No. 08-16258

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANTON BALLARD, ET AL.,
Plaintiffs/Appellees,

v.

WAL-MART STORES, INC.
Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
NOS. 06-2069, 06-5411 (SBA)
HONORABLE SAUNDRA BROWN ARMSTRONG

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING DEFENDANT-APPELLANT WAL-MART STORES, INC. AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amicus curiae* states as follows:

The Chamber of Commerce of the United States of America has no parent corporation and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

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STATEMENT OF INTEREST OF THE *AMICUS*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of over three million American businesses and organizations. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of vital concern to the Nation's business community.

Chamber members routinely are named as defendants in putative class action litigation, which is tremendously expensive for American businesses. For example, satisfying electronic discovery requirements alone can cost millions of dollars, and the potential size of an adverse damage award often means class actions are "bet-the-company" litigation. Therefore, this is an issue that transcends the immediate concerns of the parties to this litigation; indeed, it potentially affects the companies collectively responsible for a substantial portion of the total economic activity in the United States. All of those companies are employers, and many have been class action defendants.[1]

Plaintiffs bringing putative class action claims often rely on the testimony of one or more expert witnesses as the primary, if not sole,

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[1] The Chamber focuses on the impact of class certification requirements on all American businesses (as opposed to any single entity). Therefore, it has no financial interest in the underlying litigation and its perspective differs from that of the parties.

support for their certification request. Because of its extensive experience in these matters, the Chamber is well-situated to brief this Court on the intersection of federal evidentiary standards regarding the admissibility of expert testimony, including Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the class certification requirements of Federal Rule of Civil Procedure 23. To address these considerations and explain the significance of these issues for the Nation's business community, the Chamber has sought leave to file this brief.[2]

ARGUMENT

To support their request for class certification in the proceedings below, plaintiffs relied primarily upon the expert testimony of Martin Shapiro, Ph.D., and those opinions ultimately provided the sole evidentiary basis for the district court's finding that the proposed class met Rule 23(b)'s predominance requirement. [ER 18] In ordinary circumstances, before a finder of fact could consider – much less rely – on such testimony, it would have to be judged reliable under Rule 702, *Daubert*, and its progeny. Neither Rule 702 nor *Daubert* exempts class certification decisions under Rule 23 from its reach. To the contrary, the Supreme Court in *Daubert* stressed the importance of evaluating expert evidence "at the

[2] Although the Chamber also agrees with appellant Wal-Mart that the district court abused its discretion in certifying any class under Rule 23, those arguments are not addressed in this brief.

outset," finding that district courts are "gatekeepers" who must ensure that only reliable scientific evidence is admitted. 509 U.S. at 592. This "gatekeeping" role is consistent with, and indeed compliments, a district court's obligation to rigorously evaluate the evidence offered regarding certification to determine if Rule 23's criteria are met.

Nevertheless, the district court here refused to exercise the role assigned to it under Rule 702/*Daubert*, holding instead that "at the class certification stage, robust gatekeeping of expert evidence is not required." *In re Wal-Mart Stores, Inc. Wage and Hour Litig.*, No. C 06-2069 (N.D. Cal. Feb. 13, 2008) (internal quotations and citations omitted). [ER 10] In so holding, the district court abdicated its responsibility under Rule 702/*Daubert*, failed to undertake the rigorous analysis required under Rule 23, and acted contrary to recent circuit court opinions on this issue.

I. BECAUSE OF THEIR HIGH STAKES NATURE, CLASS ACTIONS PLACE ENORMOUS BURDENS ON AMERICAN BUSINESSES AND FEDERAL COURTS.

The impact of class actions on the financial well-being of American businesses cannot be underestimated. Class actions are increasingly common; between 2001 and 2007, the number of class actions commenced in federal courts increased by seventy-two percent. *See* Emery G. Lee, III and Thomas E. Willging, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil

Rules 1 (2008). In 2006, sixty-two percent of corporations with more than $1 billion in annual sales had class action lawsuits pending against them, with litigation costs representing more than seventy percent of U.S. business corporate legal spending. *See* Esther D'Amico, *Survey: Corporate Litigation Costs on the Rise Worldwide*, Chemical Week, Nov. 29, 2006.

