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

PETITION FOR A WRIT OF CERTIORARI

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March 19, 2015

QUESTIONS PRESENTED

I. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

II. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

PARTIES TO THE PROCEEDINGS

The petitioner is Tyson Foods, Inc. ("Tyson"), and respondents are Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, who filed suit on behalf of themselves and other similarly situated individuals at Tyson's pork-processing plant in Storm Lake, Iowa.

RULE 26.9 STATEMENT

Tyson has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Tyson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 765 F.3d 791 and reproduced at Pet. App. 1a–24a. The Eighth Circuit's unpublished order denying rehearing is reproduced at Pet. App. 114a–131a. The district court's unpublished orders denying Tyson's motion to decertify the class and Tyson's post-trial motion are reproduced at Pet. App. 25a–30a and 31a–38a. The district court's opinion granting class certification and conditional certification of a collective action is reported at 564 F. Supp. 2d 870 and is reproduced at Pet. App. 41a–113a.

JURISDICTION

The court of appeals entered judgment on August 25, 2014, Pet. App. 1a, and denied rehearing on November 19, 2014, Pet. App. 114a. On January 29, 2015, Justice Alito extended the time for filing a petition for a writ of certiorari to and including March 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves Federal Rule of Civil Procedure 23(b)(3) and the Fair Labor Standards Act ("FLSA") provisions that authorize a private cause of action for damages for unpaid overtime compensation, 29 U.S.C. §§ 207(a), 216(b), which are reproduced at Pet. App. 132a–136a.

INTRODUCTION

In this case, a deeply divided Eighth Circuit sanctioned the use of seriously flawed procedures that many district courts have used to permit certification and adjudication of class actions under Rule 23(b)(3) and collective actions under the FLSA. Plaintiffs are hourly workers at a pork-processing facility who alleged that they are entitled to overtime compensation and liquidated damages because Tyson failed to compensate them fully for time spent "donning" and "doffing" personal protective equipment and walking to and from their work stations. The district court certified the class based on the existence of common questions about whether these activities were compensable "work," even though there were differences in the amount of time individual employees actually spent on these activities and hundreds of employees worked no overtime at all. The court then allowed plaintiffs to ignore these individual differences and "prove" liability and damages to the class with "common" statistical evidence that erroneously presumed that *all* class members are identical to a fictional "average" employee. The end result of this "undifferentiated presentation[] of evidence" was a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." Pet. App. 24a (Beam, J. dissenting).

The Eighth Circuit's affirmance of that unjust result warrants review because it exacerbates two circuit splits and conflicts with this Court's decisions in *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2561 (2011), and *Comcast* v. *Behrend*, 133 S. Ct. 1426 (2013). *Wal-Mart* and *Comcast* should have put a stop to class certification premised on the notion that

classwide liability and damages can be established through a "Trial by Formula," *Wal-Mart*, 131 S. Ct. at 2561, and damages models that ignore the basis of the defendant's putative liability to each class member, *Comcast*, 133 S. Ct. at 1433. That lax approach to class certification effectively evades Rule 23's predominance requirement and alters substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2702.

The Second, Fourth, Fifth, Seventh, and Ninth Circuits have properly held that no class may be certified where plaintiffs seek to obtain an aggregate damages award for the class by extrapolating from a fictional "average" class member. Nevertheless, plaintiffs in other circuits continue to obtain class certification on the premise that they can "prove" the defendant's liability and damages for the class by extrapolating from an unrepresentative sample. In addition to the Eighth Circuit decision below, the Tenth Circuit recently affirmed class certification where plaintiffs obtained an aggregate damages award by extrapolating from a sample of class members who had varying degrees of injuries (and in many cases no injuries at all). This Court's review is thus warranted to clear up the confusion and put an end to this violation of the Rules Enabling Act and the Due Process Clause.

This Court's review is also needed to resolve the confusion among the lower courts on the question whether a class may be certified when it includes uninjured class members. The Second and Ninth Circuits have held that all class members must have standing to sue, and the D.C. Circuit recently held that to obtain class certification, plaintiffs must be able to show injury to all class members. The Third, Seventh, and Tenth Circuits, in contrast, have held

that the requirements of Article III are satisfied as long as a single class member was injured and has standing to sue. Like the Eighth Circuit here, those courts allow plaintiffs to use Rule 23(b)(3) to bring damages claims on behalf of individuals who were not injured and thus would have no viable individual claim for damages.

Rule 23(b)(3) does not expand the jurisdiction of federal courts or authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were harmed. This Court should grant review to resolve the confusion and put an end to this unlawful practice.

STATEMENT OF THE CASE

1. Plaintiffs are current and former hourly employees at Tyson's Storm Lake, Iowa, pork-processing plant. Apdx.00684. These line employees worked in two areas: on the Slaughter (or "Kill") floor and on the Processing (or "Fabrication") floor. *Id.*

The Storm Lake facility employs approximately 1,300 employees, doing over 420 distinct jobs over two shifts. Apdx.00684; Appellees' Apdx.00149–172. Each position requires the job-holder to perform certain duties and to wear different sanitary items and personal protective equipment ("PPE"). Apdx.00684–85; Apdx.00827–00851.

All employees wear a hard hat, hairnet, and ear protection while on the production floor, Apdx.00685, but the similarities end there. Processing employees wear a frock, like a butcher's smock, while Slaughter employees wear a company-issued white shirt-and-pants uniform, *id.*, or their own comparable clothing, Tr. 263–64.

