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 CIVIL PROCEDURE SCHOLARS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE

Amici (listed in the Appendix) are law professors who teach and write about class actions and complex litigation.[1] They have diverse perspectives on the costs and benefits of aggregating claims, but agree that judicial review should focus on the unique factual and legal circumstances of each case. Amici therefore propose narrow grounds for a decision. The Court can provide helpful guidance about managing aggregate proceedings without reconsidering certification criteria or the use of statistical evidence.

SUMMARY OF ARGUMENT

Both parties overreach. Plaintiffs defend the classwide judgment despite failing to prove that all class members were injured. Tyson seeks decertification even though classwide evidence might be available after the Court clarifies the burden of proof. Each party frames the case as implicating broad questions that the record does not raise.

Amici recommend an intermediate position. Tyson is correct that the judgment was unwarranted, but plaintiffs should have an opportunity on remand to present a feasible plan for managing a new trial. The Court should therefore reverse on narrower grounds than the Petition suggests. There is no reason to address the general utility of context-sensitive

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[1] The parties have given blanket written consent to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part. No person other than amici and their counsel—including no party or counsel for a party—made a monetary contribution to the brief's preparation or submission.

statistical methods and review of certification criteria should await the rulemaking process or future cases with records requiring an interpretation of Rule 23(b)(3).

A class may prevail at trial only by proving common allegations and presenting a feasible plan for resolving any remaining individualized disputes. Plaintiffs offered neither proof nor a plan. Their attempt at classwide proof relied on models that glossed over material factual differences between class members. The models at best established that some class members had viable claims. This record was an insufficient foundation for a judgment stating that the entire class was "entitled to additional compensation." The District Court could have salvaged the case by requiring plaintiffs to develop a feasible plan for identifying which class members were injured. Instead, the court authorized a premature and arbitrary classwide judgment.

The problem is not that plaintiffs tried to streamline the case with statistical evidence, but rather that the particular time study they offered failed to prove classwide liability. Correcting the misunderstanding of precedent that led to this mistake does not require fully answering the two questions presented. Broadly spurning "statistical techniques" or categorically prohibiting particular types of class actions would needlessly stifle the case-specific discretion animating Rule 23. Instead, the Court can provide helpful guidance by clarifying that aggregation of dissimilar claims: (1) cannot modify the substantive law that would apply to individual claimants if they litigated separately rather than

collectively; and (2) requires a feasible plan for resolving individualized issues.

Aggregation is not a form of alchemy that transmutes meritless claims into meritorious claims. A plaintiff who should lose on the merits if he sues as an individual should still lose if he raises the same claim as part of a group. Bundling claims may *reveal* merit by facilitating access to justice, but cannot *create* merit by altering the substantive law that would otherwise apply.

Plaintiffs failed to prove classwide liability under the applicable substantive law because their evidence overlooked material dissimilarities among employees with distinct jobs that required distinct gear. An individual employee in a non-aggregated suit would have needed to prove that he spent uncompensated overtime donning and doffing the gear used in his job. Evidence of how much time employees performing different jobs spent donning and doffing different gear would have been irrelevant if the differences were material to liability. Yet aggregation placed that irrelevant evidence at the center of the case. Plaintiffs' time study expert calculated the average time that employees across multiple departments spent donning and doffing. This approach disguised variations between class members, enabling meritless claims to blend in among valid claims. Plaintiffs' damages expert then incorporated the tainted time study into her calculations without accounting for the study's errors.

Recognizing that the plaintiffs' evidence did not address the liability standard applicable to each individual claim renders remaining factual disputes

moot. Tyson may have attempted to undercompensate workers and the disputed analytical methods might have conformed to norms among industrial engineers. But if expert witnesses asked the wrong questions, rigor and accuracy cannot redeem their answers. The jury at a minimum needed to know how much time each materially dissimilar subcategory of workers spent donning and doffing relative to how much compensation each subgroup received. Plaintiffs never provided that information, so the jury could not conclude that Tyson injured the entire class.

Reversal would be a frustrating result given the jury's verdict and extensive evidence that Tyson underpaid many employees. Other donning and doffing class actions have appropriately accounted for individualized issues; this one did not. Plaintiffs made poor choices about how to structure the case and the District Court erroneously endorsed their approach. An opinion from this Court highlighting the importance of fidelity to substantive law and careful management of individual issues would help courts avoid similar errors in the future.

The errors below do not necessarily foreclose continued certification. Plaintiffs should have an opportunity on remand to show that they can develop a feasible plan for resolving individual claims at a new trial. Vacating the judgment due to insufficient evidence and improper case management would enable the parties to litigate whether certification remains viable under a revised understanding of plaintiffs' burden of proof.

Given that the Court can reverse on narrow grounds that would clarify aggregation jurisprudence,

there is no reason to consider whether the class should have been certified or whether certification can be maintained. The best answer to the two broad questions that Tyson presents about whether statistical evidence and diverse classes are appropriate is: maybe, depending on the circumstances. Cataloging those circumstances in a single opinion would be neither possible nor prudent. A decision addressing matters beyond the District Court's context-sensitive errors would have unpredictable consequences in myriad fields where aggregation is fair and efficient.

ARGUMENT

I. Plaintiffs' Reliance on Averages Obscured Dissimilarities Between Individual Claims that Were Material to Liability

A simple hypothetical variation of the present case highlights the District Court's error. Suppose that an employee at Tyson's Storm Lake plant filed a complaint that was identical to Ms. Bouaphakeo's actual complaint, but without the class and collective action allegations. Further suppose that at trial, the plaintiff did not present any evidence about how much time she spent donning and doffing her gear and how much of this time was uncompensated. Instead, she proved how much time another employee in a different department spent donning and doffing materially different gear and how much that other employee was underpaid. The hypothetical plaintiff should lose: she must prove her own entitlement to damages, not someone else's entitlement. See 29 U.S.C. § 216(b) (employer is liable only "to the employee or employees affected" by underpayment);

Iowa Code § 91A.8 (employer is liable only "to the employee" that it "failed to pay"). Evidence about other employees in *similar* circumstances could be probative, but a plaintiff cannot rely entirely on evidence about materially *dissimilar* employees.

