No.

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 Supreme Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Wal-Mart Stores, Inc., has no parent corporation and no other publicly held corporation owns 10% or more of its stock, and that Sam's East, Inc., is an indirect wholly owned subsidiary of Wal-Mart Stores, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Wal-Mart Stores, Inc., and Sam's East, Inc. (collectively, "Wal-Mart") respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court (App. 1a-28a) is reported at 106 A.3d 656. The order of the Pennsylvania Supreme Court granting in part Wal-Mart's petition for allowance of appeal (App. 29a-30a) is reported at 47 A.3d 1174. The opinion of the Pennsylvania Superior Court (App. 31a-265a) is reported at 24 A.3d 875. The Pennsylvania Superior Court's order denying en banc reargument (App. 350a-351a) is unreported. The trial court's orders and opinion granting class certification (App. 317a-349a), order denying Wal-Mart's post-verdict motions and entering judgment (App. 297a-298a), opinion and order awarding liquidated damages under the Pennsylvania Wage Payment and Collection Law (App. 317a-349a), and post-trial opinion (App. 266a-296a) are all unreported.

JURISDICTION

The Pennsylvania Supreme Court issued its opinion on December 15, 2014. That opinion addressed the state-law issues that the Pennsylvania Supreme Court accepted for review on July 2, 2012, when it granted in part Wal-Mart's petition for allowance of appeal but denied discretionary review of the federal due process question that Wal-Mart presented. The Pennsylvania Superior Court issued a decision that passed upon Wal-Mart's federal due process argu-

ments on June 10, 2011, and denied Wal-Mart's application for en banc reargument on August 11, 2011. Although the Pennsylvania Superior Court remanded the case for a recalculation of attorneys' fees, the judgment is "final" for purposes of 28 U.S.C. § 1257(a) and is therefore within this Court's jurisdiction under that provision. *See Wash. State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 381 n.5 (2003); *Pierce Cnty.* v. *Guillen*, 537 U.S. 129, 142-43 (2003).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT

The Pennsylvania state courts in this case upheld a judgment of more than $150 million in favor of a class of 187,000 Wal-Mart employees who alleged that they had been denied paid rest breaks and were required to work "off the clock." Only *six* of those employees actually testified on behalf of the class; the remainder of the class's case was premised on extrapolation by the class's experts, who purported to apply evidence relating only to a small subset of class members and a portion of the relevant time period to *all* class members over the *entire* eight-year class period. Wal-Mart, in turn, was denied the opportunity to rebut the experts' extrapolation-based opinions through the presentation of individualized defenses regarding the specific facts of absent class members' claims. The Pennsylvania courts neverthe-

less affirmed both class certification and the ensuing monetary judgment over Wal-Mart's federal due process objections.

In particular, with respect to the class's rest-break claims, the Pennsylvania courts concluded that the classwide judgment could be sustained on the basis of testimony from an expert who used data about employee breaks from 1998 to 2001 to estimate the number of breaks that class members missed in the ensuing five-year period (for which there was no data). The expert *admitted* that the data did not exclude the possibility that a particular employee had failed accurately to clock in or out for a break, and did not establish that Wal-Mart compelled any employee to miss a break. The Pennsylvania courts nevertheless held that Wal-Mart had no right to rebut that evidence through an individualized showing that a particular break was not in fact missed or was missed as a result of a voluntary decision by that employee to work through the paid break.

This radical approach to classwide adjudication was unanimously rejected in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), where the Court held that it was not "possible to replace [individualized] proceedings with Trial by Formula," in which a subset of class members' claims would be adjudicated and the results extrapolated to determine liability and damages for the entire class "without further individualized proceedings." *Id.* at 2561. The Court disapproved this "novel project" as a violation of the Rules Enabling Act, and therefore did not explicitly reach the question whether it would also violate due process. *Id.* While this aspect of *Dukes* was clearly informed by the "constitutional" limitations on

"adventurous application[s]" of Rule 23, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 845 (1999), the lack of an express due process holding in the case has led some courts to conclude that due process does not independently prohibit "Trial by Formula."

This case—in which the Pennsylvania courts rejected Wal-Mart's federal due process challenges to class certification and the classwide judgment—provides the Court with a rare opportunity to resolve a deepening conflict on the "important question" of the "extent to which class treatment may constitutionally reduce the normal requirements of due process." *Philip Morris USA Inc.* v. *Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., Circuit Justice). That question arises with disturbing frequency in state courts—which are increasingly experimenting with novel and untested class-action procedures—but generally evades this Court's review due to the tremendous settlement pressure exerted on class-action defendants. The Court should utilize this valuable opportunity to make clear that due process does not permit courts to facilitate classwide adjudication by adopting procedures that relieve individual class members of their burden of proof and restrict the right of defendants to raise individualized defenses.

1. Plaintiffs Michelle Braun and Dolores Hummel are former employees at two of Wal-Mart's Pennsylvania stores who filed separate putative wage-and-hour class actions against Wal-Mart in 2002 and 2004, respectively. App. 38a-39a. Plaintiffs alleged that Wal-Mart was liable for breach of contract, unjust enrichment, and violations of the Pennsylvania Wage Payment and Collection Law, 43 Pa. Stat. §§ 260.1-260.12, because it purportedly

entered into contracts to provide its Pennsylvania hourly employees with unpaid meal breaks and paid rest breaks but breached these contractual obligations by requiring employees to work through their breaks. App. 3a, 33a, 38a-39a. Plaintiffs further alleged that Wal-Mart required each of its Pennsylvania hourly employees to work off the clock—*i.e.*, without pay after a shift ended. *Id.* at 3a, 38a-39a.

