18-1075

In the United States Court of Appeals

FOR THE SECOND CIRCUIT

THE GOLDMAN SACHS GROUP, INC.,
GOLDMAN, SACHS & CO.,

Petitioners,

v.

H. CHRISTINA CHEN-OSTER, SHANNA ORLICH,
MARY DE LUIS, ALLISON GAMBA,

Respondents.

On Petition for Permission to Appeal from the United States District Court
for the Southern District of New York

BRIEF OF *AMICI CURIAE*
THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
AND THE CLEARING HOUSE ASSOCIATION L.L.C.
IN SUPPORT OF PETITIONERS

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Dated: April 20, 2018

s/ Sam S. Shaulson
Sam S. Shaulson

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association. It regularly files *amicus curiae* briefs in cases raising issues of vital concern to securities industry participants.

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[1] In accordance with FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certify that no party's counsel authored this brief in whole or in part; no party or party's counsel, or any other person, other than *amici* or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

and white papers, the interests of its member banks on a variety of systemically important banking issues.

This appeal involves important issues concerning standards for class certification in an employment dispute that arose in the financial services industry. It has significant implications for *amici*'s members and many other employers as well.

INTRODUCTION

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 359 (2011), holds that plaintiffs cannot certify company-wide classes of employees in workplace discrimination cases simply by arguing that supervisors' exercise of discretion led to statistical disparities in employment outcomes. Such claims do not present a question common to all class members because different supervisors naturally exercise judgment in different ways. In this case, the district court fashioned an exception that swallows *Wal-Mart*'s rule and then compounded that error with a predominance analysis equally inconsistent with *Wal-Mart*. These errors, from one of the most influential and busiest district courts in the country, will affect countless employers and warrant immediate review under Rule 23(f).

Without review now, the district court's errors may escape review forever. When class action litigation defendants face "even a small chance of a devastating loss," they are "pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). That concern is very weighty here. The financial exposure from charges of company-wide discrimination (to say nothing of reputational harm) can be staggering, whether the class comprises a million lower-wage employees as in *Wal-Mart* or several thousand high-earning Goldman Sachs employees.

The court below found *Wal-Mart* inapplicable in part because supervisors' evaluative discretion is informed by input from a range of voices inside and outside of the employee's business unit. A6, A27. This practice, called 360-degree evaluation, is a commonly used business practice, as is the concept of grouping employees into different categories by job performance. Such practices do not meaningfully distinguish this case from *Wal-Mart*. If anything, they just increase the number of inputs on the front end of the process while retaining broad supervisor discretion on the back end. And it is of course the exercise of that back-end discretion that Plaintiffs contend produced unlawful discrimination.

If this framework constitutes a sufficiently uniform policy to unite the class, it is hard to imagine any approach to employee assessment that would not. Even in *Wal-Mart*, contrary to the district court's apparent supposition, managerial discretion was hardly unlimited. Promotion and compensation decisions were subject to certain objective limitations and company-wide guidelines. But then, of course, the rubber hit the road when supervisors exercised their broad discretion. The same is true here.

And it is especially unfortunate that the district court homed in on 360-degree evaluation to support certification. For decades, 360-degree reviews have been hailed as an equalizing force in the workplace because they solicit a broader range of views rather than relying exclusively on supervisors. The upshot of the district court's ruling, however, is that such laudable practices dramatically increase the risk of certification of massive employee classes. For employers with such practices, all it takes on the district court's approach is one plaintiff's expert crunching aggregated numbers to produce some raw statistical disparity, and *Wal-Mart* no longer applies. The law of class action certification should not encourage employers to artificially narrow the range of relevant viewpoints or push compensation and promotion decisions into a black box.

This Court should therefore grant the petition to appeal and reverse the district court's certification decision. Otherwise that decision may never face appellate scrutiny—and employers will start to wonder whether they are best off jettisoning well-established, commonly used employee evaluation frameworks in the hope of avoiding enormously expensive class actions like this one.

ARGUMENT

A Rule 23(f) petition should be granted upon a showing of "*either* (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, *or* (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 76 (2d Cir. 2004) (citation omitted). Both conditions are satisfied here.

The certification order below deserves review because it is inconsistent with the Supreme Court's *Wal-Mart* decision and badly distorts employers' incentives to craft fair and reliable evaluation criteria. That result is troubling, particularly given the prominence of the court below. Absent review now, it is hard to imagine this case being contested to final

judgment. As this Court recognizes, there is pressure toward "settlements in large class actions" like this one, regardless of the merits of "the parties' underlying legal positions." *Id.* at 80; *see also Concepcion*, 563 U.S. at 350. And even if the case *does* reach final judgment, that is far off and significant resources will be wasted absent an appeal now—not just in litigation fees, but also in notifying absent class members that they may have a claim when in fact the class is not certifiable in the first place. *See* FED. R. CIV. P. 23(c)(2).