Additional items worn by employees depend on the employee's job, Apdx.00685, and personal preference, Tr. 156–57, 329, 498, 504, 511. Knife-wielding employees in both areas don and doff, in varying combination, plastic belly guards, mesh sleeves, plexiglass arm guards, Polar gloves, Polar sleeves, scabbards (or sheaths) for their knives, and steels with which to maintain them. Apdx.00684.[1] Some non-knife users, in contrast, choose to wear rubber gloves, cotton gloves, or plastic aprons. Apdx.00685, Tr. 156–57, 266–69, 444, 607, 651, 654. Further, employees in both departments regularly elect to wear other Tyson-provided items as a matter of personal preference. See Tr. 157, 244, 260, 607, 651, 654. Thus, even employees working the same job may be attired quite differently. Tr. 259–60, 266–68, 271, 747–48.

2. This case is brought by employees paid on Tyson's "gang-time" system, which compensates them from the time the first piece of product passes their work stations until the last piece of product does so. Tr. 178. Tyson also pays a fixed amount of extra time each day called "K-Code time" (because it is given to employees in departments using knives), Pet. App. 2a, that compensates employees for donning/doffing-related activities.

From the beginning of the limitations periods until February 2007, Tyson paid four minutes of K-Code time per day to each employee who worked in a department in which a knife was used.[2] Apdx.00686;

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[1] Approximately 70 percent of the class were knife-wielding employees. Tr. 325.

[2] The Slaughter and Processing floors were mainly comprised of such departments; thus, most class members who worked during this time period would have received four minutes per

Tr. 1358. From February 2007 to June 28, 2010, Tyson paid only knife-wielding employees K-Code time of four to eight minutes (depending on their specific job for the shift). Apdx.00686.

In addition, some class members were compensated for these donning/doffing and walking activities even apart from any K-Code payments they received. Specifically, employees who were assigned to come in early to setup or stay late to teardown after gang time were paid for the additional time, Tr. 547, and were able to don/doff and clean their gear and walk to/from the work station during that period of time, Tr. 1457; Apdx.00108; Apdx.00136; Apdx.00139; Apdx.00236.

3. Plaintiffs filed this action in 2007 for themselves and other "similarly situated individuals," alleging that Tyson failed to compensate its employees for overtime work, in violation of the FLSA, 29 U.S.C. § 207, and the Iowa Wage Payment Collection Law, Iowa Code § 91A.1, *et seq.*, which provides a state-law basis to recover for FLSA claims. Apdx.00001–00002; Apdx.00013–00014. Plaintiffs did not challenge the gang-time system. They claimed, however, that the K-Code times were too low, and they were entitled to overtime compensation for unpaid time spent on donning/doffing, washing, and walking when those activities were undertaken by an employee who worked more than 40 hours in a workweek. Apdx.00009–00012.

Plaintiffs moved for the certification of a Rule 23(b)(3) class and an FLSA collective action. Apdx.00017; Apdx.00040. Tyson objected, arguing that liability and damages could be determined only

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day they were on the job, regardless of whether they actually worked a knife job. Apdx.00686; Tr. 390.

on an individual basis, Apdx.00065; Apdx.00461. The district court agreed that "there [we]re some very big factual differences among hourly employees at Tyson" given that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet. App. 87a. Nevertheless, because the court viewed "the gang time compensation system" as a "'tie that binds'" the class together under a single, common question of law, it certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members who are also members of the Rule 23 class. Pet. App 87a, 110–11a; Apdx.00684.

4. After this Court decided *Wal-Mart Stores, Inc.* v. *Dukes*, Tyson filed a motion to decertify the Rule 23 class. Dkt. 212. Tyson asserted that decertification was necessary because plaintiffs had failed to show that questions of liability or damages were "capable of classwide resolution ... in one stroke." Dkt. 212-1, at 5 (quoting *Wal-Mart*, 131 S. Ct at 2551).

Plaintiffs opposed decertification, asserting, first, that they could prove Tyson undercompensated the class members with a time study by Dr. Kenneth Mericle that purported to show the average amount of time Tyson employees spent on donning/doffing-related activities. Dkt. 223-1, at 22. Specifically, Mericle identified eight donning/doffing-related "activities" on the Processing side and six on the Slaughter side. Apdx.00802–00803; Apdx.1084–85. He then measured how much time a small sample of employees took for each of these activities in both areas. Tr. 1350. Finally, he computed the average time for the donning/doffing-related activities he identified, added an estimated walking time, and calculated an "all-in" average of 18 minutes on the

Processing floor and 21.25 minutes on the Slaughter floor. Apdx.0082–0083.

Second, plaintiffs said they would calculate entitlement to overtime compensation and damages with a report by Dr. Liesl Fox. Fox assumed that *all* class members spent Mericle's averaged amount of time donning/doffing their equipment—*i.e.*, that everyone on the Processing floor spent 18 minutes and everyone on the Slaughter floor spent 21.25 minutes on donning/doffing-related activities. Then, using a computer program and Tyson's pay records, she determined how much overtime compensation an employee would be due, if any, if he or she were credited for Mericle's averaged donning/doffing time each workday during the class period. Dkt. 226, Ex. 3, at 2. Finally, Fox totaled those numbers to arrive at an aggregate damages award for each class.

