No. 14-1146

In the Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

KATHRYN D. KIRMAYER
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW
Washington, DC 20024
(202) 639-2505

J. SCOTT BALLENGER
Counsel of Record
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
scott.ballenger@lw.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads ("AAR") is an incorporated, non-profit trade association representing the nation's major freight railroads. AAR members operate approximately 72% of the rail industry's line-haul mileage, produce 95% of its freight revenues, and employ 92% of rail workers. In matters of significant interest to its members, AAR frequently appears before Congress, the courts and administrative agencies on behalf of the railroad industry, including by participating as amicus curiae in cases that raise issues of vital concern to its membership and the judicial system. Like most substantial business enterprises in the United States, AAR's members have been targets of class action litigation and have an interest in ensuring that Federal Rule of Civil Procedure 23 is properly implemented and that the rights of defendants in class actions are preserved. Several of AAR's members are currently defendants in the multi-district litigation consolidated as *In re: Rail Freight Fuel Surcharge Antitrust Litigation* – MDL 1869, No. 1:07-mc-00489-PLF-GMH, in the United States District Court for the District of Columbia, a case that the parties to this litigation have discussed in their briefing to this Court.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than amicus and its members, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondents have filed letters with the Court consenting to the filing of any amicus briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court recently explained, Rule 23(b)(3) was "an 'adventuresome innovation' of the 1966 amendments" to the Federal Rules of Civil Procedure, "framed for situations 'in which "class-action treatment is not as clearly called for",'" and in which a class action would not have been permitted under the traditional equity jurisprudence that Rule 23 rests on. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) (citations omitted). The Rule permits certification when "the questions of law or fact common to class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). That provision has proven to be very useful for simplifying litigation in situations where a large number of plaintiffs have suffered "'the same injury'" from the same misconduct. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). But the Rule's appeal in small consumer and investor cases has created an understandable temptation, for creative plaintiffs' counsel and overburdened courts, to bend its requirements and the underlying substantive law to facilitate the resolution of more and more disputes through mass adjudication, at the expense of defendants' rights.

This Court's landmark decision in *Wal-Mart* recognized that trend, and called it to an emphatic halt. The *Wal-Mart* plaintiffs alleged that the company had a "culture of discrimination" against women that resulted in widespread violations of Title VII which could be analyzed statistically and remedied by

injunction. They also proposed to adjudicate individual backpay claims by trying a representative sample of cases, and then extrapolating the outcomes to generate an aggregate recovery for the entire class. It is not difficult to understand why the plaintiffs, and the Ninth Circuit, were attracted to that approach. Wal-Mart is one of the largest employers in the world, and plaintiffs marshaled a plausible case that it was systematically treating its female employees unfairly, for reasons of culture and general corporate policy that could be proven by common evidence. But this Court nonetheless rejected the class certification. Quoting Professor Nagareda's dissection of the Rule 23 case law, this Court recognized that the certification decision in *Wal-Mart* rested on an implicit, but unacknowledged, modification of the substantive requirements of Title VII. *See* 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (hereinafter "Nagareda")). Certainly all female Wal-Mart employees had some "common" experiences, including working for the same company which (allegedly) had a "culture" of discrimination that disadvantaged large numbers of female employees. But working for a company with an allegedly bad "culture" is not itself a violation of Title VII. The real question posed by the substantive law—"*why was I disfavored*," *id.* at 2552 (emphasis added)—was inherently individual and therefore could not be resolved by any class-wide proof, *id.* at 2561. And, critically, Wal-Mart could not be deprived of its right to contest, case by case, whether any particular employment decision was made for discriminatory reasons. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any

substantive right,' a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561 (citation omitted) (quoting 28 U.S.C. § 2072(b)).

This Court's reasoning in *Wal-Mart*, and in the related subsequent case *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), have important implications for several of the most important, long-simmering conflicts in class action law. This case presents an opportunity to correct four closely related misconceptions.

