No. 10-277

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,
Petitioner,
v.
BETTY DUKES, *et al*.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN SOCIOLOGICAL ASSOCIATION AND THE LAW AND SOCIETY ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* AMERICAN SOCIOLOGICAL ASSOCIATION AND THE LAW AND SOCIETY ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST [1]

The American Sociological Association (ASA) is the national professional and scholarly association of sociologists in the United States. Founded in 1905,

[1] Counsel for each party has consented to the filing of this Brief, as indicated by letters filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

the organization has more than 14,000 members, including most sociologists holding doctoral degrees from accredited universities. ASA publishes nine leading peer-reviewed journals.

The Law and Society Association (LSA) is a professional association of over 1,600 scholars in the social sciences, humanities and law who study the place of law in social, political, economic and cultural life. The LSA publishes the leading peer-reviewed journal in the interdisciplinary study of law and society.

Over the past fifty years, sociologists and other social scientists have produced an extensive body of scholarship about research methodology, proper case-study research techniques, organizational behavior, sex discrimination in the workplace, and how organizations can mitigate inequality. *Amici* offer their expertise to aid the Court in evaluating the use of social science evidence such as the evidence in the record in this case as a source of valid information about the effects of corporate culture and policy on potential discrimination, including the effects of corporate culture on individual-level decision-making. The research summarized in this Brief also addresses organizational policies and practices that place discretion within formal parameters, thereby reducing the potential for biased decision-making, an issue of significance in determining whether a class should have been certified under Rule 23 in this case.

SUMMARY OF ARGUMENT

The Court should affirm the Ninth Circuit's use of social science evidence as a source of valid information about the effects of corporate culture and policy on potential discrimination. Sociology is a social science that provides systematic research methodolo-

gies for analyzing data on individual and organizational behavior. Like natural science methods, social science methods meet rigorous disciplinary standards that include blind peer review and professional accountability for published work.

Sociological methods allow researchers to use aggregate data to form testable hypothesis about specific cases. Some research questions offer and test causal explanations for social phenomena, while others identify consistent patterns and relationships that emerge in given empirical circumstances. Sociologists can determine with a great deal of certainty, given a strong body of empirical evidence, when particular conditions or practices lead to common outcomes. Such conclusions draw on case studies, or in-depth investigations of individual cases, and other methodologies to form hypotheses about likely patterns in similar cases. A large body of research on organizations has shown that particular corporate practices and policies tend to have similar effects on personnel outcomes across cases. These findings inform researchers' preliminary hypotheses about new cases, which are subject to testing and additional research.

"Social framework analysis" is not a sociological method, but rather a legal term for some kinds of research. What constitutes high quality "social framework analysis" continues to be vigorously debated among scholars. As such, the Court should assess the underlying social science methods, as practiced by social science researchers and vetted in the peer-reviewed journals of those fields, instead of the "social framework analysis" construct when deciding whether social scientific work is valid.

Systematic social science research has shown that corporate culture may affect individual-level decision-making in common ways. Corporate culture is a set of norms and values that convey messages to employees about appropriate behavior. Corporations may actively try to engineer corporate cultures by implementing policies and practices that convey norms and values. Informal cultures also emerge in the workplace when employees interact, and may either reinforce or resist formal culture as well as promote other non-sanctioned norms. The extent to which corporate cultures, both formal and informal, influence individuals' behavior depends on the strength of the cultures and also on the degree of discretion that company personnel policies give to individual decision-makers.

Social science researchers have shown how personnel policies that condone discretionary decision-making by managers, in the absence of formal guidelines and detailed guidance on how to exercise discretion or oversight, tend to lead to biased decision-making. According to social science research, unchecked discretion is associated with the unequal treatment of female and male workers because it permits subjective decisions that incorporate stereotypes about women unrelated to job performance and allow managers to favor in-groups. While some discretion is inevitable in organizational practice, policies that condone discretion without guiding parameters can lead to biased decision-making and disparate gender outcomes.

Social science research has identified organizational policies and practices that place discretion within formal parameters, thereby reducing the potential for biased decision-making without eliminat-

ing necessary managerial judgment. In addition, they have proved more effective than corporate programs that generally stress "diversity," which lacks a consensus definition. These programs vary widely in their content.

Namely, corporations have been shown to reduce gender disparities by instituting formal personnel policies, creating accountability processes for managers, and self-monitoring their employment patterns in order to highlight and address disparities. Extensive research in sociology and other social sciences has shown that these practices equalize gender disparities in the workplace by placing central checks on individual discretion that leads to biased decision-making, but do not eliminate all discretion from managerial practice.

ARGUMENT

I. SOCIAL SCIENCES IN GENERAL, AND SOCIOLOGY IN PARTICULAR, PROVIDE SYSTEMATIC AND SCIENTIFIC RESEARCH METHODOLOGIES FOR ANALYZING INDIVIDUAL AND ORGANIZATIONAL BEHAVIOR, AND SHOULD BE CONSIDERED ALONG WITH OTHER SOURCES OF EVIDENCE TO INFORM LEGAL ANALYSIS

A. Social Sciences Use Rigorous Scientific Methods

Social sciences, like natural sciences, employ the scientific method in the pursuit of knowledge. This scientific method is highly reliable because it permits researchers to replicate, refine, and further test empirical findings. Social science researchers define problems for study, review existing literature, select

a research design most appropriate for the research question, and collect and analyze data. *See, e.g.*, B. Somekh & C. Lewin, RESEARCH METHODS IN THE SOCIAL SCIENCES (2005). Research articles are submitted to professional journals such as the *American Sociological Review* and the *American Journal of Sociology* which employ a rigorous, blind, peer-review editorial process.

