No. 18-35791

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KATHERINE MOUSSOURIS, et al.,
Plaintiffs-Appellants,

v.

MICROSOFT CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
(No. 2:15-cv-01483)

WASHINGTON LEGAL FOUNDATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all fifty states. WLF promotes free enterprise, individual rights, limited government, and the rule of law.

WLF appears often as *amicus curiae* in disputes over the proper scope of the class mechanism. It filed an *amicus* brief in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), which establishes that a class may not challenge an array of employment decisions under Title VII unless "some glue" holds "the alleged *reasons* for all those decisions together," *id.* at 352. Without evidence that the various decisions are directly connected, *Wal-Mart* declares, it is "impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.*

The plaintiffs here seek to use the class device to challenge Microsoft Corporation's discretion-based approach to determining employee pay and promotions. But that approach is, from a legal

[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

perspective, indistinguishable from the discretion-based pay-and-promotion system that *Wal-Mart* declared incapable of serving as the "glue" for a class.

The plaintiffs cannot evade *Wal-Mart*—but the problem with their effort to certify a class runs even deeper. The plaintiffs ask, in effect, that discretion-based pay-and-promotion systems be considered inherently suspect. But such systems are legitimate and immensely valuable. If we are to have a healthy and vibrant economy, we cannot do without them.

WLF urges affirmance of the district court's denial of the plaintiffs' motion to certify a class.

STATEMENT OF THE CASE

Microsoft is a major global technology company that employs many thousands of employees. Like any technology firm that hopes to continue to see the sun rise, Microsoft is a "fluid" and "dynamic" organization. (Appellee's Response Brief ("RB") 10.) It cannot afford to overcentralize its decision making, or to let its employees' roles become ossified.

To ensure that it remains versatile and adaptable, Microsoft grants its lower-level managers great discretion in determining pay and promotions. Throughout the class period, this approach had two core features. First: managers are made abundantly aware that Microsoft "prohibits all workplace discrimination" and has "zero tolerance for any form of workplace harassment." (ER 443.) Second: within that zero-tolerance environment, employee pay and promotions are based on a subjective evaluation of each employee's performance by the managers with whom she interacts.

From 2011 to 2013, the process revolved around three loose criteria. After considering (1) "What" results an employee had achieved, (2) "How" she had achieved them, and (3) her "Proven Capability" over time, a manager rated the employee on a scale from 1 (best) to 5 (worst). (RB 11.) Managers then met and "calibrated" the ratings by comparing employees with one another. (*Id.*) These meetings followed no set format. (*Id.*) The pay and promotion decisions made at the meetings were ultimately "rolled up" to executives, who checked that they fit the company's budget. (*Id.*)

In 2014 the process became even more open-ended. Microsoft discarded the "How," "What," and "Proven Capability" standards, the 1-to-5 rating system, and the peer-group "calibration." (RB 12.) Managers simply evaluated employees and then met for "people discussions." (*Id.*) The discussions focused on "what rewards" were "right for each individual employee" given her "impact" on "the group and the company." (*Id.*; ER 450.) The decisions made in the discussions were, as before, "rolled up" to executives to be checked against the budget. (*Id.*)

In 2015 a former Microsoft employee sued for gender discrimination under Title VII. After discovery she and a current employee who had joined the suit moved to certify a class of 8,630 female employees who had worked at Microsoft since September 2012. The district court denied the motion. The plaintiffs, it concluded, had failed to show commonality, predominance, typicality, or adequacy of representation. See Fed. R. Civ. P. 23(a)(2-4), 23(b)(3). We focus here on the commonality ruling—the finding that no "questions of law or fact" are "common to the class." *Id.* at 23(a)(2). (A lack of commonality guarantees a lack of predominance, and nearly guarantees a lack of typicality. (See ER 502-03 & n.26.))

The plaintiffs alleged both disparate-impact and disparate-treatment discrimination. To establish disparate-impact commonality, they needed to identify a policy or practice that disadvantaged the class. (ER 473.) The district court observed, however, that discretion pervades Microsoft's pay and promotion process. (*Id.* at 482-94.) A woman objecting to a pay or promotion decision could, therefore, point only to the conduct of a discrete manager (or subset of managers), not to a policy or practice implemented by Microsoft. (*Id.* at 493-94.) The plaintiffs submitted an expert opinion that confirmed rather than refuted this. (*Id.* at 490-91.)

