No. C079670

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

YORK CLAIMS SERVICE WAGE AND HOUR CASES

Appeal from the Superior Court of the County of Sacramento
Case No. JCCP 4560
The Honorable Michael P. Kenny

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT/ APPELLANT YORK RISK SERVICES GROUP, INC.

U.S. CHAMBER OF COMMERCE
JANET GALERIA (294416)
1615 H Street N.W.
Washington, DC 20062
Tel: (202) 463-5337

CALIFORNIA CHAMBER OF COMMERCE
HEATHER WALLACE (205201)
1215 K Street, Suite 1400
Sacramento, California 95814
Tel: (916) 325-1272

GIBSON, DUNN & CRUTCHER LLP
*BLAINE H. EVANSON (254338)
JUSTIN T. GOODWIN (278721)
333 South Grand Avenue
Los Angeles, California 90071
Tel: (213) 229-7228
Fax: (213) 229-7520
bevanson@gibsondunn.com

Attorneys for *Amici Curiae* Chamber of Commerce of the United States of America and California Chamber of Commerce

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Regulations

Other Authorities

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

The Chamber of Commerce of the United States of America ("U.S. Chamber") and the California Chamber of Commerce ("CalChamber") request permission under California Rules of Court, Rule 8.200(c), to file the attached *amici curiae* brief in support of defendant York Risk Services Group, Inc. ("York").[1]

The U.S. Chamber is the world's largest business federation. It directly represents 300,000 members and indirectly represents more than three million businesses, state and local chambers of commerce, and professional organizations. Thousands of the U.S. Chamber's members are California businesses, and thousands more do business in the State.

CalChamber is a non-profit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years,

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, Rule 8.200(c)(3).)

CalChamber has been the voice of California business. Although CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

The U.S. Chamber and CalChamber (collectively, the "Chambers") regularly advocate for the interests of their members by filing *amicus curiae* briefs in cases involving issues of significance to the California business community.

The reclassification of historically exempt administrative employees as nonexempt is an issue of critical importance to a wide variety of California businesses. The trial court's decision below, which contravenes controlling precedent regarding the exempt status of claims adjusters and other white-collar employees, would significantly disrupt those businesses if allowed to stand. The rule applied by the trial court would balkanize exemption regulation by imposing an exemption standard in California that differs from the standard applied everywhere else in the United States.

Moreover, the rule applied by the trial court would eviscerate the administrative exemption by disqualifying employees who follow corporate policies or communicate regularly with their supervisors. If affirmed, the decision could prompt a wave of litigation as employees bring wage claims against employers who had every reason to believe they were complying with state and federal regulations.

The trial court's decision also raises important issues related to class action litigation, including the constitutional limits on the type of evidence that may be used for class adjudication. The trial court erred by relying on improper statistical sampling evidence that deprived York of the opportunity to present individualized defenses. The judgment conflicts with decisions of the California and United States Supreme Courts, and if affirmed poses a severe risk of arbitrary deprivation of property.

For these reasons, and those more fully expressed in their brief, the Chambers respectfully request leave to file their *amici curiae* brief in support of defendant.

October 27, 2016 GIBSON, DUNN & CRUTCHER LLP

By: */s/ Blaine H. Evanson*
Blaine H. Evanson

Attorneys for *Amici Curiae*
Chamber of Commerce of the United States of America and California Chamber of Commerce

INTRODUCTION

For more than a decade, California employers have relied upon the United States Department of Labor's controlling guidance, incorporated by California law, that "[i]nsurance claims adjusters generally meet the duties requirements for the administrative exemption." (29 C.F.R. § 541.203(a).) Despite this directive and other clear authority that the duties commonly performed by claims adjusters qualify for the administrative exemption, the trial court concluded that a class of claims adjusters employed by York Risk Services Group, Inc. are not exempt.

The trial court's flawed decision relies on a legal standard the California Supreme Court has expressly rejected as a dispositive test, and if affirmed, the new standard would upend the classification of employees in the insurance industry and beyond. Affirming the trial court would also create a direct conflict between California and federal law on what work qualifies as administrative. Even apart from applying the wrong legal standard, the trial court's ruling eviscerates the administrative exemption by construing the requirements so narrowly as to remove all but the highest level of management employees from its coverage.