Although Pennsylvania law does not require employers to provide paid rest breaks to its employees, Wal-Mart had a rest-break policy under which "a paid, 15-minute break will be given to an employee who works between three and six hours, and . . . an additional paid, 15-minute break will be given to an employee who works more than six hours." App. 6a-7a. Wal-Mart also had an "off-the-clock work policy" that "provide[d] that it is against company policy for any employee to perform work without being paid, and that employees will be compensated for all work performed." *Id.* at 7a. These policies were set forth in employee handbooks that were distributed to new employees. *Id.* at 6a.

Over Wal-Mart's objections that class certification would "trample on [its] due process right to defend itself at trial" (R.2007a), the trial court certified a class in each case consisting of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to [May 1, 2006]" and consolidated the two cases for a class trial. App. 35a, 40a. The certified class encompasses approximately 187,000 employees in 139 Wal-Mart stores in Pennsylvania. *Id.* at 3a.

In certifying the class, the trial court emphasized that, under Pennsylvania law, "decisions applying the rules for class certification should be made liberally" and that any "doubt should be resolved in favor of class certification." App. 330a-331a. The trial court further "reject[ed]" Wal-Mart's "contention that thousands of employees will be needed to testify that the time records are inaccurate and do not explain their individual reasons for inadequate breaks and off the clock work without pay." *Id.* at 344a-345a. According to the trial court, trying this case as a class action, and without such individualized proof, would be "fair and efficient." *Id.* at 348a.

2. To support their motion for class certification and to prove their claims at trial, plaintiffs offered the testimony of two statisticians—Dr. L. Scott Baggett and Dr. Martin M. Shapiro—who extrapolated from data pertaining only to a subset of class members and a portion of the class period to opine about the supposedly uniform experiences of all 187,000 class members across all 139 Pennsylvania stores throughout the entire eight-year class period. App. 8a-11a, 40a, 43a-46a.

Plaintiffs' rest-break expert, Dr. Baggett, analyzed Wal-Mart's time-clock records from 1998 to February 2001 to identify purportedly missed or short rest breaks. App. 43a. He then extrapolated his results to cover February 2001 to May 2006, a period in which no rest-break records existed because Wal-Mart had discontinued its requirement that employees clock in and out for rest breaks. *Id.*;

R.4778a-R.4783a; R.4809a-R.4813a.[1] Dr. Baggett's extrapolation accounted for the vast majority—approximately 85%—of the 32 million missed or short rest breaks that he calculated. R.4805a. Moreover, even though Dr. Baggett admitted that he could not determine from Wal-Mart's time-clock records "whether a manager caused an employee to shorten or miss a break," Dr. Baggett nonetheless counted as a "rest-break violation" any instance in which the records showed that an employee had failed to clock in and out for a full rest break. App. 43a-44a. Dr. Baggett thus assumed both that employees always accurately clocked in and out for every rest break, and that all of the missed or short rest breaks were involuntary and caused by Wal-Mart, rather than the employee's voluntary decision to work through a paid break. *Id.*; R.5118a. In so doing, Dr. Baggett ignored unrebutted evidence developed by Wal-Mart that employees did not "always remember to swipe in and out for . . . paid rest breaks," R.5105a, and sometimes voluntarily decided to skip a paid break, R.5009a-R.5010a.

Plaintiffs' off-the-clock-work expert, Dr. Shapiro, also relied on extrapolation. Dr. Shapiro compared cash-register records to time-clock records for a subset of 16 Pennsylvania stores over the period from 2001 to 2006, and "assumed employees worked

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[1] Plaintiffs alleged that Wal-Mart changed its policy to reduce litigation risk, but at trial Wal-Mart demonstrated that the change was made so that employees would no longer be required to expend a portion of their fifteen-minute breaks walking to and from time clocks, and to bring the company into conformity with industry practice. R.4433a; R.5138a-R.5140a.

off-the-clock whenever cashiers logged onto their cash registers but were not logged into the time clock." App. 45a. Dr. Shapiro then extrapolated his calculations to the remaining 123 Wal-Mart stores in Pennsylvania and across the entire class period (including the period from 1998 to 2001 for which he did not examine any cash-register records). *Id.*; R.4867a, R.4870a-R.4876a; R.4908a-R.4909a. Dr. Shapiro acknowledged that he did not consider factors other than involuntary off-the-clock work that could have been the cause of a mismatch between the cash register log-in and time-clock records, including that the cashier simply forgot to clock in or out, or was working under someone else's log-in identification. R.5114a; R.5020a-R.5021a.

3. A jury trial was held in 2006. App. 40a. Plaintiffs' case consisted largely of the extrapolation-based opinions of Drs. Baggett and Shapiro, and testimony from six of the 187,000 class members. *Id.* at 43a-45a, 155a-162a; N.T. 9/14/06 a.m. at 54; N.T. 9/15/06 a.m. at 4. Wal-Mart called certain company executives, two expert witnesses, including its own statistician, and nine other employees who worked at Wal-Mart's Pennsylvania stores, but had no opportunity to cross-examine the tens of thousands of absent class members about their claims. App. 43a-46a, 68a-87a, 187a-195a; N.T. 9/29/06 a.m. at 104; N.T. 10/05/06 at 4; N.T. 10/04/06 p.m. at 32. In particular, Wal-Mart was not able to question the absent class members about whether the assumptions underlying the opinions of plaintiffs' experts—that every failure to clock in or out represented an involuntarily missed rest break and every discrepancy between time-clock and cash-register records

represented off-the-clock work—applied to their individual claims.

The jury returned a verdict in favor of Wal-Mart on all of the meal-break claims, but found in favor of the class on the rest-break and off-the-clock-work claims, awarding the class approximately $76 million on the rest-break claims and approximately $2.5 million on the off-the-clock-work claims. App. 46a-47a. The trial court subsequently awarded the class more than $62 million in statutory liquidated damages under the Pennsylvania Wage Payment and Collection Law, and ordered Wal-Mart to pay approximately $33 million in attorneys' fees, as well as interest and expenses, resulting in a total judgment of more than $187 million. *Id.* at 47a-48a.

