No. 14-1123

IN THE
Supreme Court of the United States

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

v.

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

and

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

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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This case squarely presents a significant question that this Court did not expressly resolve in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011): whether the "novel project" of "Trial by Formula"—in which a court certifies a class and enters a classwide judgment based on evidence pertaining only to a subset of class members that is extrapolated to the class as a whole without any consideration of individualized defenses—violates due process.

The Pennsylvania appellate courts affirmed an extrapolation-based certification order and trial plan over Wal-Mart's repeated due process objections, which the Pennsylvania Superior Court dismissed as being "in derogation of class certification," App. 166a, and the Pennsylvania Supreme Court rejected because "the extrapolation evidence" was purportedly used only to calculate damages, *id.* at 255a-256a. Thus, even after *Dukes*, "Trial by Formula" remains alive and well in the courts of Pennsylvania and other States, and, in the absence of this Court's intervention, will continue to yield proceedings that deny class-action defendants their due process right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted).

Unable to dispute the importance of this question, Plaintiffs seek to evade review through a smokescreen of purported vehicle problems. None of those supposed barriers to review can withstand even minimal scrutiny.

As an initial matter, Plaintiffs seek to recast the due process issue that Wal-Mart has raised through-

out this litigation as simply an evidentiary challenge to the "accuracy of its own business records." Opp. 17. Wal-Mart has never contested, however, that its records accurately reflect when an employee clocked in and out. Rather, Wal-Mart has consistently argued that, standing alone, the time-clock records are legally insufficient to establish that individual class members were required by Wal-Mart to miss paid rest breaks or work off the clock because those records do not reveal whether an employee made a voluntary decision to work through a paid break or simply forgot to clock in or out. Under the class-action trial plan, it was impossible for Wal-Mart to cross-examine each of the 187,000 individual class members regarding these essential aspects of their claims, and the generalized verdict-form questions adopted by the trial court gave the jury no opportunity to consider these individualized issues.

Plaintiffs further contend that the trial court's evidentiary shortcuts were warranted because Wal-Mart purportedly "spoliated its business records" when it stopped requiring employees to clock in and out for their fifteen-minute rest breaks. Opp. 14. In reality, Wal-Mart discontinued that requirement more than a year *before* this action was filed. *See* App. 8a. And, far from pursuing some nefarious purpose, Wal-Mart made that change to enable its employees to maximize their breaks—eliminating the need for employees to walk across the store to a time clock—and to align the company with standard industry practices. R.4433a; R.5138a-R.5140a. Indeed, neither the Pennsylvania Superior Court nor the Pennsylvania Supreme Court based its rejection of Wal-Mart's arguments on spoliation grounds.

The obstacles to review that Plaintiffs seek to interpose are therefore wholly illusory. And, as the four *amicus* briefs supporting Wal-Mart confirm, the question whether "Trial by Formula" can be reconciled with due process is a question with far-reaching implications that has divided the lower state and federal courts. This case—a rare state-court class action actually tried to a final judgment—presents the ideal opportunity to resolve that issue authoritatively by making clear that a "Trial by Formula" is equally unacceptable in both state and federal court.

I. THE CERTIFICATION ORDER AND CLASSWIDE JUDGMENT WERE PREMISED ON AN UNCONSTITUTIONAL "TRIAL BY FORMULA."

The certification order in this case—and ensuing $150 million classwide judgment—rest on the flawed extrapolation-based testimony of Plaintiffs' experts, Drs. Baggett and Shapiro. These experts analyzed evidence pertaining only to a subset of the class and, "without further individualized proceedings," *Dukes*, 131 S. Ct. at 2561, extrapolated the results across time and geography to cover thousands of class members for whom there was no evidence of missed breaks or off-the-clock work. It is hard to imagine a clearer, and more constitutionally problematic, case of "Trial by Formula."