Relabeling the hypothetical claimant as a class member rather than a named plaintiff does not obviate proof that she was injured. Aggregation facilitates proof but does not dispense with the need for proof, alter the elements of a claim, or eliminate defenses.

If a class encompasses materially dissimilar members, the District Court must have a plan for resolving individualized issues before entering a classwide judgment. That required parsing of dissimilar claims never happened in this case. Instead, the plaintiffs' effort to blur distinctions between class members was a troubling example of how:

> [D]issimilarity creates subtle distortions in the presentation and assessment of claims and defenses that either inflate or dilute the perceived value of the overall class claim.… [T]hese distortions [include]: "cherry-picking" (the tendency of aggregate proceedings to generalize from examples that do not fully represent the diversity of individual claims), "claim fusion" (the process by which claims in the aggregate merge to assume characteristics that no individual claim possesses), and "ad hoc lawmaking" (the manipulation of substantive rules to assist in resolving or

> preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law).

Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1003 (2005) (footnote omitted).

Lawmakers may avoid the practical obstacles that dissimilarity poses for aggregation by designing substantive rules that do not require individualized proof. For example, a perceived need to "facilitate[] class certification" may have inspired the fraud on the market doctrine in securities law. *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). Similar reforms have reshaped other fields. See, *e.g.*, Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 Tul. L. Rev. 1633 (2000) (discussing rules that facilitate aggregate proof in implied and express warranty actions). A desire to bolster aggregate remedies can be an appropriate impetus for substantive innovation when drafting or interpreting statutes or when federal courts develop common law. In contrast, federal courts have no authority to circumvent inconvenient substantive rules in order to manage a particular trial. Neither Congress nor the Iowa legislature eliminated individualized elements of donning and doffing claims. Individualized elements therefore should have shaped plaintiffs' burden of proof.

A. Neither Rule 23 nor the FLSA's Collective Action Provision Modify Otherwise Applicable Liability Standards

1. Rule 23 Requires Fidelity to Substantive Law

Class actions are a valuable mechanism for *revealing* the merit of claims that otherwise might have been abandoned or litigated ineffectively. However, certification cannot *create* merit by changing the liability standard or foreclosing defenses. "There is a difference between allowing the resources that certification brings to polish a diamond hidden in the rough and allowing the pressure that certification brings to create a diamond from coal." Erbsen, 58 Vand. L. Rev. at 1043.[2]

First, Rule 23's text does not modify the otherwise applicable substantive law. Instead, the Rule posits that individual plaintiffs have "claims" before certification that will resemble the "claims" of class members after certification. Fed. R. Civ. P. 23(a)(3). Likewise, "defenses" to individual claims before

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[2] The plurality and dissenting opinions in *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.* made a similar point. See 559 U.S. 393, 409 (2010) (plurality opinion) (holding that class actions do not violate the Rules Enabling Act simply because they encourage plaintiffs to sue and raise the stakes for defendants); *id.* at 408 (plurality opinion) ("A class action … merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."); *id.* at 447 (Ginsburg, J., dissenting) (distinguishing between the "method of enforcing a claim" and "the claim itself").

certification will resemble "defenses" to class members' claims after certification. *Id*. Nothing in Rule 23's authorization of certification purports to transform the content of claims and defenses. See *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011) ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.").

Second, if there were any doubt that Rule 23's text preserves the otherwise applicable substantive law, the Rules Enabling Act would preclude a more "adventurous" interpretation. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999). The Act requires that "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Rule 23 therefore cannot be read to "modify" the elements of a claim under Iowa's Wage Payment and Collection Law (IWPCL).

The Court has repeatedly cautioned that applying Rule 23 requires sensitivity to the Enabling Act. See *Wal-Mart*, 131 S. Ct. at 2561; *Ortiz*, 527 U.S. at 845; *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 629 (1997). The District and Circuit Court decisions in this case suggest that the message has not been fully received. The Court might consider clarifying that compliance with the Enabling Act requires courts to assess the merit of claims in a class action using the same substantive standards that would apply if each claim were litigated individually. The *method of proof* may differ in a class action, but *what must be proven* remains the same. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10, 14 (1941) (holding that the FRCP can change the "process for enforcing rights" but cannot

alter the content of those rights under the "guise" of procedural reform).

Third, absent federal preemption, the *Erie* doctrine requires faithfully applying Iowa law. See *Erie R.R. Co.* v. *Tompkin*s, 304 U.S. 64 (1938). Neither party has raised preemption before this Court.

Accordingly, Rule 23 creates procedural efficiencies without authorizing substantive shortcuts. The boundary between procedure and substance is often opaque, but state law determines the facts that a claimant must prove to recover damages under a state statute. See *Marshall* v. *Marshall*, 547 U.S. 293, 313 (2006) ("It is clear, under *Erie*" that state law provides the "substantive elements" of a claim).[3]

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[3] Amici's analysis applies only to class actions in federal court. Rule 23, the Enabling Act, and *Erie* would be irrelevant in state court. Aggregating dissimilar claims in state court would raise additional questions, including whether the Due Process Clause prohibits application of state class action rules in a manner that modifies the otherwise applicable substantive law. See U.S. Const. amend. XIV, § 1. The constitutional question is more complicated than litigants typically acknowledge because a state court decision foreclosing defenses to individual claims could be characterized in two ways with distinct implications: (1) as circumventing substantive law, which might violate due process; or (2) as interpreting substantive law to deny the existence of defenses, which may be within the court's authority as an expositor of state law. See *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (discussing rejection of a reliance defense in a class action alleging fraud under Louisiana law). Addressing due process would entail several complex inquiries that the present record does not require or support. See, *e.g.*, Erbsen, 58 Vand. L. Rev. at 1040 (noting that modifying otherwise applicable substantive law may violate due

2. The FLSA's Collective Action Provision Provides a Remedy Without Altering Claims and Defenses

Collective actions under 29 U.S.C. § 216(b) can be an efficient mechanism for challenging broadly applicable payment practices. See *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989) ("The broad remedial goal of the statute should be enforced to the full extent of its terms."). But like class actions under Rule 23, collective actions under Section 216(b) do not obviate proof that each claimant was injured.

