1	IN THE SUPREME COURT	OF THE UNITED STATES	
2		x	
3	WAL-MART STORES, INC.,	:	
4	Petitioner	: No. 10-277	
5	v.	:	
6	BETTY DUKES, ET AL.,	:	
7		x	
8	Wash	ington, D.C.	
9	Tues	day, March 29, 2011	
10			
11	The above-ent	itled matter came on for oral	
12	argument before the Supreme Court of the United States		
13	at 10:19 a.m.		
14	APPEARANCES:		
15	THEODORE J. BOUTROUS, JR., ESQ., Los Angeles,		
16	California; on behalf of Petitioner.		
17	JOSEPH M. SELLERS, ESQ., Wa	shington, D.C.; on behalf of	
18	Respondents.		
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1	CONTENTS	
2	ORAL ARGUMENT OF	PAGE
3	THEODORE J. BOUTROUS, JR., ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOSEPH M. SELLERS, ESQ.	
7	On behalf of the Respondents	24
8	REBUTTAL ARGUMENT OF	
9	THEODORE J. BOUTROUS, JR., ESQ.	
10	On behalf of the Petitioner	51
11		
12		
13		
14	•	
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1	PROCEEDINGS		
2	(10:19 a.m.)		
3	CHIEF JUSTICE ROBERTS: We'll hear argument		
4	first this morning in Case 10-277, Wal-Mart Stores v.		
5	Dukes.		
6	Mr. Boutrous.		
7	ORAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,		
8	ON BEHALF OF THE PETITIONER		
9	MR. BOUTROUS: Mr. Chief Justice, and may it		
10	please the Court:		
11	The mandatory nationwide class in this case		
12	was improperly certified for two fundamental reasons.		
13	First, plaintiffs failed to satisfy Rule 23(a)'s		
14	cohesion requirements as reflected in the commonality,		
15	typicality, and adequacy requirements of the rule.		
16	Second, plaintiffs' highly individualized claims for		
17	monetary relief failed to satisfy Rule 23(b)(2)'s		
18	requirements for certification of a mandatory		
19	non-opt-out class.		
20	Regarding Rule 23(a), because the		
21	plaintiffs' claims in this case hinge on the delegation		
22	of discretion to individual managers throughout the		
23	country, they cannot meet the cohesion requirements that		
24	are reflected in in Rule 23(a). The delegation of		
25	discretion in some ways is the opposite of cohesive		

- 1 claims that are common to everyone in the class. The
- 2 common policies that the plaintiffs point to are either
- 3 neutral and not argued to be discriminatory or they are
- 4 affirmatively nondiscriminatory. The company has a very
- 5 strong policy against discrimination and in favor of
- 6 diversity.
- 7 CHIEF JUSTICE ROBERTS: I suppose if
- 8 corporate headquarters had learned that the subjective
- 9 decisionmaking or the delegation of decisionmaking to
- 10 the field was resulting in several discriminatory
- 11 practices or a pattern of discrimination -- in other
- 12 words, the decentralized process was leading to
- 13 discrimination -- then I suppose the company -- that
- 14 that could be attributed to the policy adopted by -- at
- 15 headquarters?
- 16 MR. BOUTROUS: No, Your Honor. I think that
- in this situation, if there was a pattern, for example,
- 18 at a particular store where the decisionmaking unit --
- 19 CHIEF JUSTICE ROBERTS: No, I'm talking
- 20 about -- so, they've got thousands of stores, and, you
- 21 know, every week they get a report from another store
- 22 saying that, you know, there's an allegation of gender
- 23 discrimination. At some point, can't they conclude that
- 24 it is their policy of decentralizing decisionmaking that
- 25 is causing or permitting that discrimination to take

- 1 place?
- 2 MR. BOUTROUS: That -- I think that would be
- 3 an inquiry, Your Honor. I don't think it would rise to
- 4 a pattern or practice or a common policy that affects
- 5 everyone in the same way. Certainly, companies do look
- 6 at the -- the situation throughout the company and seek
- 7 to root out discrimination, but it would take more than
- 8 some reports, especially in -- in a company that has so
- 9 many stores and so many units.
- 10 And here, the plaintiffs' claims simply
- 11 aren't typical. If the three named plaintiffs stand
- 12 before the court, they are supposed to represent 500,000
- or a million or more people and stand in judgment --
- 14 that's the words the Court used in Hansberry v. Lee --
- 15 to represent all those other people. And the claim is
- 16 that the individual decisionmakers in those other cases
- 17 exercised their discretion in a way that was biased, and
- 18 there's no proof of that.
- 19 JUSTICE GINSBURG: Did --
- JUSTICE KENNEDY: The Chief Justice's
- 21 question reminds me somewhat of our rule in Monell under
- 22 1983: A city is not liable for a -- a constitutional
- 23 violation unless it has a policy. Would you think that
- 24 we could use that as an analogue to determine whether or
- 25 not there is a common question here?

- 1 MR. BOUTROUS: Yes, Your Honor. I think the
- 2 analogue is that if a company had a policy, a general
- 3 policy, of discrimination as opposed to here, where it's
- 4 a general policy against discrimination, and it was --
- 5 in the words of the Court in Feeney, saw patterns
- 6 throughout the company and because of sex, because of
- 7 gender, continued to allow the patterns to exist, that
- 8 would raise a different question.
- 9 JUSTICE KENNEDY: Suppose, following the
- 10 Monell analogue, there's -- it's a -- there's a showing
- 11 of deliberate indifference to the violation. Would that
- 12 be a policy?
- 13 MR. BOUTROUS: Your Honor, I think
- 14 deliberate indifference raises a different question.
- 15 Under a disparate treatment claim, again, in Feeney, the
- 16 test would be, was the company allowing the
- 17 discrimination to occur because of gender, because it
- 18 wanted there to be discrimination? There's no evidence
- 19 of that here.
- JUSTICE GINSBURG: Is there any
- 21 responsibility if you -- the numbers are what has been
- 22 left out so far. The company gets reports month after
- 23 month showing that women are disproportionately passed
- over for promotion, and there is a pay gap between men
- 25 and women doing the same job. It happens not once, but

- 1 twice. Isn't there some responsibility on the company
- 2 to say, is gender discrimination at work, and if it is,
- 3 isn't there an obligation to stop it?
- 4 MR. BOUTROUS: Your Honor, yes, there is an
- 5 obligation to ensure -- for a company to do its best to
- 6 ensure there are not wage gaps and discrimination. But
- 7 here, for example, if one looks at the aggregated
- 8 statistics that the plaintiffs have pointed to, it
- 9 points to a completely different issue. It does not
- 10 show that there were gender gaps at the stores among
- 11 comparable people. That's really the fundamental flaw
- 12 in their case.
- 13 Their argument is that individual
- 14 decisionmakers throughout the country were making
- 15 stereotyped decisions and that that had a common effect,
- 16 but they just added everything together. They haven't
- 17 shown a pattern across the map. They've added all the
- 18 data together and pointed to disparities, some of which
- 19 mirror some of the -- the statistics that --
- JUSTICE SOTOMAYOR: Counsel, I thought their
- 21 expert didn't aggregate them together. He did it
- 22 regionally, not store by store, as your expert did,
- 23 number one; and, number two, that he performed, as
- 24 accepted by the district court, and affirmed by the
- 25 circuit court, any number of controlled variable

- 1 comparisons, including job history, job ratings, and
- 2 other things, and found that the disparity could not be
- 3 explained on any of the normal variables that one would
- 4 expect and that the disparity was significantly much
- 5 higher than the 10 competitors of Wal-Mart and what they
- 6 were paying their labor force.
- 7 So, what is speculative about that, number
- 8 one? And, two, why is that kind of statistical analysis
- 9 inadequate to show that a policy of some sort exists?
- 10 MR. BOUTROUS: Justice Sotomayor, first,
- 11 plaintiffs' expert did a national regression and then
- 12 simply estimated the regional results. He did not do a
- 13 regional regression. But even if he had, these
- 14 statistics go more to the merits. We think we have
- 15 strong arguments on the merits responding to those
- 16 statistical arguments --
- 17 JUSTICE SOTOMAYOR: Well, that begs the
- 18 legal question, which is -- you're right. Ultimately,
- 19 you may win and prove to a factfinder that this analysis
- 20 is fatally flawed, but what the district court concluded
- 21 was that on the basis of your expert, whom he discounted
- 22 because your expert was -- was basing analysis on -- on
- 23 premises that the court found not acceptable, that there
- 24 was enough here after a rigorous analysis.
- 25 What's the standard that the court should

- 1 use in upsetting that factual conclusion?
- MR. BOUTROUS: Your Honor, the district
- 3 judge did not discount Wal-Mart's expert. The district
- 4 court found that it wasn't the stage at which to make a
- 5 determination between the two. The standard that we
- 6 think would govern would be the standard that the Second
- 7 Circuit adopted in the IPO case, which says there needs
- 8 to be a choice.
- 9 When you're talking about discretionary
- 10 decision around the country by different decisionmakers,
- 11 there has to be some demonstration that there's a common
- 12 effect throughout the system. Our expert's report and
- 13 testimony showed that at 90 percent of the stores, there
- 14 was no pay disparity. And that's the kind of -- and
- 15 even putting that aside, the plaintiffs needed to come
- 16 forward with something that showed that there was this
- 17 miraculous recurrence at every decision across every
- 18 store of stereotyping, and the evidence simply doesn't
- 19 show that.
- 20 The -- the other problem on the -- on the
- 21 cohesion analysis is that -- again, the typicality
- 22 inquiry. Each of the plaintiffs have very different
- 23 stories. One of them was promoted into a managerial
- 24 position. One was terminated for disciplinary
- 25 violations. One was promoted and then had a

1	disciplinary problem and then was demoted. In each of		
2	these cases, if this were an individual case, they would		
3	have to show that they were treated differently than		
4	people who were situated just like them, with the same		
5	supervisor, the same department, the same situation.		
6	JUSTICE ALITO: What do you think is the		
7	difference between the standard that the district court		
8	was required to apply at the certification stage on the		
9	question whether there was a company-wide policy and the		
10	the standard that would be applied on the merits?		
11	MR. BOUTROUS: At the certification stage,		
12	Justice Alito, the plaintiffs did not have to prove that		
13	there was an actual policy of discrimination and that		
14	that was the company's policy, but they at least needed		
15	to point to a policy that was common and that linked all		
16	of these disparate individuals and disparate locations		
17	and different people together. And and one their		
18	argument is that the common policy is giving tens of		
19	thousands of individuals discretion to do whatever they		
20	want. That is not commonality. It's the opposite.		
21	JUSTICE KAGAN: I don't think that's quite		
22	fair, Mr. Boutrous. I think their argument was that the		
23	common policy was one of complete subjectivity, was one		
24	of using factors that allowed gender discrimination to		
25	come into all employment decisions. And in Watson, we		

- 1 suggested that that was a policy, a policy of using
- 2 subjective factors only, when making employment
- 3 decisions. That's exactly the policy that was alleged
- 4 here.
- 5 MR. BOUTROUS: Justice Kagan, they do not
- 6 argue that it was an entirely subjective process. As
- 7 the Court suggested in Falcon, entirely subjective
- 8 would -- would be a different issue. They argue that it
- 9 was excessive subjectivity and that there were general
- 10 overarching company standards that exerted control.
- 11 On page -- I think it's on page 13 of their
- 12 brief, they say the discretion was unquided. Three
- 13 pages later they say it was guided by these
- 14 nondiscriminatory policies. So, it's really an
- 15 incoherent theory that does not have -- pose the kind of
- 16 situation you're suggesting.
- 17 JUSTICE KAGAN: I -- I quess I'm just a
- 18 little -- a little bit confused as to why excessive
- 19 subjectivity is not a policy that can be alleged in a
- 20 Title VII pattern and practice suit or in a Title VII
- 21 disparate impact suit.
- 22 MR. BOUTROUS: Your Honor, in Watson, the
- 23 Court did suggest -- did state and -- and hold that
- 24 subjective decisionmaking could be challenged in a
- 25 disparate impact case, but Justice O'Connor's opinion

- 1 went on to say there needs to be the identification of a
- 2 specific practice within that policy.
- 3 As the Court said in Falcon, Title VII does
- 4 not govern policies; it governs practices. And
- 5 subjectivity is not a practice if it were a policy. And
- 6 there was a -- like most companies, Wal-Mart has a
- 7 combination of objective and subjective standards.
- 8 Within that, the plaintiffs -- if they had pointed to
- 9 some particular criteria, people with a great
- 10 personality, they're going to -- they're -- they're the
- ones we're going -- we're going to push up, and they --
- 12 they were trying to tie that to a disparate impact or
- 13 disparate treatment, that would be --
- 14 JUSTICE GINSBURG: Mr. Boutrous, there was a
- 15 case, it was in the '70s, and it was a class action
- 16 against AT&T for, I think, promotion into middle
- 17 management. What was at issue there was a part -- a
- 18 test, part objective, but then in the end, the final
- 19 step was a so-called total person test, and women
- 20 disproportionately flunked at that total person.
- 21 And the idea wasn't at all complicated. It
- 22 was that most people prefer themselves; and so, a
- 23 decisionmaker, all other things being equal, would
- 24 prefer someone that looked like him. And that was
- 25 found, that total -- the application of that total

- 1 person concept was found to be a violation of Title VII.
- This sounds quite similar. I mean, it's not
- 3 just -- it's not subjective. You have an expert -- I
- 4 know you have some questions about that expert -- but
- 5 the expert saying that gender bias can creep into a
- 6 system like that simply because of the natural
- 7 phenomenon that people tend to feel comfortable with
- 8 people like themselves.
- 9 MR. BOUTROUS: Your Honor, this -- this is
- 10 not like the total person test, but I think that is a
- 11 very good example of something that could be a -- a
- 12 practice inside the -- the overarching policies, and if
- 13 you had a case where a particular decisionmaking unit
- 14 applied the total practice test, and you had disparate
- 15 results in that particular unit, that group of people
- 16 could -- could -- would have a much stronger case for a
- 17 class action.
- 18 But as Your Honor points out, the -- the
- 19 sociologist here, who is the glue that's supposed to
- 20 hold this class together, said he couldn't tell if
- 21 stereotyping was occurring one-half of 1 percent or 95
- 22 percent or at all.
- 23 And this is a class action. The question
- 24 here is whether that we can assume that every
- 25 decisionmaker acted in the same manner in a way that had

- 1 in this Court's words the same injury, caused -- the
- 2 plaintiffs had the same interest and the same injury,
- 3 that's the way the Court put it in Amchem, by their own
- 4 expert accepting all of their proof, the answer is no.
- 5 That assumption is not supported by the record. That's
- 6 why there's not the kind of cohesion that's necessary to
- 7 protect the rights of the absent class members and the
- 8 defendant.
- 9 The -- the -- the other --
- 10 JUSTICE KAGAN: Mr. Boutrous, I think that
- 11 that suggests that the plaintiffs would have to
- 12 demonstrate discrimination in every individual case, and
- 13 that's never been the law. All that the plaintiffs have
- 14 to demonstrate and, especially at this stage in the
- 15 proceedings, is that there is a practice, a policy of
- 16 subjectivity that on the whole results in discrimination
- 17 against women, not that each one of these women in the
- 18 class were themselves discriminated against.
- MR. BOUTROUS: That's correct, Your Honor.
- 20 At the phase one, we're not arguing that a plaintiff
- 21 would have to come forward and show that every class
- 22 member was discriminated at that point. Under the
- 23 Teamsters' analysis, there must be proof of a standard
- 24 operating procedure of discrimination.
- 25 Here, it's undisputed that Wal-Mart's

- 1 policy -- and it wasn't just a written policy; it was
- 2 implemented and enforced rigorously -- that was
- 3 antidiscrimination. But, Your Honor, you're correct,
- 4 that each person doesn't have to come forward in phase
- 5 one.
- 6 The big -- the other big problem here is
- 7 that the district judge said in phase two, under
- 8 Teamsters, Wal-Mart would not be entitled to put on its
- 9 individual defenses. Women who thought they had a claim
- 10 would not be able to come forward if a -- in this
- 11 process, the paper records suggested they didn't have a
- 12 claim, and come into court and have their day in court
- 13 and argue that they should be compensated.
- 14 The plaintiffs are trying to cut off half of
- 15 the Teamsters' framework, which is fundamental both to
- 16 due process and to Title VII because Title VII's section
- 17 706(g) states very clearly that only victims of
- 18 discrimination may recover.
- 19 CHIEF JUSTICE ROBERTS: What -- what happens
- 20 to the damages claim of an individual woman who is part
- 21 of this class if that class prevails?
- MR. BOUTROUS: If the class prevails, then
- 23 the -- the claim would be resolved in this manner
- 24 under -- it's very unclear what the District Court had
- 25 in mind.

