No. 10-277

In The Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

BETTY DUKES, PATRICIA SURGESON, EDITH ARANA, KAREN WILLIAMSON, DEBORAH GUNTER, CHRISTINE KWAPNOSKI, CLEO PAGE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Securities Industry and Financial Markets Association (SIFMA) represents the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA supports a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building public trust and confidence in the financial markets. SIFMA members have over 800,000 employees throughout the United States.

The outcome of this case will affect SIFMA and its members because companies in the financial sector unavoidably apply individualized, discretionary assessments as a component in making employment decisions, including pay and promotion decisions, across a multitude of jobs and diverse locations. The Ninth Circuit's ruling in this case—that commonality and typicality can be established merely by proffering some evidence that an employer uses what it reductively terms "subjective decision making" to make pay and promotion decisions—undermines the ability of the financial services industry to manage its

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs.

workforce and fulfill its regulatory and legal obligations to the public.

SUMMARY OF ARGUMENT

Employers in the financial services industry consistently apply numerous discretionary factors in making decisions about competence, performance, and employee potential. Punishing employers for applying such nonquantitative criteria could be potentially hobbling for many employers in this sector.

There is nothing wrong with applying some subjective criteria to personnel decisions. Almost three decades ago, in *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982), this Court noted that an employer cannot be subjected to class certification just because it applies some level of subjective criteria.[2] The focus of the analysis must be on an identifiable discriminatory purpose, not the mere application of nonquantitative or subjective factors. Contrary to this Court's guidance in *Falcon*, the Ninth Circuit has significantly lowered the burden of proof at the certification stage and undermined the exercise of

[2] Indeed, the Court reinforced this general principle six years later in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) ("[A]n employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should *itself* raise no inference of discriminatory conduct." (emphasis added)).

discretionary, nondiscriminatory decision making. The Ninth Circuit decision allows plaintiffs to file broad class actions for plaintiffs in multiple facilities and geographic locations who are managed by different decision makers based on little to no evidence of a general company policy to discriminate. The resulting fear of broad class-wide liability based on so-called subjective factors is likely to inhibit employers from making essential, job-related discretionary assessments of employee performance and potential. This would create a disincentive to the financial services industry in fulfilling its regulatory and compliance responsibilities in overseeing its workforce.

ARGUMENT

I. THE FINANCIAL SERVICES INDUSTRY MUST APPLY NONQUANTITATIVE, DISCRETIONARY JUDGMENT, ALONG WITH OBJECTIVE FACTORS, IN PERSONNEL DECISION MAKING TO SATISFY REGULATORY AND COMPLIANCE OBLIGATIONS.

"Discretion," "subjective," and "individualized" are not dirty words. They are necessary features of employee evaluation in many sectors, including the financial services sector. As this Court has recognized, in many sectors employers must evaluate "a wide array of factors that are difficult to articulate and quantify," including "individual personalities and interpersonal relationships," "personality conflicts,"

and "the varied needs and interests involved in the employment context." *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 604 (2008); *see also Scott v. Parkview Mem. Hosp.*, 175 F.3d 523, 525 (7th Cir. 1999) ("[N]o formulary of approved answers can replace a nuanced evaluation of [professional] candidates."); *Rogers v. Int'l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975) ("[I]n all fairness to applicants and employers alike, decisions about hiring and promotion in supervisory and managerial jobs cannot realistically be made using objective standards alone."), *vacated and remanded on other grounds*, 423 U.S. 937 (1990). This Court has even cautioned against over-reliance on objective criteria that might spur disparate impact suits. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

Discretionary judgments are especially important when financial institutions evaluate employee performance. To be sure, most financial services jobs are not subject to purely subjective criteria, and it would caricature employment decision making in any workforce requiring steadily increasing data utilization, technological, and telecommunications skills to dismiss the discretionary evaluation of performance and potential in those areas as merely "subjective." Moreover, in many financial industry jobs, revenue generation statistics are certainly a factor necessarily considered. Initiative, efficiency, and productivity also typically have objective components, as does the appropriate use of technological resources. But other crucial qualities and characteristics that defy

quantification often are as important as, or even outweigh, such objective factors. Investment bankers, personal bankers, loan officers, financial advisors, traders, and investment advisors all interact with public investors and/or corporate clients. Employees in those diverse jobs typically need a sophisticated, and ever-changing skill set, not subject to ready evaluation by purely objective factors, to properly perform their jobs.

