No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL.,

Respondents.

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

AMICUS CURIAE BRIEF OF BRAUN AND HUMMEL IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former Pennsylvania employees ("Employees") of Wal-Mart Stores, Inc. and Sam's Club ("Wal-Mart") who experienced systemic wage theft by Wal-Mart during the period 1998 through 2006. In 2002, Employees filed a wage-and-hour class action against Wal-Mart in Pennsylvania claiming, among other things, that Wal-Mart's centralized "Preferred Scheduling System"—which staffed the stores not by the man-hours required to do the job but instead by the total wage expense necessary to improve store profits year-to-year—imposed such payroll pressure and understaffing that hourly employees had to work through their promised paid breaks and off-the-clock.

After Employees prevailed at trial, in the Pennsylvania Superior Court, *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. 2011),[2] and in the Pennsylvania Supreme Court, *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656 (Pa. 2014), Wal-Mart

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[1] Letters of consent from the parties to the filing of all *amicus* briefs have been filed with the Clerk of Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, nor did any person or entity other than *amici*, their members, or their counsel make a monetary contribution to its preparation or submission.

[2] Michelle Braun and Dolores Hummel were named representatives of separately filed plaintiff classes, consisting of Wal-Mart employees and making similar allegations. The two class actions were consolidated for trial in the Pennsylvania courts.

filed two petitions for certiorari in this Court,[3] claiming that Employees' reliance on Wal-Mart's own employment and wage policies, as well as its regularly maintained business records and internal audits, somehow denied the company due process and that allowing the jury to draw an adverse inference from the period when Wal-Mart stopped keeping those records, specifically in anticipation of litigation, amounted to an improper "Trial by Formula," arguments emphatically rejected by the Pennsylvania Supreme Court. *Id.* at 665. Those Petitions are still pending before this Court.

Remarkably, Wal-Mart has filed an *amicus curiae* brief in support of Petitioner Tyson Foods, Inc., that elides Wal-Mart's own spoliation of evidence and unabashedly argues that arithmetic extrapolations from existing corporate time records may never be used by employees—whether individually, collectively, or in a class action—to prove the hours for which the employees were not paid.

To rebut Tyson's and its *amici*'s misstatement of what actually happens in these cases and Wal-Mart's imaginative retelling of its experience in Employees' litigation, Employees submit this *amicus* brief.

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[3] The largely identical petitions seek certiorari separately from the decision of the Pennsylvania Supreme Court (No. 14-1124), as well as an issue decided by the Pennsylvania Superior Court (No. 14-1123) that the Pennsylvania Supreme Court declined to take up.

INTRODUCTION AND SUMMARY OF ARGUMENT

Wage theft happens. Tyson tells this Court that "Rule 23(b)(3) does not authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were." Pet. 4. But the damages owed by Tyson here have nothing to do with Federal Rule of Civil Procedure 23(b)(3). Instead, the damages arose out of substantive labor law principles that permit a "just and reasonable inference," where, as here, an employer has failed to keep "adequate and accurate" records of all hours worked. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946), *superseded by statute on other grounds*, Portal-to-Portal Act of 1947, Pub. L. No. 49-52, § 5, 61 Stat 84, 87 (May 14, 1947) (codified at 29 U.S.C. § 216(b)).

Had Tyson maintained such records for all donning and doffing work times, as they are required by law and a permanent injunction to do, the parties would have had precise and individualized quantification of the wages owed to each worker. Tyson's failure to keep such records meant that the workers, individually and collectively, had to present substitute evidence of the uncompensated work times. Had each of the workers proceeded with an individual case, they each would have had to provide the same substitute evidence—a time and motion study—to meet the "just and reasonable inference" standard. Presenting that same study in replicated proceedings before 2,300 separate juries at 2,300 separate trials would not and could not implicate Rule 23(b)(3), as Tyson would nevertheless contend that the time and motion study was flawed and could not be used. Hence, Tyson's real complaint is not

about Rule 23(b)(3) or the class proceedings below; it is about the Court's jurisprudence under *Anderson*, and the adverse inferences courts and juries are permitted to draw from an employer's failure to keep records of all hours worked. This Court should not interpret Rule 23 to alter or abridge these longstanding and oft-stated principles of civil damages law, particularly as they apply to labor law.

Thus, Petitioner and its *amici* misstate the issues involved in this case. Properly understood, the sole issue is one of federal and state labor law, to wit, whether an employer who fails to keep adequate or accurate records of employee work times may prevent those employees—whether individually or in the aggregate—from relying on an industrial engineering study to provide a "just and reasonable inference" that the employee performed work for which he or she was improperly compensated. Such replicated proof, rather than mask differences among employees, instead supplies substituted evidence of work from which a factfinder may or may not infer improper compensation by the employer. An interpretation of Rule 23 that would prohibit such proof would, in fact, alter substantive labor law and run afoul of the Rules Enabling Act, 28 U.S.C § 2072(b) (the "rules shall not abridge, enlarge or modify any substantive right").

In this respect, Tyson and its *amici* do not and cannot dispute that Tyson had the duty to maintain adequate and accurate records of employee work times, including donning and doffing time. *See*, *e.g.*, Iowa Code Ann. § 91A.6 (employer required to maintain and preserve records of all hours worked); 29 U.S.C. § 216 (same); *Reich v. IBP, Inc.*, No. 88-2171, 1996 WL 137817, at *9 (D. Kan. Mar. 21,

1996), *aff'd sub nom.*, *Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997) (issuing permanent injunction to predecessor owner of Tyson's plant to maintain accurate time records of employee donning and doffing activities); *Anderson*, 328 U.S. at 686-87. Tyson and its *amici* also do not and cannot dispute that Tyson's records of donning and doffing time for each of the class employees were "inaccurate or inadequate," as ordered in *Reich* or described by this Court in *Anderson*, 328 U.S. at 687. Indeed, Tyson conceded below that the four minutes of K-code time did not cover the donning and doffing of all protective gear and certain walking time. JA 121-22, 176, 439-40. Thus, the question for each of the class employees, assuming each proceeded individually, was whether he or she could rely on a standard time and motion study—used every day by countless industries—to meet the employee's burden to show "that he has in fact performed work for which he was improperly compensated . . . as a matter of just and reasonable inference." *Anderson*, 328 U.S. at 687. This is and was a question of substantive labor law and evidentiary burdens of proof having nothing to do with class certification procedures.

As a matter of substantive law, penalizing employees (whether individually or in the aggregate) for the absence of accurate time records would only encourage employers to fail to keep proper records. *Id.* Nothing prevented Tyson from rebutting Respondents' proof at the trial below, as it was free to call its own experts and even absent class members to show that Respondents' study was flawed or inadequate to supply a "just and reasonable inference." The class posture of the case had nothing to do with these trial realities, and

ought not mask Tyson's real attack on *Anderson* and its progeny.

ARGUMENT

I. When Employers Spoliate or Fail to Maintain Business Records, an Adverse Inference Is Required.

Tyson and its *amici* ignore the fact that there were two principal questions at issue below: (1) was the line-prep, donning and doffing time (beyond four minutes) compensable work?; and (2) assuming such time was work, how much time over the four minute K-code time did an employee work for which he or she was not properly compensated?

