No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,
v.
PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,
Respondents.

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

BRIEF FOR THE AMERICAN INDEPENDENT BUSINESS ALLIANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The American Independent Business Alliance ("AMIBA") is a national nonprofit organization that represents the interests of independent, locally owned businesses and encourages entrepreneurship. AMIBA supports more than 80 affiliated community organizations across 34 states. Its affiliated organizations represent approximately 26,500 independent businesses covering nearly every sector of business.

AMIBA seeks to strengthen and enforce federal and state laws that prohibit restraints of trade and other unfair practices disadvantaging small businesses. AMIBA believes that such laws are essential to ensure that all businesses have the opportunity to compete and receive fair treatment under the law. In AMIBA's view, class actions provide a crucial vehicle for small businesses to band together to challenge anticompetitive and other unlawful conduct by larger businesses. AMIBA submits this *amicus* brief out of concern that acceptance of the sweeping arguments against class certification advanced by Petitioner and its supporting *amici curiae* in this case would make it far more difficult for small businesses to challenge such conduct via class actions in other cases, which would ultimately harm small businesses and prove devastating to the economy.

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[1] Pursuant to SUP. CT. R. 37.2(a), all parties have filed blanket consent letters with the Clerk of Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Tyson Foods, Inc. ("Tyson") and various *amici curiae* in support of Tyson ask this Court to interpret Federal Rule of Civil Procedure 23 in an unprecedented and unduly restrictive manner that would eviscerate the class action device. They argue that an affirmance here would harm businesses, including small businesses. This purported concern is ill-founded. Class actions benefit small business and promote economic growth by facilitating private enforcement of important substantive laws, such as the antitrust laws.

In their briefing, Tyson and its *amici* attack statistical averaging and aggregate proof, claiming that such proof in this and other cases is subject to error and violates defendants' due process rights. The use of such proof, however, is well established under the law in a variety of contexts, and it has been routinely utilized by both plaintiffs and defendants. Restricting or eliminating such proof would decimate class actions.

Tyson and its *amici* also contend that Article III standing requires proof that all putative class members suffer injury. But, as recognized by a number of Circuit Courts of Appeals, including most recently the Third Circuit, this is not the law. For these reasons and those set forth below, this Court should reject Tyson and its *amici*'s broad assaults on class actions and affirm the Court of Appeals' decision.

ARGUMENT

I. Class Actions Benefit Small Businesses And Promote Economic Growth.

Certain *amici curiae*, in a charge led by the Chamber of Commerce of the United States of America (the "Chamber"), complain that the Eighth Circuit's decision, by purportedly "easing Rule 23's certification requirements," harms businesses, including small businesses.[2] But class actions are not inherently inimical to the interests of American business, as the Chamber argues. Quite to the contrary, in many important cases, class actions substantially benefit small businesses. The quintessential example of this is in the antitrust context, where private enforcement of the laws, particularly through class actions, is critical to safeguarding competition and promoting innovation and economic growth.

The recent case of *Dow Chemical Co. v. Industrial Polymers, Inc.*, No. 14-1091 (petition for certiorari filed Mar. 9, 2015) serves as a prime example. There, after a four-week trial, a jury rendered a verdict in favor of a plaintiff class after finding that the defendant, Dow Chemical Company ("Dow") – which has also submitted an *amicus* brief in support of Tyson in this case – conspired to fix prices of billions of

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[2] *See* Brief of the Chamber of Commerce of the United States of America, Business Roundtable, Retail Litigation Center, Inc., and the National Federation of Independent Small Business Legal Center as *Amici Curiae* in Support of Petitioner, Aug. 14, 2015 ("Chamber Br."), at 19-23; Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Petitioner, Aug. 14, 2015, at 12-15.

dollars' worth of "urethane" chemicals. The jury also found that Dow's price-fixing allowed Dow and its co-conspirators to reap hundreds of millions of dollars in overcharges from its customers, which included numerous large and small businesses. Following the jury verdict, the District Court of Kansas entered a judgment against Dow, and the Tenth Circuit unanimously affirmed. Rehearing was denied. Significantly, Dow's Petition for Certiorari and its *amicus* brief in this case do not challenge the sufficiency of the evidence supporting the jury's verdict.