Tyson objected that this purported proof would result in a "trial by formula" expressly prohibited by a unanimous Court in *Wal-Mart*. Dkt. 212-1, at 10–12. Whether an employee was entitled to overtime pay, Tyson argued, could be determined only on an individualized basis because the employees donned/doffed different equipment in a different order over different amounts of time while working different jobs. Dkt. 237, at 11. To determine Tyson's liability and damages based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated the company's right to demonstrate that *individual* class members were not entitled to overtime. *Id.* at 5.

The district court denied Tyson's motion, finding that whether "donning and doffing and/or sanitizing of the PPE ... constitutes 'work'" was a common question susceptible to common proof. Pet. App. 37a. The court observed, without elaboration, that there

were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id.*

5. At trial, however, the few class members who testified admitted that Tyson required employees to wear different PPE, depending on their job, and that employees chose to wear different items, depending on their personal preferences. Tr. 611 (Lovan); Tr. 634 (Balderas); Tr. 705–06 (Brown). Additionally, these employees testified that they don and doff these pieces of equipment in a different order, in different places, and that each piece requires a distinct amount of time. Tr. 604, 628.

Nevertheless, plaintiffs purported to prove class members' entitlement to overtime compensation with Dr. Mericle's testimony regarding his averaged time study. Mericle conceded that his time measurements necessarily included employees who performed different jobs and donned and doffed different equipment. Tr. 897, 899, 1049, 1141. This resulted in "a lot of variation." Tr. 1158. For instance, when Mericle measured the pre-shift donning of equipment by Processing floor employees in the locker room, his observed times ranged from approximately half a minute to ten minutes. Pet. App. 137a. On the Slaughter side, he similarly observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift. *Id.* at 138a.

Mericle also conceded that this wide disparity—which repeated itself with each "activity" measured—was because "some of [the workers] put on more equipment than others." Tr. 1144. On the Processing floor, for example, Tyson required the employee in one position to wear one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one Plexiglass arm guard. Tr. 504–05. In contrast, the employee in another position (also on the same

Processing floor) had to wear only one mesh apron, one scabbard, one steel sharpener, one mesh glove, one Polar sleeve, and one mesh sleeve, Tr. 507, while a third employee in a different position on that floor needed to don none of these pieces, *id.*

Mericle's recorded measurements also showed that Tyson's employees did not don their equipment in the same place or in the same order. Tr. 897, 907. In fact, Mericle measured employees continuing to don equipment once they were on the disassembly line (and, thus, already on paid gang-time), yet he included them in his computations. Tr. 1003. Nor did Mericle account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or teardown responsibilities. Tr. 1457.

By his own admission, Mericle did not pre-select workers from a variety of jobs, Tr. 1105–08, or ensure that his sample had the same proportion of knife and non-knife wielding employees as Tyson's workforce, Tr. 1050. Instead, he and his team observed whichever employees were performing a certain activity at a given time, allowing the employees to self-select into his study. Tr. 912. As a result, he agreed that he did not study a "random sample." Tr. 913.

Dr. Fox testified that classwide damages were $6,686,082.36 for the Rule 23 class and $1,611,702.44 for the FLSA collective if one assumed that every class member worked Mericle's "average" times. Tr. 1277–78; Apdx.00869. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, sanitizing, and walking. Tr. 1307.

Fox also acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included over 212 members who suffered no injury at all; even adding the estimated time did not result in those employees working over 40 hours in a single week. She further explained that, as Mericle's average donning/doffing times are reduced, the number of uninjured workers would increase as more employees' work hours fell below 40 for a given week. Tr. 1351. This drop-off happens in a non-linear fashion, *id.*, so her calculations were "all or nothing," meaning 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, Tr. 1352.

At the close of plaintiffs' case, Tyson asked the court to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. Tr. 1398–1401; Dkt. 270. The district court denied the motion, trial continued, and the case was submitted to the jury.

6. The jury found that the class members were "entitled to additional compensation for ... the donning and doffing activities at issue in this case," and awarded damages in the amount of $2,892,378.70, substantially less than Fox had calculated for the Rule 23 class. Tr. 1819.

After the verdict, Tyson requested judgment as a matter of law and renewed its motion for decertification of the class. The undisputed trial testimony showed that the class contained employees from numerous departments, "all of which were comprised of many different positions, all requiring different combinations of required and optional safety

or sanitary items." Dkt. 304-1, at 9. These individual differences and Mericle's failure to account for them in his study, Tyson contended, meant that Mericle's averaged times did not establish whether any given employee was actually undercompensated. *Id.* at 10. Moreover, Fox's testimony established that there are at least 212 class members who had zero uncompensated overtime, and the actual number of uninjured employees was much higher. Because the jury awarded a damages figure less than Fox calculated, it necessarily found that Mericle's average times were overstated and, as Fox conceded at trial, the number of uninjured class members rises if one assumes that the amount of time spent on donning/doffing, cleaning, and walking activities is less than Mericle calculated. *Id.* at 13 (citing Tr. 1302). Nonetheless, these uninjured plaintiffs were included in the aggregate damages award, now making it impossible to award damages accurately after the jury rejected Fox's "all or nothing" damages total. *Id.* at 13–14.