The first question was a common, predominating question regardless of whether any employee took more than four minutes, because if it was not work, no one could ever recover. If it was work, then the only issue would be how much time did it take? *See Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (holding that preliminary and postliminary activities "integral and indispensable" to the employee's principal activity constitute "work"); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1634 (2012) (holding that "the *Steiner* test is applicable to issues of donning and doffing at the beginning and the end of work shifts in the poultry processing industry"); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) (same). Because this "work" issue was both common and predominating, there can be no dispute that the lower courts properly certified the classes under both Rule 23 and 29 U.S.C. § 216(b). Indeed, Tyson's Questions

Presented impliedly concede this point by admitting that some members of the employee class performed "work" for which they were not compensated.

The second question of "how much work time" ordinarily would have been a "mechanical," arithmetic task—"not for a trier of fact but for a computer program"—had Tyson kept accurate and adequate records of the donning and doffing time. *See*, *e.g.*, *Johnson v. Meriter Health Servs. Employee Retirement Plan*, 702 F.3d 364, 372 (7th Cir. 2012). Had Tyson kept such records, they would have been introduced and summarized as business records at trial, and Tyson would then have had to challenge or rebut its own payroll records. Such a challenge also would have presented a common, predominating issue under both Rule 23 and 29 U.S.C. § 216(b). *See Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 966-67 (9th Cir. 2013), *cert. denied,* 135 S. Ct. 53 (2014) ("In light of these [business] records, it would not be difficult to determine USSA's liability to individual plaintiffs, nor would it be overly-burdensome to calculate damages," creating a common, predominating issue whereby the class "will prevail or fail in unison").[4]

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[4] In *Braun*, the Pennsylvania trial and appellate courts recognized and held that a corporation's challenge to its own payroll records clearly presents a common, predominating question having a common answer in classwide proceedings. *See Braun*, 24 A.3d at 936-37, 945-46 ("'It is unusual in the extreme for Wal-Mart, who relies on their records for business purposes to contend that although required by law to be created and maintained, their records are so unreliable that they cannot constitute prima facie proof of their contents.'" (quoting trial court opinion)). *See also Salvas v. Wal-Mart Stores, Inc.*, 893

Because Tyson did not keep records, a "just and reasonable inference" based on substitute evidence was required. Subjective, faded memories from the employees might supply some inference, but a properly constructed study (of the time it usually takes to do something) would provide a "just and reasonable inference." An industrial engineering study of time and motion thus could be offered by each employee (whether this was a class action or not) to prove the "how much," as set forth in *Anderson*. Hence, the attack on the time and motion study has nothing to do with class certification issues.

If each of the employees would rely, necessarily, on the same time and motion study, and if the flaws of that study would be the same whether the class was certified or not, then the issue of the study's adequacy to calculate the "how much" would be identical for all and would predominate for all, so as to justify one proceeding to test the inferences, if any, arising from the study. The "how much" question, therefore, concerns issues of proof under substantive labor law not class certification. Dissimilarities among class members are beside the point, because the real issue was and is: what is the usual time it takes to do something (*e.g.*, drive from Boston to New York; prepare a hard-boiled egg; commute by train from New York to Washington,

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N.E.2d 1187, 1205-06 (Mass. 2008) ("Business records have a special place in our law of evidence. . . . Wal-Mart's business records at issue in this case satisfy all of the requirements to be afforded the usual presumption of reliability."); *Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710 (N.J. 2007) (same).

D.C.)?[5] With records, different circumstances on each day would, of course, be measured precisely, but the

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[5] In this respect, the arguments about "dissimilarities" among class members reflected in the *amicus* brief of the "Civil Procedure Scholars" are both mistaken and extra-textual. They are mistaken because the usual time it takes to perform a task like donning and doffing protective gear is an evidentiary question, not a Rule 23 question. Because Tyson employees rotated through different jobs, JA 210, 234-236, the time and motion study provided a "just and reasonable inference" that the employees were, in fact, underpaid, regardless of whether the study was admitted in individual as compared to representative proceedings.

The arguments are extra-textual because Rule 23(b)(3) requires "predominance," not "resolvability," as argued by the *amicus* brief. *See* Civ. Pro. Scholars Br. 5-23; *see also* Alan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1080 (2005) (arguing that dissimilarity among class members and their claims is significant and that "resolvability" should be the test for class certification). The difference is significant because "predominance" does not alter or abridge substantive labor law but "resolvability" does.

Where the same challenges to and alleged flaws of the time and motion study would be raised in each of 2,300 individual wage and hour cases (given the absence of any Tyson records), the issues raised by the challenges and alleged flaws undoubtedly "predominate," making one class proceeding far superior to 2,300 individual and redundant trials. If Rule 23(b)(3) were amended to instead require "resolvability," any study, projection, or extrapolation of the usual time it takes to perform a task would necessarily overcompensate the fast and undercompensate the slow without materially changing the defendant's net liability. Yet, such a test would alter

wrongdoer who failed to keep the records should not prevail due to the absence of such records. As the Court has stated repeatedly, "it does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury it has itself inflicted." *See*, *e.g.*, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) (citations and internal quotation marks omitted).

Common substitute proof, *e.g.*, an industrial time and motion study, to supply inferences is appropriate where an employer has failed to keep adequate and accurate time records just as an adverse inference is appropriate where an employer has affirmatively spoliated such records. That was and is the case in *Wal-Mart Stores, Inc. v. Braun,* Nos. 14-1123 & 14-1124. There, extrapolations from pre-spoliation time records were performed primarily because Wal-Mart purposefully stopped keeping records during the pendency of wage and hour class actions, specifically to prevent their use in litigation. *See* No. 14-1123, Pet. App. 285a ("evidence at trial clearly revealed that the corporate response to class action lawsuits filed in many states . . . was to cease all record keeping for rest break periods"). This Court has recognized that all courts have the inherent authority "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). An adverse inference from such spoliation is such a sanction, one that allows the judge as gatekeeper to determine whether to permit the

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and abridge the substantive "just and reasonable inference" standard by mandating individualized actual proof, which conflicts with *Anderson*.

factfinder to determine the appropriateness of its application.

Spoliation occurs when evidence is not preserved, and "litigation is 'pending or reasonably foreseeable.'" *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). *See also Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). The sanction for such misconduct "should be designed to" deter future spoliations, "place the risk of an erroneous judgment on the party who wrongfully created the risk," and "restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). After all, "[i]t has long been the rule that spoliators should not benefit from their wrongdoing." *Id.*

This Court has regarded the destruction of documents in anticipation of litigation to be spoliation "of unusual aggravation, and warrants the most unfavorable inferences as to ownership, employment, and destination." *The Bermuda*, 70 U.S. 514, 550 (1865). The types of sanctions for spoliation "include dismissal of the case, the exclusion of evidence, or a jury instruction on the 'spoliation inference.'" *Vazquez-Corales v. Sea-Land Serv., Inc.*, 172 F.R.D. 10, 13 (D.P.R. 1997) (citation omitted); *see also Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 513 (6th Cir. 2014) (same). The "most frequently-awarded issue-related sanction is deeming facts established for purposes of the

litigation." Jamie S. Gorelick, *et al.*, *Destruction of Evidence* § 3.16, at 111 (2015).