To establish disparate-treatment commonality, the plaintiffs needed to establish that discrimination is a regular, rather than unusual, occurrence in Microsoft's pay and promotion process. (*Id.* at 494.) The plaintiffs tried to establish that regularity with statistical evidence, 11 declarations, and assorted pieces of "culture" evidence. Besides being quite weak (see RB 57-58), the statistical evidence was averaged at too high a level to shed any light on "regular" management behavior (ER 495-97). The misbehavior of just a few individuals can skew aggregate data. The declarations, meanwhile, were too

anecdotal—11 individual accounts cannot reliably reflect the experiences of more than 8,600 other people. (*Id.* at 497-99.) And like the declarations, the "culture" evidence "offer[ed], at most, a glimpse into individual incidents that are not sufficiently representative of the entire culture across Microsoft." (*Id.* at 500.)

SUMMARY OF ARGUMENT

Wal-Mart does little more, at bottom, than take Rule 23's commonality requirement seriously. To proceed together as a class, *Wal-Mart* says, employees alleging Title VII discrimination must have claims that "depend upon a common contention." 564 U.S. at 350. A class of employees should not be certified, therefore, if the only thing its members have in "common" is their *diverse* experiences in a discretion-based pay-and-promotion system. *Id.* at 355-56.

Like the plaintiffs in *Wal-Mart*, the plaintiffs here seek to certify a class of employees who allegedly suffered sex discrimination in pay and promotions. Like the plaintiffs in *Wal-Mart*, the plaintiffs here cannot identify a uniform employment practice that caused the alleged discrimination. Like the employees in *Wal-Mart*, the employees here were in fact subjected to a discretion-based pay-and-promotion system

that is "just the opposite of a uniform employment practice." *Id.* at 355. And like the plaintiffs in *Wal-Mart*, the plaintiffs here try to manufacture commonality with an expert opinion that boomerangs against their case, with data aggregated at too high a level, and with anecdotes that show no larger pattern. Rarely does a binding precedent dictate an outcome more clearly than *Wal-Mart* dictates denial of class status here.

An undercurrent of the plaintiffs' arguments is that discretion-based pay-and-promotion schemes are inherently suspicious. This is wrong as a matter of law. A policy of "allowing discretion by local supervisors over employment matters" is, says the Supreme Court, "a very common and presumptively reasonable way of doing business." *Id.* at 355 (emphasis removed).

The plaintiffs' attack on discretion is also deeply unsound. Centralized corporate decision making tends to be rigid, slow, and ill-informed. To keep pace with the rapidly changing modern economy, companies must remain creative and adaptable—and thus decentralized. This is especially true of technology companies (such as Microsoft) and of large companies (such as Microsoft). And in any event,

any putative class action that assails an entire business method should be approached with great caution. The legal system is not well equipped to assess the negative consequences of allowing such an onslaught to proceed.

Large certified class actions almost always settle. A post-certification settlement in a case such as this would amount to a heavy tax, or even a *de facto* bar, on the challenged corporate structure. Penalizing or prohibiting the use of discretion in this way would lead to more bureaucratic, less innovative, less productive companies. At the same time it would boost established firms by hamstringing small and swift new competitors.

ARGUMENT

I. THE PLAINTIFFS CANNOT OVERCOME THE COMMONALITY RULING IN *WAL-MART STORES, INC. V. DUKES*.

Wal-Mart is adamant that discretion is not by itself commonality. Yet every part of the plaintiffs' case for class certification boils down to a complaint about discretion. The class element of this action is ultimately a mere rerun of *Wal-Mart*.

A. *Wal-Mart Stores, Inc. v. Dukes.*

A group of female employees and former employees sued Wal-Mart, under Title VII, for sex discrimination in pay and promotions. They sought to represent a class of 1.5 million other female employees and former employees. "Pay and promotion decisions at Wal-Mart [we]re generally committed to local managers' broad discretion." *Wal-Mart*, 564 U.S. at 343. The plaintiffs' theory was that "a strong and uniform 'corporate culture' permit[ted] bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice." *Id.* at 345. The district court certified a class. *Id.* at 347.

