teamsters,* the Supreme Court made clear, that at the liability phase, "if an employer fails to rebut

[4] *Amici* will not address Wal-Mart's claim that its company structure, which grants subjective or discretionary decision-making to individual stores, defeats the requisite finding of commonality, we concur with the district courts assessment that Wal-Mart "is no more entitled to 3,244 store-by-store trials than it would be entitled to try each class member's individual claim in a case of smaller scope." ER 1196.

the inference that arises from the [plaintiff's] prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the [plaintiff], a court's finding of a pattern or practice justifies an award of prospective relief." *Teamsters,* 431 U.S. at 361. The Court clarified the definition of prospective relief in a footnote, "[t]he federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of § 707(a) eliminate their discriminatory practices and the effects therefrom." *Id.* at 361. n.47 (citations omitted).

Once class liability has been established Congress has vested in the courts flexibility, "to make possible the 'fashion[ing] [of] the most complete relief possible." *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 420-421 (1975) (quoting 118 Cong. Rec. 7168 (1972)). As the D.C. Circuit recognized, *Teamsters* in no way restricts this flexibility by mandating individualized hearings: " . . . [*Teamsters*] 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, 1289-1290 (D.C. Cir. 1984) *cert. denied*, 471 U.S. 964 (1982).

Once liability has been established the Supreme Court has held that claimants in a Title VII class action should ordinarily receive back pay.

Albermarle, 422 U.S. at 412 quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968) ("Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.") The award of back pay is based on the twin goals of Title VII to make victims of discrimination whole for losses suffered as a result of discrimination and to deter employers from instituting or continuing discriminatory practices. *Id.* at 421. Over the past 30 years Title VII and cases like *Albermarle* have given the courts appropriate flexibility to achieve both these purposes. Wal-Mart attempts to strip the courts of this discretion.

If the plaintiffs in this case succeed in proving their case against Wal-Mart at the liability stage they will be entitled, as proscribed by *Albermarle*, to back pay on both their equal pay and promotion claims. With respect to the equal pay claim, obviously individualized hearings are not appropriate. Courts have consistently concluded that, in cases where persons doing similar work are paid at different rates, there is no need for individual hearings. *See generally Thompson v. Sawyer,* 678 F.2d 257 (D.C. Cir. 1982); *Sears v. Bennett* 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); *Liberles v. Daniel* 26 Fair Empl. Prac. Cas. 547 (N.D. Ill. 1981), *aff'd in part, rev'd in part*, 709 F.2d 1122 (7th Cir. 1983); *Love v. Pullman,* 13 Fair Empl. Prac. Cas. 423 (D. Colo. 1976), *aff'd* 569 F.2d 1074 (10th

Cir. 1978). This is because: 1) the victims of discrimination have already been identified during the liability stage, rendering further proceedings to establish their basic eligibility for the purpose of the remedy stage unnecessary *See Love v. Pullman,* 13 Fair Empl. Prac. Cas. 423; *see also* Douglas L. Parker, *Escape from the Quagmire: A reconsideration of the role of Teamsters hearings in Title VII Litigation*, 10 INDUS. REL. L.J. 171 at 184 and; 2) there can be no nondiscriminatory explanation for the wage disparity. *See Liberles v. County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983) (equal pay case where the court held that, "…individualized hearings are unnecessary because all three groups of workers were entitled to be paid the same amount.")

With respect to promotion or hiring claims, while one procedure for moving forward in Stage II proceedings involves individualized determinations that attempt to recreate what would have occurred in hirings or promotions absent discrimination, this is not the sole avenue available to courts. *See Teamsters*, 431 U.S. at 371–72. *Teamsters* did not hold that separate hearings were required for each discriminatee. In *Teamsters*, the Supreme Court states only that "[w]hen the [plaintiff] seeks individual relief for the victims of the discriminatory practice, a district court must *usually* conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief ." 431 U.S. at 361. (emphasis added). Properly interpreted, *Teamsters* merely states that a District

Court should *usually* hold additional proceedings to determine individual relief. *Segar*, 738 F.2d at 1290 (interpreted the word "usually" as meaning that there is no absolute right to individualized hearings). The holding did not in any way tie the hands of the courts in redressing unlawful discrimination by restricting their ability, vested in them by Title VII and Rule 23, to "fashion the most complete relief possible." Courts have used this flexibility to develop other methods such as formulaic relief when, for example, it would be impossible to reconstruct employees' work histories absent discrimination,[5] when the class is so large that it would not be economical to have individual hearings,[6] or when requiring individual hearings would violate the twin purposes of Title VII.[7]

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[5] In *Pettway,* the Fifth Circuit justified this decision by finding that since a precise reconstruction of individuals' work histories without discrimination would often be impossible in class action cases, that unrealistic exactitude is not required and uncertainties in the determination of back pay awards should be decided against the employers. *Pettway*, 494 F.2d at 260; *see also Newberg on Class Actions* § 24:121 (4th ed).