No circuit and no state supreme court has ever suggested that an adverse inference instruction raises a due-process concern. Instead, all are plainly comfortable with such a sanction. *See*, *e.g.*, *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 554 (6th Cir. 2010); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002). Moreover, courts consistently find that "holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction." *Kronisch*, 150 F.3d at 128.

In Employees' action against Wal-Mart, pending before this Court, Wal-Mart attempted to thwart Employees' proof of their claims by changing its time-keeping records to stop recording employee breaks. The internal company emails and other corporate records attached in the Appendix to this Brief show that Wal-Mart changed the "Break and Meal Period Policy to eliminate punching out and in for breaks . . . because they have received a class action lawsuit by some opportunistic lawyers to recover many millions of dollars on behalf of the 'thousands' of associates who 'regularly' have their breaks cancelled with no make up break granted." Ex. A, reproduced from record in Nos. 14-1123 & 14-1124, R. 4264a-4266a; *see also* Exs. B & C, R. 4263a & R. 9231a. The trial court in *Braun* instructed the jury that it could draw an adverse inference from Wal-Mart's spoliation of evidence, and Wal-Mart did

not object to or appeal from the adverse inference instruction. *See* No. 14-1123, Pet. App. 285a.

That Wal-Mart, "the nation's largest private employer" (Wal-Mart Amicus Br. 1), would intentionally spoliate evidence to thwart wage and hour claims by its hourly employees implicates the issues raised in the instant appeal. Where employers fail to maintain, cease keeping, or otherwise spoliate records of all hours worked by employees, employees must be able to rely on an adverse inference to establish their wage-theft claims. This rule should apply whether the claims are litigated individually, collectively, or on an aggregate basis through a class action. A contrary rule would penalize hourly employees, discourage the retention of corporate time records, and reward the destruction of evidence.

These spoliation principles animate the Court's jurisprudence under *Anderson* and its progeny, all of which emphasize that an employer has the duty to keep "adequate and accurate" time records, and that employees may prove damages in the absence of such records based on "just and reasonable inferences" from substitute evidence. Hourly employees should not be punished where, as here, an employer has failed to fulfill its statutory and court-ordered duties.

II. This Court Has Applied a "Just and Reasonable Inference" Standard for Damages in Dozens of Different Cases, Including Class Actions, for More Than 100 Years.

The "just and reasonable inference" standard is not confined to wage-and-hour claims. In fact, the

Court has relied on the standard in countless contexts, including antitrust, consumer, commercial, and even criminal cases.

For example, in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), the Court said that "where the defendant by his own wrong has prevented a more precise computation, . . . the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Id.* at 264 (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931); *Eastman Kodak Co. v. S. Photo Material Co.*, 273 U.S. 359, 377-79 (1927)); *see also Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 573 & n.31 (1990)). The Court explained that the "principle is an ancient one, *Amory v. Delamirie*, 1 Strange 505 [King's Bench, Lord Pratt, CJ (1722)], and is not restricted to proof of damage in antitrust suits." 327 U.S. at 265. According to *Bigelow*, the ancient common-law principle has been applied in a multitude of contexts because "the wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." *Id.* "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." *Id.*

In *Hetzel v. Baltimore & O.R. Co.*, 169 U.S. 26 (1898), the Court discussed and applied similar principles in the context of a trespass and nuisance action in which a railroad illegally installed tracks

that blocked a property owner's access to and sale of her property. Because the illegally placed tracks prevented any offers for the lot, the plaintiff had to estimate her damages, which the lower courts rejected, awarding just nominal damages of "one cent." This Court reversed, observing that "absolute certainty as to the damages sustained is in many cases impossible." *Id.* at 37. According to the Court, the rule in all civil actions for damages, whether based on tort or contract, is not that damages be proved "with the certainty of a mathematical demonstration," but instead be "founded upon inferences legitimately and properly deducible from the evidence." *Id.* at 38.

This Court applied the same principles and expressly approved of extrapolations to prove damages in *Eastman Kodak Co. v. S. Photo Materials Co.*, 273 U.S. 359, 376-79 (1927). In that case, the Court upheld a jury verdict that found damages based on "the profits earned by the plaintiff during the preceding four years in which it had been a customer of the defendant," concluding "that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent, and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference." *Id.*

In the same context, the Court has since emphasized that it is important not to "blur[] the distinction between the liability and damages issues." *Texaco*, 486 U.S. at 572. And, many lower courts have applied the same principles in the context of criminal, antitrust, and similar wage and hour cases. *See*, *e.g.*, *United States v. Sharp*, 400 Fed. Appx. 741, 745-46 (4th Cir. 2010), *cert. denied*, 562 U.S. 1272 (2011) (approving use of random sampling

and statistical analysis of over 15,000 Medicare claims in Medicare fraud prosecution of osteopath); *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 533-35 (6th Cir. 2008), *cert. denied*, 556 U.S. 1152 (2009) (finding expert market evidence, though discounted by the jury, was sufficient to support damages award and did not result in a "fluid recovery"); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1272, 1277 (11th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009) (upholding jury verdict in favor of hourly workers, holding that "[t]he jury's verdict is well-supported not simply by 'representative testimony,' but rather by a volume of good old-fashioned direct evidence").

All of these authorities make clear that the ancient, common-law standard of "just and reasonable inference" for the proof of damages is wholly distinct from the procedural reach of Rule 23 and the collective action principles of § 216(b). The standard is one of substantive law that should not be altered or abridged by a unique or novel interpretation of a procedural rule. Whether some Tyson class members in theory may be undercompensated by the aggregate damages award while others are overcompensated does not detract from the fundamental principle that the damages on the whole inflicted by Tyson were and are supported by a "just and reasonable inference" from an industrial time and motion study properly admitted in evidence and considered by the jury, just as 2,300 separate juries could consider the same study in awarding individual damages. In fact, there can be no doubt that all members of the Tyson class will be bound by the judgment below, so any dissimilarities among them are wholly irrelevant and have no effect on *res judicata*. *See Cooper v Federal Reserve Bank*, 467 U.S. 867, 881 (1984); *Hansberry v. Lee*, 311 U.S.

32, 43-44 (1940); *Fayerweather v. Ritch*, 195 U.S. 276, 302 (1904). How the aggregate damages are ultimately allocated to employee class members is, therefore, no concern of Tyson's, and cannot provide a basis for vacating the jury verdict and judgments below. *See Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005) ("[A] defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves.").

III. Where Employers and Businesses Regularly Rely On Business Records, Class Claimants May Also Rely On Such Records as Proof at Trial.

Employers throughout the country create and retain a wide range of business records to comply with or receive benefits from federal and state tax laws, employment laws, and other laws. Employers routinely rely on their own personnel records and a range of other business records to successfully defend against actions filed by their employees. And while workers commonly rely on their employers' records to prove their employment-related claims, they usually have a *far greater* need to discover and proffer employers' records as evidence, because employers ordinarily have exclusive access to the relevant records, while workers ordinarily have the burden of proving that their employers violated the law.