In *Dow*, thousands of businesses—the vast majority of which lacked the economic resources to pursue separate individual actions—combined their claims in a single, efficient class action to litigate common questions with common evidence in order to reach a common result. It is only as a result of Rule 23 that Dow has been held accountable for inflicting serious harm on the class in that case and the economy as a whole. *See also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) (a price-fixing class action brought on behalf of businesses who purchased high fructose corn syrup from Archer Daniels Midland and its co-conspirators); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 986 F. Supp. 2d 207 (E.D.N.Y. 2013) (a class action brought on behalf of approximately 12 million merchants after Visa and MasterCard and issuing banks fixed the interchange fee for credit card transactions); *In re Air Cargo Shipping Servs. Antitrust Litig.*, MDL No. 1775, 2009 U.S. Dist. LEXIS 88404 (E.D.N.Y. Sept. 25, 2009) (a pending class action involving a worldwide price-fixing conspiracy in air cargo shipping services); *In re Vitamins Anti-*

trust Litig., No. 99-MC-197, 2000 U.S. Dist. LEXIS 8931 (D.D.C. 2000) (price-fixing class action brought on behalf of businesses who purchased bulk vitamins during a worldwide conspiracy); *In re Corrugated Container Antitrust Litig.*, 1983-2 Trade Cas. (CCH) ¶ 65,628 (S.D. Tex. 1983) (a seminal price-fixing class action that resulted in a jury verdict for the class after a several-month trial).

As *Dow* and other antitrust cases illustrate, class actions are critical to ensuring private enforcement of vital substantive laws. *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343-45 & n. 6 (1979) (holding that the antitrust laws were written to encourage private antitrust enforcement, including through class litigation). This is due at least in part to the limited resources of the government. *Id.* at 344. Indeed, the government does not pursue certain cases precisely because private civil enforcement is available via a class action. *See, e.g.*, *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1011-12 (E.D. Mich. 2010). Such private class actions are economically beneficial because they deter wrongdoing and compensate the victims of illegal activity. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). *See also Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 677 (7th Cir. 2013) ("A class action, like litigation in general has a deterrent as well as a compensatory objective.").

Antitrust is not the only area of law where businesses have successfully enforced their rights through class actions. *See, e.g.*, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-5693 PSG (RZX), 2015 U.S. Dist. LEXIS 98656, at *17 (C.D. Cal. May 27, 2015) (certifying class of sound recording copyright

owners in unfair business practices case); *In re Navistar Diesel Engine Prods. Liab. Litig.*, No. 11-2496, 2013 U.S. Dist. LEXIS 189619, at *9 (N.D. Ill. July 3, 2013) (approving class-wide settlement of claims brought by individuals and small businesses alleging product defect); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on Apr. 20, 2010*, 910 F. Supp. 2d 891, 900, 966 (E.D. La. 2012) *aff'd sub nom. In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (granting final approval of the economic and property damages settlement agreement; defining class to include business entities within a certain geographic boundary).

Dow, the Chamber, and other *amici curiae* nonetheless urge this Court to adopt sweeping generalizations about class certification and statistical quantification of damages that will make class certification more difficult in this and other cases, arguing that "[f]ailure to reverse here would even further ratchet up the pressure on class action defendants to settle even the weakest claims."[3]

To be clear, as an organization of small businesses that are sometimes defendants in lawsuits, AMIBA is certainly no fan of meritless litigation. But Tyson and *amici* are wrong about the purported issue of undue settlement pressure under Rule 23. Current federal practice strikes a careful and appropriate balance between facilitating meritorious class actions and discouraging dubious ones.

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[3] Brief for the Dow Chemical Company as *Amicus Curiae* in Support of Petitioner, Aug. 2015 ("Dow Br."), at 17; Chamber Br. at 19-22.

