Nos. 14-1123 & 14-1124

In The Supreme Court of the United States

WAL-MART STORES, INC., et al.,

Petitioners,

v.

MICHELLE BRAUN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, et al.,

Respondents.

On Petitions For Writs Of Certiorari To The Superior Court Of Pennsylvania And To The Supreme Court Of Pennsylvania

BRIEF OF *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTERESTS OF THE *AMICUS*[1]

DRI is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership and their clients, including cases that address the constitutionality and fairness of class actions. In DRI's view, these interests, and the broader interests of the justice system, are best served by enforceable due process limits on class action practice. This is especially true in state court class action litigation, where due process is one of the few paths to federal review. When state courts elevate their procedures over constitutional rights and disregard federal constitutional limits that apply to all trials, DRI

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus*'s intention to file this brief, and all parties included in the caption of this brief have consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, no counsel for a party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amicus* and its counsel made any such monetary contribution.

takes special notice. It submits this brief urging the Court to do the same.

DRI's perspective would be of assistance to this Court in evaluating the important due process questions related to class action practice presented in the petition for certiorari, which were scuttled by the lower courts despite Wal-Mart's repeated protests. The brief is timely submitted on proper notice to all parties and with the parties' consent.

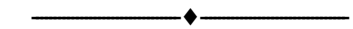
SUMMARY OF THE ARGUMENT

This case should never have been certified as a class action, and under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), it could not have been. But Pennsylvania's state courts, feeling unburdened by *Dukes*, certified it under Pennsylvania procedural rules. The result was disastrous. The courts allowed 6 plaintiffs' personal testimony to serve as classwide proof for 187,000 when it was not, in circumstances where the facts were variable and individualized proof was necessary. The Pennsylvania courts thereby significantly lowered the plaintiffs' burden at trial while depriving Wal-Mart of its right to raise individual defenses to what were, in truth, individual claims.

The trial violated Wal-Mart's right to due process. Rather than seriously confronting the trial's due process deficiencies, the Pennsylvania courts concluded that the mere fact of class certification required that

the class representatives' proof be treated as class-wide proof, and simultaneously closed the door to proof of individual differences on material issues. This Court should grant certiorari to make clear that a state's procedural mechanisms cannot be used to trample core constitutional rights.

This case presents a perfect opportunity to address the constitutional limits on state court class action litigation. Unlike so many class actions, which settle regardless of their merits due to the sheer cost of defending them, this case went to trial, and the fundamental unfairness Wal-Mart faced is therefore a matter of a well-developed trial record.



ARGUMENT

I. The Pennsylvania Courts' Trial-By-Formula Approach Violated Wal-Mart's Constitutional Rights.

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "'The fundamental requisite of due process of law is the opportunity to be heard.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). The Due Process Clause grounds "'our "deep-rooted historic tradition that everyone should have his own day in court."'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin v. Wilks*,

490 U.S. 755, 762 (1989)). Today, this tradition is under attack. Elevating state procedural laws over the United States Constitution, the Pennsylvania courts allowed supposed representative proof at a trial that called for individual proof.

The plaintiffs below claimed that Wal-Mart breached its contracts with 187,000 employees by requiring them to skip paid rest breaks (which were provided by Wal-Mart's policies) and to work off the clock. The lower courts allowed the testimony of 6 witnesses about their individual experiences to serve as representative testimony for the entire class. The courts further relied on statistics that showed unexplained instances of employees not clocking out for full rest breaks and cashiers logging into cash registers while not clocking in. The courts concluded from these naked statistics that the experiences of the 6 witnesses were common to the entire class, and held that the mere fact of class certification barred Wal-Mart from contradicting that conclusion with individual testimony and individualized evidence. The effect of this conclusion was to convert a 6-plaintiff case (the value of which couldn't possibly exceed a few thousand dollars) into a case with a judgment of $187,648,589.00.

The 6 witnesses who testified could not possibly represent the separate individual experiences of 187,000 Wal-Mart employees. And mere statistics could not possibly bridge the gap between their experiences and those of the other class members. The Pennsylvania courts relied on limited representative testimony, then

used a dubious statistical method to allow data about a subset of class members to operate as proof for the entire class. This formula denied Wal-Mart its day in court. The courts deemed representatives' individual proof to be classwide proof not because that assumption was true but as a consequence of the plaintiffs' procedural choices. That is the antithesis of what due process requires.