First, many courts have certified classes in circumstances where the plaintiffs' proposed class-wide proof, if believed, would establish injury to *some* class members, but not all. If common proof can establish a widespread legal injury within the class, but cannot identify who has a valid cause of action and who does not, then class certification grants a right to relief to persons who do not have one under the substantive law, or invents a wholly new form of legal rights vested in the class as an entity rather than in individuals. That was the core error this Court identified in *Wal-Mart*, and the Eighth Circuit's decision in this case repeats it. Whether particular employees were paid less than the Fair Labor Standards Act ("FLSA") requires is an individual question that cannot be answered merely by proof that some unidentifiable subset of class members were underpaid, or that the employer's policies would have produced systematic, but not universal, underpayments across the class as a whole. Individual claims cannot be adjudicated on the basis of common evidence unless that evidence genuinely can resolve the issue for *all* class members.

Second, class plaintiffs have been permitted to offer methods of proof that employ averages,

regression analysis, "Trial By Formula" extrapolations from some subset of class members, or other means to smooth out differences that would have been important in individual trials. In *Wal-Mart* this Court explained that an issue is "common" to the class only if the class members in fact suffered "the same injury" and are similarly situated, such that resolution of the issue for one class member will resolve that issue for all "in one stroke." 131 S. Ct. at 2550-51 (citation omitted). It is *always* possible to manufacture commonality by averaging out differences. But Rule 23 does not permit that sort of sleight of hand, and it is not consistent with the Rules Enabling Act, 28 U.S.C. §§ 2071-77, or due process of law.

Third, many courts have focused only on whether the plaintiffs have a theory of common proof that, if believed, would support a prima facie case for all (or perhaps most) class members. But the predominance inquiry under Rule 23(b)(3) also requires serious consideration of the case that *defendants* would be entitled to present if the cases were tried individually. The fact that plaintiffs might plausibly establish a prima facie case with common evidence does not mean that defendants may be forced to defend only by attacking that evidence, and offering competing common proof. When, as here, there are important differences between class members that could contradict the class-wide story that plaintiffs would prefer to tell, the key issues in the case *are not* common in the "one stroke" sense that *Wal-Mart* explained. And if the evidence that defendants would be entitled to present in individualized trials would render a class action unmanageable, the class cannot be certified.

Finally, many courts have held that if liability can be resolved on a class-wide basis, individualized issues going only to the amount of damages should not prevent certification. This Court's decision in *Behrend* squarely rejected that view, holding that a class cannot be certified unless plaintiffs come forward with a methodology for calculating the damages of individual class members that is reliable, measures only the impact of the legal wrong proven, and will not overwhelm the proceedings with burdensome individualized inquiries. And (as with liability) the certification inquiry cannot focus solely on the proof that *plaintiffs* would prefer to present. If defendants come forward with genuinely disputed, triable issues of fact on damages that cannot be resolved without individualized litigation that would render class-wide adjudication unmanageable, the class should not be certified.

ARGUMENT

I. A CLASS MAY NOT BE CERTIFIED UNLESS COMMON PROOF WILL RESOLVE THE CRITICAL LIABILITY ISSUES FOR *ALL* CLASS MEMBERS

As the certiorari briefing explained, there is a longstanding and important conflict in the lower courts about whether a class may be certified when it appears to contain "uninjured" class members. Properly understood, this conflict is another manifestation of issues that this Court has already resolved, decisively, in *Wal-Mart*. A class cannot be certified on the premise that differences among class members that would be important in individual cases will be ignored to facilitate class treatment—particularly when those

differences are so significant that they suggest that some class members have no viable claim or redressable injury at all.

We should begin by recognizing that the problem is not the presence of "uninjured class members" *per se*, but rather relevant *dissimilarities* within the class that could mean that some class members have a valid claim and others do not. Everyone agrees that class certification often will be appropriate even where there is a substantial likelihood that *every* member of the class will turn out to be uninjured. That is true in many properly certified classes because the plaintiffs' common proof fails on the merits. The problem the courts are wrestling with also is not confined to difficulties with proof of "injury," but extends to any reason that might cause the claims of some class members to fail while the claims of others succeed. The debate, in other words, is about whether the "proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196-97 (2013) (*quoting Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). The battle is often fought over the issue of individual injury because it is often clear at the certification stage that plaintiffs' *other* liability allegations will stand or fall for everyone on the basis of common evidence. In mass tort cases, for example, whether the defendant was negligent or sold an unreasonably dangerous product are often common questions—but certification usually is inappropriate because injury, cause, proximate cause, and damages raise individualized issues. *See, e.g.*, *Amchem*, 521 U.S. at 624-25.

