Nos. 14-1123 & 14-1124

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

On Petitions For Writs Of Certiorari To The Superior Court Of Pennsylvania And The Supreme Court Of Pennsylvania

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KATE COMERFORD TODD
TYLER R. GREEN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
202.463.5337

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Avenue, N.W.
Suite 800
Washington, DC 20001
202.496.3268

ALLYSON N. HO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

JOSEPH B. G. FAY
VANESSA R. BROWN
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5000

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), this Court unanimously "disapprove[d]" the "novel project" of "Trial by Formula," in which evidence pertaining only to a subset of class members is extrapolated to resolve the claims of the entire class without "further individualized proceedings," because this procedure would impermissibly alter substantive law and preclude the litigation of "defenses to individual claims." Here, both the Pennsylvania Supreme Court and Pennsylvania Superior Court upheld a classwide judgment of more than $150 million that was the product of just such a trial.

The question presented is:

Whether the Due Process Clause of the Fourteenth Amendment prohibits a state court from certifying a class action, and entering a monetary judgment in favor of the class, where the court permits the use of extrapolation to relieve individual class members of their burden of proof and forecloses the defendants from presenting individualized defenses to class members' claims.

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INTEREST OF *AMICI CURIAE*[1]

Amici, which represent a diverse array of manufacturers, retail merchants, and industries across the Nation that employ millions of workers, have an exceedingly strong interest in ensuring that class action proceedings in both federal and state courts comport with due process as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Chamber of Commerce of the United States of America is the world's largest business federation, representing three hundred thousand direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Its members include companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the Nation's business community. The Chamber has filed *amicus curiae* briefs in this Court's most significant class-action cases, including *Comcast Corp.* v. *Behrend*, 133 S. Ct.

[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel paid for or made a monetary contribution toward the preparation or submission of this brief. *Amici* file this brief with the written consent from all parties and all parties received timely notice.

1426 (2013), and *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011).

Business Roundtable is an association of chief executive officers of leading U.S. companies that collectively take in over $7.2 trillion in annual revenues and employ nearly 16 million individuals. Business Roundtable member companies comprise more than a quarter of the total value of the U.S. stock market and invest more than $190 billion annually in research and development, comprising some 70 percent of U.S. private research and development spending. Member companies pay more than $230 billion in dividends to shareholders and generate nearly $470 billion in sales for small- and medium-sized businesses annually.

STATEMENT

The Pennsylvania trial court in this wage-and-hour case certified a class consisting of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present December 27, 2005." App. 3a.[2] Ultimately, the class consisted of 187,979 members employed by 139 stores. App. 3a, 27a.

[2] Citations of the record refer to the appendix attached to the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, No. 14-1124.

During the trial, plaintiffs offered anecdotal evidence from six employees asserting they had been forced to skip rest breaks or work off-the-clock. App. 27a. Plaintiffs also presented expert testimony based on a review of time-clock and cash-register records for sixteen stores over a four-year period. App. 27a. Based on this anecdotal evidence and the review of records for only about 10 percent of Wal-Mart's stores in Pennsylvania, plaintiffs' experts were permitted to hypothesize that (i) Wal-Mart engaged in a pattern and practice of forcing employees to work off-the-clock and forego breaks; (ii) this pattern and practice persisted over an eight-year period—including four years when employees were not required to clock-out for breaks or lunch; (iii) all workers at some point either missed a rest break or worked off-the-clock; and (iv) the class of workers collectively suffered tens of millions of dollars in damages in the form of unpaid wages as a result. App. 26a-28a.

The trial court certified the class, and a divided jury found in plaintiffs' favor on their state-law wage-and-hour claims. App. 38a-39a. Ultimately, the amount of the judgment entered on the verdict was $187,648,589. App. 33a. Between the fees included in that amount and a subsequent award, plaintiffs were awarded over $45 million in attorneys' fees alone. App. 47a.