The dramatic increase in class action lawsuits underscores the importance of district courts' exercising their gatekeeping function early in the litigation. As a practical matter, certification typically either "effectively ends the litigation for the plaintiff" or "force[s] a defendant to settle rather than incur the cost of defending a class action and run the risk of potentially ruinous liability." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005) (internal quotations and citations omitted); *Newton v. Merrill Lynch*, 259 F.3d 154, 162 (3d Cir. 2001) (certification may "create unwarranted pressure to settle nonmeritorious claims on the part of defendants"); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (class certification would turn $200,000 into a $200 million dispute, placing defendant in a "bet-your-company" situation that "may induce a substantial settlement even if [plaintiffs'] position is weak"); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) (class certification "bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it"); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir.

2002) (pressure to settle putative class actions "to curtail the risk of large awards" justifies interlocutory appellate review of certification decisions).

A recent survey by the Federal Judicial Center demonstrates the startling impact of class certification on American business: fully ninety percent of certified class actions settle before trial on the merits. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005) ("Class Action Pocket Guide"). Class certification thus raises substantial due process concerns for both parties. *Oscar*, 487 F.3d at 271.

The pressure to settle once a class is certified comes not only from the potentially ruinous risk of an aggregate damage award, but also from the sheer cost of defending even meritless class claims. Corporate defendants bear a disproportionate share of discovery costs, all of which are incurred well before the merits (or bases) of a claim have been determined. As one district court noted, "[i]n many cases, such as employment discrimination cases or civil rights cases, electronic discovery is not played on a level field. The plaintiff typically has relatively few electronically stored records, while the defendant often has an immense volume of it." *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 245 (D. Md. 2005) (resolving privilege waiver dispute in putative employment class action). Merely meeting the needs of electronic discovery has

become a multi-billion dollar per year industry. *See id.* at 239 (reporting survey estimate that 2007 electronic discovery costs would exceed $2.8 billion).[3]

The high cost of class litigation in the United States has often been noted in the literature – even by international commentators. Among the realities of class action litigation in the United States commented on by the International Chamber of Commerce is that "[f]ar reaching discovery rules such as those in the US in very early stages of a proceeding mean that practically anything 'relevant' to the parties' claims is discoverable; this poses unreasonable burdens on the defendants." International Chamber of Commerce, Class Action Litigation 2 (2005), *available at* http://www.iccwbo.org/uploadedFiles/ ICC/policy/clp/ Statements/ Class_action_litigation.pdf (last visited Sept. 9, 2008). The International Chamber of Commerce also acknowledged the breakdown of the district court's traditional gatekeeping role in weeding out meritless cases early: "[g]etting class action lawsuits dismissed at an early stage of the litigation before any expensive and time consuming discovery begins can be difficult. In effect this means that even if the defendants ultimately win the case – and even if the case is won without having to go to trial – the defendants will suffer significant costs." *Id.*

[3] The discovery cost imbalance between class action defendants and plaintiffs gives the mere threat of discovery its own *in terrorem* effect. Corporate defendants, who typically have large e-mail and other electronic document archives, face a Hobson's choice: settle meritless claims or fight for vindication, but at the risk of incurring immense discovery costs.

Similar considerations led the Supreme Court last term in *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955 (2007), to emphasize the importance of the district courts' enforcing pleading requirements to prevent plaintiffs from seeking expansive and expensive discovery from corporate defendants based merely upon a "sketchy" complaint and broad discovery requests. The Court acknowledged "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases" before reaching summary judgment or trial. *Id.* at 1967. Importantly, the Court did not find the district court's screening obligation mitigated by the fact that plaintiffs only sought discovery related to class certification and the existence of the alleged antitrust conspiracy. *Id.* Although the issue in *Twombly* involved the requirements of notice pleading rather than the admissibility of expert testimony, the Court's admonition is equally applicable in the present context. As a part of its gatekeeping function, the district court must ensure that the requirements of the federal rules are met before putting defendants to the burden of expensive (and typically asymmetrical) discovery. In the context of expert testimony, that necessarily includes a full review under Rule 702/*Daubert*.

