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 WAL-MART STORES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF WAL-MART STORES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Wal-Mart Stores, Inc.—the world's largest retailer—operates over 11,000 stores across 27 countries, and serves nearly 260 million customers each week in its stores and online. In the United States alone, Wal-Mart employs more than 1.3 million associates, making it the nation's largest private employer. Given the size and scope of its operations, Wal-Mart is frequently the target of class-action lawsuits in both federal and state courts, and has been subjected to some of the same unfair and unconstitutional practices that Tyson Foods is challenging in this case.

As Wal-Mart has experienced first-hand, lower courts all too frequently allow class-action plaintiffs to rely on shortcuts like extrapolation and averaging to force highly individualized claims into the class-action framework. For example, in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court unanimously reversed the en banc Ninth Circuit's endorsement of "Trial by Formula"—a proposal to

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

adjudicate a class action by extrapolating classwide outcomes from a sample of class members' claims. The Court rejected that novel procedure because it would have eliminated Wal-Mart's right "to litigate its statutory defenses to individual claims" and would therefore have violated the Rules Enabling Act's prohibition on "interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Id.* at 2561 (quoting 28 U.S.C. § 2072(b)).

More recently, in *Braun* v. *Wal-Mart Stores, Inc.*, the Pennsylvania state courts upheld a judgment of more than $150 million in a wage-and-hour class action against Wal-Mart where the plaintiffs secured class certification and a classwide judgment by relying on experts who extrapolated from evidence relating to a subset of class members and a portion of the class period to reach conclusions with respect to all class members over the entire period. *See Braun* v. *Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014); *Braun* v. *Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011). As a result of these shortcuts, the plaintiffs were relieved of their burden to prove the elements of their individual claims, and did not have to confront Wal-Mart's individualized defenses.

Yet, when Wal-Mart challenged this patently unfair procedure on due process grounds, the Pennsylvania Superior Court held that the "contention that Wal-Mart was denied due process" was "in derogation of class certification." *Braun*, 24 A.3d at 951. The Pennsylvania Supreme Court also affirmed the judgment, and like the Eighth Circuit in this case, held that this Court's rejection of "Trial by Formula" in *Dukes* did not bar the trial court's

extrapolation-based procedure. *See Braun*, 106 A.3d at 665; *see also* Pet. App. 10a–11a. Wal-Mart's petitions for certiorari to the Pennsylvania Supreme Court and the Pennsylvania Superior Court in *Braun* remain pending. *See* Nos. 14-1123, -1124 (filed Mar. 13, 2015).

Wal-Mart submits this *amicus* brief to emphasize the serious due process implications for both defendants and absent class members when "Trial by Formula" and similar "rough justice" approaches are deployed to adjudicate class actions involving highly individualized claims that are not amenable to classwide treatment. As Wal-Mart's experience illustrates, this is a critical and recurring issue—particularly in state courts, where the constraints of the Rules Enabling Act and Federal Rule of Civil Procedure 23 do not apply. This Court's explicit guidance on this constitutional question is urgently needed to make clear that the longstanding procedural requirements of the common-law tradition cannot be abandoned in order to squeeze ill-fitting claims into the class-action mold.

SUMMARY OF ARGUMENT

The Constitution protects against the erroneous deprivation of property by guaranteeing basic due process rights in legal proceedings. These fundamental procedural protections—including the rights to be heard, to present all available defenses, and to cross-examine adverse witnesses—are deeply embedded in the common law and apply with equal force to individualized adjudications and class-action proceedings. *See*, *e.g.*, *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980).

Yet, with the "adventuresome" expansion of the class-action device in the modern era, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997), these essential due process protections are all-too-often jettisoned by courts eager to facilitate classwide adjudication of inherently individualized claims. In their place, these courts substitute procedural shortcuts—such as extrapolation, sampling, and averaging—that can prejudice defendants and absent class members alike.

Over four years ago, this Court in *Dukes* firmly rejected an extrapolation-based approach to class-action litigation that would have relieved class members of the obligation to prove the elements of their individual claims and denied Wal-Mart the right to raise individualized defenses to those claims. *See Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011). Despite this Court's unambiguous "disapprov[al]" of the "novel project" of "Trial by Formula," *id.*, that flawed approach persists and continues to be invoked with disturbing frequency by state and federal courts searching for procedures that will enable the resolution of highly individualized claims in the class-action setting.