Sociology is one of the social science disciplines dedicated to the study of the social world, human behavior, and structures and institutions within society. Sociology, like other established social sciences such as economics and psychology, has a professional infrastructure that holds researchers ethically, theoretically, and methodologically accountable for the work they produce as members of the discipline. The domestic governing body of sociology is the American Sociological Association (ASA) which organizes professional conferences, establishes rules and norms for professional researchers, publishes the discipline's flagship journal and several specialty journals, and defines the discipline.

B. Sociologists Make Causal Arguments in Limited Circumstances and with Great Methodological Care, Using Aggregate Data and Case Studies to Form Testable Hypotheses about New Cases

The general aim of social science research is to identify and "describe[] the structure of populations, social relationships, and processes." M. Gangul, *Causal Inference in Sociological Research*, 36 ANN. REV. SOCIOLOGY 21, 22 (2010). Empirical investigation that provides causal explanations for social processes is possible, subject to stringent methodological requirements. A researcher's ability to draw causal

conclusions depends on the scope of information available, the type of data she collects, and the methods she employs to analyze the data. Equally valid for some research purposes are techniques that focus on correlations between social phenomena instead of on causal relationships. Sociologists can determine with a great deal of certainty, given a strong body of empirical evidence, when particular conditions or practices lead to common outcomes. It is through consistent empirical findings over multiple studies that theories acquire strong explanatory power, which may be supplemented with causal analysis when research goals so dictate and conditions so allow.

Social scientists analyze aggregate data to inform analysis in particular case studies. *See, e.g.*, J.M. Ruane, ESSENTIALS OF RESEARCH METHODS: A GUIDE TO SOCIAL RESEARCH (2004); H. R. Bernard, SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPLICATION (2000). For example, a large body of research completed over time shows that employment practices affect individuals' opportunities and rewards on the basis of their race and gender. There is general agreement in the social sciences that personnel practices affect workplace discrimination and inequality. That well-established, scientifically tested set of findings can appropriately be used in a particular case study to provide a preliminary hypothesis for further analysis.

Using proper case study methodology (see below), most social scientists who are presented with precollected data in a particular case alleging discrimination are properly reluctant to draw causal conclusions about the reasons for sex-based disparities in that case. More likely, they would apply a set of relationships reported in high quality, relevant, peer-

reviewed scholarly research to assess whether that company's practices were likely to have prevented, permitted, promoted, or encouraged discrimination.

In keeping with social scientists' reluctance to assert causality without appropriate and often hard-to-come-by data, social scientists cannot predict either the exact likelihood that some outcome will occur or the number of times it will occur. However, social scientists routinely use the laws of probability to predict that under certain conditions, certain outcomes are likely to occur.

There is a long history of social science research about the workplace, corporate culture, and the mechanisms for limiting discretion. Although researchers specializing in these topics employ diverse methodologies including surveys, in-depth interviews, archival research, and experiments, one particularly effective research design to examine these issues is the case study, a technique in which researchers exhaustively study a particular organization.

Case study research on workplaces shows that internal policies and practices play a significant role in shaping the culture of the workplace, and that workplace cultures may in turn help to sustain or minimize bias. Research has also shown that internal accountability practices can reduce the likelihood that managers' and supervisors' biases will improperly affect their pay and promotion decisions (see below). This body of knowledge allows researchers analyzing new cases to form hypotheses about likely patterns of discrimination. Social scientific standards mandate that such hypotheses are necessarily subject to revision or rejection based on additional research on the particular case at hand.

C. Given the Established Social Science about Corporate Culture and Effective Mechanisms for Limiting Discretion (Which Can Lead to Bias), Well-Done Case Studies that are Methodologically Valid and Which Draw on the Large Body of Social Science Research to Inform Hypotheses about Particular Cases Should be Considered by the Courts

While we offer no opinion on the substance of Dr. Bielby's testimony or conclusions, we stress that the methods through which he reached these conclusions are widely accepted and are the basis for research published in the top peer-reviewed social science research journals. These methods include (1) strong reliance on established research findings, (2) careful review of relevant, case-specific statistical analyses, and (3) careful examination of all available qualitative and documentary evidence about the organization from a variety of sources regarding its culture and personnel practices.

1. Dr. Bielby systematically cites to published, peer-reviewed research on several issues of relevance to the Wal-Mart case, which are broadly supported in social science literature and which inform his analysis of Wal-Mart as a specific employer.

2. Dr. Bielby reviews the statistical results provided by other experts concerning the gender composition of hourly and management jobs in Wal-Mart.

3. Dr. Bielby refers to qualitative evidence on a variety of Wal-Mart organizational and personnel practices, including quotations from Sam Walton and the deposition testimony of Wal-Mart managers. Dr.

