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BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE

HEARING: BARRIERS TO JUSTICE AND ACCOUNTABILITY: HOW THE SUPREME COURT'S RECENT RULINGS WILL AFFECT CORPORATE BEHAVIOR

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The Supreme Court's Decision in *Wal-Mart Stores, Inc. v. Dukes*: No Justice for Women, No Accountability for Corporate Defendants

My name is Marcia Greenberger, and I am Co-President of the National Women's Law Center, which since 1972 has been involved in virtually every effort to secure and defend women's rights. I appreciate the opportunity to submit this written testimony on "Barriers to Justice and Accountability: How the Supreme Court's Recent Rulings Will Affect Corporate Behavior."

My testimony will focus on the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, which was issued just last Monday. I am also attaching an *amicus* brief submitted in *Wal-Mart* by the National Women's Law Center and the American Civil Liberties Union,[1] which sets out the importance of class actions in the employment discrimination context and illuminates how the decision could cause great injury for women in the workplace.

I. The Supreme Court In *Wal-Mart v. Dukes* Created New Hurdles for Plaintiffs Challenging Discrimination As A Class.

Last week, in *Wal-Mart Stores, Inc. v. Dukes*, in a 5-4 majority opinion on the central point in the case written by Justice Scalia, the Supreme Court created a series of new hurdles for women and other workers to overcome in challenging discrimination, and new incentives for employers to evade their responsibility to maintain a workplace free from discrimination.

In seeking class certification, the women at Wal-Mart described a corporate culture and structure that resulted in company-wide sex discrimination in pay and promotions and an overall employment record that was appalling. As described in Justice Ginsburg's dissent,[2] nationwide, women comprised 70 percent of Wal-Mart's hourly workers, but only 33 percent of managers.[3] And the higher up and better paid the management jobs, the fewer the women.[4] Women were paid less in every region, and the salary gap grew over time – even for men and women hired at

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[1] Brief for American Civil Liberties Union and National Women's Law Center et al. as *Amici Curiae* in *Wal-Mart Stores, Inc. v. Dukes*, *available at* http://www.nwlc.org/sites/default/files/pdfs/2011_2_28_aclu_nwlc_wal-mart_amicus_brief_to_printer.pdf (last visited June 28, 2011).

[2] *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277, slip op. at 4 (U.S. June 2011) (Ginsburg, J., concurring in part and dissenting in part) (hereinafter "Slip op.").

[3] *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 146 (N.D. Cal. 2004).

[4] *Id*. at 155.

the same time for the same job.[5] Yet women employees overall had better job performance reviews and greater seniority than their male counterparts.[6]

Despite these dismal statistics and evidence of an unwelcoming and discriminatory corporate culture, Wal-Mart gave local managers wide discretion to set pay and make promotions without checks and balances from the central office. As Justice Ginsburg stated in her dissent, promotions were based on a "tap on the shoulder" process,[7] which allowed managers to favor employees "with characteristics similar to their own."[8]

The evidence in the case included statements that provided a window into the attitudes of many managers. Examples include statements that certain desirable positions were "a man's job;"[9] that men are breadwinners, but women work only "for the sake of working;"[10] and that women's family responsibilities interfere with work, so they "should be at home with a bun in the oven."[11]

The women plaintiffs argued that Wal-Mart's discriminatory culture, plus minimal monitoring of managers' subjective decision-making, inevitably led to widespread gender disparities in pay and promotions that they should be able to challenge in a nationwide class. This wasn't a novel theory ─ years of legal precedent have established that employees can band together and bring a class action to challenge a practice of subjective decisionmaking that leads to discriminatory results.[12] But, last week, the five-Justice majority held that the women of Wal-Mart cannot bring a nationwide class action to challenge the discriminatory, subjective practices they described.

The *Wal*-Mart decision changed the law. Now women and others facing discrimination have a major new hurdle to overcome to show "commonality" ─ that there are "questions of law or fact common to the class" ─ as required under Rule 23(a)(2) of the Federal Rules of Civil Procedure. Despite the wide range of statistical and anecdotal evidence of discrimination presented, the five-Justice majority held that the required proof was "entirely absent" in this case because "Wal-Mart's announced policy forbids sex discrimination." *Id.* But it is extremely difficult to imagine that any company would announce a policy that did otherwise. Justice Scalia went on to assert, without benefit of any citations or authority, that as long as a company has a boilerplate policy of non-discrimination, "left to their own devices most managers in any corporation – and surely most managers in a corporation that forbids sex discrimination – would select sex-neutral performance-based criteria for hiring and promotion that produce no actionable disparity at all."[13] The experiences of all too many women over all too many years tell a very different story.