In this case, for example, the Eighth Circuit upheld class certification and a classwide judgment even though donning-and-doffing times varied dramatically across individual class members due to differences in the types of protective gear worn and washing performed (from zero minutes by all non-knife-users to multiple and varying minutes by knife users) and even though there were differences in how class members were paid for these tasks. Pet. 9. To

overcome these individual variations and facilitate classwide treatment, the lower courts permitted plaintiffs to rely on an average donning-and-doffing time, calculated based on a nonrepresentative sample of the class, to establish liability and damages for *all* class members—without any individualized determinations by the jury as to whether a particular class member had actually been undercompensated and, if so, the amount of that undercompensation. *Id.* at 9–10. As a result of this combination of extrapolation, sampling, and averaging, class members were not required to prove the elements of their individual claims, Tyson Foods was deprived of its right to raise individualized defenses to those claims, and absent class members were forced to accept an average award of damages that disregarded their individual times and payments.

That the Eighth Circuit sanctioned such a radical departure from traditional common-law procedures in the wake of this Court's decision in *Dukes* is confounding and plainly irreconcilable with Federal Rule of Civil Procedure 23 and the Rules Enabling Act. But the Eighth Circuit is by no means alone in this respect, as Wal-Mart's experience in *Braun* demonstrates. *See Braun* v. *Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014). To extinguish these problematic practices nationwide—in both state and federal courts—this Court should hold expressly that the use of extrapolation, sampling, and averaging to relieve individual class members of their burdens of proof and to foreclose the litigation of individualized defenses is incompatible with due process.

ARGUMENT

I. CLASS ACTIONS CANNOT BE USED TO ELIMINATE THE FUNDAMENTAL PROTECTIONS OF DUE PROCESS.

Settled common-law tradition and this Court's due process jurisprudence establish that defendants can only be deprived of their property where plaintiffs prove each element of their claims and where defendants are afforded the opportunity to raise all available defenses to those claims. These basic procedural protections provide a critical check on erroneous deprivations of property and apply equally to individual and class litigation.

A. This Court has consistently held, "from its first due process cases," that "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). And where courts have departed from "traditional practice" and failed to "provide[ ] protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.*

From the common-law tradition that gives content and meaning to "due process," it is clear that the "fundamental requisite of due process of law is the opportunity to be heard.'" *Mullane* v. *Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis* v. *Oredean*, 234 U.S. 385, 394 (1914)). Indeed, the Court has long recognized the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892–93 (2008) (quoting *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 798 (1996)). That a defendant

must be provided with "a day in court to make his defence" is a foundational tenet of the common law; it can be traced back as far as "chapter twenty-ninth of Magna Charta" and is embodied in the constitutional principle "that no man shall be deprived of his property without due process of law." *Rees* v. *City of Watertown*, 86 U.S. 107, 122 (1874).

As part of this right "to be heard," a defendant must be afforded an opportunity "to litigate the issues raised" by the plaintiff's claims, *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), including the "'opportunity to present *every* available defense.'" *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)) (emphasis added); *see also Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) ("[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense.") (internal quotation marks omitted). Due process likewise "requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970).

B. The fundamental due process protections that emerge from this common-law tradition—including the rights to be heard, to litigate the issues raised, to present every available defense, and to examine adverse witnesses—cannot be eliminated simply because a case is certified as a class action. From its earliest class-action cases, the Court has emphasized that the procedural protections and standards of fairness that apply in traditional individualized

litigation apply with equal force in the class-action setting.

In assessing an early use of the class-action device, for example, the Court warned that "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854). The Court later made clear that a class action is "a procedural right only, ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980), and that classwide adjudication therefore "leaves the parties' legal rights and duties intact and the rules of decision unchanged," *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality op.).

In federal court, the constitutional rights of class-action defendants are safeguarded in substantial part by Federal Rule of Civil Procedure 23, which incorporates critical "procedural protections" that are "grounded in due process," *Taylor*, 553 U.S. at 901, and by the Rules Enabling Act, which prohibits class-action procedures from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b).