Take, for example, the job of financial advisor. Financial advisors help clients develop detailed strategies for meeting their financial goals. Typically, they must be registered as representatives with the Financial Industry Regulation Authority (FINRA), "the largest independent regulator for all securities firms doing business in the United States." *About FINRA*, http://www.finra.org/AboutFINRA/ (last visited Jan. 6, 2011). FINRA imposes a "fundamental responsibility for fair dealing." FINRA Conduct Rule IM-2310-2. These requirements, and other requirements imposed on other employees in financial services by law and regulation, mean that employees must do more than satisfy objective and quantitative performance criteria. They must also demonstrate integrity, an understanding of their diverse clients' needs and interests, and the good judgment necessary to handle the core risk-management and fair-dealing responsibilities of their jobs. Their employers must evaluate their judgment, appropriate risk tolerance, integrity, regulatory sensitivity, and customer focus—all of which defy objective quantification and entail

holistic assessments of each employee's individual strengths and weaknesses. This includes evaluating how they interact with co-workers, regulators, clients, and potential clients, and how they determine priorities and exercise judgment as they initiate activities or respond to a range of idiosyncratic real-life scenarios.

Investment bankers and other capital markets experts—who provide high-level financial advisory and capital-raising services to assist individuals, start-up companies, multi-billion dollar corporations, and governments—play a much different role. *See* United States Department of Labor, Bureau of Labor Statistics, *Securities, Commodities, and Financial Services Sales Agents*, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 Edition, *available at* http://www.bls.gov/oco/ocos122.htm (last visited Jan. 11, 2011). Successful performance of their jobs requires strong analytical and strategic skills and the exercise of good judgment. Investment bankers must cultivate strong relationships with their clients to understand their goals while acting in compliance with a complex array of legal and regulatory obligations. They use their specialized training and developed expertise to analyze the performance of various financial instruments and markets, seasoned by the exercise of solid judgment, the ability to bring an engagement to closure, and an understanding of legal and regulatory requirements applicable to different products, services, and markets. Evaluation of these attributes, too, unavoidably requires substantial components of holistic, discretionary assessment. They are not readily

susceptible to quantitative measurement, nor are they applicable in the same way to all such employees.

Even within a particular financial institution, certain discretionary factors could count differently depending upon the particular job and employee. A personal banker may need stronger "people skills" than an investment banker who needs to understand sophisticated financial models. In fact, even within the same job position, one person's unique skills and attributes may propel that individual through the organization more rapidly than another. For instance, one financial advisor may develop unique, personal ties to an untapped client base in the local community, developing "relationships" and engendering "trust" in a way that is particularly valuable to his or her future success and to the institution. Those skills can only be measured with discretionary and subjective judgment.

Evaluations of everyone in a financial organization, from entry level hourly employees to highly compensated salaried professionals, will unavoidably include some subjective and discretionary components. The Ninth Circuit's acceptance of the plaintiffs' theory would allow broad class litigation of discrimination claims wherever "disparities" can be identified notwithstanding the innumerable and varying determinants of employee pay and promotion in different positions.

II. THE NINTH CIRCUIT DECISION WILL DETER EMPLOYERS FROM USING APPROPRIATE AND UNAVOIDABLE DISCRETIONARY ASSESSMENTS.

Precisely because discretionary criteria play out differently across different job titles, personnel, managers, and locations, an employer's resort to "discretionary" criteria is not legitimately characterized as or reduced categorically to the application of the standardless "subjectivity" the *en banc* decision implies, nor is it properly treated as a unitary test that affects all employees the same. As this Court explained in *General Telephone Co. v. Falcon*, it is perfectly natural to certify a class of employees where an employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees." 457 U.S. 147, 159 n.15 (1982). In that context, Federal Rule of Civil Procedure 23(a)'s commonality and typicality requirements are satisfied because the general policy appears to affect every applicant or employee the same way.

