No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,
v.
PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of Amicus Curiae Complex Litigation Law Professors in Support of Respondents

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September 29, 2015

QUESTIONS PRESENTED

The petition for certiorari sets out the following two questions:

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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INTEREST OF AMICI CURIAE

The *amici* are law professors who teach and write in the field of federal civil procedure and complex litigation. Amici share an interest in presenting this Court with an impartial view as to the appropriate doctrinal framework governing the first question presented in this case.[1] The complete list of signatories is as follows:

Sergio J. Campos, Associate Professor of Law, University of Miami School of Law;

Suzette M. Malveaux, Professor of Law, The Catholic University of America, Columbus School of Law;

David Rosenberg, Lee S. Kreindler Professor of Law, Harvard Law School;

Michael D. Sant'Ambrogio, Associate Professor of Law, Michigan State University College of Law;

Jay Tidmarsh, Professor of Law, Notre Dame Law School;

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' letters of consent to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

As interested professors of the law of complex litigation, we submit this amici curiae brief because we are concerned that the petitioner seeks an unnecessarily broad decision that would bar "statistical techniques" long used in a wide variety of complex cases. Even though the wording of the question presented suggests otherwise, actuarial and other "statistical techniques" in class actions often do not "presume" all class members are "identical to the average." Parties may introduce relevant and reliable statistical evidence, as well as other forms of aggregate proof, to resolve issues of liability and damages accurately, efficiently and consistently. In addition, parties can do so while leaving individual defenses for another day. Like other amici curiae, we accordingly urge the Court to refrain from adopting an interpretation of Rule 23 that would prohibit or undermine such appropriate uses of statistics and similar aggregate proof in class actions. *See* Brief of Civil Procedure Scholars as Amici Curiae in Support of Neither Party at 5; Brief of Amici Curiae Civil Professors in Support of Respondents at 10-13.

We submit this separate brief because we believe that the precise problem Tyson raises could have been avoided through well-accepted trial procedures that the petitioner opposed or ignored at trial. In many different kinds of litigation, district courts permit parties to use statistics, aggregate proof, and other evidentiary inferences to resolve recurring questions in complex litigation while protecting a party's right to assert individual defenses. Among other ways, they can do so by *bifurcating* the class action into two phases: (1) a "common issue" phase

which resolves issues that are the same, or common, to all of the class members, and (2) an "individual issue" phase which allows the court to resolve issues unique to individual class members.

In fact, in the present case, it appears that the respondents proposed bifurcation of common and individual issues, but Tyson itself successfully opposed such bifurcation, and offered no alternative method of preserving its individual defenses. Tyson cannot now claim that "statistical techniques," including the aggregate proof offered here, undermine a right to a day in court, including its own right to assert individual defenses, when it blocked a common and well-accepted means of protecting that right, and failed to avail itself of similar practices. As set forth below, the Court should decline the petitioner's invitation to articulate categorical rules barring actuarial tools that have long been used in complex cases.

ARGUMENT

I. STATISTICAL TECHNIQUES AND SIMILAR FORMS OF AGGREGATE PROOF HAVE MANY APPROPRIATE USES IN CLASS ACTIONS.

In general, statistical techniques can be used to determine, "to specified levels of accuracy, characteristics of a 'population' or 'universe' of events, transactions, attitudes, or opinions by observing those characteristics in a relatively small segment, or sample, of the population." *Manual of Complex Litigation (Fourth)* § 11.493, at 102 (2004). Because, by definition, a class action involves a class

"so numerous that joinder of all members is impracticable," Fed. R. Civ. P. 23(a)(1), statistical techniques can be, and have been, an efficient means of determining information about the large population of class members.

As we show in this part, in a wide variety of situations parties may use statistics, as well as other forms of aggregate proof, to resolve common questions of liability and individual issues of damages accurately and efficiently. As set forth in Part II, courts may do so, while protecting a defendant's right to raise individualized defenses for each class member, through bifurcation and similar well-accepted trial practices. The petitioner, in fact, rejected or ignored all of these practices here.

A. Statistical techniques can be used to determine issues of liability that are common to the class.

To certify a class action in federal court, one must first satisfy the requirements of "numerosity, commonality, typicality, and adequacy of representation." Fed. R. Civ. P. 23(a)(1)-(4); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Class actions involving damage claims, like the class action in this case, are typically governed by Rule 23(b)(3), which further requires a court to find that issues common to the class "predominate" over individual issues and that the class action is "superior" to other procedures. Fed. R. Civ. P. 23(b)(3); *Wal-Mart*, 131 S. Ct. at 2558.