A. Relying on representative proof does not always make sense or comport with due process.

The Pennsylvania courts erred in allowing the representatives' proof of their own individual circumstances to be treated as classwide proof at trial. A court's use of the term "class action" is not talismanic. When parties' rights require individual consideration, their rights cannot be adjudicated *without* individual consideration. *Dukes*, 131 S. Ct. at 2561; *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423 (1915); *see also Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 3-4 (2010) (Scalia, J., in chambers) (granting a stay of the judgment and noting that fraud claims required proof of individual reliance, which defendants were unable to contest because the trial court relied on representative proof). To avoid the necessity of individual proof, class claims "must depend on a common contention. . . . That common contention, moreover, must be of such nature that it is capable of classwide resolution – which means that determination of its

truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2551.

Where, as here, a class contends that an employer made thousands of adverse employment decisions, there must be "some glue holding the alleged *reasons* for all those decisions together." *Id*. at 2552 (emphasis in original). Without this bond, a trial by formula results, in which a defendant is denied the opportunity to raise "individual" defenses, including "lawful reasons" for individual employees' experiences. *Id*. at 2561 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977)). Due process prohibits trial by formula.

In *Hansberry v. Lee*, landowners sought to enjoin an African-American family from occupying land subject to a restrictive covenant forbidding occupancy by "any person of the colored race." 311 U.S. at 37-38. An earlier "'class' or 'representative' suit," in which the African-American family had not been joined, confirmed the covenant's validity, and the landowners argued that the judgment from that suit was res judicata. *Id*. at 38-40.

This Court rejected the landowners' argument and held that binding the African-American family to the earlier judgment would deprive them of due process. *Id*. at 45. The Court reasoned that although state courts "are free to attach such descriptive labels to litigations before them as they may choose," that does not end the inquiry. *Id*. at 40. Rather, "when the

judgment . . . is challenged for want of due process it becomes the duty of this Court to examine the course of procedure . . . to ascertain whether the litigant whose rights have . . . been adjudicated has been afforded such notice and opportunity to be heard as are requisite to . . . due process." *Id*. (citing *W. Life Indem. Co. v. Rupp*, 235 U.S. 261, 273 (1913)). The earlier suit had not afforded adequate notice and opportunity to be heard, largely because the class representatives could not possibly represent every member of the class through representative proof.

This Court held that, factually and logically, the case did not lend itself to such proof because of the individual nature of the obligations:

> The restrictive agreement did not purport to create a joint obligation or liability. If valid and effective its promises were the *several obligations* of the signers and those claiming under them. The promises ran *severally* to every other signer. It is plain that in such circumstances all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance. . . . Nor without more, and with the due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.

Id. at 44 (emphasis added).

An earlier case, *Coe v. Armour Fertilizer Works*, illustrates similar complications in "representative" litigation. 237 U.S. at 422-24. There, a judgment creditor enforced its judgment against one of the debtor corporation's stockholders according to a Florida statute. *Id*. at 416-18, 422. The statute authorized a state court to issue a writ of execution against the stockholder's property without providing him individual notice or an opportunity to be heard (on the theory that the corporation enjoyed such notice and opportunity as representative for all stockholders). *Id*. at 422, 424. This Court held that the statute violated the stockholder's due process rights, reasoning that "before a third party's property may be taken to pay that [corporate] indebtedness upon the ground that he is a stockholder . . . he is entitled, upon the most fundamental principles, to a day in court and a hearing upon . . . defenses *personal to himself*." *Id*. at 423 (emphasis added). The Court further noted that it was immaterial whether the stockholder's personal defenses were meritorious; procedurally, he had the right to raise them in any event. *Id*. at 424.

Here, as in *Hansberry* and *Coe*, the very nature of the parties' rights made representative proof and adjudication impossible. Wal-Mart's obligations to its employees were "several" and its defenses were "personal" to each employee's potential claims. Its obligations were based on contract law, not on external requirements.

