In the

Court of Appeal

of the

State of California

SECOND APPELLATE DISTRICT
DIVISION FOUR

NIVIDIA LUBIN, SYLVIA M. MARESCA and KEVIN DENTON,

Plaintiffs and Appellants,

v.

THE WACKENHUT CORPORATION,

Defendant and Respondent.

ON APPEAL FROM ORDER GRANTING MOTION TO DECERTIFY CLASS
SUPERIOR COURT OF LOS ANGELES COUNTY
HON. WILLIAM F. HIGHBERGER · JCCP CASE NO. 4545
Wackenhut Wage and Hour Cases (Superior Court Case Nos. BC326996, BC373415, 00180014)
SERVICE ON ATTORNEY GENERAL REQUIRED PER BUSINESS & PROFESSIONS CODE § 17209

APPELLANTS' RESPONSE TO AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATE OF AMERICA; NATIONAL ASSOCIATION OF SECURITY COMPANIES; AND CALIFORNIA ASSOCIATION OF LICENSED SECURITY AGENCIES

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I. INTRODUCTION

Contrary to the proper purpose and function of amici curiae, the brief filed in support of Defendant and Respondent The Wackenhut Corporation by the Chamber of Commerce of the United States of America, the National Association of Security Companies, and the California Association of Licensed Security Agencies (collectively referred to herein as "Amici") provides little assistance to this Court in deciding the matters at issue here.[1] Rather than offering a different viewpoint or broadening this Court's perspective, Amici merely echo the arguments advanced by Wackenhut—a member of both Amici security organizations—while ignoring or misrepresenting both the procedural posture and the factual record within which the issues in this case must be considered. Amici's inapplicable arguments regarding procedural due process and the relevance of *Wal-Mart*'s "Trial by Formula" proscription reveal their submission to be a marginally-tailored boilerplate brief attacking the propriety of class actions generally.

Despite their best effort to side-step the fundamentally flawed foundations of the trial court's decertification Order, Amici's concession that *Wal-Mart's* Title VII "Trial by Formula" holding was based directly on

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[1] Amicus curiae are intended to assist the appellate court in deciding the matters at issue. (Cal. Rules of Court, rule 8.200(c).) Often, amicus curiae provide value to a court by offering a viewpoint different from that of the principal litigants. They may "assist the court by broadening its perspective on the issues raised by the parties . . . [as well as] facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177 [internal quotations and citation omitted].)

the federal Rules Enabling Act, rather than due process, and their presumption that Wackenhut would be precluded from presenting any legitimate defenses at trial, highlight the trial court's erroneous legal assumptions regarding *Wal-Mart*, which served as the predicate for its flawed analysis of this case and decertification of the class. In the absence of facts or context to support their position, Amici fail to identify any due process violation here—actual or threatened—and are left to recapitulate the hypothetical violations of due process postulated by the trial court.

II. ARGUMENT

A. AMICI MISPRESENT THE FACTUAL AND LEGAL RECORD

The Amici brief's many misrepresentations of the factual and legal record reveal it to be an inaccurately-tailored version of a cookie-cutter approach to challenging class action certification using *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. __, 131 S.Ct. 2541 ("*Wal-Mart*"). As discussed below, *Wal-Mart* does not have the relevance to this matter or to California class action jurisprudence that both Amici and Wackenhut contend. Before addressing that issue, however, Plaintiffs must address the many distortions embedded in Amici's brief.

1. Amici Mischaracterize the Case's Procedural Posture

Amici fail to acknowledge the procedural posture of this case and to appreciate its effect on the appropriate analysis. Amici mischaracterize this case as an "appeal from a class certification ruling" and assert that "the trial court here properly denied class certification . . . ." (AB18, 29.) This is incorrect. This case is an appeal from an order granting decertification of a

previously certified class—an important distinction Amici overlook and that undermines the usefulness of their arguments.

Although the proper legal criterion for certifying or decertifying a class requires the same consideration of the requirements for class certification (see *Sav-on Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 332), "[m]odifications of an original class ruling, including decertifications, typically occur in response to significant change in circumstances, and in the absence of materially changed or clarified circumstances … courts should not condone a series of rearguments on the class issues." (*Williams v. Superior Court* (2013) 221 Cal. App. 4th 1353, 1361, as modified (Dec. 24, 2013), review den. (Mar. 19, 2014) ("*Williams*") [internal quotations and citations omitted]; see also *Weinstat v. Dentsply Int'l, Inc.* (2010) 180 Cal.App.4th 1213, 1218, 1221, 1225-26 [decertification of class permissible "only where it is clear there exist changed circumstances making continued class action treatment improper," and is limited to the claims or theories as to which the "changed circumstance" compels decertification].)

Nowhere do Amici acknowledge the trial court's original Order Granting Class Certification (5JA1135-1144; AOB9), the two years of subsequent litigation during which no new facts were adduced (AOB9-15, ARB8), nor Wackenhut's motion for decertification filed six weeks before trial predicated solely upon *Wal-Mart.* (AOB15-16.) Instead, Amici present arguments that lack this context, as illustrated by the first sentence in the Introduction:

> When plaintiffs move to certify a class action challenging an employment policy, but cannot show that the policy is both uniform and consistently applied to the individual class

> members, the trial court properly denies certification because individualized issues predominate and the trial of such class claims would be unmanageable.

(AB6.) Contrary to this mischaracterization, on March 3, 2010, the trial court certified a class based on the consistent application of Wackenhut's uniform policies. (5JA1135-1144; AOB9.) As determined by the trial court, "[s]ubstantial evidence shows common questions exist and predominate as to whether Wackenhut *uniformly* failed to comply with the statutory requirements as to on-duty meal periods." (5JA1138:1-2 (emphasis added).) Additionally, "Wackenhut appears to admittedly have had a *uniform* rest break policy 'from corporate for all of California' in which employees remained on call and were not completely relieved of their duties." (5JA1140:18-22 (emphasis added).) Lastly, Wackenhut's "*uniform* practices toward wage statements[] involve common questions that are suitable for class treatment." (5JA1141:18-19 (emphasis added).) At no time since 2010 have the facts on which the trial court based its original ruling changed.

2. Amici Misrepresent the Order Decertifying the Class

In addition to the mischaracterization of the posture of this appeal, Amici also repeatedly assert that Plaintiffs failed to show the existence of commonality. (AB2, 7, 15, 22, 30.) Specifically, Amici assert that "the trial court found that because plaintiffs did not challenge a uniform application of a common policy, plaintiffs' theories of liability could not be answered with common proof and would create an unmanageable class." (AB18.) Again, this is incorrect.

In decertifying the class, the trial court did not find that Plaintiffs had failed to allege and evidence the consistent application of a common unlawful policy. In fact, the trial court in its decertification order, expressly identified the persistence of "common questions of fact which do continue to exist." (5JA2936:24.) However, the trial court concluded that, based upon its reading of *Wal-Mart*, "common issues would be overwhelmed by the myriad individualized issues necessary to resolve Plaintiff's claims . . . ." (13JA2941:13-14.)

3. Amici Make Unsupported and Erroneous Factual Statements

Added to Amici's inaccurate characterization of this case as an appeal from a denial of certification and their repeated representation that the trial court based that denial on lack of commonality, is Amici's attempt to revise the factual record. Similar to Wackenhut, Amici rely on the trial court's decertification order as their sole source of support, citing to it 23 times. (See e.g., AB18-20.) They provide no additional factual support for their assertions anywhere from the 5,302 pages that comprise the Joint Appendix in this case. This failure to support factual contentions undermines Amici's service to this Court and, at a minimum, warrants severe skepticism toward their factual assertions.

Rule 8.204 makes very clear all briefs, *including amicus briefs*, must "[s]upport any reference to a matter in the record," whether factual or procedural. (Cal. Rules of Court, rule 8.204(a)(1)(C).) A court should "look askance at this practice of stating what purport to be facts—and not unimportant facts—without support in the record. This is a violation of the rules, specifically rule 8.204(a)(1)(C) of the California Rules of Court, with the consequence that such assertions will, at a minimum, be disregarded."

(*Liberty Nat. Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846.)

Specifically, Amici aver the following without citation to the record:

- Plaintiffs have proposed using statistical sampling to establish both class liability and damages (AB6);
- Plaintiffs challenged employment policies that were not uniform and not consistently applied to the class (AB7);
- Plaintiffs' answer to the unmanageable individualized inquiries identified by the trial court was to propose the shortcut of statistical sampling (AB8);
- Plaintiffs did not show a uniform and consistent policy supporting their meal and rest period claims (AB28);
- Plaintiffs proposed the use of statistical sampling to establish the recovery of individual class members (AB32).

As Amici fail to provide any support in the appellate record for these factual assertions, this court should disregard them. (*Dominguez v. Financial Indem. Co.* (2010) 183 Cal.App.4th 388, 392 n.2.)

a. Contrary to Amici's Accusation, Plaintiffs have not tried to avoid the evidence in this case

Despite the prevalence of unsupported assertions scattered throughout their brief, Amici accuse Plaintiffs of trying "[t]o avoid the effect of defendant's evidence here" and of "sidestep[ing] the requirement of showing both a common policy and uniform application of that policy . . . ." (AB16.) As neither Wackenhut nor Amici have adequately set forth the evidence supporting decertification, it is unclear what evidence Amici claims Plaintiffs seek to avoid. Plaintiffs have relied upon the evidence in this case, both in support of certification and in opposition to

decertification. Yet, in decertifying the class, the trial court did not rely on evidence in the record, but rather upon suggested inferences and theoretical possibilities "that somebody in actual fact got a legally adequate off-duty meal period." (See AOB14, 34-35; ARB35; 13JA2943:2-3 [stating what evidence in the record "suggests"]; compare 1RT2137:27-2139:9 and 3RT6621:28-6622:3.)