Statistical techniques and similar approaches that rely upon a sample are an appropriate way to

determine common issues of liability in a variety of settings, including antitrust, securities fraud, and employment discrimination litigation. In all of these settings statistical techniques have been especially useful at the class certification stage to determine whether the predominance requirement of Rule 23(b)(3) has been satisfied.

Antitrust. Statistical techniques have long been accepted in antitrust class actions. Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 18:45 (4th ed. 2002); *see also Manual of Complex Litigation (Fourth)* § 23.1, at 470-71 (2004) ("Statistical evidence is routinely introduced and explained by experts in antitrust litigation. . ."). For example, Section 1 of the Sherman Act prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade." 15 U.S.C. § 1. Similarly, Section 2 of the Sherman Act prohibits any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." 15 U.S.C. § 2. To satisfy the predominance requirement for both Section 1 and Section 2 claims, courts have required, among other things, a showing that the impact of the alleged conspiracy is common to the class. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (discussing Section 1 claims); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013) (discussing Section 1 and Section 2 claims).

Courts have routinely permitted the use of statistics and other inferential aggregate proof to show that an alleged antitrust violation raised prices

relative to the prices found in a competitive market, thus establishing impact. *See, e.g.*, *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1206 (N.D. Cal. 2013) (noting that the plaintiff's expert provided a statistical model that "followed a roadmap widely accepted in antitrust class actions that use evidence of general price effects plus evidence of a price structure to conclude that common evidence is capable of showing widespread harm to the class."); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 808 (7th Cir. 2012) (concluding that the plaintiffs use of "the same economic and statistical methods used by the Federal Trade Commission staff and Northshore's own economic experts to analyze antitrust impact" was sufficient to establish antitrust impact for purposes of the predominance requirement).

Moreover, proof of antitrust impact on a market requires a comparison between the actual world and the competitive world that would have existed "but for" the alleged antitrust violation. 2A Phillip E. Areeda et al., *Antitrust Law* ¶ 392a (3d ed. 2007). Because of the "inherent difficulty" of actually observing the counterfactual, "but for" world of competition, parties must rely upon statistics and other inferential, aggregate approaches like economic modeling to infer the characteristics of such a world based on observations in comparative markets. *See, e.g., Behrend v. Comcast Corp.*, 655 F.3d 182, 203 (3d Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1426 (2013); *In re Steel Antitrust Litig.*, 2015 WL 5304629, at *9 (N.D. Ill. Sept. 9, 2015) (same, citing *Behrend v. Comcast Corp.*). Accordingly, the use of statistical techniques and similar aggregate proof to establish

antitrust impact is not only useful, but it is "the only practicable means to collect and present relevant data." *Manual of Complex Litigation (Fourth)* § 11.493, at 102 (2004); *see also Comcast*, 133 S. Ct. at 1433 (recognizing the need for modeling, and noting that, in the antitrust context, "[c]alculations need not be exact," *citing Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

Securities Fraud. Statistical techniques and similar aggregate proof have also been appropriately used to establish common issues in securities fraud litigation. Federal securities laws prohibit sellers of publicly traded securities from making an "untrue statement of a material fact" to defraud investors. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (citing 15 U.S.C. § 78j(b) & 17 C.F.R. § 240.10b–5 (2004)). Federal courts have permitted investors to bring a private right of action to enforce this prohibition. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (*citing Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)). Such a claim requires an investor to prove "'(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1192 (2013) (*quoting Matrixx Initiatives, Inc. v. Siracusano*, 131 S.Ct. 1309, 1317 (2011)).

As this Court has recently recognized, both materiality and loss causation are issues common to the class. *See Amgen*, 133 S. Ct. at 1191 (materiality); *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2186 (2011) ("Loss causation . . . requires a plaintiff to show that a misrepresentation that affected the integrity of the market price also caused a subsequent economic loss"). To prove that an alleged fraudulent statement caused a loss and its magnitude, plaintiffs typically rely upon event studies, which identify a particular event like a fraudulent statement and use statistical and economic methods to determine whether that event affected the price of a stock absent other causes. *See* David Tabak & Frederick Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom*, in Litigation Services Handbook, The Role of the Financial Expert ch. 19 (3d ed. 2001); *see also* Sanjai Bhagat & Roberta Romano, *Event Studies and the Law, Part I*, 4 Am. L. & Econ. Rev. 141, 142-45 (2002); Jonathan R. Macey, Geoffrey P. Miller, Mark L. Mitchell & Jeffry M. Netter, *Lessons From Financial Economics: Materiality Reliance, and Extending the Reach of* Basic v. Levinson, 77 Va. L. Rev. 1017, 1025-42 (1991); *see also Halliburton*, 134 S. Ct. at 2415 (defining "event studies" as "regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events.").