According to Plaintiffs, however, this was not a "Trial by Formula" at all but instead a routine "trial by corporate record" because Wal-Mart's "business records" provided a "valid basis for the jury's verdict as to rest-break and off-the-clock work violations." Opp. 4, 14. Plaintiffs go so far as to assert that the judgment was the result of an "exacting examination

of extensive business records covering *every* member of the class." *Id.* at i (emphasis added).

Plaintiffs' characterizations of the proceedings below are impossible to reconcile with their experts' actual methodology and conclusions. Dr. Baggett used time-clock records from 1998 to February 2001 to opine not only about purportedly missed or short rest breaks during that three-year period, but also during the more than five-year period between February 2001 and May 2006 for which no relevant records existed. App. 13a. Extrapolation alone therefore accounted for approximately 85% (27 million out of 32.5 million) of the rest breaks that Dr. Baggett claimed were missed or short and for which the class was awarded damages. R.4805a.[1]

Similarly, Dr. Shapiro's calculation of the time class members purportedly spent working off the clock was based on an analysis of data from merely 16 of Wal-Mart's 139 Pennsylvania stores—less than 15% of the total number—from 2001 through 2006. App. 15a. Dr. Shapiro then extrapolated from this subset of data to reach conclusions about employees who worked at the other 123 Pennsylvania stores during that period, and for employees at all 139 Pennsylvania stores between 1998 and 2001 (for which there were no records available). *Id.* Given

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[1] Plaintiffs assert that Dr. Baggett "examined 46 million individual shift records that reflected actual hours worked, breaks earned, and actual rates of pay for all class members." Opp. 16 (citing App. 246a). The bulk of those 46 million records, however, did not reveal *anything* about rest breaks because "from February 2001 to 2006 . . . actual rest break data was no longer available." App. 246a.

their own experts' reliance on data that applied only to a small subset of class members to secure class certification and a classwide judgment, Plaintiffs' contention that there was no "Trial by Formula" is nothing short of incredible.

Plaintiffs further attempt to recharacterize Wal-Mart's position as resting on its supposed inability to "challenge the accuracy of its shift records." Opp. 17. In fact, the "accuracy" of Wal-Mart's time-clock records is not—and never has been—the basis of Wal-Mart's due process arguments in this case. Indeed, there is no dispute that the time-clock records were "accurate" with respect to what they recorded: the times when employees clocked in and out for particular shifts covered by those records. But the fundamental problem is that these records do not indicate whether any particular employee missed any particular break (and, if so, *why*) or was required by Wal-Mart to work off the clock, raising an avalanche of highly individualized questions: Did an employee voluntarily skip a break? Did she forget to clock out when she actually took her break? Did Wal-Mart actually require an employee to work off the clock on a particular day or did the employee simply fail to clock in and out? The records do not answer any of these questions, yet the Pennsylvania courts premised class certification and a classwide judgment on Drs. Baggett's and Shapiro's extrapolations from those records. *See* Pet. 6-8; *see also Dukes*, 131 S. Ct. at 2552 (decertifying class where the plaintiffs "wish[ed] to sue about literally millions of employment decisions at once" and it would "be impossible to say that examination of all the class members' claims for relief will produce a common answer to the

crucial question *why was I disfavored*"). The question whether such a process is constitutionally permissible was raised by Wal-Mart at each level of the proceedings below, *see* Pet. 5-10, and is squarely presented for this Court's review.

II. PLAINTIFFS' "SPOLIATION" JUSTIFICATION FOR THEIR EXPERTS' EXTRAPOLATION IS BASELESS.

In addition to denying that a "Trial by Formula" even occurred, Plaintiffs contend that their experts' extrapolation was appropriate "because Wal-Mart had spoliated its business records." Opp. 14. But neither the Pennsylvania Superior Court nor the Pennsylvania Supreme Court relied on this ground as a basis for rejecting Wal-Mart's due process arguments, which conclusively demonstrates that supposed spoliation poses no barrier to this Court's review.