Bielby's analysis of qualitative data is a standard practice in many social scientific analyses of organizations and their personnel systems. *See, e.g.*, F. Dobbin, INVENTING EQUAL OPPORTUNITY (2009); L. M. Roth, SELLING WOMEN SHORT: GENDER INEQUALITY ON WALL STREET (2006); R. Nelson and W. Bridges, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN (1999).

Again, our purpose here is not to comment on the substance of Dr. Bielby's conclusions. But his use of a combination of social science research findings and statistical and qualitative data specific to Wal-Mart is well within our discipline's accepted methods for conducting a preliminary case study of a particular organization, especially when direct access to the organization is not available to the researcher. Dr. Bielby's findings are meaningful in sociology even absent a finding of causality.[2]

In sum, contrary to the defendant's claim that Dr. Bielby's methods "lack reliable, scientific basis for linking general research to the corporate setting," Pet. Br. at 30, the methods Dr. Bielby used are those social scientists rely on in scientific research that is published in top-quality peer-reviewed journals. Dr. Bielby's analysis of Wal-Mart is presented as an example of the application of sociological knowledge in the newest edition of an important sociology textbook. A. Giddens, M. Duneier, R. P. Applebaum, and D. C. Carr, INTRODUCTION TO SOCIOLOGY (7th ed. 2009).

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[2] While the American Sociological Association cannot attest to the steps that Dr. Bielby took to arrive at his conclusions, we have no reason to doubt that he conducted the analyses that he described under penalty of perjury.

D. "Social Framework Analysis" is Not a Sociological Method, but Rather a Legal Concept that is Actively Debated in Law Reviews; Rather than Relying on this Concept the Court should assess the Underlying Social Science Methods that Dictate When and How Aggregate Data can Inform Rigorous Case Studies

"Social framework analysis" is not a term generally recognized among sociologists. A full-text search of all available issues of the four leading sociological journals[3] locates no references to "social framework analysis." The American Sociological Association features no sections or working groups that deal with the concept and it is not featured in sociology textbooks or taught in methodology or theory courses. Thus, a definition of "social framework analysis" cannot be obtained from within the sociology discipline. It is instead a concept about research methods proposed primarily outside peer-reviewed social science journals to illustrate how social science research may productively inform litigation. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559, 559 (1987).[4] Accordingly, a search of Westlaw's journal

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[3] Search term "social framework analysis" entered on 2/8/2011 in archived databases of the *American Journal of Sociology, American Sociological Review, Social Forces*, and *Social Problems*.

[4] While sociologists in legal settings have sometimes borrowed the term "social framework analysis" to describe their work for a legal audience, as did Dr. Bielby in this case, the concept itself exists outside sociology and fails to address the actual methodologies that dictate how general and specific data relate. Dr. Bielby's analysis, including the use of the term "social framework analysis" as a shorthand way of conveying

and law reviews database produces twenty-three articles addressing social framework analysis, many from practitioners' guides.[5]

The legal scholarship defines social framework analysis as "general [social science] research results . . . used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case." John Monahan et al. Essay, *Contextual Evidence of Gender Discrimination: the Ascendance of "Social Frameworks*," 94 Va. L. Rev. 1715, 1717 (2008), citing Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 Va. L. Rev. 559, 559 (1987). Legal scholars, including those who first devised the concept, recently have urged courts to limit its use by prohibiting social scientists from linking their general research to the specific cases at hand. Monahan et al. Essay, *supra* at 1718, 1734. These critiques argue that expert testimony on specific cases is "unscientific," "subjective," and lacking in "rigor" based on the mistaken belief that social science "lacks a reliable, scientific basis for linking general research to the corporate setting," *Id*. at 1745 n 83; Pet. Br. at 30, quoting *id*. at 1745 n.83.[6] Notably, attacks on

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that he is using social science methods in a legal setting is proper, but the validity of his work should be evaluated in accordance with the peer-reviewed standards of sociology as described above.

[5] Search term "social framework analysis" entered in Westlaw's Journals and Law Reviews database on 2/8/2011.

[6] Several amicus briefs filed on behalf of Wal-Mart in this case similarly question social framework analysis. *See* Brief of Costco Wholesale Corporation as Amicus Curiae in Support of Wal-Mart Stores, Inc. at 20-26; Brief of Altria Group, Inc. et al. as Amici Curiae at 26-30; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 26 n. 1.

social framework analysis have come in law reviews, not in peer-reviewed sociology journals whose audiences have the most in-depth expertise in case studies.[7] Indeed, the use of the results of prior social science research in analyzing case-study or survey data is an essential component of social scientific research.

The current debate about social framework analysis largely ignores that principled social science methods already dictate when and how general findings inform specific cases, as described above and in the following sections. Proper social scientific research does not draw unsupported conclusions about specific cases based on general patterns in aggregate data, but rather formulates testable hypotheses based on existing research. The probability that a given case will conform to predicted patterns varies with the strength of past findings as well as available data on the specific case. Social scientists thus necessarily consider both "general" and "specific" information within a rigorous structure that acknowledges variable certainty.