Amici "acknowledge *Brinker*'s holding that the trial court in deciding class certification must consider not just allegations but evidence," yet fail to identify any evidence in support of Wackenhut's position. (AB29.) A simple comparison of the parties' briefs in this case adequately demonstrates the disparity. Plaintiffs' position is supported by the record. (See AOB33-34, 37-39, 55-58, 61-62; ARB9-17, 24-27, 37.) Wackenhut's is not. (See RB35-37, 60-64.) Similarly, a comparison of the trial court's certification and decertification orders further demonstrates which decision was supported by the record in this case and which one was not. (Compare 5JA1138:13-1139:21, 1140; 17-1141:4 and 13JA2943:2-11, 2951:26-2952:1, 2954:9-12 [citing same evidence submitted on class certification].)

Plaintiffs have, at all times, challenged the consistent and class-wide application of Wackenhut's uniform policies as instructed by California Supreme Court in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 ("*Brinker*"). Yet, Amici, like Wackenhut, attempt to distinguish *Brinker* and its progeny based on Wackenhut's refusal to concede the existence of such specific policies, which distinction, as discussed below, is neither based in fact nor adopted as relevant in the case law.

b. Amici misrepresent *Brinker*'s holdings to falsely distinguish the factual record here

Ostensibly based on *Brinker*, Amici assert that lawsuits alleging violations of California's wage-and-hour laws are not susceptible to class treatment in the absence of evidence of a uniform policy or practice, which may be established only through an express concession by the employer. (AB11-12.) As Wackenhut here has not conceded the existence of uniform policies or the consistent application thereof, they argue Plaintiffs have failed to demonstrate a certifiable policy. (AB7, 28.)

Brinker's history shows that Amici misrepresent the Supreme Court's holdings as resulting from the employer's concession of the existence of a uniform policy and consistent application thereof. In *Brinker*, the employer had vigorously disputed that the policies relied on by plaintiffs constituted the full extent of its rest period policies, consistently denied that this policy accurately reflected what happened on the ground at each of the different work sites, and supported these arguments by presenting a plethora of evidence showing that in practice many class members were authorized and permitted to take the required rest periods. (*Brinker Rest. Corp. v. Superior Court* (2008) 80 Cal.Rptr.3d 781, 792-793.) As noted by the court of appeal,

> In support of its opposition to the class certification motion, Brinker submitted more than 600 declarations from hourly workers and almost 30 declarations from managers. Brinker submitted declarations from managers who stated they permitted their employees to take rest and meal breaks. The managers explained in detail their compliance with rest and meal break laws. . . . They explained that Brinker allowed restaurant managers to handle meal and rest breaks compliance locally, without a

> system wide standard practice. . . . They explained they allowed rest breaks and sometimes employees took more rest breaks than required by law. . . . A manager of one of the named plaintiffs provided a declaration and supporting documentation challenging that plaintiff's claim he was not given rest and meal breaks and also stated he periodically gave that plaintiff and other employees free meals as a way of thanking them for their hard work.

(*Ibid.*) Despite this factual record, Amici focus on a concession made by the employer *during the hearing* as the sole basis for the propriety of class treatment of the rest period subclass. (AB11.)[2] Rather, it was the plaintiffs' presentation of substantial evidence of a uniform rest break policy that made the claim amenable for class treatment. (*Brinker*, *supra*, 53 Cal.4th at p. 1033.)

Amici join Wackenhut also in advancing an ill-conceived reading of the standards set forth in *Brinker* as conditioning class certification on proof establishing absolute uniformity in how the policy or practice was applied to and actually affected all class members. Yet, Amici, like Wackenhut, fail to provide any meaningful explanation as to how their interpretation can be reconciled with the fact that California courts applying the *Brinker* standard grant class certification based on "uniform application of common policies" while acknowledging evidence that implementation and the effect of the policy were not uniform as to all individuals. (See

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[2] In quoting *Brinker*, Amici omit the fact that the employer's concession was made on the record during the hearing. (*Brinker*, *supra*, 53 Cal.4th at p. 1033.) Wackenhut too has conceded on the record the existence of its uniform on-duty meal period policy stating "[o]bviously, [Wackenhut] schedule[s] these people for on-duty meals, that was the understanding, and, frankly, it has been industry standard for some period of time." (1RT2106:4-5.)

discussion at AOB30-32, n. 18; ARB6-7, 11-12, 39-44; see also discussion, *infra*, sec. B(2).)

B. AMICI ARGUE THAT A CERTIFIABLE COMMON POLICY MUST BE UNIVERSALLY AND IDENTICALLY APPLIED; PREDOMINANCE IS THE KEY ISSUE, NOT ABSOLUTE UNIFORMITY OF POLICY

Amici rely on the same flawed reading of *Brinker* and its progeny to justify their assertion that class-wide adjudication of Appellants' claims is impossible because Plaintiffs' common evidence of Wackenhut's liability does not establish *universal* liability for damages as to each class member. This position squarely conflicts with established class action principles. (*Sav-On*, *supra*, at 332-333, 334-339 [collecting cases]; *Collins v. Rocha* (1972) 7 Cal.3d 232, 238 ["that each class member might be required ultimately to justify an individual claim does not necessarily preclude maintenance of a class action"]; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 809, 815; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707 ["Nor is a common recovery necessary in order to establish a community of interest"].)

This radical approach is in line with Amici's underlying premise—that the imposition of "class-wide" liability is itself illegitimate and a defendant's liability should exist only as to the individual whose case has been separately and exhaustively adjudicated. This is not the law, however. An individual employee plaintiff establishes liability "by proving that he or she was denied rest or meal breaks[;] [a] class, on the other hand, as in *Jaimez v. Daiohs, USA, Inc.* (2010) 181 Cal.App.4th 1286 ("*Jaimez*"), may establish liability by proving a uniform policy or practice by the employer that has the effect on the group of making it likely that the group members

will . . . miss rest/meal breaks." (*Sotelo v. MediaNews Group, Inc.* (2012) 207 Cal. App. 4th 639, 654; see also, *Jaimez*, 181 Cal. App. 4th at 1291.)

Amici's commitment to advancing a fundamental paradigm shift in California class action jurisprudence also is evident in their treatment of patently contrary class certification cases—and particularly post-*Wal-Mart* authority—that continue to reinforce California's commitment to the use of the class action device, especially as a means to enforce worker protections. Unable to ignore the continued stream of case law that conflicts with its agenda of positioning of the class action device as fundamentally unfair and increasingly disfavored, Amici—much like Wackenhut—attempt to explain away such authority by reading courts' emphasis on common proof of classwide policies and "uniform application" as imposing the extreme standard that common evidence of liability, to be certifiable, must conclusively prove individual liability as to each class member. (See AB11-15, 24-27; RB33-35, 37-39, 62-65.) When all else fails, Amici merely dismiss unfavorable precedent as narrowly limited to its unique facts, without further substantive explanation. (See AB28, 30.)

1. Case law Supports Plaintiffs' Position That a Certifiable Common Policy Need Not Establish Uniform Liability as to Each Class Member

Amici strain to distinguish the recent case law rejecting their position by drawing a fictitious division between "individual entitlement to recover damages at all" and "individual entitlement to recover damages of a certain amount." Thus, Amici contend that directly relevant precedent has "no bearing" in this case because the only individualized issues in each case relate to amount of damages, rather than individual rights to recover damages. (AB30.) They explain the key reason the present case is purportedly distinguishable: "In contrast to those cases, the question

whether individual class members received meal or rest periods is one of substantive liability that must be resolved for each class member before reaching the question of the amount of any damages." (AB30.)

In fact, the cases Amici attempt to distinguish reach the opposite conclusion. (See, e.g., *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 235, review den. (July 24, 2013) ("*Faulkinbury*") ["Whether or not the employee was able to take the required break goes to damages, and '[t]he fact that individual [employees] may have different damages does not require denial of the class certification motion'"]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726, 730, review den. (Jan. 29, 2014) (*"Benton"*) [potential need for individual inquiries to determine whether individual employees actually received breaks is not a proper basis for denying certification]; *Bradley v. Networkers Int'l, LLC* (2012) 211 Cal.App.4th 1129, 1151, as modified on denial of rehearing (Jan 8, 2013), review den. (March 20, 2013) ("*Bradley*") [fact that individual employees may have actually taken breaks does not show lack of commonality].)

Amici summarily dismiss *Jaimez* as "beside the point" without any discussion of its holdings, facts, or the "narrow circumstances" under which Amici contend it applies. (AB27.) The *Jaimez* court reversed the denial of class certification of meal and rest break claims, and concluded that common issues predominated even if the relevant employment policies did not affect every class member in the same way—or even result in liability as to every individual. (*Id.* at 1301, 1303-05.) As illustrated in Appellants' previous discussions of the decision (AOB28-29, 60-61; ARB39-41), *Jaimez* is yet another example of a court finding commonality and approving the adjudication of classwide liability, despite defendant's

evidence contradicting plaintiff's theory of recovery and showing differing liability as to individual class members. (*Id.* at 1294-1295, 1299-1300, 1303-1305.)