Rather than go down that road, the Court should grant the Rule 23(f) petition and reverse the decision below.

I. The District Court's Order Conflicts With *Wal-Mart* And Rule 23's Requirements.

Wal-Mart held that a proposed nationwide class of Wal-Mart's female employees—who alleged disparate impact and disparate treatment claims under Title VII—could not be certified under Rule 23. *Wal-Mart*, 564 U.S. at 344-45, 348-67. The class failed, first of all, to meet the Rule's requirement of commonality—*i.e.*, "questions of law or fact common to the class," FED. R. CIV. P. 23(a)(2)—because "Wal-Mart's 'policy' of *allowing discretion* by local supervisors over" compensation and promotion was

"the opposite of a uniform employment practice that would provide the commonality needed." *Wal-Mart*, 564 U.S. at 355. It was instead "a policy *against having* uniform employment practices." *Id.* The *Wal-Mart* plaintiffs "provide[d] no convincing proof of a companywide discriminatory pay and promotion policy," and so failed to "establish[] the existence of any common question" for either species of discrimination claim. *Id.* at 359.

The district court's order in this case makes this holding a nullity. As Goldman Sachs explains more fully, the court erred in concluding that the company's use of a 360-degree review process, followed by sorting employees into different job-performance-based groups through a "quartiling" process, constituted a "common mode of exercising discretion" that falls outside *Wal-Mart*'s holding. A25 (quoting *Wal-Mart*, 564 U.S. at 356).

Virtually every large employer guides managerial discretion over compensation and promotion to some extent, and Wal-Mart was no exception. By way of example, for managerial promotions, it imposed "requirements that candidates have an 'above average' evaluation, have at least one year in their current position, be current on training, not be in

a 'high shrink' department or store, be on the company's 'Rising Star' list, and be willing to relocate." *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 148 (N.D. Cal. 2004). Wal-Mart also constrained managers' authority over subordinates' pay by setting minimum and maximum salaries. *Id.* at 146-47. The plaintiffs (and *Wal-Mart* dissent) argued that these were specific policies that operated with sufficient similarity and uniformity across the company to amount to common questions under Rule 23(a). *Wal-Mart*, 564 U.S. at 370-71 (Ginsburg, J., dissenting in relevant part).

But the Supreme Court majority disagreed. To qualify as a "common mode of exercising discretion," in the Court's view, more channeling of managerial discretion was necessary beyond mere identification of starting points or outer limits. *Wal-Mart*, 564 U.S. at 356 (majority opinion). What the Court had in mind, when it made reference to a "common mode of exercising discretion," was the sort of "common direction" from central command that would lead "all managers [to] exercise their discretion in a common way." *Id.*

360-degree evaluation and quartiling are not that. If anything, 360-degree frameworks compound discretion by soliciting an increased range

of feedback on each reviewee, including from the reviewee's subordinates, supervisors, peers, and internal clients in different business units in the company. *See* A6. Those reviewers assess the reviewee across a range of incommensurable criteria: technical skills, communication skills, judgment, teamwork, compliance, diversity, leadership, commercial effectiveness, and professional performance. *Id.* This process generates lots of raw material for the review, but there remains broad discretion to be exercised in synthesizing those reviews. Then the quartiling process requires further discretion, as managers group employees into different categories by performance, using the 360-degree reviews and six additional factors. *Id.* Any employer that assesses whether employees exceed, meet, mostly meet, or fall below expectations is well acquainted with this basic idea, whether or not it uses the "quartiling" label. This framework is no more likely to lead "all managers [to] exercise their discretion in a common way" than the constraints in *Wal-Mart*. 564 U.S. at 356.

The decision below also conflicts with *Wal-Mart* in a second way. Contrary to the magistrate judge's recommendation, the district court concluded that common issues predominate over individualized ones, and

agreed to certify a damages class under Rule 23(b)(3). But as *Wal-Mart* teaches, before plaintiffs may recover individual damages under Title VII—even when they allege disparate impact claims—defendants are entitled "to raise any individual affirmative defenses it may have" to rebut the plaintiffs' contentions, including by arguing that individual employees were denied additional compensation or promotions for nondiscriminatory reasons. 564 U.S. at 367; *see* 42 U.S.C. § 1981a(a)(1); *id.* § 2000e-5(g)(2)(A). The district court wrongly concluded otherwise. *See* A44, A46-47. Because "a class cannot be certified on the premise that [Goldman Sachs] will not be entitled to litigate its statutory defenses to individual claims," *Wal-Mart*, 564 U.S. at 367, this Court's review is needed now for this additional reason too.