Wal-Mart thereafter moved to set aside the verdict and decertify the class because the "effect, individually and in combination, of the Court's rulings against Wal-Mart and the conduct of the trial generally was to deny Wal-Mart a fair trial, in violation of Wal-Mart's rights . . . under the Due Process Clause of the Fourteenth Amendment." R.4007a. The trial court denied Wal-Mart's post-trial motions, reiterating its position that class certification was appropriate. App. 270a.

4. Wal-Mart appealed to the Pennsylvania Superior Court, arguing that "it was denied its due process rights to have a jury determine liability as to each individual class member, rather than relying upon the analysis of Drs. Shapiro and Baggett." App. 195a. Wal-Mart further asserted that the "trial court's improper application of the class action rules deprived Wal-Mart of its due process rights." R.206a

(citing *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007)).

The Superior Court largely affirmed the judgment (as modified to correct a minor numerical error), vacating only the attorneys' fee award, which it instructed the trial court to recalculate on remand. App. 33a-34a. The vast majority of the Superior Court's opinion consists of verbatim excerpts from the trial transcript, *id.* at 68a-162a, and block quotations from cases and statutes, *id.* at 49a-67a, rather than independent analysis.

The Superior Court rejected Wal-Mart's federal due process arguments as inconsistent with class certification under Pennsylvania law. According to the Superior Court, the "contention that Wal-Mart was denied due process in not being able to question each individual employee"—and "in defending against Drs. Baggett and Shapiro"—was "in derogation of class certification" because the trial court found that "common questions of law and fact predominate." App. 195a-196a. The court concluded that "[u]nder . . . the liberal construction of Pennsylvania's class action rules, . . . the record substantiates the trial court's certification of the class" and that it "discern[ed] no denial of due process." *Id.* at 33a.

5. Wal-Mart then petitioned the Pennsylvania Supreme Court for discretionary review, asking the court to determine whether "in a purported class action tried to verdict, it violates . . . the Due Process Clauses of the U.S. and Pennsylvania Constitutions to subject Wal-Mart to a 'Trial by Formula.'" R.342a. In granting review, however, the Pennsylvania

Supreme Court reformulated Wal-Mart's question presented to eliminate any reference to due process or the U.S. Constitution. *See* App. 30a (granting review limited to "[w]hether, in a purported class action tried to verdict, it violates Pennsylvania law (including the Pennsylvania Rules of Civil Procedure) to subject Wal-Mart to a 'Trial by Formula' that relieves Plaintiffs of their burden to produce class-wide 'common' evidence of their claims").

Both Wal-Mart and plaintiffs nevertheless addressed in their merits briefs whether plaintiffs' use of extrapolation to prove their case, and the limitations imposed on Wal-Mart's ability to raise individualized defenses, violated Wal-Mart's federal due process rights. *See*, *e.g.*, Wal-Mart's Opening Br. at 18, 22, 50. Moreover, in its opinion, the Pennsylvania Supreme Court cited and discussed several federal due process decisions, as well as this Court's decision in *Dukes*, and concluded that "Wal-Mart's claim that it was denied due process fails." App. 19a. The court reasoned that "the now-disapproved 'trial by formula' process at issue in *Dukes* was not at work here" because, according to the court, "the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of *damages* to the class as a whole" rather than "*liability*." *Id.* at 18a-19a (emphasis in original). The Pennsylvania Supreme Court distinguished *Dukes* on that ground despite the fact that the core liability issues at trial—whether Wal-Mart required each of the 187,000 class members to miss rest breaks and work off the clock—were resolved on the basis of Dr. Baggett's and Dr. Shapiro's extrapolations and assumptions, rather

than individualized proof regarding the experiences of each member of the class. *Id.*

In addition, the Pennsylvania Supreme Court affirmed the trial court's certification of the class, reasoning that "the existence of distinguishing individual facts among class members is not fatal to certification" and that "[c]lass members may assert a single common complaint even if they have not all suffered actual injury." App. 14a n.8.

In dissent, Justice Saylor criticized the majority for upholding a judgment that was based on "the simple averaging and extrapolations offered up by [plaintiffs'] expert witnesses," who extrapolated from "16 Pennsylvania stores to 139 others" and from one time period to "a distinct four-year period," even though there were "indisputable variations across store locations, management personnel, time, and other circumstances." App. 27a. Justice Saylor emphasized that "the kinds of alterations to substantive law reflected in the majority's relaxed approach to class-action litigation . . . should not occur as a byproduct of the application of a mere procedural device by the judiciary," *id.* at 28a, and that any alterations to "the class action landscape" are "subject to constitutional limitations such as the due process constraints raised by" Wal-Mart. *Id.* at 28a n.2.

Despite these discussions of due process in both the majority and dissenting opinions, the Pennsylvania Supreme Court stated in a footnote that "[t]here are no federal due process claims asserted." App. 6a n.4. Thus, according to the Pennsylvania Supreme

Court, its holding rests on state-law grounds and does not reach any federal constitutional issues.[2]

REASONS FOR GRANTING THE PETITION

In *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011), this Court held that the Rules Enabling Act prohibits federal courts from certifying highly individualized claims that can be adjudicated on a class-wide basis only by relieving individual class members of their burden of proof and restricting the defendant's right to raise individualized defenses. *Id.* at 2561. The question here is whether the Due

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[2] The Pennsylvania Supreme Court's statement that it was not addressing any "federal due process claims," and its modification of Wal-Mart's question presented to eliminate the references to due process and the U.S. Constitution, indicate that the court exercised its discretion to deny review of the federal due process issue raised in Wal-Mart's petition for allowance of appeal. *See* Pa. R. App. P. 1114(a). Where a state supreme court denies discretionary review in a case, certiorari is appropriately directed to the state intermediate appellate court, *see* Stephen M. Shapiro, *Supreme Court Practice* 178-80 (10th ed. 2013), and Wal-Mart is therefore simultaneously filing a materially identical petition for certiorari directed to the Pennsylvania Superior Court, in which Wal-Mart's federal due process arguments were both pressed and passed upon. In an abundance of caution, Wal-Mart is also filing this petition for certiorari directed to the Pennsylvania Supreme Court due to the absence of authority regarding the court to which a petition should be directed where a state supreme court denies review of a federal question passed upon by a state intermediate appellate court but issues an opinion on a state-law question. The Court should grant the petition that it deems to be directed to the appropriate court and dismiss the other petition. *See R.J. Reynolds Tobacco Co.* v. *Durham Cnty.*, 479 U.S. 130, 138-39 (1986).