"The crux" of the appeal before the Supreme Court was "commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.' Rule 23(a)(2)." *Id.* at 349. "Commonality," the Court explained, "requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* at 349-50. The plaintiff must, in other words, raise a "common contention," the "truth or falsity" of which will resolve "in one stroke" an

"issue that is central to the validity of each one of the [class members'] claims." *Id.* at 350.

Because they could point to no "express corporate policy against the advancement of women," *id.* at 344, the *Wal-Mart* plaintiffs needed to supply "significant proof that Wal-Mart operated under a *general* policy of discrimination," *id.* at 353 (emphasis added). The plaintiffs made three attempts at supplying such proof, each of which failed. First, they submitted the testimony of a sociologist who claimed that Wal-Mart had a "corporate culture" conducive to "gender bias." *Id.* at 354. "At his deposition," however, the sociologist "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking." *Id.* Because whether "0.5 percent or 95 percent" of Wal-Mart's pay and promotion decisions were the product of biased thinking was "the essential question on which [the plaintiffs'] theory of commonality depend[ed]," and because the sociologist had "no answer to that question," his testimony could be "safely disregard[ed]." *Id.* at 354-55.

Second, the plaintiffs presented regression studies that (they claimed) showed gender pay and promotion disparities. But these

studies found disparities only across entire regions. Disparities at the regional level did "not establish the existence of disparities at individual stores." *Id.* at 356-57. "A regional pay disparity," after all, could "be attributable to only a small set of Wal-Mart stores," and could not "by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depend[ed]." *Id.* Moreover, nothing in the studies suggested that any given disparity was the product of "a company-wide policy of discrimination" implemented by lower-level managers' "discretionary decisions." *Id.* "Merely proving that [a] discretionary system has produced a . . . sexual disparity *is not enough*," the Court said, because "almost all" of Wal-Mart's managers would surely "claim to have been applying some sex-neutral performance-based criteria—whose nature and effects will differ from store to store." *Id.* at 357. Because the plaintiffs had not identified a "specific employment practice"—a practice *other* than "delegated discretion"—that "tie[d] all their . . . claims together," their purported showing of "an overall sex-based disparity" did not suggest commonality. *Id.*

Finally, the plaintiffs offered "anecdotal reports of discrimination from about 120 of Wal-Mart's female employees." *Id.* at 346. But unless

they truly suggest the presence of discrimination *throughout* a company, a plaintiff's anecdotes cannot "demonstrate that the entire company operates under a general policy of discrimination." *Id.* at 358. The Court therefore rejected the 120 reports as "too weak to raise any inference that all the individual, discretionary personnel decisions [at Wal-Mart] [we]re discriminatory." *Id.*

B. The Lack Of Commonality In *Wal-Mart* Is Indistinguishable From The Lack of Commonality Here.

Like the plaintiffs in *Wal-Mart*, the plaintiffs here rely on three forms of evidence: the opinion of a soft-science expert (this time an organizational psychologist), statistical studies purporting to show pay and promotion disparities, and anecdotal complaints about bias and harassment.

Dr. Ann Marie Ryan opined that Microsoft's protocol for determining pay and promotions lacks "sufficient standardization." (ER 452.) But to want *more* "standardization" is to want *less* "discretion." Consider Dr. Ryan's assertion that Microsoft's "criteria" for assessing employees should be less open-ended and more "job-related." (Appellants' Opening Brief ("OB") 13.) That is simply an assertion that

Microsoft should stop letting managers decide *for themselves* what "criteria" justify a raise or a promotion. To use discretion as a basis for commonality, the plaintiffs must "identif[y] a common mode of exercising discretion that pervades the entire company." *Wal-Mart*, 564 U.S. at 356. Instead they put forth an expert who criticizes Microsoft's decision *not* to implement a "common mode" of exercising discretion. They portray that expert as identifying a "common mode" precisely when she criticizes the *variation* that discretion produces. (OB 33-34.) They defy *Wal-Mart*'s holding that relying on managerial discretion is a "presumptively reasonable way of doing business," one that "itself raise[s] no inference of discriminatory conduct." 564 U.S. at 355.

"The sort of statistical evidence" that the plaintiffs present "has the same problem as the statistical evidence in *Wal-Mart*: it begs the question." *Bolden v. Walsh Constr. Co.*, 688 F.3d 893, 896 (7th Cir. 2012) (Easterbrook, J.). The plaintiffs claim to have found pay and promotion disparities not in the decisions of individual managers or teams, but in aggregate data. The plaintiffs ignore (1) that *lower*-level managerial discretion definitively shapes Microsoft's pay and promotion decisions (OB 46), and (2) that, according to *Wal-Mart*, a plaintiff must

connect the existence of a statistical disparity to a specific employment policy (*id.* at 24-25).