Section 216(b)'s text does not alter the content of claims in a collective action. The first sentence limits relief to workers who are "affected" by an illegal practice, and only in relation to the "amount" of their loss. 29 U.S.C. § 216(b). The third sentence authorizes collective remedies, but expressly incorporates the description of "liability prescribed" in the first sentence. *Id*. No language suggests that elements of a claim expand or contract depending on whether the claim is raised individually or collectively.

Accordingly, a claim that would lack merit under Section 216(b) if filed by a single employee suing alone

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process if a defendant is "unable to conform its conduct to rules that vary with the procedural context of a claim, thus rendering it liable to groups for conduct that is not illegal with respect to any individual member of the group."); Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319 (2012) (discussing historical evidence that complicates analysis of due process arguments in class actions); Judith Resnik, *Fairness in Numbers*, 125 Harv. L. Rev. 78 (2011) (noting that analyzing due process requires considering an array of public and private interests that litigants often overlook).

would still lack merit if filed by an employee who is part of a collective litigation unit. Collective actions streamline litigation but do not streamline claims.

Congress may of course amend the FLSA to facilitate proof of collectively filed allegations. For example, an amendment could enable employees to prove that an employer had a policy of miscalculating overtime, compel an employer with such a policy to pay a penalty, and allow equitable distribution of the penalty among employees without requiring proof that specific employees were underpaid. Such an amendment would make collective actions more effective tools for policing misconduct by employers.

The classwide judgment resembles what the hypothetical amendment to the FLSA would authorize. However, the judgment is inconsistent with what Congress currently requires.

B. Plaintiffs Failed to Prove Classwide Liability

Given that aggregation did not alter the substantive law applicable to each beneficiary of the classwide judgment, the Court confronts two questions. First, what facts would establish a violation of the FLSA and IWPCL? Second, did the jury receive evidence capable of proving those facts for the entire class? Reviewing the statutes and trial record establishes that plaintiffs failed to prove

required facts because they used aggregation as an excuse to circumvent substantive liability standards.[4]

1. The FLSA and IWPCL Required Proof that Tyson Underpaid Each Claimant

The FLSA and IWPCL condition liability on proof that each claimant: (1) spent compensable time donning and doffing that (2) was not compensated. Plaintiffs can potentially prove these facts using aggregate data, but only if the data accounts for variations that could prevent some claimants from establishing liability. For example, liability would not exist if an employee's donning and doffing occurred during paid shifts, if overtime payments covered pre- or post-shift work, or if the employee worked less than forty hours per week.

First, the FLSA conditions liability for overtime on proof that the employer underpaid each claimant by a specific amount. The statute creates a right to sue only when an "employee" alleges that "his employment" exceeded forty hours in a week. 29 U.S.C. § 207(a)(1). If the employee worked overtime, the statute entitles him to 150% of the rate that "he" normally earned. *Id*. Time spent donning and doffing is compensable as overtime only if "an employee"

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[4] The District Court instructed the jury that the IWPCL and FLSA impose "the same" "duplicative" standards, J.A. 479, and the large IWPCL class mostly subsumed the small FLSA class, J.A. 117. The parties therefore focused on the FLSA's substantive provision but not its aggregation provision, and they avoided the IWPCL's substantive language while emphasizing Rule 23. This case is therefore about how a federal procedural rule enforces a state law that duplicates a federal law governed by a different federal procedure.

alleges that the time is part of the "principal activity" in which "he" engages. *Id.* § 254(a). Damages are available only to "the employee or employees affected" by a violation. *Id.* § 216(b). Calculation of damages is based on "the amount" of wrongfully withheld compensation. *Id.*

Second, the IWPCL similarly conditions liability on proof that an employer withheld a specified amount from each claimant. Employees are entitled only to "wages" that are "due." Iowa Code § 91A.3(1). A "wage" is due only when "owed" as "compensation." *Id.* § 91A.2(7)(a). An employer that withholds required compensation is liable only "to the employee" for an amount based on the specific "wages" that it "failed" to pay. *Id.* § 91A.8. The statute is thus "remedial," focusing on a specific group ("employees" who are "owed" wages) for a specific purpose (enabling them "to collect wages"). *Hornby* v. *State*, 559 N.W.2d 23, 26 (Iowa 1997).

Statutory text linking liability to underpayment of each complaining worker means that donning and doffing claims are job-specific rather than plant-specific. Where the employee works is less important than what the employee wears. The fact that one employee was underpaid for donning and doffing one type of gear does not prove that an adjacent employee was underpaid for donning and doffing a materially different type of gear. A claimant may prevail only if the record contains proof that she was underpaid based on her own circumstances or those of her similarly situated coworkers.