[6] The *Pettway* court found that a large class size would justify not making individual back pay determinations. *See Pettway*, 494 F.2d at 261. In *Kraszewski v. State Farm Ins. Co.,* a district court in the Ninth Circuit expressed a similar concern about using individual hearings in very large cases. While the court determined that back pay should be determined on an individual basis, it noted that its decision might have been different had the class been larger. 41 Fair Empl. Prac. Cas., 1088 (N.D. Cal., 1986), *aff'd in part, rev'd in part*, 912 F.2d 1182 (9th Cir. 1990).

[7] Courts have been granted broad discretion to devise comprehensive relief "in light of the large objectives of the Act," therefore its decisions must "…be measured against the purposes which inform Title VII." *Albermarle*, 422 U.S. at

Further, *Teamsters'* directive that a district court must usually conduct additional proceedings after the liability phase, addresses cases in which a plaintiff "seeks *individual relief* for the victims of the discriminatory practice." The plaintiffs in this case are seeking class-wide, injunctive declaratory relief and punitive damages, not individual compensatory damages. Plaintiffs' Reply in Support of Class Certification at 19. (The plaintiffs specifically state that class members who wish to seek compensatory damages will need to do so on a case-by-case basis.) The plaintiffs are seeking back pay, which is an equitable remedy, unlike compensatory damages. *In re Monumental Life Ins. Co*. 343 F.3d 331, 346 (5th Cir. 2003) (cases involving "[e]quitable monetary relief, such as back pay, [would not be] subject to the *Allison* predomination test"); *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 317-318 n.43 (5th Cir. 1998) (back pay awards are strictly equitable remedies). The lower courts that have interpreted *Teamsters* have not found that it entitles defendants to individualized trials in determining back pay. *See generally* Marc Schachter, *Individualizing Back Pay Relief in Title VII Class Actions*, 19 N.Y.U. Rev. L. & Soc. Change 617, 630 (1992). In holdings subsequent to the Supreme Court's *Teamsters* decision the Second, Fifth, Sixth,

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415-16, 421-22. *Segar v. Smith* declared that its remedial powers in discrimination cases were determined by the goals of Title VII. 738 F.2d at 1291. The court in *Thomas v. City of Evanston* specifically referred to the "make whole" goal of Title VII in its decision to award back pay through formula relief. 610 F. Supp. 422, 435 (N.D. Ill. 1985).

Seventh, Eighth, Ninth and Tenth circuits have all held that back pay may be awarded on a class-wide basis. [8]

Over the past 25 years, class action cases have taken into account complex facts relating to large numbers of class members, resulting in equitable awards, without losing class-action efficiencies by devolving into an individualized quagmire, or by trammeling constitutional rights. *E.g.*, *Pegues v. Mississippi State Employment Service*, 899 F.2d 1449 (5th Cir. 1990); *Segar*, 738 F.2d at 1289–93 (hearings for lower-level black agents, but statistical multi-factor approach to

[8] *In re Monumental Life Ins. Co.* 343 F.3d at 342 (characterizing back pay "as a remedy readily calculable on a classwide basis."); *Coleman v. General Motors Acceptance Corp.,* 296 F.3d 443, 450 (6th Cir. 2002) (holding that formula relief while not appropriate in some cases is appropriate in Title VII class actions seeking backpay because "as an equitable remedy, backpay does not involve [ ] significant issues of procedural fairness and constitutionality"); *EEOC v. O & G Spring & Wire Forms Specialty Co*., 38 F.3d 872, 879-880 (7th Cir. 1994) (states that "back pay is presumptively appropriate in a Title VII case" and affirms lower court fashioning of back pay on a class-wide basis and without individualized hearings); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1274 (10th Cir. 1988) (notes that the equitable relief of back pay can be awarded as a group remedy); *Hameed v. Int'l Ass'n. of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 520 (8th Cir. 1980) ("Given the apparent complexity and uncertainty of identifying which 45 black applicants are entitled to back pay, a classwide back pay remedy is appropriate."); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 n.6 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002) ("…some cases may require class-wide, rather than individualized, assessments of monetary relief."); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984) (holding, "[t]he facts of this case justify a departure from an individualized remedy for each claimant," and that a class-wide approach to the measure of back pay was necessary.)