When lower-level managers make the decisions, aggregating the data abstracts away what matters. If one of a company's ten managers, acting in defiance of company policy, discriminates based on sex when granting raises and promotions, he could single-handedly inject a statistical disparity into companywide pay and promotion statistics. The disparity would, in such a case, arise solely from the company's having one rotten apple. See *Bolden*, 688 F.3d at 896. Yet under the legal rule proposed by the plaintiffs, this would be no problem; a plaintiff would, in their view, need to show neither that the company encouraged the misuse of discretion nor that discretion was widely misused. Certification of companywide classes would be nearly automatic. That is not how commonality under *Wal-Mart* works. In asking that an aggregate statistical disparity—and, further, a disparity unconnected to a specific employment practice—be accepted as a basis for class certification, the plaintiffs seek not merely to upend *Wal-Mart*, but to ban, in practice, the use of lower-level managerial discretion.

The plaintiffs' anecdotal reports are just that: anecdotal. Some reports, to be sure, allege serious misconduct. If it is true, for example, that a manager said (OB 17 n.14) he did not want to "waste" a promotion on a woman "who might become pregnant," that is disgraceful. No one is proposing that Microsoft not face an individual Title VII lawsuit whenever such a lawsuit is warranted. But anecdotes suffer from the same problem as aggregate data. The plaintiffs' anecdotal evidence includes only 11 sworn declarations—one for every 800 or so class members. (ER 498 & n.22.) Assume the declarations are all true. Do they convey systematic misbehavior, or do they convey the misconduct of a handful of managers?

"Demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's," *Wal-Mart*, 564 U.S. at 355-56; yet the declarations—even when combined with the plaintiffs' various hearsay reports, comments, and complaints (see ER 499-501)—show at most that *some* managers abused their discretion. The anecdotal evidence "is too weak to raise any inference that *all* [Microsoft's] individual, discretionary personnel decisions are discriminatory." 564 U.S. at 358 (emphasis added). Episodic misuses of

discretion do not invalidate an entire discretion-based pay or promotion scheme. The plaintiffs' approach again amounts to an attack on discretion itself.

Wal-Mart is a square hole, and this case is a square peg.

II. DECENTRALIZED PAY AND PROMOTION SYSTEMS ARE PRESUMPTIVELY LEGITIMATE.

Just below the surface of the plaintiffs' bid to certify a class lies an attempt to portray discretionary pay-and-promotion schemes as questionable, even presumptively invalid. (See OB 30-31, 33-34.) As we have seen, the law is otherwise. *Wal-Mart*, 564 U.S. at 355.

But the plaintiffs' effort to tar discretion is not just contrary to law; it is also gravely misguided. There are powerful reasons for a company to decentralize its pay and promotion decisions, and, even if there were not, a court should not lightly second guess how a business structures itself. Letting lawyers manage business methods through class actions is a prescription for unintended consequences.

A. There Are Good Reasons To Decentralize Pay And Promotion Decisions.

The development of vertical corporate hierarchies helped drive the United States' explosive economic growth in the late-nineteenth and early-twentieth centuries. During this period, "manufacturing and

industrial production grew more complex and involved the management of more and more workers." Frank Ostroff, *The Horizontal Organization*, p. 4 (1999). To cope with these changes, corporations drew "solid lines of authority and command" and created "definite responsibilities for each phase of the company's business." *Id.* at 5. "So long as markets were steady, competition was primarily domestic, technology meant simple, special-purpose machines such as the typewriter, and labor was abundant and semi-skilled," these "vertical hierarch[ies] worked—and worked magnificently." *Id.* at 8.

