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 OF *AMICI CURIAE* CIVIL PROCEDURE PROFESSORS IN SUPPORT OF RESPONDENTS

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September 29, 2015

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write about civil procedure, class actions, and complex litigation, and are concerned about petitioner's arguments on (1) the use of statistical and other representative proof, (2) the Rules Enabling Act, and (3) due process. *Amici* respectfully seek to offer the Court their professional academic perspective on these particular issues.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs in this case, employees in the Tyson Foods Storm Lake hog processing plant, do hard, dirty, dangerous work. To protect themselves and the hygiene of Tyson's pork products, plaintiffs wear personal protective equipment (PPE). All employees wear standard PPE, and most wear a variety of additional PPE, with the types worn overlapping substantially. During the time period at issue in this case, plaintiffs were all paid on Tyson's "gang time" system, which as a matter of uniform company policy did not compensate them for either the time they spent donning and doffing the standard PPE described above, or the time they spent walking to

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] A full list of *amici* is provided in the appendix to this brief. *Amici* join this brief as individuals; institutional affiliation is noted for informational purposes only and does not indicate endorsement by institutional employers of positions advocated.

their work stations. The plaintiffs also alleged, and the jury found, systematic underpayment in connection with the additional knife-related PPE worn by nearly all workers.

Plaintiffs alleged Tyson failed to pay overtime owed under the Fair Labor Standards Act of 1938 (FLSA) and, by incorporation of the FLSA, the Iowa Wage Payment Collection Law, Iowa Code (IWPCL). The district court certified a Rule 23 class action after a careful and extended analysis of the required elements of Rule 23(a) and Rule 23(b). The court rejected plaintiffs' proposed class as overbroad and substituted a more narrowly drawn one for which common answers to common questions would or could resolve critical issues in an across-the-board manner. The court also rejected plaintiffs' suggestion that a Rule 23(b)(1) class action could be certified, in light of the individual money damage claims at issue. The court's decision to certify under Rule 23(b)(3) was consistent with subsequent dicta by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2558 (2011) ("we think it clear that individualized monetary claims belong in Rule 23(b)(3)").

After years of pre-trial wrangling, there was a class-wide trial at which plaintiffs presented multiple forms of evidence. They presented testimonial evidence as to Tyson's liability, from both representative plaintiffs and Tyson's own managers. They also presented exhibits and statistical evidence based on an industry-standard time study of worker behavior in the very Tyson plant where all class plaintiffs worked. And they presented individualized damage determinations computed from a combination of averages from the time study and millions of Tyson's own employee time-sheet records. Tyson vigorously defended itself at this trial.

A jury returned a verdict with specific answers to common questions, specifically finding Tyson liable for unlawfully failing to compensate plaintiffs under some of their allegations. The jury awarded damages that were both substantial and considerably less than what plaintiffs had requested.

Notably, Tyson declined to object under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to plaintiffs' time-study evidence, so it has conceded that this evidence was relevant and admissible. And Tyson has not sought review of the Eighth Circuit's affirmance of the district court's denial of Tyson's renewed motion for judgment as a matter of law, so Tyson has conceded that plaintiffs' evidence is legally sufficient to support a verdict.

Tyson now seeks a ruling from this Court that representative litigation using relevant, legally sufficient evidence violated not only Tyson's due process rights, but also the Rules Enabling Act (REA). Tyson also advances a radical theory of evidence that would destabilize many fields of law.

Tyson tells this Court (at 38) that the time-study evidence admitted in this case is "biased" and "unreliable," and (at 42) that it is "unrepresentative" and that "no reasonable inferences may be drawn from" it. Tyson also contends (at 36) that admission of this evidence violated its due process rights because it "lessened plaintiffs' burden of proof and undermined Tyson's ability to defend itself." Tyson argues that this same supposedly lessened burden of proof independently constitutes a Rules Enabling Act violation, because the burden of proof embodies a substantive right. *Id.*

Evidence that is biased, unreliable, and unrepresentative, from which no reasonable inferences may be drawn, and whose use violates both due process and the Rules Enabling Act is not admissible. Indeed, both *Daubert* and Federal Rule of Evidence 402 provide bases to object to the admissibility of such evidence. But Tyson did not object to the admission of the evidence in question.

This Court should reject all of Tyson's arguments. In light of Tyson's reliance in this Court on supposed deficiencies of evidence it failed so completely to challenge, the most reasonable disposition of this case would be to dismiss the writ as improvidently granted. Should the Court instead take up the merits of Tyson's arguments, it should reject them, and affirm the Eighth Circuit, for the following reasons addressed in more detail throughout this brief.

First, the Court should reject the evidentiary principle that Tyson claims as the basis for its REA and due process claims. Tyson states (at 19) that "[n]o court would allow an individual employee to prove that *he* worked unpaid overtime by submitting evidence of the amount of time worked by *other* employees who did different activities that took a different amount of time to perform." Tyson provides virtually no authority for the principle underlying this contention, and the empirical claim itself is demonstrably false: In FLSA actions alone, *many* courts have done precisely what Tyson says *no* court would do. Dispositive as it is, that is a side point to the threat posed by Tyson's new theory of evidence. Courts allow the kind of evidence Tyson disparages in many substantive fields of law, provided that such evidence meets the usual case-specific tests of

relevance and admissibility. In this context, those tests police not for the presence of any differences, but rather for *material* ones. Any endorsement of Tyson's position here would destabilize many areas of state and federal litigation. *See* Part I, *infra*.