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[5] *Id*.
[6] Joint Appendix to the Record in the Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 483a-85a (hereafter "JA")
[7] 222 F.R.D. at 148
[8] Slip op. at 7 (Ginsburg, J., concurring in part and dissenting in part).
[9] JA 839-41a, 1110a.
[10] JA 1313-14a.
[11] JA 845a.
[12] *See, e.g.*, *Brown v. Nucor Corp.*, 576 F.3d 149 (9th Cir. 2009); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999).
[13] Slip op. at 15.

The Court's decision also leaves it unclear how the prerequisites for a class action can be satisfied in future cases. The Court rejected the statistical analyses of regional and national pay disparities between men and women as insufficient to "establish the uniform, store-by-store disparity" that the majority considered necessary to establish commonality for the class.[14] The anecdotal evidence proffered by the women of Wal-Mart was also not sufficient for the Court. Although the plaintiffs submitted about 120 affidavits, the Court discounted them because they made up only "about 1 for every 12,500 class members" and they only came from a small percentage of Wal-Mart's 3,400 stores.[15] In its decision, the majority cited an earlier case, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), in which there was about one anecdote for every eight class members. But, as Justice Ginsburg noted in her dissent, since *Teamsters* "instructs that statistical evidence alone may suffice, . . . that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account."[16] Moreover, Justice Ginsburg wrote that the plaintiffs' evidence, including the anecdotes, "suggests that gender bias suffused Wal-Mart's company culture."[17]

Finally, under another section of the opinion that was joined by all the Justices, it will be harder for employees to seek backpay in class actions.[18] They will have to proceed under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires individual notice to prospective class members that gives them the chance to "opt out" of the class – a costly procedure.

II. The Increased Burden For Class Certification Will Affect Employees' Ability to Challenge Discrimination In The Workplace.

The *Wal-Mart* case has dramatically changed the landscape for employees who face discrimination on the job by undermining the class action enforcement mechanism. Class actions were designed to change system-wide discriminatory employment practices that can affect large numbers of people. And, in cases where, as here, large numbers of plaintiffs are challenging systemic discrimination, it is more efficient, and thus less expensive for individual plaintiffs in the class, to bring the case as a class action rather than in numerous separate lawsuits where both the legal pleadings and briefings and the discovery of evidence may be duplicative. Indeed, the scope and efficiency of the class action mechanism can overcome the many practical barriers that prevent individuals from bringing claims on their own, including fear of retaliation by an employer, the high costs of litigation compared to a low dollar value for one individual's claims (especially if the individual is a low-wage worker), lack of knowledge of how to find a lawyer, or lack of awareness that an individual may have suffered discrimination — especially in the context of pay discrimination, when employer rules often prohibit the discussion of wages.[19]

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[14] *Id.* at 16.
[15] *Id.* at 18.
[16] Slip op. at 5, n. 4 (Ginsburg, J., concurring in part and dissenting in part).
[17] *Id.* at 5.
[18] Slip op. at 20-27.
[19] *See, e.g.*, H. R. Rep. 110-237, at 7 (2007) (House Report on the Lilly Ledbetter Fair Pay Act of 2007); Leonard Bierman & Rafael Gely, *"Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law*, 25 Berkeley J. Emp. & Labor L. 167, 168, 171 (2004).

The *Wal-Mart* majority suggested that employment discrimination class actions are a frequent occurrence that imposes a significant burden on corporate employers. But in fact, class actions make up only a small fraction of employment discrimination lawsuits. One study found that, between 1987 and 2003, class certification was requested in only 3% of employment discrimination cases.[20] Another study concluded that, in 2010, employment discrimination cases made up only 1.9% of class action cases overall.[21] Between 2008 and 2010, in employment discrimination cases where certification was requested, courts certified only about 25%.[22] These figures demonstrate that the concern that employment discrimination class actions overburden employers is significantly overblown. And, after the Supreme Court's decision in *Wal-Mart*, it is likely that even fewer employment discrimination class actions will be certified.

The increased difficulty of class certification means that many employees facing discrimination will be forced to proceed on their own. But, unfortunately, individual employment discrimination plaintiffs have a difficult time securing legal representation, especially if their claims are low in value. A 2003 estimate found that "for a member of the private bar to accept a civil case against an employer, there must be provable economic damages (not including punitive damages) of at least $75,000"[23] — and that figure has surely increased with inflation. In fact, a study of five significant employment class actions concluded that individual employees would have experienced great difficulty securing legal representation given the small values of their claims and the cost of legal fees.[24] Pay discrimination claims of low-income workers, such as many of the women in the *Wal-Mart* case, are typically very small in value.