To the extent there are legitimate concerns regarding the possibility of baseless putative class actions, the Federal Rules of Civil Procedure already address such concerns.[4] *See, e.g.*, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) (upholding grant of motion to dismiss implausible antitrust class action conspiracy claims); *In re Chocolate Confectionary Antitrust Litig.*, ___ F.3d.___, 2015 U.S. App. LEXIS 16405 (3d Cir. Sept. 15, 2015) (affirming grant of summary judgment in price-fixing class action lacking sufficient evidence of conspiracy).

Rule 23(f) now allows interlocutory appeals as an additional check on erroneous class certification decisions.[5] Moreover, Congress has taken legislative action in the past to curb class action abuse, such as through the Private Securities Litigation Reform Act and Class Action Fairness Act, and is quite capable of doing so again if it believes reforms are necessary.

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[4] *See, e.g.*, *Fairness in Class Action Litigation Act of 2015: Hearing on H.R. 127 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 74 (2015) (statement of Prof. Alexandra Lahav) ("A 2008 study by the Federal Judicial Center, currently the most reliable source for empirical information on class actions, found that only 25% of diversity actions filed as class actions resulted in class certification motions, 9% settled and none went to trial. This means that class actions are already heavily screened by the courts, with baseless claims being dismissed early on.").

[5] Rule 23(f) is working as intended to allow early review of potentially erroneous class certification rulings. Indeed, Rule 23(f) petitions are granted with far more frequency than petitions for certiorari or other petitions for discretionary review. *See, e.g.*, Mark D. Harris and John E. Roberts, *Appealing Class Certification Orders Under Rule 23(f)*, N.Y. Law Journal, Aug. 24, 2015 (25% of Rule 23(f) petitions are granted).

Similarly, the Rules Advisory Committee has promulgated amendments to Rule 23, such as Rule 23(f), to address perceived problems with the Rule.

The various procedural mechanisms available to defendants to challenge unmeritorious class actions explain why "blackmail" settlements are a myth not supported by empirical evidence.[6] To the contrary, a number of recent cases – including this very case and the *Dow* case – directly dispel this myth. Notwithstanding class certification, Tyson chose not to settle the present case and instead took it to trial, just as it did in other recent class actions against it.[7] Dow made the same decision in the urethanes case, in spite of class certification.

Similarly, in another case recently before this Court on a petition for certiorari, *Whirlpool Corp. v.*

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[6] *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269, 1316 (2013) ("We know of no study providing evidence that any significant number of cases lacked merit and yet recovered substantial settlements."); Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 Baylor L. Rev. 681, 698 (2005) ("In sum, the empirical evidence quite simply does not prove up the assertion that class certification applies hydraulic pressure on defendants to settle."); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1359 (2003) (citing empirical research dispelling the notion that class certification coerces settlement of meritless claims).

[7] *Acosta v. Tyson Foods*, No. 08-CV-86 (D. Neb.) (docket #311) (May 31, 2013) (bench verdict); *Gomez v. Tyson Foods*, No. 08-CV-21 (D. Neb.) (docket #394 and 395) (April 3, 2013) (jury verdict).

Glazer et al., both Whirlpool and various *amici*, including the Chamber, argued that allowing class certification to stand would lead to a "blackmail settlement" because of the "hydraulic pressure to settle" created by the "potentially ruinous liability" posed by a trial.[8] Despite that customary and well-worn hyperbole, after this Court denied certiorari, Whirlpool did *not* settle but instead went to trial and prevailed.[9] In all three of these cases – *Tyson*, *Dow*, and *Whirlpool* – the defendants elected *not* to settle, despite class certification and the supposed inexorable pressure it exerts on defendants to do so.