Second, Tyson's Rules Enabling Act argument fails even to engage with Iowa substantive law or the federal law that it incorporates. The plain text of the FLSA, and many years of federal court practice based on it, establish that the FLSA embraces representative litigation, including both representative testimony and statistical evidence. Absent any indication to the contrary—and there is none—Iowa state law also should be understood to welcome such evidence in aggregate litigation. The litigation of plaintiffs' IWPCL claims using a Rule 23(b)(3) class action with representative evidence is thus entirely consistent with Iowa substantive law. Therefore, the trial conducted here did not violate 28 U.S.C. § 2072(b). *See* Part II, *infra*.

Third, even if Tyson has a due process interest of the sort it proclaims here, that interest was honored. As the record and Tyson's own merits brief together indicate, Tyson raised every one of its now-claimed defenses at trial. It is true that Tyson did not get to raise every one of these defenses via cross-examination of more than 3,000 class plaintiffs. But the fact that Tyson has a due process interest in raising defenses does not give it a trump card to do so in unlimited fashion. This Court has repeatedly held out the three-pronged test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), including when the most fundamental liberty interests are at stake, as the framework for determining the ambit of a procedural due process interest. If the Court takes

up Tyson's due process arguments, it should use the familiar *Mathews* framework. Applying *Mathews*, the Court can only find that the trial in this case easily satisfied Tyson's due process interests. *See* Part III, *infra*.[3]

ARGUMENT

I. THE APPROACH TO EVIDENCE IN THIS CASE HAS TRADITIONALLY BEEN USED IN FLSA CASES AND IS USED IN LITIGATION ACROSS WIDE SWATHS OF THE LAW

Tyson argues (at 36) that allowing plaintiffs to use statistical evidence in this case "masked important differences" across individuals, by allowing plaintiffs to focus on hypothetical rather than real plaintiffs.

As a threshold matter, this argument is inconsistent with Tyson's own practice in the ordinary course of business, in which it used precisely this type of average time study to pay—or not pay—workers for donning, doffing, and walking time. JA446-55. If Tyson could reasonably use average time-study data to determine its everyday compensation of Storm Lake workers, the same type

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[3] This brief addresses in detail only those issues related to the first Question Presented. Tyson's argument as to the second Question Presented should also be rejected, both because it mixes up merits and standing and because it arrogates to Tyson third-party standing to litigate interests of parties adverse to it. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (explaining that a party might have a "distinct and personal interest" as to the rights of absent class members due to the first party's interest "in seeing the entire plaintiff class bound by res judicata just as [the first party] is bound"). Respondents' merits brief addresses the second Question Presented in detail.

of data may reasonably be used to estimate donning, doffing, and walking time in litigation under the FLSA.

Further, Tyson's argument applies in equal measure to non-statistical evidence. Any use of evidence for representative purposes would in some sense "mask individual differences," Pet. Br. 33, and thereby "lessen" plaintiffs' burden of proof, *id.* at 36. But courts have many times allowed the representative use of testimony from a small share of plaintiffs in representative-action FLSA cases where, as here, class members are similarly situated as to basic job duties, gear, and company-wide compensation policies (*see* Part II.B, *infra*). The test is whether workers are *similarly* situated given all the facts and circumstances of the case, not whether they are *identical* in each and every respect.

Tyson also asserts that "[n]o court would allow an individual employee to meet his burden of proving that he performed work for which *he* was not properly compensated by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform." Pet. Br. 36 (internal quotation marks and citation omitted). But Tyson points to no text in the FLSA that would yield such an evidentiary rule, and the case law Tyson cites is as inapposite as it is meager.[4]

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[4] Tyson cites only a 12-year-old case from the Second Circuit, *Grochowski v. Phoenix Constr.*, 318 F.3d 80 (2d Cir. 2003), which affirmed a directed verdict because several non-testifying plaintiffs had failed to "point to *any* evidence establishing the amounts they *were* paid," *id.* at 88-89 (emphases added), and a recent district court case, *Callahan v. City of Chicago*, 78 F. Supp. 3d 791, 816 (N.D. Ill. 2015)

There is nothing unusual about an individual employee meeting *his* burden using evidence about *other* employees, even when this evidence includes some "differences." The relevant question is not whether there are any differences, but rather whether those differences are small enough that the proffered evidence meets Rule 401's requirement that evidence (a) "has any tendency to make a fact more or less probable than it would be without the evidence" and that this fact (b) "is of consequence in determining the action."

Rule 401 thus instructs that the pertinent question is whether evidence offered about the work done by a set of workers who testify or were included in Dr. Mericle's time study could make it "more or less probable" that Tyson unlawfully failed to compensate a plaintiff for her own work time. Here the answer is yes, because Tyson's failure to pay the workers for their donning, doffing, and walking activities was the result of a plant-wide policy; because all the workers in this case wore standard gear; because there was substantial overlap in the additional gear they wore; because all worked daily shifts in a plant that regularly ran for more than 40 hours a week; and because the jury was properly instructed on the use of representative proof. The time-study data buttressed plaintiffs' showing of a systematic pattern and practice of under-compensation at Storm Lake, a fact surely relevant to plaintiffs' claims. Moreover, the district court never had occasion to rule on the admissibility of the

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(granting summary judgment on grounds unrelated to the text Tyson quotes), *appeal pending*, No. 15-1318 (7th Cir.). The facts and legal issues in those two cases have nothing to do with this case.

evidence Tyson now disparages, because Tyson failed to challenge it when the time was ripe.