But centralization has its flaws. To begin with, "important information" is lost "as knowledge travels up and down the multiple levels" of a hierarchy. *Id.* at 6. This loss is unavoidable. There exists "knowledge of the kind which by its nature cannot enter into statistics and therefore cannot be conveyed to any central authority in statistical form." F. A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 524 (1945). "By its nature," central planning "cannot take direct account of these circumstances of time and place." *Id.* Some decisions must therefore be "left to the 'man on the spot.'" *Id.*

And even when the flow of information is relatively smooth, centralized control encourages stasis. "When top managers become overloaded and immersed in operational decision making about day-to-day resource issues (such as hiring people and obtaining inputs)," they "have little time to spend on long-term strategic decision making, and planning crucial future organizational activities, such as deciding on the best strategy to compete globally." Gareth R. Jones, *Organizational Theory, Design, and Change*, p. 104 (7th ed. 2013). As "top management makes all important decisions," moreover, "managers lower down in the hierarchy become afraid to make new moves and lack the freedom to respond to problems as they arise in their own groups and departments." *Id.* at 105.

The speed at which the modern economy evolves raises these costs of centralization. "The long-favored vertical model is, by itself, no longer capable of meeting all the different needs of business." Ostroff, supra, at 6. "With inconstancy becoming the rule, a bureaucracy weighted down by supervisory layer upon supervisory layer" will be "incapable of reacting with the speed needed to meet the varied and unrelenting demands of global markets and customers." *Id.* at 8. Firms must become

ever better at using "equally divided knowledge," Hayek, supra, at 528, and this can be done only through ever greater decentralization. Dispersing authority "ensure[s] that knowledge of the particular circumstances of time and place will be promptly used." *Id.* at 524. It "promotes flexibility and responsiveness by allowing lower-level managers to make on-the-spot decisions." Jones, supra, at 105.

Because of the "extraordinary rate of innovation" in "computer software" and "communications technology," the "extraordinary amount of capital available worldwide for investment in new enterprises," and "the rapidity with which new networks that are primarily electronic can be put into service," the technology industry is especially fast-moving and competitive. Richard A. Posner, *Antitrust Law* p. 249 (2d ed. 2001). So technology companies, in particular, must strive to remain decentralized. Microsoft knows this as well as anyone. In late 2000 Microsoft's market capitalization was more than $500 billion, while Apple's was less than $5 billion. By mid-2012 Microsoft was at $250 billion, Apple at $540 billion. The problem, according to some experts, was, at least in part, that Microsoft had become "horribly weighed down by internal bureaucracy." James Titcomb, *Microsoft: From 'Dinosaur' to*

World's Most Valuable Company, NZ Herald, https://perma.cc/NTH8-SUDH (Nov. 30, 2018). (It has since recovered. See *id.*) To survive, a technology company must take risks and innovate—and companies that "want to encourage risk taking and innovation decentralize authority." Jones, supra, at 105.

Large companies, too, must be particularly vigilant against over-centralization and sclerosis. As they grow, "companies stereotypically add more rules, regulations, protocols, and procedures at increasingly finer levels of organization, resulting in the increased bureaucratic control that is typically needed to administer, manage, and oversee their execution." Geoffrey West, *Scale: The Universal Laws of Growth, Innovation, Sustainability, and the Pace of Life in Organisms, Cities, Economies, and Companies*, pp. 408-09 (2017). This increase in stratification and regulation tends to come "at the expense of innovation and R&D (research and development), which should be major components of a company's insurance policy for its long-term future and survivability." *Id.* at 409. In fact, "the relative amount allocated to R&D systematically *decreases* as company size increases, suggesting that support for innovation does not keep up with bureaucratic and

administrative expenses as companies expand." *Id.* If a large company is to avoid "becom[ing] less agile and more rigid and therefore less able to respond to significant change," *id.*, it must strive to stay nimble. And to stay nimble it must fight the natural tendency toward the accumulation of red tape—of review processes, mandatory "criteria," and so on.

Microsoft is a large technology company competing in a fast-moving global economy. It is a quintessential example of a company that must seek relentlessly to promote flexibility through decentralization. Forcing its managers to make pay and promotion assessments based on set "job-related criteria" is the opposite of what it should do. The "criteria" would be expensive and difficult to formulate; they would miss much knowledge held by the people "on the spot"; and they would invariably be almost immediately obsolete.

"The issue of how much to centralize or decentralize the authority to make decisions" is "a basic design challenge for all organizations." Jones, supra, at 103. Microsoft has no doubt thought deeply about how to determine raises and promotions. The best approach for Microsoft is

almost certainly the approach Microsoft in fact uses: entrust decisions to the judgment of lower-level managers.