Amici purport to distinguish numerous other cases previously cited by Appellants which likewise stand for the principle that, where a class theory of recovery is based on asserted class-wide policies and practices that allegedly fail to comply with meal and rest break statutes, individual variations concerning if or why some employees actually took breaks do not justify finding a lack of predominance. None was decided based on a plaintiff's ability to conclusively prove universal liability to every class member by common evidence. (See, e.g., *Bradley, supra,* 211 Cal.App.4th at 1134, 1143 [rejecting rationale that individual liability issues predominated based on *Brinker*'s rejection of "[the idea] that evidence showing some employees took rest breaks and others were offered rest breaks but declined to take them made certification inappropriate"] [AOB30, 33, 36, 45, 56; ARB4-5, 12-13, 17, 29, 42-44]; *Benton, supra,* 220 Cal.App.4th at 725-730 [reversible error in denying certification based on potential individual inquiries as to the extent individual class members actually received breaks and variation as to reasons why any breaks were missed, as employer's alleged liability for failing to adopt compliant meal and rest policies was susceptible to common proof] [ARB4-6, 17].)

Appellants discuss the applicability of *Faulkinbury* and *Abdullah v. U.S. Security Associates, Inc.* (9th Cir. 2013) 731 F.3d 752 ("*Abdullah*") at length in their prior briefing. (See AOB29-30, 33, 40-41, 56-57, 62; ARB12, 18-24, 42-44.) *Faulkinbury*, however, is especially illustrative of Amici's errors. In its original decision (*Faulkinbury v. Boyd & Assoc., Inc.* (2010) 112 Cal.Rptr.3d 72 ("*Boyd*"), this Court had affirmed the trial

court's denial of class certification for lack of commonality based primarily on employee declarations stating that some class members did receive breaks, reasoning that defendant's liability therefore could not be established without individual inquires for each class member. (*Faulkinbury*, *supra*, at 237.) This is exactly the analysis Amici advance here. Yet, on remand after *Brinker*, this Court conclusively rejected its previous analysis as inconsistent with the dictates of the Supreme Court, and held that class treatment was appropriate as evidence of variation within the class does not show individual issues of liability, but "at most establishes individual issues of damages, which would not preclude class certification." (*Faulkinbury*, *supra,* at 237.)

In *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, review den. (March 12, 2014) ("*Jones*"), the court reversed the trial court's denial of certification, as well as its determinations on predominance and superiority, in an action for unpaid overtime and related Labor Code violations brought on behalf of insurance claims adjusters. The employer denied it had a uniform policy denying compensation for pre-shift work, asserted that liability would depend upon numerous individual issues, and presented evidence from class members stating they were not required to perform pre-shift work, that they requested and were approved for overtime when necessary, and that time spent pre-shift was de minimus. (*Id.* at 991-992, 996.) The court of appeal concluded that the trial court had applied improper criteria by focusing on potential conflicting individual issues concerning the right to recover damages, and that substantial evidence did not support the trial court's finding that individual issues predominated, as "Farmers's liability depends on the existence of such a uniform policy and its overall impact on its APD claims representatives, rather than

individualized damage determinations." (*Id.* at 995, 997.) "Moreover, the trial court erred to the extent that its ruling was based on its evaluation of the merits of Plaintiffs' claim as to the existence of such a uniform policy." (*Id.* at 997.)

Amici also assert that the employer in *Williams, supra,* 221 Cal. App. 4th 1353, "acknowledged that its uniform policy was not to track the [class members' time]" (AB25), and therefore had admitted a violative policy and a corresponding absence of individual issues. To the contrary "[i]n its post-*Dukes* motion for decertification, [the employer] argued it had a policy forbidding adjusters from working before each day's first appointment, and [the employer] asserted it instructed its adjusters to follow that policy" and "also argued not every adjuster claimed to work off the clock, and among those who claimed they worked off the clock, they varied in how much time they worked, with some number of them working *de minimis* time." The employer also asserted that the evidence shows that instructions differed from manager to manager and from employee to employee" and that "its policy [was] to pay for all overtime that adjusters work[ed], and indeed, appellant concede[d] he received overtime pay 70 times." (*Id.* at 1369-70.) The *Williams* court ignored these machinations:

> We instead assume based on the evidence appellant and other adjusters put to the trial court that [the employer] had a company-wide practice of adjusters working off-the-clock. (*Id.* at p. 1023, 139 Cal.Rptr.3d 315, 273 P.3d 513 [court assumes claims have merit].) An unlawful practice may create commonality even if the practice affects class members differently. "[C]lass treatment does not require that all class members have been equally affected by the challenged practices—it suffices that the issue

> of whether the practice itself was unlawful is common to all."

(*Id.* at 1370 [citations omitted].) This Court should do likewise.

2. Amici Rely on Cases Exhibiting a Sharp Predominance of Individual Issues, Yet Claim the Cases Establish a Bright-line Against Certification When Individual Issues Simply Exist

Amici follows Wackenhut's lead in relying extensively on a core group of certification cases in which it was determined that liability was dependent on substantial, inherently individualized issues, which could not be evaluated on a class basis. Amici rely most heavily on two pre-*Sav-On* and pre-*Brinker* cases: *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447 (AB *passim*) ("*San Jose*") and *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal. 4th 1096 (AB13, 22, 28).

Amici hold out *San Jose* as establishing a "long-standing rule that the right to recover is an issue of liability, not damages" and "individuality regarding that right bars class certification." (AB28, 29.) Yet, our Supreme Court flatly rejected this characterization of its opinion in that case:

> Finally, the Court of Appeal erroneously cited *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 115 Cal.Rptr. 797, 525 P.2d 701 (*San Jose*) in suggesting trial courts must "deny class certification when each member's right to recover depends on facts individual to the member's case." In *San Jose*, the trial court had certified a class of property owners pressing claims against a municipal airport. We reversed, remarking at one point that the general rule "that a class action cannot be maintained where each member's right to recover depends on facts peculiar to his case . . . remains viable in this state." But reading this categorical extract out

> of context would misstate the established legal standard for commonality, which, as previously noted, is comparative. Our holding in *San Jose* was, in fact, expressly comparative (see *San Jose, supra*, at p. 460, 115 Cal.Rptr. 797, 525 P.2d 701 [comparing "the issues which may be jointly tried" with "those requiring separate adjudication"]), and we consistently have adhered to that approach.

(*Sav-On*, *supra*, at 338-339 [internal citations omitted].) Thus, determining the propriety of class certification where some individual factors are present requires an "expressly comparative" approach: Amici's argument that a bright-line has been drawn is disingenuous.

Likewise, Amici's reliance on *Lockheed Martin*, 29 Cal. 4th 1096, for two sweeping propositions—that "individuality regarding the right to recover prevent[s] commonality" and "the right to recover is a liability issue and that individuality regarding that right bars class certification," (AB22, 28)—also is misplaced because there also was no bright-line articulated there. *Lockheed Martin* was a case against multiple manufacturers alleging that defendants discharged dangerous chemicals that contaminated a city's drinking water. Although there were numerous issues that could have been adjudicated based on common evidence, because plaintiffs had no liability theory that made actual dosages and variations in individual response irrelevant, they were not able to prove causation and damages by common evidence. (*Id.* at 1110.) Thus, using the comparative approach, "[e]specially when considered in light of the trial court's finding that the class consist[ed] of an estimated 50,000 to 100,000 people," the Court determined that individual issues predominated. (*Id.* at 1111.)

Amici relies less extensively on several other cases whose factual predicate is distinguishable from that here and where the court's "expressly

comparative" approach resulted in denial of class certification. For example, the court in *Thompson v. Automobile Club of Southern California* (2013) 217 Cal.App.4th 719, affirmed a denial of class certification based on numerous deficiencies, including there being no classwide proof for plaintiff's prima facie case and uncontroverted evidence that a substantial portion of the class could not recover under *any* of plaintiff's theories.

Likewise, *Morgan v. Wet Seal, Inc.* (2012) 210 Cal.App.4th 1341, was a Labor Code § 2802 class action alleging an unlawful policy of requiring workers to purchase and wear company clothing without compensation. There, class certification was denied because there was no written policy requiring the purchases and no common proof as to what individual managers required of the workers. (*Id.* at 1356-57.)

Fuhrman v. California Satellite Systems (1986) 179 Cal.App.3d 408, is even less relevant here. *Fuhrman* was a tort action arising from a cable television company's conduct in sending demand letters to 8,700 people accusing them of illegally intercepting satellite television signals. The court sustained a demur to the class allegations, where the members of the proposed class, some 8,700 area residents, were not similarly situated (because some had actually received the signals and because the proposed class members had responded to the letters in different ways) and the injury alleged was that of *emotional distress*, which is singularly ill-suited to class treatment because its nature and effect will vary greatly with the individual. (*Id.* at 424-25.)

Wilens v. TD Waterhouse Group, Inc. (2003) 120 Cal.App.4th 746, concerned a nationwide putative class of webBroker customers who were subject to a provision allowing Waterhouse to terminate their internet trading access without notice. The plaintiff contended that all the class

members shared a common question of law, i.e., whether the termination provision is unconscionable. The court agreed that unconscionability was a common issue, but held that individual issues predominated because damage could not be presumed "by the mere insertion of the . . . provision in the webBroker agreement." (*Id.* at 755.) In *Wilens*, the court determined that *each* of the 1.7 million putative class members would have to prove his or her right to and extent of damages. (*Id.* at 751.)