In any event, Plaintiffs' assertions of spoliation are entirely unsupported by the record. In February 2001, more than a year before the first complaint in this action was filed in March 2002, "Wal-Mart officially ended its policy of requiring hourly employees to swipe in and out for rest breaks." App. 8a. As Wal-Mart managers explained, this change was made because it was "a waste of time to have someone . . . walk back [and] swipe their time card" during a short fifteen-minute rest break, R.4433a, and because when Wal-Mart "went out to the retail industry to take a look at what best practices were," it "discovered that a number of [its] competitors" did not require employees to record time spent on rest breaks, R.5139a. Thus, long before this action was initiated, Wal-Mart changed its recordkeeping prac-

tices and decided for legitimate business reasons not to continue *in the future* to generate records that it was under no obligation to create in the first place.[2]

Wal-Mart's prospective modification of its employees' time-clock requirements—and preservation of already-existing records—cannot plausibly be termed spoliation. *See*, *e.g.*, *Micron Tech., Inc.* v. *Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) ("'Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.'") (quoting *Silvestrie* v. *Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)).[3]

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[2] Plaintiffs assert that Wal-Mart "improperly eliminated its *statutorily required* record-keeping systems." Opp. 30 (emphasis added). Plaintiffs provide no support for this assertion because there is none; Wal-Mart was under no obligation to record the *paid* rest breaks that it voluntarily provided its employees because employees were paid whether or not they took those breaks (which also meant that employees had no incentive to clock in and out). *See* App. 243a-244a.

[3] Plaintiffs suggest that Wal-Mart waived its due process challenge by purportedly failing to object in the trial court to an adverse-inference jury instruction related to its change in recordkeeping practices. Opp. 14. Wal-Mart, however, expressly "oppose[d] the instruction," which it argued was not "appropriate" because "[i]t is incorrect that Wal-Mart destroyed records or destroyed evidence." R.5162a. In any event, the due process shortcomings in this case are attributable to the trial court's certification order, trial plan, and verdict form, not its adverse-inference instruction.

III. WAL-MART HAD NO OPPORTUNITY TO PRESENT DEFENSES TO INDIVIDUAL CLAIMS AT TRIAL.

In an effort to erect a further barrier to review, Plaintiffs contend that Wal-Mart was not formally "precluded from calling any witness" and therefore could have individually examined all 187,000 class members about whether they were required by Wal-Mart to miss breaks or work off the clock. Opp. 14. Plaintiffs' contentions are at odds with the record and the practical realities of class-action litigation.

As an initial matter, any ability that Wal-Mart might have had to examine individual class members would not have cured the due process deficiencies in the trial because, over Wal-Mart's objections, the trial court adopted a verdict form that asked the jury to consider liability for the class *as a whole*, rather than for individual class members. *See* R.3976a ("Did defendant fail to pay class members for all time worked?"); R.3978 ("Did defendant fail to provide fifteen-minute rest breaks to class members?"); R.3392a-R.3397a (Wal-Mart's objections). Thus, the jury had no means of resolving the individualized issues that reside at the heart of Plaintiffs' claims: (1) whether each member of the class actually missed paid rest breaks and, if so, whether the missed breaks were attributable to a voluntary decision by the employee or compulsion by Wal-Mart, and (2) whether each member of the class actually worked off the clock. The verdict form presented the jury with a binary, classwide choice on the rest-break and off-the-clock-work claims, rather than employee-specific questions that would have enabled the jury to evaluate the individual circumstances of each

class member. Instead of papering over these individualized issues, the trial court should have declined to certify this disuniform class in the first place or, at a minimum, decertified it after trial.[4]

Moreover, while the trial court suggested that "no prohibition on calling 126,000 witnesses was ever imposed," App. 270a n.4, Wal-Mart's ability to call thousands of witnesses at trial was, as a practical matter, entirely illusory. No trial—and certainly no jury trial—could ever actually encompass the testimony of more than a hundred thousand witnesses. *See id.* (rejecting as an "absurd[ ] . . . 'threat'" Wal-Mart's position that testimony from thousands of individual class members would be needed). Due process requires a meaningful—not purely theoretical—opportunity to present "every available defense." *Lindsey*, 405 U.S. at 66 (internal quotation marks omitted).