When workers seek to vindicate their rights collectively, it is vital that they can rely on their employers' business records to prove their claims. In *Braun*, the Employees relied on millions of existing Wal-Mart business records to establish the wage violations. *Braun*, 106 A.3d at 660-61 (explaining

"[a]t trial, Dr. Baggett testified that he had been provided the hourly employee time clock, rest break, and payroll records for all 139 Wal-Mart stores in Pennsylvania for the period from 1998 through early 2006, which amounted to 46 million individual shifts."). The Pennsylvania Supreme Court specifically held that

> the now-disapproved "trial by formula" process at issue in *Dukes* was not at work here, because there was no initial or prior adjudication of Wal-Mart's liability to a subset of employees that would then be extrapolated to the rest of the class . . . . [T]he evidence of Wal-Mart's *liability* to the entire class for breach of contract and WPCL violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits.

Id. at 665 (emphasis in original). Where an employer destroys, corrupts, or fails to maintain payroll records required by law, it should not receive a procedural ruling that would preclude substitute evidence or an adverse inference.

In actions seeking to recover lost wages or employee benefits, employers' payroll and other business records are often capable of answering common questions for all class members.[6] Thus, it is

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[6] *See*, *e.g.*, *Alvarez v. City of Chicago*, 605 F.3d 445, 449 & n.1 (7th Cir. 2010) (reversing the denial of certification and dismissal of federal overtime collective action and noting that the individual facts in "payroll and

unsurprising that "numerous courts have found that wage claims are especially suited to class litigation—perhaps the most perfect questions for class treatment—despite differences in hours worked, wages paid, and wages due." *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 359-60 (E.D.N.Y. 2011) (internal quotations and citations omitted) (granting certification of class alleging prevailing wage violations and concluding "a class action is the most efficient way to resolve the same claims at issue here" as "plaintiffs may calculate class damages by applying a common formula to data culled from defendant's electronic records").

A. Statistical evidence is routinely admitted in class actions.

Parties frequently use statistical evidence to support factual findings as well. Of course, the opposing party has the opportunity to challenge these findings by contesting the methodology employed to reach the conclusions, but these

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time records" will determine how much individual class members are owed); *Morgan*, 551 F.3d at 1239, 1277 (affirming jury verdict in favor of class of employees who used employer's payroll records to establish that they "routinely worked 60 to 70 hours a week and to quantify the overtime wages owed to each Plaintiff" and noting that the business records introduced constituted "good old-fashioned direct evidence"); *U.S. Dep't of Labor v. Cole Enters.*, 62 F.3d 775, 780 (6th Cir. 1995) (holding payroll records undermined employer's claim that it had paid its restaurant workers the minimum wage); *Sperling v. Hoffman-La Roche*, 24 F.3d 463, 472 n.16 (3d Cir. 1994) (noting that "employers generally have business records containing the vital statistics and work histories of their past employees").

challenges are common to the class. When properly compiled and described, such evidence is routinely admitted. In class actions and complex business disputes, such evidence is often the only feasible way for the fact finder to answer certain questions. Litigants commonly rely on aggregate, statistical evidence in a variety of areas of the law—such as securities, antitrust, and commercial litigation—and the courts, juries, and parties are capable of comprehending and using this evidence in civil litigation. Precluding the use of this evidence would deny factfinders access to an important category of evidence frequently used in courtrooms across America, as well as in science and business every day. And because the underlying data are admissible, the alternative would be admission of the very same evidence, sliced into individual strands, in an endless series of individual trials, along with the other common evidence. Therefore, both fairness and efficiency mandate the approach taken by trial courts in conducting a single class action relying on the same types of evidence typically used in individual cases and class actions.

The use of statistics has been overwhelmingly endorsed by courts, by the Federal Judicial Center, and by commentators. *See*, *e.g.*, *Manual for Complex Litig.* § 11.493 (4th ed.) (use of sampling acceptable in pretrial procedures). For example, an aggregate approach to class damages is well established. *See In re Neurontin Antitrust Litig.*, Nos. 02-1830 & 02-2731, 2011 WL 286118, at *10 (D.N.J. Jan. 25, 2011) (collecting authority approving aggregate class damages); *Meijer, Inc. v. Warner-Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 312 (D.D.C. 2007) (approving aggregate approach to class damages).

Statistics have been used successfully in myriad class cases, as well as non-class cases. The leading commentator on class action jurisprudence explains:

> Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages. . . . Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually[] will not withstand analysis.

3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 10.5, at 483-86 (4th ed. 2002). This commonsense logic is borne out across the spectrum of different types of litigation.

1. Wage and hour.

In *Brinker Restaurant Corp v. Superior Court*, 273 P.3d 513, 546 (Cal. 2012), the California Supreme Court reiterated that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." *Id.* (citing *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010)) (certifying a meal break subclass because liability could be established through employer records and representative testimony, and class damages could be established through statistical sampling and selective direct evidence); *Bell v. Farmers Ins. Exchg.*, 9 Cal. Rptr. 3d 544, 578 n.32 (Cal. Ct. App. 2004) (relying on Reference Guide

on Statistics in the Reference Manual on Scientific Evidence in upholding as consistent with due process the use of surveys and statistical analysis to measure a defendant's aggregate liability); *Sav-on Drug Stores, Inc. v. Superior Court*, 17 Cal. Rptr. 3d 906, 918 n.6, 923 n.12 (Cal. 2004) (noting with approval the use of statistical sampling in overtime compensation and aggregate techniques in other cases). The *Brinker* Court observed that "statistical inference offers a means of vindicating the policy underlying [applicable state law] without clogging the courts or deterring small claimants with the cost of litigation." 273 P.3d at 546; *see also id.* (encouraging "a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts").[7]

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[7] Tyson relies on *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), as prohibiting all time and motion studies—even for an individual wage and hour claim—because Tyson says they are based on a "*fictional 'average' employee"* and that "approach confers a 'windfall' on some class members while 'undercompensating' others." Tyson Br. 20 (quoting *Espenscheid*, 705 F.3d at 774). But Tyson over-reads the case, which did not involve an industrial time and motion study or any expert analyses. The technicians in *Espenscheid* were not line-workers at a processing plant; they were "more like independent contractors" who "spend the work day installing and repairing satellite equipment at customers' homes and are paid on a piece-rate basis—so many dollars per job—rather than being paid a fixed hourly wage." *Id.* at 772. Because the installers had to keep and report their own work times, and because they each did different types of installations

2. Employment discrimination.

Statistics are also routinely admitted in employment discrimination cases. As discussed in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this Court reaffirmed that plaintiffs may establish a pattern or practice of discrimination under Title VII through the introduction of statistical evidence, and courts continue to certify Title VII classes based on statistical and other evidence. *See*, *e.g.*, *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012); *see also Lavin-McEleney v. Marist College*, 239 F. 3d 476, 481 (2d Cir. 2001) (allowing statistical sampling to show gender-based salary disparity for both liability and damages).

3. Antitrust.

It is a settled practice for courts in antitrust class actions to rely on classwide aggregate techniques in calculating individual damages awards without individualized hearings of class member claims. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d at 533-35 (affirming jury verdict where plaintiffs "provided evidence of a class-wide

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and repairs each day, the court faulted class counsel for not providing a workable trial plan from which a factfinder could infer whether and how much work the technicians had performed for which they were not compensated. *See id.* at 776. Without a study or at least a random sampling of technicians, the court said, "a shapeless, freewheeling trial" would result. *Id.* By contrast, the Tyson processing plant workers here presented the exact type of expert-based study and trial plan that was missing in *Espenscheid*.

aggregate injury."); *In re Neurontin Antitrust Litig.*, 2011 WL 286118, at *10 (collecting authority holding that "the use of an aggregate approach to measure class-wide [antitrust] damages may be appropriate").