Dr. Bielby's unwillingness to draw causal inferences is consistent with sociologists' prudent reluc-

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[7] Study of the legal scholarship reveals an on-going debate. *See, e.g.*, G. Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. 133, 137 (2010); J. Monahan, L. Walker & G. Mitchell, *The Limits of Social Framework Evidence*, 8 LAW, PROBABILITY & RISK 307 (2009); D. L. Faigman, *The Limits of Science in the Courtroom*, in E. Borgida & S. T. Fiske eds., BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 303, 310 (2008). But *see* M. Hart and P. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009), for a lawyers' review of the debate's political nature and defense of social framework analysis.

tance to assert causality in the absence of appropriate methodological safeguards. *See* Bielby Dep. 33:20-34:15, cited in Bielby Motion to Strike, 9th Cir. ECF Docket No. 263 at 9 n.15. It is not true that social scientists cannot rigorously use general data to understand specific cases. The court should look beyond petitioner's opposition to legally defined "social framework analysis" and to the actual social science methods that inform research.

II. ORGANIZATIONAL CULTURES, BOTH FORMAL AND INFORMAL, MAY INFLUENCE MULTIPLE DISCRETIONARY DECISION-MAKERS TO ADOPT COMMON VALUES AND NORMS THAT SHAPE THEIR BEHAVIORS, WITHIN AND APART FROM CORPORATE POLICIES

A corporation's culture comprises its assumptions, values and norms about how things should be done. E. Schein, *Culture: The Missing Concept in Organizational Studies*, 41 ADMINISTRATIVE SCIENCE QUARTERLY 229 (1996); C. O'Reilly and J. Chatman, *Culture as Social Control: Corporations, Cults and Commitment*, 18 RESEARCH IN ORGANIZATIONAL BEHAVIOR 157 (1996); R. L. Daft, ORGANIZATIONAL THEORY AND DESIGN 374 (10th ed. 2010).

Values include ideas about what is "right" and "wrong." Norms include a set of "rule-like" ideas about permissible conduct that members can draw on to define appropriate behavior and shape workplace interactions. P. DiMaggio, *Culture and Cognition*, 23 ANN. REV. OF SOCIOLOGY 265 (1997); E. Borgotta and R. Montgomery, eds., INTERNATIONAL ENCYCLOPEDIA OF SOCIOLOGY V. 1 567 (2000). Corporate culture is

thus one of the features that define acceptable workplace conduct.

A. Corporations May Use Strategies to Proactively Create and Promote Corporate Cultures that Embody Corporate Identity and Shape Individual-Level Conduct

Because formal practices and policies may in some cases give rise to norms and values, corporate policy and practices may influence the corporate culture. Corporations may adopt policies and practices explicitly because they want to convey cultural norms and values such as diversity, E. Kelly and F. Dobbin, *How Affirmative Action Became Diversity Management*, 41 AMERICAN BEHAVIORAL SCIENTIST 976 (1998), or creativity, R. M. Kanter, EVOLVE!: SUCCEEDING IN THE DIGITAL CULTURE OF TOMORROW (2001). *See also* J. Lincoln and A. Kalleberg, CULTURE, CONTROL, AND COMMITMENT: A STUDY OF WORK ORGANIZATION AND WORK ATTITUDES IN THE UNITED STATES AND JAPAN (1990).

B. Corporate Cultures May Arise Informally through Interactions among Employees

In addition to the formal or "official" corporate culture which impacts individual decision-making in organizations, sociologists long have recognized that informal corporate cultures or "sub-cultures" may emerge in organizations. J. N. Baron and D. M. Kreps, STRATEGIC HUMAN RESOURCES: FRAMEWORKS FOR GENERAL MANAGERS 19-20 (1999) [hereinafter Baron and Kreps]; E. H. Schein, ORGANIZATIONAL CULTURE AND LEADERSHIP (4th ed 2010). Informal corporate cultures can complement, disparage, or

even explicitly conflict with formal corporate culture. M. Burawoy, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM (1982); G. A. Fine, *Negotiated Orders and Organizational Cultures*, 10 ANN. REV. SOCIOLOGY 239 (1984).

C. The Extent to Which Corporate Culture (Either Formal or Informal) Influences Individual Decision-Making Depends on the Strength of Formal and Informal Cultures as Well as the Degree of Discretion that Corporate Policies Permit

Organizations often attempt to manufacture corporate cultures that focus on such values as diversity, creativity, entrepreneurialism, competition, or quality. These "engineered" or "created" corporate cultures, with associated policies and implementation systems, "can send powerful messages that are likely to influence organizational norms and values as experienced by employees." Baron and Kreps, *supra*, at 20. Social science has demonstrated that while these norms and values do not fully control individual attitudes, behaviors, or decision-making, corporate cultures shape what employees view as acceptable conduct.

Corporations make decisions about the kind of corporate culture they promote. Employees act on these norms in the context of personnel policies that directly shape decision-making. In the area of gender, corporations may promote norms that value or discourage equality. This may lead to bias in pay and promotion decisions if corporate policy allows managers to make subjective judgments about women workers. Conversely, centralized formal guidelines are more likely to limit the extent to which

cultural biases in organizations translate into pay and promotion disparities.