- 1 CHIEF JUSTICE ROBERTS: Would -- would she
- 2 be eligible for only back pay or compensatory damages as
- 3 well?
- 4 MR. BOUTROUS: Yes, Your Honor, she would
- 5 only be eliqible for back pay. The plaintiffs retained
- 6 their compensatory--
- 7 CHIEF JUSTICE ROBERTS: I'm sorry. Go
- 8 ahead.
- 9 MR. BOUTROUS: -- their compensatory damage
- 10 claims for themselves but waived those for the class
- 11 members in order to get a class certified, which I think
- 12 is a fundamental, crucial violation.
- 13 CHIEF JUSTICE ROBERTS: All right. But
- 14 would -- would the -- would the women with a claim for
- 15 compensatory damages be able to sue that after the class
- 16 prevails in this case?
- 17 MR. BOUTROUS: Our view is that she would
- 18 not be because that would have been part of the core
- 19 nucleus of facts in the case.
- 20 CHIEF JUSTICE ROBERTS: Even -- even though
- 21 she could have not received notice and not had an
- 22 opportunity to opt out?
- 23 MR. BOUTROUS: That's the -- that's the
- 24 problem -- that goes to the problem with this (b)(2)
- 25 certification, that this case, if it -- if it were going

- 1 to be certified at all, needed to be looked at under
- 2 Rule 23(b)(3). Rule 23(b)(3) was -- was created for
- 3 precisely this sort of circumstance, the growing edge of
- 4 the law where individualized monetary claims are at
- 5 stake. The -- the language of Rule 23(b)(2) speaks of
- 6 injunctive and declaratory relief.
- JUSTICE SOTOMAYOR: Counsel, would --
- 8 JUSTICE KAGAN: I thought your position was
- 9 that this could not be certified under Rule 23(b)(3),
- 10 either; is that correct?
- 11 MR. BOUTROUS: Our view is the plaintiffs
- 12 will -- will not be able to satisfy those -- those
- 13 provisions, but that's why they brought it under Rule
- 14 23(b)(2), to circumvent the procedural protections of
- 15 superiority, predominance, and the like.
- 16 JUSTICE SOTOMAYOR: Would that bar the
- 17 (b)(2) class? Meaning if their claim is, as they state
- 18 it, that they're seeking injunctive and declaratory
- 19 relief against a discriminatory impact or -- case or a
- 20 pattern and practice case, wouldn't that have value and
- 21 wouldn't that value be, standing alone without the
- 22 damages component, be that the plaintiffs who come in
- 23 later have a presumption that discrimination affected
- 24 them and the burden shifts to Wal-Mart to prove that
- 25 there was a nondiscriminatory reason?

1 MR. BOUTROUS: There certainly could be a 2 benefit from an injunction if -- if the plaintiffs met all the standards. The problem here is that the -- the 3 individualized damage claims, the back pay claims, 4 engulfed and overwhelm the injunctive relief --5 6 JUSTICE SOTOMAYOR: Even if they did, why 7 couldn't you separate out the (b)(2) issue from the 8 (b)(3) question of whether monetary damages have enough common facts and law to warrant a certification under 9 10 (b)(3)? 11 MR. BOUTROUS: Your Honor, some courts have 12 done that, looked at the injunctive relief claims under -- under the (b)(2) standard and the monetary reliefs 13 14 under a (b)(3) standard. That can raise other 15 complications, especially here the plaintiffs are 16 seeking punitive damages as well, but that's at least a possibility. It would certainly be better than this, 17 18 shoe-horning these monetary relief claims that are so 19 individualized. 20 JUSTICE SOTOMAYOR: So, would you address the -- address them separately for me, and tell me why a 21 (b)(2) class couldn't exist only on injunctive relief? 22 And if it can, if you're conceding it can, then is your 23 attack merely that the monetary component of this, the 24 back pay -- which, you know, I know the dispute on 25

- 1 whether that's equitable relief or compensatory relief
- 2 or not -- why that just can't be separated out and put
- 3 into the (b)(3) claim?
- 4 MR. BOUTROUS: Your Honor, our view is that
- 5 the injunctive relief claim still has significant
- 6 problems concerning cohesion, adequacy, typicality,
- 7 commonality. On the adequacy point, this case includes
- 8 at least 544 store managers who are alleged to be
- 9 discriminators and victims. If that's not a conflict
- 10 under Amchem and the adequacy test in Hansberry v. Lee,
- 11 I don't know what is. The -- the women who are
- 12 compelled to be in the class -- they can't opt out,
- they're current employees, they're former employees,
- 14 they cut across every position in the country, and
- there's no demonstration that they're being affected in
- 16 a common way. So, I think there would still be those
- 17 commonality, typicality, cohesion problems because of
- 18 the nature of the plaintiffs' case here, the notion of
- 19 the common policy being giving -- giving discretion and
- 20 -- and independent judgment.
- 21 JUSTICE GINSBURG: I thought that -- correct
- 22 me if I'm wrong, but I thought that this district judge
- 23 said that -- that the absent class members would get
- 24 notice and have an opportunity to -- to opt out. So, a
- 25 -- a plaintiff, a member of the class who wants to go

- 1 for compensation instead of just back pay could opt out.
- 2 MR. BOUTROUS: The district court, Justice
- 3 Ginsburg, limited that ruling to the punitive damage
- 4 claim, and the Ninth Circuit made clear it was viewing
- 5 it that way. It said under its ruling, which sent
- 6 punitive damages back, that would simplify things
- 7 because then there wouldn't have to be notice and an
- 8 opportunity to opt out under back pay. And back pay is
- 9 monetary relief for individuals. To bind people based
- on a balancing test under (b)(2) to a judgment to which
- 11 they were not a party -- in Taylor v. Sturgell, this
- 12 Court talked about the fundamental rule that an
- individual is not bound by a judgment to which they're
- 14 not a party and said we need crisp rules with sharp
- 15 corners in this area where such a fundamental right is
- 16 at stake. And that's why we think it needs to be Rule
- 17 23(b)(3) when individual monetary relief is at stake.
- JUSTICE SOTOMAYOR: That begs my question.
- 19 Are you talking about any monetary relief? You're --
- 20 you're claiming, I'm assuming, that monetary relief
- 21 includes equitable relief.
- MR. BOUTROUS: Yes, Your Honor.
- 23 JUSTICE SOTOMAYOR: The Fifth Circuit has
- 24 described a test where it doesn't use the predominant
- 25 question; it uses the incidental test. What's wrong

- 1 with that test?
- 2 MR. BOUTROUS: That test is much better than
- 3 the test that was applied below. The plaintiffs have
- 4 walked away from the two tests that were applied in the
- 5 lower court. They have never contended they could meet
- 6 the incidental damages test. And under the Fifth
- 7 Circuit's case, the Allison case, only automatic back
- 8 pay that goes to the group as a whole would qualify for
- 9 that. Here, this is individualized relief.
- 10 JUSTICE SOTOMAYOR: I -- that's where I'm
- 11 going to. Would you accept that incidental test as
- 12 appropriate to the question of when monetary damages
- 13 predominate or don't?
- MR. BOUTROUS: Your Honor, the text of Rule
- 15 23(b)(2) is very clear. It talks about injunctive and
- 16 declaratory relief. The only ambiguity that's created
- 17 is from the advisory committee note, and as this Court
- 18 said three weeks ago in the Milner case, we don't look
- 19 to legislative history to try to create ambiguities.
- 20 The -- the other parts of the advisory committee notes
- 21 make very clear that the drafters were concerned about
- 22 the historical antecedents where it was an
- 23 injunctive-only case to -- of -- to desegregate and the
- 24 like. I think the drafters of Rule 23(b)(2) would have
- 25 been shocked if they had learned that this case that

- 1 involves millions of claims for individualized monetary
- 2 relief were -- were being sought to be included in a
- (b)(2) class.
- 4 That said, Your Honor, the incidental damage
- 5 test is -- is I think far superior because it's at least
- 6 clearer and would be closer to a sharp, bright-line
- 7 rule, which is required in this context.
- 8 I'd like to go back briefly to the point I
- 9 made earlier about individual relief and taking away the
- 10 rights of both Wal-Mart and the absent class members.
- 11 The procedures that would be used here -- the Ninth
- 12 Circuit proposed a statistical sampling method. The
- 13 plaintiffs do not defend that. They do not mention
- 14 the Hilao case, which was the cornerstone of the -- the
- 15 Ninth Circuit's ruling, which would allow sort of a
- 16 prediction about who might have been hurt, how many
- 17 people might have been hurt, and then a divvying up of
- 18 -- of moneys based on that.
- 19 The district court precluded the fundamental
- 20 Teamsters hearings, which would allow, once a
- 21 presumption, if one was to arise, of discrimination
- 22 occurred in a pattern of practice -- would allow the
- 23 defendant to then show that it didn't discriminate on --
- on an individual basis, and it would allow the
- 25 individuals to come in and have their day in court.

- 1 That violates Title VII. It violates the Rules Enabling
- 2 Act, and -- and we think it really shows some of the
- 3 core flaws in this case.
- 4 CHIEF JUSTICE ROBERTS: What if the class
- 5 does -- does not prevail; it loses? Does that bar an
- 6 individual woman at a particular Wal-Mart from bringing
- 7 these same claims?
- 8 MR. BOUTROUS: Yes, Your Honor. There's a
- 9 presumption in -- in the world of class actions --
- 10 there's two that I think the plaintiffs are -- are
- 11 relying on. One is that class actions are always good,
- 12 and the bigger the class action, the better, and that
- 13 the class will win. None of those presumptions can be
- 14 counted on. If the plaintiffs lose, and they -- and
- 15 here their compensatory damages claims, I think, would
- 16 be gone because the named plaintiffs are asserting them.
- 17 If they tried to bring a case as pattern or practice or
- 18 pay or promotion, there would be significant questions
- 19 of res judicata and collateral estoppel. And it's not
- 20 fair to anyone to put this all into one big class.
- JUSTICE KAGAN: But you're not suggesting
- that they would be precluded on individual
- 23 discrimination claims, are you?
- MR. BOUTROUS: No, Your Honor, if they had
- 25 individual claims that were separate from the nucleus of

- 1 operative facts here, that might pose a different
- 2 question.
- 3 CHIEF JUSTICE ROBERTS: But what if it were
- 4 the same theory, that the reason this person was able to
- 5 discriminate was because he had total subjective
- 6 discretion in his hiring?
- 7 MR. BOUTROUS: Then I -- then there would be
- 8 a real problem of collateral estoppel or res judicata,
- 9 Your Honor.
- 10 Mr. Chief Justice, I'd like to reserve my
- 11 remaining time for rebuttal.
- 12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MR. BOUTROUS: Thank you.
- 14 CHIEF JUSTICE ROBERTS: Mr. Sellers.
- 15 ORAL ARGUMENT OF JOSEPH M. SELLERS
- ON BEHALF OF THE RESPONDENTS
- 17 MR. SELLERS: Mr. Chief Justice, may it
- 18 please the Court:
- 19 This case follows from the -- the Teamsters
- 20 and Watson models of theories of discrimination, and as
- 21 a consequence, there is no requirement to have a formal
- 22 policy of discrimination here. It can be --
- JUSTICE SOTOMAYOR: What would the
- 24 injunction look like in this case?
- 25 MR. SELLERS: The injunction would look like

- 1 a series of remedial measures that would direct Wal-Mart
- 2 to provide for detailed criteria by which to make pay
- 3 and promotion decisions that are job-related in a way
- 4 that hasn't been true up until now. It would provide
- 5 for it to hold managers accountable for the decisions
- 6 they make; it would ensure effective oversight of the --
- 7 of these pay and promotion decisions in a way that the
- 8 company had -- while the company did have, by the way,
- 9 information regularly submitted to it about pay
- 10 decisions, it took no action, and it did not effectively
- 11 monitor -- allowed these problems to fester.
- 12 CHIEF JUSTICE ROBERTS: All right. Is it
- 13 your position that on this scale subjective
- 14 decisionmaking processes are necessarily illegal?
- MR. SELLERS: No, not at all, Mr. Chief
- 16 Justice.
- 17 CHIEF JUSTICE ROBERTS: So, if this were --
- 18 how many stores are we talking about, a thousand stores?
- 19 MR. SELLERS: Several thousand stores.
- 20 CHIEF JUSTICE ROBERTS: Several thousand
- 21 stores. How many examples of abuse of the subjective
- 22 discrimination delegation need to be shown before you
- 23 can say that flows from the policy rather than from bad
- 24 actors? I assume with three -- however many thousands
- of stores, you're going to have some bad apples.

- 1 MR. SELLERS: Well, Mr. Chief Justice, we
- 2 have some examples in the record. As Teamsters --
- 3 CHIEF JUSTICE ROBERTS: No, I know there are
- 4 examples. How many do you need to have?
- 5 MR. SELLERS: I --
- 6 CHIEF JUSTICE ROBERTS: Surely it won't be
- 7 -- if somebody sends one letter in saying the guy at
- 8 this plant -- is -- plant -- this store is
- 9 discriminating, that can't be enough to support your
- 10 theory.
- 11 MR. SELLERS: That's correct. We don't
- 12 submit that. There is no minimum number that this Court
- 13 has ever set. Teamsters, as an example in Teamsters,
- 14 the Court had before it about 40 examples, but
- 15 significantly they weren't required. In order to
- 16 establish a pattern and practice of liability -- and we
- 17 have more than that, of course -- but in order to
- 18 establish a pattern and practice of liability or at
- 19 least a prima facie case, Teamsters holds that what you
- 20 need to do is show that there were disparities
- 21 sufficiently substantial to create an inference of
- 22 discrimination with respect to a discrete practice.
- 23 CHIEF JUSTICE ROBERTS: Is it -- is it true
- 24 that Wal-Mart's pay disparity across the company was
- 25 less than the national average?

