No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

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

REPLY BRIEF

MICHAEL J. MUELLER
EMILY BURKHARDT VICENTE
EVANGELINE C. PASCHAL
HUNTON & WILLIAMS
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

CARTER G. PHILLIPS *
JOSEPH R. GUERRA
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
CHRISTOPHER A. EISWERTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

* Counsel of Record

May 11, 2015

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THE EIGHTH CIRCUIT IMPROPERLY CERTIFIED A CLASS BASED ON EXTRAPOLATION AND AVERAGING, IN CONFLICT WITH OTHER CIRCUIT COURTS	2
II. THE EIGHTH CIRCUIT IMPROPERLY CERTIFIED A CLASS THAT INCLUDES UNINJURED CLASS MEMBERS, IN CONFLICT WITH OTHER CIRCUIT COURTS	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Anderson v. *Mt. Clemens Pottery*, 328 U.S. 680 (1946), *superseded on other grounds by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, *as recognized in IBP, Inc.* v. *Alvarez*, 546 U.S. 21 (2005) 1, 7
Broussard v. *Meineke Disc. Muffler Shops*, 155 F.3d 331 (4th Cir. 1998) 5
Comcast v. *Behrend*, 133 S. Ct. 1426 (2013) 2
Espenscheid v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013) 4, 7, 8
In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) 6
Grochowski v. *Phoenix Constr.*, 318 F.3d 80 (2d Cir. 2003) 7
Jimenez v. *Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3638 (Jan. 27, 2015) (No. 14-910) 6
Kohen v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672 (7th Cir. 2009) 10
McLaughlin v. *Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *abrogated on other grounds*, *UFCW Local 1776* v. *Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010) 6
In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244 (D.C. Cir. 2013) 10
Reich v. *So. Md. Hosp., Inc.*, 43 F.3d 949 (4th Cir. 1995) 7
United States v. *Williams*, 504 U.S. 36 (1992) 8
Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011) 2, 3, 4

TABLE OF AUTHORITIES—continued

STATUTE Page

28 U.S.C. § 2702 9

REPLY BRIEF

Plaintiffs' Opposition is notable for what it does not contain: a defense on the merits to the questions presented in Tyson's Petition. They cite nothing in Rule 23 or this Court's cases that allows a court to certify a class on the premise that liability and damages will be determined with statistical techniques that presume that all class members are identical to the average of a sample of disparate class members—indeed, Plaintiffs offer no substantive defense of "averaging" at all. Plaintiffs similarly cite no authority that allows a class to be certified and to obtain a judgment when it includes hundreds of members who were not injured and would receive zero damages in an individual lawsuit.

Instead, Plaintiffs assert that Tyson failed to preserve these objections, and they attempt to recast their case as a straightforward wage-and-hour class action in which liability and damages were proved using "representative evidence" in accordance with *Anderson* v. *Mt. Clemens Pottery*, 328 U.S. 680 (1946). Both claims are incorrect.

Tyson repeatedly opposed class certification and moved to decertify on the same grounds raised in the Petition, and it renewed those arguments on appeal. And *Mt. Clemens* did not adopt any "special rule for wage/hour cases," Opp. 1, that allows plaintiffs to obtain damages with evidence of the amount of time worked by a fictional "average" employee derived from a sample of employees who performed *different* tasks consuming admittedly *different* amounts of time. Yet that is precisely what a divided Eighth Circuit panel allowed Plaintiffs to do here, contrary to the decisions of several other circuits.

The Eighth Circuit further erred by affirming class certification and a multi-million judgment even though the class contains hundreds of members who were not injured and are not entitled to any damages. That decision exacerbates two circuit splits and conflicts with *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), and *Comcast* v. *Behrend*, 133 S. Ct. 1426 (2013).

The seven amicus briefs filed in support of Tyson's Petition attest to the important and recurring nature of the questions presented. This Court should grant certiorari to resolve the lack of clarity in the law that has permitted plaintiffs to obtain certification of classes with uninjured members and to use extrapolation and averaging to elide significant differences among class members that should preclude classwide adjudication of their claims.

I. THE EIGHTH CIRCUIT IMPROPERLY CERTIFIED A CLASS BASED ON EXTRAPOLATION AND AVERAGING, IN CONFLICT WITH OTHER CIRCUIT COURTS.