Unavoidably, no one will ever know the exact amount of time plaintiffs in this case worked without legally required compensation, because Tyson failed to keep proper time records. The best that employees can possibly do in this situation, as this Court recognized decades ago, is to provide evidence sufficient to create a "just and reasonable inference" of the damages owed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), *superseded on other grounds by statute*, Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84. Under the FLSA, plaintiffs may meet this burden using representative evidence, including plant-wide data. *See* Part II.B, *infra*.

The Court should be mindful, moreover, of the broader implications of Tyson's uncabined attack on quantitative evidence. Tyson's evidentiary principle would prove a significant obstacle to the use of representative evidence in general, and statistical evidence in particular, whether by plaintiffs or defendants, and across numerous fields of law. The Federal Rules of Evidence, and the body of common law built up around them, are flatly inconsistent with such a result.[5]

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[5] Vast areas of litigation—involving both individual and class actions—would be radically changed if the Court were to question the use of statistical or other representative proof as a tool for establishing facts relevant to a particular individual case. The Federal Judicial Center's *Reference Manual on Scientific Evidence*, for example, has two chapters directly related to the use of statistics in litigation. The *Reference Guide on Statistics* opens with the observation that "[s]tatistical assessments are prominent in many kinds of legal cases, including antitrust, employment discrimination, toxic torts, and

Any time a material issue depends on a counterfactual object—what *would* have happened in the absence of the alleged wrongful activity?—there will be no way to determine facts at the center of litigation without using evidence based on *other* facts. Tyson's suggested evidentiary standard would transform the ability of litigants to use statistical evidence across many areas of the law; just a few such areas include damages determinations in wrongful death actions;[6] liability related to pharmaceutical products;[7] antitrust;[8] discrimination

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voting rights cases," because "[s]tatistical studies suitably designed to address a material issue generally will be admissible." David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, *in* Federal Judicial Center, *Reference Manual on Scientific Evidence* 211, 213, 214 (3d ed. 2011) ("*Reference Manual*"). The *Reference Guide on Multiple Regression* notes that multiple regression analysis has been used in myriad cases involving antitrust, sex and race discrimination, voting rights, the deterrent effect of the death penalty, public utility regulation, and intellectual property. *See* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in Reference Manual* 303, 306-07.

[6] *See*, *e.g.*, *Roth v. Islamic Republic of Iran*, 78 F. Supp. 3d 379, 402 (D.D.C. 2015) (finding it reasonable to base damages in a wrongful death action on experts' application of a forensic economic model to statistical earnings data); *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1277 (Miss. 2000) (holding that, under Mississippi law, there is a rebuttable presumption in favor of using *national averages* of earnings to calculate lost earnings in a wrongful death action).

[7] *See*, *e.g.*, *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997) (holding that plaintiffs may prove *liability* using epidemiological studies).

[8] *See*, *e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (reversing lower court as to certification not because an econometric model was *used*, but rather because the proposed model did not measure the right damages).

law;[9] and the use of DNA evidence in criminal prosecution.[10]

Tyson's proffered evidentiary limit would destabilize the myriad areas of law in which courts have long allowed statistical evidence. The proper test for whether such evidence is appropriate is not due process, unmoored from the facts of a case. Rather, it is the tried and true framework set forth by Rules 401 and 702. Evidence that tends to make a consequential fact more or less probable, and which meets the *Daubert* gatekeeping standards, should be admitted and tested through the "traditional and appropriate means of attack[]", namely, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Daubert*, 509 U.S. at 596. Material differences are a reasonable basis to reject evidence; the presence of *any* difference is not.[11]

Regardless of how it disposes of this case, this Court should make clear that nothing in its decision should be understood to undermine this framework.

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[9] *See Castaneda v. Partida*, 430 U.S. 482, 496 (1977) (taking judicial notice of statistical methods for evaluating whether jury-selection method was discriminatory).

[10] *See United States v. Davis*, 40 F.3d 1069, 1075 (10th Cir. 1994) (finding that district court did not abuse discretion by allowing statistical DNA evidence to be admitted).

[11] *See*, *e.g.*, *Merck & Co. v. Garza*, 347 S.W.3d 256, 266 (Tex. 2011) (rejecting use of epidemiological study not because it involved other people, or even because those people took a different dosage of the drug at issue, or for a different amount of time, but rather because plaintiff took a *much* different dosage for a *much* different time).

II. THE RULES ENABLING ACT ALLOWS CLASS-ACTION LITIGATION WHERE SUCH LITIGATION IS CONSONANT WITH THE SUBSTANTIVE LAW, AS IT IS HERE

It is undisputed that the Rules Enabling Act prevents this Court from promulgating "general rules of practice and procedure," 28 U.S.C. § 2072(a), that change substantive rights, *id.* § 2072(b).

Tyson argues (at 36) that the district court's allowance of the statistical evidence discussed above "lessened plaintiffs' burden of proof," thereby impermissibly abridging Tyson's substantive rights. Intrinsic to this argument is Tyson's view that, to win, a plaintiff class must offer proof that would be sufficient to win in a set of separate, individual-specific trials for each plaintiff in the class. As the *Shady Grove* plurality put this idea:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010) (plurality).