Nor are the risks of prematurely – and erroneously – certifying a class action limited to the parties. Resolving a class action claim consumes enormous amounts of already strained judicial resources. For example, in *Marlo v. United Parcel*

Serv., __ F.R.D. __, No. CV 03-04336 DDP, 2008 WL 2485175 (C.D. Cal. May 19, 2008), the court decertified a class action after almost four years of litigation when it concluded the expert testimony plaintiffs intended to offer to support their claims did not pass review under *Daubert*. *Id.* at *9. Similarly, in *Hervey v. City of Little Rock*, 599 F. Supp. 1524 (E.D. Ark. 1984), *aff'd* 787 F.2d 1223 (8th Cir. 1986), decided years before *Daubert*, the district court decertified a class action that had been pending for three years because of "fatal flaws" in the expert testimony offered by plaintiffs. *Id.* at 1528.[4] Had a more critical and early look at the admissibility of the proffered expert testimony been taken, this unnecessary expenditure of resources might have been avoided. Wasting resources litigating a class action certified based on an expert opinion that will later fail under Rule 702/*Daubert* offers no benefits to courts or litigants.

II. IN LIGHT OF THOSE BURDENS AND TO SATISFY THE DEMAND OF RIGOROUS REVIEW OF RULE 23'S CRITERIA, WHERE CLASS CERTIFICATION HINGES ON THE RELIABILITY OF EXPERT TESTIMONY, IT MUST BE ANALYZED UNDER *DAUBERT*/RULE 702.

In the proceedings below, plaintiffs offered Dr. Shapiro's testimony as the primary evidence that the proposed class met the requirements of Rule 23. The use of expert testimony in that fashion is not uncommon. Indeed, expert testimony

[4] Notably, the expert in *Hervey* appears to be the same expert upon whom plaintiffs here rely.

plays a role in modern litigation unmatched by any other time in the Nation's history. *See, e.g.,* Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 Villanova L. Rev. 763 (2007) (tracing increasing use of experts over time); Douglas R. Richmond, *Regulating Expert Testimony*, 62 Mo. L. Rev. 485, 486 (1997) (discussing increasing number of expert witnesses used in modern litigation). The Chamber's members are commonly confronted by expert testimony as the primary – and often only – support for class certification.

Merely offering expert testimony in support of certification does not lighten plaintiffs' burden to show that class certification is appropriate. Rule 23's requirements are stringent – a class may not be certified unless, after "rigorous" evaluation, the court determines that it meets *each* of the Rule's requirements, including all four subparts of Rule 23(a) and either 23(b)(1), (b)(2) or (b)(3). *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *as amended* 273 F.3d 1266 (2001). This analysis necessarily includes determining the relevance and reliability of expert testimony when it is offered at the class certification stage. Rule 702 permits qualified experts to offer opinion testimony based on their "scientific, technical, or other specialized knowledge" if their knowledge will "assist the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. To be

admissible, the testimony must be based on "sufficient facts or data," and be the "product of reliable principles and methods" which are in turn applied appropriately to the facts of the case. *Id.*

As this Court emphasized:

> The trial court's "special obligation" to determine the relevance and reliability of an expert's testimony, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) is vital to ensure accurate and unbiased decision-making by the trier of fact. *Kumho Tire* described the "importance of *Daubert's* gatekeeping requirement ... to make certain that an expert ... employs in the courtroom the same intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* at 152. ***Or, more specifically, the trial judge must ensure that "junk science" plays no part in the decision.***

Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1063 (9th Cir. 2002) (emphasis added); *accord Rider v. Sandoz Pharms. Corp.*, 295 F.3d 1194, 1202 (11th Cir. 2002) (district court may not make "leaps of faith" to connect the elements of a causal chain in absence of reliable scientific evidence); *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) ("district court's gatekeeping role separates expert opinion evidence based on 'good grounds' from speculation that masquerades as scientific knowledge").

In the proceedings below, the district court declined to undertake a full *Daubert*/Rule 702 review, reasoning that such a review would require an impermissible foray into the merits of plaintiffs' claims. [ER 10-11] A district

court, however, cannot abandon its duty to conduct a rigorous analysis of whether Rule 23's criteria are met simply because expert or other "evidence which goes to the requirements of Rule 23 ... may also relate to the merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992). Instead, the district court must resolve any "factual and legal inquiries" necessary to determine if Rule 23's requirements are met. *Szabo*, 249 F.3d at 676; *see also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits"); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996) (same); *accord Tardiff v. Knox County*, 365 F.3d 1, 4-5 (1st Cir. 2004) ("court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another").