- 1 MR. SELLERS: Mr. Chief Justice, the
- 2 position -- I don't know that that's a fair comparison.
- 3 The position that Wal-Mart has advanced makes no -- the
- 4 comparison it makes is with the general population, not
- 5 with people in retail.
- 6 Wal-Mart's obligation under Title VII is to
- 7 ensure that its managers do not make pay decisions
- 8 because of sex, and the comparison that's relevant is
- 9 between men and women at Wal-Mart, not the general
- 10 population that includes people in retail, but includes
- 11 railroad workers and all kinds of other people. That's
- 12 not the appropriate comparison.
- 13 JUSTICE KENNEDY: It's not clear to me:
- 14 What is the unlawful policy that Wal-Mart has adopted,
- 15 under your theory of the case?
- MR. SELLERS: Justice Kennedy, our theory is
- 17 that Wal-Mart provided to its managers unchecked
- 18 discretion in the way that this Court's Watson decision
- 19 addressed that was used to pay women less than men who
- 20 were doing the same work in the same -- the same
- 21 facilities at the same time, even though -- though those
- women had more seniority and higher performance, and
- 23 provided fewer opportunities for promotion than women
- 24 because of sex.
- 25 JUSTICE KENNEDY: It's -- it's hard for me

- 1 to see that the -- your complaint faces in two
- 2 directions. Number one, you said this is a culture
- 3 where Arkansas knows, the headquarters knows, everything
- 4 that's going on. Then in the next breath, you say,
- 5 well, now these supervisors have too much discretion.
- 6 It seems to me there's an inconsistency there, and I'm
- 7 just not sure what the unlawful policy is.
- 8 MR. SELLERS: Well, Justice Kennedy, there
- 9 is no inconsistency any more than it's inconsistent
- 10 within Wal-Mart's own personnel procedures. The company
- 11 provides to its managers this discretion, which, by the
- 12 way, is very discrete. It is not the broad kind of --
- 13 we're not attacking every facet of the pay and promotion
- 14 decisions. The District Court found specific features
- of the pay and promotion process that are totally
- 16 discretionary. There's no guidance whatsoever about how
- 17 to make those decisions.
- 18 But with respect to the discretion, every
- 19 store, the District Court found, is provided -- managers
- 20 are provided with the same level of discretion. But the
- 21 company also has a very strong corporate culture that
- 22 ensures that managers, not just with respect to the
- 23 practices we're challenging, but in all respects, what
- 24 they call the Wal-Mart way, and the purpose of that is
- 25 to ensure that in these various stores that, contrary to

- 1 what Wal-Mart argues, that these are wholly independent
- 2 facilities, that the decisions of the managers will be
- 3 informed by the values the company provides to these
- 4 managers in training --
- 5 JUSTICE KENNEDY: Well, is that disparate
- 6 treatment?
- 7 MR. SELLERS: It is disparate treatment. It
- 8 is a form of disparate treatment because they are making
- 9 these decisions because of sex, and they -- and they are
- 10 doing so with -- we have evidence that we think, through
- 11 the stereotyping evidence we have here, as well as the
- 12 statistical results --
- JUSTICE SCALIA: I don't -- I'm getting
- 14 whipsawed here. On the one hand, you say the problem is
- 15 that they were utterly subjective, and on the other hand
- 16 you say there is a -- a strong corporate culture that
- 17 quides all of this. Well, which is it? It's either the
- 18 individual supervisors are left on their own, or else
- 19 there is a strong corporate culture that tells them what
- 20 to do.
- 21 MR. SELLERS: Well, Justice Scalia, there is
- 22 this broad discretion given the managers.
- JUSTICE SCALIA: Right.
- MR. SELLERS: But they do not make these
- 25 decisions in a vacuum. They make the decisions within a

- 1 company where they are heavily --
- JUSTICE SCALIA: So, there's no discretion;
- 3 is that what you're saying?
- 4 MR. SELLERS: No, I'm not. I'm suggesting
- 5 they are given this discretion, but they are informed by
- 6 the company about how to exercise that discretion. So,
- 7 it's effectively saying --
- 8 JUSTICE SCALIA: If somebody tells you how
- 9 to exercise discretion, you don't have discretion.
- 10 MR. SELLERS: Well, all right. That's
- 11 another -- it's certainly -- the bottom line is, they
- 12 didn't, and the results show it. There was consistent
- disparities in every one of the regions, 41 regions.
- JUSTICE SCALIA: What do you know about --
- 15 about the unchallenged fact that the central company had
- 16 a policy, an announced policy, against sex
- 17 discrimination, so that it wasn't totally subjective at
- 18 the managerial level? It was, you make these hiring
- 19 decisions, but you do not make them on the basis of sex.
- 20 Wasn't that the central policy of the company?
- 21 MR. SELLERS: That was a written policy.
- 22 That was not the policy that was effectively
- 23 communicated to the managers.
- JUSTICE SCALIA: Now, how was -- how was
- 25 that established?

- 1 MR. SELLERS: Well, what we have, as I said
- 2 before, is evidence of -- for instance, at the -- at the
- 3 Sam Walton Institute, where every manager has to be
- 4 trained before they become a manager, they provide as a
- 5 question -- a response to a standard question: Why are
- 6 women so underrepresented, or so few women in
- 7 management? And the response given was, because men
- 8 seek advancement, are more aggressive in seeking
- 9 advancement.
- Now, that's a typical, stereotypical
- 11 statement provided to every person going through the
- 12 management training program, that they then go off and
- 13 inform -- that informs their decisions when they make --
- 14 when they have this discretion to make promotions.
- 15 JUSTICE SCALIA: And that causes them
- 16 intentionally to discriminate on the basis of sex?
- 17 MR. SELLERS: That's -- that is --
- 18 JUSTICE SCALIA: That causes -- how could
- 19 that possibly cause them to intentionally discriminate
- 20 on the basis of sex?
- MR. SELLERS: Well, they -- they have --
- 22 they have an intent to take sex into account in making
- 23 their decisions; that is -- that is, they apply a
- 24 stereotype about that women are less aggressive when it
- 25 comes to assessing their suitability for promotions.

- 1 JUSTICE SCALIA: That -- that's just an
- 2 assessment of why the percentage is different. They
- 3 differ not only at Wal-Mart, but at -- throughout the
- 4 industry. To say that that's the explanation is not to
- 5 tell your people: Don't promote women.
- 6 MR. SELLERS: Right.
- 7 JUSTICE SCALIA: If you have an aggressive
- 8 woman, promote her.
- 9 MR. SELLERS: I understand that, and there
- 10 were -- there have been women promoted. But Justice
- 11 Scalia, first of all, we think that that is -- the
- 12 questions you are raising are ones that Wal-Mart can
- 13 raise at trial. The question at this juncture is
- 14 whether there are -- there are questions common to the
- 15 class.
- 16 We've identified what has been recognized as
- 17 a -- a common policy, that there's no dispute this
- 18 policy applies throughout the company. And the fact
- 19 that we, at this juncture, are -- I mean, and we have
- 20 shown, as we think we have to in order to satisfy
- 21 commonality, that there are disparities adverse to
- 22 women. And we have the means to show, through the
- 23 testimony of Dr. Bielby and other evidence, that we can
- 24 provide this -- connect these two through --
- JUSTICE SCALIA: Have you sufficiently

- 1 shown -- despite the fact of an explicit written central
- 2 policy of no discrimination against women, do you think
- 3 you've adequately shown that that policy is a fraud, and
- 4 that what's really going on is that there is a
- 5 central -- a central policy that promotes discrimination
- 6 against women? Do you really think --
- 7 MR. SELLERS: We -- we have testimony in the
- 8 record from the vice president of the company that that
- 9 policy was lip service at the company. We have
- 10 testimony from -- from the expert in this case --
- 11 JUSTICE GINSBURG: Isn't this something that
- 12 would be -- I mean, this -- we're not just talking about
- 13 getting your foot in the door. We're talking about
- 14 certifying the class, and you may well lose on every one
- of these points, but -- but the 23(a) standards, they're
- 16 not supposed to be very difficult to overcome. It's
- 17 just a common question of fact --
- MR. SELLERS: That is --
- 19 JUSTICE GINSBURG: -- that dominates at
- 20 that --
- MR. SELLERS: I'm sorry.
- 22 JUSTICE GINSBURG: But what seems to me is a
- 23 very serious problem in this case is: How do you work
- out the back pay? You say -- we get through the 23(a)
- 25 threshold. We got class certified under 23(b)(2). And

- 1 the judge says, there's no way I could possibly try each
- of these individuals. So, we're going to do it how?
- 3 How are they going to calculate the back pay?
- 4 MR. SELLERS: Well, the -- the approach that
- 5 the District Court endorsed, an approach we recommended,
- 6 and which has been endorsed by seven circuits over a
- 7 period of 40 years, is in circumstances here -- like
- 8 here, which are, admittedly, the exception to the rule,
- 9 where the company had no standards by which to make
- 10 promotion and pay decisions, they had kept no records of
- 11 who -- the reasons for people being promoted and the
- 12 reasons why they pay people certain amounts, that as a
- 13 consequence of that, the Albemarle decision and the
- 14 Teamsters decision make clear that the obligation of the
- 15 District Court upon finding of liability is to attempt
- 16 to reconstruct the decisions that would have been made
- in the absence of discrimination.
- 18 And the District Court found here -- and we
- 19 submit it's not clearly erroneous -- that the more
- 20 reliable method for doing so is to use a formula relying
- 21 on Wal-Mart's robust database in which it captures
- 22 performance, seniority, and a host of other job-related
- 23 variables, factors that bear on pay and promotion
- decisions, and permits a comparison, a very precise
- 25 comparison, in a way that having individual hearings

- 1 relying on hazy memories, post hoc rationalizations,
- 2 doesn't.
- 3 CHIEF JUSTICE ROBERTS: What if you had a
- 4 situation where you had a company with a very clear
- 5 policy in favor of equal treatment of men and women?
- 6 You know, the answer to your -- the answer to your
- 7 question was women don't have as many positions because
- 8 managers discriminate against them in -- in hiring and
- 9 in promotion, yet you still have the same subjective
- 10 delegation system.
- 11 Could you have a class of women who were
- 12 harmed by this subjective policy, even though it was
- 13 clear that the policy of the corporation favored equal
- 14 employment opportunity?
- MR. SELLERS: Well, I think if the -- if
- 16 there were -- as clear as your hypothetical suggest,
- 17 that the company had a policy of that sort, it would be
- 18 appropriate for it to seek summary judgment.
- 19 CHIEF JUSTICE ROBERTS: No, no, no, they
- 20 still -- well, then you're saying it is not enough that
- 21 it be a subjective decision. This company has a
- thousand stores, and sure enough in a thousand stores
- 23 you're going to be able to find a goodly number who
- 24 aren't following the company's policy, who are
- 25 exercising their subjective judgment in a way that

- 1 violates the right to equal treatment.
- 2 Couldn't you bring a class of people
- 3 subjective to discrimination as a result of that
- 4 subjective policy?
- 5 MR. SELLERS: You could bring a class case
- 6 on behalf -- if I understand your hypothetical -- on
- 7 behalf of women -- I'm sorry -- who were subject to
- 8 discrimination as a consequence of that unchecked
- 9 discretion.
- 10 I -- I want to be clear that we shouldn't
- 11 lose sight of the fact that we have evidence here of
- 12 results from this that are, that are really
- 13 extraordinary.
- 14 JUSTICE BREYER: Is the -- is the common
- 15 question of law or fact whether, given the training
- 16 which central management knew --
- 17 MR. SELLERS: Right.
- 18 JUSTICE BREYER: -- given the facts about
- 19 what people say and how they behave, many of which
- 20 central management knew, and given the results which
- 21 central management knew or should have known, should
- 22 central management under the law have withdrawn some of
- 23 the subjective discretion in order to stop these
- 24 results?
- MR. SELLERS: That -- that is a fair way to

- 1 put it.
- 2 JUSTICE BREYER: If that is a fair way to
- 3 put it, is that a question that every one of the women
- 4 in this class shares in common?
- 5 MR. SELLERS: I -- I believe so, Justice
- 6 Breyer, because they've all been the subject in every
- 7 one of these stores to this very broad discretion.
- 8 JUSTICE GINSBURG: The district judge didn't
- 9 think so. Didn't the district judge say that in
- 10 awarding back pay some would get a windfall and others
- 11 would be uncompensated?
- 12 MR. SELLERS: Actually, Justice Ginsburg,
- 13 I -- I think the district judge did not find that. What
- 14 he found was that the formula, and I can assure you the
- 15 formula we intend -- would tend -- tend to use is a
- 16 regression analysis that would permit a comparison
- 17 between each woman and the amount she was paid and
- 18 similarly situated men, taking into account, as I said,
- 19 performance and seniority and the like, and you will
- 20 find there are women that were not underpaid and the
- 21 formula will show that they should get no back pay.
- 22 I think that the district court --
- JUSTICE GINSBURG: I thought -- I thought
- 24 his point was not simply that some women were not
- 25 underpaid, but women, if you had an individual case, the

- 1 employer might show this person could have been fired,
- 2 disciplined, and wasn't owed any back pay, not that she
- 3 compares favorably to a -- a male peer, but that she
- 4 wouldn't have gotten any pay at all.
- 5 MR. SELLERS: Well, Justice Ginsburg, the
- 6 kind of factors that are entered into this -- this
- 7 economic model, performance in particular, should
- 8 capture whether somebody should have been fired.
- 9 That -- that is a very important part of the model here
- 10 that permits people to -- and we found -- the evidence
- 11 shows that women were, in fact -- had higher performance
- 12 than men and were nonetheless still underpaid.
- JUSTICE SCALIA: Can I just say something
- 14 here? Doesn't your class include both those women who
- 15 were underpaid and both -- and those women who weren't
- 16 underpaid?
- 17 MR. SELLERS: That's --
- 18 JUSTICE SCALIA: Doesn't your class include
- 19 both?
- MR. SELLERS: As every --
- 21 JUSTICE SCALIA: Is that commonality?
- MR. SELLERS: As every class does, Justice
- 23 Scalia. Every class has some portion of its members who
- 24 are not harmed by the discrimination. As the Teamsters
- 25 case recognized, what is common about them is they were

- 1 all subject to the same highly discretionary
- 2 decisionmaking, even if some of them weren't harmed by
- 3 it. That still presents a question common to the class.
- 4 JUSTICE KENNEDY: Well, correct me if I'm
- 5 wrong, I thought the Teamsters case was an action by the
- 6 government that wasn't a class action case.
- 7 MR. SELLERS: That -- that is correct, but
- 8 it -- it -- it is the paradigm we use for determining
- 9 what you need to establish a pattern or practice of
- 10 discrimination.
- 11 JUSTICE KENNEDY: Pattern or practice,
- 12 that's correct.
- Help me, if you can, with this. Let's --
- 14 let's suppose that experts' testimony, sociologists and
- 15 so forth, establish that in industry generally and in
- 16 retail industry generally, women still are discriminated
- 17 against by a mathematical factor of X. You have a
- 18 company that has a very specific policy against
- 19 discrimination, and you look at their -- the way their
- 20 employees are treatment -- are treated, and you find a
- 21 disparity by that same mathematical factor X, does that
- 22 give you a cause of action?
- 23 MR. SELLERS: If the -- I'm sorry -- if
- 24 the -- it, the disparity --
- 25 JUSTICE KENNEDY: The -- the -- the

- 1 disparity with -- that women are subjected to are the
- 2 same in the company as they are --
- 3 MR. SELLERS: Outside the company.
- 4 JUSTICE KENNEDY: -- society wide, but the
- 5 company does have a policy against discrimination.
- 6 MR. SELLERS: Right. I -- I would say that
- 7 the company's responsibility under Title VII is to
- 8 ensure its managers do not make pay and promotion
- 9 decisions because of sex. If the comparison between the
- 10 pay women receive, for instance, who are similarly
- 11 situated to men within the company is such that they are
- 12 underpaid compared to similarly situated men in the
- 13 company, then -- then the company would have legal
- 14 responsibility under Title VII, regardless of what
- 15 happens in the rest of the industry, what happens in the
- 16 rest of the world.
- JUSTICE KENNEDY: Would that be true even if
- 18 you could not show deliberate indifference?
- MR. SELLERS: Well, I don't know that the --
- 20 the respect that the standard is deliberate
- 21 indifference. I think that under this Court's decision
- 22 in Heller --
- JUSTICE KENNEDY: Where there's no
- 24 deliberate indifference and a specific policy
- 25 prohibiting the discrimination, can you still proceed?

