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**COURT URGED TO DECERTIFY
MASSIVE CLASS ACTION SUIT
(Dukes v. Wal-Mart Stores, Inc.)**

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Ninth Circuit in San Francisco to grant rehearing *en banc* in a case in which a three-judge panel of the appeals court recently upheld a lower-court decision that certified a massive class action against retailer Wal-Mart. The suit was filed by a small number of female Wal-Mart employees who claim that the company denied them equal pay and opportunities for promotion. But the trial court has certified them as representatives of a class of 1.6 million current and former female employees.

In a brief filed in *Dukes v. Wal-Mart Stores, Inc.*, WLF argued that the plaintiffs have failed to demonstrate that the case could manageably be tried as a class action. WLF argued that the plaintiffs failed to demonstrate that common issues of fact and law predominate over individual issues -- an absolute prerequisite for certification of a class action. WLF's brief was drafted with the pro bono assistance of Jennifer L. Brown and Anthony J. Capozzola, attorneys in the San Francisco office of the law firm of Shook, Hardy & Bacon.

The Ninth Circuit panel issued its initial decision affirming class certification nearly a year ago. Wal-Mart filed an initial rehearing petition in February 2007, and WLF filed a brief in support of that petition. The panel responded in December by withdrawing its initial opinion and issuing a substantially revised opinion -- albeit the panel still upheld the class certification decision. WLF's latest brief is in support of Wal-Mart's renewed petition for rehearing *en banc*, which was filed in response to the December decision.

"There is little doubt that the only reason the plaintiffs' lawyers sought class certification was to coerce the defendant into settling the case without regard to the merits of the plaintiffs' claims," said WLF Chief Counsel Richard Samp after filing WLF's brief. "Class actions of this magnitude are virtually never appropriate because they could never be brought to trial; yet they serve the purposes of the plaintiffs' bar by imposing tremendous settlement pressure on defendants," Samp said.

The plaintiffs do not allege that Wal-Mart has a company policy of discriminating against female employees. Rather, they allege that Wal-Mart maintains an amorphous "corporate culture" that can "perpetuate gender stereotypes" and lead to differences in

pay and promotion between men and women. WLF argued that class treatment of such vague claims is never appropriate; rather, WLF argued, every case of alleged discrimination must stand or fall on its own merits.

In its brief, WLF was particularly critical of the trial court's decision to admit into evidence and rely on the testimony of Dr. Bielby, the plaintiffs' sociology expert witness. Dr. Bielby testified that gender stereotyping was "likely" to exist at Wal-Mart, but he conceded that his opinion was largely conjectural. The trial court nonetheless admitted Dr. Bielby's testimony and relied on it in its certification decision. The three-judge Ninth Circuit panel explicitly affirmed the trial court's decision to admit Dr. Bielby's testimony. WLF argued that this conjectural testimony did not meet the standard of scientific reliability established by the U.S. Supreme Court's *Daubert* decision and thus should have been excluded.

The three-judge panel reasoned that the strict *Daubert* standard only applies when a case is being decided on the merits, not at preliminary stages such as when a court is considering whether to certify a class. In its brief in support of rehearing *en banc*, WLF argued that the strict *Daubert* standard should apply *whenever* a court is considering whether to admit expert testimony into evidence. WLF argued that anything less permits "junk science" to seep into the judicial process. WLF argued that exclusion of unscientific, and thus unreliable, evidence should be an important goal at all stages of litigation, WLF argued.

WLF argued that the trial court's certification of the plaintiff class, consisting of 1.6 million women who worked for Wal-Mart at any time since 1998, should be overturned because it was based in significant part on unscientific, unreliable evidence.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.