III. SOCIAL SCIENCE RESEARCH SHOWS THAT EMPLOYMENT POLICIES AND PRACTICES THAT ALLOW UNCHECKED MANAGERIAL DISCRETION CAN LEAD TO BIASED DECISION-MAKING, WHILE POLICIES AND PRACTICES THAT PLACE LIMITS ON DISCRETION CAN REDUCE THE LIKELIHOOD OF BIAS

Managers require some discretion to carry out their responsibilities. However, social science research shows that excessive or unchecked subjective discretion invites biased decisions that can lead to sex-linked disparities among the individuals they supervise. Substantial research has focused on the conditions under which discretion becomes excessive. M. E. Heilman and M. C. Haynes, *Subjectivity in the Appraisal Process: A Facilitator of Gender Bias in Work Settings*, in E. Borgida and S. Fiske, eds., BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 128 (2008) [hereinafter Heilman and Haynes].

A. Corporate Policies and Practices that Cede Decision-Making to Individual Managers without Central Oversight or Accountability Mechanisms Predictably Permit Biased Decision-Making

Corporate policies that institutionalize managerial discretion allow managers to make decisions based primarily on their own criteria. In such systems, managers enjoy considerable discretion to decide how they will go about filling positions, how they will choose among candidates, how to evaluate and re-

ward employees, and the magnitude of rewards. Although such systems may entail specified practices for filling and rewarding positions, they typically lack formal oversight structures and grievance procedures for individuals to appeal managers' decisions. G. R. Siniscalco, *Subjective Decsionmaking: Proper or Problematic?*, Talk presented at the National Conference on Equal Employment Opportunity Law (2006). This pattern institutionalizes a form of authority that does not distinguish organizationally relevant statuses from personal characteristics or relationships. J. N. Baron, D. Burton and M. T. Hannan, *The Road Taken: Origins and Early Evolution of Employment Systems in Emerging Companies*, 5 INDUSTRIAL AND CORPORATE CHANGE 239 (1996); D. L. Westby, *A Typology of Authority in Complex Organizations*, 44 SOCIAL FORCES 484 (1966). Managers enjoy trust in decision-making based on their backgrounds and interpersonal ties. Because substantial discretion in personnel decisions is a perquisite of managerial status, central oversight can be perceived as inconsistent with trust, competence, and privilege.

The extent to which corporations permit discretionary decision-making without oversight or criteria anchored in observable behavior can affect individual workers' opportunities to advance because of irrelevant characteristics such as their race or gender. According to social science research, unchecked discretion is associated with the unequal treatment of female and male workers because discretion permits subjective decisions. Subjective decisions require inference because judgments are based on outcomes and criteria that are open to interpretation. Heilman and Haynes, s*upra*, at 128. Social psychological research has established that subjective assessments are susceptible to influence by irrelevant and sex-

biased factors such as whether one "fits" into the work environment, conforms to prescriptive stereotypes about how women ought to be, or resembles the decision maker or other workers on characteristics that are irrelevant to job performance.[8] In the absence of guidelines and oversight, managers have little incentive to suppress stereotypes and are more likely to favor persons of their same sex. Heilman and Haynes, *supra*, at 143; L. M. Roth, SELLING WOMEN SHORT: GENDER INEQUALITY ON WALL STREET (2006); Elizabeth Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70

[8] Women who engage in "self promotion" come across as less likeable than men, presumably because self promotion violates the female norm of modesty. Laurie Rudman, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. OF SOCIAL ISSUES 743 (2001). Being disliked negatively affects women's performance evaluations, chance of promotion, and pay raises. M.E. Heilman, A.S. Wallen, D. Fuchs, and M.M. Tamkins, *Penalties for success: Reactions to women who succeed at male tasks*, 89 J. OF APPLIED PSYCHOLOGY, 416 (2004); M.E. Heilman, *Description and prescription: How gender stereotypes prevent women's ascent up the organizational ladder*, 57 J. OF SOCIAL ISSUES 657 (2001); L. Sinclair and Z. Kunda, *Motivated stereotyping of women: she's fine if she praised me but incompetent if she criticized me*, 26 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN 1329 (2000). According to several case studies, performance evaluations have a weaker effect on promotion for men than for women, suggesting that other criteria are more important for men. K.S. Lyness, and M. E. Heilman, *When fit is fundamental: Performance evaluations and promotions of upper-level female and male managers*, 91 JOURNAL OF APPLIED PSYCHOLOGY 777 (2006). Women have less access to high-level jobs if the previous incumbent was male. J. Cohen, H. Broschak, and H. Haveman, *And then there were more? The effect of organizational sex composition on the hiring and promotion of managers*, 63 AM. SOC. REV. 711 (1998).

AM. SOC. REV. 702 (2005); J. Cohen, H. Broschak, H. Haveman, *And then there were more? The effect of organizational sex composition on the hiring and promotion of managers*, 63 AM. SOC. REV 711 (1998); J. Allmendinger and R. Hackman, *The More, the Better? A Four-Nation Study of the Inclusion of Women in Symphony Orchestras*, 74 SOCIAL FORCES 423 (1995); G.R. Salancik and J. Pfeffer, *Uncertainty, Secrecy, and the Choice of Similar Others*, 41 SOCIAL PSYCHOLOGY 246, 253 (1978) [hereinafter Salancik]; R. M. Kanter, MEN AND WOMEN OF THE ORGANIZATION (1977).