The Supreme Court and Congress did not limit the applicability of *Daubert* and Rule 702, respectively, only to certain stages of proceedings. Instead, the Supreme Court held in *Daubert* that Rule 702 applies to "any and all scientific testimony or evidence admitted." 509 U.S. at 589. *Daubert* is designed to keep unreliable scientific evidence out of federal courts, and certainly to prevent it from serving as a basis for courts' decisions. Trial judges must determine "at the outset" of considering any expert evidence "whether the reasoning or methodology underlying [it] is scientifically valid" and "whether that reasoning or methodology

properly can be applied to the facts in issue." *Id.* at 592-93. Exclusion of expert testimony is required under *Daubert* – whatever the stage of the proceedings – where the expert's assumptions are unsupported by the facts, *Guidroz-Brault v. Missouri Pac. R.R.*, 254 F.3d 825, 830-31 (9th Cir. 2001), or if "there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Domingo ex rel. Domingo v. T.K.*, 289 F.3d 600, 607 (9th Cir. 2002).

Nor is the requirement to properly analyze expert testimony under Rule 702/*Daubert* obviated because the parties offer conflicting expert testimony on Rule 23 (and possibly merits) issues. In *West*, for example, the district court declined to address questions about the reliability of the methodology used by plaintiffs' expert, and instead granted plaintiffs' motion for class certification simply because each side had offered testimony by a "reputable financial economist," which it believed could not be further evaluated at the class certification stage. 282 F.3d at 938. The Seventh Circuit reversed, finding that the district court's decision

> amount[ed] to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert. A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by

> holding evidentiary hearings and choosing between competing perspectives.

Id. (citing *Szabo*, 249 F.3d at 677-78; *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001)).

Conducting a *Daubert* review prior to class certification also is fully consistent with the Supreme Court's determination in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), that a party's likelihood of success on the merits is not a factor in class certification decisions. Rule 702 and *Daubert* address the admissibility (i.e., scientific reliability and relevance) of expert opinions, not which expert is more believable or whether an expert's testimony is convincing on the ultimate issues in the litigation. *Daubert*, 509 U.S. at 595. If, under Rule 702/*Daubert*, an expert's testimony is based on reliable methodology and the expert's conclusions are relevant, the testimony is admissible at the class certification stage, even if the trier of fact ultimately does not find it persuasive on the merits questions.[5] However, where the expert's methodology is not reliable or the opinions are unrelated to issues in dispute, the opinion must be excluded under Rule 702/*Daubert*. *See Gen. Elec. Co.*, 522 U.S. at 146 (court should reject expert

[5] To be sure, once the court determines that proffered expert opinions are admissible, it may have to choose between conflicting expert opinions when addressing whether Rule 23's requirements are met, even if merits issues are implicated. But that is a function of Rule 23, not Rule 702/*Daubert*. *Eisen* is not to the contrary.

testimony where "there is simply too great an analytical gap between the data and the opinion proffered").

For these reasons, other circuit courts have held that when considering class certification, district courts should evaluate expert testimony under Rule 702/*Daubert*. *See In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006) (expert testimony cannot establish satisfaction of a Rule 23 elements "simply by being not fatally flawed"); *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 314 n.13 (5th Cir. 2005) (party seeking certification is not required to offer expert testimony, but when it does, the district court must evaluate and find that testimony is "reliable"); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005) (where expert testimony offered, it must meet reliability and admissibility criteria before it can support class certification); *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (court must resolve disputes regarding expert testimony where necessary to evaluate if requirements of Rule 23 are met).[6]

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[6] This Court has not yet decided the question of the scope of *Daubert* review required at the class certification stage. In *Dukes v. Wal-Mart, Inc.*, a three member panel of this Court recognized that Rule 702/*Daubert* require that expert evidence be reliable and relevant, but upheld the district court's decision not to conduct a Rule 702/*Daubert* review because, in the panel's view, Wal-Mart had not challenged the opinion on either basis. 509 F.3d 1168, 1179 (9th Cir. 2007), *pet. for reh'g pending.*