Process Clause imposes a similar constraint on state courts.

In this case, the Pennsylvania courts upheld a judgment in favor of a class that relied on extrapolation to establish the elements of its claims and that was not required to confront Wal-Mart's individualized defenses to those claims. The class was permitted to recover more than $150 million from Wal-Mart without proof that any of the 187,000 absent class members actually missed a rest break or worked off the clock, and without any opportunity for Wal-Mart to provide legitimate explanations for the allegedly missed breaks or off-the-clock work, such as an individual employee's failure to clock in or out accurately or the employee's voluntary decision to work through a paid break.

The Pennsylvania courts' affirmance of this classwide judgment directly conflicts with decisions of the California Supreme Court, and three federal courts of appeals, all of which have recognized 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.'" *Duran* v. *U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014) (quoting *Dukes*, 131 S. Ct. at 2561) (alteration in *Duran*); *see also Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008); *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990). Moreover, although the Pennsylvania Supreme Court stated that it was not addressing Wal-Mart's federal due process argument, its conclusion that *Dukes* permits a "Trial by Formula" on "damages" issues nonetheless illus-

trates (and exacerbates) the lower courts' substantial confusion over the meaning of *Dukes* and whether its prohibition on an extrapolation-based "Trial by Formula" extends to both liability and damages.

Nor can the Pennsylvania courts' rulings be reconciled with this Court's precedent, which has repeatedly emphasized that "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted). In their zeal to facilitate classwide treatment of plaintiffs' inherently individualized claims, the Pennsylvania courts denied Wal-Mart its due process right to raise individualized defenses and upheld a judgment that, as a result, will inevitably require Wal-Mart to pay damages to uninjured plaintiffs.

This case presents a rare and valuable opportunity for the Court to articulate authoritatively the due process constraints on state-court class actions. *See Duran*, 325 P.3d at 920 ("We encounter here an exceedingly rare beast: a wage and hour class action that proceeded through trial to verdict."). While state courts are continuing to devise ever-more-creative means of squeezing inherently individualized claims into the class-action mold, those cases typically evade review because this Court lacks jurisdiction to review state courts' interlocutory class-certification decisions and, once certified, class actions typically settle before trial. This case, which was tried to verdict and then reviewed on the merits by both the Pennsylvania Superior Court and the Pennsylvania Supreme Court, presents an excellent vehicle for this Court to make clear that the "novel project" of "Trial by Formula" rejected in *Dukes*, 131

S. Ct. at 2561, is no more acceptable, or constitutionally permissible, in state court than in federal court.

I. THE LOWER COURTS ARE DIVIDED OVER WHETHER THE USE OF EXTRAPOLATION TO FACILITATE CLASSWIDE ADJUDICATION IS CONSISTENT WITH DUE PROCESS.

A. In *Dukes*, this Court rejected an extrapolation-based approach to classwide adjudication that the Ninth Circuit believed would have allowed that case to "be manageably tried as a class action." 131 S. Ct. at 2550. Under the plan endorsed by the Ninth Circuit, "[a] sample set of the class members would be selected," and the "percentage of claims determined to be valid would then be applied to the entire remaining class . . . without further individualized proceedings." *Id.* at 2561. This Court unanimously "disapprove[d]" that procedure, which it labeled "Trial by Formula." *Id.* The Court explained that, because the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.* (quoting 28 U.S.C. § 2072(b)) (citations omitted).

In light of its holding under the Rules Enabling Act, the Court in *Dukes* did not expressly address Wal-Mart's alternative argument that the Ninth Circuit's proposed "Trial by Formula" also violated due process. *See* Br. for Wal-Mart Stores, Inc. at 43, *Dukes*, No. 10-277. In the aftermath of *Dukes*, lower courts have split on whether it violates due process to facilitate classwide adjudication by permitting the use of extrapolation to relieve individual class mem-

bers of their burden of proof and by eliminating class-action defendants' right to raise individualized defenses.

Several state and federal courts have rejected these procedural shortcuts as violations of federal due process. In *Duran* v. *U.S. Bank National Ass'n*, for example, the California Supreme Court reversed on federal due process grounds a wage-and-hour class-action judgment that was premised on extrapolation, rather than the presentation of individualized proof and defenses. 325 P.3d at 935. To adjudicate the claims of 260 bank employees who alleged that they had been misclassified as exempt from California's overtime laws, "the trial court devised a plan to determine the extent of [the defendant's] liability to all class members by extrapolating from a random sample." *Id.* The "court heard testimony about the work habits of 21 plaintiffs," and, "based on testimony from the small sample group, the trial court found that the *entire* class had been misclassified." *Id.* The trial court then "extrapolated the average amount of overtime reported by the sample group to the class as a whole." *Id.*

The California Supreme Court unanimously reversed the judgment. The court deemed this use of extrapolation to be "profoundly flawed" because it "prevented [the defendant] from showing that some class members were exempt and entitled to no recovery." *Duran*, 325 P.3d at 920. Agreeing with this Court's reasoning in *Dukes*, the California Supreme Court explained that courts cannot "abridge" the presentation of a "defense simply because that defense [is] cumbersome to litigate in a class action" and that "'a class cannot be certified on the premise

that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.'" *Id.* at 935 (quoting *Dukes*, 131 S. Ct. at 2561) (second alteration in *Duran*). The court emphasized that "[t]hese principles derive from both class action rules and *principles of due process*." *Id.* (citing *Lindsey*, 405 U.S. at 66; *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007)) (emphasis added). These due process requirements were violated, the California Supreme Court explained, when the trial court "extrapolate[d] classwide liability from a small sample" and "refus[ed] to permit any inquiries or evidence about the work habits of [class members] outside the sample group." *Id*.