Finally, *Frieman v. San Rafael Rock Quarry, Inc.* (2004) 116 Cal.App.4th 29 was a real property *nuisance* class action brought by neighbors of a quarry. Certification was denied because "the multiple variations in potential impact (or complete lack of impact) of Quarry's operations . . . involve differences in establishing Quarry's liability to the proposed class members as well as in the nature of the damages suffered." (*Id.* at 41.) Again, each individual class member would have had to establish liability and damages—thus, although Quarry's substantial unpermitted expansion was a common issue, individual issues predominated.

As discussed immediately below, Amici's reliance on the above-listed cases, each exhibiting a strong predominance of individual issues and which resulted in a denial of class certification, should not be regarded favorably by this Court in review of the present case because similar individual issues do not exist or predominate in this case.

3. Amici's Asserted "Individual Issues" Do Not Predominate Here Because They Can Be Managed with Common Proof

Amici assert, as if unequivocal law, that "[i]ndividuality regarding the right to recover precludes class certification." (AB22.) This statement, however, is merely Amici's aspiration, not the law. In fact, all of the cases

Amici discuss, both in support of and against certification, are examples of the same, long-standing, unremarkable commonality principles applied to different sets of facts and different substantive law in each case. The question has always remained the same: do common questions predominate? Depending on the facts and the underlying substantive law, the answer to that question varies. Predominance remains a comparative principle.

"On the issue whether common issues predominate in the litigation, a court must 'examine the plaintiff's theory of recovery' and 'assess the nature of the legal and factual disputes *likely to be presented*.' " (*Ramirez v. Balboa Thrift and Loan* (2013) 215 Cal.App.4th 765, 776, review den. (S210930 July 31, 2013), ("*Balboa*") citing *Brinker*, at 1025) [emphasis in original].) "The ultimate question . . . is whether the issues which may be jointly tried, when *compared* with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Ibid.* (citing *Brinker*, at 1021) (emphasis added) (internal quotations omitted).)

Here, as was determined by the trial court before *Wal-Mart*, the answer remains "yes," common questions predominate. Substantial evidence shows common questions predominate as to whether Wackenhut uniformly failed to provide off-duty meal periods and comply with the statutory requirements for on-duty meal periods; whether Wackenhut's had a rest break policy that authorized and permitted rest periods; and whether Wackenhut's wage statements complied with the requirement of Labor Code section 226. (5JA1138-1141.) The propriety of Wackenhut's policies, when compared to the requirements of the wage order, will be adjudicated by common proof. (AOB2-8.) Based upon Plaintiffs' theories

of liability, liability will be shown through common evidence, even if that liability translates to differing rights to recovery (or no recovery at all) to individual class members. This concept does not destroy commonality.

> '[T]he necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate.' [Citations.] Individual issues do not render class certification inappropriate so long as such issues may effectively be managed. [Citations.] [¶] Nor is it a bar to certification that individual class members may ultimately need to itemize their damages.

(*Sav-On*, *supra,* 34 Cal.4th at 334.) Plaintiffs are not required to prove each element of liability on an individual basis, and Defendants have no right to demand proof by such individual evidence when common methods of proof exist. Here, common methods of proof exist regarding the asserted "individual evidence of liability" demanded by Amici which, in turn, makes the case manageable.

Brinker instructs that a court "must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, *whether there are ways to manage effectively proof of any elements that may require individualized evidence.*" (*Brinker*, at 1024, citing *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 [emphasis added].) Whether an individual received a bona fide, off-duty meal period or whether an individual signed a valid meal period waiver, both of which could reduce the amount of an individual's damages or negate an individual's claim entirely, may be proven through the employees' records.

Amici's suggestion that Wackenhut also has right to explore the "supposed event when somebody allegedly, somehow, fell into an off-duty lunch period, contrary to the alleged uniform policy" (3RT6304:25-6305:1)

does not present any likelihood that individual issues would predominate. In *Balboa, supra*, 215 Cal.App.4th 765, the defendant asserted "that individual issues would predominate because it should be provided the right to 'investigate' each class member to determine whether it could find any facts showing the applicability of any of [its] statutory exceptions." (*Balboa*, at 782.) This Court, relying on *Brinker*, concluded the following:

> Without any foundational basis showing that such evidence could or would be discovered, this possibility does not raise a likelihood that individual issues would predominate over common issues in the litigation.

(*Ibid.*) The same consideration also militates against Amici's assertion that Wackenhut has an unfettered due process right to engage in the same fishing expedition.

C. AMICI'S DUE PROCESS ARGUMENTS DEMONSTRATE THE TRIAL COURT'S ERRONEOUS LEGAL ASSUMPTIONS REGARDING *WAL-MART*

Amici also echo Wackenhut's assertion of a fundamental due process right guaranteeing the opportunity to litigate individualized defenses to every class member's claim for liability and damages at trial. Contrary to Amici's creative deconstruction of the decision, this argument still finds no support in the *Wal-Mart* Court's rejection of "Trial by Formula," which, pursuant to the federal Rules Enabling Act, was compelled by the statutory language of Title VII specifically providing the employer's right under that statute to offer individualized defenses at the remedial stage of a case seeking injunctive relief based on a pattern and practice of sex discrimination. (131 S. Ct. at 2561, citing 42 U.S.C. § 2000e-5(g)(2)(A).) Nor can such a rule be cobbled together from the

hodgepodge of due process quotes Amici selectively extract from case law spanning a broad range of jurisdictions and inapposite subject matter to justify its position.

In advancing this position, Amici disregard the State's interest in enforcing minimum labor standards and in conserving scarce judicial resources, as well as plaintiffs' and class members' interest in obtaining a class-wide remedy and resolving wage claims that have been pending for years. These interests are germane to the due process analysis and compel continued application of class treatment here.

Procedural due process protections do not limit courts from exercising their discretion to regulate the quantum, method, or order of proof when necessary to facilitate the fair and efficient adjudication of claims. Nor can due process questions be answered by reference to a bright-line test. Instead, consideration of whether a procedural mechanism comports with due process requires the balancing of three separate interests: a plaintiff's interest in obtaining a remedy, a defendant's interest in avoiding the erroneous deprivation of its property, and "any ancillary interest the [Court] may have in providing the procedure or forgoing the added burden of providing greater protections." (*Connecticut v. Doehr* (1991) 501 U.S. 1, 11; *Oberholzer v. Comm'n on Judicial Performance* (1999) 20 Cal. 4th 371, 390-91.) Due process simply requires the opportunity to be heard at a meaningful time and in a meaningful manner. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333, 348 [holding live hearing not required prior to termination of Social Security benefits, given the government's interest "in conserving scarce fiscal and administrative resources"].) It calls for a "flexible" approach requiring only "such

procedural protections as the particular situation demands." (*Oberholzer,* at 333, 334.)

Amici flatly ignore or go to great lengths to innovatively interpret authority that is controlling in this case, because their argument cannot be reconciled with the prevailing law of California class actions. Amici never even mention *Doehr*, which discusses balancing the interests involved where a defendant claims that a procedural device is depriving it of property without due process.[3] Amici ignore this seminal decision to advance two equally flawed premises in support of their position: (1) that decisions applying federal Rule 23 are binding on California courts' application of section 382 to the extent they draw from any due process principles; and (2) that procedural due process protections confer on defendants an absolute right to pursue all individualized defenses in the manner of its choosing.

1. California Class Action Law Continues to Provide a Well-Established Procedural Scheme Encouraging Class Actions While Safeguarding Due Process Protections

As the U.S. Supreme Court recognized shortly before deciding *Wal-Mart*, state class certification procedures can and do differ widely from federal procedures. (*Smith v. Bayer Corp.* (2011) __U.S. _, 131 S.Ct. 2368, 2377-2388 [state may interpret its class action rules independently of federal interpretation of federal rules even where state rules use same language as federal rules]; see also *Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 128 [rejecting interpretation of federal rules as "not

[3] Our Supreme Court recently unanimously rejected a due process claim applying a balancing analysis in *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, emphasizing the "flexible" and "context[ual] requirements of due process.

persuasive" in California].) In California, federal class certification cases provide guidance only "in the absence of controlling California authority," and do so primarily as "constructional aids." (*Southern California Edison Co. v. Superior Court* (1972) 7 Cal.3d 832, 839.)[4] Historically, California courts have never hesitated to reject interpretations of analogous federal case law in favor of advancing its stated public policies, including providing greater protections to California workers and consumers when appropriate to further the Legislature's intent.[5]

In the same vein, California class action jurisprudence has always strongly supported the class action process. California's class action statute, Code of Civil Procedure section 382, was enacted in 1872, nearly seven decades before the adoption of Federal Rule 23. Independent of federal law, California has an affirmative "'public policy which encourages

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[4] Accord *Green v. Obledo* (1981) 29 Cal.3d 126, 145; *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 872; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 822; *Daar, supra*, 67 Cal.2d at 709.

[5] See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798 ("where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced"); see also *Martinez v. Combs* (2010) 49 Cal.4th 35, 66 (rejecting federal definitions of "employ" and "employer" in favor of IWC definitions in effect since 1916 and 1947); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1057-59 (rejecting federal limitation on continuing violation doctrine for retaliation claims because adopting the federal rule "would mark a significant departure from the reasoning and underlying policy rationale of our previous cases"); *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 568, 570 (rejecting federal "catalyst" fee-shifting restriction noting that "United States Supreme Court interpretation of federal statutes does not bind us to similarly interpret similar state statutes"); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, 1137 (rejecting federal limitation on fees multipliers); *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592 (rejecting less protective federal "travel time" standard: "we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication").

the use of the class action device."' (*Sav-on*, *supra*, 34 Cal.4th at 340 (quoting *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 473).) That policy "rests on considerations of necessity and convenience, adopted to prevent a failure of justice." (*Daar*, *supra*, 67 Cal.2d at 704.)