Moreover, the trial court's sweeping, class-wide judgment resulted from a trial in which plaintiffs were permitted to prove their case by statistical sampling in a manner that relieved them of their burden of proof. At trial, the only evidence of overtime worked by absent class members came in the form of hearsay statements collected in an anonymous and unrepresentative survey which, by design, gave class members an incentive to overstate their hours worked and guaranteed that they would never be cross-examined with respect to their responses. This drastic departure from the procedural safeguards of common-law adjudication violated York's due process rights by producing a judgment in favor of class members who were never required to prove the elements of their individual claims or to confront York's individualized defenses to those claims.

This Court should reverse the trial court's decision.

ARGUMENT

I. The Trial Court Improperly Applied the Administrative Exemption Requirements

In determining that York misclassified its claims adjusters as exempt, the trial court committed a host of legal errors that require reversal of its decision. The trial court's ruling (A) contravenes controlling Supreme Court precedent by applying the outmoded

administration/production test as a dispositive standard; (B) applies a standard that would require the reclassification not only of claims adjusters, but also of financial analysts, stock brokers, account executives, and a range of other employees the incorporated federal regulations recognize as paradigmatic exempt employees; (C) undermines the Industrial Welfare Commission's policy objective of promoting consistent enforcement across jurisdictions; and (D) renders the administrative exemption meaningless by eliminating from its coverage all but the highest level of corporate management.

A. The California Supreme Court Has Rejected the Administration/Production Test as a Dispositive Standard

The trial court determined that a class of claims adjusters failed to qualify for the administrative exemption because their job responsibilities involved "producing [the company's] product" rather than "performing purely administrative tasks." (See Statement of Decision (Jan. 30, 2015, C079670) (hereinafter Tr. Ct. Op.), at pp. 11–12, citing *Bell v. Farmers Ins. Exchange* (2001) 87 Cal.App.4th 805.) But *Bell*'s outmoded administration/production dichotomy "rested on the conclusion that [previous regulations] failed to provide a sufficient explanation of the extent of the administrative exemption." (*Harris v.*

Superior Court (2011) 53 Cal.4th 170, 187.) The California Supreme Court has since denounced the use of the administration/production test as a first-line, dispositive standard for determining coverage of the administrative exemption. (*Id.* at p. 188.) The Supreme Court explained in *Harris* that the administration/production test is a judicially created relic "of the common law, which has been effectively *superseded* . . . by the more specific and detailed statutory and regulatory enactments." (*Ibid.*, italics added.) Courts now must construe the administrative exemption "in light of the incorporated federal regulations," which "delineate what work qualifies as administrative." (*Id.* at p. 179.)

Industrial Welfare Commission ("IWC") Wage Order No. 4-2001 provides the relevant standard. (Cal. Code Regs., tit. 8 § 11040.) In pertinent part, the Wage Order provides that an employee qualifies for the administrative exemption if he or she performs "office or non-manual work directly related to management policies or general business operations," "customarily and regularly exercises discretion and independent judgment," "performs under only general supervision work along specialized or technical lines requiring special training,

experience, or knowledge," and "is primarily engaged in duties that meet the test of the exemption." (*Id*. at subd. 1(A)(2).)

The Wage Order makes no mention of the administration/production test, and instead provides that "[t]he activities constituting exempt work and non-exempt work shall be construed *in the same manner as such terms are construed in [certain] regulations under the Fair Labor Standards Act*[.]" (Cal. Code Regs., tit. 8 § 11040, subd. 1(A)(2)(f), italics added.) Those federal regulations, in turn, explicitly recognize insurance claims adjusters as exempt employees: "Insurance claims adjusters generally meet the duties requirements for the administrative exemption[.]" (29 C.F.R. § 541.203(a); see also *Soderstedt v. CBIZ S. Cal., LLC* (2011) 197 Cal.App.4th 133, 149–150 [holding that the 2004 regulations now guide the application of the Wage Order].) And the regulations list a range of duties commonly performed by claims adjusters, such as "inspecting property damage," "reviewing factual information to prepare damage estimates," and "evaluating and making recommendations regarding coverage of claims," as examples of duties that plainly meet the test for the exemption. (29 C.F.R. § 541.203(a).)