But that way of understanding the REA question does not apply here, because the federal and state substantive law relevant to the present case have long permitted wage-and-hour plaintiffs to prove claims on a representative group basis. Decades of FLSA cases are in accord, starting most famously with this Court's decision in *Mt. Clemens*, which approved the use of representative testimony from

eight employees to establish an employer's group-wide liability under the FLSA to a group of 300 in total. For a number of district court cases from the 1940s allowing such representative testimony even before *Mt. Clemens*, *see* Albert B. Gerber & S. Harry Galfand, *Employees' Suits under the Fair Labor Standards Act*, 95 U. Pa. L. Rev. 505, 508-09 (1947) (collecting cases in which there were "'marked differences' in employment," and explaining that, according to practice at the time, there need only be "a peg upon which to hang the statutory language 'employees similarly situated' [for] the action [to] go forward") (footnotes omitted); *see also Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 371-72 (4th Cir. 2011) (approving use of average from expert's time study in the same way such average was used here); *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014) (describing representative testimony and time-study evidence as competent evidence that can contribute to a "finding of class-wide liability").

Thus Tyson misapprehends the REA question. It is not whether the burden of proof was lessened as to particular individual plaintiffs' claims. As even Tyson's own proposed jury instructions reflected here, plaintiffs faced the usual burden of proof. The REA question here concerns the substance of what plaintiffs had to prove under Iowa law. In other words, the question concerns not the *burden* of proof, but rather what the *object* of proof is.

Plaintiffs did not need to provide individual-by-individual presentation of evidence to establish the elements of their claims, because long practice establishes that, under the FLSA's substantive provisions, claims of groups of plaintiffs may be

proved on a representative basis. The cases clearly establish that FLSA claims brought under 29 U.S.C. § 207 may be proved once, on a group-wide basis. While this practice has developed in actions brought under 29 U.S.C. § 216(b), the representative-action section of the FLSA, § 216(b)'s procedural terms could hardly make group-wide liability the object of proof if § 207 did not allow it.

That is critical for this case, because the IWPCL incorporates § 207's substantive terms. As a general rule, plaintiffs making IWPCL claims that spring from the FLSA may prove them the same way they would prove the underlying FLSA claims. Barring express reason to think otherwise—and a review of both the IWPCL's text and Iowa case law indicates that no such reason exists here—plaintiffs may prove their IWPCL claims the same way they would prove them directly under the FLSA. Thus, plaintiffs may prove their claims on a group-wide basis, using the same representative evidence they could use directly under the FLSA.

A. The Rules Enabling Act Requires Fidelity to the Substance of Both Federal and State Law

It is appropriate for this Court to promulgate, and for the lower courts to apply, "general rules of practice and procedure," 28 U.S.C. § 2072(a), so long as these rules do not change the substantive rights embodied in either congressional or state legislation, or state common law. The point of the second part of the Rules Enabling Act, 28 U.S.C. § 2072(b), was, and properly considered remains, the delineation of the boundaries of the judiciary's legitimate institutional authority. "Congress wanted the definition of substantive rights left to itself in cases

where federal law applies, or to the States where state substantive law governs." *Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 565 (1991) (Kennedy, J., dissenting).

It is impossible for the REA to pose an obstacle to the representative FLSA collective-action aspect of this case, both because Rule 23 plays no role under the direct FLSA claims and because the aggregate litigation of the FLSA claims in this case is blessed by the plain text of the procedural terms of the FLSA itself, *see* 29 U.S.C. § 216(b). The sole statutory requirement qualifying the characteristics of individuals who can be represented in aggregate litigation under § 216(b) is that they be "similarly situated."

But the FLSA's substantive terms nevertheless are relevant to REA considerations, because Iowa state law incorporates these terms. The IWPCL declares that "[a]n employer shall pay all wages due its employees." Iowa Code § 91A.3. Because § 207 of the FLSA creates obligations to pay wages, it can be the source of an employer's obligation to pay wages "due its employees" under the IWPCL. That is the basis—and the only basis—of plaintiffs' claims under the IWPCL in this action. For workers in the Iowa Rule 23 class, then, the IWPCL claims are established if and only if those workers' FLSA claims under § 207 are established. Accordingly, substantive rights under § 207 of the FLSA also are directly grounded in Iowa state law.

B. FLSA Litigation Has Long Proceeded on a Group-Wide Basis

The substantive policy of allowing a group of FLSA plaintiffs to satisfy their burden of persuasion

through representative proof is exhibited in the development of case law over nearly seven decades. This long experience evinces a clear stance in favor of aggregate litigation in which plaintiffs need not introduce evidence individual-by-individual. Consequently, representative evidence—whether testimonial, statistical, or otherwise—is appropriate in aggregate actions brought under § 207.[12]

Courts adjudicating FLSA claims in representative actions have long permitted evidence from a small fraction of plaintiffs in favor of the aggregation of those represented. For example, *Mt. Clemens*, which pre-dated Rule 23's expansion in 1966, involved the testimony of just eight workers out of the 300 represented. *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 461, 462 (6th Cir. 1945). This allowance for some workers to testify for the benefit of all represented plaintiffs has continued with regularity, *see Reich v. Southern New England Telecomms. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (allowing representative testimony of 39 employees to support an award of back wages for approximately

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[12] Despite the exclusive focus Tyson trains on plaintiffs' use of time-study averages, Tyson's argument would apply no less to the voluminous testimonial evidence provided by representative plaintiffs and Tyson managers, which Tyson has ignored in briefing this Court. The testimonial evidence is of a piece with the statistical evidence, because both tend to establish that Tyson unlawfully failed to compensate its workers for their work time. If the time-study averages "lessened plaintiffs' burden of proof," as Tyson maintains, then all the testimonial evidence did, too. There is no principled way for this Court to find statistical evidence bad under the Rules Enabling Act, but representative testimonial evidence good. If anything, presenting both testimonial and empirical evidence is *more* rigorous and reliable than relying on testimony alone, so this practice should not be discouraged as a general rule.