The district court denied Tyson's motion, saying that "there [was] not a complete absence of probative facts to support the [jury's] conclusion, nor did a miscarriage of justice occur." Pet. App. at 30a.

7. On appeal, a divided panel of the Eighth Circuit affirmed. The majority recognized that "individual plaintiffs varied in their donning and doffing routines," Pet. App. 8a, and that plaintiffs "rel[ied] on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated "work" time, *id.* at 11a. The majority reasoned, however, that because "Tyson had a specific company policy" and the "class members worked at the same plant and used similar equipment," "this inference [was] allowable under *Anderson v. Mt. Clemens*

Pottery Co., 328 U.S. 680, 687 ... (1946)." *Id.* at 8a. In the majority's view, plaintiffs' application of Mericle's averaged donning/doffing times to individual "employee time records to establish individual damages" meant that "[t]hey [had] prove[d] liability for the class as a whole." *Id.* at 10a.

The majority also rejected Tyson's argument that decertification was necessary "because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." Pet. App. 8a. The majority said "Tyson exaggerate[d] the [legal] authority for its contention," but provided no further analysis or explanation. *Id.* at 9a.

Judge Beam dissented. He emphasized the myriad differences between the class members, "differences in [their] donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation [and] other relevant factors." *Id.* at 23a (Beam, J., dissenting). "While ... all class members were subject to a common policy—gang-time payment," there could be "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because Tyson, by issuing K-Code time, had already paid for donning/doffing in many instances and because the amount of time individual employees spent donning and doffing varied. *Id.* Thus, the common evidence could not "resolve[] [the case] in 'one stroke,'" *id.* (quoting *Wal-Mart*, 131 S. Ct. at 2551), and the class "should have been decertified," *id.*

In addition, Judge Beam found that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees. Pet. App. 22a. As he noted, "the

jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* Consequently, by certifying a class with hundreds of uninjured employees the district court would force Tyson to pay employees whom it had fully compensated, a result that would be unfair to Tyson and any class members who actually were injured. *Id.*

8. Tyson's petition for rehearing or rehearing *en banc* was denied by a vote of 6 to 5. In an opinion respecting the denial of rehearing, Judge Benton stated his view that "*Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context" and that the plaintiffs implicitly satisfied this standard by proffering expert testimony of classwide average donning/doffing times. Pet. App. 127a–128a & n.5 (Benton, J., respecting the denial of rehr'g en banc). He also concluded that "Tyson has no interest in how the fund is allocated among class members," so it is not relevant to the appeal that hundreds of uninjured employees were included in the class. *Id.* at 131a.

Again, Judge Beam dissented, decrying the court's affirmance of "a professionally assembled class action lurching out of control." *Id.* at 115a (Beam, J., dissenting from rehr'g denial). First, Judge Beam faulted the majority for misreading *Mt. Clemens*, which allows the use of a "just and reasonable inference" in determining damages, but *only after* plaintiffs carry the "individual burden of [proving] by a preponderance of the evidence" that "each putative class member" "performed work for which he was not properly compensated." *Id.* at 120a (internal quotation marks omitted). Applying that inference at

the liability stage by using an average donning/doffing time, Judge Beam argued, relieved plaintiffs of their burden and resulted in awarding damages to hundreds of uninjured plaintiffs. *Id.* at 120a–121a.

Second, Judge Beam emphasized that the inclusion of these uninjured employees in the class—when paired with the jury's reduced aggregate damages award—underscored the inappropriateness of certifying the class in the first instance. By awarding a reduced damages award, the jury necessarily found Mericle's time estimations inflated. As a result, "well more than one-half the certified class of 3,344 persons have no damages whatsoever and the balance have markedly lower damages that are now virtually impossible to calculate." Pet. App. 125a. By upholding the district court's class certification, the entire class—including the hundreds of members with "no provable damages"—were made "joint beneficiaries" of the "lump sum district court judgment" but without a means to limit distributions for only proven damages. *Id.*

REASONS FOR GRANTING THE PETITION

I. WHETHER CLASS OR COLLECTIVE ACTIONS MAY BE CERTIFIED BASED ON STATISTICS THAT ERRONEOUSLY PRESUME ALL CLASS MEMBERS ARE IDENTICAL TO AN AVERAGE OBSERVED IN A SAMPLE IS AN IMPORTANT AND RECURRING QUESTION THAT HAS DIVIDED THE CIRCUIT COURTS.

This case presents this Court with the opportunity to address the propriety of certifying a class under Rule 23(b)(3), or an FLSA collective action, where plaintiffs' common "proof" of liability and damages is

statistical evidence that erroneously presumes that all class members are identical to the average observed in a sample. Notwithstanding this Court's guidance in *Wal-Mart* and *Comcast*, this recurring issue has sharply divided the lower courts.

The undisputed evidence in this case showed that there was substantial variance in the amount of time individual employees spent in donning/doffing-related activities each day. The three production workers who testified at trial and gave time estimates, explained that each wore different items and spent different amounts of time on donning/doffing-related activities. See Tr. 708–09 (more than 2 minutes for Brown to don gear pre-shift); Tr. 598 (6–7 minutes for Lovan); Tr. 641 (10–12 minutes for Balderas); see also Tr. 1157 (Mericle conceding that in his time study, there were "different [times] for every single person [his] team measured").