Although state courts are not obligated to follow Rule 23 or the Rules Enabling Act, *see Smith* v. *Bayer Corp.*, 131 S. Ct. 2368, 2377–78 (2011), this Court has repeatedly rejected state court class actions that failed to comport with the requirements of due process. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814–23 (1985) (holding that a nation-

wide class action violated due process because Kansas lacked a sufficient basis for applying its law to out-of-state claims); *Hansberry* v. *Lee*, 311 U.S. 32, 42–45 (1940) (holding that due process precludes binding absent class members to a class-action judgment unless they are "adequately represented by parties who are present"). The Constitution thus imposes certain procedural protections that must be obeyed in *all* class actions.

While several of this Court's decisions addressing the due process limitations on class actions have focused on the rights of absent class members, *see*, *e.g.*, *Hansberry*, 311 U.S. at 42–45, there is no doubt that abuse of the class-action procedure can also impair the due process rights of defendants. In fact, a number of lower courts have recently rejected class-action procedures that abridged the defendant's due process rights.

In *Carrera* v. *Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), for example, the Third Circuit held that a "defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." *Id.* at 307. The court explained that this "due process right" includes both the right "to challenge the elements of a plaintiff's claim" and the "right to challenge the proof used to demonstrate class membership." *Id.* Applying these due process principles, the Third Circuit vacated a class-certification order because the plaintiff failed to demonstrate that there was a "method for ascertaining class members" that was "reliable and adminis-

tratively feasible" and that permitted the "defendant to challenge the evidence used to prove class membership." *Id.* at 308.

Similarly, the Second Circuit in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), rejected on due process grounds a procedure in which "an initial estimate of the percentage of class members who were defrauded," along with an estimate of "the average loss for each plaintiff," would be used to determine the "total amount of damages suffered" by the class as a whole. *Id.* at 231. When "the mass aggregation of claims" is used "to mask the prevalence of individual issues," the court explained, "the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." *Id.* at 232.

Several state courts have likewise condemned procedures that denied class-action defendants their due process rights. The California Supreme Court, for example, vacated a class-action judgment because the trial court's "decision to extrapolate classwide liability from a small sample, and its refusal to permit any inquiries or evidence" regarding class members "outside the sample group, deprived [the defendant] of the ability to litigate" its defenses in violation of due process. *Duran* v. *U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014). Relying on this Court's decision in *Dukes*, the court emphasized that, under "principles of due process," a "'class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" *Id.* (quoting *Dukes*, 131 S. Ct. at 2561).

These decisions make clear that the bedrock procedural protections that emerged over centuries of common-law jurisprudence and that were incorporated into the Due Process Clause apply with full force to class actions. Thus, as in typical individualized litigation, a plaintiff cannot deprive a defendant of its property in a class action unless the plaintiff proves every element of his individual claims and the defendant is provided the opportunity to raise every available defense to those claims.

II. A "TRIAL BY FORMULA" IN WHICH INDIVIDUALIZED ISSUES ARE REPLACED BY EXTRAPOLATION, SAMPLING, AND AVERAGING VIOLATES DUE PROCESS.

A number of lower courts have lost sight of these basic due process principles in their zeal to facilitate class certification. While class actions have always represented a departure from the traditional model of bilateral adjudication, the threat that class actions pose to defendants' due process rights has become particularly acute in recent years, as courts have increasingly resorted to ever-more creative measures to facilitate the adjudication of ever-larger classes comprising inherently individualized claims.

A. "[R]epresentative suits have been recognized in various forms since the earliest days of English law." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832 (1999). Before the 1966 amendments to Federal Rule of Civil Procedure 23, however, class actions were limited to relatively narrow circumstances. In fact, "*every* form of representative litigation" that had preclusive effect on absent class members before "the 1966 amendment to Rule 23 solely involved aggrega-

tion of claims that were already linked by substantive law prior to suit." Martin H. Redish, *Rethinking the Theory of the Class Action: The Risks and Rewards of Capitalistic Socialism in the Litigation Process*, 64 Emory L.J. 451, 456 (2014). And the predecessor to today's Rule 23(b)(3) damages class action, the "spurious" class action, only produced binding judgments as to those absent class members who affirmatively "opted-in" to the action. *See Amchem*, 521 U.S. at 615 (explaining that "Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action, so characterized because it generally functioned as a permissive joinder ('opt-in') device"). As a result of these limitations, the class-action procedure was historically invoked with far less frequency—and in far less unorthodox settings—than it is today. *See*, *e.g.*, Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 385–86 (1967) (noting "[d]espondency over the inadequacies" of the pre-1966 version of Rule 23, under which the "class-action device . . . had become snarled").