Like the California Supreme Court in *Duran*, the Second, Third, and Fifth Circuits have all recognized that due process prohibits class-action procedures that relieve individual class members of their burden of proof and deprive defendants of their right to present defenses to individual claims.

In *McLaughlin* v. *American Tobacco Co.*—a nationwide smokers' class action—the Second Circuit rejected on due process grounds a trial proposal under which "an initial estimate of the percentage of class members who were defrauded," along with an estimate of "the average loss for each plaintiff," would be used to determine the "total amount of damages suffered" by the class as a whole. 522 F.3d at 231. The court held that this proposal was "likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants." *Id.* This "raise[d] serious

due process concerns" because when courts "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." *Id.* at 232.

The Fifth Circuit rejected a similar procedural approach in *In re Fibreboard Corp.*, an asbestos class action in which the plaintiffs proposed "a full trial of liability and damages" for "a total of 41 plaintiffs," with the results extrapolated to the "remaining 2,990 class members." 893 F.2d at 709. The Fifth Circuit expressed "profound disquiet" over this approach, and explained that its "concerns" with the proposed trial plan "f[ou]nd expression in defendants' right to due process." *Id.* at 710-11. The court reasoned that class certification was improper because, to "create the requisite commonality for trial, the discrete components of the class members' claims and the asbestos manufacturers' defenses must be submerged," which the proposed trial plan could accomplish "only by reworking the substantive duty owed by the manufacturers." *Id.* at 712; *see also Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 311-21 (5th Cir. 1998) (reaffirming *Fibreboard* and rejecting an extrapolation-based trial plan).

Similarly, the Third Circuit in *Carrera* v. *Bayer Corp.*, relying on both this Court's decision in *Dukes* and the Second Circuit's decision in *McLaughlin*, 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." 727 F.3d at 307 (emphasis added).

The Pennsylvania courts' decisions in this case cannot be reconciled with *Duran*, *McLaughlin*, *Fibreboard*, or *Carrera*. While the courts in each of those cases held that due process *prohibits* replacing individualized elements and defenses in class proceedings with procedural shortcuts, such as extrapolation, the Pennsylvania courts upheld precisely such a procedure in this case over Wal-Mart's federal due process objections.

The testimony of Drs. Baggett and Shapiro—on which plaintiffs relied both to secure class certification and to prove their claims at trial—was not based on a review of evidence pertaining to all class members throughout the entire class period, but instead on a non-representative subset of data that was not geographically or temporally coextensive with the class or class period. With respect to the rest-break claims, for example, Dr. Baggett analyzed Wal-Mart's time-clock records from 1998 to February 2001. App. 43a. He then extrapolated the results of that subset to reach the conclusion that the class as a whole had amassed 32 million missed or short breaks over the eight-year class period, R.4805a—with no opportunity for Wal-Mart to examine absent class members about whether they had in fact missed breaks and the reasons that the breaks had been missed. In fact, only *six* employees testified in support of the class's claims at trial. The result is a classwide judgment awarded without requiring any of the 187,000 absent class members to prove that they had actually missed a rest break and without permitting Wal-Mart to establish that individual employees had failed to clock in or out for breaks

that they had in fact taken or had made the voluntary decision to work through their paid breaks.

Despite this reliance on extrapolation, the Superior Court held that the "contention that Wal-Mart was denied due process in not being able to question each individual employee is in derogation of class certification." App. 196a. In other words, according to the Superior Court, the fact that a class was certified—a purely procedural act—meant that it was constitutionally acceptable for extrapolation to replace the claimant-specific inquiries otherwise necessary to resolve the inherently individualized claims of the 187,000 class members. The Pennsylvania Supreme Court likewise ignored the due process consequences of this procedure, holding that Wal-Mart's due process rights were not violated because "the extrapolation evidence Wal-Mart challenges in this appeal involves the amount of *damages* to the class as a whole," and that, as a result, "the now-disapproved 'trial by formula' process at issue in *Dukes* was not at work here." *Id.* at 18a-19a (emphasis in original).[3]

This classwide judgment would not have been sustained by the California Supreme Court, or the

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[3] Contrary to the Pennsylvania Supreme Court's assertion, extrapolation was in fact used in this case to establish both liability *and* damages because the threshold question of liability—whether Wal-Mart required each of the class members to miss rest breaks and work off the clock—was resolved on the basis of Dr. Baggett's and Dr. Shapiro's extrapolation and the testimony of six out of 187,000 class members. That these shortcuts were *also* used to calculate damages simply compounds the due process violation.

Second, Third, or Fifth Circuits, because it rests on evidentiary and procedural shortcuts that those courts have categorically rejected as violations of class-action defendants' federal due process rights. In fact, if Wal-Mart had been able to remove this class action to federal court, the class could not have been certified and allowed to proceed to trial under the Third Circuit's decision in *Carrera*.