Calling each of the remaining 3,341 members of the class to testify would have been impracticable. It also would have demonstrated that the district court was clearly wrong in thinking Tyson's liability for damages was "capable of classwide resolution" and could be resolved "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. So plaintiffs presented evidence that purportedly would permit the jury to determine liability and damages for all class members: Mericle's time study. In upholding class certification, the Eighth Circuit panel majority allowed plaintiffs to "prove" liability and damages based on Mericle's averaged times, and held that the variations among individual plaintiffs did not "prevent [a] 'one stroke' determination" of liability and damages. Pet. App. 8a.

That erroneous decision is in direct conflict with the Seventh Circuit's decision in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). Plaintiffs in

Espenscheid were satellite dish technicians who claimed that they were required "to do work for which they were not compensated at all, and also to work more than 40 hours a week without being paid overtime for the additional hours" in violation of the FLSA and parallel provisions of state law. *Id.* at 773. The Seventh Circuit assumed, for purposes of appeal, that "plaintiffs could prove that [the employer's] policies violated the [law] in these ways." *Id.* But even so, the court held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776.

In so holding, the Seventh Circuit expressly rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class." *Id.* at 774. In that case (as here, see *supra* p. 10), there was "no suggestion that sampling methods used in statistical analysis were employed to create a random sample of class members." 705 F.3d at 774. But even if by "pure happenstance" the number of unpaid hours worked each week by the employees in the sample "was equal to the average number of hours of the entire class," the sampling "would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* "To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held,

> would require that all have done roughly the same amount of work.... No one thinks there was such uniformity. And if for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of

> overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) under-compensate him by half.

Id.

That reasoning is equally applicable here. Plaintiffs' time study confirmed that there was wide variation in the amount of time employees spent donning and doffing different combinations of PPE. For example, employees spent between 0.583 minutes and 13.283 minutes donning equipment in the locker room pre-shift, and between 1.783 minutes and 9.267 minutes doffing and storing equipment post-shift. See Pet. App. 137a–138a. But even this understates the individual variation among class members. The undisputed record evidence shows that some employees had time to don protective gear at their station after the production line had commenced operation—and thus were paid for that activity under Tyson's gang-time system. See *supra* p. 16. Some employees were paid to come in before or after gang time to set up or clean up the production line, and when they did so, they donned and doffed their PPE during the set up or clean up time for which they were paid. See *supra* pp. 6, 10. Thus, had this case been brought in the Seventh Circuit, class certification would have been denied because plaintiffs could prove entitlement to overtime and damages only by using a time study based on impermissible averaging.

The Eighth Circuit did not explain how its decision was consistent with *Espenscheid*. Although it acknowledged that the Seventh Circuit held that class certification was "improper" when there were variations in the class and "use of an average

conferred a 'windfall' on some class members," the panel majority dismissed the decision with a simple "cf." citation with no explanation. Pet. App. 9a. Instead, it said that to apply the time study to "individual overtime claims did require inference, but this inference is allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 ... (1946)." Pet. App. 8a. That is simply incorrect.

Mt. Clemens requires a plaintiff seeking unpaid overtime under the FLSA to prove "that *he* performed work for which *he* was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687 (emphasis added). As the Seventh Circuit recognized, nothing in that decision allows an employee who was fully compensated by the K-Code time he received to recover damages by showing that K-Code time was not sufficient to compensate another employee, much less a fictional composite employee. See *Espenscheid*, 705 F.3d at 775 ("what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them").

Class certification also would have been denied had this case been brought in the Fourth Circuit, which, like the Seventh Circuit, does not permit class certification where aggregate damages will be based "on abstract analysis of 'averages.'" *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). *Broussard* was brought by franchisees who sought lost profits allegedly caused by the franchisor's misuse of advertising funds. To prove damages, plaintiffs called an expert who computed "an average profit margin based on a sample of franchisees' financial data" and "an

estimate of 'on average how many additional cars would have come in per week in the typical Meineke dealer's shop had the additional advertising dollars been spent.'" *Id.* This focus on a "fictional" "'typical franchisee operation,'" the court held, was improper where the actual "profits lost by franchisees" differed "according to their individual business circumstances." *Id.* That this invalid "shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible." *Id.*

The Second Circuit in *McLaughlin* v. *American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), similarly held that a class cannot be certified based "on an estimate of the average loss for each plaintiff." *Id.* at 231. "[S]uch an aggregate determination," the Second Circuit explained, would likely result in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *Id.* It also poses the "danger of overcompensation" in that some members of the class may benefit from the recovery even though they were not injured. *Id.* at 232. "This kind of disconnect offends the Rules Enabling Act, which provides that the federal rules of procedure, such as Rule 23, cannot be used to 'abridge, enlarge, or modify any substantive right.'" *Id.* at 231 (quoting 28 U.S.C. § 2072(b)).

The Fifth Circuit, too, has recognized that class certification based on such procedures results in an impermissible "alteration of substantive" rights. See *In re Fibreboard*, 893 F.2d 706, 712 (5th Cir. 1990). Plaintiffs in *Fibreboard* were individuals suffering diseases allegedly caused by exposure to asbestos. The district court certified a class based on a trial

plan under which liability and damages would be determined for approximately 3,000 class members by "index[ing]" them to 41 test cases. *Id.* at 711. The Fifth Circuit reversed, holding the class "cannot be certified" on this basis because it "create[d] the requisite commonality for trial" by "submerge[ing]" the "discrete components of the class members' claims and the asbestos manufacturers' defenses." *Id.* at 712; see also *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 311–29 (5th Cir. 1998) (finding plan to establish classwide liability on damages based on extrapolation violates defendants' Seventh Amendment right to a jury trial).

