No. 14-1124

IN THE
Supreme Court of the United States

WAL-MART STORES, INC., and SAM'S EAST, INC.,
Petitioners,

v.

MICHELLE BRAUN, on behalf of herself and all others similarly situated,

and

DOLORES HUMMEL, on behalf of herself and all others similarly situated,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

SUPPLEMENTAL BRIEF FOR PETITIONERS

MARK A. PERRY
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR.
Counsel of Record
JULIAN W. POON
ALEXANDER K. MIRCHEFF
BRADLEY J. HAMBURGER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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This case presents the Court with a valuable opportunity to address the constraints that due process imposes on the use of "Trial by Formula" in state-court class actions. The lower courts are deeply divided over whether due process permits the use of sampling, extrapolation, and similar procedural shortcuts as substitutes for individualized proof and defenses in class actions. *See* Pet. 16-26. Given settlement pressure on class-action defendants and the absence of interlocutory review of state-court decisions, however, this Court rarely has the opportunity, as it does here, to address that due process issue.

The Court's decision in *Tyson Foods, Inc.* v. *Bouaphakeo*, No. 14-1146 (Mar. 22, 2016), does not explicitly address the question presented in this case. In *Tyson Foods*, the Court reviewed the certification of a class action under Federal Rule of Civil Procedure 23, as well as the certification of a Fair Labor Standards Act ("FLSA") collective action under 29 U.S.C. § 216, and affirmed certification and the ensuing classwide judgment based on the evidentiary inference available to FLSA plaintiffs under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *See Tyson Foods*, slip op. 11. The Court's opinion was limited to those questions of federal law and did not expressly consider the due process limits on "Trial by Formula." Because that question will continue to divide lower courts in the absence of this Court's review, the Court should grant plenary review in this case to resolve whether it is compatible with due process to deploy sampling, extrapola-

tion, and other "Trial by Formula" procedures in state-court class actions. It may be years before the Court has another opportunity to address this "important question" in a state-court class action tried to a final judgment. *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1303 (2010) (Scalia, J., Circuit Justice).

At a minimum, the Court should grant the petition for certiorari, vacate the decision below, and remand the case for further proceedings in light of *Tyson Foods*. The use of extrapolation and evidentiary assumptions in this case as substitutes for individualized proof and defenses is impossible to reconcile with the standard that *Tyson Foods* establishes for the use of sampling and other "representative evidence" in class actions. Slip op. 14. In the absence of plenary review by this Court, the Pennsylvania courts should be afforded the opportunity to reconsider their decisions upholding class certification and the classwide judgment with the benefit of this Court's recent analysis.

To establish that sampling and other types of "representative proof" are "permissible method[s] of proving classwide liability," *Tyson Foods* requires the class to "show[ ] that each class member could have relied on that sample to establish liability if he or she had brought an individual action." Slip op. 11. The class in *Tyson Foods* comprised 3,344 employees of a single pork processing plant who alleged that their employer violated the FLSA and Iowa law by denying them overtime pay for the time that they spent donning and doffing protective gear. *Id.* at 2, 5. The employer did not "record the time each employee spent donning and doffing," *id.* at 2, and, to

prove their claims, the plaintiffs therefore introduced testimony from an expert who calculated an average donning-and-doffing time for all class members based on 744 videotaped observations of class members, *id.* at 5.

The Court upheld this use of sampling to prove the class members' claims. The Court explained that, "[i]f the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce [the expert's] study to prove the hours he or she worked" because there was "an evidentiary gap created by the employer's failure to keep adequate records." *Tyson Foods*, slip op. 12. Under *Mt. Clemens*, the employees in those hypothetical 3,344 individual suits would have been permitted to rely on the expert's sampling as "'sufficient evidence to show the amount and extent of th[eir] [uncompensated] work as a matter of just and reasonable inference.'" *Id.* (quoting *Mt. Clemens*, 328 U.S. at 687). Because "the sample could have sustained a reasonable jury finding as to hours worked in each employee's *individual* action, that sample [was] a permissible means of establishing the employees' hours worked in a *class* action." *Id.* at 11 (emphases added).

The same cannot be said of the extrapolation and bare assumptions on which plaintiffs relied in this case to secure class certification and a classwide judgment of more than $187 million. If the 187,000 class members had brought their own individual suits, the class members would each have been required to testify or introduce other individualized evidence that they were compelled by Wal-Mart to work through their paid 15-minute rest breaks and

to work off the clock. (The badge-swiping records on which plaintiffs' experts relied provide no evidence of such compulsion.) They likewise would have been required to withstand cross-examination by Wal-Mart as to whether there were legitimate explanations for the alleged missed breaks and off-the-clock work, such as a voluntary decision by the employee to work through a paid break or a failure by the employee to clock in or out.

An individual plaintiff would not have been permitted to prove her case through expert testimony that extrapolated from records about a small subset of stores and a limited time frame—which may not have included the store in which the plaintiff worked or the time period in which she was employed—to speculate that the plaintiff missed a particular number of breaks and worked off the clock for a particular number of hours. *See Tyson Foods*, slip op. 14 (where "employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which *other* employees were" injured) (emphasis added). Nor would the individual plaintiff have been permitted to rely on expert testimony that simply *assumed* that she invariably remembered to clock in and out at the beginning and end of every shift and every rest break, and *assumed* that every time the plaintiff allegedly missed a break, she was compelled to do so by Wal-Mart. With respect to both the rest-break and off-the-clock claims, the plaintiffs in an individual action would have been required to prove their cases through a combination of their own testimony, the testimony of corroborating witnesses,

employment records, and other evidence with a direct bearing on the plaintiffs' individual claims.[1]