When subjective discretion is not cordoned by corporate culture or policy, it permits managers' stereotypes and ingroup preferences to prejudice their evaluations and employment decisions in ways that disadvantage women. N. Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and their Behavioral Manifestations*, 17 SOCIAL JUSTICE RESEARCH 143 (2004); M. Hewstone, M. Rubin, and H. Willis, *Intergroup Bias*, 53 ANNUAL REVIEW OF PSYCHOLOGY 575 (2002); C. N. Macrae and G. V. Bodenhausen, *Social Cognition: Thinking Categorically about Others*, 51 ANNUAL REVIEW OF PSYCHOLOGY 93 (2000).[9]

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[9] As the *amicus* brief filed in support of Wal-Mart by the Society for Human Resource Management observed, quoting its own work, "It is easy for managers to allow their impressions of employees or their personal feelings about them to dominate the performance rating process." Brief Amici Curiae Society for Human Resource Management and HR Policy Association in Support of Petitioner at 13. And as Altria's *amicus* brief in support of Wal-Mart wrote, "If authority is too decentralized . . . managers have so much freedom that they can pursue their own functional goals and objectives at the expense of organizational goals." Brief of Altria Group, Inc. et al. as Amici Curiae in

B. Social Science Research Has Identified Organizational Policies and Practices that Place Subjective Discretion within Formal Parameters that Limit the Risk of Biased Decisions without Eliminating Necessary Managerial Judgment

In the absence of oversight, subjective discretion creates opportunities for bias and stereotyping to limit workers' compensation and their chance to advance. A large body of social science research has identified types of policies and practices that reduce personnel actions that are harmful to individuals on the basis of irrelevant characteristics by placing checks on discretionary decision-making. While this brief cannot review the extensive findings, three important corporate practices that curb discretion are (1) formalized, objective criteria regarding job assignments, promotions and raises, (2) implementation of procedures that hold managers accountable for complying with hiring guidelines, including formal appeals, and (3) collection and monitoring of data that allow detection of sex and race disparities across corporate locations and levels. These mechanisms do not eliminate all managerial discretion; rather they place it within frameworks of central accountability and oversight that have been scientifically shown to reduce bias (see below).

Support of Petitioner at 20-11, quoting Gareth R. Jones, ORGANIZATIONAL THEORY, DESIGN, AND CHANGE 104 (6th ed. 2010). Other organizational scholars have similarly concluded that "[S]upervisory ratings are notorious for their subjectivity and sometimes for their low reliability." Robert D. Gatewood, Hubert S. Field, and Murray Barrick, HUMAN RESOURCE SELECTION 410 (6th ed. 2010).

Research has shown that specific procedures including the three discussed here more effectively reduce discrimination than a corporate focus on "diversity". There is no generally shared definition of the concept of diversity. E. Kelly and F. Dobbin, *How Affirmative Action Became Diversity Management*, 41 AMERICAN BEHAVIORAL SCIENTIST 976 (1998). "Diversity" refers to everything from mandatory extended training for managers to short electronic training exercises that can be done on a computer, and the subject matter ranges from Equal Employment Opportunity (EEO) laws and regulations to the business case for a diverse workforce. This nonspecific nature of "diversity" made it popular among corporations.[10] Diversity programs' effectiveness in promoting equal treatment of employees depends on what a corporation's diversity program entails. Recent research suggests that the most common diversity practices had little effect on women's access to managerial jobs. A. Kalev, F. Dobbin, and E. Kelley, *Best Practices or Best Guesses? Diversity Management and the Remediation of Inequality*, 71 AMERICAN SOCIOLOGICAL REVIEW 589 (2006).[11] In contrast, the specific procedures discussed below have been shown to reduce disparities across a variety of cases.

1. Formalized personnel practices tend to decrease gender disparities

Formalized personnel procedures are grounded in written rules that stipulate how specific personnel decisions must be conducted. Corporations formalized personnel practices in part to check the abuses

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[10] By 2000, three-fourths of Fortune 500 companies had some kind of diversity program. Jefferson P. Marquis et al., MANAGING DIVERSITY IN CORPORATE AMERICA 1 (2008).

that can be associated with unchecked supervisory discretion. F. Dobbin, INVENTING EQUAL OPPORTUNITY (2009); S. M. Jacoby, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN THE 20TH CENTURY (Revised Edition, 2004); R. Edwards, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKFORCE IN THE TWENTIETH CENTURY (1979). Formalized policies require that managers and supervisors conduct personnel tasks in a uniform manner that is consistent with organizational goals. Formal policies replace subjective individual criteria with organizationally-relevant standards, and also specify general processes that all decision-makers must follow. For example, they may require managers to formally describe jobs along with required qualifications, and to advertise positions both inside and outside of the organization. J. N. Baron, M. T. Hannan, G Hsu, and O. Kocak, *In the company of women: Gender inequality and the logic of bureaucracy in start-up firms*, 34 WORK AND OCCUPATIONS 35 (2007).