Plaintiffs do not deny that the trial court failed to address these controlling regulations in its decision. Rather, they emphasize that *Harris* did not hold that the administration/production dichotomy "can never be used as an analytical tool." (RB 53.) But *Harris* makes clear that "courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. *Only if those sources fail to provide adequate guidance* . . . is it appropriate to [consider] other sources," such as the administration/production test. (*Harris*, *supra*, 53 Cal.4th at p. 190, italics added.) Here, the controlling regulations specifically address claims adjusters and the duties they perform, and as York's briefs explain at length (AOB 34–42; Reply at pp. 20–22), the trial court plainly erred by failing to consider them.

B. Imposing the Administration/Production Test Would Upend Years of Practice in a Broad Range of California Industries

For years, employers in the insurance industry have classified claims adjusters as exempt administrative employees in reliance on the governing regulations and the growing nationwide consensus that claims adjusters are exempt. Imposing the trial court's administration/production test in contravention of the incorporated

federal regulations would thus significantly disrupt the industry and likely prompt a wave of new class actions against insurance companies that have long been classifying adjusters as exempt.

Like the adjusters at York, virtually all property, casualty, and other insurance claims adjusters spend the majority of their time performing claims adjusting services. That is, they do not primarily engage in executive functions, such as advising management or determining corporate policies; rather, they conduct interviews, review factual information, prepare damage estimates, make recommendations regarding coverage of claims, and negotiate settlements—administrative responsibilities which have placed them squarely within the coverage of the administrative exemption for more than a decade. (See 29 C.F.R. § 541.203(a).) Nevertheless, because such responsibilities constitute the service being provided to clients, imposing the trial court's administration/production test could potentially require the reclassification of all such exempt claims adjusters as non-exempt employees despite their status as archetypal exempt employees under both federal and California law. (See 29 C.F.R. § 541.203(a); Cal. Code Regs., tit. 8 § 11040, subd. 1(A)(2)(f).)

The ramifications of the trial court's erroneous decision are not limited to the insurance industry alone—the trial court's test could require reclassification of employees across a broad range of California industries. Indeed, many companies employ administrative workers who meet the stated qualifications of the Wage Order and the incorporated federal regulations without rising to the high level of corporate policymaking that the trial court demanded below.

For example, the incorporated federal regulations expressly contemplate that "[e]mployees in the financial services industry" are exempt under the administrative exemption. (29 C.F.R. § 541.203(b).) The California Labor Commissioner agrees, specifically identifying "customers' brokers in stock exchange firms" as prototypical exempt administrative employees. (Dept. Industrial Relations, DLSE Enforcement Policies & Interpretations Manual (June 2002 rev.) § 52.3.) Stock brokers, of course, do not spend their time formulating the internal management policies of their employer brokerage firms; they are primarily responsible for servicing clients. Indeed, the incorporated federal regulations make clear that the client-oriented responsibilities of stock brokers and other financial services employees qualify for the exemption:

> Employees in the financial services generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products.

(29 C.F.R. § 541.203(b).)

Like the duties of claims adjusters, these duties may flunk the trial court's administration/production test because they constitute the "product" offered to the customer and do not relate to internal corporate policies. The trial court's rule thus threatens the exempt status of stock brokers (not to mention financial analysts, account executives in advertising firms, tax experts, resident buyers and many others) despite the express contrary guidance of the California Labor Commissioner and the incorporated federal regulations. (See Dept. Industrial Relations, DLSE Enforcement Policies & Interpretations Manual (June 2002 rev.) § 52.3; 29 C.F.R. §§ 541.201(a)(3)(ii), 541.203 (2000).)