Consistent with that policy, the California Supreme Court has been vigilant to protect against the consequences of depriving employees of their right to prosecute their commonly held wage-and-hour claims on a class action basis, repeatedly invoking the doctrine that the that "rules promulgated by this court should reflect that policy." (*Richmond*, *supra*, 29 Cal.3d at 473 [emphasis added]; see also *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 378 [noting "public interest in establishing a procedure that permits [class] actions to be decided on their merits"].) "As [the] court has observed on many occasions..., the adoption of efficient class action procedures unquestionably... vindicat[es] a wide range of legitimate public purposes." (*Civil Service*, 22 Cal.3d at 377 [citing *Daar, supra,* 67 Cal.2d at 714-15 & n.14; *Vasquez, supra,* 4 Cal.3d at 808; *Southern California Edison Co., supra,* 7 Cal.3d at 841-42].)

Finally, because in many cases the practical effect of denying a class proceeding may be no proceeding at all (see *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 441), our Supreme Court has consistently examined the nature of the claim and the importance of the rights to be vindicated by the proposed class action when reviewing lower courts' certification rulings. (See, *id.* at 445-46 ["courts remain under the obligation to consider 'the role of the class action in deterring and redressing wrongdoing"' (emphasis added)].) In *Daar*, the Court observed that "absent a class suit, recovery by any of the individual [class members] is unlikely .... [Instead], defendant will retain the benefits from its alleged wrongs. A procedure that

would permit [class members] to recover the amount of their overpayments is to be preferred over the foregoing alternative." (*Daar*, *supra*, 67 Cal.2d at 715.) In *Vasquez*, the Court said more forcefully that "[p]rotection of unwary customers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society," and that the alternatives to a class action "do not sufficiently protect the consumer's rights." (*Vasquez, supra*, 4 Cal.3d at 808.)

In addition to protecting the rights of vulnerable individuals and enforcing its statutory mandates, a third significant component of California's foundational public policy is the benefit to the judicial system of class proceedings over the alternatives - individual proceedings or mandatory joinder. Thus, the Court has adopted procedural rules *precisely because* they facilitate use of the class action device.

As such, California courts have not hesitated to interpret section 382 independently of the federal courts' construction of Rule 23 and to reject federal interpretations of Rule 23 that are inconsistent with California law or policy, even in cases where the resulting rules stand in direct conflict with one another. Contrary to Amici's suggestions otherwise, such variation between state and federal class action standards and procedures is entirely permissible (*Smith*, *supra,* 131 S.Ct. at 2377-2378) and is accomplished in accordance with due process.

For example, federal courts interpreting Rule 23 invoke "due process principles" to hold that plaintiffs, not defendants, must bear the cost of notifying the class of the pendency of a class action. (*Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156.) Nonetheless, the California Supreme Court applied *Doehr*'s instructions in the class action context to hold otherwise in *Civil Service*

Employees, 22 Cal.3d at 377-81, where the defendant challenged the trial court's order requiring it to bear the cost of the class notice. (*Id.* at 374.) The Court found the strong public policies behind the California class action device determinative. (*Id.* at 377-78 [holding that defendants may be ordered to bear notice costs without violating due process because "[i]n the absence of such a cost-shifting procedure, the class action mechanism might frequently be completely frustrated"].)

In a further illustrative example, federal courts generally hold that fluid recovery, a method of distributing damages not claimed by class members, is not authorized in Rule 23 class actions. (*Eisen v. Carlisle & Jacquelin* (2d Cir. 1973) 479 F.2d 1005, 1018, vacated on other grounds (1974) 417 U.S. 156 ["the fluid recovery concept and practice [is] illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."].)

But California courts have reached a different conclusion. In *Bruno v. Superior Court, supra,* 127 Cal.App.3d 120, the California Court of Appeal held that *Eisen* was "not persuasive" and refused to follow it, stating, "Whatever the validity of their analysis of federal civil procedure, we find it inapposite to an interpretation of California's class action statute (Code Civ. Proc., § 382), which *Eisen* itself called 'very different in its phraseology from amended Rule 23.'" (*Id.* at 128.) In *State of California v. Levi Strauss & Co.* (1986) 41 Cal.3d 460 ("*Levi Strauss*"), California's Supreme Court agreed, approving fluid recovery in California class actions and rejecting the contrary federal precedents. Significantly, the Court emphasized that fluid recovery served the important policy of deterrence: "Without fluid recovery, defendants may be permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in

small amounts instead of small numbers of people in large amounts." (*Id.* at 472.)[6]

Ignoring such strong statements of public policy, Amici fall back on dictum that "[c]lass actions are provided only as a means to enforce substantive law" and "[a]ltering the substantive law to accommodate procedure would be to confuse the means with the ends...." (citing, inter alia, *San Jose, supra,* 12 Cal.3d 447, 462; *Granberry v. Islay Investments,*

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[6] The Court also addressed a due process argument in *Kraus v. Trinity Management Servs. Inc.* (2000) 23 Cal.4th 116, 137-38 (finding the representative action to be constitutionally firm where the trial management plan accommodated the defendant's defense that it had already repaid some of the persons entitled to a refund). See also *Richmond, supra*, 29 Cal.3d at 479 (declining to adopt rule proposed by defendant that "would unnecessarily interfere with the rights of the class members to use this equitable procedure...To rule otherwise would eliminate a substantial number of class action suits in this state."); *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 363 n.6 (rejecting defense argument that materiality of misrepresentations about fees depends on each plaintiffs individual "financial status"; "[r]equiring proof of this nature would necessarily preclude the certification of virtually all class actions based on allegations of fraud."); *San Jose, supra*, 12 Cal.3d at 457 (rejecting argument that individual pre-suit government claim forms were required for each class member; such a requirement "would severely restrict the maintenance of appropriate class actions - contrary to recognized policy favoring them"); *Southern Cal. Edison, supra,* 7 Cal.3d at 842 (rejecting defendants' bid to depose unnamed class members and scheme to exclude those who fail to appear because it is "vital to prevent such 'chilling' of class actions in light of their new importance as a litigation tool"); *La Sala, supra*, 5 Cal.3d at 873 (rejecting defense attempt to "pick off" class representatives by offering full relief because it would mean that "only members of the class who can afford to initiate or join litigation will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs. Yet the function of the class action is to avoid the imposition of such burdens upon the class and upon the court.").

Inc. (1995) 9 Cal.4th 738, 749.) These cases are readily distinguishable.[7] Moreover, this language does not mean—as Amici apparently contend—that a class action cannot be certified unless it will be tried using procedures identical to those available in an individual action.

2. There is No General Due Process Right to Unfettered Litigation of Individual Defenses or to Demand Individualized Proof of Any Element of Claims or Defenses, Whether in Individual or Class Proceedings

The trial court in this case neither acknowledged nor applied the appropriate balancing of interests in analyzing Wackenhut's due process argument for decertifying the class. It gave little consideration to the competing interests of Plaintiffs and the State in an aggregate resolution, but treated Wackenhut's interests as inviolate after *Wal-Mart*. The trial court ultimately concluded that, based on due process, "individualized inquiries are necessary because, pursuant to *Wal-Mart*, Wackenhut has a right to defend itself by proving that, in practice, even at worksites that typically had on-duty meal periods, some class members were actually authorized to take off-duty meal periods." (13JA2944.) In other words, the

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[7] In *San Jose*, the Court held that the ancient common law principle that each parcel of land is unique precluded a group of property owners from bringing a class action for damages for airplane noise, dust and vibrations against a municipal airport. In *Granberry*, the Court held that the plaintiff-tenants, having brought a class action against their former landlords for non-refunded security deposits, could not deprive the landlords of their statutory right to claim set-offs for unpaid rent, repairs and cleaning. The Court specifically noted that it might be possible to shape a remedy to resolve the setoff on a class basis and ordered the trial court to hold "an evidentiary hearing" on whether the landlords had sustained their statutory burden to claim the setoff.

court held that due process allows defendants to demand individualized proof from every single class member. That is not the law.

"[A]s a matter of due process, courts have broad discretion to regulate opportunities to present evidence in civil cases," and treat "many choices in the realm of civil procedure and evidence as a subconstitutional matter left to judicial or legislative choice." (Mark Moller, Class Action Defendants' New Lochnerism, 2012 Utah L. Rev. 319, 366, 392 (2012).) Allowing aggregate proof in class action cases is one such choice.

> In effect, modern procedural due process cases and the nineteenth century tradition converge on essentials: Neither construes due process as a fixed limit on the type or quantity of evidence presented in ordinary civil proceedings. Then and now, due process leaves a great deal of room for courts to regulate parties' opportunities to present relevant evidence in civil proceedings in the service of equity and convenience. Class action defendants' arguments are rooted in a brief, and brief-lived, deviation from this tradition - the Lochner era. If history provides the "baseline" against which constructions of due process should be tested, class action defendants' claims are losers.

(*Id.* at 324.)

Of course, even an individual plaintiff's trial would necessarily involve "estimates" and other "sources of error." (Cf. *Jaimez, supra*, 181 Cal.App.4th 1302 [without records, class members would have to "attest to the typical amount of overtime time they worked each day"]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 725 [plaintiff reconstructed his hours of work over a nine-month period a year later "solely from . . . memory"].)