This problem also arises in securities fraud cases, for example, when a class is defined in a way that includes "in and out" traders or traders who were both long and short, and therefore may have escaped injury or even benefited from the challenged misconduct. *Compare Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677-78 (7th Cir. 2009) (suggesting that such issues can be sorted out at trial), *cert. denied*, 559 U.S. 962 (2010), *with In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. 1341, 1367 (N.D. Cal. 1994) (requiring evidentiary hearing about seller/purchaser conflicts prior to certification). And it comes up in antitrust cases, when it appears that class members would have had opportunities to mitigate or avoid the impact of an alleged violation depending on their individual circumstances. *Compare, e.g.*, *Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 522 F.3d 6, 29 (1st Cir. 2008) (vacating class certification when individual negotiations affected the final price paid), *with Dow Chem. Co. v. Seegott Holdings, Inc. (In re Urethane Antitrust Litig.)*, 768 F.3d 1245, 1254 (10th Cir. 2014) (affirming certification even though "[i]t is true that some of the plaintiffs may have successfully avoided damages"), *petition for cert. filed*, No. 14-1091 (U.S. Mar. 9, 2015).

Some courts, like the D.C. Circuit, rightfully insist that class certification is inappropriate unless the class members "can prove, through common evidence, that all class members were in fact injured by the alleged [misconduct]." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013).[2] But a number of courts—most notably the

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[2] *See also, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (injury must be shown for "every class

Seventh Circuit—have turned that principle on its head and embraced the view that "a class will often include persons who have not been injured by the defendant's conduct" and that certification should be denied only if "it is apparent that [the class] contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen*, 571 F.3d at 677; *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (same).

There are at least two distinct problems embedded here. First, a plaintiff who concedes he is uninjured or does not have even a plausible claim of injury ordinarily cannot state a claim and lacks Article III standing. Plaintiffs appear to admit in this case, for example, that even under their own theory of proof-by-averaging at least 212 members of the class were not underpaid and have no FLSA claim. So plaintiffs are litigating on behalf of a class that *they concede* contains a very substantial group of persons who do not have even a plausible claim for relief. This is an action *for individual damages*, and unless something extraordinary and unexpected is contemplated for the next phase of the litigation, it appears that the jury's aggregate damages award will be distributed among class members in some manner that does not attempt to distinguish between the injured and the uninjured—or, at least, does not draw that distinction in any way that is rigorous, judicially supervised, and consistent with the due process and Seventh Amendment rights of Tyson Foods. Article III does not permit a federal

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member"); *Blades v. Monsanto Co.*, 400 F.3d 562, 571-74 (8th Cir. 2005) (denying certification where "not every member of the proposed classes can prove with common evidence that they suffered impact from the alleged conspiracy").

court to award damages to a plaintiff that has not suffered an injury in fact, fairly traceable to the defendant's violation of law. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 357-60 & n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established," and "[t]his is no less true with respect to class actions than with respect to other suits."). In addition to that obvious Article III problem, it is hard to imagine a process that improperly modifies substantive rights, in violation of the Rules Enabling Act, more blatantly than one that effectively gives a cause of action and a monetary recovery to putative plaintiffs who lack a cause of action or standing even under their own theory of proof.

Second, the presence of apparently uninjured class members is a blazing red flag that everyone in the class has not "suffered the same injury," *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted), that the key issues cannot be resolved "in one stroke" for all class members, *id.*, and that the proposed class is not "sufficiently cohesive to warrant adjudication by representation," *Amchem*, 521 U.S. at 623. Something has to explain why within the group that the class plaintiffs contend is homogeneous and commonly impacted, some putative class members would have escaped injury even if the alleged misconduct occurred. If the answer is the stuff of individual trials, *e.g.*, there were ways for putative class members to avoid the impact of the allegedly unlawful practices, one cannot reasonably conclude that individual trials are unnecessary or must give way to the "greater good."