C. Courts and Regulators Have Stressed the Need for Uniformity in Classification Rules

Consistent with the regulations incorporated by the California Wage Order, federal courts have repeatedly held that claims adjusters

performing some or all of the duties listed in section 541.203(a) are exempt. (See, e.g., *In re Farmers Insurance Exchange, Claims Representatives' Overtime Pay Litigation* (9th Cir. 2006) 481 F.3d 1119, 1125; see also AOB 28–29 [collecting cases].)

In light of the federal consensus, the IWC decided to clarify the exemption requirements by aligning California and federal law. At the request of the Legislature in 2001, the IWC issued Wage Order 4-2001, delineating an administrative exemption that tracks the key elements of the exemption under federal law. (See 8 Cal. Code Regs. § 11040, subd. (1)(A)(2); see also IWC, Statement as to Basis, § 1 [the IWC "derived the duties that meet the test for the administrative exemption from language in the federal regulation[s]"].) As explained above, the Wage Order expressly incorporates pertinent federal regulations: "The activities constituting exempt work and non-exempt work shall be construed *in the same manner as such terms are construed in [certain pertinent] regulations under the Fair Labor Standards Act*." (8 Cal. Code Regs. § 11040, subd. (1)(A)(2)(f), italics added.) The IWC's stated purpose in incorporating the federal regulations was to "provide clarity" and "promote uniformity of enforcement" across state and federal jurisdictions. (IWC, Statement as to the Basis, § 1.) By

bringing California law in line with the federal regulations, the 2001 Wage Order makes California a more attractive place for employers to do business and helps retain the enterprises already established in the California business community.

Adopting the trial court's administration/production test would do just the opposite, frustrating the IWC's efforts to coordinate exemption law by unhinging California law from the federal regulations and imposing standards at odds with those applied in all other states. Many employers who do business across state lines would be required to classify their California employees differently than they classify similar employees throughout the rest of the country. This unnecessary burden hardly amounts to the clarity and uniformity sought by the IWC. By reading the administration/production test into the Wage Order, the trial court violated its duty to apply the law in a manner that effectuates, rather than defeats, the IWC's intent. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 ["The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law"].)

In short, it is for the IWC, not the trial court, to determine the policy that guides California exemption law. The IWC has chosen

clarity and uniformity to encourage white-collar employment in California. This Court should respect that decision.

D. The Trial Court's Unduly Restrictive Application of the Exemption Requirements Would Eviscerate the Administrative Exemption if Affirmed

In addition to applying the wrong legal standard (the administrative/production test), the trial court construed the exemption requirements in a manner which, if affirmed, would eviscerate the administrative exemption by disqualifying the majority of administrative employees from its coverage. To qualify as exempt, administrative employees must both "customarily and regularly exercise discretion and independent judgment" and work "under only general supervision." (Cal. Code Regs., tit. 8 § 11040, subd. (1)(A)(2).) The trial court's unduly restrictive interpretation of these two requirements flouts well-settled law and renders the administrative exemption inapplicable to all but the highest tier of corporate management.

First, the trial court erroneously concluded that York's adjusters lacked the requisite "discretion and independent judgment" simply because they "had to comply with [York's] policies and procedures." (Tr. Ct. Op. at pp. 13–14.) That conclusion ignores the well-settled

principle that "requir[ing] adherence to regulations, guidelines or procedures does not mean an [employee] does not exercise discretion or judgment." (*In re United Parcel Service Wage and Hour Cases* (2010) 190 Cal.App.4th 1001, 1026 (*UPS*).) In *UPS*, this Court rejected an employee's contention that he lacked discretion and independent judgment simply because "his decisionmaking was dictated by stringent UPS procedures and methods." (*Id.* at p. 1025.) The Court explained that employees "are not rendered mere automatons because they must navigate each workday mindful of regulations and internal policies governing their work environment." (*Id.* at p. 1026.)