1,500 employees in total); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472-73 (11th Cir. 1982) (23 testifying employees sufficient for back wages award to 207); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973); *McLaughlin v. DialAmerica Mktg., Inc.*, 716 F. Supp. 812, 824-25 (D.N.J. 1989) (liability for approximately 350 non-testifying employees based on trial or deposition testimony of 43 witnesses); and very recently, *see Garcia*, 770 F.3d at 1307 (describing representative testimony as competent evidence that can contribute to finding of "class-wide liability").

As one district court whose judgment was affirmed on appeal explained:

> [I]n a typical FLSA case, the [plaintiff] presents testimony from some of the affected employees as part of the proof of a prima facie case. The [plaintiff] then can rely on testimony and evidence from representative employees to meet the initial burden of proof requirement.

Herman v. Hector I. Nieves Transp., Inc., 91 F. Supp. 2d 435, 446 (D.P.R. 2000), *aff'd*, 244 F.3d 32 (1st Cir. 2001).

Nor is this capacity for aggregate proof limited to damages. As the Third Circuit recognized, "[i]t is not necessary for every single affected employee to testify in order to *prove violations* or recoup back wages. The testimony and evidence of *representative employees may establish prima facie proof of a pattern and practice of FLSA violations*." *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1298 (3d Cir. 1991) (emphases added); *see also Herman*, 91 F. Supp. 2d at 446 (once plaintiff establishes that the FLSA was

violated as to testifying employees, "the *existence of the violations* as well as an award of backwages may be inferred for employees that do not testify") (emphasis added).

Put simply, decades of federal case law reveal a clear FLSA policy of allowing plaintiffs to prove both liability and damages in the aggregate, using representative evidence. Iowa law incorporates the FLSA provisions that embody this policy. And Iowa case law gives no indication of any rejection by the state's courts of the FLSA policy in favor of aggregate proof by representative evidence. Accordingly, the IWPCL is properly viewed as favoring a policy of allowing representative evidence in those cases where plaintiffs bring FLSA-derived IWPCL claims. The Rules Enabling Act is thus not violated by allowing representative evidence to prove liability and damages in Rule 23(b)(3) actions under the IWPCL.[13]

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[13] All that is left of Tyson's contention to the contrary (at 36) is the qualifier "who did different activities requiring a different amount of time to perform." But both common sense and experience indicate that not all activities done by all workers in a representative action would be precisely the same; nor would all require precisely the same "amount of time to perform." Further, *Mt. Clemens* made clear that, when employers unlawfully fail to keep records of unlawfully uncompensated work time, employees are not required to do the impossible. The evidence presented by plaintiffs in this case easily meets the *Mt. Clemens* "just and reasonable inference" standard for damages. This evidence, based on a combination of individual time-sheet records with data from an objective time study of the very plant where all class plaintiffs worked, was surely at least as reliable as the testimony of eight employees that the *Mt. Clemens* Court found sufficient for determining damages.

III. DUE PROCESS DOES NOT GIVE A DEFENDANT THE RIGHT TO LITIGATE ALL DEFENSES HOWEVER IT PLEASES, AND TYSON HAD EVERY APPROPRIATE OPPORTUNITY TO RAISE ALL ITS DEFENSES

This Court set forth the framework for evaluating whether governmental action is consonant with a person's due process interests in *Mathews v. Eldridge*. That framework involves a three-pronged inquiry into the risk of deprivation of the person claiming due process protection, the protections provided in the procedural mechanism the government proposes, and the governmental interest in using the proposed procedure rather than feasible alternatives. Applying the *Mathews* framework shows that class-action litigation fits comfortably within the bounds of due process in this case.[14]

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews*, 424 U.S. at 332. But due process rights are not inflexible trump cards: "due process, unlike some legal rules, is not a technical

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[14] The *Mathews* framework has been applied in substantive areas involving the most fundamental due process interests. *See*, *e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (assignment to super-max prisons) ("we generally have declined to establish rigid rules and instead have embraced [the] framework . . . established in *Mathews*") (Kennedy, J.); *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (*habeas corpus* action) ("*Mathews* dictates . . . the process due in any given instance").

conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334. Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* And the protections demanded by the situation here were provided.

Tyson argues that it has a due process right to individualized determination as to every individual claim in this action. But even stipulating that Tyson has a due process interest here would hardly give Tyson a trump card allowing it to mount its defense on whatever terms it prefers. Trial plans regularly limit both plaintiffs' and defendants' freedom to maneuver, even in *individual* actions. No one believes Rule 16 or Rule 20 or Federal Rules of Evidence that limit admissibility of relevant evidence are unconstitutional as a consequence. Yet Tyson's argument would render class litigation unconstitutional whenever there are *any* individual questions, even when Rule 23(b)(3)'s requirement that common questions "predominate" over them is satisfied.

Further, the trial that occurred in this case was nothing like the "Trial by Formula" plan that the Ninth Circuit approved and this Court questioned on due process grounds in *Dukes*. Here, Tyson had an opportunity to mount a defense on every issue it raises in its merits brief. In some instances, it hurled fastballs; in others, it lobbed softballs; and in still others it wandered off the mound without delivering a single pitch. In light of all that, Tyson's insistence that it was unable to defend itself is baseless.

The governmental-interest prong of the *Mathews* test also tilts strongly in favor of aggregate litigation allowing representative proof. The burdens on the

judicial system of Tyson's suggested alternative to class-wide litigation—thousands of individual jury trials with the same questions raised repeatedly on cross-examination—are obviously prohibitive.