Formalized personnel practice can equalize pay and promotion opportunities by reducing any adverse effects of unchecked subjective discretion that allows candidates' sex and race to influence personnel decisions. A. Kalev, F. Dobbin, and E. Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV 589 (2006); J. A. Kmec, *White Hiring Agents' Organizational Practices and Out-Group Hiring*, 35 SOCIAL SCIENCE RESEARCH 668 (2005); T. DiPrete and W. Soule, *The Organization of Career Lines: Equal Employment Opportunity and Status Advancement in a Federal Bureaucracy*, 51 AM. SOC. REV. 295 (1986). *See also* B. F. Reskin and D. B. McBrier, *Why Not Ascription? Organizations'*

Employment of Male and Female Managers, 65 AM. SOC. REV 222 (2000); D. Guthrie and L. Roth, *The State, Courts, and Equal Opportunities for Female CEOs in US organizations: Specifying Institutional Mechanisms*, 78 SOCIAL FORCES 511, 528 (1999); D. Tomaskovic-Devey, A. Kalleberg, and P. V. Marsden, *Gender Differences and Organizational Commitment*, in A. Kalleberg et al., eds., ORGANIZATIONS IN AMERICA: ANALYZING THEIR STRUCTURES AND HUMAN RESOURCE PRACTICES 297 (1996); B. S. Mittman, *Theoretical and Methodological Issues in the Study of Organizational Demography and Demographic Change*, 10 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 3 (1992); R. F. Szafran, *What Kinds of Firms Hire and Promote Women and Blacks? A Review of the Literature*, 23 SOCIOLOGICAL QUARTERLY 171 (1982).[12]

An econometric study dramatically showed the importance of formalizing personnel procedures: major symphony orchestras that used open auditions in which judges knew the auditioners' sex systematically favored male musicians; implementing blind auditions as a formal practice increased women's

[12] While the positive evidence is substantial, formalization does not always have this effect for a variety of reasons. F. Dobbin, D. Schrage and A. Kalev, *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, Working Paper, Department of Sociology, Harvard University (2009). For example, formalization may fail to advance women's careers when employers formalize the use of discretion instead of actual guidelines. In this case formalized discretion may institutionalize and legitimate unequal access to workplace rewards, rather than challenging patterns of inequality. E. L. Kelly and A. Kalev, *Managing flexible work arrangements in US organizations: formalized discretion or "a right to ask,"* 4 SOCIO-ECONOMIC REVIEW 379 (2006).

representation across these orchestras. C. Goldin and C. Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715 (2000).

Formalized personnel practices tend to increase women's share of managerial jobs. B. F. Reskin and D. B. McBrier, *Why Not Ascription? Organizations' Employment of Male and Female Managers*, 65 AM. SOC. REV. 222 (2000), and to reduce the penalty associated with a largely female workforce on women's earnings. M. M. Elvira and M. E. Graham, *Pay System Formalization and Sex-Related Earnings Effects*, 13 ORGANIZATION SCIENCE 601 (2002). In contrast, informal personnel practices tend to reproduce the demographic composition of the current workforce. J. Cohen, H. Broschak, and H. Haveman, *And Then There Were More? The Effect of Organizational Sex Composition on the Hiring and Promotion of Managers*, 63 AM. SOC. REV 711 (1998) [hereinafter Cohen et al.]; Roberto Fernandez and N. Weinberg, *Sifting and Sorting: Personal Contacts and Hiring in a Retail Bank*, 62 AM. SOC. REV. 883 (1997). Jobs that are filled almost exclusively by members of one group become "labeled" as belonging to or appropriate for members of those groups, B.F. Reskin, D.B. McBrier and J. Kmec, *The Determinants and Consequences of Workplace Sex and Race Composition*, 25 ANNUAL REVIEW OF SOCIOLOGY 335 (1999) [hereinafter Reskin et al. (1999)]; Cohen et al., *supra*; M. E. Heilman, *Sex Bias in Working Settings: The Lack of Fit Model*, 5 RESEARCH IN ORGANIZATIONAL BEHAVIOR 269 (1983). Surprisingly, this pattern may be exacerbated when decision makers belong to that group. Reskin et al. (1999), *supra*; Cohen et al., *supra*; A. M. Konrad, S. Winter, and B. Gutek, *Diversity in Work Group Sex Composition: Implications*

for Majority and Minority Members, 10 RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS 115 (1992).

Formalization in and of itself is not a panacea. For instance, some research shows that formalization contributes to equal treatment only if organizations take steps to ensure that managers comply with the corporation's rules. Bias against workers may persist if corporations implement formalized processes to emulate peer corporations or to create a facade of objectivity while departing from formal criteria in actual decision-making. V. Roscigno, S. Mong, R. Byron, G. Tester, *Age discrimination, social closure, and employment*, 86 SOCIAL FORCES 313 (2007); D. Pager and H. Shepherd, *The Sociology of Discrimination: Racial discrimination in employment, housing, credit, and consumer markets*, 34 ANN. REV. SOC. 181 (2008).

In short, for formalized practices to limit the use of individuals' irrelevant and inappropriate characteristics, these practices must be enforced with adequate resources and subject to accountability processes. A. Kalev, F. Dobbin, and E. Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV 589 (2006); L. B. Edelman and S. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, 17 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 107 (1999); J. N. Baron, B. S. Mittman, and A. E. Newman, *Targets of Opportunity: Organizational and Environmental Determinants of Gender Integration Within The California Civil Service*, 1979–1985, 96 AMERICAN JOURNAL OF SOCIOLOGY 1362 (1991); R. G. Schaeffer and E. F. Lynton, CORPORATE EXPERIENCE IN IMPROVING

WOMEN'S JOB OPPORTUNITIES. Report 755. The Conference Bd. (1979).