Federal courts agree that "independent judgment is not foreclosed by the fact that an employee's work is performed in accordance with strict guidelines." (*Roe-Midgett v. CC Services, Inc.* (7th Cir. 2008) 512 F.3d 865, 875; see also, e.g., *Marlo v. United Parcel Service, Inc.* (9th Cir. 2011) 639 F.3d 942, 948 ["the fact that UPS expects [supervisors] to follow certain procedures or perform certain tasks does not establish . . . whether they customarily and regularly exercise[] discretion and independent judgment"]; *Tsyn v. Wells Fargo Advisors, LLC* (C.D. Cal. Feb. 16, 2016) 2016 WL 612926, at *13 ["Precedent . . . bars the court from concluding that the plaintiffs lacked

independent judgment because they were subject to Wells Fargo's corporate policies"]; *Cheatham v. Allstate Ins. Co.* (5th Cir. 2006) 465 F.3d 578, 585 ["the requirement that Allstate adjusters must consult with manuals or guidelines does not preclude their exercise of discretion and independent judgment"]; *Donovan v. Burger King Corp.* (2d Cir. 1982) 675 F.2d 516, 521–522 [holding that a restaurant chain's detailed manual did not prevent employees from exercising discretion].)

Second, the trial court applied an unduly restrictive interpretation of the "general supervision" requirement. The court's unsupported conclusion that York adjusters were "subject to substantial scrutiny" simply because they interacted with supervisors "on a daily basis" and were "supervised with regard to their working hours" contravenes established federal law. (Tr. Ct. Op. at pp. 16–17.) Indeed, the law makes clear that employers "may require exempt employees to work a specified schedule" without "affecting their employees' exempt status." (69 Fed. Reg. at p. 22178; see also *Renfro v. Indiana Michigan Power Co.* (6th Cir. 2004) 370 F.3d 512, 516 ["An employer may require exempt salaried employees to make up for time missed from work due to personal business"].) And courts have explained that regular

interaction with supervisors does "not constitute more than general supervision." (*Maddox v. Continental Casualty Co.* (C.D. Cal. Dec. 22, 2001) 2011 WL 6825483, at *7; see also, e.g., *Robinson-Smith v. Government Employees Ins. Co.* (D.C. Cir. 2010) 590 F.3d 886 [adjusters exempt despite "routinely call[ing]" their supervisors]; *Bucklin v. American Zurich Ins. Co.* (C.D. Cal. June 19, 2013) 2013 WL 3147019, at *1 [same].)

The trial court's erroneous application of these two requirements not only contravenes precedent; it renders the administrative exemption hollow by disqualifying most administrative employees in California. As this Court recognized in *UPS*, "[t]he modern workplace is a regulated workplace." (*UPS*, *supra*, 190 Cal.App.4th at p. 1026.) The need for businesses to ensure quality of service, consistency, and legal compliance necessitates the use of detailed operating procedures and regular guidance from supervisors. It is difficult to imagine a claims adjuster, financial services employee, or purchasing agent—each a prototypical exempt employee (29 C.F.R. § 541.201)—who is not subject to corporate policies or regular interaction with a supervisor. (See *Tsyn*, *supra*, 2016 WL 612926, at *13 [questioning how "any company operating in so heavily regulated an industry as investments

could proceed without laying out fairly significant policies and guidelines for its personnel. Corporate oversight must to some extent be consistent with administrative exemption."].)

Given the ubiquity of operating policies and procedures in the modern workplace, the trial court's ruling would "render the exemptions virtually nugatory—inapplicable to any employee save for the uppermost tier of corporate officers or high-level management." (*UPS*, *supra*, 190 Cal.App.4th at p. 1026.) That result is plainly at odds with this Court's precedent and the governing regulations. For these reasons, the Court should reverse the trial court's erroneous decision.

II. The Adjudication of Class Claims Using Statistical Sampling Violated York's Due Process Rights

York argues, correctly, that "the use of anonymous survey evidence *in the circumstances of this case* plainly was inappropriate." (Reply at p. 51.) The Chambers agree with York that plaintiffs' statistical evidence in this case was fatally flawed and therefore is not substantial evidence supporting the judgment below. The Chambers write separately to emphasize the important constitutional constraints on the use of statistical and other supposedly "aggregate" methods of proof in a class action. Even if the evidence introduced by plaintiffs here were deemed "substantial" enough to support the judgment (it

should not be), the judgment would nonetheless violate due process because York was deprived of its right to defend itself at trial with individualized evidence beyond the statistical sample.