At bottom, the case law about uninjured class members is wrestling with whether (and to what

degree) the perceived jurisprudential or public policy advantages of the class action device can justify ignoring differences between class members to facilitate aggregate resolution of disputes. Many class certification decisions therefore appear to be "driven primarily by vague policy considerations" rather than "actual comparisons of the relative weights of the common questions and the individual questions." *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp. at 1352; *Amchem*, 521 U.S. at 622-23 ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry." (citation omitted))

But as this Court has reiterated many times, the Rules Enabling Act leaves no room for that sort of balancing. It forbids any interpretation of Rule 23 that would "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b).[3] Whether proof requirements for individual injury or causation should be relaxed or presumed away, in the interests of facilitating more efficient or widespread compensation and deterrence, is an important issue to be resolved *by the substantive law*. These are precisely the sorts of concerns that, for example, support a presumption of reliance in federal securities law, *see Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988), and that led courts to recognize new theories of liability based on market shares, *e.g.*, *Sindell v. Abbott Labs.*, 607 P.2d 924, 937-

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[3] This Court has been forced to reiterate that point over and over, in Rule 23 cases specifically. *See, e.g., Wal-Mart*, 131 S. Ct. at 2561; *Amchem*, 521 U.S. at 615; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309-10 (2013).

38 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980), and for "medical monitoring" based on exposures to harmful substances when no actual injury has yet manifested, *e.g.*, *Ayers v. Township of Jackson*, 525 A.2d 287, 314 (N.J. 1987). Thoughtful observers have pointed out that debates about class certification often are "stalking horse[s]" for similar arguments that the underlying substantive law should be modified in some way that will facilitate class-wide resolution. Nagareda, *supra*, at 130; *see also Mclaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008) ("Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof."). But federal courts are not permitted to reform the substantive law through the Federal Rules of Civil Procedure. A class certification decision that functionally grants a cause of action to persons who do not have one violates the Rules Enabling Act, conceals important changes in the law from legislative debate and oversight, and, when state law creates the cause of action, profoundly exceeds the power of the federal courts. *See, e.g.*, Allen Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1021 (2005) ("[S]uch innovations should be debated and discussed through legitimate democratic channels, and should not be achieved covertly, as they often are now, as an ad hoc incident to judicial attempts to squeeze a square peg of dissimilar claims through the round hole of class certification criteria."); Nagareda, *supra*, at 133-64.

If the substantive cause of action requires proof of individual injury, and common proof will be able to establish that *many* were injured but cannot show injury to all or sort the wheat from the chaff, then by

definition there are "[d]issimilarities within the proposed class" that "impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2551 (quoting Nagareda, *supra*, at 132). The key issues in the case *will not* stand or fall, for all class members, "in one stroke." *Id.* This Court held emphatically in *Wal-Mart* that defendants are entitled to litigate those potentially dispositive dissimilarities class member by class member, and that no class may be certified on the premise that defendants will be prevented from doing so. *Id.* at 2561.

Of course there will be cases in which the variation in class members' circumstances lends itself, beyond reasonable dispute, to some easy or formulaic resolution. In some securities cases, for example, it may be possible to identify the uninjured traders (such as net short sellers) through a mechanical analysis of transaction records, with no need or justification for time-consuming individualized evidence.[4] But that possibility must be approached with caution.

The First Circuit recently held that a class may be provisionally certified despite the appearance that a small number of class members may have escaped injury, if the court is "satisfied that, prior to judgment,

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[4] Alternatively, it may be possible to define the class to limit it to those who only bought (and did not sell) the security during the time period in question. But the class must be defined based on clear and objective criteria. Class definitions that attempt to solve these problems with vague qualifiers such as "and who suffered injury thereby" create an impermissible and unascertainable "fail-safe" class. Potential class members cannot readily determine whether they are in the class or not, in order to exercise their opt-out rights. And anyone later determined not to have suffered injury would retroactively drop out of the class definition and would not be bound by the judgment.