Adopting unnecessary and sweeping rules to make it difficult or impossible to certify a class out of concern that certification could pressure defendants to settle would leave class members without an effective means of redress even in cases where there has been wrongful conduct. The denial of class certification effectively prevents proposed class members, which in many cases include small businesses, from obtaining relief. *See, e.g.*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the

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[8] *See* Whirlpool Corporation's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, No. 13-430 & 13-431, Oct. 2013, at 28, 34; Brief of *Amicus Curiae* DRI – The Voice of the Defense Bar in Support of Petitioners, No. 13-430 & 13-431, Nov. 5, 2013, at 5-6, 16, 23; Brief of the Chamber of Commerce of the United States of America, Business Roundtable, and the National Association of Manufacturers as *Amici Curiae* in Support of Petitioners, No. 13-430 & 13-431, Nov. 6, 2013, at 7, 19-21.

[9] *See In re: Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 1:08-WP-65000 (N.D. Ohio Oct. 30, 2014) (docket #490) (jury verdict).

very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . . ."); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001) (affirming class certification; reasoning that without class certification, numerous "small merchants will lose any practical means of obtaining damages. . ."). Indeed, "while affirming certification may induce some defendants to settle, overturning certification may create similar 'hydraulic' pressures on the plaintiffs, causing them to either settle or—more likely—abandon their claims altogether." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004); *see* FED. R. CIV. P. 23(f) Advisory Committee's note (1998) ("An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation."). This is precisely why it is vital that class certification decisions be made on the facts and the law, not based on how they might influence settlement.

Similarly, the Chamber's professed concern that certifying classes in cases such as this one will somehow harm absent class members by binding them to "class-wide dispositions that are substantially divorced from the merits of their individual claims" is disingenuous at best. Chamber Br. at 19. As the Chamber knows very well, in the absence of class certification, most victims of illegal conduct perpetrated by defendants such as Tyson will never file individually, will recover nothing, and consequently unlawful conduct will not be deterred. *Amchem*, 521 U.S. at

617; *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974); *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("only a lunatic or a fanatic" would litigate the claim individually).[10]

II. Statistical Analysis And Representative Proof Are Appropriate, Including In Class Actions.

The Chamber and other *amici* mount a wholesale attack on statistical averaging and aggregate proof, arguing that "statistical analysis for purposes of litigation is an exercise fraught with peril, as it is often susceptible to manipulation and error." Chamber Br. at 15. But there are already multiple mechanisms under the law for evaluating the reliability of such proof in particular cases – *Daubert* "gatekeeping" under Federal Rule of Evidence 702, summary judgment or directed verdicts, and "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" at trial.

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[10] As one district court has noted:

> There is an irony inherent in defendants' attempts to protect absent class members when their real hope is to deny plaintiffs any recovery. *In Re Diasonics Securities Litigation,* 599 F. Supp. 447, 450-51 (N.D. Cal. 1984) (comparing defendants' concern to that of a fox respecting the safety of a chicken coop). A court, recognizing this irony, must be suspicious of defendants' efforts to protect unnamed plaintiffs when that protection will, as a practical matter, leave them without a remedy. *Kline v. Wolf,* 702 F.2d 400, 402 (2nd Cir. 1983); *In re Computer Memories Securities Litig.*, 111 F.R.D. 675 (N.D. Cal. 1986).

Abelson v. Strong, No. 85-0592-S, 1987 U.S. Dist. LEXIS 7515, at *6 (D. Mass. July 30, 1987).

See, e.g., *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596-97 (1993).

Here, Tyson did not move to exclude this expert evidence based on statistical analysis and averaging under *Daubert*; it litigated that evidence exhaustively on the merits at trial, and it requested judgment as a matter of law after the verdict. In these circumstances, the jury's ultimate resolution, based on the trial record as a whole, is dispositive and warrants deference under the Seventh Amendment on appeal. This is particularly so in the context of the Fair Labor Standards Act ("FLSA"), given this Court's recent recognition that donning and doffing claims involve a "morass of difficult, fact-specific determinations" that warrant deference to the fact-finder. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 881 (2014).