This interpretation is consistent with the Court's opinion in *Anderson* v. *Mt. Clemens Pottery Co.*, 328

U.S. 680 (1946), on which plaintiffs rely. Br. in Opp. 5–9. *Anderson* might justify an imprecise calculation of damages when the entire class was injured, but it cannot justify a judgment for plaintiffs who never proved liability. In *Anderson*, the Court observed that "exactness and precision" in measuring unpaid overtime are often unattainable. *Id.* at 688. "[R]easonable inferences" from probative evidence can therefore suffice when defendants do not maintain comprehensive time records. *Id.* at 693. However, the Court conditioned its willingness to tolerate imprecise overtime calculations on proof that "damage" was "certain." *Id.* at 688. Each employee must prove that "he has performed work and has not been paid." *Id.* Nothing in *Anderson* suggests that a plaintiff can prove liability by showing that the defendant underpaid the "average" employee when the average obscures material variations.

Under *Anderson*, the appropriate manner of proving donning and doffing claims depends on the degree of variation among clothing requirements for different work groups. For example, imagine two hypothetical meat-processing plants that each employ one thousand workers who must wear cumbersome clothing. Plant *X* requires each worker to wear the identical uniform, while Plant *Y* employs three groups of workers who each wear materially different gear. Proving aggregate claims will be easier in suits involving Plant *X* than in suits involving Plant *Y*. An expert could study an appropriate sample of workers at Plant *X* and extrapolate donning and doffing times to the entire plant. But an expert studying Plant *Y* would need to analyze three distinct work groups and present distinct conclusions for each.

The problem in this case is that the District Court treated Tyson's Storm Lake facility like the homogenous Plant *X* even though it more closely resembled the heterogeneous Plant *Y*.

2. The Jury Had No Basis for Finding that Tyson Underpaid the Entire Class Because Plaintiffs' Time Study Ignored Material Dissimilarities Among Class Members

Plaintiffs' reliance on broad averages would have been appropriate only if class members were similarly situated. If the class was homogenous, then a statistical average would be an appropriate form of proof. An average would sacrifice accuracy about outliers—such as unusually speedy donners or lethargic doffers—for the sake of efficiently enforcing statutory rights. See *Steiner* v. *Mitchell*, 350 U.S. 247, 251 (1956) (apparently accepting finding in donning and doffing case that "each" employee spent "ten minutes in the morning and twenty minutes in the afternoon" bathing even though these uniform times presumably were averages). There is no reason to believe that the FLSA—which expressly contemplates collective litigation—requires all similarly situated workers to testify when a representative sample could prove the point.

If the class was materially heterogeneous, then expert testimony about overall average donning and doffing times could not establish classwide liability. For example, suppose that a statute requires employers to provide a twenty-minute break each day. A class of one hundred employees sues and the evidence eventually shows that forty received a ten-

minute break while sixty received a twenty-minute break. Most of the class clearly cannot prove liability—they received the required twenty-minute break. Yet the average break for the class as a whole was sixteen minutes. Expert testimony about the average would create an illusion that 100% of the class was underpaid by four minutes each, even though 60% were fully paid. Donning and doffing claims are more complicated than the hypothetical break claim, but the same principle applies: averages by definition disguise variations. Sometimes variations do not matter, in which case relying on averages can be fair and efficient. But if variations are material to liability, then averaging them away would ignore the substantive law.

The materiality of a variation is a question unique to each area of substantive law and each disputed fact. A decision that the factual variations in this case precluded averaging under the FLSA or IWPCL would not preclude using averages to efficiently establish different facts in different substantive contexts. See *infra* Part II(A).

The class in this case was heterogeneous and plaintiffs' evidence failed to account for material factual variations. This fact-bound oversight, rather than any inherent flaw in statistical reasoning, requires reversal for a combination of six reasons.

First, the record establishes at least three kinds of material factual variations: (1) some positions used distinct gear that required distinct donning and doffing times; (2) some work groups were subject to distinct practices for calculating overtime; and (3) some donning and doffing occurred during paid

portions of the work day. Amici will not repeat the extensive discussion of these variables in Tyson's brief. Pet. Br. 4–15, 29–34.

Although factual variations seem peripheral in light of evidence that Tyson often underpaid workers, the District Court still should not have entered a *classwide* judgment. Evidence of systematic underpayment was a good reason to aggregate claims. But evidence that these practices did not injure the entire class was a reason to manage variations rather than ignore them. The District Court should have developed a plan for identifying workers who could not prove liability. See *infra* Part II(B). This parsing could have occurred either during the trial or in a post-trial claims resolution process. Instead, the court skipped directly to a classwide judgment stating that all class members were entitled to compensation. The error is frustrating given the extensive resources that this case has consumed, but it is nevertheless inexcusable under the applicable substantive law. Small factual variations may be immaterial under many statutes, but the Court has interpreted the FLSA as being "*all about* … the relatively insignificant periods of time" required to donn and doff distinct gear. *Sandifer* v. *U.S. Steel Corp.*, 134 S. Ct. 870, 880 (2014) (emphasis in original).

Second, plaintiffs' time-study expert (Kenneth Mericle) admitted that he ignored factual variations between class members. Mericle conceded that he: (1) did not study a "random" sample (J.A. 378–79) and that up to 40% of the plant's workers did not wear various items that he included in his calculations (J.A. 392); (2) lumped all the plant's workers into two

groups—"kill" and "fabrication"—and provided an average donning and doffing time for each group (J.A. 361–62); (3) collapsed two distinct departments—"cut" and "retrim"—into the "fabrication" category (J.A. 363–64); (4) did not separately measure numerous "small departments" (*id.*); (5) made no effort to identify the "specific job an individual does" because doing so would "slow" his analysis (J.A. 355–56); and (6) recognized that plaintiffs' use of distinct gear distorted his averages yet made no effort to control for these variations. See J.A. 388 ("Q. One of the reasons for the difference in times is different combinations of clothing, right? A. Yes."); J.A. 376 ("I didn't differentiate between knife users and non-knife users.").

When confronted with his omissions, Mericle opined:

> I think, you know, that [the jury] could repeat the study using a different methodology if they wanted to ….