A. Class Actions Cannot Be Used to Eliminate the Fundamental Protections of Due Process

Defendants can be deprived of their property only where plaintiffs prove each element of their substantive claims and where defendants are afforded the opportunity to raise all available defenses to those claims. The class action procedural device cannot be used as an end-run around this core due process protection.

The "fundamental requisite of due process of law is the opportunity to be heard." (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314, quoting *Grannis v. Oredean* (1914) 234 U.S. 385, 394.) Indeed, the Supreme Court of the United States has long recognized the "'deep-rooted historic tradition that everyone should have his own day in court.'" (*Taylor v. Sturgell* (2008) 553 U.S. 880, 892–893, quoting *Richards v. Jefferson County* (1996) 517 U.S. 793, 798.) That a defendant must be provided with "a day in court to make his defence" is a foundational tenet of the common law; it can be traced back as far as "chapter twenty-ninth of Magna Charta" and is embodied in the constitutional principle "that no man shall be deprived

of his property without due process of law." (*Rees v. City of Watertown* (1874) 86 U.S. 107, 122.)

As part of this right "to be heard," a defendant must be afforded an opportunity "to litigate the issues raised" by the plaintiff's claims (*United States v. Armour & Co.* (1971) 402 U.S. 673, 682), including the "'opportunity to present *every* available defense'" (*Lindsey v. Normet* (1972) 405 U.S. 56, 66, italics added, quoting *Am. Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168; see also *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353 ["the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense"], internal quotation marks omitted). Due process likewise "requires an opportunity to confront and cross-examine adverse witnesses." (*Goldberg v. Kelly* (1970) 397 U.S. 254, 269.)

These core due process rights cannot be eliminated simply because a case is certified as a class action. The Supreme Court warned that "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." (*Smith v. Swormstedt* (1853) 57 U.S. 288, 303.) The Court later made clear that a class action is "a procedural right only,

ancillary to the litigation of substantive claims" (*Deposit Guaranty Nat'l Bank v. Roper* (1980) 445 U.S. 326, 332), and that classwide adjudication therefore "leaves the parties' legal rights and duties intact and the rules of decision unchanged" (*Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* (2010) 130 S.Ct. 1431, 1443 [plurality op.]).

Consistent with the fundamental protections of due process, the California Supreme Court in *Duran* vacated a class-action judgment because the trial court's "decision to extrapolate classwide liability from a small sample, and its refusal to permit any inquiries or evidence" regarding class members "outside the sample group, deprived [the defendant] of the ability to litigate" its defenses in violation of due process. (*Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 35.) The Court emphasized that, under "principles of due process," a "'class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" (*Ibid.*, quoting *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S.Ct. 2541, 2561.)

Several federal appellate courts have similarly stressed the constitutional constraints on allowing plaintiffs to prove their cases in a way that denies defendants the right to present their defenses. In

Carrera v. Bayer Corp. (3d Cir. 2013) 727 F.3d 300, for example, the Third Circuit held that 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." (*Id.* at p. 307.) The court explained that this "due process right" includes *both* the right "to challenge the elements of a plaintiff's claim" and the "right to challenge the proof used to demonstrate class membership." (*Ibid.*) Applying these due process principles, the Third Circuit vacated a class-certification order because the plaintiff failed to demonstrate that there was a "method for ascertaining class members" that was "reliable and administratively feasible" and that permitted the "defendant to challenge the evidence used to prove class membership." (*Id.* at p. 308; see also *McLaughlin v. American Tobacco Co.* (2d Cir. 2008) 522 F.3d 215, 232 [when "the mass aggregation of claims" is used "to mask the prevalence of individual issues," the court explained, "the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation"].)

The U.S. Supreme Court's recent decision in *Tyson Foods, Inc. v. Bouaphakeo* (2016) 136 S.Ct. 1036 does not alter the due process

limits described above. *Tyson Foods* involved a claim under the Federal Labor Standards Act, and the particular methods of proof available in individual actions brought under that statute. The Court explained that "[i]f the sample could have sustained a reasonable jury finding as to hours worked in each employee's *individual* action, that sample is a permissible means of establishing the employees' hours worked in a *class* action." (*Id.* at pp. 1046–1047, italics added.) *Tyson Foods* thus confirms what the Court held in *Dukes* and what the California Supreme Court held in *Duran*—that, where not permitted by the underlying substantive law in an individual action, sampling impermissibly gives "plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action." (*Id.* at p. 1048.)