it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members" in a way that is "administratively feasible" and "protective of defendants' Seventh Amendment and due process rights." *Astrazeneca AB v. United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 19-20 (1st Cir. 2015). That sounds good in theory. But on closer scrutiny it becomes apparent that the First Circuit had no real theory of how it could be done in *Nexium*, and seems to have shifted the burden to defendants to *dis*prove the possibility. *See id.* at 20-21. The individualized problem in *Nexium*—that some class members undoubtedly would have continued buying the brand-name product rather than the generic out of brand loyalty—is clearly a question of the individual's experience with other generics, their attitudes toward the branded drug, the incentives under their health insurance plan, and the practices of their physician in writing prescriptions and their pharmacist in filling them. That complexity cannot be resolved by any formula. The court of appeals speculated that the millions of class members might satisfy their prima facie burdens with affidavits that "if unrebutted, would be sufficient to establish injury." *Id.* at 20. But if the defendants have a right to "rebut" such affidavits class member by class member, how could the case remain manageable as a class action? The First Circuit also speculated frankly that the problem *might* be solved by modifying the substantive law with a presumption that consumers will always buy a generic when it is available. *Id.* But the court's recognition of the need for such a presumption simply underlines that class certification could never be appropriate without it. In

practice, therefore, the First Circuit's superficially reasonable standard quickly turned into an abdication of the court's responsibility to determine *prior to certification* that the elements of Rule 23 are met and the case can fairly be tried as a class action.

This Court has recognized repeatedly that the certification of a class creates an overwhelming hydraulic pressure on the defendant to settle, even if the claims are fairly weak in substance. *See, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011). That dynamic no doubt explains why so many of these critical and obvious questions about Rule 23(b)(3) remain unsettled, a half-century after the 1966 amendments. A class cannot be certified on the premise that the court will figure out *later* whether the case can be tried as a class action, consistent with the defendant's rights. *See, e.g.*, Erbsen, *supra*, at 1047-48.

II. COMMON ISSUES MAY NOT BE MANUFACTURED BY AVERAGING DIFFERENCES ACROSS THE CLASS

Dissimilarities within a putative class also cannot be wished away by averaging out important differences between class members.

The employee plaintiffs in this case spent widely varying amounts of time donning and doffing protective gear, and were paid for that time in different degrees and in different ways. The courts below purported to solve that problem by allowing plaintiffs to determine an "average" donning and doffing time by observing a small subset of employees, and then to win a judgment on the theory that the jury could assume that every class member's experience

was identical to the sampled "average." This is precisely the "Trial by Formula" that this Court disapproved in *Wal-Mart*. 131 S. Ct. at 2560-61. The court below manufactured commonality on the key issues in the case where none existed, and made it impossible for Tyson to hold individual class members to their burden of proving an individual entitlement to relief under the law. *See, e.g.*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343-44 (4th Cir. 1998) (reversing certification and class-wide judgment that had relied on an expert's "abstract analysis of 'averages'"); *Gates v. Rohm & Haas, Co.*, 655 F.3d 255, 266-67 (3d Cir. 2011) (denying certification of tort claims when plaintiffs proposed to prove average exposure to carcinogen).

Contrary to the Eighth Circuit's suggestion, this certainly *would not* be an acceptable way for an individual FLSA plaintiff to prove his claim. If an individual employee brought an action for uncompensated overtime and proffered only evidence that a sample of *other* employees worked uncompensated overtime, that evidence certainly would not suffice to prove his claim. And the defendant would be entitled to attack the relevance of that aggregate proof, by (*inter alia*) cross-examining the individual plaintiff and rebutting his testimony with individualized defensive evidence. In the context of an individual trial, the defendant's argument that the trier of fact should disregard evidence about workers other than the plaintiff would be powerful. By certifying a class and giving explicit judicial blessing to the project of class-wide *aggregate* proof here, the district court inherently deprived Tyson of what would, in individual

cases, have been the most effective defense to this sort of proof.

This Court *did not* endorse this sort of proof-by-averaging in *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946). This Court did say that if the employer has not kept proper and accurate records, the employee can satisfy his burden "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687-88. The Eighth Circuit latched onto the phrase "just and reasonable inference," but this Court was crystal clear that it applied *only* to proof of the amount of damages, not to liability. "[H]ere we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. *The uncertainty lies only in the amount of damages arising from the statutory violation by the employer.*" *Id.* at 688 (emphasis added). That is a straightforward application of the ancient rule that a plaintiff must carry his burden of proving liability with non-speculative evidence, but is allowed greater leeway for inference on damages after wrongdoing has been established. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

Of course sampling and statistical modeling have their place, and can be powerful and appropriate tools in the class action context just as in individual litigation. But this case illustrates two common pitfalls that the courts must take great care to avoid.