Finally, while Tyson asserts its due process challenge only in relation to the statistical evidence, the evidence in the record is ample enough for this Court to simply avoid the due process question. The record runs over with non-statistical evidence that would entitle a reasonable jury to find Tyson liable here. And the use of Dr. Mericle's evidence for determining damages easily falls within the standard, which this Court elaborated long ago in *Mt. Clemens*, that applies when an employer such as Tyson fails to keep legally required records.

A. Tyson's Interest Was in Putting Forward Its Defenses on the Merits, Which Tyson Did

Mathews teaches that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." 424 U.S. at 333 (quotation marks omitted). Thus, Tyson's interest was to have its defenses heard meaningfully when a court adjudicates its employees' claims, and that interest was vindicated in this case.

At the trial itself, Tyson was afforded a full opportunity to cross-examine plaintiffs' witnesses. On cross-examination, it savagely attacked plaintiffs' expert, Dr. Mericle, concerning supposed methodological flaws in his time study—and evidently the attack drew blood, as the jury awarded far less than plaintiffs requested. Further, Tyson's own brief lists detailed excerpts from the trial transcript of testimony by numerous employee

witnesses that the jury might have taken as the basis for rejecting Dr. Mericle's time study. *See* Pet. Br. 30-31.

Tyson contends (at 37) that in individual trials it could have countered plaintiffs' claims "by demonstrating, through cross-examination of the plaintiff or the testimony of other employees, that it took (or reasonably could have taken) much less time to don and doff the particular equipment that the plaintiff wore." Ironically, Tyson makes this contention only after spending pages of its brief (at 30-35) listing "vivid" examples of just such testimony that Tyson elicited from plaintiffs' witnesses. And Tyson neither called to the stand, nor even sought to call, any other employees (including, for example, additional opt-in class members), despite the fact that no Rule or order of court blocked it from doing so.

Tyson's second example of a defense it could have raised at an individual trial is no different. It is true that in an individual trial the company might have shown that "the plaintiff was compensated for time spent donning and doffing apart from any K-Code time, because the particular plaintiff donned equipment after 'gang time' started or when the plaintiff was paid to setup or clean up the production area." Pet. Br. 37. It is also true that in the very next sentence Tyson cites JA90 for a discussion of an "example of an employee who [*testified* he] did all of his post-shift washing of equipment on paid clean-up time." *Id.* (emphasis added).

It is thus simply not true that "[i]n this class action . . . Tyson could not raise such individualized defenses." *Id.* Tyson could and did raise them on a representative basis in the class-wide trial. And, just

as the generality of representative testimony in their favor can benefit plaintiffs as to the entire class, such testimony could be expected also to redound to Tyson's advantage when it favored Tyson.[15]

Tyson's ability to raise exactly the defenses it incorrectly says were denied contrasts dramatically to the procedure this Court rejected in *Dukes*, where:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Dukes, 131 S. Ct. at 2561.

The procedure rejected in *Dukes* really is Trial by Formula, because the claims selected for trial would themselves be sampled, with extrapolation to the rest of the claims in the class. A defendant snagged in such a procedure would not be able to raise defenses relevant to claims that had not been sampled concerning the "crucial [subjective] question *why was I disfavored*." *Id.* at 2552. This case, by contrast, did not involve any such novel procedure, unrepresentative evidence, or lack of a common company policy. Nor, as explained above, did the

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[15] As with its attack on Dr. Mericle, Tyson's success in such cross-examination might well explain why the jury awarded plaintiffs substantially less than they requested.

trial in this case involve any limitation on Tyson's ability to raise defenses that would defeat claims of class-wide liability, which Tyson did with gusto.

B. Tyson Received Ample Procedural Protections

With respect to the FLSA collective action, the procedures here included the standard protections. The FLSA requires that collective-action members give written consent to representation, as hundreds did here. Additionally, represented members of the collective action must be similarly situated to the representative plaintiffs. The district court undertook a detailed analysis of that question, and the case for certifying the FLSA collective action, in the same memorandum opinion that considered certification of the Rule 23 class action. The court expressly found that the factual differences emphasized by Tyson are "small," Pet. App. 99a, a finding to which this Court should defer. *See*, *e.g.*, *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979) (abuse-of-discretion standard applies to class-certification findings); *see generally* Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. Pa. L. Rev. 1897 (2014) (explaining vital systemic importance of discretion, especially as to fact-bound issues, in class-certification matters).

With respect to the Rule 23(b)(3) class under Iowa law, Tyson had all the usual protections that attend Rule 23 actions. *See*, *e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997) (requirements of Rule 23 are carefully calibrated to comport with Rules Enabling Act and due process). It had an opportunity to contest class certification following an appropriate period of class discovery. Only after class discovery had occurred, and both

sides had made detailed arguments, did the district court certify the Rule 23(b)(3) class action after expressly "rigorous" analysis. Pet. App. 95a. Tyson moved for decertification following this Court's decision in *Dukes*. It received a full and fair consideration of its argument, which was decidedly weak given that *Dukes* involved a class action certified under a different provision of Rule 23(b)—not to mention the dictum in *Dukes* affirmatively stating that damages actions like this one "belong in Rule 23(b)(3)." 131 S. Ct. at 2558.

After the trial, Tyson renewed its motion for judgment as a matter of law, and for a new trial in the alternative. After the district court denied that motion for the prosaic reason that a reasonable jury could have found for plaintiffs on the basis of the record before it, Tyson appealed its loss to the Eighth Circuit, which properly considered and then rejected Tyson's argument.