- 1 MR. SELLERS: I -- well, I would submit you
- 2 still can proceed. If -- if the policy -- announcing a
- 3 policy saying don't discriminate were to be effective
- 4 in -- in immunizing companies against liability in class
- 5 actions, imagine every company in the country would
- 6 publish that policy and have free license to go
- 7 discriminate as much as it wanted to.
- 8 JUSTICE ALITO: I understand your answer to
- 9 Justice Kennedy's question to be that this typical
- 10 company would be in violation of Title VII; is that
- 11 correct?
- 12 MR. SELLERS: That's correct.
- 13 JUSTICE ALITO: That's what the -- and
- 14 that's what the academic literature on which your theory
- is based includes; isn't that right?
- 16 MR. SELLERS: With -- Justice Alito, I think
- 17 it's not just academic literature, I think it's the
- 18 precedents from this Court. I think that's the --
- 19 that's the premise behind Teamsters, that the -- you
- 20 look to in Hazelwood, which makes very clear that you
- 21 don't look to populations outside the company in making
- 22 comparisons.
- 23 JUSTICE ALITO: So, you have the company
- 24 that is absolutely typical of the entire American
- 25 workforce, and let's say every single -- there weren't

- 1 any variations. Every single company had exactly the
- 2 same profile. Then you would say every single company
- 3 is in violation of Title VII?
- 4 MR. SELLERS: It -- that could very well be
- 5 the case. If -- if the -- I think that Title VII holds
- 6 companies responsible for the actions they take with
- 7 respect to their employees. There certainly are
- 8 industries, and there were 30 years -- many more 30 or
- 9 40 years ago when Teamsters was decided, where the
- 10 entire industry might have had evidence of
- 11 discrimination. That would not -- there is not a
- 12 negligence standard under this statute that immunizes
- 13 companies because they follow the same standards as
- others.
- 15 JUSTICE SCALIA: What -- what --
- 16 what's -- what's your answer assumes is if there is a
- 17 disparity between the advancement of women and the
- 18 advancement of men, it can only be attributed to sex
- 19 discrimination --
- MR. SELLERS: No.
- JUSTICE SCALIA: Well, otherwise, how could
- 22 you say that all -- all of the companies are -- are --
- 23 are presumptively engaging in sex discrimination?
- MR. SELLERS: Well, Justice Scalia, I --
- 25 I -- I want to deal with the -- in this instance, we

- 1 have -- it's not just any old analysis that we're --
- 2 that we're using. We have statistical regression
- 3 analysis that isolates and takes into account the
- 4 factors such as performance and -- and seniority.
- JUSTICE SCALIA: See, I wasn't talking about
- 6 this case. I was talking about your answer to Justice
- 7 Alito --
- 8 MR. SELLERS: I'm sorry.
- 9 JUSTICE SCALIA: -- which said that, you
- 10 know, it may well be that every industry in the United
- 11 States is guilty of sex discrimination --
- MR. SELLERS: Well, I --
- JUSTICE SCALIA: -- unless there -- you
- 14 know, there -- there's equality of promotion for men and
- women.
- MR. SELLERS: No, I -- I don't -- I don't
- 17 take that position, Justice Scalia. What I was trying
- 18 to make clear is that the fact that there are other
- 19 companies in the same industry where the same problems
- 20 may arise, which, by the way, wasn't true here, where
- 21 Wal-Mart was behind the other large retailers, doesn't
- 22 mean that a company is any less liable for the
- 23 discrimination practiced in its own workplace.
- I can't speak for the rest of society, I
- 25 don't have any reason to think the entire society is

Τ	engaging in employment discrimination.
2	JUSTICE SOTOMAYOR: Counsel
3	JUSTICE KAGAN: Mr. Sellers, could I take
4	you back to the remedial question here
5	MR. SELLER: Yes.
6	JUSTICE KAGAN: and when you think it is
7	that individualized hearings are required? You've
8	described a kind of formula that you would use. When
9	when when is the formula approach right and when is
10	the individual hearings approach right?
11	MR. SELLERS: Well, I think it's a it's a
12	call that, of course, we leave we should leave to the
13	district court in the first instance, but factors that
14	could weigh in the balance would include whether or not
15	you have available the kind of information that we do
16	here from database with which to be able to more
17	reliably construct the the kinds of decisions that
18	would have been made in the absence of discrimination.
19	Likewise, there may be companies where they
20	have kept better records or kept any records or have
21	more substantial standards that would permit the
22	reconstruction of those decisions through individual
23	hearings. I don't think this is something that I'm
24	not contending that under that you could always use a
25	formula-like approach in connection with these cases.

- 1 This is an extraordinary case with evidence that is --
- 2 that they have kept really no standards and no records.
- JUSTICE GINSBURG: I thought, didn't the
- 4 district judge say because of the numbers we couldn't --
- 5 couldn't possibly have the hearing in each case on
- 6 whether the particular woman was owed back pay? They
- 7 did say something about this.
- 8 MR. SELLERS: The district -- I'm sorry, the
- 9 district court did make the comment that the sheer
- 10 number of class members would make the administration of
- 11 individual hearings difficult, but the district court
- 12 went on, very importantly --
- 13 JUSTICE GINSBURG: I thought he said
- "impossible."
- MR. SELLERS: Sorry?
- JUSTICE GINSBURG: I thought he said more
- 17 than difficult.
- MR. SELLERS: Well, he may have said
- 19 impossible, but the important point is that he went --
- 20 the district court went ahead and made specific findings
- 21 about the extent to which the -- the particular record
- 22 here shows that the use of a formula would be more
- 23 reliable than individualized hearings.
- JUSTICE SOTOMAYOR: Counsel, I'm -- I'm a
- 25 little confused, all right?

1	MR. SELLERS: Okay.
2	JUSTICE SOTOMAYOR: Because you're saying an
3	individualized hearing is impossible, but that's exactly
4	what you're saying you're going to do, only through
5	statistics.
6	MR. SELLERS: That's
7	JUSTICE SOTOMAYOR: You're going to say
8	through my statistical model, I will be able to identify
9	those women in the class who are deserving of pay
L O	raises. What that doesn't answer is when in this
L1	process is the defendant going to be given an
L2	opportunity to defend against that finding?
L3	MR. SELLERS: Right.
L 4	JUSTICE SOTOMAYOR: Because you're are
L5	you suggesting that the district court would
L6	appropriately bar a defendant where there's no proof of
L7	intentionality with respect to not keeping records, that
L8	it was intended to stop these women from collecting
L9	money, et cetera? When are they going to get a chance?
20	MR. SELLERS: Well
21	JUSTICE SOTOMAYOR: And if they're going to
22	get a chance, isn't that an individualized hearing?
23	MR. SELLERS: Yes. Effectively Wal-Mart
24	will have ample opportunity through the arguments over
25	which variables which to use. There was a very robust

- 1 debate below already about which variables to use, that
- 2 will have a significant impact on whether women are
- 3 shown to be underpaid or underpromoted compared to men.
- 4 So, Wal-Mart will have that opportunity, and frankly --
- JUSTICE SOTOMAYOR: No, no, no. That sounds
- 6 like you're saying their only opportunity will be on the
- 7 model.
- 8 MR. SELLERS: I'm --
- 9 JUSTICE SOTOMAYOR: They will be precluded
- 10 from attempting to show any particular evidence that a
- 11 particular decision was not made?
- 12 MR. SELLERS: If Wal-Mart -- if Wal-Mart,
- 13 Justice Sotomayor, if a Wal-Mart comes forward below and
- it hasn't done so, so far, and is able to persuade the
- 15 district court that it can, consistent with some kind
- 16 of -- in a way that's consistent with a reliable
- 17 determination of who should have been paid what and
- 18 promoted in the absence of discrimination --
- 19 JUSTICE SOTOMAYOR: You're not answering me.
- MR. SELLERS: I'm trying to.
- JUSTICE SOTOMAYOR: You're -- what you're
- 22 saying is we're going to preclude them from doing
- 23 anything but offering a mathematical model --
- MR. SELLERS: I'm -- I'm --
- 25 JUSTICE SOTOMAYOR: -- because otherwise

- 1 it's going to be too hard to have individual hearings.
- 2 MR. SELLERS: I -- I'm -- let me answer you
- 3 directly. I'm not saying that. Wal-Mart has an
- 4 opportunity to make the case that with whatever showing
- 5 it wishes to make it can reconstruct these decisions
- 6 more reliably, and in an entirely subjective
- 7 environment, and if it does, it can offer evidence in
- 8 certain circumstances; but it hasn't done so; and I
- 9 don't submit it's going to be able to do so here.
- 10 JUSTICE SCALIA: This -- this takes
- 11 evidence, to establish that -- that it's more reliable
- 12 to have a hearing with evidence on the particular
- 13 promotion or dismissal of the individual, that that is
- 14 more reliable than using -- I don't care how admirable a
- 15 statistical guess you make; I mean is that really a
- 16 question?
- 17 MR. SELLERS: I think it is, Justice Scalia,
- 18 because the --
- 19 JUSTICE SCALIA: We must have a pretty bad
- 20 judicial system then.
- 21 MR. SELLERS: Well, I think it's not the
- 22 judicial system, it's the recordkeeping of the company,
- 23 and the standardlessness of its -- of the pay and
- 24 promotion processes that basically mean 10 years later,
- 25 these managers are going to be coming forward to

- 1 speculate about what they did 10 years earlier, with no
- 2 records to cross-examine them on. That is not the --
- 3 the model for a reliable adjudication.
- 4 CHIEF JUSTICE ROBERTS: Counsel --
- 5 JUSTICE SCALIA: We should use that in jury
- 6 trials, too, for really old cases. We should just put a
- 7 statistical model before the jury and say, you know,
- 8 this stuff is too old; so, we'll --
- 9 MR. SELLERS: Well --
- 10 JUSTICE SCALIA: -- we'll do it on the basis
- 11 of -- is this really due process?
- 12 MR. SELLERS: I -- Justice Scalia, I submit
- 13 it is; and the circuits that have been considering this
- 14 for 40 years have so held. In the narrow set of
- 15 circumstances that we have here, where there are
- 16 standardless, recordless decisions at issue.
- 17 JUSTICE KENNEDY: Well, if it's standardless
- 18 and -- and recordless, then why is there commonality?
- 19 It seems to me that what you -- your answer that you
- 20 just gave really is a -- shows a flaw in your case on
- 21 commonality.
- MR. SELLERS: No, Justice Kennedy, the --
- 23 the standardless and recordless aspect is with respect
- 24 to trying to reconstruct these decisions years later.
- 25 As I said before, we have a common policy here; it

- 1 presents a common question. We've shown evidence that
- 2 would probably create a prima facie case of pattern or
- 3 practice under Teamsters, and we think we've satisfied
- 4 the three components of commonality that we think need
- 5 to be addressed.
- 6 JUSTICE GINSBURG: One thing you haven't
- 7 touched on is to -- to have, first of all the question
- 8 of whether (b)(2) is limited to injunction and
- 9 declaratory relief.
- MR. SELLERS: Yes.
- 11 JUSTICE GINSBURG: But if -- if you follow
- 12 the advisory committee's note, then if dollars -- if
- 13 damages predominates -- if damages predominate, then you
- 14 can't use (b)(2). You have to make your case under
- 15 (b)(3); and the one factor here is that about half the
- 16 class is gone, so -- they're not interested in
- injunctive relief, but everybody's interested in money.
- 18 So, why isn't the money -- why do you say that the --
- 19 that the injunction -- injunctive relief is the thing
- 20 and the damages are lesser, rather than the other way
- 21 around?
- MR. SELLERS: Well --
- JUSTICE SCALIA: In fact it's more than half
- the class that's gone, isn't it?
- 25 MR. SELLERS: Well, I don't -- nobody knows

- 1 that, because they continue to have more employees
- 2 adding -- added at the company. So, I wouldn't
- 3 presume --
- 4 JUSTICE SCALIA: But nobody's leaving yet.
- 5 MR. SELLERS: Well, there are people
- 6 leaving, but the point -- but more importantly, the
- 7 advisory committee note with respect to Rule 23(b)(2)
- 8 makes clear that there is a -- that the -- whether or
- 9 not an action or inaction is taken with respect to the
- 10 class which is the predicate to (b)(2) certification, it
- 11 depends on -- it doesn't depend on the number of people
- 12 who are adversely affected by that action.
- And so, as a consequence where the former
- 14 employees are -- that they -- if they would be included
- in the class under (b)(2) because that -- the question
- is not on a day-to-day basis who should have been in a
- 17 position to seek injunctive relief and who's employed
- 18 and who's not.
- 19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MR. SELLERS: Thank you.
- 21 CHIEF JUSTICE ROBERTS: Mr. Boutrous, you
- 22 have 4 minutes remaining.
- 23 REBUTTAL ARGUMENT OF THEODORE J. BOUTROUS, JR.,
- 24 ON BEHALF OF THE PETITIONER
- MR. BOUTROUS: Thank you, Mr. Chief Justice.