First, the court must be confident that the experiences of individual class members truly are

cohesive, such that the key issues logically stand or fall "in one stroke" for all class members. Because it is *always* possible to manufacture commonality by using mathematical tools that average out (or completely ignore) important differences between class members, the fact that an expert can construct a statistical model or sampling methodology does not itself demonstrate that the requirements of Rule 23 are satisfied. As the ABA guidelines for antitrust cases explain,"it is always possible to perform a regression with the price as the dependent variable and with a variety of independent variables." ABA Section of Antitrust Law, *Econometrics: Legal, Practical, and Technical Issues* 221 (2005). "[T]his does not mean, however, that impact can be shown with common proof, or that damages can be calculated in a formulaic manner." *Id.* To the contrary, the use of a regression or statistical model "*presupposes*—at least as a matter of economic or statistical methodology—the aggregate unit whose legitimacy the court is to determine." Nagareda, *supra*, at 103 (emphasis added). Basing the certification decision on that proposed proof therefore "exhibits a troubling circularity. The legitimacy of aggregation as a procedural matter would stem from the shaping of proof that presupposes the very aggregate unit whose propriety the court is to assess." *Id.* at 126. So it is absolutely critical for the court to scrutinize, rigorously and independently, whether that proposed aggregate unit is in fact cohesive enough that the contemplated modeling, sampling, or averaging can resolve the dispute without modifying anyone's substantive legal rights.

Competing class-wide proof is capable of fairly and fully resolving issues that are genuinely "common"

in the sense explained in *Wal-Mart*. Sometimes that commonality will be supplied by the underlying substantive law, such as when the fraud-on-the-market doctrine dictates a classwide presumption of reliance in securities cases. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013); Nagareda, *supra*, at 116-17. Or it may be clear from the facts, such as in the prototypical antitrust case where every purchaser bought the same fungible product at the same uniform, market-wide price, and the factors bearing on injury and damages are simple and mechanical. But the crucial point, for present purposes, is that Plaintiffs' ability to construct a "plausible" or "workable" sampling methodology or regression analysis *does not* establish that the underlying issues are common in the legally relevant sense.

Second, the proposed model or sampling methodology must reliably capture the full panoply of facts that bear on the issues it addresses and that could be decisive if the class members' claims were tried individually. As Professor Nagareda notes, "the real concern about aggregate proof in class certification lies in its threat 'to conform the law to the proof.'" Nagareda, *supra*, at 104 (quoting *McLaughlin*, 522 F.3d at 220)). That was this Court's concern in *Behrend*, 133 S. Ct. at 1435 n.6, where the damages model failed to account for the geographic effects of "overbuilding," and in *Wal-Mart*, where the disparate-impact study fell short of addressing all relevant Title VII considerations. *Wal-Mart*, 131 S. Ct. at 2555 (rejecting Title VII regression model that did not obviate defendants' rebuttal that its employment decisions were gender-neutral and performance based).

It was also the basis for this Court's separate rejection of the proposed "Trial by Formula" in *Wal-Mart*, where the formulas left out so much important detail that basing decisions on them would have prejudiced the defendant's right to assert individualized defenses. 131 S. Ct. at 2561. That will often be the case when a model obscures important differences among class members, such as through the excessive use of averages, *see, e.g.*, *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003), or when the model fails to consider important factors bearing on liability or damages, *see, e.g.*, *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 972 (C.D. Cal. 2012). A court may limit the dispute to a battle of aggregate proofs only upon a finding that the model so reliably and comprehensively captures the underlying facts relevant to each class member's claim that individualized rebuttal evidence can be excluded as irrelevant or repetitive under the Rules of Evidence.

III. A CLASS MAY NOT BE CERTIFIED MERELY ON THE BASIS THAT THE PLAINTIFFS PROPOSE TO LIMIT *THEMSELVES* TO COMMON EVIDENCE

This case also illustrates a third issue that has plagued class action jurisprudence for many years. Many cases (even otherwise rigorous ones) will say that the issue for class certification is whether *plaintiffs* can offer a theory of how to satisfy their burden by common proof—and stop there. *See, e.g.*, *Blades*, 400 F.3d at 566 ("If the same evidence will suffice for each [class] member to make a prima facie showing, then it becomes a common question."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) (stating that class certification

requires a "rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial"). But as this Court emphasized in *Wal-Mart*, the defendants' rights and the defendants' evidence must be considered as well.