Other state appellate courts that have addressed the propriety of class certification in nearly identical class actions against Wal-Mart have reached conflicting conclusions as to whether the use of extrapolation violates due process. In *Wal-Mart Stores, Inc.* v. *Lopez*, 93 S.W.3d 548 (Tex. Ct. App. 2002), the Texas Court of Appeals reversed class certification where the plaintiffs "intend[ed] to establish their claims for missed breaks and off-the-clock work with the presentation of 'statistical analysis of Wal-Mart records and a random survey of the class.'" *Id.* at 560 (citation omitted). The court of appeals expressly rejected the plaintiffs' contention that this "trial plan [did] not violate Wal-Mart's due process rights," because the use of "such statistical evidence [would] preclude any individual inquiry . . . regarding . . . the varied circumstances surrounding each employee's missed breaks or off-the-clock work." *Id.* at 560-61. In contrast, the Missouri Court of Appeals affirmed certification of essentially the same claims, and held that "random sampling and statistical analysis [would] not violate Wal-Mart's due process rights." *Hale* v. *Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 228 (Mo. Ct. App. 2007). The court reasoned that there was "no absolute right to individualized determinations of damages" and that due process

was satisfied because "Wal-Mart would have the opportunity to contest the proofs of aggregate methods." *Id.*

Outside the wage-and-hour setting, courts have likewise endorsed class-action procedures that relieve individual class members of their burden of proof and limit defendants' opportunity to raise individualized defenses. In *Strawn* v. *Farmers Insurance Co. of Oregon*, for example, the Oregon Supreme Court upheld a judgment in favor of a class of insurance policyholders where the plaintiffs were permitted to recover on their common-law fraud claims by "prov[ing] reliance for *the class as a whole*" without providing "evidence of each class member's individual reliance" on alleged misrepresentations in their insurance policies. 258 P.3d 1199, 1210-11 (Or. 2011), *cert. denied*, 132 S. Ct. 1142 (2012) (emphasis added). The Oregon Supreme Court approved that undifferentiated, classwide evidentiary presentation over the defendants' due process objections, despite acknowledging that, outside the class-action context, one of the "essential elements of a common-law fraud claim" is that "the *plaintiff* justifiably relied on the misrepresentation." *Id.* at 1209 (emphasis added); *see also Scott* v. *Am. Tobacco Co.*, 949 So. 2d 1266, 1277 (La. Ct. App. 2007) (holding that a class of smokers alleging a fraud claim was not required to prove the individual element of reliance because the "certified claim" was one for "the class as a whole"), *cert. denied sub nom.*, *Philip Morris USA Inc.* v. *Jackson*, 131 S. Ct. 3057 (2011).

Similarly, in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 582 F.3d 156 (1st Cir. 2009), the First Circuit rejected a defendant's argu-

ment that the extrapolation of an assessment of the class representatives' knowledge and expectations to all absent class members "violated due process by depriving [the defendant] of its opportunity to raise individual defenses." *Id.* at 191, 195-96. According to the First Circuit, it is "obvious that class-action litigation often *requires* the district court to extrapolate from the class representatives to the entire class," and the court therefore deemed a "careful[ ] examin[ation]" of the "representatives' knowledge and expectations" to be sufficient to support a classwide judgment. *Id.* at 195.

The approach to class adjudication in these cases is impossible to square with the holdings of the California Supreme Court, and the Second, Third, and Fifth Circuits, that due process prohibits courts from "abridg[ing] a party's substantive rights" in order to facilitate classwide adjudication of inherently individualized claims. *Duran*, 325 P.3d at 935. This Court's review is necessary to resolve this rapidly expanding conflict, which has been significantly deepened by the Pennsylvania courts' rejection of Wal-Mart's due process arguments in this case.

B. Granting review would also afford the Court the opportunity to clarify the scope of its rejection of "Trial by Formula" in *Dukes*. While the Pennsylvania Supreme Court did not grant review of the federal due process issue presented by Wal-Mart, it did explicitly approve plaintiffs' reliance on extrapolation based on its view that this Court's rejection of "Trial by Formula" in *Dukes* applies only to issues of *liability*, not damages, App. 18a-19a, and on its erroneous conclusion that extrapolation was only used to de-

termine damages in this case. That aspect of the Pennsylvania Supreme Court's reasoning deepens the existing confusion over whether the permissibility of "Trial by Formula" depends on whether the procedure is invoked to resolve liability or damages issues.

For example, the Ninth Circuit in *Jimenez* v. *Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (Jan. 27, 2015), held that "statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages." *Id.* at 1167. The Ninth Circuit viewed extrapolation as permissible as long as a defendant's "due process right to present individualized defenses to damages claims" was preserved and the "form of statistical analysis . . . is capable of leading to a fair determination of . . . liability." *Id.* at 1168-69.

By contrast, the Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015), like the Pennsylvania Supreme Court, held that *Dukes* "does not prohibit certification based on the use of extrapolation to calculate damages." *Id.* at 1257. In direct conflict with *Jimenez*, the Tenth Circuit reasoned that, because the plaintiffs in that case did not "seek to prove . . . liability through extrapolation" but instead "used [extrapolation] only to approximate damages," this Court's rejection of "Trial by Formula" was not implicated. *Id.* at 1256-57. The Eighth Circuit in *Bouaphakeo* v. *Tyson Foods, Inc.*, 765 F.3d 791 (8th Cir. 2014), similarly held that this Court's disapproval of "Trial by For-

mula" is not implicated where "plaintiffs do not prove liability only for a sample set of class members," and therefore approved the use of averaging to "prove damages." *Id.* at 798-99.

Adding to this confusion, the California Supreme Court in *Duran* suggested that there might be a constitutionally relevant distinction between the use of extrapolation to establish liability as opposed to damages, and posited that the "use of statistical sampling to prove damages in overtime class actions is less controversial." 325 P.3d at 939.

The lower courts' disarray about the scope of this Court's rejection of "Trial by Formula" is ultimately difficult to fathom—given that the plaintiffs in *Dukes* proposed to use extrapolation to determine *both* "liability for sex discrimination and the backpay owing as a result," 131 S. Ct. at 2561, as well as this Court's refusal in *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), to recognize a distinction between damages and liability issues in assessing predominance under Rule 23(b)(3). *See id.* at 1433. This case illustrates that this confusion nonetheless persists and continues to deepen.