Accordingly, statistical methods like event studies have long been accepted at the class certification stage to establish, or disprove, predominance. *Halliburton*, 134 S. Ct. at 2415-16 (permitting a defendant to submit evidence of "price impact" based

on event studies to rebut fraud on the market presumption of reliance).

Employment Discrimination. Courts have also used statistical methods in employment discrimination cases under Title VII. Statistical models are readily accepted to establish whether a pattern or practice has a "disparate impact" on a protected group in violation of Title VII. Indeed, any claim of disparate impact requires "reliable statistical evidence showing that a particular employment practice has a disparate impact on a protected class." *E.E.O.C. v. Freeman*, 2015 WL 5178420, at *3 (D. Md. Sept. 5, 2015); *see also Munoz v. Orr*, 200 F.3d 291, 300 (5th Cir. 2000) ("Claims of disparate impact under Title VII must, of necessity, rely heavily on statistical proof."), *citing Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)).

Similarly, for disparate treatment cases, "[a]ppropriate statistical data showing an employer's pattern of conduct toward a protected class as a group, can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990) (*citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973)). *cf. Wal-Mart*, 131 S. Ct. at 2553-54 (concluding that statistical and sociological aggregate evidence was insufficient to establish discriminatory intent for purposes of commonality).

B. Statistical techniques can also facilitate the determination of individual issues.

Statistical techniques can also be used to facilitate the determination of issues unique to each individual. First, statistical techniques can be used to sequence the resolution of individual issues so that the court and the parties efficiently use resources. For example, random sampling can be used to pick individual cases whose damage determinations will help other parties assess their claims and facilitate settlement. *Manual of Complex Litigation (Fourth)* § 22.316, at 360 (2004); Alexandra D. Lahav, *Bellwether Trials,* 76 Geo. Wash. L. Rev. 576, 577-78 (2008); Eldon E. Fallon, *et. al*., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2342 (2008). Such "bellwether trials" are typically used in multidistrict litigation or litigation that is otherwise consolidated before a single court. *See* Duke Law Center for Judicial Studies, *MDL Standards and Best Protocols* 18-20 (2014), *available at* https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf; Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action,* 112 Colum. L. Rev. 1992, 2061-62 (2012). However, bellwether trials can be, and are, used in class actions to facilitate settlement. *See, e.g.*, *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 607 Fed. Appx. 203, 205 (3d Cir. 2015) (discussing the use of a bellwether trial for damages for class action certified as to common issues only).

Second, statistical techniques and similar aggregate proof can be used to develop a mechanical

formula that allows the class members to recover in an efficient manner. Examples can be found in class actions involving antitrust and securities fraud claims. *See* 6 Newberg & Conte, *supra* § 18.53, at 175-76 (noting that the "application of mechanical formulae or statistical methods to individual claims, has received approval in antitrust cases"); 7 *id.* § 22.65, at 303-04 ("Determination of damages sustained by individual class members in securities class action suits is often a mechanical task involving the administration of a formula."); *see also In re Polyurethane Foam Antitrust Litig.*, 2014 WL 6461355, at *67 (N.D. Ohio Nov. 17, 2014) (certifying antitrust class action, noting that the plaintiffs proposed "a workable damages methodology" using "Direct and Indirect Purchaser regressions").

Third, statistical techniques can be a valuable and efficient way to establish the aggregate damages owed by the defendant. By doing so, the court can ensure that the defendant does not avoid its liability, thereby preventing "unjust enrichment." 6 Newberg & Conte, *supra* § 18.53, at 174-75 (noting, in the antitrust context, that aggregate damages "may prove to be extremely equitable inasmuch as the amount of damages arrived at is likely to correspond to the total injury inflicted by defendant or the extent of its unjust enrichment") (quotation omitted).