In assessing predominance, the "critical need is to determine how the case will be tried." Fed. R. Civ. P. 23 advisory committee's note to 2003 amendments; *see also Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir.) (Rule 23(b)(3) requires the court to "consider how a trial on the merits would be conducted if a class were certified."), *cert. denied*, 540 U.S. 819 (2003); *Hydrogen Peroxide*, 552 F.3d at 311 ("[A] district court must formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." (citations omitted)). Forecasting how the issues will play out at trial requires serious consideration of the evidence that Defendants are entitled to present. If the issues are genuinely common to the class, the trial court will be able to exclude individualized defensive evidence as either irrelevant or repetitive and unnecessary. But when class members are differently situated and individualized evidence is relevant and *not* repetitive, defendants cannot be prevented from presenting that evidence merely because it is inconvenient for class-wide adjudication. *Wal-Mart*, 131 S. Ct. at 2561. *Wal-Mart* eliminates any

misconceptions on that point, although the better reasoned cases have always recognized it.[5]

For that reason, the Eighth Circuit's class certification reasoning in this case would have to be rejected even if it were correct that *Mt. Clemens* permits an FLSA plaintiff to establish a prima facie case entirely with statistics or averages. In an individual case, the defendant would be entitled to respond to such a showing with evidence unique to that employee. The fact that a case can be tried as a class action up through the end of the plaintiffs' case in chief does not establish that the key issues are in fact common or capable of *resolution* through evidence common to the class. It may simply mean that named plaintiffs have strategically chosen to limit their own proofs in order to facilitate class treatment. And as this Court and many have noted, that choice may *harm* absent class members who could have put on a stronger case, subordinating their actual litigation interests to the economic interests of class counsel in receiving the largest fee award for the least effort. *See, e.g.*, *Amchem*, 521 U.S. at 620-21 (noting that genuinely cohesive interests are necessary to ensure "sufficient

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[5] *See, e.g.*, *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413, 1414 n.9 (D.C. Cir. 1984) (holding that certification was properly denied because defendants were entitled to rebut the plaintiffs' proposed common proof with individualized evidence); *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191-94 (11th Cir. 2009) (same); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268-70 (11th Cir. 2009) (same); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

unity so that absent class members can fairly be bound by decisions of class representatives."). This case illustrates the problem vividly. Class plaintiffs' theory of proof extrapolated a supposed *average* donning and doffing time from a limited sample of observations, in which the actual time varied dramatically. Even if the sampling were perfectly constructed, the entire enterprise rests on compromising the claims of those class members whose actual donning and doffing time was greater than average, and giving part of the recovery they deserve to class members who may have had no claim at all, or a claim for far less.

Whether the FLSA should be amended to recognize a new form of group liability in circumstances like these is a question for Congress. The Rules Enabling Act forbids courts from accomplishing that goal *sub rosa*, by pretending that aggregate or average proof offered by the plaintiffs conclusively resolves issues that defendants are in fact entitled to litigate individually.

IV. INDIVIDUALIZED DAMAGES ISSUES PRECLUDE CERTIFICATION

The courts below permitted plaintiffs to seek and obtain a lump sum judgment for the class, as an entity, without resolving the damages that individual class members are, or are not, entitled to. That is not permissible. In many class actions calculating individual damages will be essentially a mechanical exercise once liability has been decided. But if there are genuine, disputed issues about damages that require individualized litigation, a class cannot be certified on the premise that defendants will be precluded from contesting those issues.

The aggregate class-wide verdict sought and rendered here reflects a common, and disturbing, strategy to attempt to neuter the defendants' ability to contest liability and damages case-by-case, and to remove the allocation of damages among class members from the realm of disciplined adjudication to *ad hoc* "claims administration." In *Behrend* this Court held that the class could not be certified without a reliable method of quantifying damages at the individual level. *See Behrend*, 133 S. Ct. at 1434-35. This Court clarified that predominance is a "demanding" inquiry and explained that plaintiffs "[could not] show Rule 23(b)(3) predominance" without a "common methodology" because in a case with so many class members and different damage "permutations," "[q]uestions of individual damage calculations" would "inevitably overwhelm questions common to the class." *Id.* at 1432-35; *see also id.* at 1435 n.6 (referring to "requisite commonality of damages").

