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NELP Statement on U.S. Supreme Court Decision in *Dukes v. Wal-Mart*

Today, the U.S. Supreme Court issued its decision in *Dukes v. Wal-Mart*, reversing class certification for hundreds of thousands of women who allege systemic gender-based pay and promotion disparities by Wal-Mart, their employer. The decision sets a troubling precedent that will make it easier for large and powerful corporations to discriminate and otherwise violate the workplace rights of their employees, while making it harder for these workers to join together to oppose this conduct. CEOs and Wall Street are celebrating the result, but for the millions of workers for whom collective action is the only realistic vehicle for achieving fair pay and equal opportunity, the road to workplace justice has just gotten tougher.

The Court's opinion decertified a class of hundreds of thousands of female Wal-Mart employees in a case alleging that Wal-Mart engages in a pattern and practice of pay and promotion discrimination. Disturbingly, the Court's decision explicitly injects extensive consideration of the ultimate merits of the case into the preliminary decision about whether there are common questions of law and fact that warrant class certification. And despite its denigration of the plaintiffs' evidence in support of common questions, the Court itself makes assumptions that have no evidentiary basis—e.g., the presumption that in the face of a corporate policy against discrimination (a policy that every major corporation in the nation likely has), the vast majority of managers should be presumed not to discriminate—in dismissing the plaintiffs' evidence.

The reversal of class certification was unanimous, with only a bare majority – 5 to 4 – holding that the named plaintiffs had not met the threshold test of establishing that the class of women it sought to represent had questions of law and fact in common. Justices Ginsburg, Breyer, Sotomayor and Kagan dissented forcefully from that holding.

Class actions remain vital for enforcement of workplace rights. Not only do class actions address systemic, broad-based patterns and practices that cannot be adequately redressed in a series of one-on-one actions, they are often the only effective way to remedy individual harms that could not be redressed if workers were required to file individual complaints.

First, even when the result of systemic employer discrimination, individual claims are often small relative to the costs, duration and risks of litigation. The limited remedies an individual worker may recover combined with the expense of filing suit – particularly against an employer that has significant resources to fund litigation – means that the cost of individual litigation is usually prohibitive.

Second, workers face well-documented retaliation and fear of retaliation in pursuing individual litigation against employers. Low-wage workers in particular are especially vulnerable to such retaliation, given their dependence on every penny they earn, and, in cases involving large employers, the possibility that they may be working for the only major employer in town.

Third, class action relief for workplace violations is especially important at a time when resources for government enforcement of these rights remain woefully insufficient. Agencies like the Equal Employment Opportunity Commission and the U.S. Department of Labor are understaffed and underfunded and as numerous reports have found, their enforcement capacities remain inadequate to the task of addressing widespread employer noncompliance with core workplace rights.

Finally, while isolated individual cases may just be a small “cost of doing business” for an unscrupulous employer, class actions provide a crucial tool to achieving remedies that address widespread and systemic noncompliance with workplace laws, and ensure that employers are not effectively immunized from meaningful liability for workplace-wide violations.

The Court today has not closed the door on remedies for women who experienced discrimination while working at Wal-Mart, but it has made the pathway to relief much more arduous. We hope the Court’s decision will not deter the women of Wal-Mart or other workers around the country who experience unlawful treatment on the job from pursuing their rights and remedies under the law.

Counsel for the workers in this case have set up an informational website for current and former Wal-Mart female employees, available at www.walmartclass.com.