The trial management tools endorsed by California courts for class actions do not categorically "restrict [the defendant's] right to present

evidence against the claims." Rather, they commonly—and properly—control the manner and timing of the presentation of that evidence. California may constitutionally set boundaries of this kind on the parties' evidentiary presentations as they may in any proceeding. (*Cohen v. Beneficial Indus. Loan Corp.* (1949) 337 U.S. 541, 552 ["A state may set the terms on which it will permit litigations in its courts."]; see *People v. Sandoval* (1989) 206 Cal.App.3d 1544, 1550 [due process requires only "a reasonable opportunity to be heard"]; Moller, *supra*," 2012 Utah L. Rev. at 366 ["[A]s a matter of due process, courts have broad discretion to regulate opportunities to present evidence in individual cases," and "many choices in the realm of civil procedure and evidence [are] a subconstitutional matter left to judicial or legislative choice."].)

The same principles are recognized in federal courts, and the authority relied on by Amici do not compel the extreme standard with which they would replace these necessary management tools. For example, Amici cite *Lindsey v. Normet* (1972) 405 U.S. 56 for the proposition that "[d]ue process requires that there be an opportunity to present every available defense." But *Lindsey* holds that due process requires only that there be "available procedures" to present the defenses. (*Lindsey*, 405 U.S. at 66.) In *Lindsey*, the U.S. Supreme Court upheld a procedure that barred

the defenses from being presented at all until a later, "separate action" was filed. (*Id.*)[8]

Equally important to this Court's analysis is the fact that Amici's reliance on often long-standing federal authority to support Wackenhut's purported due process right to present individual defenses is misplaced because Amici fail to acknowledge two critical weaknesses, which preclude such reliance: (1) Amici present this due process rule as having been established before the trial court originally granted certification of the class—but in fact, the trial court entertained and ultimately granted Wackenhut's Motion for Decertification based on its interpretation of *Wal-Mart* as having announced a *newly applicable* due process standard amounting to a "change in law"; and (2) the applicability of the principles relied upon by Amici is based upon the presumption that Wackenhut actually attempted to present—or at least proved an ability and intent to present—legitimate individual defenses at trial and was denied the opportunity to do so. Indisputably, as discussed below, neither of these premises is true.

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[8] Other authority cited by Amici are similarly unpersuasive here. (See, e.g., *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215 [concerning a defendant's "right to raise individual defenses against each class member," and quoted from the context of the court's holding that fluid recovery would violate due process, a position rejected by California courts]; *Bruno, supra*, at 128; *Levi Strauss, supra*, 41 Cal.3d at 472; *In re Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 836 fn 1 [stating that that "aggregate litigation must not be allowed to trump our dedication to individual justice," in the context of a mass trial of 79 wrongful death and personal injury cases for asbestos exposure].)

3. Amici Cannot Transform *Wal-Mart*'s "Trial by Formula" Discussion Into a Broad Restatement of Constitutional Due Process Rights Justifying Decertification Here

In their Opening and Reply Briefs, Appellants discussed extensively the reasons why the Supreme Court's decision in *Wal-Mart*, issued shortly before the scheduled trial date in this case, did not compel decertification of the class here and, moreover, did not establish a new bright-line rule of constitutional due process binding on all courts considering class certification motions. (AOB15-25, 35, 47-49; RB1-4.) Since that briefing, Division 8 of this Court in *Williams v. Superior Ct.* (2013) 221 Cal.App.4th 1353, has thoroughly debunked the notion that such a constitutional bright-line exists in all types of class actions. (*Id.* at 1361-71.)

Amici's contentions here regarding *Wal-Mart*'s "Trial by Formula" holding are similar to Respondent's arguments to the trial court in support of its Motion to Decertify the Class. Wackenhut contended, and the trial court ultimately accepted, that class action defendants such as Wackenhut have a constitutional due process right, derived from the Trial by Formula discussion in *Wal-Mart*, to rebut each class member's claim as to both liability and damages issues on an individual basis. The trial court was persuaded, and ultimately adopted Wackenhut's view of *Wal-Mart* in decertifying the class. But the portion of the *Wal-Mart* opinion that addressees "Trial by Formula" did not rest on the Due Process Clause and is not a sweeping condemnation of aggregate proof in general. *Wal-Mart* does not contemplate, let alone enshrine, a constitutional due process right to litigate each class member's claim individually.

Despite defendants' seemingly ubiquitous parroting of the phrase in countless other contexts in the wake of the decision, the Supreme Court's

reference to "Trial by Formula" appears only at the tail end of its extended discussion of whether claims for backpay under Title VII could properly be certified under Federal Rule of Civil Procedure 23(b)(2), which applies where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Court left open the possibility that (b)(2) certification might be used in certain cases involving "incidental" monetary relief that did not require individualized proof, but held that such relief could not awarded in the Title VII case before it. Read in context, the limited import of the "Trial by Formula" shorthand is plain: it refers only to a proposed plan for proving aggregate damages that the Court found incompatible with Title VII's specific statutory scheme. The Supreme Court explained:

> Contrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate." § 2000e-5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay."§ 2000e-5(g)(2)(A).
>
> We have established a procedure for trying pattern-or-practice cases that gives effect to

> these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings... to determine the scope of individual relief." At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."

(*Wal-Mart*, 131 S. Ct. at 2561-62 (quoting *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 367.)

The Court rejected the Ninth Circuit's view "that it was possible to replace such proceedings with Trial by Formula" without further individualized proceedings. (*Id.*) Pointing specifically to the language of Title VII, the Court "disapprove[d] that novel project," explaining that the individualized defenses guaranteed by Title VII cannot be replaced with formulaic proof under Rule 23 because to do so would override Wal-Mart's substantive statutory rights in violation of the Rules Enabling Act (not the Due Process Clause). "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." (*Wal-Mart*, 131 S. Ct. at 2561 [internal citation omitted].) Nowhere does the opinion establish a trans-substantive right to present individualized defenses in every case, regardless of the underlying substantive law at issue.

Wackenhut's Amici here concede—if reluctantly—that *Wal-Mart*'s Title VII "Trial by Formula" holding was based directly on the federal

Rules Enabling Act, and not the 14th Amendment as advanced by Wackenhut in front of the trial court. (AB38, 43.) Yet, presumably recognizing that the trial court's decertification order is inextricably dependent upon its erroneous interpretation of *Wal-Mart* as establishing just such controlling due process rules, Amici here attempt to skirt the fundamentally flawed foundations of the trial court's Order to justify its result. Amici thus argue that, "although the *Wal-Mart* court centered its decision on Rules Enabling Act," the decision is nonetheless binding on state courts as a dictate of United States constitutional law because "such class action procedural 'protections [are] grounded in due process.'" (AB38 [citing *Taylor v. Sturgell* (2008) 553 U.S. 880, 901].)

The attempt to turn the rejection of Trial by Formula into a constitutional bar to representative actions ignores the entire history of the Supreme Court's "Due Process Clause" jurisprudence, which Amici and Wackenhut apparently believe was swept aside without so much as a nod to the three-part test that the Court first articulated in *Mathews v. Eldridge,* 424 U. S. at 343-344 and restated in *Connecticut v. Doehr*. According to Amici, there is now a technical conception with fixed content that protects class action defendants from any use of representative testimony, statistical evidence, and any other forms of common proof, regardless of the government's interest in preventing the "failure of justice" recognized in *Daar v. Yellow Cab*.

Amici also deny that particular considerations of the underlying substantive law at issue in *Wal-Mart*—Title VII—limit at all the other contexts in which its holdings may properly be extended. (AB42-43.) In their discussion, there is repeated reference to a presumably broad "substantive right" to present all individual defenses. (See, e.g., AB38, 42-

43.) Yet, surrounding language and context in the sources relied upon show that what Amici are actually referring to is the very statutory right to present individual defenses codified in Title VII, and the basis of *Wal-Mart*'s "Trial by Formula" discussion. (See AB42 [quoting *Wal-Mart*, at 2561].)

Essentially, Amici set forth a string of otherwise unconnected statements of law to create a chain of reasoning that, when taken in order, purportedly justify or even *require* a state trial court to construe a Supreme Court holding explicitly premised on the Rules Enabling Act and Title VII as a broad statement of constitutional law and apply it accordingly. Amici's argument is creative, but not correct.[9]

Nor does it accurately reflect the *trial court's* interpretation of *Wal-Mart*. This distinction is critical, as the trial court's erroneous legal assumptions regarding *Wal-Mart* served as the predicate for its flawed analysis of the case in considering and ultimately granting decertification of the class. (13JA2934, 2937-2942, 2944-2949; RFJN, Ex. 8; see also AOB16, 30-33, 35, n.17 [in addition to the court's explicit reliance on an erroneous interpretation of *Wal-Mart* as compelling decertification, the presumptions flowing directly therefrom permeate the entire decertification order].)

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[9] See also, Moller, *supra*, 2012 Utah L. Rev. at 6, n. 31 (discussing identical arguments advanced by the Petitioners in *Wal-Mart*, and distinguishing between Wal-Mart's argument to the lower courts that there is a general due process right to present individual defenses, and the modified due process argument Wal-Mart successfully advanced to the Supreme Court, which was based not on broad due process principles but the base requirement that due process requires courts to follow the statutory provisions in Title VII).