In pertinent part, the intermediate appellate court affirmed, as did the state supreme court. App. 23a, 196a. The Pennsylvania Supreme Court sought to distinguish the proceedings in this case from the

"Trial by Formula" disapproved by this Court in *Dukes* on the basis that the evidence presented in the former related to damages, whereas the evidence presented in the latter related to liability. App. 16a-19a. The court concluded that both parties had opportunities to explain discrepancies in the evidence presented; therefore in the court's view Wal-Mart was not denied due process. App. 23a. The court further held that the lack of commonality at issue in *Dukes* was not present here. App. 20a.

One justice dissented, objecting that the plaintiff class "was permitted to effectively project the anecdotal experience of each of six testifying class members upon thirty-thousand other members of the class at large, [and] to extrapolate abstract data concerning missed and mistimed 'swipes' [of timecards] from 16 Pennsylvania stores to 139 others." App. 27a. In the dissenting justice's view, that "severely lax approach" resulted in an "almost two-hundred-million-dollar verdict based on proof that was insufficient to establish liability and damages across a 187,000 member class." App. 26a.

INTRODUCTION AND SUMMARY OF ARGUMENT

When companies must defend class actions in state courts, where Rule 23 does not apply, it is essential to the fairness and integrity of those proceedings that due process requirements are rigorously enforced. Those requirements include, at a

minimum, an opportunity to be heard and to present every available defense. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). In conflict with this Court's precedent, the trial by formula conducted in this case deprived Wal-Mart of those constitutionally guaranteed safeguards by allowing the anecdotal testimony of 6 plaintiffs (out of 187,979 class members) and statistical evidence extrapolated from 16 stores (out of 139) to serve as the basis of liability and over $200 million in damages.

Given the inherent dynamics of class action litigation, the decision's impact will be felt well beyond the immediate context and industry. Class action litigation news travels fast. Once a court creates a favorable loophole for filing, it becomes a litigation magnet and further abuses of the class-action device are inevitable. Percolation would serve no useful purpose, and only compound the serious problems created by the decisions below.

Review is further warranted because this case presents a rare opportunity for this Court to address the extraordinarily important issue of the procedural fairness guaranteed by federal due process in state-court class actions. As this Court has recognized, the sheer size and breadth of most class actions bring to bear an inordinate pressure upon defendants to settle. See, e.g., *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings."). This case is one of the rare

state-court class actions actually to proceed to trial. It therefore offers the Court an ideal vehicle for confirming that due process does not permit trial by formula either in federal or state court, but requires affording class-action defendants a meaningful opportunity to be heard and to present every available defense. For those reasons, the petition should be granted and the judgment should be reversed.

REASONS FOR GRANTING THE WRIT

I. The "Trial By Formula" Conducted In This Case Violates Due Process And Conflicts With This Court's Precedent

At a minimum, due process requires a meaningful opportunity to be heard and to present every available defense. *Lindsey*, 405 U.S. at 66. This Court has made clear, on more than one occasion, that to justify a departure from the requirement that litigation is conducted by and on behalf of named plaintiffs, class-action representatives must "possess the same interest and suffer the same injury as the class members." *Dukes*, 131 S. Ct. at 2550 (internal quotation marks and citations omitted); see also *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008) ("When fluid recovery 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 why this Court in *Dukes* rejected "Trial by Formula" in no uncertain terms, because it would impermissibly alter substantive law and preclude the litigation of "defenses to individual claims." 131 S. Ct. at 2561. That is exactly what happened here. Absent this Court's review, such abuse of the class-action device to abridge due process rights can only spread—and will likely be insulated from review given the hydraulic pressure on class-action defendants to settle rather than face ruinous liability. Cf. *Stoneridge Inv. Partners*, *LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies.").

In this case, the anecdotal stories of 6 employees—at different locations, in different positions, with different managers, working different shifts, and with different career motivations—together with a sampling of time-clock and cash-register records for 16 stores (out of 139)—cannot, consistent with due process, support the conclusion that any class member (other than those who testified) was forced to miss a break, let alone the conclusion that each of the 187,979 class members was forced to do so.