1	Let me begin with this question of back pay
2	because Mr. Sellers has made clear under their vision
3	Wal-Mart would never have an opportunity to prove that
4	it didn't discriminate against a woman who was seeking
5	back pay; and the district court did not suggest that it
6	might be difficult, as Mr. Sellers suggested. The
7	district court, as Justice Ginsburg suggested, said that
8	he found it would be impossible; not just because of the
9	number of people, but because of the nature of the
10	claims, that discretionary decisions were being
11	implemented in a way that affected different people
12	differently.
13	The the problem here Mr. Sellers says is
14	that the records are not available. Then he says we're
15	going to have a a proceeding where the district judge
16	relies only on the records, that he says are inadequate,
17	to allow a reconstruction of the decision. That is not
18	a process known to our jurisprudence. It doesn't
19	comport with due process. It takes away Wal-Mart's
20	rights under Title VII; it injures the rights of the
21	individual women, who the record
22	JUSTICE SOTOMAYOR: You don't you don't
23	seriously contend that if a plaintiff, if a policy were
24	found or practice of discrimination that a woman

couldn't come in and say they put X in, I had a longer

25

- 1 history at Wal-Mart, I had far superior job ratings, I
- 2 had no criticisms of my work, and I wasn't promoted.
- 3 Wouldn't that be enough for her to show that that policy
- 4 influenced her lack of selection?
- 5 MR. BOUTROUS: I agree with you, Justice
- 6 Sotomayor. Except --
- 7 JUSTICE SOTOMAYOR: And your personal
- 8 database has all that information. So, why is it
- 9 impossible to try these cases other than because of
- 10 their large numbers? That's a different issue.
- MR. BOUTROUS: Yes, Your Honor, what you've
- 12 just outlined, we agree that a woman should be able to
- 13 come in and say that, and she may say well, the records
- 14 don't show what really happened. I -- I had more
- 15 experience; I was a much better employee than the guy
- 16 working next to me. Under the plaintiff's theory in
- 17 order to get a class here, they have thrown that out the
- 18 window; that woman would not be able to come and
- 19 testify. Wal-Mart wouldn't be able to say this person
- 20 was a terrible employee, this person was a great
- 21 employee. On the record, it's not impossible to
- 22 recreate these decisions. The record is filled with
- 23 declarations from managers who remember very well that
- 24 Ms. Dukes violated company policy, that Ms. Arana was
- 25 fired for infractions regarding how she kept her hours.

- 1 JUSTICE BREYER: If you just spend one
- 2 second, remember my question. We've got a common issue.
- 3 Why isn't that enough at least to support a (b)(2)
- 4 injunctive action?
- 5 MR. BOUTROUS: Your Honor, the -- the
- 6 scenario you outline -- there's no dispute about the
- 7 policies that existed at the time, that there were --
- 8 JUSTICE BREYER: That sounds like the merits
- 9 you're getting to. His point, remember, is this is just
- 10 certification. So, my question is: Assuming they can
- 11 support it with evidence, why can't they have their
- 12 (b)(2) class, at least on an injunctive relief?
- 13 MR. BOUTROUS: Because, Your Honor, the --
- 14 the common policy is one that affects everyone
- 15 differently by definition. Therefore, these plaintiffs
- 16 are not typical, and they are not arguing that everyone
- 17 was affected the same way by the common policy. Many
- 18 women thrived. Maybe some men stereotyped or some women
- 19 stereotyped the other direction. Five hundred and
- 20 forty-four of the plaintiffs are female store managers.
- 21 So, it's impossible to make these sweeping
- 22 generalizations, which, of course, is what stereotyping
- is supposed to prevent. And so, it's -- there's
- 24 absolutely no way there can be a fair process here.
- On the policy question, the policy -- the

- 1 plaintiffs point to the general policies and the central
- 2 control, but the one policy they do not want to confront
- 3 is the policy against discrimination. It was not just a
- 4 written policy on paper.
- 5 In fact, the -- there's a declaration at
- 6 page 1576 of the Joint Appendix that lays out the very
- 7 aggressive efforts the company --
- 8 JUSTICE SCALIA: What about the vice
- 9 president that said it was just window dressing or
- 10 something like that?
- MR. BOUTROUS: I'm glad you asked about
- 12 that, Justice Scalia. Here's what he said. He
- 13 testified about the diversity goals of the company at
- 14 the time, the effort to get more women into management,
- 15 and he said in his view, until the company linked
- 16 diversity goals to compensation of managers, it would be
- 17 lip service.
- 18 He wasn't saying the whole program was lip
- 19 service. He was one of the advocates for diversity in
- 20 the company. He wanted to be more aggressive. He said
- 21 his -- his goals were 20 percent and other people's were
- 22 10. So -- so, it's completely misleading to suggest he
- 23 was -- he was denigrating the entire policy.
- JUSTICE SOTOMAYOR: I think he's just making
- 25 your -- their point, which is if they started paying

Т	women the same as men, they might get more diversity.
2	MR. BOUTROUS: They do pay the same as men,
3	Your Honor. The record reflects that.
4	JUSTICE SOTOMAYOR: Well, that's the whole
5	issue that's in dispute.
6	MR. BOUTROUS: Thank you.
7	CHIEF JUSTICE ROBERTS: Thank you, counsel.
8	The case is submitted.
9	(Whereupon, at 11:20 a.m., the case in the
LO	above-entitled matter was submitted.)
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L5	
L 6	
L 7	
L 8	
L 9	
20	
21	
22	
23	
24	
25	

$\mathbf{A}$	administration	19:10	argues 29:1	18:25 20:1,6,8
<b>able</b> 15:10 16:15	45:10	American 41:24	arguing 14:20	20:8 21:7 22:8
17:12 24:4	admirable 48:14	<b>amount</b> 37:17	54:16	33:24 34:3
35:23 44:16	admittedly 34:8	amounts 34:12	argument 1:12	37:10,21 38:2
46:8 47:14 48:9	<b>adopted</b> 4:14 9:7	<b>ample</b> 46:24	2:2,5,8 3:3,7	44:4 45:6 52:1
53:12,18,19	27:14	analogue 5:24	7:13 10:18,22	52:5
above-entitled	advanced 27:3	6:2,10	24:15 51:23	<b>bad</b> 25:23,25
1:11 56:10	advancement	analysis 8:8,19	arguments 8:15	48:19
absence 34:17	31:8,9 42:17,18	8:22,24 9:21	8:16 46:24	balance 44:14
44:18 47:18	adverse 32:21	14:23 37:16	Arkansas 28:3	balancing 20:10
absent 14:7	adversely 51:12	43:1,3	aside 9:15	<b>bar</b> 17:16 23:5
19:23 22:10	advisory 21:17	Angeles 1:15	asked 55:11	46:16
absolutely 41:24	21:20 50:12	announced 30:16	<b>aspect</b> 49:23	<b>based</b> 20:9 22:18
54:24	51:7	announcing 41:2	asserting 23:16	41:15
abuse 25:21	advocates 55:19	answer 14:4 35:6	assessing 31:25	basically 48:24
academic 41:14	affirmatively 4:4	35:6 41:8 42:16	assessment 32:2	basing 8:22
41:17	affirmed7:24	43:6 46:10 48:2	assume 13:24	basis 8:21 22:24
accept 21:11	aggregate 7:21	49:19	25:24	30:19 31:16,20
acceptable 8:23	aggregated 7:7	answering 47:19	assumes 42:16	49:10 51:16
accepted7:24	aggressive 31:8	antecedents	assuming 20:20	<b>bear</b> 34:23
accepting 14:4	31:24 32:7 55:7	21:22	54:10	begs 8:17 20:18
account 31:22	55:20	antidiscriminat	assumption 14:5	<b>behalf</b> 1:16,17
37:18 43:3	<b>ago</b> 21:18 42:9	15:3	<b>assure</b> 37:14	2:4,7,10 3:8
accountable 25:5	<b>agree</b> 53:5,12	APPEARANC	attack 18:24	24:16 36:6,7
Act 23:2	<b>ahead</b> 16:8 45:20	1:14	attacking 28:13	51:24
acted 13:25	<b>AL</b> 1:6	Appendix 55:6	attempt 34:15	<b>behave</b> 36:19
action 12:15	Albemarle 34:13	<b>apples</b> 25:25	attempting 47:10	believe 37:5
13:17,23 23:12	<b>Alito</b> 10:6,12	application 12:25	attributed4:14	benefit 18:2
25:10 39:5,6,22	41:8,13,16,23	applied 10:10	42:18	best 7:5
51:9,12 54:4	43:7	13:14 21:3,4	<b>AT&amp;T</b> 12:16	<b>better</b> 18:17 21:2
actions 23:9,11	allegation 4:22	applies 32:18	automatic 21:7	23:12 44:20
41:5 42:6	<b>alleged</b> 11:3,19	<b>apply</b> 10:8 31:23	available 44:15	53:15
actors 25:24	19:8	approach 34:4,5	52:14	<b>BETTY</b> 1:6
actual 10:13	Allison 21:7	44:9,10,25	average 26:25	<b>bias</b> 13:5
added7:16,17	allow 6:7 22:15	appropriate	awarding 37:10	biased 5:17
51:2	22:20,22,24	21:12 27:12	<b>a.m</b> 1:13 3:2 56:9	<b>Bielby</b> 32:23
adding 51:2	52:17	35:18		<b>big</b> 15:6,6 23:20
address 18:20,21	allowed 10:24	appropriately	B	bigger 23:12
addressed 27:19	25:11	46:16	<b>b</b> 16:24 17:17	<b>bind</b> 20:9
50:5	allowing 6:16	<b>Arana</b> 53:24	18:7,8,10,13	<b>bit</b> 11:18
adequacy 3:15	ambiguities	area 20:15	18:14,22 19:3	<b>bottom</b> 30:11
19:6,7,10	21:19	<b>argue</b> 11:6,8	20:10 22:3 50:8	<b>bound</b> 20:13
adequately 33:3	ambiguity 21:16	15:13	50:14,15 51:10	<b>Boutrous</b> 1:15
		142	51:15 54:3,12	2.2 0 2.6 7 0
adjudication 49:3	Amchem 14:3	argued4:3	back 16:2,5 18:4	2:3,9 3:6,7,9

	1	Ī	<u> </u>	<u> </u>
4:16 5:2 6:1,13	27:15 33:10,23	51:25 56:7	<b>clear</b> 20:4 21:15	19:17 32:21
7:4 8:10 9:2	36:5 37:25	choice 9:8	21:21 27:13	38:21 49:18,21
10:11,22 11:5	38:25 39:5,6	<b>circuit</b> 7:25 9:7	34:14 35:4,13	50:4
11:22 12:14	42:5 43:6 45:1	20:4,23 22:12	35:16 36:10	communicated
13:9 14:10,19	45:5 48:4 49:20	circuits 34:6	41:20 43:18	30:23
15:22 16:4,9,17	50:2,14 56:8,9	49:13	51:8 52:2	companies 5:5
16:23 17:11	cases 5:16 10:2	Circuit's 21:7	clearer 22:6	12:6 41:4 42:6
18:1,11 19:4	44:25 49:6 53:9	22:15	clearly 15:17	42:13,22 43:19
20:2,22 21:2,14	<b>cause</b> 31:19	circumstance	34:19	44:19
23:8,24 24:7,13	39:22	17:3	closer 22:6	<b>company</b> 4:4,13
51:21,23,25	caused 14:1	circumstances	<b>cohesion</b> 3:14,23	5:6,8 6:2,6,16
53:5,11 54:5,13	causes 31:15,18	34:7 48:8 49:15	9:21 14:6 19:6	6:22 7:1,5
55:11 56:2,6	causing 4:25	circumvent	19:17	11:10 25:8,8
breath 28:4	<b>central</b> 30:15,20	17:14	cohesive 3:25	26:24 28:10,21
<b>Breyer</b> 36:14,18	33:1,5,5 36:16	<b>city</b> 5:22	collateral 23:19	29:3 30:1,6,15
37:2,6 54:1,8	36:20,21,22	<b>claim</b> 5:15 6:15	24:8	30:20 32:18
<b>brief</b> 11:12	55:1	15:9,12,20,23	collecting 46:18	33:8,9 34:9
briefly 22:8	certain 34:12	16:14 17:17	combination 12:7	35:4,17,21
<b>bright-line</b> 22:6	48:8	19:3,5 20:4	<b>come</b> 9:15 10:25	39:18 40:2,3,5
<b>bring</b> 23:17 36:2	certainly 5:5	claiming 20:20	14:21 15:4,10	40:11,13,13
36:5	18:1,17 30:11	<b>claims</b> 3:16,21	15:12 17:22	41:5,10,21,23
bringing 23:6	42:7	4:1 5:10 16:10	22:25 52:25	42:1,2 43:22
<b>broad</b> 28:12	certification 3:18	17:4 18:4,4,12	53:13,18	48:22 51:2
29:22 37:7	10:8,11 16:25	18:18 22:1 23:7	<b>comes</b> 31:25	53:24 55:7,13
brought 17:13	18:9 51:10	23:15,23,25	47:13	55:15,20
burden 17:24	54:10	52:10	comfortable 13:7	company's 10:14
C	certified 3:12	<b>class</b> 3:11,19 4:1	<b>coming</b> 48:25	35:24 40:7
-	16:11 17:1,9	12:15 13:17,20	comment 45:9	company-wide
C 2:1 3:1	33:25	13:23 14:7,18	committee 21:17	10:9
calculate 34:3	certifying 33:14	14:21 15:21,21	21:20 51:7	comparable 7:11
<b>California</b> 1:16 <b>call</b> 28:24 44:12	cetera 46:19	15:22 16:10,11	committee's	compared 40:12
	challenged 11:24	16:15 17:17	50:12	47:3
capture 38:8	challenging	18:22 19:12,23	common 4:1,2	compares 38:3
captures 34:21 care 48:14	28:23	19:25 22:3,10	5:4,25 7:15	comparison 27:2
case 3:4,11,21	chance 46:19,22	23:4,9,11,12	9:11 10:15,18	27:4,8,12 34:24
7:12 9:7 10:2	Chief 3:3,9 4:7	23:13,20 32:15	10:23 18:9	34:25 37:16
11:25 12:15	4:19 5:20 15:19	33:14,25 35:11	19:16,19 32:14	40:9
13:13,16 14:12	16:1,7,13,20	36:2,5 37:4	32:17 33:17	comparisons 8:1
16:16,19,25	23:4 24:3,10,12	38:14,18,22,23	36:14 37:4	41:22
17:19,20 19:7	24:14,17 25:12	39:3,6 41:4	38:25 39:3	compelled 19:12
19:18 21:7,7,18	25:15,17,20	45:10 46:9	49:25 50:1 54:2	compensated
21:23,25 22:14	26:1,3,6,23	50:16,24 51:10	54:14,17	15:13
23:3,17 24:19	27:1 35:3,19	51:15 53:17	commonality	compensation
24:24 26:19	49:4 51:19,21	54:12	3:14 10:20 19:7	20:1 55:16
27.27 20.17				