Amici cannot butress the trial court's decertification ruling by concocting a more nuanced reading of *Wal-Mart* that purports to justify the same result. Appellate courts review the soundness of the trial court's reasoning and rationale for a class certification ruling, reversing a ruling founded upon erroneous legal assumptions or improper criteria and ignoring other grounds that may support it. (*Balboa, supra,* 215 Cal.App.4th at 776-777, 783 [collecting cases].) It is therefore the trial court's particular application of *Wal-Mart*—not Amici's alternative theory to reach the same conclusion—that circumscribes the inquiry on review of its order decertifying the class and that compels reversal, as where "if a trial court bases its denial of class certification on an incorrect legal analysis, a reviewing court must reverse and remand." (*Id.* at 777, 783 [collecting cases].)

4. Amici Fail to Show How Wackenhut's Due Process Rights Have Been or Would Be Violated Here

Absent from Amici's discussion of a class action defendant's purported due process right to present "every available defense" is any mention of the actual defenses available to Wackenhut that have been or will be precluded by this litigation. (See AB8, 32, 33, 35, 40.) Rather, Amici, like Wackenhut, merely echo the potential due process violations suggested by the trial court. (AB36, 40, 43.)

Without any application or contextual discussion of the purported due process violations here, Amici's repetition of the catch-phrase—"every available defense"—offers little guidance to this Court. An examination of Wackenhut's *available* defenses demonstrates that this litigation has not

and will not result in any violation of Wackenhut's purported due process rights.[10]

As initially stated in Appellants' Opening Brief, *Brinker* establishes "every available defense" to an employer in response to a claim for meal period violations. After five hours of work, "an employer is put to a choice: it must (1) afford an off duty meal period; (2) consent to a mutually agreed-upon waiver if one hour or less will end the shift; or (3) obtain written agreement to an on duty meal period if circumstances permit. Failure to do one of these will render the employer liable for premium pay." (AOB38-39; *Brinker*, 53 Cal.4th at 1039.) As Plaintiffs' theory of recovery focuses only on shifts lasting six (6) or more hours, it is undisputed that the limited waiver option is inapplicable in this case. (AOB39; 7JA1456-1457 [¶¶ 6-10]; 1531-1532.) Consequently, Wackenhut's available defenses to Plaintiffs' meal period claim comprise: (1) a substantive defense that it provided off-duty meal periods; and (2) an affirmative defense that the on-duty meal periods it afforded were permissible under the nature-of-the-work exception.

a. Wackenhut may present employee records to show the rare exceptions when Officers received off-duty meal periods

The factual record is clear that, but for rare exceptions that have never been disputed by the Parties, Wackenhut did not provide Security Officers with off-duty meal periods. (AOB6-7, 12-14, 33-34; ARB11-16.) Contrary to Amici's assertion that Plaintiffs seek to deprive Wackenhut of

[10] Assuming Amici's due process argument is directed toward the meal period claim, as it appears to be, Plaintiffs' response will be limited to a discussion of that claim. However, the same principles apply to all of Plaintiffs' claims.

its defenses to individual claims, only contrary facts and the applicable law preclude Wackenhut from asserting a defense that it provided off-duty meal periods, not Plaintiffs.

To the extent that Wackenhut wishes to defend against Plaintiffs' meal period claim by emphasizing the rare exceptions when an individual security officer received an off-duty meal period, it may do so through common and class-wide proof from its labor scheduling system, which maintains records of the off-duty meal periods provided to security officers. (4JA813:17-814:21; 3RT6310:27-6312:13, 6313:4-6315:13; Plaintiffs' Motion to Augment [MTA] 1-10.) Notably, this same class-wide evidence, obtained during discovery, could also be used by Wackenhut to negate individual claims and ascertain the precise amount of an individual's damages. (ARB18.) Further, to the extent that Wackenhut wishes to pursue this defense at trial, this method of proof eliminates any need for individualized testimony from class members as it is undisputed that Wackenhut complies with its legal obligation to maintain accurate records of its employees' meal periods.[11] (AOB38; Cal. Code Regs., tit. 8, § 11040, 7(A)(3)); Lab. Code § 1174(d).) At no point have Plaintiffs attempted to preclude Wackenhut from using this information and, in fact, informed the trial court of its existence.

With respect to Wackenhut's asserted right to explore the possibility of the undocumented and "supposed event when somebody allegedly, somehow, fell into an off-duty lunch period, contrary to the alleged uniform policy" (3RT6304:25-6305:1), due process does not afford Wackenhut an

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[11] If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided. (*Brinker*, 53 Cal.4th at 1052-53 (Werdegar, J. concurring).)

unfettered right to assert hypothetical defenses unsupported by fact or law, nor binds a court to entertain them.[12] Again, it is the facts of this case and the standards enunciated in *Brinker* that limit the availability of this defense for Wackenhut, not Plaintiffs or any procedural constraints.

An employer's obligation under Labor Code section 512(a) and the Wage Order is to affirmatively provide employees with an off-duty meal period. (*Brinker*, 53 Cal. 4th at 1040.) An employer satisfies this obligation only if it (1) relieves its employees of all duty, (2) relinquishes control over their activities, (3) permits them a reasonable opportunity to leave the employer's premises for an uninterrupted 30-minute break, and (4) does not impede or discourage them from doing so. (*Id.* at 1036, 1040-41.) Except for the few identified locations where class members were permitted to take an actual, bona fide, 30-minute, unpaid, off-duty meal period, there is no evidence in the record that class members took, stole, or were otherwise inadvertently provided with, a meal period that satisfies the requirements set forth in *Brinker*.[13]

Amici would be hard pressed to show how Wackenhut's right to due process has been violated at this point. Since the initiation of the first action in this matter on January 7, 2005 until the filing of the motion for decertification on September 23, 2011, Wackenhut has had over six years

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[12] Prior to the association of new counsel, Wackenhut sought to argue that employee preference for on-duty meals was relevant to whether on-duty meal periods are permissible (AOB12; ARB16; 6JA1289, 1395-1399; 7JA1540-1541), but the trial court granted Plaintiffs' motion in limine on this issue as it is contrary to law. (7JA1592.)

[13] As set forth in Appellants' Opening and Reply briefs, each of the declaration and deposition excerpts identified by the trial court as the supposed evidence supporting this defense establish that, under the parameters specified in *Brinker*, the officers had only on-duty meal periods. (AOB37; ARB10-11.)

to present evidence in support of its now desired substantive defense to Plaintiffs' claim that it actually provided off-duty meal periods at worksites almost universally scheduled for on-duty meal periods. (1JA74:5-8; 20JA4732; 13JA2943:3-4.) In opposing class certification, Wackenhut deposed 22 putative class members and produced declarations from 108 current and former employees. (15JA3358:16-19.) Yet, none of its discovery elicited any evidence supporting Wackenhut's later-formed hypothetical defense that Amici contend due process provides Wackenhut the right to endlessly entertain at trial.

Contrary to the hopes of Amici, due process does not afford Wackenhut the right to explore every conceivable defense and theoretical possibility concocted after six years of litigation. Nor does the creation of these hypothetical situations to avoid trial constitute substantial evidence, negate commonality, or implicate due process protections that justify decertification. (See *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 646.)

Discussing the requisite proof of reliance on a material misrepresentation for purposes of a securities-fraud action,[14] the United States Supreme Court, after *Wal-Mart*, elucidated the appropriate effect of hypothetical situations advanced by a defendant on the predominance inquiry under Rule 23(b)(3).

> No doubt a clever mind could conjure up fantastic scenarios in which an individual

[14] To recover damages in a private securities-fraud action under Rule 10b–5, a plaintiff must prove, among other things, reliance on a material misrepresentation or omission made by the defendant. (*Amgen Inc. v. Connecticut Ret. Plans and Trust Funds* (2013) __U.S. __, 133 S.Ct. 1184, 1188.)

> investor might rely on immaterial information (think of the superstitious investor who sells her securities based on a CEO's statement that a black cat crossed the CEO's path that morning). But such objectively unreasonable reliance does not give rise to a Rule 10b–5 claim. [Citation] Thus, "the individualized questions of reliance," [Citation] that *hypothetically* might arise when a failure of proof on the issue of materiality dooms the fraud-on-the-market class *are far more imaginative than real.* Such "individualized questions" do not undermine class cohesion and thus cannot be said to "predominate" for purposes of Rule 23(b)(3).

(*Amgen Inc. v. Connecticut Ret. Plans and Trust Funds* (2013) __ U.S. __, 133 S.Ct. 1184, 1196-97 [emphasis added].) Nor does a class defendant, like Wackenhut, have a due process right to unlimited opportunities to assert hypothetical defenses at every stage of the litigation absent support from the facts or any basis in the law. The trial court once understood this concept when Wackenhut suggested that it might argue that Officers were provided with off-duty meal periods, but voluntarily decided to remain on-duty instead. (1 RT 2105:15-22, 2109:9-18, 2115:12-20.) The court responded accordingly:

> If you actually try to sell that bag of goods to the jury, I'll be first to tell them that this is an unbelievable effort to turn facts upside down, and an absolute offense to the fact finder.
> . . .
>
> [it] is testing the fact[s] so unbelievably that I assure you, I will comment to the fact-finder, exercising my constitutional rights, that they should approach this factual argument very skeptically.