backpay for senior agents). Wal-Mart's invitation to now change this approach should be rejected.

2. For Decades, Courts Have Approved Statistical or Formulaic Approaches to the Relief Phase of Class Litigation

District courts have been addressing individual relief issues in class action cases for decades and have used their discretion to "devise imaginative solutions" to fashioning appropriate remedies as the particular circumstances of a case may require. *Carnegie v. Household Int'l, Inc.*, 376 F. 3d 656, 661 (7th Cir. 2004). In doing so, they have recognized that individual damage issues should not defeat class treatment. *Ibid.*; *Palmer v. Combined Insurance Co. of Am.*, 217 F.R.D. 430, 439 (N.D. Ill., 2003); *In re Memorex Securities Litigation*, 61 F.R.D. 88, 103 (N.D. Cal. 1973). In cases where discrimination has so percolated through an employment system that any attempt to reconstruct individual employment histories would drag the court into "a quagmire of hypothetical judgments," courts have approved statistical or formulaic approaches to determining individual class members' entitlement to relief. *Pettway*, 494 F.2d at 261; *see also Domingo*, 727 F.2d at 1444-45; *Segar*, 738 F.2d at 1289-91; *McKenzie v. Sawyer*, 684 F.2d 62, 76 (D.C. Cir. 1982); *Hameed*, 637 F.2d 506, 520 (8th Cir. 1980); *Stewart v. Gen. Motors Corp*., 542 F.2d 445, 452-53 (7th Cir. 1976). Wal-Mart makes the unsubstantiated argument that awarding remedies based on statistical analysis will

deny it the opportunity to defend itself. Wal-Mart Br. at 36. Formula-based determinations are made according to methods of calculation that are well developed and often highly comprehensive. *See e.g., In Re Monumental Life Ins. Co.*, 365 F. 3d at 419-20 (5th Cir. 2004). These formulas can incorporate objective data specific to each employee in order to determine whether a class member is entitled to relief, and if so, to the amount of relief.

The ability to grant class-wide remedies must be available to the courts in order to uphold the purpose of the CRA 91. The Supreme Court held that the awarding of back pay is essential to eliminating "so far as possible ... the discriminatory effects of the past" and to "bar like discrimination in the future." *Albermarle*, 422 U.S. 405, 418 (1975) (citations omitted). The Supreme Court noted the centrality of back pay awards in leading employers to eliminate discriminatory practices: "It is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Id.* at 417-418. Prohibiting courts from fashioning appropriate class-wide relief would severely undercut Title VII and the CRA 91's purpose of deterring employment discrimination.

III. WAL-MART'S ARGUMENTS THAT RULE 23 ONLY APPLIES TO THOSE CLASS ACTIONS THAT ARE "JUST RIGHT" DESTROYS THE PURPOSE OF CLASS ACTIONS AS A DEVICE TO ATTACK SYSTEMIC EMPLOYMENT DISCRIMINATION

Ignoring the very purpose of class actions, distorting the clear legislative intent of the CRA 91 and throwing common sense out the window, Wal-Mart and its *amici* essentially argue this class action is "too big." It would serve as cruel irony that a litigation device adopted to address claims too small, or too numerous to be addressed on an individual basis was interpreted to prevent class certification because the defendant's discrimination affected too many victims.