The 1966 amendments to Rule 23 marked a sea change in the use of the class-action device. As this Court has explained, new Rule 23(b)(3)—which created the "opt-out" damages class—was "framed for situations 'in which class-action treatment is not as clearly called for'" as in traditional class-action settings. *Dukes*, 131 S. Ct. at 2558 (quoting *Amchem*, 521 U.S. at 614–15). In fact, "the drafters of the amendments to Rule 23 . . . were quite clearly creating a procedural mechanism previously unheard of in Anglo-American law"—a procedural mechanism

that could "bind absent class members when their rights possessed no prelitigation substantive link" and who had not taken any action to join the litigation. Redish, *supra*, at 456.

B. In the aftermath of the 1966 amendments, this Court has repeatedly reiterated that the class action remains an "'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" *Dukes*, 131 S. Ct. at 2550 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979)), and that Rule 23 continues to "impose[ ] stringent requirements for certification that in practice exclude most claims," *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013). Nevertheless, "[i]n the decades since the 1966 revision of Rule 23, class-action practice has become ever more 'adventuresome,'" with courts increasingly invoking untested procedures to adjudicate claims *en masse* that were thought to be "too numerous to secure their 'just, speedy, and inexpensive determination' one by one." *Amchem*, 521 U.S. at 617–18 (quoting Fed. R. Civ. P. 1); *see also* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 98 (2009) ("Since the emergence of the modern class action in the 1966 amendments to the Federal Rules of Civil Procedure, controversy has attended the certification of litigation to proceed on a class-wide basis.").

The perceived benefits of aggregation have led some lower federal courts—as well as state courts applying their own analogues to Rule 23(b)(3)—to certify classes that are far more sprawling, dispar-

ate, and internally conflicted than those contemplated by the drafters of Rule 23(b)(3) or authorized by this Court. To fit these highly individualized claims within the class-action mold, these courts have resorted to procedural shortcuts that relieve class members of their individual burdens of proof and restrict defendants' right to raise individualized defenses—in a sharp departure from the common-law procedures that are the "touchstone" of due process. *Oberg*, 512 U.S. at 430.

In *Dukes*, this Court recognized the serious shortcomings of class-action proceedings that replace individualized adjudication with extrapolation and sampling. 131 S. Ct. at 2561. The Ninth Circuit had attempted to transform a vast, unwieldly case—"one of the most expansive class actions ever"—into one that could "be manageably tried as a class action" by endorsing a trial plan under which "[a] sample set of the class members would be selected" and the "percentage of claims determined to be valid would then be applied to the entire remaining class . . . without further individualized proceedings." *Id.* at 2547, 2550, 2561. This Court "disapprove[d]" that "novel project," which it labeled "Trial by Formula," and made clear that "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* at 2561.

Despite the Court's clear repudiation of "Trial by Formula" in *Dukes*, some lower courts continue to permit plaintiffs to rely on extrapolation, sampling, and averaging to try their inherently individualized claims as class actions. Wal-Mart itself was

subjected to those deficient procedures in the *Braun* litigation, where only six plaintiffs testified on behalf of a class of 187,000 employees, the class-certification order and classwide judgment rested on extrapolation by the class's experts (rather than on individualized proof from class members), and the jury was not required to find that any of the class members had proved the individual elements of their wage-and-hour claims. *See* Pets. for Writ of Certiorari, *Braun*, Nos. 14-1123 & -1124; *see also*, *e.g.*, *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1252, 1256–57 (10th Cir. 2014) (affirming class judgment of more than $1 billion where plaintiffs used "extrapolation to calculate damages"), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015).