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[4] Plaintiffs assert that Wal-Mart "waived any claim that subsequent proceedings had rendered class certification improper" because it purportedly "failed to move to decertify the class" after trial. Opp. 12 & n.8. But neither of the Pennsylvania appellate courts endorsed Plaintiffs' waiver argument. In fact, Wal-Mart specifically argued in its post-trial motion that the trial court erred in "failing to grant . . . Class Decertification" because certification of the class had "depriv[ed] Wal-Mart of its right . . . under the Due Process Clause of the Fourteenth Amendment . . . to defend itself against claims of the individual class members." R.4001a; *see also* App. 269a-274a (trial court post-trial ruling addressing the propriety of class certification).

IV. THE PENNSYLVANIA COURTS' ENDORSEMENT OF "TRIAL BY FORMULA" CONFLICTS WITH NUMEROUS LOWER-COURT DECISIONS.

The Pennsylvania courts' opinions upholding the certification order and classwide judgment premised on this "Trial by Formula" are impossible to reconcile with the decisions of the California Supreme Court, and the Second, Third, and Fifth Circuits, rejecting similar procedural shortcuts and concluding that due process precludes trial procedures that "abridge" a "defense simply because that defense [is] cumbersome to litigate in a class action." *Duran* v. *U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014); *see also* Pet. 18-19.

Plaintiffs' efforts to distinguish these cases rest on the same flawed characterizations of the record that underpin Plaintiffs' imagined vehicle problems. With respect to *Duran*, for example, Plaintiffs assert that the case is distinguishable because it did not involve "extrapolating only where . . . spoliation causes gaps in the business records" and because the defendant there was formally denied the opportunity to call additional witnesses. Opp. 22-23. But, as already explained, there was no spoliation here, and Wal-Mart, like the defendant in *Duran*, had no meaningful opportunity to exercise its "due process" right to present "'defenses to individual claims.'" *Duran*, 325 P.3d at 935 (quoting *Dukes*, 131 S. Ct. at 2561).

Plaintiffs' attempt to distinguish *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), is equally unavailing. According to Plaintiffs, the class-action procedures condemned by the Second Circuit

are distinct from those endorsed by the Pennsylvania courts because, rather than "[r]oughly estimating the gross damages to the class as a whole" based on the "average loss for each plaintiff," *id.* at 231, damages here were supposedly calculated by "counting all hours worked and breaks earned from Wal-Mart's own business records," Opp. 26. But, far from examining evidence regarding each individual class member, Plaintiffs relied on extrapolation from a subset of records to calculate an estimate of damages for the class as a whole—which is exactly the procedure rejected in *McLaughlin* on due process grounds.

Plaintiffs acknowledge the conflicting decisions among state appellate courts that have considered nearly identical class actions against Wal-Mart, Pet. 22-23, but suggest that they merely represent applications of "different rules on class actions." Opp. 27-28. In fact, these courts are in direct disagreement with each other regarding the restrictions that due process imposes on the use of extrapolation in class actions. *Compare* App. 166a, *with Wal-Mart Stores, Inc.* v. *Lopez*, 93 S.W.3d 548, 560-61 (Tex. Ct. App. 2002).

Finally, Plaintiffs discount the relevance of the pending petitions in *Jimenez* v. *Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (Jan. 27, 2015), *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015), and *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), *petition for cert. filed*, No. 14-1146 (Mar. 19, 2015), all of which ask this Court to clarify the meaning and scope of the "Trial by Formula" holding in *Dukes*, on the ground that this case is not

governed by Rule 23 or the Rules Enabling Act. Opp. 30. That distinction, however, is a reason to grant *this* petition (in addition to *Jimenez*, *Urethane*, and/or *Bouaphakeo*), because doing so would allow this Court to clarify for both state and federal courts the existing confusion over when, if ever, a "Trial by Formula" is permitted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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