III. THIS CASE ILLUSTRATES WHY A FULL RULE 702/*DAUBERT* REVIEW IS WARRANTED AT THE CLASS CERTIFICATION STAGE.

In this case, Dr. Shapiro's testimony was the sole evidence relied upon by the district court in finding that Rule 23(b)'s predominance requirement was met. [ER 18] However, as demonstrated in Wal-Mart's challenge to his opinions, Dr. Shapiro's methodology is inherently unreliable because he failed to consider all relevant data. *See Guidroz-Brault*, 254 F.3d at 830-31 (striking expert opinion based on assumptions unsupported by facts or other evidence in record); *Ruiz-Troche v. Pepsi Cola of Puerto Rico*, 161 F.3d 77, 81 (1st Cir. 1998) (under *Daubert*, data considered must provide adequate support for opinions offered). For example, Dr. Shapiro claimed that by reviewing selected databases, he could determine which former Wal-Mart employees were owed compensation and how much each should receive. Shapiro Decl. ¶ 10. [ER 534] However, as Wal-Mart noted and the district court found, the databases provide only part of the information necessary to determine whether Wal-Mart's statutory obligations regarding compensation pay-outs to former employees were triggered. [ER 11] Dr. Shapiro also did not review or consider relevant personnel files, which contain plaintiff-specific payment information. Shapiro Dep. 53:11-19. [ER 316]

In addition to failing to review relevant and essential information, Dr. Shapiro testified that "[t]he data do not require validation" because "the data in the

data fields are what they purport to be." Shapiro Dep. 52:3; 52:16-17. [ER 315] He saw no need to learn the factual circumstances behind the named plaintiffs' claims or to speak with a putative class representative or class member, despite admitting that those sources could have provided a comparison point allowing him to determine the reliability of his data. Shapiro Dep. 43:8-45:9, 45:20-46:4. [ER 307-10] Instead, he relied on what he termed "retroactive validation," which he explained as using an earlier version of the databases at issue to analyze different data supplied to him in connection with a different case with different plaintiffs and different claims "to arrive at some early estimates of damages" in this case. Shapiro Dep. 46:5-48:12, 50:13-51:1. [ER 310-12, 313-14]

Ultimately, Dr. Shapiro reviewed only limited amounts of available information, and undertook no independent analysis of even that data's reliability or adequacy. Based upon these and other irregularities, the district court expressed its own "concerns about Dr. Shapiro's competence (or at least his attention to detail)." [ER 21] Nevertheless, the district court reasoned that it could consider Dr. Shapiro's testimony because it was "useful" in determining whether Rule 23's requirements were met. [ER 10] However, scientific evidence that is unreliable under *Daubert* is inadmissible in federal courts, 509 U.S. at 591-92, and unreliable and inadmissible evidence cannot be "useful" in any judicial decision.

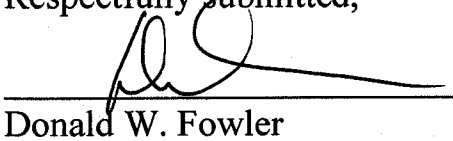
Whatever the ultimate outcome of a full Rule 702/*Daubert* review would have been, the district court's recognition of significant faults in Dr. Shapiro's analysis and its expression of concern about the reliability of the opinions he offered were red flags highlighting the need to conduct such a review of his testimony. *See Hollander v. Sandoz Pharms. Corp.*, 289 F.3d 1193, 1213 (10th Cir. 2002) (where expert makes "speculative leaps" in deriving opinions, those opinions must be excluded under *Daubert*). The district court's refusal to do so warrants reversal.

CONCLUSION

For the reasons stated, this Court should grant Defendant-Appellant's petition for reversal of the district court's decision.

Dated: September 11, 2008

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dated: September 11, 2008

Donald W. Fowler

PROOF OF SERVICE

I, Donald W. Fowler, declare as follows:

I am a member of the bar of this Court, and on September 11, 2008, I served the attached:

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING DEFENDANT-APPELLANT WAL-MART STORES, INC. AND URGING REVERSAL

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown:

X **BY OVERNIGHT DELIVERY**: I placed a true copy in a sealed Federal Express envelope addressed as indicated above, on the date shown.

I also transmitted via Federal Express the original and 15 copies of the above document to the Clerk, United States Court of Appeals, 95 Seventh Street, San Francisco, California 94103-1526.

X **BY ELECTRONIC MAIL (E-MAIL)**: I caused a true PDF copy of the above-mentioned document to be also transmitted by e-mail to the specifically indicated parties identified below at their respective e-mail addresses.

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I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document was printed on white, 8½ x 11 inch paper, and that this Proof of Service was executed by me on September 11, 2008.

Donald W. Fowler