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The Pennsylvania courts' endorsement of a class-action procedure that uses extrapolation to relieve individual class members of their burden of proof and eliminates the defendants' right to raise individualized defenses conflicts with the decisions of multiple courts and compounds the growing confusion over the meaning of *Dukes*. The Court should grant review to ensure that all class-action defendants—

whether sued in state or federal court—are afforded the same basic set of due process safeguards.

II. THE PENNSYLVANIA COURTS' ENDORSEMENT OF "TRIAL BY FORMULA" CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

In addition to deepening the lower courts' confusion about the due process limits on classwide adjudication, the Pennsylvania courts' approval of a "Trial by Formula" in this case is flatly at odds with this Court's due process jurisprudence.

This Court has repeatedly held that "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey*, 405 U.S. at 66 (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); *accord Williams*, 549 U.S. at 353 ("[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" (quoting *Lindsey*, 405 U.S. at 66)).[4]

This fundamental due process requirement applies with full force to class actions. This Court has emphasized that the certification of a class action is subject to "procedural protections" that are "grounded in due process" and that reflect the "'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892-

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[4] *See also United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) (the "right to litigate the issues raised" is a "right guaranteed . . . by the Due Process Clause"); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970) ("due process requires an opportunity to confront and cross-examine adverse witnesses").

93, 901 (2008) (quoting *Richards* v. *Jefferson Cnty.*, 517 U.S. 793, 797 (1996)). While the class-action procedure potentially enables courts to "adjudicate claims of multiple parties at once, instead of in separate suits," class actions must "leave[ ] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality op.); *see also Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 332 (1980) (a class action is "a procedural right only, ancillary to the litigation of substantive claims").

These due-process-based constraints on classwide adjudication bind both state and federal courts. To be sure, "[s]tate courts are generally free to develop their own rules for protecting against . . . the piecemeal resolution of disputes." *Richards*, 517 U.S. at 797. "[E]xtreme applications" of this principle, however, "may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* (citation omitted). Thus, where state courts have departed from "traditional procedures" and failed to "provide[ ] protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994).

Indeed, this Court has reversed state-court judgments because it identified due process deficiencies in class-action proceedings upheld by the State's highest court. *See Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814-23 (1985); *Hansberry* v. *Lee*, 311 U.S. 32, 39-45 (1940). Those cases make clear that federal due process is an independent constraint on state class-action procedures and that, even if a state

court has determined that a class action complied with state law, the proceeding still must be compatible with the separate requirements of federal due process.

In this case, the Pennsylvania courts impermissibly cast aside fundamental due process protections in order to facilitate classwide adjudication of the inherently individualized claims of 187,000 class members employed at 139 different Wal-Mart stores at varying times over an eight-year period. If those claimants had filed individual actions, they each would have been required to introduce evidence that they were compelled by Wal-Mart to miss specific paid rest breaks and to work off the clock after particular shifts had ended. They likewise would have been obligated to withstand cross-examination by Wal-Mart as well as the presentation of individualized defenses showing that the supposedly missed breaks and off-the-clock work were the result of the employee's failure to clock in or out, or that breaks were missed voluntarily by the employee, rather than under compulsion from Wal-Mart. Because this suit proceeded as a class action, however, *all* of the 187,000 class members were permitted to recover even though only six employees testified on behalf of the class regarding their specific missed breaks and off-the-clock work, and the remainder of plaintiffs' case rested on extrapolation by Drs. Baggett and Shapiro. The vast majority of class members therefore were not required to prove that Wal-Mart actually forced them to miss breaks and work off the clock, and were not required to undergo cross-examination or withstand Wal-Mart's presentation of individualized defenses.

These due process violations were amplified by the imposition of more than $62 million in statutory liquidated damages under the Pennsylvania Wage Payment and Collection Law based on Wal-Mart's supposed failure to provide rest breaks that Pennsylvania law does not even require. *See* App. 299a-316a. This sanction was imposed based on the state courts' retroactive determination that Wal-Mart's employee handbooks—which each contained an express disclaimer that the "handbook is not a contract" and that the "policies and benefits" outlined therein did "not constitute terms or conditions of employment," *id.* at 34a—had created binding contractual obligations to provide rest breaks. This type of retroactive exaction based on vague standards and without fair notice would be constitutionally suspect in any circumstance, *see*, *e.g.*, *BMW of N. Am. Inc.* v. *Gore*, 517 U.S. 559, 574-75 (1996), but it poses an especially "acute danger of arbitrary deprivation of property," *Oberg*, 512 U.S. at 432, in this case, where the Pennsylvania courts eliminated Wal-Mart's right to defend itself against the class members' individual claims.

Yet, according to the Pennsylvania Superior Court, Wal-Mart's due process rights had to yield to the "liberal construction of Pennsylvania's class action rules," App. 33a, and Wal-Mart's contention that it was "denied due process in not being able to question each individual employee" was therefore "in derogation of class certification." *Id.* at 196a. That has it exactly backwards. The protections of due process, including the right to present "every available defense," *Lindsey*, 405 U.S. at 66 (internal quotation marks and citation omitted), take precedence

over a State's desire to resolve individual claims through aggregate litigation. *See Taylor*, 553 U.S. at 892-93, 901; *Richards*, 517 U.S. at 797.

To hold otherwise would allow state courts to utilize the class-action procedural device to alter underlying substantive law—creating one set of standards for defendants sued by an individual plaintiff and a different set of standards for defendants sued by a class of plaintiffs, who would not be required to prove the same elements, or confront the same defenses, as all other plaintiffs. That two-tiered system of justice is incompatible with this Court's recognition that *all* defendants have a due process right to "litigate the issues raised," *Armour*, 402 U.S. at 682, and that class actions "leave[ ] . . . the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A.*, 130 S. Ct. at 1443 (plurality op.).