One prominent example is *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96 (2d Cir. 2005), where Wal-Mart was a named plaintiff and served as a class representative for approximately five million other merchants. *Id.* at 101. In that case, the Second Circuit approved Wal-Mart's use of a statistical formula to calculate damages, despite potential differences in individual circumstances. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001), *disapproved in part on other grounds by In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-40, 42 (2d Cir. 2006). Ultimately, Wal-Mart secured a $3 billion settlement for itself and its fellow class members. *Id.*

4. Securities.

Courts also routinely employ classwide, formula-based techniques to calculate individual damages in securities class actions. *See* 3 *Newberg on Class Actions* § 10:8. The large volume of trades and the difficulty of identifying each security purchaser make precise individual damages determinations infeasible or impossible. Michael Barclay & Frank C. Torchio, *A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation*, 64 Law & Contemp. Probs. 105, 106 (2001). Given the large numbers of class members involved in many securities class actions and the correspondingly large number of shares and transactions at issue, requiring individual proof of damages would imperil enforcement of the nation's

laws against large-scale securities fraud. Thus, securities cases regularly involve aggregate damages awards based on class-wide statistical analyses. *See*, *e.g.*, *Harmsen v. Smith*, 693 F.2d 932, 945-46 (9th Cir. 1982) (aggregate damages need not be proved to a "mathematical certainty").

5. Consumer.

Similarly, courts regularly approve aggregate techniques for computing classwide damages in numerous consumer class actions. For example, in *Smilow v. Southwestern Bell Mobile System, Inc.*, 323 F.3d 32 (1st Cir. 2003), the First Circuit rejected a defendant's argument that damages should not be calculated based on its computer records and analysis through a "mechanical process." *Id.* at 40 & n.8. Other courts agree. *See*, *e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 419 (5th Cir. 2004) (insurance rates); *Roper v. Consurve, Inc.*, 578 F.2d 1106, 1115 (5th Cir. 1978) (credit card charges); *Occidental Land, Inc. v. Superior Court*, 134 Cal. Rptr. 388, 393 (Cal. 1976) (in bank) (developer fraud); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (stating that "Rule 23 allows district courts to devise imaginative solutions to problems created by . . . individual damages issues" and affirming trial court's certification of a class of 17 million class members).

6. Housing discrimination.

Statistical evidence plays a critical role in housing discrimination cases. In cases brought under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, this Court recently approved the use of statistical evidence, when combined with a defendant's policy or

practices that cause a disparity, to establish liability for disparate impact. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015). In fact, "[t]ypically, a disparate impact is demonstrated by statistics, and a *prima facie* case may be established where gross statistical disparities can be shown." *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 382 (3d Cir. 2011) (internal citations and quotations omitted).

7. Businesses use statistical evidence in litigation.

Even conventional commercial litigation often involves damage determinations based on aggregate proof. *See*, *e.g.*, *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 958 N.Y.S.2d 647 (Tbl.), 2010 WL 5186702, at *13 (N.Y. Sup. Ct. 2010) (approving plaintiff's request to analyze samples of loans in support of allegations that defendant misrepresented the origination and quality of loans); *I4I Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 855 (Fed. Cir. 2010) (affirming calculation of damages in patent case based in part on responses from 46 businesses out of 988 surveyed, which were "randomly selected from a database of 13 million U.S. companies"); *Ratanasen v. State of Cal. Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir. 1993) (approving "the use of sampling and extrapolation as part of audits in connection with Medicare and other similar programs, provided the aggrieved party has an opportunity to rebut such evidence").

8. Businesses use statistics every day.

The use of statistics and other aggregate proof in class actions is not only commonplace and well-accepted, but it also mirrors how companies, in conducting business, handle information and make decisions. For example, "Wal-Mart's internal audit department used TPERs [Time Clock Punch Exception Reports] and TCARs [Time Clock Archive Reports] to conduct internal audits of employees' compliance with the rest-break policies. If the audits revealed violations of the policies, then managers or employees could be subject to discipline up to and including termination." *Braun*, 24 A.3d at 885, *aff'd,* 106 A.3d 656. Wal-Mart relied on the same records to dock employee pay electronically if the employee was late by just "1 minute" in returning from a break, *see id.* at 915-16, while it failed to pay anything if the employee missed or was shorted for her break, despite the records expressly recording "TOO FEW BREAKS," "SHORT BREAK," and "TOO FEW MEALS." *See* Ex. D, reproduced from record in Nos. 14-1123 & 14-1124, R. 8644a-8647a. The courts in *Braun* all correctly held it was proper for Employees to rely on such payroll records to prove their claims, as Wal-Mart itself relied on the same business records. *See* 24 A.3d at 915-16, *aff'd*, 106 A.3d at 665.

B. Tyson waived its objection to statistical evidence and had the opportunity to cross-examine class members.

Tyson had every opportunity to treat its current issue—damages—separately from liability to prevent confusion that aggregation of damages

would automatically follow class-wide liability. In fact, at trial, the plaintiffs requested bifurcation of the proceedings between liability and damages. Pet. App. 112-13. On the basis of Tyson's objection, *id*. at 115, the court denied the plaintiffs' request, so all issues were tried on a unitary basis. *Id*. at 112-13. Because Tyson made a tactical decision to oppose bifurcation, it cannot now complain that the failure to bifurcate has deprived it of "the opportunity to challenge each class member's claim to recovery during the damages phase." *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015); *see also Amgen, Inc. v. Connecticut Ret. Plan & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3) . . . does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." (Emphasis in original; internal quotation marks and alterations omitted)).

While due process guarantees an opportunity to present a defense "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), the right is not unbounded and must still be an opportunity "appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Here, Tyson had that opportunity, chose not to take advantage of it, and cannot now complain that the Constitution provides a basis for correcting a tactical choice it now regrets. As Justice Scalia wrote, "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment). The fundamental rule is that a party

"may not complain on appeal of errors that he himself invited or provoked." *Harvis v. Roadway Express Inc.*, 923 F.2d 59, 60 (6th Cir. 1991); *Kriner v. Dinger*, 147 A. 830, 832 (Pa. 1929) (same).

Tyson further claims it was denied due process because it was unable to cross-examine each class member, arguing such individualized examinations would have been available if individual trials, rather than a class action, occurred. Tyson Br. 37. But nothing prevented Tyson from calling as many class members as witnesses as it chose to. Perhaps recognizing that, Tyson complains it was not "feasible to call hundreds or thousands of class members at trial" and that "discovery on each class member's individualized issues" would not be allowed. *Id.* at 37-38. But Tyson's complaints misapprehend the enterprise that Rule 23 sets in motion and ignore the fact that the opt-ins under § 216(b) were before the court and were subject to discovery. In truth, Tyson's tactical decision at trial was not compelled by Rule 23 or § 216(b), because Tyson would undoubtedly contend in 2,300 separate trials that examinations of all the workers were required to rebut Respondents' study, which is the real focus and necessary import of Tyson's appeal.