In class litigation (or other aggregate litigation) seeking individual monetary recovery, "each" is the critical word. The trial by formula conducted in this

case impermissibly replaced "each" with "on average" or "generally speaking." Plaintiffs did not argue that the proof they presented at trial, if fully credited, established that each of the 187,979 class members worked at least some time off-the-clock, or that each class member missed, at a minimum, some portion of at least one promised rest break (much less how much each employee should recover in unpaid wages, if anything). Plaintiffs did not even attempt to prove these things. Rather, with the blessing of the Pennsylvania courts, they sought to prove aggregated facts for the certified class as a single collective entity, based upon certain unsubstantiated assumptions and extrapolations from information concerning a subset of employees and time periods. Due process does not permit such procedural shortcuts.

The Pennsylvania Supreme Court attempted to avoid that conclusion by denying that a trial by formula even took place here—purporting to find a distinction between the procedure disapproved by this Court in *Dukes* and the case at bar by observing that while the plaintiffs in *Dukes* failed to establish that each class member was a victim of discrimination in promotion or hiring, here there was support for a "pattern" of missed rest breaks and off-the-clock work. App. 17a, 19a. The court found that, "[b]oth parties had ample opportunity to present evidence to explain these discrepancies, i.e., to show that the discrepancies were or were not evidence of class-wide wage-and-hour violations." App. 17a, 19a. But evidence of an "extensive pattern of discrepancies"

between rest breaks earned and rest breaks taken can hardly substitute for evidence that *each* employee missed at least one rest break. This is akin to reasoning that evidence of "an extensive pattern" of late arrivals by an airline is evidence that each plane was late and that each late arrival was the airline's fault.

Similarly, the Pennsylvania courts permitted evidence of statistically determined "average" circumstances to replace evidence relevant to "each," in violation of due process. "Each" simply is not the same as "on average," and class certification does not transmogrify one into the other. Class certification within a system of civil procedural rules achieves joinder of individual persons and entities and the claims brought by or against them. It does not substantively create a new juridical person. That class members become "parties" in the sense that their claims are brought into litigation does not, to be sure, necessarily make them "parties" for all purposes within any civil rule system. But as relevant here, class members (plaintiffs or defendants) are "parties" for purposes of the property interests protected by the Due Process Clause because they are bound as individuals by the final judgment. See *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002).

What is more, as to each plaintiff proceeding against it, a defendant is entitled to a meaningful opportunity to be heard. See *Lindsey*, 405 U.S. at 66. Due process is not merely a technical concept "with a fixed content unrelated to time, place and circumstances." *Connecticut* v. *Doehr*, 501 U.S. 1, 10 (1991)

(internal quotation marks and citation omitted). Rather, due process mandates that courts consider a number of circumstances individual to each case and consider the risk of an erroneous deprivation through the procedures employed along with the probable value of additional safeguards. See *ibid.*; see also *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.").

More specifically, the fundamental fairness rooted in the notion of procedural due process dictates that when a single trial is conducted on multiple claims, a defendant must be allowed to defend every claim. The trial-by-formula approach adopted by the courts below, however, deprived Wal-Mart of its right to show that individual plaintiffs were not harmed (among other things). The hypothesis that the amount determined to be due employees as a result of this trial by formula might coincidentally approximate the amount that would have resulted from proper procedures does not diminish the due process problem. Just as there is no way of knowing whether a valid defense might have prevailed if defendant had been allowed the opportunity to present it, there is no way of knowing what would have happened if Wal-Mart had been given the opportunity to defend each claim. But the risk of erroneous deprivation is indisputable—and that is what counts for due-process purposes.

Here, the risk is enormous—where anecdotal testimony of injury by only 6 individuals was extrapolated to an entire class of nearly 188,000 individuals, based solely on evidence of a "pattern of discrepancies" that was in turn derived from the records of only 16 of 139 stores for only 4 of 8 years. And the trial court abdicated its responsibility to reduce the risk of erroneous deprivation by failing to address the individualized factual issues, and proceeding based on the purported statistical significance of the extrapolation methodology. See *Mathews*, 424 U.S. at 334. Due process requires more.