But the same is not true just because an employer uses some subjective or discretionary criteria to evaluate many employees. Since there is nothing inherently discriminatory about applying subjective criteria, the mere fact that an employer allows different managers in different offices to evaluate employees based upon some subjective or discriminatory criteria cannot provide sufficient commonality or typicality to justify certifying a class based on that fact alone. As this Court suggested in *Falcon*,

plaintiffs must show that they have much more in common than that. Plaintiffs can "conceivably" satisfy the requirements for a class action in that context if they present "*[s]ignificant proof* that an employer *operated under a general policy of discrimination*" where "*the discrimination manifested itself* in hiring and promotion practices *in the same general fashion*." *Id.* (emphasis added). But where different decision makers apply different criteria in different ways to different employees, they are affecting the employees differently and the employees do not have enough in common to justify placing them in the same class.[3]

[3] The Court's concern applies not only at the Rule 23(a) stage, but also when determining whether a class—as the Ninth Circuit approved here—can be certified under Rule 23(b)(2). Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class." This is a more traditional type of class action than a Rule 23(b)(3) class action, which requires a showing that common questions "predominate," since a 23(b)(2) action is directed at remedying, through binding injunctive relief, discrimination where it is infeasible to identify all particular plaintiffs. For that reason, there is no requirement that plaintiffs be permitted to opt out of the class. A primary question under Rule 23(b)(2) is, therefore, whether there is a generally applicable discriminatory policy that applies to each class member in the same way and that forms the basis for liability as to each class member. As that question is applied to subjective decision making, it merely mimics the Rule 23(a) inquiry formed by *Falcon*: Is there significant evidence of a discriminatory policy that affects all persons in the class in the same way? Hence, *Falcon* requires that the class members must "possess the same interest and suffer the same injury." *Id.* at 156.

The Ninth Circuit ran afoul of these principles in certifying a class with no common boundaries merely because all members share a protected characteristic and decision making with respect to pay and promotion was influenced by some subjectivity. If that is enough to satisfy *Falcon's* requirement of "significant proof" of a company-wide common policy to discriminate, employers like those in the financial services industry who must necessarily exercise discretion and apply non-objective factors to the performance evaluation of their employees will face company-wide class action after class action that would seriously impede the fulfillment of their obligations to regulators and to the public.

A. The Ninth Circuit's Standard of Proof for Rule 23(a) Means Little to No Evidence of Commonality or Typicality Is Required.

Under the Ninth Circuit's commonality test, the fact that employees are evaluated with some subjective components all but creates a presumption that a wide-scale class will be certified—even where different managers in different locations apply different subjective components to different jobs to yield different results.[4]

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[4] Other courts have rightfully found differently. As one district court has noted:

> Geographically widespread facilities make proving a pattern and practice of disparate treatment difficult.

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> Employees who were from different departments, were supervised by different people, worked different shifts, and were at different levels within the company hierarchy have grievances that are not susceptible to generalized proof or defenses.