Moreover, even if the Pennsylvania Supreme Court had been correct that plaintiffs' reliance on extrapolation was limited to damages issues, App. 18a-19a, a class-action defendant's due process right to present "every available defense," *Lindsey*, 405 U.S. at 66 (internal quotation marks and citation omitted), is not limited to issues that could be considered pertinent to "liability" rather than "damages." If the basic protections of due process did not apply to damages determinations, defendants would have no right to contest unjustified windfalls to uninjured or minimally injured plaintiffs. There is no such gaping hole in the Due Process Clause. *See*, *e.g.*, *Williams*, 549 U.S. at 353-54 (holding that due process precludes depriving a defendant of an "opportunity to defend against [a] charge, by showing" that a "victim was not entitled to damages"). Indeed,

as this Court recently explained in *Comcast*, while damages "[c]alculations need not be exact," cases may not be forced into the class-action mold through the use of "arbitrary" damages methodologies that, like the procedures endorsed by the Pennsylvania courts in this case, result in damages awards to uninjured plaintiffs. 133 S. Ct. at 1433.

In each of these respects, the Pennsylvania courts ran roughshod over Wal-Mart's due process rights in order to uphold a class-certification ruling and classwide judgment premised on extrapolation, rather than individual proof and a full airing of Wal-Mart's defenses. The Court should grant review to condemn this radical departure from the "basic procedural protections of the common law." *Oberg*, 512 U.S. at 430.

III. THIS CASE PRESENTS A RARE OPPORTUNITY FOR THIS COURT TO RESOLVE A QUESTION OF PROFOUND IMPORTANCE TO STATE-COURT CLASS-ACTION LITIGANTS.

This case affords the Court a rare chance to review a final judgment in a state-court class action. The Court should seize this opportunity to resolve the squarely presented, and surpassingly important, question regarding the limitations that due process imposes on state courts' class-action procedures.

The proceedings in this case, as well as the California proceedings in *Duran,* the Oregon proceedings in *Strawn*, and the Missouri proceedings in *Hale*, demonstrate that state trial courts are regularly resorting to procedural shortcuts to secure classwide adjudication of inherently individualized claims—and that state appellate courts are frequently con-

doning these practices. *See also*, *e.g.*, *Moore* v. *Health Care Auth.*, 332 P.3d 461, 465-66 (Wash. 2014) (holding that due process does not require individualized proof of damages in class actions because such a requirement would "create an unreasonable burden on class members" and "hinder . . . state policy underlying class action lawsuits").

While this Court's decision in *Dukes* has restricted the use of this practice in federal court (at least in some circuits), class-action plaintiffs have repeatedly bypassed this aspect of *Dukes* in state court by emphasizing that the Court's rejection of "Trial by Formula" was formally based on the Rules Enabling Act rather than due process. *See* 2 Joseph M. McLaughlin, *McLaughlin on Class Actions* § 8:6 (11th ed. 2014) ("Despite this clear, due process-based directive against 'Trial by Formula,' a number of principally state courts have approved class proceedings that do not provide defendants an opportunity to introduce evidence going to individualized issues and defenses . . . ."); Kimberly A. Kralowec, Dukes *and Common Proof in California Class Actions*, Competition: J. Antitrust & Unfair Competition L. Sec. State B. Cal., Summer 2012, at 9, 12 (arguing that *Dukes* has not "placed a constitutional due process limitation on the class action device").

Granting review in this case would enable the Court to establish conclusively that a "class cannot be certified"—in either state or federal court—"on the premise that [a defendant] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S. Ct. at 2561. That ruling would not only put an end to the alarming trend among state courts of using ever-more-novel means of extrapola-

tion, and increasingly onerous restrictions on individualized defenses, to facilitate class actions, but would also make clear to those federal courts that have declined to follow this Court's "Trial by Formula" ruling that the Court's disapproval of that procedure applies both to liability and damages determinations.

Opportunities for this Court to review a final judgment in a state-court class action are exceedingly rare because class actions are only infrequently tried to verdict. As this Court has recognized, class certification places significant pressure on defendants to settle even "questionable claims" in the face of potentially "devastating loss[es]." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Shady Grove Orthopedic Assocs., P.A.*, 130 S. Ct. at 1465 n.3 (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."). As a result, it is a "rare case in which a class action not dismissed pretrial goes to trial rather than being settled." *Hughes* v. *Kore of Ind. Enter., Inc.*, 731 F.3d 672, 676 (7th Cir. 2013). Moreover, because this Court possesses jurisdiction only with respect to final state-court judgments, 28 U.S.C. § 1257(a), there is no mechanism for this Court to review state courts' interlocutory class-certification orders (unlike certification orders in federal class actions, which are potentially subject to interlocutory review under Federal Rule of Civil Procedure 23(f) and a subsequent petition for certiorari to this Court).

This case—a rare state-court class action that was actually tried to verdict—presents an excellent vehicle for this Court to address the due process

limitations on state-court class actions. At every stage of the proceedings, Wal-Mart raised its federal due process objections to the certification and trial of this class action. Although the Pennsylvania Supreme Court declined discretionary review of the federal due process issue presented by Wal-Mart, that ruling is neither a formal nor practical barrier to review because the Pennsylvania Superior Court clearly passed upon that question. App. 33a, 195a-196a. Moreover, while it nominally has refused to address the federal due process issue, there is no doubt that the Pennsylvania Supreme Court has firmly endorsed the use of extrapolation and restrictions on individualized defenses in Pennsylvania class actions, despite the serious burdens that these procedures impose on defendants' due process rights.

The Court should take advantage of this opportunity to ensure that the critical protections of the Due Process Clause are respected in state-court class actions and that the state courts do not continue to sacrifice the fundamental rights of class-action defendants for purposes of mere expediency. It may be years before the Court is presented with another such case; the price of delay—in terms of settlements exacted, verdicts paid, and rights abridged—is simply too high to tolerate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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