A. Wal-Mart's "Goldilocks"[9] Defense Should Be Rejected

Wal-Mart's argument is that a class cannot be certified unless it is "just right." Obviously if the discrimination affects too few it cannot be certified because it fails to satisfy the numerosity requirement of Fed. R. Civ. P. 23(a)(1). Incredibly, here Wal-Mart contends the class is just too big. Wal-Mart Br. at 42-43. Apparently in Wal-Mart's view, Rule 23 does not permit class certification when an employer adopts a corporate-wide policy that discriminates against millions of people. The victims are left with bringing millions of individual claims, or

[9] Referring to the fable "Goldilocks and the Three Bears," where Goldilocks sampled items in the three bears' home in search of things that fit her "just right."

thousands of smaller class actions.[10] The self-serving nature of Wal-Mart's argument should be obvious to the Court. Wal-Mart offers this Goldilocks defense under the guise of unmanageability. As discussed above, for decades courts have exercised the discretion vested in them through Rule 23 to develop various devices to manage even the largest class actions. These include but are not limited to formulaic relief, opt-out provisions, and *Teamsters* style group trials on common defenses and subclasses.

In short, class actions were designed to address exactly this kind of claim. The Seventh Circuit recently rejected the argument that there could be too many class members, thereby making a case unmanageable as a class action. *Carnegie*, 376 F. 3d at 661 ("The more claimants there are, the more likely a class action is to yield substantial economies in litigation."). Further, Rule 23 (b)(2) class actions were designed "as a tool for facilitating civil rights actions." Fed. R. Civ. P. 23(b)(2) Advisory Note. Consistent with this intent, trial courts since the seminal employment class cases such as *Albemarle* and *Teamsters,* have certified and managed Title VII cases involving claims of backpay. The case before this Court is no different and the district court should be permitted to manage this case,

[10] It bears repeating here that before a court would reach the manageability arguments proffered by Wal-Mart the trial would have already reached the decision that there was indeed a corporate policy that affected all in the class. To then require thousands of smaller classes would fly in the face of this very finding.

applying the discretion granted it under Rule 23 and Title VII and as the courts have been doing for the past 30 years.

B. The Tired "Quota" And "Public Policy" Arguments Advanced By The *Amici* In Support Of Wal-Mart Have Already Been Rejected By Congress And The Courts.

Contrary to the arguments of *amici*, the district court's Order does not create incentives for employers to adopt quota-like policies. *See* Brief of *Amicus Curiae* The Chamber of Commerce, In Support of Defendant/Appellant/Cross-Appellee, at 13-15; Brief of *Amicus Curiae* The Employers Group In Support of Defendant/Appellant/Cross-Appellee, at 28-30. This argument is not new, nor is it persuasive. Throughout the history of Title VII, opponents have asserted the rhetoric of quotas, which has been rejected at every juncture. This argument remains unconvincing in this context, as well.

When Title VII of the Civil Rights Act of 1964 was debated in Congress, opponents argued that the Act would encourage the adoption of quota hiring and promotion schemes. *See* H.R. Rep. No. 88-914 1st Sess. 1, 62, 72-73 (minority report), reprinted in 1964 U.S.C.C.A.N. 2391, 2431, 2441 (charging that Title VII would impose quotas to "racially balance" workforces); 110 Cong. Rec. 4764 (1964) (statements of Sen. Ervin and Sen. Hill); 110 Cong. Rec. 5092, 7418-20 (1964) (statement of Sen. Robertson); 110 Cong. Rec. 8500 (1964) (statement of Sen. Smathers); 110 Cong. Rec. 9034-35 (1964) (statements of Sen. Stennis and

Sen. Tower). These arguments were successfully rebutted, and the law was passed. *See* 110 Cong. Rec. S7420 (1964) (statement of Sen. Humphrey) ("If the Senator can find in Title VII . . . any language which provides that an employer will have to hire on the basis of a percentage or **quota** related to color . . . I will start eating the pages one after another, because it is not in there.")

Similarly, the Supreme Court has remained unconvinced by the rhetoric of quotas in interpreting Title VII. The Court rejected arguments that the disparate impact theory of discrimination would encourage employers to engage in hiring quotas to avoid costly litigation. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."); *see also Connecticut v. Teal*, 457 U.S. 440, 450 (1982) ("[T]his Court has consistently focused on employment and promotion requirements that create a discriminatory bar to opportunities. This Court has never read [Title VII] as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.")