Tr. 1051. The jury was in no position to perform complex quantitative analysis on hundreds of video studies and thousands of spreadsheet entries. Plaintiffs themselves suggested when discussing Mericle's credentials that only a qualified expert was capable of such modeling. Tr. 827–40.

Mericle's indifference to factual variations among class members rendered him unable to parse meritless claims from meritorious claims. When an expert's "testimony does nothing to advance" a party's case, the Court "can safely disregard what he has to say." *Wal-Mart*, 131 S. Ct. at 2554.

Third, plaintiffs' damages expert (Liesl Fox) admitted that her damages calculations relied on Mericle's averages. J.A. 418. This was a fatal error because Fox conceded that liability was not linear. If lowering the estimated donning and doffing time for a particular worker reduced his weekly hours below the amount for which he had been fully compensated, then he had no claim. J.A. 424–25. For example, a 10% reduction in estimated donning and doffing time would not necessarily translate into a 10% reduction in damages; instead, damages could plummet to zero because there was no injury. Proving liability therefore required measuring the difference between: (1) the time for which employees doing a particular job were paid; and (2) the time the employees actually worked. Fox knew how much employees with particular job codes were paid, but she did not know how long they actually worked. She therefore could not prove classwide liability.

Plaintiffs cannot contend that differences between jobs were immaterial to liability because they had the burden of proving material similarity yet never systematically measured variations. Mericle needed to prove rather than assume that employee *A* in department *B* using equipment *C* spent a materially similar amount of time donning and doffing as employee *X* in department *Y* using equipment *Z*. Class certification does not create a presumption at trial that claims are materially similar; otherwise, certification would invert the substantive law's burden of proof. See *supra* Part I(A). Plaintiffs must in some fashion prove all class members' claims rather than forcing the defendant to disprove its liability to particular employees.

Even if the Court were inclined to impose classwide donning and doffing liability based on rough overall averages, the liability standard would presumably distinguish between "acceptably rough" and "too rough." Mericle and Fox failed to provide any data that would allow the Court to apply that distinction in this case. Their failure is especially salient in a legal regime where even a few minutes per week—which in other contexts might be immaterial—can be the tipping point between no liability and millions of dollars in damages.

Fourth, the jury rejected plaintiffs' estimates, yet had no other basis for finding classwide liability. Plaintiffs conceded that the jury awarded exactly 50% less than Fox calculated. Resp. C.A. Br. 44. This across the board reduction is exactly what Fox admitted the jury could not do because liability was not linear:

> Q. If the jury were to say no, Dr. Mericle's numbers are wrong, it is only half that, you can't just take half of your $6.6 million, can you?
> A. No, you cannot.

J.A. 424–25. After finding that plaintiffs' models were fundamentally inaccurate, the jury had no basis for awarding *any* classwide remedy given that numerous class members would lack a valid claim. Juries in many cases can permissibly award much less than plaintiffs request. But this case is unusual. The combination of non-linear liability, reliance on broad averages to obscure material variations among class members, and a 50% reduction in damages indicates that the judgment benefits claimants who were not

injured. A model supporting aggregate liability "need not be exact," but it cannot be "arbitrary." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1433 (2013).

Fifth, plaintiffs inadvertently highlighted the confusion their models had wrought. During closing arguments, they conceded that the class contained "about 3,344 people, not all of whom are due any money." Tr. 1721. Yet the jury awarded money to the entire class. The verdict form states that "the plaintiffs" are "entitled to additional compensation." J.A. 487. A subsequent claims proceeding that attempts to reject individual class members' claims could raise Seventh Amendment concerns. See U.S. Const. amend. VII ("no fact tried by a jury, shall be otherwise re-examined").

The District Court should have prevented this disarray by planning for a claims resolution process *before* submitting aggregate damages to the jury. See *infra* Part II(B). A post-trial claims proceeding is an appropriate way to allocate damages, but only if the initial judgment is structured to account for the additional litigation.

Finally, all remaining factual disputes are moot even if the record is construed in the light most favorable to the plaintiffs. Tyson could have sought to underpay its workers and obscure its misconduct with inadequate records. Mericle could in turn have used unassailable observational methods to calculate average donning and doffing times and Fox could have correctly analyzed millions of data entries. Even so, Mericle's time study ignored the governing substantive law by lumping meritless claims together with meritorious claims. *Comcast*, 133 S. Ct. at 1433–

34 n.5 (distinguishing factual accuracy of data from the legal question of "what those data prove").

Amici take no position on plaintiffs' argument that Tyson waived the foregoing objections to the classwide judgment. However, amici offer an observation about how to analyze waiver: adaptation to aggregation generally should not be treated as acquiescence. Defendants who unsuccessfully oppose aggregation cannot endlessly refight that lost battle at the expense of trying to win on the merits. Tactical decisions made in an effort to prevail at trial attempt to mitigate the alleged prejudice of aggregation without necessarily conceding that aggregation was appropriate. Treating these tactical decisions as waiving prior objections would punish the defendant for defending itself. Amici express no view about how this approach to waiver would apply to the present record.

C. The Appropriate Remedy Would Be to Vacate the Aggregate Damages Award and Remand for Consideration of Whether Plaintiffs Have a Feasible Plan for a New Trial

Getting lost in the labyrinth of aggregative procedure should not permanently preclude access to justice. Plaintiffs followed a path that both the District and Circuit courts thought was available. An appropriate remedy for this error would be to vacate the jury's aggregate damages award without foreclosing further aggregate proceedings.[5]

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[5] Plaintiffs prevailed on four of the verdict form's five questions. See J.A. 486–87. This brief focuses on the fifth question, which

The question for the Court to decide is what the certified class needed to prove in order to prevail. If classwide proof was insufficient, the propriety of continued certification would be an issue on remand. The parties would address certification with the benefit of this Court's assessment of the trial and a revised adjudication plan from plaintiffs. Prior donning and doffing cases in which claimants acknowledged and accounted for material variations among employees would provide a helpful template.[6]

Accordingly, the Court should reverse the denial of Tyson's motion for a new trial, with leave for Tyson to move for decertification on remand if plaintiffs fail to present a feasible adjudication plan. See *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 172 (2007); *City of Canton* v. *Harris*, 489 U.S. 378, 392 (1989).