In short, the bedrock procedural protections that emerged over centuries of common-law jurisprudence and that were incorporated into the Due Process Clause apply with full force to class actions. A plaintiff cannot deprive a defendant of its property on behalf of a class unless the plaintiff proves every element of the class claims and the defendant is provided the opportunity to raise every available defense to those claims.

B. The Statistical Sampling Method that Plaintiffs Pursued Here Violated York's Right to Due Process

In pressing their claims against York, plaintiffs used procedural shortcuts that relieved class members of their individual burdens of proof and restricted defendant's right to raise individualized defenses—in a sharp departure from the common-law procedures that are the "touchstone" of due process. (*Honda Motor Co., Ltd. v. Oberg* (1994) 512 U.S. 415, 430.)

As the U.S. Supreme Court explained in *Dukes*, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." (*Dukes*, *supra*, 131 S.Ct. at p. 2561.) The California Supreme Court in *Duran*, following *Dukes*, similarly held "that the class action procedural device may not be used to abridge a party's substantive rights." (*Duran*, *supra*, 59 Ca1.4th at p. 34, citing *City of San Jose v. Superior Court* (1974) 12 Ca1.3d 447, 462.) Accordingly, a trial court cannot "abridge" the presentation of a "defense simply because that defense [is] cumbersome to litigate in a class action." (*Id.* at p. 35.) A class judgment cannot be imposed if the defendant "will not be entitled to litigate its statutory defenses to individual claims." (*Ibid*., quoting *Dukes*, *supra*, 131 S.Ct. at p. 2561.) This "principle[] derive[s] from both class action rules and

principles of due process." (*Ibid*., citing *Lindsey*, *supra*, 405 U.S. at p. 66; *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353.)

The procedural shortcuts used below to force plaintiffs' highly individualized claims into the class-action framework produced a proceeding that departed from the basic requirements of common-law adjudication, and thus violated York's due process rights.

In awarding overtime damages to all 122 class members, the trial court did not require evidence that any individual class member had worked a single hour of overtime. (See AOB 20–22.) Rather, the trial court based its sweeping judgment on hearsay statements collected in an unrepresentative survey of *some* absent class members. (See *ibid*.) By design, the survey encouraged class members to overstate their hours. Participating class members were told that the survey was being conducted at the request of their counsel, and they were well-aware that their answers bore directly on the amount of money they could recover from York. (See AA 84–86, 245; RT 512:7–17.) Moreover, the anonymous nature of the survey guaranteed participating class members that they would never be cross-examined about their responses. (See RT 537:24–538:5.) And because class members were not required to participate, those who had worked little or no overtime

had an incentive to abstain from the survey, further skewing the results. Some class members reported that they had worked no overtime, and thus were not subject to any overtime violations (AA 169-171), yet the trial court awarded overtime damages even to these admittedly uninjured class members.

This radical departure from the traditional procedural safeguards of common-law adjudication violated York's due process rights because it produced a judgment in favor of plaintiffs who have never been required to prove the individual elements of their claims or to confront the defendant's individualized defenses to those claims. This Court should reverse the judgment.

CONCLUSION

For the foregoing reasons, in addition to those set forth by York in appellant's opening brief and reply brief, this Court should reverse the judgment of the trial court and enter judgment in favor of defendant.

October 27, 2016 GIBSON, DUNN & CRUTCHER LLP

By: */s/ Blaine H. Evanson*
Blaine H. Evanson

Attorneys for *Amici Curiae* Chamber of Commerce of the United States of America and California Chamber of Commerce

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, the undersigned hereby certifies that the foregoing brief is in 14-point Times New Roman font and contains 4,619 words, according to the word count generated by the computer program used to produce the brief.

/s/ Blaine H. Evanson