1. Tyson preserved its objection to class certification based on "statistical techniques that presume all class members are identical to the average observed in the sample." Pet. (i). Tyson opposed the motion for class certification, moved to decertify the class after this Court decided *Wal-Mart* v. *Dukes*, and renewed the motion to decertify at the close of Plaintiffs' case and again post-trial. Pet. 6–8, 11–12. After the district court rejected Tyson's arguments on the merits, *id.* at 8–9, 11–12, Tyson raised them to the Eighth Circuit panel, which rejected them on the merits, and in a petition for rehearing en banc, which was denied 6–5, *id.* at 12–15.

Plaintiffs dispute none of that. Instead, they attempt to rewrite the first question presented as an objection to the use of "representative proof"; Plaintiffs then claim that Tyson "waived" that objection, Opp. 6, by requesting a jury instruction that if plaintiffs "prove that the employees have in fact performed work for which they were not paid," they may prevail if they "produce sufficient evidence to show the amount and extent of such work as a matter of just and reasonable inference." Doc. 151, at 41 (proposed instructions); Doc. 277, at 16 (actual instructions). But the Eighth Circuit identified no "waiver" and "passed upon" the merits of Tyson's arguments. See Pet. 12–13. Moreover, this jury instruction has nothing to do with "representative proof"; it refers to the manner in which a plaintiff who has proven liability and the certainty of damages may then quantify such damages. It did not concede the propriety of "averaging."

In fact, Tyson is challenging "trial-by-formula"—the use of averaging and extrapolation to ignore individual differences among class members and manufacture supposedly "common" questions by presuming that each class member is identical to a hypothetical "average" observed in a sample. There is no dispute that a court may permit the use of "representative proof" at trial to prove a common question—*i.e.*, one where "determination of its truth or falsity" as to one class member fairly may be deemed to answer the question for other class members "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. But here, there is no such commonality among class members: they indisputably perform different jobs and wear different combinations of personal protective equipment that take significantly different amounts of time to don and doff. Pet. 5–7, 9–10, 16;

Pet. App. 137a–138a. These dissimilarities within the class "impede the generation of common answers," *Wal-Mart*, 131 S. Ct. at 2551 (quotation omitted), because proof of the donning/doffing time of one class member is not proof of the donning/doffing time of other class members who wear different equipment. And proof of the *average* time observed in a sample of class members who wear varying combinations of personal protective equipment is not proof of the time it takes *any* class member to don/doff particular equipment, let alone proof of which class members worked unpaid overtime. See Pet. 16–19.

Tyson's dispute is thus not with the concept of representative proof. It is with the use of averaging to avoid differences among class members that require individualized inquiry and preclude class certification. That is a legal issue to be decided by the court, not the jury. Tyson repeatedly raised the legal objection that Plaintiffs were seeking, in the Seventh Circuit's words, to "get around the problem of variance" by using averages extrapolated from a sample of disparate class members. *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013). As the Seventh Circuit recognized, such averaging is not the type of "genuinely representative evidence" that can provide the classwide proof of liability and damages necessary to support class certification. *Id.* at 774–75. Instead, such averaging necessarily confers a "windfall" on some class members and "undercompensates" others. *Id.* at 774.

2. The Eighth Circuit's decision is thus in direct conflict with *Espenscheid*. But the split does not end there. As we demonstrated, Pet. 19–24, the Second, Fourth, Fifth, and Ninth Circuits also have held that a class may not be certified where liability and/or

damages are based on averages extrapolated from a sample of disparate class members.

Plaintiffs say the decisions from other circuits "involved much greater variation" among class members than the "few minutes" of donning/doffing time at issue here. Opp. 11. But Plaintiffs brought this suit because, as their counsel told the jury, the difference between the 4–8 minutes of K-Code time Tyson paid depending on the job and the 18–21 minutes Plaintiffs sought was "significant." Tr. 21. Moreover, their expert admitted that a small difference in minutes substantially reduced the number of injured employees and the amount of damages to the class, *compare* Apdx.00869, *with* Apdx.00871 (if one assumes that all class members spent 15 minutes/day on donning/doffing instead of 18–21 minutes, there are 110 fewer injured class members and damages are reduced by more than $1.78 million).