The courts below tried to solve that problem by wishing it away—pretending that litigation can end with an aggregate damages figure for *the class*, while leaving questions of individual damages unresolved. That premise is inconsistent with *Behrend*, and with the better reasoned cases going back decades. The Second Circuit has long insisted that this sort of "fluid recovery" procedure "offends both the Rules Enabling Act and the Due Process Clause" and systematically inflates the recovery beyond what the defendant would actually face in individual trials. *McLaughlin*, 522 F.3d at 231-32; *see also Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1008 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 156 (1974). In effect the class itself is

constituted as a legal entity with a cause of action to recover for aggregate injury to its members, modifying the substantive law beyond all recognition.

That flawed procedure cannot be rescued by pretending, as plaintiffs and the courts below did in this case, that all class members are the same as some estimated average. Plaintiffs have always received somewhat more leeway in proof of the amount of damages than in proof of liability, but still have to offer proof of *their own damages*. It is never just and reasonable to infer that everyone is the same, merely because examining the differences would be time-consuming. When all class members are awarded an averaged damages amount, the awards are not even attempting to estimate actual damages. All of them will be too high or too low, except perhaps by sheer luck.

Nor can the problem be solved simply by positing some post-verdict process for dividing the total among class members. Many classes have been certified on the premise that if liability can be established by common evidence, damages issues can be deferred to some undefined future "claims process." But the better reasoned cases have always recognized that where calculating damages "requires separate mini-trial[s] of an overwhelming large number of individual claims, . . . the staggering problems of logistics thus created make the damage aspect of [the] case predominate, and render the case unmanageable as a class action." *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) (second alteration added) (citations and quotations omitted) (collecting cases), *cert. denied*, 435 U.S. 968 (1978); *Bell Atl. Corp.*, 339 F.3d at 306-07. Of course defendants cannot simply obstruct class-wide

resolution by insisting on individualized litigation of issues that are unimportant, duplicative, or not reasonably in dispute. In class actions as in individual cases, district courts retain ample discretion to manage and limit the presentation of unnecessary evidence, and to grant motions *in limine* or for summary judgment in order to narrow the issues for trial. But if there are genuinely individualized and disputable issues of fact going to damages, which defendants would be entitled to litigate in individual trials, those issues cannot be banished just because doing so would be convenient.

As a practical matter that may mean that certification is appropriate only when it is clear that once the class-wide issues are resolved damages calculation becomes "virtually a mechanical task, capable of mathematical or formula calculation." *Windham*, 565 F.2d at 68 (citations omitted). If a jury determined based on competent evidence that every member of a class overpaid by $2 per widget, and the number of widgets each class member purchased was not reasonably disputable, damages calculations could be relegated to an administrative process. But if the extent of any class member's damages depend on fact issues that the defendant is entitled to contest with evidence individual to each class member, the specter of mini-trials may become overwhelming. That conclusion is hardly radical. This Court has emphasized over and over again that Rule 23(b)(3) was designed for situations in which the class plaintiffs "'suffered the same injury'" at the hands of the defendant—which does not mean "merely that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 25521 (citation omitted).

The damages issues in this case are real, individualized, and not at all mechanical. Neither plaintiffs nor the courts below have identified any reliable way to resolve those issues consistent with due process, the Seventh Amendment, and the Rules Enabling Act. Indeed, the premise of the judgment appears to be that those issues will never be resolved—that class members will share equally in an undifferentiated judgment, and Tyson Foods cannot complain that it never had an opportunity to litigate individual questions. That procedure is plainly inconsistent with both *Wal-Mart* and *Behrend*, and should be rejected.

CONCLUSION

This Court should reverse the decision of the Eighth Circuit and hold that the class must be decertified.

Respectfully submitted,

KATHRYN D. KIRMAYER
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, SW
Washington, DC 20024
(202) 639-2505

J. SCOTT BALLENGER
Counsel of Record
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
scott.ballenger@lw.com

Counsel for Amicus Curiae

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