B. Courts Should Hesitate To Second Guess How Businesses Structure Themselves.

Even if the value of decentralized discretion is put to one side, there is a broader point: *any* class action that amounts to a causation-free frontal assault on an entire business method should be viewed with extreme skepticism.

"It is useful for many purposes to think of market behavior as random." Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 5 (Aug. 1984). "Firms try dozens of practices. Most of them are flops, and the firms must try something else or disappear. Other practices offer something extra to consumers—they reduce costs or improve quality—and so they survive." *Id.*

"Why do particular practices work? The firms that selected the practices may or may not know what is special about them. They can describe *what* they do, but the *why* is more difficult." *Id.* Yet when a practice is attacked in a lawsuit, it is scrutinized by lawyers who know less about it than the firm, and then by a judge who likely knows even less about it than the lawyers. *Id.*

A plaintiff raising a classwide challenge to the validity of a business practice has a key asymmetry at his disposal. He can present witnesses who claim that the practice injured them. The defendant will want to respond not only with an argument about a lack of commonality, but also with a full-throated defense of the practice's value. But even if the defendant knows why the practice is beneficial—again, not a sure thing—the case for those benefits will usually stand, not on flesh-and-blood witnesses, but on an abstract discussion of innovation and consumer welfare. Such benefits are not even precisely measurable. *Id.* at 9. It is nearly impossible, after all, "to determine the difference in efficiency between a known practice and some hypothetical alternative." *Id.* But the plaintiff, in his motion to certify a class, will gladly invite the judge to "leap to the conclusion" that "whatever is poorly understood"—or hard to explain—must be bad. *Id.* at 9.

This leads to another asymmetry. The market will punish the use of an ineffective business practice. Such a practice is ultimately self-defeating. But if a judge errs in letting a class attack a beneficial practice, "the benefits may be lost for good." *Id.* at 2. "Any other firm that uses the condemned practice faces sanctions in the name of *stare*

decisis, no matter the benefits." *Id.* Companies will therefore avoid the practice, even if economists and other experts become increasingly convinced of its value. Judges will be "deprived of opportunities to reconsider, with the light of knowledge, what they decided in ignorance." *Id.* at 7.

In short, "the welfare implications" of barring a business method are usually "beyond [lawyers' and judges'] ken," *id.* at 11, yet several hidden features of litigation put us at risk of overlooking the fact. We should instead keep it squarely in view.

C. Treating Decentralized Pay And Promotion Systems As Suspicious Would Reduce Productivity, Innovation, and Competition.

The plaintiffs seek, in effect, to place Microsoft's decentralized pay and promotion system on trial. But certifying their putative class would not produce an *assessment* of that system. It would, rather, produce an automatic *condemnation* of it.

Sweeping class actions are notoriously costly and risky for defendants. If the putative class here were certified, Microsoft would be under intense pressure to pay a large sum to make even a very weak case go away. "Empirical studies . . . confirm what most class action

lawyers know to be true: almost all class actions settle." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1292 (2002).

If, in a case like this one, a court overlooks a lack of commonality, typicality, and adequacy; certifies a class; and leaves the defendant to its fate—paying whatever it takes to end the case, and changing whatever it takes to avoid another suit—many people lose. Consumers lose, because lawyer-imposed changes to a company's practices are sure to make the company more bureaucratic and less innovative. Shareholders lose, obviously, because the company's bottom line takes a hit. Even some employees with legitimate claims of sex discrimination lose, because they share the settlement with employees with groundless claims that go untested.

In the long run, ironically, the biggest losers in such a scenario will likely be startups. New companies can ill afford to pay administrators to craft and constantly update "job-related criteria." It probably hurts such firms even to think of employees as fitting in distinct boxes or striving to satisfy set "criteria." Regimented pay and promotion procedures might *slow* a major corporation; but they will

cripple its youngest competitors. If established firms are castles, ill-considered compliance costs are moats.

CONCLUSION

The order denying class certification should be affirmed.

April 8, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

(i) That this brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 4,651 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared using Microsoft Office Word 2010 and is set in 14-point Century Schoolbook font.

April 8, 2019

/s/ Corbin K. Barthold

CERTIFICATE OF SERVICE

I certify that on April 8, 2019, I filed the foregoing brief of Washington Legal Foundation via the CM/ECF system and served the foregoing via the CM/ECF system on all counsel who are registered CM/ECF users.

/s/ Corbin K. Barthold