The procedural irregularities were similarly egregious in this case. In fact, the trial proceedings endorsed by the district court—and upheld by the Eighth Circuit on appeal—were materially indistinguishable from the trial plan rejected in *Dukes*. Like the Wal-Mart associates in *Dukes*, the Tyson Foods employees swept into the class here held numerous different positions. Pet. 4. Those varied positions led, in turn, to significant differences in the types of protective clothing class members were required to wear and what they were required to wash, if anything (as well as differences in payment for those tasks). *Id.* at 4–5. Even though these distinctions had a dramatic impact on the time employees spent donning and doffing (and how much they were compensated), the jury was not asked to assess the actual time that any individual class member spent putting on, and removing, protective gear and whether that time was longer than the period for

which the employee was compensated. *Id.* at 11. Rather, plaintiffs were permitted to rely on an expert's calculation of an *average* donning-and-doffing time that was based on an erroneous assumption that all such time beyond K-Code time was uncompensated; that average was determined based on a nonrepresentative sampling of class members and then extrapolated to all of the remaining members of the class. *Id.* at 9–10.

Because plaintiffs were permitted to rely on this classwide, extrapolation-based procedure, individual class members were relieved of their burden of proving that they were undercompensated based on the time that they *actually* spent donning and doffing protective gear on unpaid time. Tyson Foods, in turn, was denied its right to raise individualized defenses to each plaintiff's claims and unfairly compelled to "defend against a fictional composite" plaintiff, rather than against the actual claims of each member of the class. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). These procedural shortcuts leave no doubt that the class-certification order is incompatible with the requirements of Rule 23 and the Rules Enabling Act. *See id.* (reversing class judgment and emphasizing that the fact a "shortcut was necessary in order for [the] suit to proceed as a class action should have been a caution signal to the district court that classwide proof of damages was impermissible").

C. In addition to violating the federal procedural limitations on class actions, the class-certification order in this case culminated in a judgment that deprived Tyson Foods of its due process rights

because the procedural shortcuts used to force the plaintiffs' highly individualized claims into the class-action framework produced a proceeding that departed from the basic requirements of common-law adjudication.

The "Trial by Formula" endorsed by the Eighth Circuit used extrapolation, sampling, and averaging to relieve class members of their individual burdens of proof and to preclude Tyson Foods from raising defenses to their individual claims. If this wage-and-hour case had been a traditional suit initiated by a single plaintiff, it would have proceeded to trial in much the same way that cases have been tried for centuries: (1) the plaintiff would have testified about the actual time that she spent donning and doffing protective gear and washing based on her individualized job requirements and personal choices as well as the amount of time for which she was compensated, (2) Tyson Foods would have cross-examined the plaintiff to test the veracity of her testimony and would have called its own witnesses to dispute the plaintiff's assertions, and (3) the jury would have returned a verdict in which it determined whether the plaintiff had been undercompensated by Tyson Foods and, if so, the amount of damages to which the plaintiff was entitled.

None of that happened, however, because the plaintiffs' highly individualized claims were certified as a class action. To make classwide adjudication possible, the features of traditional common-law adjudication were abandoned: (1) the class introduced evidence about the average time that a sample of class members had spent donning and doffing and

washing, and assumed that all such tasks beyond Tyson Foods' K-Code payments were unpaid, rather than individualized evidence about each class member's actual experience, (2) Tyson Foods had no opportunity to cross-examine each class member to assess the validity of their individual claims and the sufficiency of their individual proof, and (3) the jury was not required to determine whether any individual class member had in fact been undercompensated by Tyson Foods or to assess the appropriate amount of damages for each undercompensated class member.

This radical departure from the traditional procedural safeguards of common-law adjudication violated Tyson Foods' due process rights because it produced a judgment in favor of plaintiffs who have never been required to prove the individual elements of their claims or to confront the defendant's individualized defenses to those claims. As even an academic who generally supports the use of extrapolation and sampling in class actions has acknowledged, these procedures "sacrific[e]" a defendant's "ability to contest its liability to each plaintiff" and deny the defendant its "right to a 'day in court'—an autonomy-enhancing ideal that . . . is sometimes seen as the hallmark of American justice." Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459, 1471 (2015).