Despite the frequent refrain about the need to examine every member of a class to mount every possible defense, corporate defendants never undertake such an examination of even a small number of class members. For example, in Employees' case pending before this Court on Wal-Mart's petitions for certiorari, despite designating more than 130 witnesses on its witness list and, on the weekend before trial, identifying more than one hundred more, *Wal-Mart*, No. 14-1123, Pet. App.

270a n.4, and despite the absence of any ruling preventing it from calling those witnesses, Wal-Mart made a strategic decision to call only 12 fact witnesses (only one of whom was a class member) and two expert witnesses (out of eight retained experts), yet still inaccurately told this Court that it was deprived of the "right to rebut [plaintiffs' evidence] through an individualized showing that a particular break was not in fact missed or was missed as a result of a voluntary decision by that employee." *Wal-Mart*, No. 14-1123, Pet. 3. The disconnect between the trial tools absolutely available to class-action defendants and their later post-trial complaints is all too real. Class certification does not deprive a defendant of its ability to mount every possible defense, only the defendant's strategic decisions do.

IV. Trial Courts Must Have Sufficient Discretion to Control Redundant Evidence Given Common Proof of a Corporate-Wide Practice.

The judiciary historically has had discretion to control the types and amount of evidence permitted at trial. Many courts have held that trial courts must have the authority to control the nature and types of evidence presented, the course of proceedings and the avoidance of repetitive or redundant testimony. *See Commonwealth v. Laird*, 988 A.2d 618, 636 (Pa. 2010); *Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 29, 39-41 (Pa. 2011), *cert. denied*, 133 S. Ct. 51 (2012). Whether there is or should be a constriction of these discretionary powers based on the procedural form of the action or the substantive nature of the claims implicates public policy choices that arc between the judicial and legislative

branches. *See* Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 389, 392 (2012) (questioning whether "Congress ought to have the choice about how class claims can be proven" and arguing that due process arguments of class action defendants lack any historical or textual support, except for two repudiated cases from the discredited *Lochner* era).

A constitutional or other constriction on the historic discretionary powers of the courts would impact, necessarily, all forms and stages of action whether they be criminal or civil, at preliminary or class certification hearings, during pre-trial discovery or motions *in limine*, or in connection with mid-trial evidentiary decisions or requests for jury charges. *See Reyes v. Netdeposit LLC*, No. 14-1228, 2015 WL 5131287 (3d Cir. Sept. 2, 2015) (quoting Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897, 1898 (2014)) ("District Courts sometimes exercise discretion in defining the parameters of the class definition and deciding when subclasses are necessary, often acting independently of any proposals made by the parties.")). As other courts have recognized, this Court's *Dukes* decision did not "work[] some sea change in class action jurisprudence." *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 482 (D. Kan. 2012). The *Dukes* Court emphatically did not establish or define a new due process right for defendants. Rather, it emphasized the statutory right of employers, expressly provided by Congress in Title VII, to assert the "individual affirmative defense" of "lawful reason," and found that a procedure that short-circuited that individual statutory defense ran afoul of the Rules Enabling Act. 131 S. Ct. at 2561. The *Dukes* Court only

discussed due process in the context of *class member rights* to notice and the opportunity to opt-out. *Id*. at 2559 ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.").

Our jurisprudence has emphasized that due process applies to both parties, and often requires a balancing test to ensure that both sides have a fair chance to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 343-48 (1976). "'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id*. at 334. In this respect, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) (class actions are most appropriate where class members' claims would be "uneconomical to litigate individually"); *Kelly v. Cnty. of Allegheny*, 546 A.2d 608, 612-13 (Pa. 1988) (same); *Salvas*, 893 N.E.2d at 1213 (same); *Iliadis*, 922 A.2d at 718 (same).[8]

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[8] *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 & n.8 (1974) (internal citation and quotation marks omitted):

> The class action is one of the few legal remedies the small claimant has against those who command the status quo. . . . The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes

The cases Wal-Mart musters for a different due process standard are off-point. For example, the court's observations in *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (Wal-Mart Amicus Br. 10), hinged on the varying reasons a class member may have purchased Light cigarettes and their impact on the element of reliance. *See id.* at 232.[9] Of course, reliance was not an issue below, as Tyson's K-code system was the uniform source of the wage violations. Wal-Mart's citation of *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (Wal-Mart Amicus Br. 16), is equally mistaken because the unitary trial of the common issues below was not infected by a "hodgepodge" of various and conflicting legal theories as in that case. *See id.* at 342-52. Similarly, *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (Wal-Mart Amicus Br. 9-10), concerned the sole issue of ascertainability of class membership where the defendant had no record

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> involving all of our citizens . . . or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods. . . . When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct.

[9] This Court contradicted *McLaughlin*'s reliance analysis in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 655 (2008).

of class members' purchases. Other circuits have rejected *Carrera*'s unique approach,[10] and Wal-Mart nowhere contends that the class members were unascertainable from Tyson's payroll records.

In sum, Tyson's attack on Respondents' industrial engineering study is not a class certification issue, as Tyson would raise the same arguments had 2,300 separate trials occurred, all of which would have relied on the same study because Tyson violated its duty to maintain adequate and accurate payroll records. Tyson's attack is really directed at the substantive "just and reasonable inference" standard, and this Court should not alter or abridge that substantive law with a procedural ruling under Rule 23.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below and deny the Petitions for Certiorari in *Wal-Mart Stores, Inc. v. Braun,* Nos. 14-1123 and 14-1124.

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[10] *See Rikos v. Proctor & Gamble*, No. 14-4088, 2015 WL 4978712, at *22 (6th Cir. Aug. 20, 2015) ("We see no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts."); *Mullins*, 795 F.3d at 671 ("the Third Circuit's approach in *Carrera*, which is at this point the high-water mark of its developing ascertainability doctrine, goes much further than the established meaning of ascertainability and in our view misreads Rule 23").

September 29, 2015 Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Exhibit A

Reproduced from record in
Nos. 14-1123 & 14-1124, R. 4264a-4266a, for the
Court's convenience.

From: Paul Ratziaff
Sent: Monday, December 04, 2000 4:51 AM
To: Allen Plant
Cc: Roland Boudreau; Nancy Bass
Subject: RE: Break and Meal Policy CPD-07
Sensitivity: Confidential

Allen: Proceed with communicating and securing our interests. Thanks. Paul

---------Original Message---------
From: Roland Boudreau
Sent: Saturday, December 02, 2000 12:25 PM
To: Paul Ratzlaff
Subject: RE: Break and Meal Policy CPD-07
Sensitivity: Confidential

I support Al's position.

Roland Boudreau
Sr. Vice President Operations
Wal-Mart Canada Inc.
905-821-2111 ext. #4128
905-821-8391 fax
rboudre@wal-mart.com

---------Original Message---------
From: Paul Ratziaff
Sent: Thursday, November 30, 2000 10:30 AM
To: Roland Boudreau
Subject: FW: Break and Meal Policy CPD-07

Sensitivity: Confidential
Roland: The US is changing their Break and Meal Period Policy to eliminate punching out and in for breaks and to eliminate the published policy language that the associate is entitled to a full break later if their regular break is interrupted. They are doing this because they have received a class action lawsuit by some opportunistic lawyers to recover many millions of dollars on behalf of the 'thousands' of associates who 'regularly' have their breaks cancelled with no make up break granted. The US wanted us to make the same policy and procedure changes, largely so that the SMART programming would not have to be different for Canada. Al has researched and we do not support this request. You'll see his answer below. FYI. Paul.