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addressed aggregate liability and damages. Amici express no view about whether the errors invalidating the judgment on question five also affect questions one through four.

[6] See *Tum* v. *Barber Foods, Inc.*, 331 F.3d 1, 4–5 (1st Cir. 2003), aff'd in part, rev'd in part, 546 U.S. 21 (2005); *Farris* v. *Cnty. of Riverside*, 667 F. Supp. 2d 1151, 1154 (C.D. Cal. 2009). See also *Lugo* v. *Farmer's Pride Inc.*, No. CIV 07-0749, 2010 WL 5060994, at *2 (E.D. Pa. Dec. 10, 2010) (after court decertified donning and doffing action due to "extensive variation … [in] whether and by how much any given Plaintiff was unlawfully undercompensated," plaintiffs proposed six relatively homogenous subclasses and court agreed to try one as a test case).

II. The Record Does Not Warrant a Broad Inquiry into Context-Sensitive Questions About Statistical Evidence and Certification Criteria

Judicial decisionmaking benefits from "sharply presented issues in a concrete factual setting." *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403 (1980). The factual setting of this case does not present the full range of issues raised in the Petition. Specifically, the record does not require: (1) considering the general utility of "statistical techniques" such as averaging and sampling; or (2) deciding when courts may certify classes that contain a mix of injured and uninjured claimants.

Courts managing aggregate litigation apply flexible procedural and evidentiary standards to the circumstances of each case. A district court must "determine the course of proceedings" and "prevent … complication in presenting evidence," Fed. R. Civ. P. 23(d)(1)(A), consider "adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," *id*. at 16(c)(2)(L), and ensure that expert testimony is based on "sufficient … data" that is "reliably applied" to the "facts of the case," Fed. R. Evid. 702.

Flexible standards are difficult to apply in part because, as Judge Friendly observed, "no two cases will be exactly alike." *Abrams* v. *Interco Inc.*, 719 F.2d 23, 28 (2d Cir. 1983) (affirming denial of class certification on manageability grounds after close scrutiny of the record). Courts can assess whether a particular aggregative technique is appropriate only

by carefully considering the relevant facts, governing law, and proposed management plan. See American Law Institute, *Principles of the Law of Aggregate Litigation* §§ 1.03, 2.02, 2.12 (2010).

The importance of context suggests that the Court should approach the questions presented with caution and restraint. See *Waters* v. *Churchill*, 511 U.S. 661, 686 (1994) (Scalia, J., concurring) (noting that the Court should avoid a conclusion that is "superfluous to the decision in the present case" and "unpredictable in its application and consequences"). A single broad sentence in an opinion about pork processing could unsettle the myriad fields where class actions promote access to justice, including civil rights, antitrust, securities, and consumer protection.

A light touch would also be appropriate to accommodate the Enabling Act's rulemaking process. The Advisory Committee on Civil Rules has formed a subcommittee to consider potential reforms to Rule 23.[7] If revisions to certification and case management criteria are necessary, they should evolve through notice and comment rulemaking. This preference for rulemaking underlies the Court's holding that it is "bound to follow Rule 23" and is "not free to alter it except through the process prescribed by Congress in the Rules Enabling Act." *Ortiz*, 527 U.S. at 861. Even if the Court were "convinced" that a proposed "standard would more effectively promote the goals of" Rule 23, the Court "would not be free to implement this standard outside of the rulemaking process." *Bus.*

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[7] See *Rule 23 Subcommittee Report* (Apr. 2015), available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015.

Guides, Inc. v. *Chromatic Commc'ns Enters.*, 498 U.S. 533, 549 (1991). The Court strives "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989).

A. The Suitability of "Statistical Techniques" Depends on the Factual and Legal Context, Is Not an Issue in this Case, and Is Already Subject to Extensive Guidance

This Court presumably would not entertain a proposal to condemn the use of "mathematical techniques" in litigation. Even though many lawyers seem uncomfortable with math, litigation is often an exercise in quantification. Courts routinely estimate the costs and benefits of conduct, the amount of damages, and the probability that various events occurred.

The "statistical techniques" that the petition asks the Court to address are merely a species of math. Statistical evidence is neither categorically appropriate nor categorically suspect. Instead, statistics are context-sensitive tools that help courts decide if a particular fact is true or a particular argument is persuasive. See Fed. R. Evid. 102 (stressing importance of "ascertaining the truth and securing a just determination").

Like any tool, statistics can be misused. Statistical analysis can be poorly implemented in a context where it would otherwise be helpful, carefully implemented in a context where it does not belong, or rigorously applied in an appropriate context but given undue weight. The present case involves the use of averages where they did not belong because the time

study obscured variations among class members that were material to liability. Reversal on that narrow ground would obviate consideration of how courts adjudicating different cases under different substantive laws should evaluate different methods used by different experts for different purposes. Caution in addressing the use of statistics in aggregate litigation is especially appropriate for three reasons.

First, any discussion of statistics in this case will have unpredictable ripple effects because statistical analysis is ubiquitous in legal reasoning. Courts routinely rely on sampling, averaging, imputation, and extrapolation when applying myriad legal rules in myriad factual contexts. For example, this Court has relied on statistics when analyzing such issues as: discrimination based on race,[8] sex,[9] and national origin,[10] assessment of taxes under the Internal Revenue Code,[11] market dynamics under antitrust

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[8] See *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 339 (1977) ("[O]ur cases make it unmistakably clear that '(s)tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." (quoting *Mayor of Phila.* v. *Educ. Equal. League*, 415 U.S. 605, 620 (1974))).