Because it is challenging to secure legal representation, many employment discrimination plaintiffs proceed pro se, representing themselves. One study found that one in five employment discrimination plaintiffs act pro se throughout the lawsuit, and another 8% of plaintiffs initially file pro se and obtain counsel later in the case.[25] Unfortunately, plaintiffs acting pro se generally fare poorly in court – compared to represented plaintiffs, "they are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment."[26]

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[20] Laura Beth Nielsen, Robert L. Nelson, Ryon Lancaster & Nicholas Pedriana, American Bar Foundation, *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003* 3 (2008), *available at* http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf (last visited June 28, 2011).

[21] Brief for National Employment Lawyers Association et al. as *Amici Curiae* in *Wal-Mart Stores, Inc. v. Dukes* 32, *available at* http://www.americanbar.org/content/dam/aba/publishing/previewbriefs/Other_Brief_Updates/ 10-277_respondentamcunela-ejs-andlas-elc.authcheckdam.pdf (last visited June 28, 2011).

[22] *Id.*

[23] Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. R. 105, 106-107 (2003) (estimating the $75,000 figure in 2003, based on a 1995 study that concluded private attorneys would accept cases only if there were provable economic damages of at least $60,000).

[24] National Workrights Institute, *Class Actions – A Look at the Record* 7-8, *available at* http://workrights.us/wp-content/uploads/2011/02/Class-Action-PDF1.pdf (last visited June 28, 2011).

[25] Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175, 188 (2010).

[26] *Id.*

Finally, to understand *Wal-Mart*'s full effect on other employees — and women in particular — it is important to view the decision in the context of recent economic vicissitudes. The recession and the ongoing recovery only underscore the need for robust protections against unlawful employment practices for women in the workplace. The recession hurt women and men across the nation. Although women, especially those holding public sector jobs, initially were more likely to remain employed, women have not fared as well as men in the subsequent recovery.[27] For example, during the recovery, the unemployment rate for women actually increased from 7.7% to 8.0%, while for men it dropped from 9.8% to 8.9%.[28] The unemployment rate as of May 2011 continued to be particularly acute for African-American women (13.4%, increasing from 11.8% in July 2009) and single mothers (12.7%, increasing from 12.6%).[29] Women lost nearly 3 out of every 10 jobs in the recession, but have gained fewer than 2 in every 10 jobs since the recovery began to pick back up in 2010.[30] In the public sector, job loss for women has continued throughout the recovery, with women losing 68.8% of public sector jobs, although they make up 57% of the public workforce.[31] And, although the private sector has experienced growth during the recovery, women gained only 14% of the 1.267 million new jobs in the private sector. The impact of the recession and recovery on women's jobs has a real effect on families, especially given the fact that, today, about 4 in 10 mothers are the breadwinner for their families.[32]

Given the still-bleak economic picture and the effect on women's jobs, it is essential that women continue to have recourse to tools that enable them to fight against unlawful employment practices. Title VII and other civil rights laws guarantee that women in the workplace receive equal treatment – including equal pay – and that women who are currently looking for work have equal access to employment opportunities. In tough economic times, when every job and every dollar count, loss of wages due to pay discrimination, for example, has a particularly serious impact on women and their families. And, when women are unable to find work due to employer discrimination, the economic effect on their families is considerable. In this time of recession, therefore, it is essential that women, especially low-income women, do not lose the ability to enforce their workplace rights in the courts.

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[27] *See* National Women's Law Center, *Modest Recovery Largely Leaves Women Behind* (June 2011), *available at* http://www.nwlc.org/resource/modest-recovery-largely-leaves-women-behind (last visited June 28, 2011).

[28] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, *available at* http://bls.gov/ces/cesbtabs.htm (last visited June 28, 2011).

[29] NWLC calculations from *id.* at Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, Table A-3: Employment status of the Hispanic or Latino population by sex and age, not seasonally adjusted, and Table A-10: Selected Unemployment Indicators, seasonally adjusted.

[30] NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Employment Statistics Survey, Table B-5: Employment of women on nonfarm payrolls by industry sector, seasonally adjusted, *available at* http://bls.gov/ces/cesbtabs.htm (last visited June 28, 2011).