The Ninth Circuit in *Jimenez* v. *Allstate Insurance Co.*, 765 F.3d 1161 (9th Cir. 2014), likewise realized that it would alter rights and violate due process to allow classwide damages to be determined through "sampling" when there is substantial variance among individual class members. *Id.* at 1168. *Jimenez* was a wage-and-hour class action brought by claims adjusters who alleged that Allstate had an unofficial policy requiring them to work unpaid off-the-clock overtime. The district court certified a class to decide whether such a policy existed, but bifurcated the proceedings and "rejected the plaintiffs' motion to use representative testimony and sampling at the damages phase." *Id.* "This split," the Ninth Circuit held, preserved "Allstate's due process right to present individualized defenses to damages claims." *Id.*[3]

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[3] Allstate has filed a petition for writ of certiorari seeking review of this decision on the grounds that Rule 23 and the Due Process Clause do not allow plaintiffs to establish classwide *liability* through statistical "sampling" just as they do not allow plaintiffs to use sampling to prove classwide *damages*. *See Allstate Ins. Co.* v. *Jimenez*, 83 U.S.L.W. 3638 (Jan. 27, 2015)

In contrast, neither the district court nor the Eighth Circuit took any steps to preserve Tyson's right to present defenses to individual claims. They refused to decertify the class notwithstanding the existence of undisputed differences in donning and doffing times. And they allowed plaintiffs to "prove" damages with a formula that applied average donning/doffing times to all class members.

That the Eighth Circuit would allow such a procedure is particularly surprising because it is so at odds with this Court's recent decisions in *Wal-Mart* and *Comcast*. *Comcast* made clear that "courts must conduct a rigorous analysis" of expert models "purporting to serve as evidence of damages in [a] class action," and they must deny class certification where the models employ flawed methodologies or produce "arbitrary measurements." 133 S. Ct. at 1433 (quotations omitted). To ignore defects in the model and allow class certification as long as there is "*any*" damages model, "no matter how arbitrary," would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* (emphasis in original).

And *Wal-Mart* makes clear that a damages model based on averaging is a flawed approach that cannot be used to avoid individualized inquiries and permit liability and damages to be determined on a classwide basis. In *Wal-Mart*, this Court unanimously reversed class certification where liability and damages would be determined for a sample, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class,

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(No. 14-910). Here, the Eighth Circuit upheld the district court's class certification with regard to both liability *and* damages. Thus, if this Court were to grant certiorari and reverse in *Jimenez*, that would *a fortiori* require vacatur of the Eighth Circuit's decision here.

and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the same set to arrive at the entire class recovery—without further individualized proceedings." 131 S. Ct. at 2561. Such a "Trial by Formula," this Court held, would impermissibly abridge the defendant's rights under the Due Process Clause and the Rules Enabling Act. *Id.*

Here, as in *Wal-Mart*, allowing classwide liability and damages to be established on the basis of statistical sampling precluded Tyson from raising its "defenses to individual claims." *Id.*; see also *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Carrera* v. *Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("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."). In this class trial, Tyson lost the right to show the jury that individual class members had no unpaid overtime. In an individual trial, Tyson could have cross-examined the employee and sought to prove that the employee spent (or reasonably could have spent) less time engaged in donning/doffing-related activities than was claimed. Or Tyson could have shown that the employee was compensated for such activities by the K-Code payments or because he performed them at times in which he was compensated (*i.e.*, when that employee's "gang time" had started or when Tyson paid the employee to setup or clean up the production area). In a class trial, however, Tyson was reduced to attacking the methodology used by plaintiffs' experts to determine the "average" donning/doffing time.

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a; see also *id.* at 13a. That plaintiffs' expert added the average donning/doffing times to the class members' actual time records does not change the fact that classwide liability was based purely on extrapolation and an assumption—*i.e.*, that each class member spent the same "average" amount of time donning, doffing and walking—rather than individualized proof as to how, if at all, each was injured.

Unfortunately, the Eighth Circuit is not alone in its refusal to follow *Wal-Mart*. The Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014), affirmed class certification in an antitrust case where plaintiffs "proved" damages with an expert who applied average overcharges to disparate transactions, including transactions for which there were no overcharges. *Id.* at 1257. The Tenth Circuit thought that was an appropriate way to "approximate" damages in a large class action, saying "*Wal-Mart* does not prohibit certification based on the use of extrapolation to calculate damages."[4] *Id.*

This Court should grant review to resolve the conflicts among the courts of appeals and put an end to the practice of using averaging and extrapolation from a sample to mask individual differences so that

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[4] The Dow Chemical Company filed a petition for writ of certiorari on March 9, 2014, seeking review of this issue. *Dow Chemical Co.* v. *Seegott Holdings, Inc.*, No. 14-1091. Thus, if this Court were to grant certiorari and reverse in *Dow*, that would require vacatur of the Eighth Circuit's decision here.

vast numbers of disparate individual liability and damages claims can be aggregated together in a large class action. Rule 23 is not a license for plaintiffs' counsel to engage in this type of "'claim fusion'" in "which claims in the aggregate merge to assume characteristics that no individual claim possesses." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1003 (2005). Nor does it permit district courts to engage in "'ad hoc lawmaking'" or "the manipulation of substantive rules to assist in resolving or preventing practical difficulties that arise in the course of adjudicating dissimilar questions of fact and law." *Id.* This Court's review is therefore needed to ensure that Rule 23 is "interpreted in keeping with" the Due Process Clause and the Rules Enabling Act, "which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613 (1997).