[9] See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 270–75 (1989) (O'Connor, J., concurring in the judgment) (discussing precedent about the use of statistical evidence).

[10] See *Castaneda* v. *Partida*, 430 U.S. 482, 496 n.17 (1977) (analyzing statistical techniques used to prove intentional exclusion of Mexican-Americans from grand juries).

[11] See *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 243 (2002) (noting various statistical methods by which the IRS "*estimates* an individual's tax liability") (emphasis in original).

law,[12] congressional apportionment[13] and redistricting,[14] state enforcement of federal regulations,[15] and regulatory variances under the Clean Water Act.[16] Likewise, scholars have discussed the use of quantitative methods for analyzing a diverse range of additional issues, including the standard of care in medical malpractice suits,[17] consumer confusion in trademark infringement actions,[18] application of the federal sentencing

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[12] See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 341 (1962) ("There is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample.").

[13] See *Utah* v. *Evans*, 536 U.S. 452, 464–79 (2002) (discussing distinction between statistical "sampling" and statistical "imputation" or "inference").

[14] See *Abrams* v. *Johnson*, 521 U.S. 74, 98–101 (1997) (reviewing statistical evidence).

[15] See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 531 n.18 (1977) (rejecting contention "that States may not use valid statistical sampling techniques, including reliance on lot average weights, to police compliance with federal and valid state net-weight labeling laws").

[16] See *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council, Inc.*, 470 U.S. 116, 132 n.24 (1985) (rejecting challenge to the EPA's use of "statistical methodologies" to grant variances from effluent limitations).

[17] See William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 Duke L.J. 629, 631 (2001) ("The legal system should rely, whenever it can and far more than it now does, on statistical data about doctors' performance rather than on the opinions of experts about doctors' performance.").

[18] See Daniel Gervais & Julie M. Latsko, *Who Cares About the 85 Percent? Reconsidering Survey Evidence of Online Confusion in Trademark Cases*, 96 J. Pat. & Trademark Off. Soc'y 265, 293–95 (2014) (proposing nuanced analysis of survey data).

guidelines,[19] adjudication by administrative agencies,[20] and actuarial predictions of future dangerousness that influence detention of sex offenders[21] and imposition of the death penalty.[22]

The preceding list of fields infused with statistics blurs numerous distinctions between the methodology, purpose, and complexity of statistical evidence. That variation illustrates why restraint is necessary: critical distinctions could easily be overlooked if the Court assesses statistical tools such as averaging and sampling in the abstract rather than in a narrow and well-defined context. The Court might attempt to confine the precedential force of any opinion addressing statistical evidence to the specific

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[19] See Alan Julian Izenman, *Statistical Issues in the Application of the Federal Sentencing Guidelines in Drug, Pornography, and Fraud Cases*, in *Statistical Science in the Courtroom* (Joseph L. Gastwirth ed., 2000) (discussing use of sampling when sentences depend on calculating the amount of harm caused or the amount of items possessed).

[20] See Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2060–63 (2012) (considering how administrative law judges should review statistical evidence).

[21] See Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 Am. Crim. L. Rev. 1443, 1444 (2003) (contending that "actuarial methods have proven equal or superior to clinical judgments").

[22] See Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. L. & Criminology 1251, 1252 (2000) ("Studies have found the fate of capital defendants in Texas and Oregon is determined almost entirely by juries' deliberations on, and emotional responses to, the punishment inquiry concerning defendants' future dangerousness.").

facts of this case. But some seepage across doctrinal boundaries is inevitable because lawyers and judges will read the tea leaves for signs of the Court's approach to statistical methods.

Second, even if limited to the context of proving classwide liability in aggregate litigation, a discussion of statistical evidence would require more nuance then the present record could support. Scholars have repeatedly demonstrated that statistical evidence can either vindicate or undermine substantive rights in aggregate proceedings. Context is critical. Courts must consider the purpose for which statistics are used (such as proving liability, damages, or both), the specific methods employed, how and to what extent class members' factual circumstances materially vary, the elements of claims and defenses, whether cognitive biases might distort the presentation or perception of statistics, the interaction between statistical evidence and more traditional forms of evidence in painting a coherent picture for the trier of fact, and the costs and benefits of the best alternative to statistical evidence.[23] The Court has similarly observed that statistical models supporting aggregate litigation must account for the factual and legal context. See *Comcast*, 133 S. Ct. at 1433 (limiting its

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[23] See, *e.g.*, Robert G. Bone, *Normative Evaluation of Actuarial Litigation*, 18 Conn. Ins. L.J. 227 (2011–2012); Alexandra D. Lahav, *The Case for "Trial By Formula,"* 90 Tex. L. Rev. 571 (2012); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 Minn. L. Rev. 1459 (2015); Laurens Walker & John Monahan, *Sampling Liability*, 85 Va. L. Rev. 329 (1999); sources cited *infra* notes 24–25.

analysis to a particular econometric model in an antitrust class action).

The failure of two witnesses to analyze one slaughterhouse does not signal a deeper problem requiring comment from the Court. Plaintiffs' time study was flawed because it ignored the governing substantive law. See *supra* Part I(B)(2). This error should not indict the use of averaging and sampling in countless cases by experts in such diverse disciplines as economics, political science, environmental studies, psychiatry, epidemiology, criminology, and sociology.

Third, to the extent the Court is concerned that lower courts need guidance about the proper use of statistics, ample guidance already exists. For example, the Federal Judicial Center's *Reference Manual on Scientific Evidence* devotes 297 pages to statistical analysis,[24] and treatises cover statistical evidence at length.[25] Calling attention to these sources would be helpful, but an extended discussion of "statistical techniques" divorced from the time study in this case could do more harm than good.