The evidence introduced by plaintiffs in this class action bore no resemblance to the evidence that would have been required in the class members' individual actions. Dr. Baggett, plaintiffs' rest-break expert, extrapolated from time-clock badge-swiping records between 1998 and February 2001 to identify more than 20 million allegedly missed or short breaks during the ensuing five-and-a-half-year period. Pet. 6-7. He likewise assumed that every

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[1] There was no "evidentiary gap" in this case comparable to the absence of "adequate records" in *Tyson Foods*. Slip op. 12. Throughout the class period, Wal-Mart required employees to clock in and out at the beginning and end of shifts, R.8680a, and those records could have been used by plaintiffs in individual suits to substantiate their claims that they were compelled to work off the clock. Until February 2001, Wal-Mart also required employees to clock in and out at the beginning and end of paid rest breaks, and those records would have been available to individual plaintiffs. In accordance with industry practice, Wal-Mart subsequently discontinued that policy so that employees would no longer be required to expend a portion of their breaks walking to and from time clocks. R.4433a; R.5138a-R.5140a. There was no statutory obligation for Wal-Mart to record paid rest breaks because employees were paid whether or not they took those breaks. *See* App. 6a-7a. The *Mt. Clemens* inference—which applies where "employers violate their statutory duty to keep proper records"—would therefore be inapplicable in this case. *Tyson Foods*, slip op. 11. The inference is also unnecessary here because plaintiffs claiming that they were compelled to work during paid breaks after the February 2001 policy change could have proved their case through their own testimony about the frequency with which they were required to miss breaks as well as employment records documenting the number of shifts they worked.

instance in which an employee failed to clock in and out for a full 15-minute break represented a break that Wal-Mart had compelled the employee to miss, rather than, for example, a voluntary decision by the employee to work through the paid break or a failure by the employee to remember to clock in or out. *Id.* at 7.

Similarly, Dr. Shapiro, plaintiffs' off-the-clock-work expert, extrapolated from records for 16 of Wal-Mart's Pennsylvania stores between 2001 to 2006 to identify alleged off-the-clock work at all 139 Pennsylvania stores between 1998 and 2006. Pet. 7-8. He assumed that every mismatch between cash register log-ins and time-clock records was attributable to compelled off-the-clock work, rather than to an employee's working under someone else's log-in or failure to clock in or out. *Id.* at 8.

This expert testimony was the linchpin of the trial court's class-certification ruling and the ensuing classwide judgment. In fact, only *six* of the 187,000 class members testified in support of the class at trial, and Wal-Mart had no opportunity to cross-examine the tens of thousands of absent class members.

Thus, unlike in *Tyson Foods*, where the "class members" were employed at a single plant and "could have relied on th[e] [same] sample to establish liability if [they] had brought an individual action," plaintiffs are unable "to show . . . that the sample relied upon here is a permissible method of proving classwide liability." Slip op. 11. If plaintiffs "had brought . . . individual suits, there would be little or no role for representative evidence" because, like the

employees in *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), "the experiences of the employees in [this case] bore little relationship to one another." *Tyson Foods*, slip op. 14. They worked at more than a hundred different stores over distinct portions of an eight-year period and could have made myriad individualized decisions, such as voluntarily working through paid rest breaks, that provide legitimate explanations for alleged wage-and-hour violations.

In *Dukes*, "[p]ermitting the use of . . . sampl[ing] in a class action . . . would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." *Tyson Foods*, slip op. 14. In this case, plaintiffs' reliance on "[r]epresentative evidence" that was both "statistically inadequate" and "based on implausible assumptions" violated Wal-Mart's due process rights by permitting plaintiffs to recover without proving the same individualized elements and confronting the same individualized defenses as plaintiffs pursuing individual claims. *Id.*; *see also*, *e.g.*, *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.) (class actions "leave[ ] the parties' legal rights and duties intact and the rules of decision unchanged").[2] In fact, there was

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[2] Unlike the defendant in *Tyson Foods*, which "did not move for a hearing regarding the statistical validity of [the class's] studies under *Daubert*," slip op. 6, Wal-Mart consistently challenged the reliability of the methodology employed by plaintiffs' experts. *See* R.261a-R.262a (arguing on appeal that the trial court should have excluded plaintiffs' experts based on

uncontroverted testimony at trial that at least some of the class members were *never* compelled to work through rest breaks or off the clock, R.5099a-R.5100a, but these uninjured plaintiffs nevertheless stand to share in the classwide $187 million judgment—a possibility to which this Court directed the district court in *Tyson Foods* to be particularly attentive when crafting a method of allocation on remand. *See Tyson Foods*, slip op. 16 ("the question whether uninjured class members may recover is one of great importance").

To be sure, *Tyson Foods* applied Federal Rule of Civil Procedure 23, not due process, but this Court has made clear that the "procedural protections prescribed in . . . Rule 23" are "grounded in due process." *Taylor* v. *Sturgell*, 553 U.S. 880, 901 (2008). If the Court does not grant plenary review, it therefore should remand the case to permit the Pennsylvania courts to reconsider class certification and the classwide judgment in light of *Tyson Foods*. That decision confirms that this case never should have been certified as a class action and that leaving the judgment intact would deprive Wal-Mart of its due process rights and afford plaintiffs an unwarranted and unconstitutional windfall.

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their flawed methodologies); R.3641a-R.3662a (trial court motion to exclude plaintiffs' experts).

CONCLUSION

The Court should grant the petition for a writ of certiorari and set the case for argument or, at a minimum, vacate the decision below, and remand the case for further proceedings in light of *Tyson Foods, Inc.* v. *Bouaphakeo*.

Respectfully submitted.

MARK A. PERRY
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

THEODORE J. BOUTROUS, JR.
Counsel of Record
JULIAN W. POON
ALEXANDER K. MIRCHEFF
BRADLEY J. HAMBURGER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioners

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