	1	1	 I	 I
compensatory	continued 6:7	courts 18:11	12:23 13:25	depends 51:11
16:2,6,9,15	contrary 28:25	Court's 14:1	decisionmakers	described 20:24
19:1 23:15	control 11:10	27:18 40:21	5:16 7:14 9:10	44:8
competitors 8:5	55:2	create 21:19	decisionmaking	desegregate
complaint 28:1	controlled 7:25	26:21 50:2	4:9,9,18,24	21:23
complete 10:23	<b>core</b> 16:18 23:3	created 17:2	11:24 13:13	deserving 46:9
completely 7:9	corners 20:15	21:16	25:14 39:2	despite 33:1
55:22	cornerstone	creep 13:5	decisions 7:15	detailed 25:2
complicated	22:14	<b>crisp</b> 20:14	10:25 11:3 25:3	determination
12:21	corporate 4:8	<b>criteria</b> 12:9 25:2	25:5,7,10 27:7	9:5 47:17
complications	28:21 29:16,19	criticisms 53:2	28:14,17 29:2,9	determine 5:24
18:15	corporation	cross-examine	29:25,25 30:19	determining 39:8
component 17:22	35:13	49:2	31:13,23 34:10	differ 32:3
18:24	correct 14:19	crucial 16:12	34:16,24 40:9	difference 10:7
components 50:4	15:3 17:10	<b>culture</b> 28:2,21	44:17,22 48:5	different 6:8,14
comport 52:19	19:21 26:11	29:16,19	49:16,24 52:10	7:9 9:10,22
conceding 18:23	39:4,7,12 41:11	current 19:13	53:22	10:17 11:8 24:1
concept 13:1	41:12	<b>cut</b> 15:14 19:14	declaration 55:5	32:2 52:11
concerned 21:21	counsel 7:20		declarations	53:10
concerning 19:6	17:7 24:12 44:2	<b>D</b>	53:23	differently 10:3
conclude 4:23	45:24 49:4	<b>D</b> 3:1	declaratory 17:6	52:12 54:15
concluded 8:20	51:19 56:7	damage 16:9	17:18 21:16	difficult 33:16
conclusion 9:1	counted 23:14	18:4 20:3 22:4	50:9	45:11,17 52:6
conflict 19:9	country 3:23	damages 15:20	<b>defend</b> 22:13	direct 25:1
confront 55:2	7:14 9:10 19:14	16:2,15 17:22	46:12	direction 54:19
confused 11:18	41:5	18:8,16 20:6	defendant 14:8	directions 28:2
45:25	<b>course</b> 26:17	21:6,12 23:15	22:23 46:11,16	directly 48:3
connect 32:24	44:12 54:22	50:13,13,20	defenses 15:9	disciplinary 9:24
connection 44:25	<b>court</b> 1:1,12 3:10	<b>data</b> 7:18	<b>definition</b> 54:15	10:1
consequence	5:12,14 6:5	database 34:21	delegation 3:21	disciplined 38:2
24:21 34:13	7:24,25 8:20,23	44:16 53:8	3:24 4:9 25:22	discount 9:3
36:8 51:13	8:25 9:4 10:7	day 15:12 22:25	35:10	discounted 8:21
considering	11:7,23 12:3	<b>day-to-day</b> 51:16	deliberate 6:11	discrete 26:22
49:13	14:3 15:12,12	deal 42:25	6:14 40:18,20	28:12
consistent 30:12	15:24 20:2,12	debate 47:1	40:24	discretion 3:22
47:15,16	21:5,17 22:19	decentralized	demonstrate	3:25 5:17 10:19
constitutional	22:25 24:18	4:12	14:12,14	11:12 19:19
5:22	26:12,14 28:14	decentralizing	demonstration	24:6 27:18 28:5
construct 44:17	28:19 34:5,15	4:24	9:11 19:15	28:11,18,20
contend 52:23	34:18 37:22	decided 42:9	demoted 10:1	29:22 30:2,5,6
contended 21:5	41:18 44:13	decision 9:10,17	denigrating	30:9,9 31:14
contending 44:24	45:9,11,20	27:18 34:13,14	55:23	36:9,23 37:7
context 22:7	46:15 47:15	35:21 40:21	department 10:5	discretionary 9:9
continue 51:1	52:5,7	47:11 52:17	depend 51:11	28:16 39:1
		decisionmaker		
	l	l	I	I

		Ì	Ì	l
52:10	dispute 18:25	29:17	30:25	extraordinary
discriminate	32:17 54:6 56:5	eligible 16:2,5	estimated 8:12	36:13 45:1
22:23 24:5	<b>district</b> 7:24 8:20	employed51:17	estoppel 23:19	
31:16,19 35:8	9:2,3 10:7 15:7	employee 53:15	24:8	F
41:3,7 52:4	15:24 19:22	53:20,21	et 1:6 46:19	faces 28:1
discriminated	20:2 22:19	employees 19:13	everybody's	<b>facet</b> 28:13
14:18,22 39:16	28:14,19 34:5	19:13 39:20	50:17	<b>facie</b> 26:19 50:2
discriminating	34:15,18 37:8,9	42:7 51:1,14	evidence 6:18	facilities 27:21
26:9	37:13,22 44:13	employer38:1	9:18 29:10,11	29:2
discrimination	45:4,8,9,11,20	employment	31:2 32:23	<b>fact</b> 30:15 32:18
4:5,11,13,23	46:15 47:15	10:25 11:2	36:11 38:10	33:1,17 36:11
4:25 5:7 6:3,4	52:5,7,15	35:14 44:1	42:10 45:1	36:15 38:11
6:17,18 7:2,6	diversity 4:6	Enabling 23:1	47:10 48:7,11	43:18 50:23
10:13,24 14:12	55:13,16,19	endorsed 34:5,6	48:12 50:1	55:5
14:16,24 15:18	56:1	enforced 15:2	54:11	factfinder8:19
17:23 22:21	divvying 22:17	engaging 42:23	<b>exactly</b> 11:3 42:1	<b>factor</b> 39:17,21
23:23 24:20,22	doing 6:25 27:20	44:1	46:3	50:15
25:22 26:22	29:10 34:20	engulfed 18:5	<b>example</b> 4:17 7:7	factors 10:24
30:17 33:2,5	47:22	ensure 7:5,6 25:6	13:11 26:13	11:2 34:23 38:6
34:17 36:3,8	dollars 50:12	27:7 28:25 40:8	examples 25:21	43:4 44:13
38:24 39:10,19	dominates 33:19	ensures 28:22	26:2,4,14	<b>facts</b> 16:19 18:9
40:5,25 42:11	door 33:13	entered 38:6	exception 34:8	24:1 36:18
42:19,23 43:11	<b>Dr</b> 32:23	entire 41:24	excessive 11:9	factual 9:1
43:23 44:1,18	drafters 21:21	42:10 43:25	11:18	<b>failed</b> 3:13,17
47:18 52:24	21:24	55:23	exercise 30:6,9	<b>fair</b> 10:22 23:20
55:3	dressing 55:9	entirely 11:6,7	exercised 5:17	27:2 36:25 37:2
discriminators	<b>due</b> 15:16 49:11	48:6	exercising 35:25	54:24
19:9	52:19	entitled 15:8	exerted 11:10	<b>Falcon</b> 11:7 12:3
discriminatory	<b>Dukes</b> 1:6 3:5	environment	exist 6:7 18:22	<b>far</b> 6:22 22:5
4:3,10 17:19	53:24	48:7	existed 54:7	47:14 53:1
dismissal 48:13	<b>D.C</b> 1:8,17	equal 12:23 35:5	exists 8:9	fatally 8:20
disparate 6:15		35:13 36:1	expect 8:4	<b>favor</b> 4:5 35:5
10:16,16 11:21	E	equality 43:14	experience	favorably 38:3
11:25 12:12,13	<b>E</b> 2:1 3:1,1	equitable 19:1	53:15	favored35:13
13:14 29:5,7,8	earlier 22:9 49:1	20:21	expert 7:21,22	features 28:14
disparities 7:18	economic 38:7	erroneous 34:19	8:11,21,22 9:3	<b>feel</b> 13:7
26:20 30:13	<b>edge</b> 17:3	especially 5:8	13:3,4,5 14:4	Feeney 6:5,15
32:21	<b>effect</b> 7:15 9:12	14:14 18:15	33:10	<b>female</b> 54:20
disparity 8:2,4	effective 25:6	<b>ESQ</b> 1:15,17 2:3	experts 39:14	fester 25:11
9:14 26:24	41:3	2:6,9	expert's 9:12	<b>fewer</b> 27:23
39:21,24 40:1	effectively 25:10	establish 26:16	explained 8:3	<b>field</b> 4:10
42:17	30:7,22 46:23	26:18 39:9,15	explanation 32:4	<b>Fifth</b> 20:23 21:6
disproportiona	<b>effort</b> 55:14	48:11	explicit 33:1	<b>filled</b> 53:22
6:23 12:20	efforts 55:7	established	extent 45:21	<b>final</b> 12:18
	either 4:2 17:10			<b>find</b> 35:23 37:13
	<u> </u>			<u> </u>

37:20 39:20	<b>free</b> 41:6	21:11 25:25	48:1	<b>impact</b> 11:21,25
<b>finding</b> 34:15	fundamental	28:4 31:11 33:4	heavily 30:1	12:12 17:19
46:12	3:12 7:11 15:15	34:2,3 35:23	held 49:14	47:2
findings 45:20	16:12 20:12,15	46:4,7,11,19	Heller 40:22	implemented
<b>fired</b> 38:1,8	22:19	46:21 47:22	<b>Help</b> 39:13	15:2 52:11
53:25		48:1,9,25 52:15	higher 8:5 27:22	important 38:9
first 3:4,13 8:10	G	good 13:11 23:11	38:11	45:19
32:11 44:13	<b>G</b> 3:1	<b>goodly</b> 35:23	<b>highly</b> 3:16 39:1	importantly
50:7	<b>gap</b> 6:24	gotten 38:4	Hilao 22:14	45:12 51:6
<b>Five</b> 54:19	<b>gaps</b> 7:6,10	<b>govern</b> 9:6 12:4	hinge 3:21	impossible 45:14
flaw7:11 49:20	<b>gender</b> 4:22 6:7	government 39:6	<b>hiring</b> 24:6 30:18	45:19 46:3 52:8
flawed 8:20	6:17 7:2,10	governs 12:4	35:8	53:9,21 54:21
<b>flaws</b> 23:3	10:24 13:5	<b>great</b> 12:9 53:20	historical 21:22	improperly 3:12
flows 25:23	general 6:2,4	<b>group</b> 13:15 21:8	<b>history</b> 8:1 21:19	inaction 51:9
<b>flunked</b> 12:20	11:9 27:4,9	growing 17:3	53:1	inadequate 8:9
<b>follow</b> 42:13	55:1	guess 11:17	hoc 35:1	52:16
50:11	generalizations	48:15	<b>hold</b> 11:23 13:20	incidental 20:25
following 6:9	54:22	guidance 28:16	25:5	21:6,11 22:4
35:24	generally 39:15	<b>guided</b> 11:13	holds 26:19 42:5	<b>include</b> 38:14,18
<b>follows</b> 24:19	39:16	<b>guides</b> 29:17	<b>Honor</b> 4:16 5:3	44:14
<b>foot</b> 33:13	getting 29:13	<b>guilty</b> 43:11	6:1,13 7:4 9:2	included 22:2
force 8:6	33:13 54:9	<b>guy</b> 26:7 53:15	11:22 13:9,18	51:14
<b>form</b> 29:8	Ginsburg 5:19		14:19 15:3 16:4	includes 19:7
<b>formal</b> 24:21	6:20 12:14	H	18:11 19:4	20:21 27:10,10
<b>former</b> 19:13	19:21 20:3	half 15:14 50:15	20:22 21:14	41:15
51:13	33:11,19,22	50:23	22:4 23:8,24	including 8:1
<b>formula</b> 34:20	37:8,12,23 38:5	<b>hand</b> 29:14,15	24:9 53:11 54:5	incoherent 11:15
37:14,15,21	45:3,13,16 50:6	Hansberry 5:14	54:13 56:3	inconsistency
44:8,9 45:22	50:11 52:7	19:10	host 34:22	28:6,9
formula-like	give 39:22	happened 53:14	hours 53:25	inconsistent 28:9
44:25	given 29:22 30:5	happens 6:25	hundred 54:19	independent
<b>forth</b> 39:15	31:7 36:15,18	15:19 40:15,15	<b>hurt</b> 22:16,17	19:20 29:1
forty-four 54:20	36:20 46:11	hard 27:25 48:1	hypothetical	indifference 6:11
<b>forward</b> 9:16	<b>giving</b> 10:18	harmed35:12	35:16 36:6	6:14 40:18,21
14:21 15:4,10	19:19,19	38:24 39:2		40:24
47:13 48:25	glad 55:11	Hazelwood 41:20	I	individual 3:22
<b>found</b> 8:2,23 9:4	<b>glue</b> 13:19	hazy 35:1	idea 12:21	5:16 7:13 10:2
12:25 13:1	<b>go</b> 8:14 16:7	headquarters 4:8	identification	14:12 15:9,20
28:14,19 34:18	19:25 22:8	4:15 28:3	12:1	20:13,17 22:9
37:14 38:10	31:12 41:6	hear 3:3	identified 32:16	22:24 23:6,22
52:8,24	goals 55:13,16	hearing 45:5	identify 46:8	23:25 29:18
framework 15:15	55:21	46:3,22 48:12	illegal 25:14	34:25 37:25
frankly 47:4	goes 16:24 21:8	hearings 22:20	imagine 41:5	44:10,22 45:11
<b>fraud</b> 33:3	going 12:10,11	34:25 44:7,10	immunizes 42:12	48:1,13 52:21
	12:11 16:25	44:23 45:11,23	immunizing 41:4	
	12:11 16:25	44:23 45:11,23	immunizing 41:4	,