II. THE CIRCUIT COURTS ARE DIVIDED ON WHETHER A CLASS MAY BE CERTIFIED WHERE THE CLASS INCLUDES MEMBERS WHO WERE NOT INJURED.

Plaintiffs who seek to invoke the jurisdiction of the federal courts have the burden of establishing that they have standing to sue. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To meet that burden, plaintiffs must show, among other things, that they suffered an "'injury in fact'—an invasion of a legally protected interest" that is "concrete and particularized" and "'actual or imminent.'" *Id.* at 560. "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the

resolutions of which have direct consequences on the parties involved." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1528 (2013).

Although this Court has held that Rule 23 "'must be interpreted in keeping with Article III constraints'" on standing, *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem*, 521 U.S. at 613), the lower courts are divided about what that entails. Specifically, the circuit courts disagree about whether plaintiffs must show that all class members were injured by the defendants' allegedly unlawful actions, or whether a class may be certified even though it includes members who were not injured and thus have no claim for damages.

The lead decision allowing certification of classes that include members with no plausible claim to damages is *Kohen* v. *Pacific Investment Management Co.*, 571 F.3d 672 (7th Cir. 2009). Although the Seventh Circuit recognized that "injury is a prerequisite to standing," it held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Id.* at 676.

A divided panel of the First Circuit recently agreed that the "'possibility or indeed inevitability'" that some class members were not injured "'does not preclude class certification.'" *In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (quoting *Kohen*, 571 F.3d at 677). The court thus affirmed class certification in an antitrust case in which 2.4% of the class likely had no injury, *id.* at 32, which, as the dissent noted, would be "at least 24,000 people," and

"nobody knows who the 24,000 are," *id.* at 32, n.29, 25 (Kayatta, J., dissenting).[5]

The Tenth Circuit also has cited *Kohen* in holding that "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." *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010). And the Tenth Circuit recently affirmed class certification in an antitrust case in which it expressly acknowledged that some class members "avoid[ed] injury altogether." *In re Urethane*, 768 F.3d at 1254.

The Third Circuit reached a similar result in *Krell* v. *Prudential Insurance Company of America*, 148 F.3d 283 (3d Cir. 1998), a case involving allegedly fraudulent sales practices by an insurance company. The district court certified the class despite defendants' objections that it included "both injured and uninjured policyholders." *Id.* at 306. The Third Circuit affirmed, holding that if "the named plaintiffs satisfy Article III," the "absentee class members are not required to make a similar showing." *Id.* at 307.

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[5] To be sure, *Kohen* and its progeny have stated that a district court may decline to certify a class that "contains a great many persons who have suffered no injury at the hands of the defendant." 571 F.3d at 677. But it reached that conclusion not because of the limitations imposed by Article III (or due process or any substantive law), or because the presence of uninjured class members is a warning sign that individualized inquiry is required, but "because of the *in terrorem* character of a class action," which, "by aggregating a large number of claims," can "impose a huge contingent liability upon a defendant." *Id.* at 678. *Nexium* demonstrates this *ad hoc* and standardless test imposes no meaningful constraint on class certification of classes with thousands of uninjured members, even when the district court has no plan for ensuring that they do not contribute to the defendant's liability or share in the judgment.

In contrast, the Second Circuit held in *Denney* v. *Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006), that "no class may be certified that contains members lacking Article III standing." Rather, the class must "be defined in such a way that anyone within it would have standing." *Id.* at 264. The Ninth Circuit has agreed with this test. See *Mazza* v. *Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing *Denney*, 443 F.3d at 264).[6]

More recently, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244 (D.C. Cir. 2013), the D.C. Circuit vacated the district court's certification of a class where plaintiffs could not "prove, through common evidence, that all class members were in fact injured." *Id.* at 252. The district court in *Rail Freight* had not been troubled by the presence of uninjured class members, because it looked to cases like *Kohen* and held that "[c]lass certification is not precluded simply because a class may include persons who have not been injured by the defendant's conduct." *Id.* at 255 (alterations in original) (quotations omitted). The D.C. Circuit expressly disapproved of that approach, noting that *Kohen* was decided before this Court's decision in *Comcast* when "the case law was far more accommodating to class certification under Rule 23(b)(3)." *Id.* Instead, the court held that if plaintiffs cannot show with "common evidence" that "all class members suffered *some* injury," then class

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[6] As the Fifth Circuit noted in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir.), *cert. denied sub nom.* 135 S. Ct. 754 (2014), the Seventh, Eighth, and Ninth Circuits have not been entirely consistent on the question, with some decisions adopting the *Kohen* test and others citing *Denney*. *Id.* at 800–01 & nn.27–30. Considering all the decisions, there is a "roughly even split of circuit authority." *Id.* at 801.

certification must be denied because "individual trials" would be necessary "to establish whether a particular [class member] suffered harm." *Id.* at 252.