(1 RT 2105:15-22, 2106:12-27.) Under Amici's and the trial court's interpretation of due process after *Wal-Mart*, Wackenhut should now have the right to present this defense.

b. Wackenhut may present all of the on-duty meal period agreements

At the heart of Amici's due process contentions lies Wackenhut's separate, affirmative defense that the on-duty meal periods it afforded were permissible under the nature-of-the-work exception. Described as "manifest" by Amici, the "threatened" due process violation is summarized as follows:

> Wackenhut asserted the nature of the work exception as an affirmative defense to plaintiffs' meal period claims. (13 JA 2941-2942.) That defense required a written agreement regarding on-duty meal periods. (13 JA 2944.) Plaintiffs argued that some of those agreements were ineffective because they lacked language informing employees that they had the right to revoke the agreements. (13 JA 2945.) However, plaintiffs obtained in discovery only a small fraction of the total agreements and planned to use statistical sampling to establish the proportion of the agreements lacking revocation language and to "extrapolate the results across the entire class." (*Ibid.*) As the trial court found, plaintiffs' proposal "would violate Wackenhut's due process right to 'present every available defense' " and "impermissibly alter the substantive law." (13 JA 2946.)

(AB40.) This summary suggesting a "threatened" violation to Wackenhut's due process rights is predicated upon a wholesale misrepresentation of the role statistical sampling has played and will play in this case. More importantly, it confirms that no such due process violation has occurred.

The text of the relevant Wage Order spells out the precise circumstances in which on-duty meal periods are permitted, including the baseline requirement that the employer and employee have executed a written on-duty meal period agreement that includes language stating that the employee may revoke the agreement at any time. (AOB39; Cal. Code Regs., tit. 8, § 11040(11)(A); *Brinker*, 53 Cal.4th at 1034-35.) At all times during this case it has been undisputed that: prior to April/May 2004 Officers did not execute valid on-duty meal period agreements informing them of the right to revoke; that beginning in 2004, only new hires signed agreements containing revocation language; and not until 2008 did Wackenhut require valid agreements be executed by all Officers. (AOB6-7, 44, 48; ARB3, 30, 32-33.) Plaintiffs' theory of liability to rebut Wackenhut's affirmative defense is that the nature-of-the-work exception is unavailable to Wackenhut for this portion of the class period.[16] (ARB32-33; 5JA1139-1140.) The only role played by statistical sampling here was to estimate the number of officers who had signed valid agreements during the transition between 2004 and 2008 from zero to 100% of the workforce because Wackenhut could not or preferred not to produce these agreements in support of its affirmative defense. (ARB30; 9JA2171:1-5.)

Quoting the trial court, Amici assert that Plaintiffs' "use of statistical sampling would impermissibly alter the substantive law and abrogate defendant's right to present its defenses to liability because 'Wackenhut would be limited to challenging Plaintiffs' statistical methods.' (*Ibid.*)" (AB36.) However, Amici fail to acknowledge that the sampling stipulation

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[16] The trial court often referred to this portion of the class, in part, as "an admitted liability case." (2RT5103:28-5104:5.) Plaintiffs also contend that the nature of the work does not prevent Officers from being relieved for meal periods. (AOB40-41.)

between the Parties does not *preclude* Wackenhut from producing all of the on-duty meal period agreements to establish this element of its affirmative defense. (7JA1632-1637; 13JA2947:26-27.) Amici contend, rather, that the very existence of statistical sampling for any purpose would abrogate Wackenhut's right to assert the nature-of-the-work defense. This has never been Plaintiffs' position.[17]

Neither Plaintiffs nor the mere existence of statistical sampling to resolve a discovery dispute has precluded or would preclude Wackenhut from producing any of the meal period agreements then, now, or at the time trial. To the contrary, Plaintiffs have repeatedly invited Wackenhut, both formally and informally, to produce all of the meal period agreements. (AOB10-15, 50-52.) Only Wackenhut's unwillingness and inability to do so have precluded it from producing them, not Plaintiffs. (*Ibid.*)

Amici's contention is premised upon two faulty presumptions: (1) that the Plaintiffs proposed and court required statistical sampling over the objections of Wackenhut; and (2) that statistical sampling would constitute the sole manner of proof at trial, despite the existence of other evidence presented by Wackenhut. Neither is presumption is true.

i. Plaintiffs never proposed statistical sampling over the objection of Wackenhut

Amici repeatedly accuse Plaintiffs of proposing the use of statistical sampling for a multitude of reasons including: establishing class liability, proving damages, answering unmanageable individualized inquiries, establishing the recovery of individual class members, and most importantly, to restrict the fundamental rights of Wackenhut including its

[17] Equally preposterous is Amici's assertion that the existence of statistical sampling would also "alter the substantive law."

purported right to present every conceivable defense. (AB3, 6, 8, 32, 35, 36, 41.) Without rehashing the procedural history of this case, which is given no consideration by Amici, the Plaintiffs did not propose sampling at all. (AOB10-15, 50-52.) The sampling present in this case was the result of a court-suggested compromise between the Parties due to Wackenhut's contention that discovery would otherwise be too burdensome.[18] (*Ibid.*) Plaintiffs did not propose statistical sampling for any of the purposes that Amici assert, and certainly did not insist on sampling over Wackenhut's objection.

ii. The threatened due process deprivations suggested by Amici would never be realized

Despite Amici's identification of the purported due process violations as "threatened," a far different procedural posture would be required to create such a "threat." Amici repeatedly refer to what "[t]he effect of plaintiffs' trial plan would have been . . . ." (AB41.) Yet, there was *no trial plan* in this case. Not one independently created by Plaintiffs, nor one collectively agreed upon by the Parties. No trial plan was requested or determined by the trial court. (AOB15.) Yet, Amici discuss this nonexistent trial plan as being "substantively different from the one required by law because it would have allowed the use of statistical sampling to establish class liability after the defendant evidence support individual defenses to liability." (AB41.) This is fabrication.

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[18] It must be noted, however, that the production of meal period agreements by Wackenhut would be no more burdensome in a class action than in response to 10,000 individual actions in which the same information—a meal period agreement—would be at issue.

First, the sampling in this case was arrived at only because Wackenhut considered it too burdensome to produce the evidence in support of individual defenses. Later, after asserting a due process right to support individual defenses, Plaintiffs encouraged Wackenhut to produce the meal period agreements. Wackenhut agreed that this would cure any perceived deprivation of Wackenhut's right to due process. (3 RT 6061:23-6062:9, 6070:25-28.) Consequently, if Wackenhut presented evidence supporting individual defenses to liability—i.e. the meal period agreements—Plaintiffs would use the evidence produced by Wackenhut, not sampling.[19]

Second, Plaintiffs have never needed the sampling evidence for trial. Contrary to Amici's assertions, Plaintiffs do not need the sampling to prove liability, which can be proven through the undisputed testimony of Wackenhut's mangers. As Amici assert, the nature-of-the-work exception is an affirmative defense that requires a meal period agreement. Absent the production of the meal period agreements or any use of the sampling results, Plaintiff will emphasize Wackenhut's failure of proof. (See CACI No. 203 [instructing on a party's ability to produce better evidence]; CACI 204 [instructing on the willful suppression of evidence].)

Nor do Plaintiffs need sampling evidence to prove damages, which will be established by Wackenhut's records that provide the number of days each employee worked more than six hours and the hourly wage rates. (AOB45, n.25.) If Wackenhut wanted to challenge its liability to or the amount of damages for any specific individual, it would have to produce

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[19] Plaintiffs explained to the trial court exactly how individual damages would be proven if Wackenhut produced all of the meal period agreements. (3RT6046:1-6047:3.)

the meal agreement for that individual as it would in any individualized proceeding. In reality, the sampling utilized here is just one piece of evidence that the trial court may or may not entertain. It is not necessary and indispensable to any of Plaintiffs' claims, including meal periods.

Amici draw attention to *Duran v. U.S. Bank National Assn.* to emphasize this purported the use of statistical sampling to prove liability here. (AB44, n.4.) However, the present case offers nothing akin to the factual predicate and procedural posture of *Duran*, which is an appeal from a judgment *following* a bifurcated bench trial. (*Duran v. U.S. Bank Nat. Assn.* (2012) 137 Cal.Rptr.3d 391.) In *Duran*, the trial court, following a trial plan submitted by the parties, *prevented* the defendant from submitting any relevant evidence already in its possession in its defense as to 239 out of the 260 class members. (*Duran*, at 433-34.) Instead, the trial court relied on a 21–person sample with a 43.3 percent margin of error in weekly overtime hours to determine class-wide liability. (*Id.* at 420.) Here, Wackenhut has not been prevented from submitting anything.

It is only Amici's conspicuous avoidance of the procedural posture and factual in the present case that allow it to draw a parallel to *Duran* (and many of the other authorities on which they rely). In context, there is simply no legitimate indication that a similar violation of Wackenhut's rights is inevitable or even likely to occur. Amici's reliance on the trial court's conclusion that "Wackenhut would be limited to challenging Plaintiffs' statistical methods," is unfounded. (AB43.)

III. CONCLUSION

The Amici Curiae in support of Defendant and Respondent The Wackenhut Corporation provide little value to this court by merely echoing Defendant's arguments in the absence of facts or context. For the reasons

stated in Appellants' Opening and Reply briefs, the trial court's order granting Wackenhut's decertification motion should be reversed and this case remanded with directions to recertify the proposed class and each of the subclasses. Plaintiffs should also be awarded their costs on appeal.

Dated: April 7, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned counsel for Appellants certifies that this Appellants' Response to Amici Curiae Brief contains 13,810 words in proportionately-spaced, 13-point Times New Roman type, exclusive of tables of contents and certificate of service, as determined by the word processing system used in the preparation of this brief, Microsoft Word 2003.

Respectfully submitted this 7th day of April 2014.

By:_____
Emily P. Rich

State of California)
County of Los Angeles)
)

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 354 South Spring St., Suite 610, Los Angeles, California 90013.

On 4/7/2014 declarant served the within: Appellants' Response to Amici Curiae Brief **upon:**

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