		<u> </u>		
individualized	intentionally	11:25 12:14	keeping 46:17	<b>left</b> 6:22 29:18
3:16 17:4 18:4	31:16,19	14:10 15:19	Kennedy 5:20	legal 8:18 40:13
18:19 21:9 22:1	interest 14:2	16:1,7,13,20	6:9 27:13,16,25	legislative 21:19
44:7 45:23 46:3	interested 50:16	17:7,8,16 18:6	28:8 29:5 39:4	lesser 50:20
46:22	50:17	18:20 19:21	39:11,25 40:4	letter 26:7
individuals 10:16	involves 22:1	20:2,18,23	40:17,23 49:17	<b>let's</b> 39:13,14
10:19 20:9	<b>IPO</b> 9:7	21:10 23:4,21	49:22	41:25
22:25 34:2	isolates 43:3	24:3,10,12,14	Kennedy's 41:9	level 28:20 30:18
industries 42:8	<b>issue</b> 7:9 11:8	24:17,23 25:12	<b>kept</b> 34:10 44:20	<b>liability</b> 26:16,18
industry 32:4	12:17 18:7	25:16,17,20	44:20 45:2	34:15 41:4
39:15,16 40:15	49:16 53:10	26:1,3,6,23	53:25	liable 5:22 43:22
42:10 43:10,19	54:2 56:5	27:1,13,16,25	<b>kind</b> 8:8 9:14	license 41:6
inference 26:21		28:8 29:5,13,21	11:15 14:6	Likewise 44:19
influenced 53:4	<u>J</u>	29:23 30:2,8,14	28:12 38:6 44:8	limited 20:3 50:8
<b>inform</b> 31:13	<b>J</b> 1:15 2:3,9 3:7	30:24 31:15,18	44:15 47:15	<b>line</b> 30:11
information 25:9	51:23	32:1,7,10,25	kinds 27:11	linked 10:15
44:15 53:8	<b>job</b> 6:25 8:1,1	33:11,19,22	44:17	55:15
informed 29:3	53:1	35:3,19 36:14	knew36:16,20	<b>lip</b> 33:9 55:17,18
30:5	job-related 25:3	36:18 37:2,5,8	36:21	literature 41:14
<b>informs</b> 31:13	34:22	37:12,23 38:5	know4:21,22	41:17
infractions 53:25	<b>Joint</b> 55:6	38:13,18,21,22	13:4 18:25,25	little 11:18,18
injunction 18:2	<b>JOSEPH</b> 1:17	39:4,11,25 40:4	19:11 26:3 27:2	45:25
24:24,25 50:8	2:6 24:15	40:17,23 41:8,9	30:14 35:6	locations 10:16
50:19	<b>JR</b> 1:15 2:3,9 3:7	41:13,16,23	40:19 43:10,14	longer 52:25
injunctive 17:6	51:23	42:15,21,24	49:7	look 5:5 21:18
17:18 18:5,12	<b>judge</b> 9:3 15:7	43:5,6,9,13,17	known 36:21	24:24,25 39:19
18:22 19:5	19:22 34:1 37:8	44:2,3,6 45:3	52:18	41:20,21
21:15 50:17,19	37:9,13 45:4	45:13,16,24	knows 28:3,3	looked 12:24
51:17 54:4,12	52:15	46:2,7,14,21	50:25	17:1 18:12
injunctive-only	judgment 5:13	47:5,9,13,19		looks 7:7
21:23	19:20 20:10,13	47:21,25 48:10	L	Los 1:15
<b>injures</b> 52:20	35:18,25	48:17,19 49:4,5	labor 8:6	lose 23:14 33:14
<b>injury</b> 14:1,2	judicata 23:19	49:10,12,17,22	lack 53:4	36:11
<b>inquiry</b> 5:3 9:22	24:8	50:6,11,23 51:4	language 17:5	loses 23:5
<b>inside</b> 13:12	judicial 48:20,22	51:19,21,25	<b>large</b> 43:21	lower21:5
instance 31:2	juncture 32:13	52:7,22 53:5,7	53:10	
40:10 42:25	32:19	54:1,8 55:8,12	law 14:13 17:4	M
44:13	jurisprudence	55:24 56:4,7	18:9 36:15,22	<b>M</b> 1:17 2:6 24:15
<b>Institute</b> 31:3	52:18	Justice's 5:20	lays 55:6	<b>making</b> 7:14 11:2
<b>intend</b> 37:15	<b>jury</b> 49:5,7		leading 4:12	29:8 31:22
intended 46:18	<b>Justice</b> 3:3,9 4:7	K	learned4:8	41:21 55:24
<b>intent</b> 31:22	4:19 5:19,20	<b>Kagan</b> 10:21	21:25	<b>male</b> 38:3
intentionality	6:9,20 7:20	11:5,17 14:10	leave 44:12,12	management
46:17	8:10,17 10:6,12	17:8 23:21 44:3	leaving 51:4,6	12:17 31:7,12
	10:21 11:5,17	44:6	<b>Lee</b> 5:14 19:10	36:16,20,21,22
	I	I	I	I

		1	<u> </u>	 [
55:14	10:10 54:8	need 20:14 25:22	<b>old</b> 43:1 49:6,8	<b>part</b> 12:17,18
manager31:3,4	met 18:2	26:4,20 39:9	once 6:25 22:20	15:20 16:18
managerial 9:23	method 22:12	50:4	ones 12:11 32:12	38:9
30:18	34:20	needed 9:15	one-half 13:21	particular 4:18
managers 3:22	<b>middle</b> 12:16	10:14 17:1	operating 14:24	12:9 13:13,15
19:8 25:5 27:7	million 5:13	needs 9:7 12:1	operative 24:1	23:6 38:7 45:6
27:17 28:11,19	millions 22:1	20:16	opinion 11:25	45:21 47:10,11
28:22 29:2,4,22	Milner 21:18	negligence 42:12	opportunities	48:12
30:23 35:8 40:8	<b>mind</b> 15:25	neutral 4:3	27:23	parts 21:20
48:25 53:23	<b>minimum</b> 26:12	never 14:13 21:5	opportunity	party 20:11,14
54:20 55:16	minutes 51:22	52:3	16:22 19:24	passed 6:23
mandatory 3:11	miraculous 9:17	Ninth 20:4 22:11	20:8 35:14	<b>pattern</b> 4:11,17
3:18	<b>mirror</b> 7:19	22:15	46:12,24 47:4,6	5:4 7:17 11:20
manner 13:25	misleading 55:22	nobody's 51:4	48:4 52:3	17:20 22:22
15:23	<b>model</b> 38:7,9	nondiscriminat	opposed 6:3	23:17 26:16,18
map 7:17	46:8 47:7,23	4:4 11:14 17:25	opposite 3:25	39:9,11 50:2
<b>March</b> 1:9	49:3,7	non-opt-out 3:19	10:20	patterns 6:5,7
mathematical	models 24:20	normal 8:3	opt 16:22 19:12	pay 6:24 9:14
39:17,21 47:23	<b>Monell</b> 5:21 6:10	note 21:17 50:12	19:24 20:1,8	16:2,5 18:4,25
matter 1:11	monetary 3:17	51:7	oral 1:11 2:2,5	20:1,8,8 21:8
56:10	17:4 18:8,13,18	notes 21:20	3:7 24:15	23:18 25:2,7,9
mean 13:2 32:19	18:24 20:9,17	<b>notice</b> 16:21	<b>order</b> 16:11	26:24 27:7,19
33:12 43:22	20:19,20 21:12	19:24 20:7	26:15,17 32:20	28:13,15 33:24
48:15,24	22:1	<b>notion</b> 19:18	36:23 53:17	34:3,10,12,23
Meaning 17:17	money 46:19	nucleus 16:19	outline 54:6	37:10,21 38:2,4
means 32:22	50:17,18	23:25	outlined 53:12	40:8,10 45:6
measures 25:1	moneys 22:18	number7:23,23	outside 40:3	46:9 48:23 52:1
meet 3:23 21:5	monitor 25:11	7:25 8:7 26:12	41:21	52:5 56:2
member 14:22	month 6:22,23	28:2 35:23	overarching	paying 8:6 55:25
19:25	morning 3:4	45:10 51:11	11:10 13:12	peer 38:3
members 14:7		52:9	overcome 33:16	people 5:13,15
16:11 19:23	N	numbers 6:21	oversight 25:6	7:11 10:4,17
22:10 38:23	N 2:1,1 3:1	45:4 53:10	oversight 25.5	12:9,22 13:7,8
45:10	named5:11		owed 38:2 45:6	13:15 20:9
memories 35:1	23:16	0	O'Connor's	22:17 27:5,10
men 6:24 27:9,19	narrow49:14	<b>O</b> 2:1 3:1	11:25	27:11 32:5
31:7 35:5 37:18	national 8:11	objective 12:7,18		34:11,12 36:2
38:12 40:11,12	26:25	obligation 7:3,5	P	36:19 38:10
42:18 43:14	nationwide 3:11	27:6 34:14	<b>P</b> 3:1	51:5,11 52:9,11
47:3 54:18 56:1	natural 13:6	<b>occur</b> 6:17	page 2:2 11:11	people's 55:21
56:2	<b>nature</b> 19:18	occurred 22:22	11:11 55:6	percent 9:13
mention 22:13	52:9	occurring 13:21	pages 11:13	13:21,22 55:21
merely 18:24	necessarily	offer48:7	paid 37:17 47:17	percentage 32:2
merits 8:14,15	25:14	offering 47:23	paper 15:11 55:4	performance
1110110 0.14,13	necessary 14:6	Okay 46:1	paradigm 39:8	performance
	J		1	

27:22 34:22	<b>point</b> 4:2,23	possibly 31:19	42:23	12:16 23:18
37:19 38:7,11	10:15 14:22	34:1 45:5	<b>pretty</b> 48:19	25:3,7 27:23
43:4	19:7 22:8 37:24	post 35:1	prevail 23:5	28:13,15 34:10
performed 7:23	45:19 51:6 54:9	practice 5:4	prevails 15:21	34:23 35:9 40:8
period 34:7	55:1,25	11:20 12:2,5	15:22 16:16	43:14 48:13,24
<b>permit</b> 37:16	pointed 7:8,18	13:12,14 14:15	prevent 54:23	promotions
44:21	12:8	17:20 22:22	<b>prima</b> 26:19 50:2	31:14,25
permits 34:24	<b>points</b> 7:9 13:18	23:17 26:16,18	probably 50:2	<b>proof</b> 5:18 14:4
38:10	33:15	26:22 39:9,11	problem9:20	14:23 46:16
permitting 4:25	policies 4:2	50:3 52:24	10:1 15:6 16:24	proposed 22:12
person 12:19,20	11:14 12:4	practiced 43:23	16:24 18:3 24:8	protect 14:7
13:1,10 15:4	13:12 54:7 55:1	practices 4:11	29:14 33:23	protections
24:4 31:11 38:1	<b>policy</b> 4:5,14,24	12:4 28:23	52:13	17:14
53:19,20	5:4,23 6:2,3,4	precedents	problems 19:6	<b>prove</b> 8:19 10:12
personal 53:7	6:12 8:9 10:9	41:18	19:17 25:11	17:24 52:3
personality	10:13,14,15,18	precise 34:24	43:19	<b>provide</b> 25:2,4
12:10	10:23 11:1,1,3	precisely 17:3	procedural 17:14	31:4 32:24
personnel 28:10	11:19 12:2,5	preclude 47:22	procedure 14:24	provided 27:17
persuade 47:14	14:15 15:1,1	precluded 22:19	procedures	27:23 28:19,20
Petitioner 1:4,16	19:19 24:22	23:22 47:9	22:11 28:10	31:11
2:4,10 3:8	25:23 27:14	predicate 51:10	proceed 40:25	provides 28:11
51:24	28:7 30:16,16	prediction 22:16	41:2	29:3
<b>phase</b> 14:20 15:4	30:20,21,22	predominance	proceeding	provisions 17:13
15:7	32:17,18 33:2,3	17:15	52:15	publish41:6
phenomenon	33:5,9 35:5,12	predominant	proceedings	punitive 18:16
13:7	35:13,17,24	20:24	14:15	20:3,6
place 5:1	36:4 39:18 40:5	predominate	process 4:12	purpose 28:24
plaintiff 14:20	40:24 41:2,3,6	21:13 50:13	11:6 15:11,16	<b>push</b> 12:11
19:25 52:23	49:25 52:23	predominates	28:15 46:11	<b>put</b> 14:3 15:8
plaintiffs 3:13,16	53:3,24 54:14	50:13	49:11 52:18,19	19:2 23:20 37:1
3:21 4:2 5:10	54:17,25,25	prefer 12:22,24	54:24	37:3 49:6 52:25
5:11 7:8 8:11	55:2,3,4,23	premise 41:19	processes 25:14	putting 9:15
9:15,22 10:12	population 27:4	premises 8:23	48:24	
12:8 14:2,11,13	27:10	presents 39:3	profile 42:2	Q
15:14 16:5	populations	50:1	program 31:12	qualify 21:8
17:11,22 18:2	41:21	president 33:8	55:18	<b>question</b> 5:21,25
18:15 19:18	portion 38:23	55:9	prohibiting 40:25	6:8,14 8:18
21:3 22:13	pose 11:15 24:1	presume 51:3	<b>promote</b> 32:5,8	10:9 13:23 18:8
23:10,14,16	position 9:24	presumption	promoted 9:23	20:18,25 21:12
54:15,20 55:1	17:8 19:14	17:23 22:21	9:25 32:10	24:2 31:5,5
plaintiff's 53:16	25:13 27:2,3	23:9	34:11 47:18	32:13 33:17
<b>plant</b> 26:8,8	43:17 51:17	presumptions	53:2	35:7 36:15 37:3
please 3:10	positions 35:7	23:13	promotes 33:5	39:3 41:9 44:4
24:18	possibility 18:17	presumptively	promotion 6:24	48:16 50:1,7
				51:15 52:1 54:2

54:10,25	49:18,23	<b>report</b> 4:21 9:12	46:13	30:24 31:15,18
questions 13:4	records 15:11	reports 5:8 6:22	<b>rights</b> 14:7 22:10	32:1,7,11,25
23:18 32:12,14	34:10 44:20,20	represent 5:12	52:20,20	38:13,18,21,23
quite 10:21 13:2	45:2 46:17 49:2	5:15	rigorous 8:24	42:15,21,24
	52:14,16 53:13	required 10:8	rigorously 15:2	43:5,9,13,17
R	recover 15:18	22:7 26:15 44:7	rise 5:3	48:10,17,19
<b>R</b> 3:1	recreate 53:22	requirement	ROBERTS 3:3	49:5,10,12
railroad 27:11	recurrence 9:17	24:21	4:7,19 15:19	50:23 51:4 55:8
raise 6:8 18:14	reflected 3:14,24	requirements	16:1,7,13,20	55:12
32:13	reflects 56:3	3:14,15,18,23	23:4 24:3,12,14	scenario 54:6
raises 6:14 46:10	regarding 3:20	res 23:19 24:8	25:12,17,20	second 3:16 9:6
raising 32:12	53:25	reserve 24:10	26:3,6,23 35:3	54:2
ratings 8:1 53:1	regardless 40:14	resolved 15:23	35:19 49:4	section 15:16
rationalizations	regional 8:12,13	respect 26:22	51:19,21 56:7	see 28:1 43:5
35:1	regionally 7:22	28:18,22 40:20	robust 34:21	seek 5:6 31:8
real 24:8	regions 30:13,13	42:7 46:17	46:25	35:18 51:17
really 7:11 11:14	regression 8:11	49:23 51:7,9	root 5:7	seeking 17:18
23:2 33:4,6	8:13 37:16 43:2	respects 28:23	<b>rule</b> 3:13,15,17	18:16 31:8 52:4
36:12 45:2	regularly 25:9	Respondents	3:20,24 5:21	selection 53:4
48:15 49:6,11	relevant 27:8	1:18 2:7 24:16	17:2,2,5,9,13	SELLER 44:5
49:20 53:14	reliable 34:20	responding 8:15	20:12,16 21:14	Sellers 1:17 2:6
reason 17:25	45:23 47:16	response 31:5,7	21:24 22:7 34:8	24:14,15,17,25
24:4 43:25	48:11,14 49:3	responsibility	51:7	25:15,19 26:1,5
reasons 3:12	reliably 44:17	6:21 7:1 40:7	rules 20:14 23:1	26:11 27:1,16
34:11,12	48:6	40:14	ruling 20:3,5	28:8 29:7,21,24
rebuttal 2:8	relief 3:17 17:6	responsible 42:6	22:15	30:4,10,21 31:1
24:11 51:23	17:19 18:5,12	rest 40:15,16		31:17,21 32:6,9
receive 40:10	18:18,22 19:1,1	43:24	S	33:7,18,21 34:4
received 16:21	19:5 20:9,17,19	result 36:3	<b>S</b> 2:1 3:1	35:15 36:5,17
recognized 32:16	20:20,21 21:9	resulting 4:10	<b>Sam</b> 31:3	36:25 37:5,12
38:25	21:16 22:2,9	results 8:12	sampling 22:12	38:5,17,20,22
recommended	50:9,17,19	13:15 14:16	satisfied 50:3	39:7,23 40:3,6
34:5	51:17 54:12	29:12 30:12	<b>satisfy</b> 3:13,17	40:19 41:1,12
reconstruct	reliefs 18:13	36:12,20,24	17:12 32:20	41:16 42:4,20
34:16 48:5	relies 52:16	retail 27:5,10	saw 6:5	42:24 43:8,12
49:24	relying 23:11	39:16	<b>saying</b> 4:22 13:5	43:16 44:3,11
reconstruction	34:20 35:1	retailers 43:21	26:7 30:3,7	45:8,15,18 46:1
44:22 52:17	remaining 24:11	retained 16:5	35:20 41:3 46:2	46:6,13,20,23
record 14:5 26:2	51:22	right 8:18 16:13	46:4 47:6,22	47:8,12,20,24
33:8 45:21	remedial 25:1	20:15 25:12	48:3 55:18	48:2,17,21 49:9
52:21 53:21,22	44:4	29:23 30:10	<b>says</b> 9:7 34:1	49:12,22 50:10
56:3	remember 53:23	32:6 36:1,17	52:13,14,16	50:22,25 51:5
recordkeeping	54:2,9	40:6 41:15 44:9	scale 25:13	51:20 52:2,6,13
48:22	reminds 5:21	44:10 45:25	<b>Scalia</b> 29:13,21	sends 26:7
recordless 49:16		110 13.23	29:23 30:2,8,14	201100 2011
			<u> </u>	