The Civil Rights Act of 1991 prevailed over arguments that the bill would encourage the use of quotas. Employers and opponents objected to the disparate

impact provisions of the bill, which sought to reinstate the law defining "business necessity" and "job related" as it existed prior to the Supreme Court's ruling in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991). Opponents again argued that an overly restrictive standard of "business necessity" would force employers to adopt quotas for fear that any statistical disparity would expose them to disparate impact liability. *See* 137 Cong. Rec. H1664-65; 136 Cong. Rec. S16, 457-58 (26 Weekly Comp. Pres Doc. 1631 (Oct. 20, 1990) (rejection of Civil Rights Act of 1990 as a "quota bill.")). Ultimately, these arguments were rejected, and the bill was passed.

Here, Wal-Mart's *amici* employ the same rhetoric that has been rejected in previous battles over the interpretation of Title VII. Despite opponents' predictions, there is no evidence that quotas have resulted from the Civil Rights Acts of 1964 and CRA 91 or the Supreme Court's approval of the disparate impact theory of discrimination. Indeed, if employers had adopted the management-by-quota policies that had been predicted, one would not expect that women and minorities would continue to be underrepresented in many occupations. For the same reasons that these arguments have been rejected in the past, this Court should ignore *amici's* unfounded and overblown assertions that class certification in this case will encourage the use of unlawful quotas.

CONCLUSION

The CRA 91 did not turn the back the clock on decades of Title VII class action jurisprudence and this court should reject Wal-Mart's invitation to do so. Federal courts should continue to follow fair procedures that give effect to the intent of Congress and to the goal of equal opportunity promised by Title VII.

Dated: January 7, 2005

Respectfully submitted,

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Michael Foreman
Counsel of Record
Lawyers' Committee for Civil Rights Under Law
1401 New York, Ave., N.W.
Suite 400
Washington D.C. 20005

Julie Su
Asian Pacific American Legal Center
1145 Wilshire Blvd, 2nd FL.
Los Angeles, CA 90017

Patricia A. Shiu
The Legal Aid Society -- Employment Law Center
600 Harrison Street, Suite 120
San Francisco, CA 94107

Theodore M. Shaw
Director-Counsel
Norman J. Chachkin
Robert Stroup
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, New York 10013

Vincent A. Eng
National Asian Pacific American
Legal Consortium
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036

Dennis Courtland Hayes
Angela Ciccolo
National Association for the
Advancement of Colored People
4805 Mt. Hope Drive
Baltimore, Maryland 21215

John T. Affeldt
Public Advocates, Inc.
131 Steuart Street, Suite 300
San Francisco, CA 94105

Melissa Josephs
Women Employed
Director of Equal Opportunity Policy
111 N. Wabash Suite #1300
Chicago, IL 60602

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) &
CIRCUIT RULE 32-1

Pursuant to Fed. R. App. 32(a) and 9th 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 6, 939 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: January 7, 2005

_____

Michael Foreman
Counsel of Record
Lawyers' Committee for
Civil Rights Under Law
1401 New York, Ave., N.W.
Suite 400
Washington D.C. 20005
(202) 662-8600

Certificate of Service

I hereby certify that on this 7th day of January 2005, I caused two copies of the foregoing brief to be served by first-class, postage pre-paid, to:

Brad Seligman
Jocelyn D. Larkin
THE IMPACT FUND
125 University Avenue
Berkeley, CA 94710
Telephone: (510) 845-3473
Facsimile: (510) 845-3654
bseligman@impactfund.org

Joseph M. Sellers, Esq.
Christine Webber, Esq.
COHEN, MILSTEIN, HAUSFELD & TOLL, P.L.L.C.
1100 New York Avenue, N.W., Suite 500
West Tower
Washington, D.C. 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
jsellers@cmht.com

Paul Grossman
Nancy L. Abell
PAUL, HASTINGS, JANOFSKY &
WALKER LLP
515 South Flower Street
Los Angeles, CA 90071
Telephone: (213) 683-6000
Facsimile: (213) 627-0705
paulgrossman@paulhastings.com

Theodore J. Boutrous, Jr.
Gail E. Lee
Mary A. Perry
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
tboutrous@gibsondunn.com

Furthermore, on January 7, 2005, the foregoing *amicus* brief was filed with the Ninth Circuit by sending the original and fifteen copies by first class mail, postage pre-paid to the Clerk, Ninth Circuit Post Office Box 193939, San Francisco, California 94119-3939.

_____

Michael Foreman
Counsel of Record
Lawyers' Committee for
Civil Rights Under Law
1401 New York, Ave., N.W.
Suite 400
Washington D.C. 20005
(202) 662-8600