Tyson also declined to avail itself of a number of procedural mechanisms that were within its reach. First, Rule 23(f) allowed Tyson to pursue an interlocutory appeal of class certification. Notwithstanding the extraordinary constitutional deprivations and Rules Enabling Act violation Tyson now claims, Tyson did not do so.

Second, Tyson could have filed a motion to exclude one or both of plaintiffs' experts under *Daubert*. Tyson now insists (at 42) to this Court that Dr. Mericle's time study was "unrepresentative" and incapable of yielding any "reasonable inference." Such alleged defects would render an expert's testimony and related exhibits inadmissible under *Daubert*, irrelevant under Rule 401, and thus also inadmissible. It is hornbook law that our adversarial

system places the obligation to object to inadmissible evidence on a party itself. Even were it to mistakenly agree with Tyson's description of Dr. Mericle's time-study evidence, this Court should reject Tyson's attempt to do by end-run what it failed to do forthrightly when the time was ripe.

Third, Tyson could have presented its own time-study expert to convince the jury that Dr. Mericle's figures were inflated. Indeed, Tyson originally planned to call one Dr. Adams as a rebuttal time-study expert. The company subsequently determined that it was "not necessary" to do so, on the basis of deposition testimony given by Dr. Mericle and Dr. Fox. *See* Def's. Mem. Supporting Exclusion of Dr. Adams at 2, ECF 233-1. But, before that time, Tyson actually told the district court that it would be an appropriate question for the jury to decide whether evidence from Dr. Adams or Dr. Mericle was more reliable.[16]

Fourth, Tyson could have chosen not to oppose *plaintiffs'* motion for a bifurcated trial that would have separated liability and damages determinations.[17]

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[16] Referring to its own time-study expert, Dr. Adams, Tyson argued: "[B]oth sides' experts are doing something similar, and the jury will just need to evaluate which one had the *better* measure, is the better expert, and is more reliable." Def's. Resistance to Pls.' Omnibus Motion in Limine at 11, ECF 170.

[17] *See* JA115. Tyson maintained that it opposed a bifurcation of liability and damages because (i) plaintiffs did not give it more notice of their motion for bifurcation, and (ii) it believed liability included some individualized issues. But nothing stopped Tyson from making its own, putatively better-tailored motion either before or after plaintiffs' motion.

Fifth, Tyson could have called its own employee witnesses. The representative plaintiffs were employed at the same Tyson facility as those they represented, wore substantially similar PPE, and were subjected to the same uniform policy of non-compensation. If individualized issues related to liability were as substantial as Tyson claims, it would have had little trouble finding employees who could have testified to this effect, including certain opt-in class members who had elected to become parties to the FLSA case. Tyson obliquely seeks to excuse its failure to do so by citing (at 37-38) to an observation in a treatise mentioning a smattering of district court rulings.[18] But Tyson points to no order of court, because there was none, that limited its ability either to engage in such discovery or to call non-named plaintiffs to testify.

Having availed itself of numerous procedural protections, and elected to forgo many others, Tyson is in no position to argue that it was due any more process. Analysis of the second *Mathews* prong shows that Tyson received ample procedural protections.

C. The Governmental Interests in Class Litigation Were Very Strong in This Case

The third *Mathews* prong requires a court to consider "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

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[18] And even this handful of cases does not uniformly support Tyson's position. *See McCarthy v. Paine Webber Grp., Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995) (stating that "[d]iscovery of absent class members" is "not forbidden," even if it is "rarely permitted").

requirement would entail." *Mathews*, 424 U.S. at 335.

One alternative to aggregate litigation in this action would be *no* litigation. But that is a result that this Court should not countenance. Claims like the ones at issue here are precisely the types of relatively small claims for which the Court has said Rule 23(b)(3) was designed. *See Amchem*, 521 U.S. at 617 ("[S]mall recoveries do not provide the incentive for any individual to bring a solo action . . . . A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."). Absent a viable path to class-wide redress of systematic wage-and-hour violations, a company in Tyson's position could thwart the duly enacted laws of the United States and of Iowa.

The alternative that Tyson evidently embraces is a series of individual trials. In these trials, Tyson's merits brief suggests (at 37) the following questions would be raised *seriatim*:

- Q for individual plaintiff: Did you spend time walking to your work station outside gang time? A: Yes.
- Q: Did you use the standard PPE you alleged you used? A: Yes (after all, that is what makes it standard).
- Q: Did you use any additional PPE? A: Yes (just like virtually all other employees at the Storm Lake plant).
- Q: Did you use any of this PPE in a week in which you worked more than 40 hours? A: Yes, because I regularly worked more than 40 hours, and I always used PPE.

- Q: Did Tyson compensate you fully for the donning and doffing of PPE in every week in which you worked more than 40 hours? A: No; Tyson had a uniform policy of not compensating anyone for donning and doffing standard PPE, and I frequently wore additional PPE not covered by K-Code time.
- Q: How much overtime did Tyson fail to pay you as a result of this uniform policy? A: I can't say exactly, because I didn't keep my own records.

Tyson apparently envisions repeated performances of this process, thousands of times, in front of thousands of duly selected juries, over many thousands of days of court time. Such tedious reconstruction and parsing of the minutes each individual employee spent donning and doffing essentially the same gear at the same plant during the same period of time—all to determine the legality *vel non* of an unquestionably common plant-wide pay policy—would hardly befit a system that is supposed "to secure the just, speedy, and inexpensive determination" of anything. Fed. R. Civ. P. 1.