2. Accountability Tends to Reduce Bias in Subjective Personnel Decisions

Accountability – the practice of holding decision-makers accountable for their decisions, Heilman and Haynes, *supra* at 141– is a fundamental principle in organizational governance. Organizations achieve compliance with policies by making organizational managers accountable for complying with the process itself as well as its outcome. Effective accountability systems preserve managerial discretion while also requiring decision makers to assess the consequences of their decisions by documenting and justifying them to central reviewers. In the context of personnel management, this obligation potentially can check the effects of decision makers' propensities to view subordinates differently based on their group membership. Supervisors who must justify their decisions regarding compensation, bonuses, job assignments, and layoffs are less likely to make those decisions based on irrelevant criteria of favoritism or stereotypes, and are more likely to heed organizational policies.

Holding managers accountable for their decisions has been shown to reduce exclusionary outcomes. N. P. Mero, S. J. Motowidlo, and A. Anna, *Effects of Accountability on Rating Behavior and Rater Accuracy*, 33 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 2493 (2003); A. M. Konrad and F. Linnehan, *Formalized HRM Structures: Coordinating Equal Employment Opportunity or Concealing Organizational Practices?*, 38 ACADEMY OF MANAGEMENT JOURNAL 787 (1995); Salancik, *supra*. Indeed, ensuring decision

makers that they may have to account for their behavior leads them to regulate their biases. F. Dobbin, D. Schrage and A. Kalev, *Someone to Watch over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity*, Working Paper, Department of Sociology, Harvard University (2009). According to experimental research, people not only make different kinds of decisions when they expect to be accountable, but they also store the information they use in decision-making differently when they know ahead of time that they will be held accountable for their decisions. Philip Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 331 (1992); Philip Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 RESEARCH IN ORGANIZATIONAL BEHAVIOR 297 (1985).

Accountability has been studied in relation to compensation policy using both survey research and case studies. A case study of a corporation that had separated performance evaluation from compensation decisions illustrates its effect. No sex bias existed in the evaluations of first-line supervisors whose managers oversaw their assessments. However, the raises based on these evaluations that were set by a different group of managers who were not subject to corporate oversight were significantly higher for men, although the women's performance evaluations were as high as the men's.[13] E. J. Castilla, *Gender, Race,*

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[13] *See also* M. Elvira and M. Graham, *Not Just a Formality: Pay System Formalization and Sex-Related Earnings Effects*, 13 ORGANIZATION SCIENCE 601, 614 (2002), concluding from a case study that "(t)he lack of accountability for decisions, the lack of normative structure defining appropriate action, and the

and Meritocracy in Organizational Careers, 113 AM. J. SOCIOL. 1479 (2008). Organizations that based managers' and supervisors' evaluations and pay on nondiscriminatory behavior employed more women in nontraditional jobs. R. A. Noe, EMPLOYEE TRAINING AND DEVELOPMENT (2002).

Research on a cross-section of firms has further documented the importance of accountability in hiring for reducing exclusionary practices. Konrad and Linnehan, *supra.* Thus, social science research has shown that practices designed to increase organizational accountability can help to prevent workers' sex or race from influencing personnel decisions. Accountability structures – personnel staff whose duty is to monitor progress and that hold managers responsible for fair decisions – have been shown to increase women's access to managerial jobs, but these structures make a difference only if some organizational entity is responsible for regularly assessing the decision making practices and their outcomes and providing feedback to those higher in the organizational hierarchy who are in a position to sanction noncompliant behavior. A. Kalev, F. Dobbin, and E. Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV 589 (2006).

C. Monitoring Tends to Decrease Gender Disparities

Corporations routinely monitor their performance with respect to their core functions, realizing that without data they cannot remain competitive. For

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greater the ambiguity in performance criteria, the more likely personnel decisions will be influenced by bias."

the same reason, monitoring the outcomes of personnel decisions is necessary to discover and address disparities. Reskin et al. (1999), *supra*, at 64-5. As in monitoring any form of corporate performance, the extent to which subjective discretionary decisions systematically disadvantages members of some groups is not immediately obvious. Without systematic data, disparities are difficult to detect. C.G. Rutte, K.A. Diekmann, J.T. Polzer, F.J. Crosby and David M. Messick, *Organization of Information and the Detection of Gender Discrimination*, 5 PSYCHOLOGICAL SCIENCE 226-231 (1994). As accountability specialists point out, "tracking [the effects of] discretion can be difficult, as assumptions, uncertainty and ambiguity are buried in layers of small decisions . . . ." W. N. Espeland and B. I. Vannebo, *Accountability, Quantification, and the Law*, 3 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 21, 39 (2007). Nonetheless, research indicates that monitoring checks the effects of discretion. L. I. Langbein, *Ownership, Empowerment, and Productivity: Some Empirical Evidence on the Causes and Consequences of Employee Discretion*, *19* J. OF POLICY RESEARCH 427 (2000).

In addition to recording and comparing the results of personnel decisions, corporations may monitor their personnel procedures by analyzing complaints brought to grievance-resolution structures or by systematically surveying employees about their perceptions of bias. They can then use this information to develop more effective policies and procedures. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

CONCLUSION

For these reasons, *amici* urge the Court to affirm the Ninth Circuit's decision allowing certification of the class under Rule 23.

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