Statistical models are still subject to Federal Rule of Evidence 702, which requires courts to ensure that expert evidence "fits" the plaintiff's legal theory. *See Comcast*, 133 S. Ct. at 1435 ("The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic

impact of that event," citing Federal Judicial Center, *Reference Manual on Scientific Evidence* 432 (3d ed. 2011)); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Parties can also challenge a judge's clearly erroneous decision to admit expert testimony. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146-47 (1997). Such questions involve whether plaintiffs offered "relevant" and "reliable" expert testimony to meet the elements of their case. But questions of evidentiary "fit" are not raised by the first question presented here, which only concerns the use of these methods in class actions, not their sufficiency in this case.

II. WELL-ACCEPTED TRIAL PRACTICES CAN PERMIT THE USE OF STATISTICAL TECHNIQUES WHILE PRESERVING A DEFENDANT'S RIGHT TO ASSERT INDIVIDUAL DEFENSES.

Statistical and similar aggregate evidence remain useful even when the kinds of individual questions asserted by Tyson here remain. Well-accepted trial practices, such as bifurcation, permit courts to materially advance litigation using aggregate forms of proof while protecting the defendant's right to assert individualized defenses.

A. Individual defenses can be asserted through bifurcation and similar trial practices.

This Court has previously expressed concern that the use of statistics in Rule 23 class actions in the form of a "Trial By Formula" may "deprive" a defendant's right to assert individual defenses in

violation of the Due Process Clause, or otherwise "abridge" such a right under the Rules Enabling Act. *Wal-Mart*, 131 S. Ct. at 2561 (citing U.S. Const. amend. v, xiv & 28 U.S.C. § 2072(b)). Tyson argues that the use of statistical techniques here violated the Due Process Clause and the Rules Enabling Act for the same reason. Specifically, it contends that the statistical techniques permitted by the district court prevented Tyson from asserting individual defenses against specific class members. Petitioner's Br. at 36.

However, *Wal-Mart* does not stand for the proposition that all statistical techniques and similar methods of aggregate proof in class actions violate the Due Process Clause and the Rules Enabling Act. For years, courts appropriately have used statistical evidence while protecting defendants' right to assert individualized defenses.

One method that district courts have used is bifurcating issues that are the same, or common, to each class member from issues that are unique for each individual class member. Bifurcation of common issues from individual issues "insulates a party from the possible prejudice of jointly trying certain issues." William B. Rubenstein, 4 *Newberg on Class Actions* § 11:4, at 13 (5th ed. 2014). Given this benefit, it is no surprise that bifurcation is generally accepted in a wide variety of contexts. *See, e.g.*, *Chiang v. Veneman*, 385 F.3d 256, 273 (3d Cir. 2004) (Equal Credit Opportunity Act); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir. 2001) (Labor-Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564–566 (6th Cir. 2007) (Federal

Communications Act); *see also* 4 Rubenstein, *supra* § 11:4, at 15 (noting that "trial bifurcation is widely accepted").

Along with "(1) bifurcating liability and damage trials," a court may also protect individual issues by "(2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (Sotomayor, J.), *overruled on other grounds by In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *see also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (noting some of these possibilities, citing *In re Visa Check*).

Accordingly, Tyson simply misses the mark when it objects to class certification based on issues like "whether Tyson's system for compensating employees for these activities failed to compensate the employee for all of the overtime he or she worked." Petitioner's Br. at 29. Given the availability of these trial practices to cordon off individual issues, including individual defenses, from common issues, "[i]n the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members." *Comcast,* 133 S. Ct. at 1437 (Ginsburg, J., dissenting) (noting that "[r]ecognition that individual damages calculations do not preclude class

certification under Rule 23(b)(3) is well nigh universal," *citing* 2 Rubenstein, *supra* § 4:54, at 208); *see also* Elizabeth C. Burch, *Constructing Issue Class Actions*, 102 Va. L. Rev. ---, 32-33 (forthcoming 2016) ("[C]ourts have properly separated eligibility components such as plaintiffs' specific and proximate causation, reliance, and damages to facilitate issue classes in employment-discrimination, environmental contamination, and consumer-fraud litigation.") (collecting cases), *available* at http://ssrn.com/abstract=2600219.

Moreover, bifurcation and similar trial practices would not result in a "Trial by Formula." In *Wal-Mart Stores, Inc. v. Dukes*, this Court rejected a trial plan in which "[a] sample set of the class members would be selected, as to whom liability" would be assessed, and then "the number of (presumptively) valid claims . . . would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—*without further individualized proceedings*." 131 S. Ct. at 2561 (emphasis added).