Thus, if Tyson's plant were located in the Second or D.C. Circuits, the district court could not have certified the class because plaintiffs could not prove, with common evidence, that all class members were injured. Quite the contrary, plaintiffs' damages expert admitted that the class contained at least 212 employees who were not injured because they did not work *any* unpaid overtime even under Mericle's assumed averages. See *supra* p. 11. The actual number of uninjured class members is even larger. As Judge Beam explained in dissent, the fact that the jury awarded plaintiffs less than half the damages they requested indicates that the jury disagreed with plaintiffs' "over-generous time study conclusions." Pet. App. 125a. And plaintiffs' expert admitted that if "'employee[s] worked less than [the time study] numbers ... it is possible that Tyson's K-code payments already have fully paid them for that time.'" *Id.* at 123a (omission in original). Accordingly, "under the evidence [plaintiffs] themselves adduced, well more than one-half of the certified class of 3,344 persons have no damages." *Id.* at 125a. Yet *all* class members are "included as beneficiaries of the single damages verdict" and, "damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 22a–24a.

To affirm that result, as the Eighth Circuit did, is to allow plaintiffs to use the procedural device of Rule 23(b)(3) to alter substantive law in violation of the Rules Enabling Act. The panel majority had no persuasive argument to the contrary. Its only justification for the inclusion of uninjured class members was to say that *Tyson* "invited" the error by

requesting that the jury be instructed that it could not award damages for "[a]ny employee who has already received full compensation for all activities you find to be compensable." Pet. App. 10a (quotations omitted). That reasoning is flawed and cannot insulate the district court's error from appellate review. As Judge Beam explained, Tyson did not invite the erroneous inclusion of uninjured class members; it "vigorously" opposed class certification "at every turn in this litigation." *Id.* at 20a. But when its objections to class certification were rejected by the district court, Tyson reasonably and properly requested "that the plaintiffs be held to their evidentiary burdens of proof." *Id.*

This Court should therefore grant review to resolve the circuit split and ensure that Rule 23(b)(3), which is a limited procedural device for aggregating liability and damages claims, is not used improperly to expand federal court jurisdiction and compensate individuals who suffered no injury, lack Article III standing, and are entitled to zero damages.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECUR IN BOTH CLASS ACTIONS UNDER RULE 23(B)(3) AND COLLECTIVE ACTIONS UNDER THE FLSA.

As is evident from the circuit court cases discussed above, the question whether a class can be certified where liability and damages will be determined with statistical sampling that erroneously presumes that all class members are identical to the average of a sample, and the question whether a class can be certified that includes members with no injury, are questions that arise in a variety of class actions. Indeed, this Court's own docket confirms that these questions commonly arise in wage-and-hour collective

actions under the FLSA and in Rule 23(b)(3) class actions brought under parallel provisions of state law like the Iowa Wage Payment Collection Law at issue here. See *supra* note 3 (discussing petition for writ of certiorari in *Allstate Ins. Co.* v. *Jimenez*, No. 14-910). They also arise in consumer fraud cases and antitrust actions and a variety of other actions for damages in federal courts. See *supra* note 4 (discussing petition for writ of certiorari in *Dow Chemical Company* v. *Seegott Holdings, Inc.*, No. 14-1091).

The division among the lower courts on these questions warrants this Court's review. Although the questions frequently arise when plaintiffs seek class certification in the district court, they typically escape appellate review. Interlocutory review of a certification decision is rare. See 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 7.2 (10th ed. 2013). And "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

In addition, "professionally assembled class action[s]," Pet. App. 115a (Beam, J., dissenting), are now a fact of life that impose significant costs on companies doing business in the United States. While Rule 23 was intended to "impose[] stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Color Rest.*, 133 S. Ct. 2304, 2310 (2013), certification continues to be the norm. A recent study of major companies found that 54% of them "are currently engaged in class action litigation." *The 2015 Carlton Fields Jorden Burt Class Action Survey* 6 (2015), *available at* http://classactionsurvey.com/pdf/2015-class-action-

survey.pdf. "[C]onsumer fraud and labor and employment remain the most prevalent class action matters," accounting for "more than 50 percent of all class actions." *Id.* at 3. Indeed, it is now estimated that "90% of all federal and state court employment law class actions filed in the United States are wage and hour class or collective actions." Laurent Badoux, ADP, *Trends in Wage and Hour Litigation Over Unpaid Work Time and Precautions Employers Should Take* 1 (2012) *available at* http://www.lb7.uscourts.gov/documents/12-19431.pdf.

Although the drafters of Rule 23 realized that a damages class action could "be convenient and desirable depending upon the particular facts," they emphasized that it should only be used when "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Fed. R. Civ. P. 23, advisory committee's 1966 note. When it is necessary for plaintiffs to use sampling techniques to create a fictional plaintiff with "average" characteristics that are applied by extrapolation to class members with strikingly different individual circumstances in order to "prove" defendants' liability or damages to all class members with common evidence, procedural fairness and due process are sacrificed. See *supra* pp. 23–24. When a class includes uninjured members who would have no standing to litigate or obtain damages on their own, procedural fairness and due process are the victims. See *supra* pp. 29–30. This Court should grant review to put an end to these unlawful practices and return Rule 23 to the narrow exception to individual litigation as it was adopted in 1966.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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March 19, 2015