---------Original Message---------
From: Allen Plant
Sent: Thursday, November 30, 2000 10:09AM
To: Nancy Bass
Cc: Paul Ratzlaff; Greg Muzingo; Dean Dolan; Bryan Miller – Int'l People; Robbie Wasserman
Subject: Break and Meal Policy CPD-07
Sensitivity: Confidential

Hi Nancy:
Thank you for the heads up on the likely policy and procedure change relative to the Break and Meal Period (CPD-07).

I have had this issue researched in our legal department and solicited opinion from Personnel Managers in some of our larger Stores.

We are of the strong view that the policy should note be changed by removing the requirement that Associates "punch" in and out for break periods in Canada for the following reasons.

1.) There is no legal exposure in any jurisdiction in Canada similar to that faced in Colorado. The various Provincial Employment jurisdictions each have an "Employment Standards Act" setting minimum standards for employees to follow with regards to all employment obligations including breaks and meals. Wal-Mart [4264a] Canada and in fact most employers provide standards that far exceed what is set out in the various Acts. In fact even if Wal-Mart were to refuse a break as set out in the policy, in many cases may still exceed the employment standards minimum for breaks. Nevertheless there are mechanisms provided to employees by which they would register complaints with the Employment Standards Branch of the Labour Board. Accordingly, because Employment Standards Commissions have jurisdictions over matters such as this it is highly unlikely that a court would even hear a complaint relating to an employers alleged breach of its obligations with regard to its policy and/or the Employment Standards Act.

2.) It is extremely rare, as we believe it should be, that Management would as or require an Associate to suspend their break in any event. We would consider that if there were a case that this was happening on a regular and/or perpetual basis it would be cause for serious concern from a scheduling perspective and an Associate Relations perspective.

3.) The Timeclock Exception Report (SAS1040R) is an extremely useful tool for our Personnel Managers to

Manage Associates who are not following proper guidelines. In fact this report is most often used in evidence to support a misconduct coaching for time fraud. The administrative time spent by Personnel Managers in a large store is approximately 3 to 5 minutes daily, and the report is anywhere from one to three pages long. You suggested that for some stores in the U.S. this report was printing "15 feet long". This is not happening in Canada and we believe its because we have been managing the report on a daily basis and addressing issues as they happen.

4.) We strongly believe that the removal of the Associate obligation to "punch" in and out for breaks would result in a significant increase in time fraud and other inconsistencies and would most definitely give rise to productivity loss and increased administration costs in managing and monitoring Associates break times.

5.) As I indicated on our telephone call, I believe that if this policy were to be reformed as suggested, and at a later date was to be reinstated in its present form for the reasons listed above or other business reasons, this would represent a significant Associate Relations concern.

6.) With respect the provision in policy CPD-07 that requires Management to compensate Associates for the entire break and allow for an additional break or meal period when breaks or meal periods are interrupted, in our view acts as a disincentive for Managers to interrupt an Associates break in the first place. We would be prepared to remove this provision nevertheless if so directed

(See below policy provision highlighted)

Interruption of Break and Meal Periods
Supervisors and management may not require nor request associates to perform work during their break and meal periods, except in extreme emergencies where no other associate is available.

Hourly associates whose break or meal period is interrupted to perform work will receive compensation for the entire period at their regular rate of pay and be allowed an additional break or meal period

You indicated that the suggested policy changes do not necessarily have to apply to Wal-Mart Canada. I recommend respectfully that Canada's policy (CPD-07) remain as is.

Your respectfully
Allen Plant
Associate Relations
People Division
Wal-Mart Canada

Exhibit B

Reproduced from record in Nos. 14-1123 & 14-1124, R. 4263a, for the Court's convenience.

APPOINTMENT

Organizer: Nancy Bass

Required Attendees: Andy Wilson, Charlyn Jarrells; Deborah Kass; Jeffrey Reeves; Kevin Harper; Mark Shaffer; Nancy Bass; Nancy Wetmore; Ramona Truax; Randy Rogers

Subject: Special Meeting of the Policy Committee

Start Date: 09/29/2000 16:30:00 (GMT-06:00)
End Date: 09/29/2000 17:00:00 (GMT-08:00)

Show time as: Busy
Importance: Normal
Location: Andy Wilson's office

There is a law suit in Colorado that involves our Break and Meal Period Policy, PD-07. We need to meet for a short time to discuss proposed changes in this policy to assist our efforts in the suit and minimizing potential future litigation. Charlyn will give us the details at the meeting. I will be routing to you today the policy with the proposed changes.

Thank you for your help!
Nancy
x38326

WMIA-CC WMCa-000032-001-00009149
PX 50 CONFIDENTIAL

Exhibit C

Reproduced from record in
Nos. 14-1123 & 14-1124, R. 9231a, for the Court's convenience.

STAFF MEETING OCTOBER 2, 2000
CONFERNCE ROOM B
7:00 a.m.- 9:00 a.m.

(All RPM's Present. Covered w/Jessica 10/2/00)

Clubs up for Selection (No selection today)
((For Randy) RPM candidates.
(GM only) • name • club • survey • length of service)

Agenda

- Need a clear understanding of our "next in line" for co-mgr. positions. Re: promotable assistants (surveys, wats, relocatability)
- RPM candidates
- Bill: update the people remiplis
- TAPS: 9175, some clubs want it left open per Randy
  - Oct. 23 new program going – ALL posters down
  - Get info job on TAP's bills that had been previously paid
- Break/Meal Period – interrupted PD-07
  - $550M lawsuit on Wal-Mart b/c of 1400 exceptions
  - Wal-mart will be eliminating clocking in/out for breaks

(open door issues re not getting breaks and/or lunches interrupted)

- Verify fall college recruiting attendance

- Ethics summary – Aug. hrs. to 1st contact/Aug. hrs. to close (below expecations)

(caps from Betty)

- Client satisfaction survey
- Mgmt. terminations – email Wanda compensation issues for mgmt. leaving
- Doppler clubs resurveyed – doppler clubs dates backed to Oct. 13th
- MIT's go to $29,500 after training / RPM must be involved in all money offers
- Area mgr. minimum is $75K

(Run Query for <$75 for area 1 MIT's)

(For area <$75 for MIT's)

Betty –

- Project Calendar*
- Maintaining I-9s*

Ulonda

- Working on wage survey info
- New club needs to have GAP turned on

PLAINTIFF'S EXHIBT 134

DEPOSITION EXHIBIT 30 Sherrill

Exhibit D

Reproduced and excerpted from record in Nos. 14-1123 & 14-1124, R. 8644a-8647a, for the Court's convenience.

[Note: This is an excerpt of the Timeclock Punch Exception Report for Wal-Mart Store 8160 for May 30, 2000. Several columns containing department and individual identifying information have been deleted to allow space for the pertinent information contained in the columns excerpted below.]

WAL MART STORES, INC.