In addition, statistical analysis and averaging are routinely used in a wide range of contexts, including class actions. Indeed, one of the amici supporting Tyson is Wal-Mart Stores, Inc., whose amicus brief takes the extreme position that averaging and extrapolation are "incompatible with due process."[11] However, that contention is squarely contrary to Wal-Mart's stance when it served as lead plaintiff in an antitrust class action on behalf of five million merchants. In that case, Wal-Mart successfully advocated for the use of class-wide aggregate techniques to determine damages, and overcame defendants' due process objections. *Visa Check/MasterMoney*, 280 F.3d at 139-40.

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[11] *See* Brief of Wal-Mart Stores, Inc. as *Amicus Curiae* in Support of Petitioner, Aug. 14, 2015 ("Wal-Mart Br."), at 5.

As noted, a basic premise of the class action rule is that aggregation can serve as a vital means of enforcing certain substantive laws, particularly those involving relatively small claims. *See, e.g.*, *Amchem*, 521 U.S. at 617 (recognizing that class actions "aggregat[e] the relatively paltry potential [individual] recoveries into something worth someone's . . . labor.") (citation omitted); Alba Conte & Herbert Newberg, Newberg on Class Actions § 10:5 & n. 20 (4th ed. 2002) ("[A]ggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objective of Rule 23.").

Aggregate proof is customary and indispensable to establish liability and damages in a wide variety of class, collective, and other actions, from wage and hour[12] to antitrust[13] to consumer[14] to securities[15] cas-

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[12] *See, e.g.*, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (holding an employee may recover under the FLSA based on representative testimony where the employer's records are inaccurate or inadequate); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (affirming award of "back wages to an entire group of employees based on the testimony of a representative sample . . . of 2.5 percent" of the employees under the FLSA); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1995) (granting back wages under the FLSA "to non-testifying employees based upon the representative testimony of a small percentage of the employees"); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991) (same); *McLaughlin v. HO Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) (same).

[13] *See, e.g.*, *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 534-35 (6th Cir. 2008) (affirming aggregate damages award based on expert testimony); *Linerboard Antitrust Litig.*, 305

(*Footnote continued*)

es. Absent aggregate proof such as statistical analysis and averaging, the class action device, which is essential to the enforcement of important substantive laws, would be vaporized.[16]

F.3d 145, 153-55 (3d Cir. 2002) (approving multiple regression and benchmark methodologies to prove antitrust impact); *Visa Check/MasterMoney*, 280 F.3d at 138-140, *disapproved in part on other grounds in In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-40 (2d Cir. 2006) (affirming district court's decision that "common formula for damages - that absent the tie, the interchange fees for off-line debit cards would have decreased, the interchange fees for credit cards would not have increased, and that an individual merchant's damages could be calculated by comparing those fees with the interchange fees actually paid - was not fatally flawed.").

[14] *See, e.g.*, *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 603 (7th Cir. 2014) (approving "uniform" class-wide damages methodology proposed by plaintiff: "every purchaser of a tile is injured (and in the same amount per tile) by delivery of a tile that does not meet the quality standard represented by the manufacturer"); *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197-200 (1st Cir. 2009) (approving expert's methodology for calculating aggregate damages: "The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself."); *In re Monumental Life Ins. Co.*, 365 F.3d 408, 418-420 (5th Cir. 2004) (approving use of "standardized formulas or restitution grids to calculate individual class members' damages" in case challenging insurance company's practice of paying lower benefits and charging higher premiums to blacks than whites in selling life insurance).

[15] *See, e.g.*, *Basic v. Levinson*, 485 U.S. 224, 242, 250 (1988) (approving rebuttable presumption of reliance supported by the "fraud-on-the-market" theory in order to prevent individualized proof of reliance from impairing enforcement of securities laws).