Jones v. GPU, Inc., 234 F.R.D. 82, 92 (E.D. Pa. 2005) (citing *Vinson v. Seven Seventeen HB Philadelphia Corp. No. 2*, No. 00-5334, 2001 U.S. Dist. LEXIS 25295, at *66 (E.D. Pa. Oct. 31, 2001) (collecting cases)); *see also Serrano v. Cintas Corp.*, No. 04-40132, 2009 U.S. Dist. LEXIS 26606, *16 (E.D. Mich. Mar. 31, 2009) (denying class certification when "thousands of Cintas managers at hundreds of Cintas facilities" made hiring decisions based on "widely differing circumstances at each facility," thereby precluding a finding of commonality); *Sperling v. Hoffmann-La Roche, Inc*., 924 F. Supp. 1346, 1363 (D.N.J. 1996) ("[A] decision by a company to give managers the discretion to make employment decisions, and the subsequent exercise of that discretion by some managers in a discriminatory manner, is not tantamount to a decision by a company to pursue a systemic, companywide policy of intentional discrimination."). Indeed, district courts within the Ninth Circuit have been persuaded by the common sense of such reasoning, although the Ninth Circuit has rejected it. *See Grosz v. Boeing Co.*, No. SACV-02-71-CJC (MLGx), 2003 U.S. Dist. LEXIS 25341, **14-17 (C.D. Cal. Nov. 7, 2003) ("The putative class that Plaintiffs seek spans the operations of different heritage companies, multiple physical locations, and countless localized compensation practices. Although Plaintiffs allege that women were discriminated against because of their gender at Boeing's Southern California facilities, they have not identified any company-wide policy or practice that might have caused the alleged salary disparities between men and women working for Boeing. . . . Plaintiffs' answer to this enormous diversity is the claim that all of Boeing's operations are infected by 'excessive subjectivity.' '*Excessive subjectivity,' however, is a criticism, not an actual company-wide policy or practice*. Without some evidence of the class-wide use of common decisional criteria or practices, Plaintiffs have failed to show the

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Once the court sees evidence of subjective decision making, the likelihood of certification is high despite the significant diversity in treatment among employees. Though subjective decision making may not be discriminatory by itself, the Ninth Circuit suggests that plaintiffs can bridge the gap with threadbare evidence in three main categories. First, plaintiffs need only show aggregate statistics reflecting that employees in a protected class are adversely affected regardless of differing duties, locations, employment decision-making hierarchies, conditions of employment, market or client circumstances, product characteristics, etc. That is enough to warrant class-wide treatment under the Ninth Circuit's test even if the plaintiffs' statistics ignore the absence of disparities in particular job categories or in many company locations.

Second, plaintiffs must simply present anecdotal evidence of sporadic discrimination—one allegation against a manager in South Carolina, another allegation against a different manager in Texas, and one more against yet another in California.

The final category requires even less—just that plaintiffs point to a "common culture" within a large employer, such as a nationwide financial institution. Pet. App. 78a. This category is satisfied, the Ninth Circuit held, even with respect to matters

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requisite commonality and typicality." (italics added)), *aff'd*, 136 F. App'x 960 (9th Cir. 2005).

that have no direct connection with employment decision making and even if the culture emphasizes only plainly desirable attributes. Any financial employer that presents itself as having a focus on integrity, good judgment, and conservative personalized investment principles will make certain that focus is reflected throughout its operations. If that is sufficient, a "common culture" will certainly be established.

As a consequence, a nationwide class of employees, regardless of job classification or conditions of employment, will almost inevitably be certified because of the use of some discretionary criteria in promotion or pay practices; the availability of aggregate and undifferentiated statistics; a few elicited anecdotes from diverse and far-flung environments; and a "common culture" that may be animus-neutral or actually affirmatively opposed to invidious discrimination. In sum, under the Ninth Circuit *en banc* majority's rationale, even though jobs are different, the skills required of employees are different, and the determinations by managers on questions of promotion and pay are different, common questions of fact and law predominate to satisfy Rule 23(a). That is a dangerous precedent at odds with *Falcon*'s "significant proof" requirement, and it flies in the face of the requirement that the court conduct a "rigorous analysis" of whether the Rule 23 requirements are met. *Falcon*, 457 U.S. at 161.

B. The "Significant Proof" Requirement Does Not Mean That Subjective Decision Making Is Always Immune from Class Treatment.

To reject the Ninth Circuit's exceedingly liberal policy is not to insulate all subjective decision making from class treatment. Obviously, as *Falcon* indicated, where a plaintiff presents "*[s]ignificant proof* that an employer operated under a general policy of discrimination" and transparently veils the discrimination in criteria that are "entirely subjective," class treatment might be appropriate. For example, plaintiffs would almost certainly be able to certify a class if they adduced significant evidence that an employer implemented a general policy of directing its managers to hire and promote only "barracudas" and "macho" employees, with the attendant result that all or most hired or promoted are men.