More fundamentally, the reason a class may not be certified where liability or damages are based on extrapolation from a sample of disparate class members applies regardless of whether the difference between class members is extensive or relatively small: The use of averaging alters substantive rights. Instead of proving that the defendant's conduct actually harmed *him*, a plaintiff can recover by showing the harm the defendant's actions inflicted on some *hypothetical* "average" class member. See *Broussard* v. *Meineke Disc. Muffler Shops*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing class certification where plaintiffs substituted expert testimony based "on abstract analysis of 'averages,'" for "proof of individual damages"). The trial focuses on "the testimony of experts regarding [class members'] claims, as a group," instead of "individual causation"

and "discrete injury" to individual class members. *In re Fibreboard Corp.*, 893 F.2d 706, 711–12 (5th Cir. 1990). As a result, "the discrete components of class members' claims" and defendants' "defenses [are] submerged." *Id.* at 712; see also *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014) (affirming class certification where the district court rejected the plaintiffs' motion to use representative testimony and sampling at the damages phase, and bifurcated the proceedings to preserve "Allstate's due process right to present individualized defenses to damages claims"), *petition for cert. filed*, 83 U.S.L.W. 3638 (Jan. 27, 2015) (No. 14-910)[1]; *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008) (when averaging "is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation").

That is what happened to Tyson. Pet. 23. Tyson could not raise defenses to individual claims and was reduced to attacking the methodology plaintiffs' expert used to create the average donning/doffing times. That would not have been permitted in the Second, Fourth, Fifth or Seventh Circuits.

3. Plaintiffs cannot avoid that conclusion by claiming that different principles apply to wage-and-

---

[1] *Jimenez*'s rejection of sampling to prove damages cannot be dismissed as "pure dicta," Opp. 13, because it was central to the court's rejection of Allstate's argument that class certification on the question of liability "violated Allstate's due process rights," 765 F.3d at 1166. As we explained, Pet. 21 n.3, Allstate seeks review of the Ninth Circuit's decision because it allowed plaintiffs to prove classwide liability through sampling. Because the Eighth Circuit allowed Plaintiffs to use sampling to prove both classwide liability and damages, Tyson's Petition should be granted, or at least held, if the Court grants Allstate's petition.

hour class actions. *Mt. Clemens* does not create any "special rule" for wage-and-hour cases, Opp. 1, 7–10, that justifies class certification here or how the class claims were proved here. *Mt. Clemens* held that an employee who sues for "unpaid overtime compensation" under the FLSA has "the burden of proving that *he* performed work for which he was not properly compensated," and he additionally must produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 686–87 (emphasis added).

Nowhere does *Mt. Clemens* say that an employee can prove that *he* worked unpaid overtime based on an average derived by looking at time worked by *other* employees who performed different jobs that admittedly took different amounts of time to perform. See, *e.g.*, *Grochowski* v. *Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (testimony that co-worker generally worked with plaintiff, but did not always do so because "'people rotated,'" is insufficient to award the co-worker damages for unpaid overtime); *Reich* v. *So. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995) (evidence that employees in some departments were denied lunch breaks does not support award of damages to employees in other departments who did not miss breaks). Even though there are a number of ways to estimate the amount of an employee's unpaid overtime, the average of a sample of employees who performed different tasks and worked different amounts of unpaid time "can't support an inference about the work time of thousands of workers." *Espenscheid*, 705 F.3d at 775.[2]

---

[2] Plaintiffs repeat the Eighth Circuit panel majority's assertion that Mericle's time study was "'representative, and approximately random.'" Opp. 15 (quoting Pet. App. 13a). Mericle admitted at trial, however, that his study was not a

II. THE EIGHTH CIRCUIT IMPROPERLY CERTIFIED A CLASS THAT INCLUDES UNINJURED CLASS MEMBERS, IN CONFLICT WITH OTHER CIRCUIT COURTS.

This Court should also grant review to resolve a second question that has divided the circuit courts: whether a class may be certified when it includes hundreds of members who were not injured and would have no claim to damages in individual lawsuits.

1. Plaintiffs urge the Court to deny review because the Eighth Circuit declined to address this question. Opp. 15. Tyson did, however, press the argument in the Eighth Circuit, and it was a principal part of the dissents from the panel opinion, Pet. App. 22a–24a, and the denial of rehearing en banc, *id.* at 122a–127a. There is no bar to this Court's review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (grant of certiorari precluded "only when 'the question presented was not pressed *or* passed upon below'") (emphasis added).