However, trial practices like bifurcation do not require a court to apply the outcomes of a sample of cases per force to all of the cases, thereby preventing Tyson to assert an individual defense against a nonsampled plaintiff. Indeed, the whole point of trial practices like bifurcation is to preserve each party's day in court with respect to individual issues. Accordingly, by protecting individual issues from such sampling, "bifurcation is the *answer* to the problems found by" this Court in *Wal-Mart*. 4 Rubenstein, *supra* § 11:7, at 27 (emphasis in original); *see also* Sergio J. Campos, *Mass Torts and*

Due Process, 65 Vand. L. Rev. 1059, 1111 (2012) ("[A] plaintiff may still have her 'day in court' in the context of a bifurcated class action with a common-issue proceeding and individual-issue determinations.").[2]

This case is, in fact, a far cry from *Wal-Mart* where statistics provided the "glue" holding together the large number of disparate claims asserted against different Wal-Mart stores. *Wal-Mart*, 131 S. Ct. at 2551-52 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Unlike in *Wal-Mart*, the plaintiffs here were all subject to the same, explicit policy regarding overtime—the "gang time" compensation system—which Tyson concedes is common to the class. *See* Petitioner's Br. at 31-32. Consequently, this case already involves a common policy, and thus does not use statistics to "presuppose[] the proposed class as a unit." Nagareda, *supra,* at 115. When plaintiffs use statistical evidence to establish the extent of liability for a single employer's past conduct, such evidence

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[2] To be clear, we do not contend that Due Process or the Rules Enabling Act *requires* bifurcation or other trial procedures in class actions that rely on such methods. *See* Brief of Amici Curiae Civil Professors in Support of Respondents (arguing that aggregate proof is consistent with substantive law and Due Process). Nor does the question presented raise this issue. But, as set forth below, Tyson cannot now complain that class certification violated due process when it did nothing to protect its right to assert individual defenses and even frustrated an accepted means of doing so.

can be used to establish classwide liability—particularly when widely-accepted trial practices exist to protect defendants' interests in contesting other issues raised in the litigation.

B. Tyson should not profit because it successfully opposed or ignored bifurcation and similar practices prior to trial.

Tyson cannot now object to the use of aggregate proof in this case when it failed to avail itself of the trial practices discussed above. Prior to trial, the plaintiffs "request[ed] that the calculation of individual amounts of backpay for each plaintiff and class member be bifurcated so that the jury trial will be limited to the issues of liability." *See* Order for Final Pretrial Conference, *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ (N.D. Iowa Oct. 14, 2010), *available at* Joint Appendix at 112. However, Tyson successfully opposed the proposed bifurcation. *See id.,* Joint Appendix at 115.

In addition to opposing bifurcation, Tyson also did not provide its own proposal for bifurcation, nor suggest decertifying the class as to individual issues, nor suggest a magistrate to deal with individual issues, nor suggest using subclasses, nor propose altering or amending the class. *See In re Visa Check*, 280 F.3d at 141 (discussing these possibilities). Tyson cannot now complain about due process when it obstructed or failed to avail itself of any procedure which would have protected its rights. *Cf. Espenscheid,* 705 F.3d at 775-76 (admonishing the plaintiffs for "opposing bifurcation and subclasses

and refusing to suggest a feasible alternative, including a feasible method of determining damages").

Tyson further frustrated the potential effectiveness of bifurcation and similar procedures by failing to keep individualized records of the plaintiff's "donning and doffing" times as required by law. *See* 29 U.S.C. § 211(c) ("Every employer . . . shall make, keep, and preserve such records of the persons employed by him . . ."). Faced with this lack of evidence as to individual donning and doffing times, the district court turned to a common use of aggregate, inferential evidence—to prevent the "unjust enrichment" of the defendant. 6 Newberg & Conte*, supra* § 18.53, at 174-75.

Indeed, the very aggregate evidence that Tyson challenges is permitted under the substantive law precisely because "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11(c) of the Act." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946). "Any other rule would allow the wrongdoer to profit from his wrongdoing at the expense of his victim." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946) (noting that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created," and that this rule "is not restricted to proof of damage in antitrust suits"). Given all of the above circumstances, Tyson received all of the process it was due.

CONCLUSION

As set forth above, the Court should decline the petitioner's invitation to articulate categorical rules barring actuarial tools that have long been used in many areas of law—particularly where the precise problem the petitioner raises can be avoided through well-accepted trial procedures.

Respectfully submitted,

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September 29, 2015