Run On: 05/31/2000 at 09:20:45 TIMECLOCK PUNCH EXCEPTION Store: 8160 Report: sas1130r

For Period Ending: 05/30/2000 FROM 05/30/2000 TO 05/30/2000

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*6335	Long Shift	9:02	8.50	0741	0757	0:16	1058	1129	0:31						
	Too Few Breaks														
*7679	Long Break	8:17	7.69	1134	1157	0:23	1308	1336	0:28						
	Too Few Breaks														
*5580	Too Few Breaks	8:14	7.74	0807	0822	0:15	1156	1226	0:30						
*2237	Too Few Meals	8:00	7.70	0712	0728	0:16				0730	0743	0:13			
	Too Many Breaks									0744	0757	0:13			
*7269	Short Break	6:08	6.14	0908	0919	0:11									
	Too Few Meals														
	Too Few Breaks														

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*8585	Short Break	8:09	7.62	1535	1552	0:17	1804	1834	0:30	1959	2009	0:10			
*9077	Long Meal	9:52	7.75	0909	0927	0:18	1157	1400	2:03	1614	1630	0:16			
*1918	Break Too Early Short Break	7:42	7.17	0135	0151	0:16	0715	0746	0:31	0748	0758	0:10			
*2845	Short Break	4:43	4.72	2028	2039	0:11									
*8710	Short Shift Meal Too Early Short Break Long Meal Too Many Meals	4:11	3.69	2036	2047	0:11	1742	1812	0:30						
*4683	Short Break	8:12	7.72	1845	1900	0:15	1619	1648	0:29	1914	1915	0:01			
*8921	Long Shift	8:48	8.25	0632	0648	0:16	0917	0949	0:32	1130	1144	0:14			
*3639	Long Break Too Few Meals	6:52	6.75	1313	1325	0:12				1520	1542	0:22			

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*2222	Long Shift	9:21	8.77	1006	1024	0:18	1251	1320	0:29	1446	1504	0:18			
*4401	Long Break Long Break Long Meal	8:20	7.55	0909	0928	0:19	1107	1143	0:43	1330	1352	0:22			
*6676	Too Few Meals Too Few Breaks	6:49	6.82	1006	1018	0:12									
*1422	Too Few Breaks	7:30	7.05	0910	0926	0:16	1258	1324	0:26						
*9430	Break Too Early	8:10	7.55	0725	0743	0:18	1133	1205	0:32	0909	0926	0:17			
*5272	Too Few Meals Too Few Breaks	6:01	6.02	1307	1322	0:15									
*0334	Short Shift	2:33	2.55												
*4954	Long Break Too Few Meals Too Many Breaks	8:08	7.75	1119	1135	0:26				1322 1536	1345 1551	0:23 0:15			

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*1521	Short Shift	0:34	0.57												
*4041	Short Break	7:15	6.74	1337	1354	0:17	1509	1538	0:29	1638	1649	0:11			
*6121	Long Break	8:07	7.52	1513	1532	0:19	1658	1730	0:32	2014	2029	0:15			
*7311	Short Break	4:22	4.37	1936	1945	0:10									
*3211	Short Break Long Meal Too Few Break Too Many Meals	8:03	6.89	1333	1336	0:03	1129	1202	0:33				1405	1442	0:37
*2587	Long Break Long Meal	8:17	7.42	0909	0928	0:19	1120	1205	0:45	1337	1355	0:18			
*1321	Short Shift	3:50	3.84	1924	1939	0:15									
*7792	Too Few Breaks	8:07	7.65	0935	0950	0:15	1133	1201	0:28						
*0760	Long Meal Too Many Meals	8:26	6.65	1414	1432	0:18	1628	1659	0:31	1758	1810	0:12	1937	2050	1:13

Associ	Reason	Time* Worke	Net* Hours	Break 1 Out	Break 1 In	Break 1 Time	Meal 1 Out	Meal 1 In	Meal 1 Time	Break 2 Out	Break 2 In	Break 2 Time	Meal 2 Out	Meal 2 In	Meal 2 Time
*5465	Long Shift Short Break	9:34	9.00	1303	1317	0:14	1227	1301	0:34	1630	1639	0:09			
*3415	Break Too Early	8:06	7.54	0726	0742	0:16	1133	1204	0:31	0909	0926	0:17			
*0209	Short Shift	3:45	3.75	1608	1623	0:15									
*7711	Long Break Long Meal	7:23	6.65	1334	1352	0:18	1533	1609	0:36	1734	1754	0:20			
*9297	Short Break	8:29	7.95	0908	0921	0:13	1330	1442	0:32	1505	1515	0:10			
*4632	Long Shift	9:11	8.69	0725	0741	0:16	1133	1201	0:28	0909	0925	0:16			
*7444	Long Break	5:01	4.94	1921	1941	0:20									
*3936	Long Break Too Few Meals Too Many Breaks	8:01	7.67	0941	0954	0:13				1213 1355	1238 1408	0:25 0:13			

*Time worked is amount of time the associate was in the store (including all breaks and meals) and is shown in hours and minutes.

Net hours is the amount of hours the associate is paid for the shift (and paid breaks and meals included) and is shown in hours and hundredths of an hour.

PORT LEGEND:

Following are the rules that determine whether an associate will appear on a Timeclock Punch Exception Report:

The following rules apply to MINORS

* TOO LATE DAY => Minor has worked too late
* TOO EARLY DAY => Minor started work too early
* SCHOOL HOURS => Minor has worked during school hours
* MAX W/O MEAL => Minor has maximum net hours without meal
* MAX HR/DAY => Minor has more than the maximum net hours allowed in a day
* MAX HR/WEEK => Minor has more than the maximum net hours allowed in a week
* CONSEC DAYS => Minor has worked more than the maximum number of straight consecutive days allowed

The following rules apply to all hourly associates

* NO MAIN OUT => associate has no main out punch for the day
* BREAK TOO EARLY => associate has worked less than 1 hrs 30 mins before first break
* MEAL TOO SHORT => associate worked less than 2 hrs before first meal
* SHORT SHIFT => associate net hours less than 4 hrs.
* LONG SHIFT => associate net hours more than 8 hrs.

The number and duration of breaks and meals depends on the amout of time worked
(To get the expected number and duration of breaks and meals, see Break/Meal Duration Rules below)

* SHORT BREAK => duration of break is shorter than expected break duration
* LONG BREAK => duration of break taken is longer than expected break duration
* SHORT MEAL => duration of meals is shorter than exepected meal duration
* LONG MEAL => duration of meal taken is greater than expected meal duration
* TOO MANY BREAKS => number of breaks taken is greater than expected number of breaks
* TOO MANY MEALS => number of meals taken is greater than expected number of meals
* TOO FEW BREAKS => number of breaks taken is less than expected number of breaks
* TOO FEW MEALS => number of meals taken is less than expected number of meals

Break/Meal Duration Rules:

Day of Week	Time Worked	Break Quantity	Break Duration	Meal Quantity	Meal Duration
	0:00	0	0:00	0	0:0(
All Days	3:01	1	0:15	0	0:0(
	6:01	2	0:15	1	0:3(

NOTE: -Net hours is shown in hours and hundredths of an hour
-All other figures are in hours and minutes
-Grace period for breaks is plus or minus 3 minutes
-Grace period for meals is plus or minus 5 minutes

END OF JOB