[31] NWLC calculations from *id.*

[32] Heather Boushey, *The New Breadwinners*, *in* THE SHRIVER REPORT: A WOMEN'S NATION CHANGES EVERYTHING, 32, 35 (2009) (reporting that in 2008, 4 out 10 mothers were breadwinners, compared with 1 out of 10 in 1967) , *available at* http://www.americanprogress.org/issues/2009/10/womans_nation.html/#breadwinners.

III. The *Wal-Mart* Decision Can Be Expected To Have A Significant Impact Upon The Federal Court System.

The immediate impact of the *Wal-Mart* decision is that more individuals will be forced to file their own lawsuits, rather than join with other plaintiffs. This means more cases will be filed, resulting in more motions, conferences, and trials on already overburdened judges' dockets. Moreover, limiting the class action mechanism means that plaintiffs who might otherwise have banded together must each separately conduct discovery and collect evidence for their cases, increasing time, litigation costs, and the potential for duplicative processes. Increased individual actions also result, eventually, in more appeals for the federal court system to absorb. Further, employers and corporate defendants more generally will likely seek to push the boundaries of this decision in the courts, and lower courts around the country will need to grapple with the troubling and unnecessary language in Justice Scalia's opinion.

Increasing litigation of this nature is particularly problematic given the current state of the federal court system. Currently, there are 87 vacancies on the federal district and appellate courts (16 on the courts of appeals and 71 on the district courts),[33] a vacancy rate of over ten percent. Moreover, court caseloads around the country have been rising over the past five years, especially in border states where the numbers of immigration-related cases have increased exponentially.[34] At present, 35 of the 87 vacant judgeships have been designated "judicial emergencies"[35] by the Administrative Office of the U.S. Courts. Courts around the country are already struggling to manage their caseloads, with judges routinely driving hundreds of miles to hear cases,[36] district courts sending cases to courts in other states,[37] and unprecedented reliance on senior judges to keep the courts functioning.[38] Unless the Senate takes steps to confirm more judicial nominees, including by voting expeditiously on nominees once they have been approved by this Committee, the federal courts, which are already strained to the breaking point, will be significantly and detrimentally impacted by litigation in the wake of *Wal-Mart*.

IV. Congress Must Take Steps To Address The Consequences Of The Decision In *Wal-Mart.*

While the women of Wal-Mart continue their fight, it is essential for women, and indeed for all employees across the country, no matter their employer, that the devastating consequences

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[33] U.S. Courts website, Judicial Vacancies, *available at* http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx.

[34] U.S. Courts, Filings in the Federal Judiciary Continued to Grow in Fiscal Year 2010 (March 15, 2011), *available at* http://www.uscourts.gov/News/NewsView/11-03-15/Filings_in_the_Federal_Judiciary_Continued_to_Grow_in_Fiscal_Year_2010.aspx.

[35] U.S. Courts website, Judicial Emergencies, *available at* http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx.

[36] Jerry Markon and Shailagh Murray, *Federal Judicial Vacancies Reaching Crisis Point*, WASH. POST, Feb. 8, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020706032.html (last visited June 28, 2011).

[37] Ian MacDougall, *RI Judge Holdup Sends 2 Dozen Cases to NH, Mass.*, ASSOC. PRESS, Mar. 7, 2011, *available at* http://newsblog.projo.com/2011/03/ri-judge-holdup-sends-2.html (last visited June 28, 2011).

[38] Carol J. Williams, *Senior Judges Keep 9th Circuit Courthouses Open*, L.A. TIMES, March 14, 2011, *available at* http://www.latimes.com/news/local/la-me-senior-judges-20110314,0,1680937.story (last visited June 28, 2011).

of this decision not be allowed to stand. The Senate should certainly pick up the pace in filling judicial vacancies, and Congress must step up to keep the courthouse door open and to counteract the perverse incentive employers now have to become less vigilant in reining in discriminatory practices by their managers. One essential way to do that is to pass the Paycheck Fairness Act, S.797/H.R. 1519, introduced in April by Senator Mikulski and Representative DeLauro, which establishes employer incentives to provide equal pay, as well as enhanced enforcement tools to secure it. In the last Congress, the House of Representatives had passed the Paycheck Fairness Act, and it fell only two votes short of overcoming a filibuster in the Senate. In these tough economic times, it is hardly asking too much for Congress to provide American women with a fair shot at a job, with equal pay, for their sake and the sake of their families.

The National Women's Law Center deeply appreciates this Committee's consideration of this important issue, as well as the opportunity to submit written testimony for this hearing.