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[24] *Reference Manual on Scientific Evidence* 211–423, 549–632 (3d ed. 2011) (chapters on "statistics," "multiple regression," "survey research," and "epidemiology").

[25] See 1 David L. Faigman et al., *Modern Scientific Evidence* §§ 6:1–6:55 (2014) (chapter on "statistical proof"); David H. Kaye et al., *The New Wigmore: Expert Evidence* §§ 12.1–12.10 (2014) (chapter on "statistical studies"); 4 William Rubenstein et al., *Newberg on Class Actions* §§ 11:1–11:21 (5th ed. 2012) (sections on proof at trial); 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* §§ 8:6–8:13 (11th ed. 2014) (sections on "Aggregate proof" and "statistical evidence").

The Court has correctly observed that statistics "come in infinite variety" and that their "usefulness depends on all of the surrounding facts and circumstances." *Int'l Bhd. of Teamsters*, 431 U.S. at 340. Questions about the utility of statistical evidence should "be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

B. The District Court's Failure to Develop a Feasible Management Plan Does Not Require Reconsidering Precedent Governing Certification When Some Class Members Might Be Unable to Prove Liability

The Court should not fully address the second question presented, which asks whether a class or collective action "may be certified or maintained" if some claimants were "not injured." Pet. Br. i. Answering this context-sensitive question would require reconsidering settled precedent on an inadequate record. Instead, whether the case can continue as a class action or collective action should be an issue on remand. See *supra* Part I(C).

First, this issue does not involve "standing" (Pet. Br. 46) for the same reason that standing is not retroactively a concern in ordinary litigation when plaintiffs lose on the merits. For example, suppose that four employees joined donning and doffing claims under Fed. R. Civ. P. 20(a)(1), there were no class allegations, the plaintiffs survived a motion to dismiss

for failure to state a claim, and at trial three plaintiffs prevailed and one lost. The Court would not treat the losing plaintiff as lacking "standing"; he simply failed to prove a claim. See *Bond* v. *United States*, 131 S. Ct. 2355, 2362 (2011) (observing that "conflation" of merits and justiciability issues "can cause confusion"). Likewise, "standing" is not the relevant inquiry when class actions identify some claims as meritorious and some as meritless because Rule 23 is, like Rule 20, a "species" of "traditional joinder." *Shady Grove*, 559 U.S. at 408 (plurality opinion).

Second, Rule 23's text expressly contemplates that "questions affecting only individual" class members may cause some to lose while others prevail. Fed. R. Civ. P. 23(b)(3). The prospect that some class members' claims will lack merit requires careful case management but does not categorically preclude certification. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) ("That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate."); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997) (requiring "caution" rather than a categorical bar when "disparities among class members [are] great"). If there is confusion about this point, evolving doctrine addressing "ascertainability" will present more direct opportunities to address the issue.[26]

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[26] *Byrd* v. *Aaron's Inc.*, 784 F.3d 154, 161–71 (3d Cir. 2015) (collecting cases). Amici express no view about whether "ascertainability" is a sensible concept or how it should apply.

Third, the critical problem below was that the District Court improperly managed the trial by failing to account for factual variations among class members. The judge who certified the class found that "dissimilarities" existed but believed they would be "manageable." Pet. App. 90a. That judge never had an opportunity to manage variations because the case was transferred to another district. Pet. App. 5a. The transferee court did not adapt as the case evolved.

District Courts managing aggregate litigation must make decisions "informed by the proceedings as they unfold." *Amchem*, 521 U.S. at 620. Here, the court overlooked mounting evidence that a classwide judgment would be premature. After Mericle and Fox testified, the District Court should have realized that plaintiffs: (1) had not proved classwide liability; and (2) had no plan for a post-trial claims resolution process. The court should have anticipated these problems before the trial, but in any event was required to react when the problems arose. By failing to adjust as the class action unraveled, the District Court overlooked its "unique responsibilit[y]" to provide "active judicial management" in aggregate proceedings. *Manual for Complex Litigation*, *Fourth*, § 21.

The District Court's error presents an opportunity for this Court to provide guidance about case management. At early stages of litigation some courts "overestimate their ability to cope with the burdens that class actions impose." Erbsen, 58 Vand. L. Rev. at 1046. Certification then "creates momentum that courts may be unwilling to halt." *Id.* at 1047. Requiring a "feasible" plan can help courts make a

"realistic assessment of how a case can be litigated" before they go too far down an unproductive path. *Id.* at 1046–48. Courts should therefore develop an "adjudication plan" addressing both "common" and "remaining" issues. ALI *Principles* § 2.12(a)(3). Planning can avoid ill-considered "shortcuts" that attempt "to squeeze heterogeneous claims into a homogenous mold" in order to manage "dissimilarity" among class members. Erbsen, 58 Vand. L. Rev. at 1009.

Careful planning in this case might have led to a more refined presentation of evidence. Alternatively, if planning revealed that aggregation was not feasible, the court and parties would have been spared the expense of trial.

Finally, this case is an anachronism. It was certified before *Wal-Mart* redefined commonality, and it was tried before *Comcast* reconsidered statistical evidence and *Sandifer* reinterpreted the FLSA. Settled precedent requires vacating a classwide judgment based on a poorly constructed time study that glossed over material variations among individual claims. A new opinion might clarify the importance of fidelity to substantive law and the need for feasible management plans. Any additional issues should await future cases with appropriate records.

CONCLUSION

Jurisprudence governing aggregation should be sensitive to the diverse contexts in which it operates. Vacating the classwide judgment on narrow grounds would recognize the fact-bound nature of the errors below, provide guidance that could avoid similar errors in the future, and preserve flexibility to employ aggregative procedures in cases where they are fair and efficient.

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