The due process rights of absent class members are also jeopardized by the use of "Trial by Formula." By divorcing the adjudication of absent class members' claims from individualized proof, extrapolation-based trial plans risk undercompensating

class members who nonetheless will be bound by the judgment. *See* Tidmarsh, *supra*, at 1470 ("[F]or the individual victims who receive the average award, the process almost always results in either over-compensation or under-compensation."). This case provides a stark illustration of this constitutional infirmity. Because the classwide damages award was not based on the individual circumstances of each class member, but instead on the "average" time that a subset of class members spent donning and doffing and washing, those class members who spent less than the "average" time on those tasks stand to receive unjustified windfalls, while those who spent more than the "average" time will lose forever their right to a full recovery. The possibility that absent class members bound by the judgment have been systematically undercompensated raises serious due process concerns. *See Shutts*, 472 U.S. at 807–08 ("due process protections . . . apply to absent class members" where a class judgment "may extinguish the chose in action forever through res judicata").[2]

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[2] Class-action defendants have standing to challenge methodologies that undercompensate absent class members because systematic undercompensation can call into question the adequacy of representation and, in turn, the ability of a defendant to obtain a binding judgment against absent class members. *See Taylor*, 553 U.S. at 884 ("In a class action, . . . a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation."); *Shutts*, 472 U.S. at 804–05 (holding that a class-action defendant has standing to raise a challenge to a court's exercise of personal jurisdiction over absent class members because of the need to "assure itself of [the] binding effect of the judgment").

Because "Trial by Formula" fails to adjudicate the claims of individual class members, deprives defendants of their right to present defenses to those individual claims, and risks binding absent class members to judgments that result in pervasive undercompensation, it cannot be reconciled with fundamental principles of due process.

III. THE COURT SHOULD EXPRESSLY HOLD THAT "TRIAL BY FORMULA" VIOLATES DUE PROCESS.

This Court's rejection of "Trial by Formula" in *Dukes* plainly had due process underpinnings—particularly in light of the Court's concern that Wal-Mart had been denied the right to present "defenses to individual claims." 131 S. Ct. at 2561. Nevertheless, the Court did not explicitly address whether "Trial by Formula" violated due process and instead rested its express holding on the constraints of the Rules Enabling Act. *See id.* The lack of an unambiguous due process holding in *Dukes* has provided class counsel with a means of circumventing the decision in state courts—where the Rules Enabling Act does not apply—and provides a compelling reason to reject class certification in this case on both non-constitutional and due process grounds.

Wal-Mart's experience in *Braun* highlights that, in the wake of *Dukes*, state courts continue to endorse procedural shortcuts indistinguishable from the "Trial by Formula" rejected by this Court. *See also*, *e.g.*, *Moore* v. *Health Care Auth.*, 332 P.3d 461, 465–66 (Wash. 2014) (holding that due process does not require individualized proof of damages in class actions because such a requirement would "create an

unreasonable burden on class members" and "hinder . . . state policy underlying class action lawsuits"). As a leading treatise on class actions has noted, "[d]espite [*Dukes*'] clear, due process-based directive against 'Trial by Formula,' a number of principally state courts have approved class proceedings that do not provide defendants an opportunity to introduce evidence going to individualized issues and defenses." 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (11th ed. 2014). They have done so at the urging of plaintiffs' lawyers who have maintained that *Dukes* did not "place[ ] a constitutional due process limitation on the class action device." Kimberly A. Kralowec, Dukes *and Common Proof in California Class Actions*, Competition: J. Antitrust & Unfair Competition L. Sec. State B. Cal., Summer 2012, at 9, 12.

The disturbing frequency with which state courts continue to rely on procedural shortcuts such as sampling and extrapolation underscores that the "extent to which class treatment may constitutionally reduce the normal requirements of due process" remains an "important question" that the Court has yet to fully address. *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., Circuit Justice). Expressly deciding that important question in this case—and squarely rejecting, as a constitutional matter, the procedural shortcuts endorsed by the Eighth Circuit—would provide essential guidance to lower courts and put an end to the serial deprivation

of defendants' due process rights in class actions across the country.[3]

CONCLUSION

For the foregoing reasons, the Court should hold that "Trial by Formula" violates due process and reverse the judgment of the court of appeals.

Respectfully submitted.

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[3] In the event the Court declines to address in this case whether "Trial by Formula" is compatible with due process, it should grant one of Wal-Mart's pending petitions in *Braun* to resolve that critical constitutional question.