There is, moreover, no support for Plaintiffs' contention, Opp. 12, that Tyson invited the jury to treat class members with no injury as members of the class by requesting an instruction that the jury could

---

"random sample." Tr. 913. As we demonstrated, Pet. 10, Mericle did not select workers from a variety of jobs or ensure that his sample had the same proportion of knife and non-knife wielding employees as in Tyson's workforce. But even if the sample were collected in a statistically sound manner, the average time still would not be a just and reasonable inference of the donning/doffing time of any employee because the average is based on employees in different jobs who wore different equipment that took different amounts of time to don and doff. *See Espenscheid*, 705 F.3d at 775.

not award damages for any employee that already received full compensation. When the district court rejected Tyson's request to decertify the class and allowed the case to proceed to trial, Tyson had every right to request that Plaintiffs "be held to their evidentiary burdens of proof," Pet. App. 20a (Beam, J., dissenting). That request invited no error. The jury does not decide who is in the Rule 23 class and the FLSA collective action. The class is defined by the *court* and is composed of individual employees who responded to the court-ordered notice by opting into the FLSA collective or declining to opt out of the Rule 23 class.

2. Nor does this Court's precedent allowing a court to decide a constitutional challenge as long as at least one plaintiff has standing to sue support the Eighth Circuit's affirmance of class certification in an action for damages when a class includes members with no claim to damages in their own right. Opp. 17. If a court determines that a statute is unconstitutional, it will enter declaratory and injunctive relief regardless of whether the lawsuit was brought by one plaintiff or many, and that relief may incidentally benefit nonparties and individuals who would not have standing to sue. But that is not the case in an action for damages. A defendant should not be compelled to pay damages to those who are not injured, and persons with no injury should not become entitled to relief by joining their claims with others who are. Such a result would allow the procedural device of a class action to alter substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2702, and transgress Article III limitations on judicial power.

3. Plaintiffs' attempt to explain away the confusion in the circuit courts on this question also fails.

a. Plaintiffs assert, first, that there is no real circuit split because there are decisions in several circuits (notably the Seventh, Eighth, and Ninth) on both sides of the issue. Opp. 17–18. But that serves only to confirm the confusion, not to dispel it. See Pet. 25–30.

b. Plaintiffs next attempt to discount the D.C. Circuit's insistence in *In Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013) that plaintiffs must show injury to all class members as a prerequisite to obtaining class certification. Plaintiffs claim the D.C. Circuit made that statement "in the context of deciding whether to hear an interlocutory appeal" of the class certification order. Opp. 18–19. But after deciding to grant the petition for interlocutory review, the D.C. Circuit turned to the *merits* of the class certification ruling and expressly criticized the district court's reliance on *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009), and its willingness to certify a class that includes persons who may not have been injured, *In re Rail Freight*, 725 F.3d at 254–55. Moreover, the reason the D.C. Circuit vacated the class certification order and remanded for the district court "to consider possible flaws in the class's damages model," Opp. 18, was because the model was "essential to the plaintiffs' claim they can offer common evidence of classwide injury," *In re Rail Freight*, 725 F.3d at 253.

4. This case presents the Court with an opportunity to resolve that conflict because the Eighth Circuit not only affirmed certification of a class that contains uninjured members, it also affirmed a nearly $6 million class judgment. Plaintiffs say there is "no basis for concern about the use of Rule 23 to expand substantive rights by affording recoveries to uninjured class members,"

Opp. 19, but the only authority they cite is the jury instruction advising the jury not to award damages for employees who were fully paid. The judgment, however, does not say uninjured class members will not share in the recovery; it says nothing about how the award will be distributed. Pet. App. 125a–126a (Beam, J., dissenting). Nor, tellingly, do Plaintiffs propose any way that the judgment can be limited only to injured class members. In fact, there is no way to know which class members the jury found were injured and to limit recovery to them. *Id.* at 27a, 125a. There is just "a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 24a.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

MICHAEL J. MUELLER
EMILY BURKHARDT VICENTE
EVANGELINE C. PASCHAL
HUNTON & WILLIAMS
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
(202) 955-1500

CARTER G. PHILLIPS *
JOSEPH R. GUERRA
C. FREDERICK BECKNER III
KATHLEEN MORIARTY MUELLER
CHRISTOPHER A. EISWERTH
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

* Counsel of Record

May 11, 2015