And plaintiffs could introduce representative proof and aggregate statistical evidence in individual trials anyway. Tyson maintains (at 37) that at most it could be required to pay only for the *reasonable* time it takes to don and doff the gear at issue in this case. In determining how long is reasonable, it would surely be relevant how long employees *typically* take to do these activities. The accepted method of answering that question—and the way Tyson calculated its own K-Code time—is via *a time study done by an industrial engineer such as plaintiffs' expert witness Dr. Mericle*. Thus each of

the thousands of individual trials Tyson envisions could easily feature Tyson's own internal "average" time studies or, similarly, the following testimony from an expert such as Dr. Mericle:

- Q: Roughly speaking, how much time does it take employees at the Storm Lake plant to don and doff PPE? A: I did an industry-standard time study and found that the average time spent donning and doffing is 18 minutes for Cut and Trim workers and 21.25 minutes for Kill workers.

To even consider such an alternative is to demonstrate the vital governmental interest in allowing aggregate litigation in this case, and in others like it. Aggregate litigation in this case, whether through the FLSA opt-in class or the Rule 23 Iowa class, is clearly consonant with the Constitution when the scope and character of the claimed constitutional right are taken seriously and considered in context.

D. There Was Sufficient Non-Statistical Evidence To Support the Liability Verdict, Making Statistical Evidence as to Damages Appropriate Under *Mt. Clemens*' "Just and Reasonable Inference" Standard

This Court need not address whether statistical evidence *standing alone* can establish liability consistent with due process, because here this evidence does not stand alone. In its briefing for this Court, Tyson has simply ignored the volumes of stipulations and non-statistical testimony and exhibits that reasonable jurors could have believed support a liability finding. *Accord Mt. Clemens*, 328

U.S. at 687-94; *Garcia*, 770 F.3d at 1307 (describing representative testimony and time-study evidence as competent evidence that can contribute to "finding of class-wide liability").

As to whether plaintiffs worked more than 40 hours, Tyson stipulated before trial that "[h]ourly workers at the Storm Lake plant *tend to work a significant amount of overtime on a weekly basis*." JA122 (emphasis added). Its managers testified to similar effect at trial.[19]

Plaintiffs also presented testimonial evidence of Tyson's class-wide policy of paying zero compensation for donning and doffing standard protective gear worn by all or virtually all class members—including hard hats, work boots, hair nets, frocks, aprons, gloves, ear plugs, and uniforms or outerwear. JA176-78.

And plaintiffs then provided representative testimony from class members concerning the standard and additional PPE they wore, and concerning the typical time spent donning, doffing, and walking. *E.g.*, JA255-65. Tyson's own supervisors testified to similar effect, JA453-55, and the jury had voluminous videotape evidence that allowed jurors to evaluate the relevant donning, doffing, and walking issues for themselves.

A reasonable jury easily could determine that this record established critical issues related to both overtime status and whether donning and doffing the PPE at issue in this case was work and thus should

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[19] *See*, *e.g.*, JA326 (testimony of top plant manager Mrylon Kizer, whose answer confirmed that "more often than not employees work most Saturdays and have a 48-hour week in the production departments").

have been compensated. Accordingly, the post-verdict posture of this case entitles plaintiffs to the inference that the jury *did* find Tyson liable to plaintiffs on the basis of the record as a whole, and this Court should avoid upsetting a jury verdict based on Tyson's challenge to just one piece of the evidence. *See*, *e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000) (post-trial review demands "draw[ing] all reasonable inferences in favor" of the verdict in light of the trial "record as a whole," and court must "disregard all evidence favorable to [Tyson] that the jury [was] not required to believe").

Beyond plaintiffs' liability showing, this Court long ago interpreted the relevant provisions of the FLSA to allow an equitable determination of damages where, as here, the employer failed to keep records required by law. *Mt. Clemens*, 328 U.S. at 687. The *Mt. Clemens* Court's reading of the FLSA, which is due the strong form of *stare decisis* usually accorded to statutory interpretations, spares employees the need to do the impossible and prove exact damages where no records exist. Instead, plaintiffs may prove damages as a matter of "just and reasonable inference" using the best available evidence. *Id.* That is just what plaintiffs did here, combining individualized time-sheet records with an industry-standard time study to estimate the amount of uncompensated time.

Finally, contrary to Tyson's argument, the jury was hardly obligated to award either zero damages or damages exactly equal to what plaintiffs requested. A long line of case law establishes that damages are "a matter so peculiarly within the province of the jury that the Court should not alter

it." *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 409 (2009) (Thomas, J.). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720-22 (1999) (Kennedy, J.) ("the extent of any resulting damages [is a] question[] for the jury"); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 453 (1996) (Scalia, J., dissenting) ("the proper measure of damages involves only a question of fact") (internal quotation marks omitted).

Applying these Seventh Amendment principles, there is nothing remotely unusual or problematic about a jury's rendering a split-the-difference damage award within the range of the evidence presented at trial. *See, e.g.*, *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (Posner, J.).[20]

CONCLUSION

For these reasons, this Court should dismiss the writ as improvidently granted or affirm the judgment below.

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[20] This Court should also disregard Tyson's attempt to impeach the testimony from plaintiffs' statistical expert, Dr. Fox, by characterizing her testimony "that 'if the jury concludes the activities take [a different number of minutes than Mericle calculated], you have no idea what kind of back wage calculations would result' without re-running the program." Pet. Br. 13-14 (citing JA425) (alteration in original). The jury in our system is not tasked with predicting variations in an expert witness's computations. The jury is instead asked to determine, on the basis of admissible evidence, the damages it believes to be appropriate based on the trial record as a whole.

Respectfully submitted,

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September 29, 2015

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