				ı
seniority 27:22	23:18 47:2	specific 12:2	9:18 13:21	35:16 52:5
34:22 37:19	significantly 8:4	28:14 39:18	29:11 54:22	55:22
43:4	26:15	40:24 45:20	<b>stop</b> 7:3 36:23	suggested 11:1,7
sent 20:5	similar 13:2	speculate 49:1	46:18	15:11 52:6,7
separate 18:7	similarly 37:18	speculative 8:7	<b>store</b> 4:18,21	suggesting 11:16
23:25	40:10,12	<b>spend</b> 54:1	7:22,22 9:18	23:21 30:4
separated 19:2	simplify 20:6	<b>stage</b> 9:4 10:8,11	19:8 26:8 28:19	46:15
separately 18:21	<b>simply</b> 5:10 8:12	14:14	54:20	suggests 14:11
series 25:1	9:18 13:6 37:24	stake 17:5 20:16	stores 1:3 3:4	suit 11:20,21
serious 33:23	single 41:25 42:1	20:17	4:20 5:9 7:10	suitability 31:25
seriously 52:23	42:2	stand 5:11,13	9:13 25:18,18	<b>summary</b> 35:18
service 33:9	situated 10:4	standard 8:25	25:19,21,25	superior 22:5
55:17,19	37:18 40:11,12	9:5,6 10:7,10	28:25 35:22,22	53:1
set 26:13 49:14	<b>situation</b> 4:17 5:6	14:23 18:13,14	37:7	superiority 17:15
seven 34:6	10:5 11:16 35:4	31:5 40:20	stories 9:23	supervisor 10:5
sex 6:6 27:8,24	society 40:4	42:12	strong 4:5 8:15	supervisors 28:5
29:9 30:16,19	43:24,25	standardless	28:21 29:16,19	29:18
31:16,20,22	sociologist 13:19	49:16,17,23	stronger 13:16	support 26:9
40:9 42:18,23	sociologists	standardlessn	<b>stuff</b> 49:8	54:3,11
43:11	39:14	48:23	Sturgell 20:11	supported 14:5
shares 37:4	somebody 26:7	standards 11:10	<b>subject</b> 36:7 37:6	<b>suppose</b> 4:7,13
<b>sharp</b> 20:14 22:6	30:8 38:8	12:7 18:3 33:15	39:1	6:9 39:14
sheer 45:9	somewhat 5:21	34:9 42:13	subjected 40:1	supposed 5:12
<b>shifts</b> 17:24	<b>sorry</b> 16:7 33:21	44:21 45:2	subjective 4:8	13:19 33:16
shocked 21:25	36:7 39:23 43:8	standing 17:21	11:2,6,7,24	54:23
shoe-horning	45:8,15	started 55:25	12:7 13:3 24:5	<b>Supreme</b> 1:1,12
18:18	<b>sort</b> 8:9 17:3	<b>state</b> 11:23 17:17	25:13,21 29:15	sure 28:7 35:22
<b>show</b> 7:10 8:9	22:15 35:17	statement 31:11	30:17 35:9,12	Surely 26:6
9:19 10:3 14:21	Sotomayor 7:20	states 1:1,12	35:21,25 36:3,4	sweeping 54:21
22:23 26:20	8:10,17 17:7,16	15:17 43:11	36:23 48:6	<b>system</b> 9:12 13:6
30:12 32:22	18:6,20 20:18	statistical 8:8,16	subjectivity	35:10 48:20,22
37:21 38:1	20:23 21:10	22:12 29:12	10:23 11:9,19	
40:18 47:10	24:23 44:2	43:2 46:8 48:15	12:5 14:16	T
53:3,14	45:24 46:2,7,14	49:7	<b>submit</b> 26:12	<b>T</b> 2:1,1
<b>showed</b> 9:13,16	46:21 47:5,9,13	statistics 7:8,19	34:19 41:1 48:9	take 4:25 5:7
<b>showing</b> 6:10,23	47:19,21,25	8:14 46:5	49:12	31:22 42:6
48:4	52:22 53:6,7	statute 42:12	submitted 25:9	43:17 44:3
<b>shown</b> 7:17 25:22	55:24 56:4	step 12:19	56:8,10	taken 51:9
32:20 33:1,3	sought 22:2	stereotype 31:24	substantial 26:21	takes 43:3 48:10
47:3 50:1	<b>sounds</b> 13:2 47:5	stereotyped7:15	44:21	52:19
<b>shows</b> 23:2 38:11	54:8	54:18,19	<b>sue</b> 16:15	talked 20:12
45:22 49:20	so-called 12:19	stereotypical	sufficiently	<b>talking</b> 4:19 9:9
<b>sight</b> 36:11	speak 43:24	31:10	26:21 32:25	20:19 25:18
significant 19:5	speaks 17:5	stereotyping	suggest 11:23	33:12,13 43:5,6
				talks 21:15
	l ————————————————————————————————————	I	I	I

	 	1		
<b>Taylor</b> 20:11	10:21,22 11:11	training 29:4	31:6	<b>VII's</b> 15:16
<b>Teamsters</b> 14:23	12:16 13:10	31:12 36:15	understand 32:9	violated 53:24
15:8,15 22:20	14:10 16:11	treated 10:3	36:6 41:8	violates 23:1,1
24:19 26:2,13	19:16 20:16	39:20	undisputed 14:25	36:1
26:13,19 34:14	21:24 22:5 23:2	treatment 6:15	unguided 11:12	violation 5:23
38:24 39:5	23:10,15 29:10	12:13 29:6,7,8	<b>unit</b> 4:18 13:13	6:11 13:1 16:12
41:19 42:9 50:3	32:11,20 33:2,6	35:5 36:1 39:20	13:15	41:10 42:3
tell 13:20 18:21	35:15 37:9,13	<b>trial</b> 32:13	<b>United</b> 1:1,12	violations 9:25
32:5	37:22 40:21	trials 49:6	43:10	vision 52:2
tells 29:19 30:8	41:16,17,18	<b>tried</b> 23:17	units 5:9	
<b>tend</b> 13:7 37:15	42:5 43:25 44:6	<b>true</b> 25:4 26:23	unlawful 27:14	-
37:15	44:11,23 48:17	40:17 43:20	28:7	wage 7:6
tens 10:18	48:21 50:3,4	<b>try</b> 21:19 34:1	upsetting 9:1	waived 16:10
terminated 9:24	55:24	53:9	use 5:24 9:1	walked21:4
terrible 53:20	thought 7:20	<b>trying</b> 12:12	20:24 34:20	Walton 31:3
test 6:16 12:18	15:9 17:8 19:21	15:14 43:17	37:15 39:8 44:8	Wal-Mart 1:3
12:19 13:10,14	19:22 37:23,23	47:20 49:24	44:24 45:22	3:4 8:5 12:6
19:10 20:10,24	39:5 45:3,13,16	Tuesday 1:9	46:25 47:1 49:5	15:8 17:24
20:25 21:1,2,3	thousand 25:18	twice 7:1	50:14	22:10 23:6 25:1
21:6,11 22:5	25:19,20 35:22	two 3:12 7:23 8:8	uses 20:25	27:3,9,14,17
testified 55:13	35:22	9:5 15:7 21:4	utterly 29:15	28:24 29:1 32:3
testify 53:19	thousands 4:20	23:10 28:1		32:12 43:21
testimony 9:13	10:19 25:24	32:24	<b>V</b>	46:23 47:4,12
32:23 33:7,10	three 5:11 11:12	typical 5:11	<b>v</b> 1:5 3:4 5:14	47:12,13 48:3
39:14	21:18 25:24	31:10 41:9,24	19:10 20:11	52:3 53:1,19
tests 21:4	50:4	54:16	<b>vacuum</b> 29:25	Wal-Mart's 9:3
text 21:14	threshold 33:25	typicality 3:15	<b>value</b> 17:20,21	14:25 26:24
<b>Thank</b> 24:12,13	thrived 54:18	9:21 19:6,17	values 29:3	27:6 28:10
51:19,20,25	<b>thrown</b> 53:17		variable 7:25	34:21 52:19
56:6,7	tie 12:12	U	variables 8:3	want 10:20 36:10
THEODORE	time 24:11 27:21	Ultimately 8:18	34:23 46:25	42:25 55:2
1:15 2:3,9 3:7	54:7 55:14	unchallenged	47:1	<b>wanted</b> 6:18 41:7
51:23	<b>Title</b> 11:20,20	30:15	variations 42:1	55:20
theories 24:20	12:3 13:1 15:16	unchecked 27:17	various 28:25	wants 19:25
theory 11:15	15:16 23:1 27:6	36:8	vice 33:8 55:8	warrant 18:9
24:4 26:10	40:7,14 41:10	unclear 15:24	victims 15:17	Washington 1:8
27:15,16 41:14	42:3,5 52:20	uncompensated	19:9	1:17
53:16	total 12:19,20,25	37:11	<b>view</b> 16:17 17:11	wasn't 9:4 12:21
thing 50:6,19	12:25 13:10,14	underpaid 37:20	19:4 55:15	15:1 30:17,20
things 8:2 12:23	24:5	37:25 38:12,15	viewing 20:4	38:2 39:6 43:5
20:6	totally 28:15	38:16 40:12	<b>VII</b> 11:20,20	43:20 53:2
think 4:16 5:2,3	30:17	47:3	12:3 13:1 15:16	55:18
5:23 6:1,13	touched 50:7	underpromoted	23:1 27:6 40:7	Watson 10:25
8:14 9:6 10:6	trained31:4	47:3	40:14 41:10	11:22 24:20
		underrepresen	42:3,5 52:20	27:18
				<u> </u>

	ī	<u> </u>	
way 5:5,17 13:25	19:11 27:9,19	<b>13</b> 11:11	<b>95</b> 13:21
14:3 19:16 20:5	27:22,23 31:6,6	<b>1576</b> 55:6	
25:3,7,8 27:18	31:24 32:5,10	<b>1983</b> 5:22	
28:12,24 34:1	32:22 33:2,6		
34:25 35:25	35:5,7,11 36:7	2	
36:25 37:2	37:3,20,24,25	<b>2</b> 16:24 17:17	
39:19 43:20	38:11,14,15	18:7,13,22	
47:16 50:20	39:16 40:1,10	20:10 22:3 50:8	
52:11 54:17,24	42:17 43:15	50:14 51:10,15	
ways 3:25	46:9,18 47:2	54:3,12	
week 4:21	52:21 54:18,18	<b>20</b> 55:21	
weeks 21:18	55:14 56:1	<b>2011</b> 1:9	
<b>weigh</b> 44:14	words 4:12 5:14	<b>23(a)</b> 3:20,24	
went 12:1 45:12	6:5 14:1	33:15,24	
45:19,20	work 7:2 27:20	<b>23</b> (a)'s 3:13	
weren't 26:15	33:23 53:2	<b>23(b)(2)</b> 17:5,14	
38:15 39:2	workers 27:11	21:15,24 33:25	
41:25	workforce 41:25	51:7	
<b>we'll</b> 3:3 49:8,10	working 53:16	<b>23(b)(2)'s</b> 3:17	
we're 12:11,11	workplace 43:23	<b>23(b)(3)</b> 17:2,2,9	
14:20 28:13,23	<b>world</b> 23:9 40:16	20:17	
33:12,13 34:2	<b>wouldn't</b> 17:20	<b>24</b> 2:7	
43:1,2 47:22	17:21 20:7 38:4	<b>29</b> 1:9	
52:14	51:2 53:3,19	3	
we've 32:16 50:1	written 15:1		
50:3 54:2	30:21 33:1 55:4	3 2:4 18:8,10,14	
whatsoever	wrong 19:22	19:3 50:15	
28:16	20:25 39:5	30 42:8,8	
whipsawed 29:14		4	
<b>wholly</b> 29:1	X	<b>4</b> 51:22	
<b>wide</b> 40:4	<b>x</b> 1:2,7 39:17,21	<b>40</b> 26:14 34:7	
win 8:19 23:13	52:25	42:9 49:14	
windfall 37:10	Y	<b>41</b> 30:13	
window53:18			
55:9	years 34:7 42:8,9	5	
wishes 48:5	48:24 49:1,14	<b>500,000</b> 5:12	
withdrawn 36:22	49:24	<b>51</b> 2:10	
woman 15:20	1	<b>544</b> 19:8	
23:6 32:8 37:17	1 13:21		
45:6 52:4,24	<b>10</b> 8:5 48:24 49:1	7	
53:12,18	55:22	<b>70s</b> 12:15	
women 6:23,25	<b>10-277</b> 1:4 3:4	<b>706</b> ( <b>g</b> ) 15:17	
12:19 14:17,17	<b>10:19</b> 1:13 3:2	9	
15:9 16:14	<b>11:20</b> 56:9		
		<b>90</b> 9:13	
	•	ı	1