II. The District Court's Order Unduly Discourages Employers From Implementing Beneficial Evaluation Frameworks.

Beyond its legal flaws, the district court's approach to *Wal-Mart* also badly skews employers' incentives. Under that approach, employers with any sort of framework for employee performance evaluations thereby open themselves up to company-wide class actions—as long as plaintiffs' lawyers can find an expert willing to opine as to the existence

of an aggregate statistical disparity. Thus, if the district court's decision stands, risk-conscious employers will have a strong incentive to jettison 360-degree review frameworks and similarly basic employment approaches—like grouping employees into performance-based categories—in favor of the sort of content-less subjectivity that the district court (incorrectly) believed to be present in *Wal-Mart*. There is no reason for the law of class action certification to distort incentives this way.

Such distortion in fact may hinder the important goal of workplace equality. For decades, scholars have often championed 360-degree evaluations—also called multi-source or "full circle" evaluations—because they "consider the input of all persons in the corporation, thereby increasing the extent to which decisions concerning promotions are based on objective factors of merit and facilitating the advancement of women in the workplace." Edward S. Adams, *Using Evaluations To Break Down The Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 118 (2002). Such "evaluations fight discrimination" by "incorporat[ing] the views of many raters" rather than supervisors only. *Id.* at 159-60; *see also, e.g.*, Lior Jacob Strahilevitz, *Reputation Nation: Law In An Era Of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667,

1687-88 (2008) (supporting "'360 degree' feedback" because it "decrease[s] the weight associated with any particular evaluation and minimize[s] the likelihood that race or gender dynamics will taint the accuracy of the employee evaluations").

In addition, 360-degree evaluations generate "opportunities for peers and subordinates to expose managers who discriminate against and harass women" and even help counteract "subconscious biases." Adams, *supra*, at 159-61. Relatedly, employers can use 360-degree frameworks to encourage important values like "balance of work and personal life priorities." Joan C. Williams et al., *Better On Balance? The Corporate Counsel Work/Life Report*, 10 WM. & MARY J. WOMEN & L. 367, 438 (2004). In this vein, Ernst & Young's "360-degree 'People Point' evaluation . . . judges top managers on their success in creating quality work environment, including workplace flexibility." *Id.* "When the chairman says you can't be a top rated partner with a lousy 'People Point' score, that's real." *Id.*

For reasons like these, 360-degree reviews have received broad support, including in a report funded by the U.S. Glass Ceiling Commission

to recommend initiatives for improving diversity in the American workforce. *See* Taylor Cox Jr. & Carol Smolinski, *Managing Diversity And Glass Ceiling Initiatives As National Economic Imperatives* (Jan. 31, 1994), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1119&context=key_workplace. As the report explained, a 360-degree framework "provides a much richer base of information [and] increases the probability that the persons providing the input on performance will represent a variety of cultural backgrounds." *Id.*

There is also empirical support that backs up these endorsements. For example, one case study of a U.K. company discovered that under its 360-degree framework "the performance of female managers was rated significantly higher than the performance of their male counterparts." Mike Millmore et al., *Gender Differences Within 360-Degree Managerial Performance Appraisals*, 22 WOMEN IN MGMT. REV. 536, 547 (2007). Such findings provide at least preliminary "support [for] those who argue that 360-degree appraisal systems are more accurate and credible because multiple ratings iron out the greater potential for bias inherent in superior-subordinate performance appraisal systems." *Id.*

Unsurprisingly, employers have increasingly chosen to implement aspects of the basic 360-degree approach. One survey revealed that *90% of surveyed Fortune 1000 firms* had "implemented some form of multi-source assessment for career development, or performance management, or both." Adams, *supra*, at 123 (citation omitted). Employees who undergo 360-degree reviews report that they see such reviews "as a limiting influence on inflated ratings and bias and . . . a positive force on diversity, balance, respect, and specificity of feedback." *Id.* at 124.

The district court's order, however, significantly increases the litigation risks for employers who wish to solicit a broader range of input about reviewees and thus encourages leaving promotion and compensation to opaque, unguided managerial discretion. That makes little sense. Employers bear the difficult but critical responsibility to design equitable and unbiased evaluation policies. Their efforts should not be skewed by the standards for class certification under Rule 23.

Unfortunately, the district court's class certification order in this case threatens just that. It should be reviewed promptly and reversed.

CONCLUSION

Defendants' petition to appeal should be granted and the certification order reversed.

Dated: April 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 29(a)(5) and 5(c)(1) because it contains 2,591 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook Font.

Dated: April 20, 2018

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