[16] At a minimum, this Court should refrain from casting any doubt on the admissibility of representative evidence, including "average" data presented by an expert, in any situation beyond

(*Footnote continued*)

III. The Use Of Aggregate Proof Comports With Due Process.

Tyson, the Chamber, and other *amici* argue that "allowing a statistical model to establish liability for an entire class runs a grave risk of violating due process" because "due process requires giving a defendant a meaningful opportunity to . . . present every available defense." Chamber Br. at 17; Brief of Petitioner, Aug. 7, 2015 ("Tyson Br."), at 36. This argument, espoused by many defendants in numerous class actions, is wrong. There simply is no such due process right.

In a comprehensive historical study of the due process theory proffered by Tyson, the Chamber, and other class action defendants, one scholar explains that the theory, which derives from the hoary and long-discredited case of *Lochner v. New York*, 198 U.S. 45 (1905), is entirely misplaced:

> In effect, modern procedural due process cases and the nineteenth century tradition converge on essentials: Neither construes due process as a fixed limit on the type or quantity of evidence presented in ordinary civil proceedings. Then and now, due process leaves a great deal of room for courts to regulate parties' opportunities to present relevant evidence in civil proceedings in the service of equity and convenience. Class action de-

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the specific donning and doffing context at issue in the present case.

> fendants' arguments are rooted in a brief, and brief-lived, deviation from this tradition - the Lochner era. If history provides the 'baseline' against which constructions of due process should be tested, class action defendants' claims are losers.

Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 324 & n. 30 (2012); *see also* Newberg at § 10.5 ("Aggregate computation of class monetary relief is lawful and proper. . . . Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.").

As this Court has recognized, "due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (citation omitted). This Court has never recognized any constitutional right to any specific form or method of proof. Such case management decisions lie within the sound discretion of the trial courts, subject to appropriate appellate review. *See, e.g.*, *Holmes vs. South Carolina*, 547 U.S. 319, 326 (2006) (holding Constitution allows rules of evidence that "permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury"); FED. R. EVID. 102, 403.

IV. The Presence Of Uninjured Class Members Does Not Defeat Article III Standing Or Bar Certification Of A Class Or Collective Action.

Tyson, the Chamber, Dow, and other amici also incorrectly argue that the courts below violated Article III standing requirements because uninjured absent class members were included in the class. Chamber Br. at 6; Tyson Br. at 44-49; Dow Br. at 12. Following a comprehensive historical review of representative actions, the Third Circuit recently rejected this interpretation of Article III, holding that "unnamed, putative class members need not establish Article III standing. Instead, the 'cases or controversies' requirement is satisfied so long as a class representative has standing . . . ." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 361 (3d Cir. July 22, 2015).

A contrary rule requiring "individual standing of all class members would eviscerate the representative nature of the class action" and would be "inconsistent with the nature of an action under Rule 23." *Id.* at 364 367. This is because a "class will often include persons who have not been injured by the defendant's conduct." *Id.* at 367 (quoting *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009).[17] "Such a possibility or indeed inevitability

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[17] Several other courts of appeals agree that unnamed class members need not establish Article III standing and that class certification is appropriate even where some class members may not have been injured. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020-21 (9th Cir. 2011) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements [of Article III]." (citation omitted); *DG ex rel. Stricklin*, 594 F.3d at

(*Footnote continued*)

does not preclude class certification." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) (quoting *Kohen*, 571 F. 3d at 677).

A rule that would require a jury verdict to be overturned and recovery denied to *all* class members if there is even one class member that is uninjured would be unfair and unjust, denying recovery to clearly injured class members. Chamber Br. at 8 ("Prohibiting the certification of classes that include uninjured class members is not merely a fair reading of Rule 23, it is the only permissible one."). Moreover, adoption of such a rule would allow those who have been found liable for violations of the law to avoid the consequences of their wrongdoing, undermining the goal of deterring unlawful conduct.

CONCLUSION

In asking this Court to reverse the Eighth Circuit's decision, Tyson and its *amici* urge this Court to adopt an unduly constricted interpretation of Rule 23 that would call into question the continued viability of the class action device. Because class actions are essential to small businesses and the economy, and because the courts below properly concluded that class certification was warranted in this case, the judgment of the Court of Appeals should be affirmed.

1198 ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct.").

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