Subjective decision making could also be the basis for a class action when there is significant proof that the subjective determinations were all made by the same decision maker or within the same chain of decision makers. As one court noted:

> Commonality is relatively easily satisfied when a single individual or a small, centralized group makes decisions. . . . On the other hand, a decentralized hiring procedure, which allows decisionmakers to consider subjective factors, supports individual claims of discrimination but cuts against the assertion that an employer engages in a pattern or

> practice of discriminatory hiring as a standard operating procedure.

Ellis v. Elgin Riverboat Resort, 217 F.R.D. 415, 424 (N.D. Ill. 2003) (citing *Stastny v. S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 279 (4th Cir. 1980)). A class action might be appropriate if, for example, a financial institution headquartered in Illinois anointed a single manager to make all promotion decisions for all financial advisors in California, there is significant evidence that this regional manager applies a common policy or practice and there is a disparate impact against women in the region. In that context, the plaintiffs might be able to present common questions of discrimination.

In each of these examples, the class action depends not just on the employer's use of some subjective or discretionary factors, but on concrete proof of a discriminatory policy or practice affecting all members in the class in the same way. It is also an approach where the decision making process contains not just some discretionary elements, but one where the evidence shows that the process is standardless and unfettered by anything other than whim or caprice. But that is not the way in which employment decision making typically operates in large, complex business organizations. The Ninth Circuit *en banc* majority's approach thus sweeps far too wide. Without the "significant proof" of a broad policy or practice of discrimination required by *Falcon*, subjective decision making is too varied and too individualized

to meet Rule 23(a) commonality and typicality requirements.

III. THE NINTH CIRCUIT DECISION ACTUALLY IMPEDES ROBUST EFFORTS TOWARDS REGULATORY COMPLIANCE AND COMPANY-WIDE DIVERSITY INITIATIVES.

The Ninth Circuit's exceedingly low threshold for class certification undermines public policy by imposing absurd and unworkable demands on all employers.

An employer who wants to insulate itself from the risk of such enormous class actions has very few options—none of them palatable. One option would be to base employment decisions on solely objective measures. If that were even possible, it would be inadvisable for many employers. Determining whether an employee has the right mix of skills to be a leader—such as teamwork, organizational acumen, empathy, attentiveness to investor interests and regulatory obligations, and the like—cannot be based on objective criteria alone, especially in the financial services industry. Another alternative would be to try to limit the exercise of subjective decision making to only a few individuals who could be monitored to ensure that they did not abuse their subjectivity. But that would mean essentially doing away with any lower- or mid-level management, and it would force decision making upwards in the organization to levels

where managers have progressively less information about the performance and capabilities of the employees they are judging. This, of course, is not the way most businesses operate. It certainly would not work for an industry like financial services, which requires a decentralized management structure and careful oversight to ensure regulatory compliance and appropriate investor relations. If every business decision requiring some sort of subjectivity had to be made by a few high-level employees, the day-to-day operations of American industry would grind to a halt.

Equally troubling is the impact the Ninth Circuit's approach will have on efforts to foster a corporate culture dedicated to eradicating and remedying invidious discrimination. The Ninth Circuit's standard does not distinguish in any way between a culture of discrimination and all others. The Ninth Circuit approach tars with the same brush any effort to create a common culture—as long as it is sufficiently uniform and pervasive. Paradoxically, a culture of integrity—and even a culture of diversity and *non*-discrimination—can be as damning as a culture of discrimination. All the plaintiff needs to do is find a few rogue managers who ignore the employer's policies against discrimination to find a platform for a broad class action. Pet. App. 55a. Any large institution tries to instill common values and mores in its employees. It is a very hard challenge to which employers devote considerable resources. Their efforts

should be encouraged, not deterred with enhanced exposure to potentially crushing class action suits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 27, 2010