II. This Case Is An Ideal Vehicle For Resolving The Exceptionally Important Issue Of What Due Process Requires When State Courts Certify Actions For Class Treatment

Whether businesses forced to defend class actions in state courts can be subject to trial by formula without violating due process is a matter of vast importance. If permitted to stand, the decision below will reverberate well beyond the immediate context and industry—whether by creating a litigation magnet in Pennsylvania, or by providing a roadmap for enterprising litigants in other jurisdictions, or both.

Each year, businesses devote substantial resources to defend against the filing and even the threat of

class actions.[3] Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are passed on to consumers or absorbed as a loss to the company. In some cases, a company will be forced out of business by expensive litigation. That is certainly not to say that all class actions are frivolous. It is to say that the requirements of due process must be scrupulously observed in the class-action context—particularly given the potential for serious abuses. See *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low * * * * These settlements have been referred to as judicial blackmail." (citation omitted)); see also George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997) ("Class certification in a mass tort

[3] Because of the settlement pressure discussed above, many lawsuits do not result in reported decisions or adequate records of class action costs, particularly in state courts. Thus, even extensive studies by notable institutes like the RAND Corporation have had difficulty quantifying the volume of class actions and related expenditures with specificity. See Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP & INT'L L. 179, 184 (2001). A major international insurance firm study has concluded that the total cost of all U.S. tort litigation, of which class actions comprise a substantial portion, was $264.6 billion in 2010. See Towers Watson, *2011 Update on U.S. Tort Cost Trends*, http://www.towerswatson.com/en-US/Insights/IC-Types/Survey-Research-Results/2012/01/2011-Update-on-US-Tort-Cost-Trends (last visited Apr. 13, 2015).

case confers extraordinary negotiating power even where the underlying claim is meritless * * * * The power is so extreme that all mass tort claims certified as classes appear to settle, rather than litigate to judgment.").

Unlike most class-action cases before this Court, this case cannot be resolved by reference to the proper application of Rule 23. If this case came to the Court through the federal system, the question in the first instance would likely be whether a class was properly certified under Rule 23(b)(3). Class certification under Rule 23 would have been improper in this case where, to make class-wide trial of the action manageable, it was necessary to modify substantive rights by devising a formula whereby claims were adjudicated in the aggregate, based on the hypothesized facts of a statistically "average" plaintiff, rather than the actual facts associated with any individual plaintiff. This state-court case, however, and others like it cannot be resolved with reference to the limits of Rule 23. It therefore presents cleanly and squarely the exceedingly important issue of what due process requires when defendants must litigate class actions in state courts.

There is no need to wait to resolve that issue. Indeed, given the pressure on class-action defendants to settle even meritless claims, the vast majority of them settle—so this case presents the Court with a rare opportunity to address the issue. Percolation is not needed. There will be no better time than the present for this Court to provide much-needed

guidance to the state and federal courts on the limits of what due process can tolerate with regard to the rights of defendants in class actions to have a meaningful opportunity to be heard and to present every available defense. Streamlining litigation cannot be allowed to abrogate litigants' essential rights.[4]

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[4] As the number of recent cases raising similar issues in the Rule 23 context demonstrates, these issues continue to arise and further percolation is not necessary, nor would it be helpful in resolving the issue presented in this case. For example, *amici* have filed or will file briefs in support of *certiorari* in *Jimenez* v. *Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, 2015 WL 350579 (U.S. Jan. 27, 2015) (No. 14-910); *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, 2015 WL 1043612 (U.S. Mar. 9, 2015) (No. 14-1091); and *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *petition for cert. filed*, 2015 WL 1285369 (U.S. Mar. 19, 2015) (No. 14-1146).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

KATE COMERFORD TODD
TYLER R. GREEN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
202.463.5337

MARIA GHAZAL
BUSINESS ROUNDTABLE
300 New Jersey Avenue, N.W.
Suite 800
Washington, DC 20001
202.496.3268

ALLYSON N. HO
Counsel of Record
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

JOSEPH B. G. FAY
VANESSA R. BROWN
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania 19103
215.963.5000

Counsel for Amici Curiae