Contract formation necessarily depended on individual proof. Wal-Mart's employees did not have

written, bilateral contracts; their alleged contractual right to paid rest breaks arose out of Wal-Mart's policies (*i.e.*, a unilateral contract). *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 45, 50; BLACK'S LAW DICTIONARY 374 (9th ed. 2009). Under Pennsylvania substantive law, a contract with an individual employee could only arise if the employee was actually aware of, and relied on, the policies. *Morosetti v. Louisiana Land & Exploration Co.*, 564 A.2d 151, 152-53 (Pa. 1989). Without such knowledge and reliance, there was no meeting of the minds and thus no contract. *Id*.

It was not possible for 6 employees to know and rely on policies on behalf of the entire class, nor did they claim any knowledge of what other class members did or did not know or rely upon. That critical issue was an individual one, which accordingly required individual proof.

Likewise, contract breach depended on individual proof. Wal-Mart's policies called for paid breaks and forbade working off the clock. To attribute responsibility to Wal-Mart for employees' experiences not matching these policies required explanation, yet no explanation was ever provided for thousands of class-members. The courts accepted 6 witnesses' personal explanations without any proof that their personal explanations applied universally. The statistical evidence was unhelpful on this point, as the data showed only instances where employees failed to clock in and out for breaks and logged into a cash register without clocking in for work, not why.

There is no telling what the thousands of class-members who didn't testify might have said on the witness stand, and how their testimony might have differed from the 6 class members who testified. It is plausible that many employees simply forgot to clock out during rest breaks or to clock in when operating cash registers. Their forgetfulness or carelessness is not attributable to Wal-Mart or its practices. It is equally plausible that some employees voluntarily (without Wal-Mart's knowledge) skipped their rest breaks because of a personal work ethic or sense of duty. There could be as many explanations for missed rest breaks and off the clock work as there were class-members. The many explanations for the data were never properly aired in open court because of the Pennsylvania courts' rush to accept the representatives' individual testimony as supposed classwide proof.

Unquestionably, the Pennsylvania courts were free to "attach such descriptive labels," *Hansberry*, 311 U.S. at 40, to the case as they chose. But labels may not disturb the balance between procedural rules and the United States Constitution. The Pennsylvania courts were not free to elevate their class action procedures over the Due Process Clause. Due process did not permit the courts to accept proof of the representatives' personal claims as proof for the class in a trial that so clearly required proof of the subjective circumstances and state of mind of each individual.

B. When due process requires individual proof, class action procedure must be applied in a way that protects core substantive rights.

The Pennsylvania Superior Court gave short shrift to Wal-Mart's protest regarding the violation of its due process rights, explaining that Wal-Mart's constitutional arguments were "in derogation of class certification."[2] The court was entirely backward in its approach and, not surprisingly, its result. Class certification does not trump due process. To the contrary, it is a mere procedural device that must be applied in a way that ensures due process and leaves the substantive elements and defenses applicable to each individual's claim unaltered.

The United States Constitution is "the supreme law of the land" and "the judges in every state" are "bound thereby." U.S. Const. art. VI. As *Hansberry* and *Coe* illustrate, a state court may not override core constitutional rights through procedures that embrace supposed representative proof. 311 U.S. at 44-45; 237 U.S. at 423.

Thus, while representative suits, including class actions, can be an acceptable deviation from the

[2] The Pennsylvania Supreme Court then purported to deny discretionary review of Wal-Mart's federal due process question. Nonetheless, Wal-Mart briefed its due process argument, and the Pennsylvania Supreme Court considered and rejected the argument in its opinion. *Braun v. Wal-Mart Stores, Inc.*, 106 A.3d 656, 663-67 (Pa. 2014).

day-in-court ideal, their acceptability turns on whether they are "properly conducted." *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (citing *Martin*, 490 U.S. at 762). This means, at the very least, fulfilling "the fundamental requisite of due process" of providing a defendant "the opportunity to be heard." *Goldberg*, 397 U.S. at 267. Due process must always underlie the procedures a court applies, even when a case travels under the "class action" banner. *See* Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) & the Impact of General Telephone v. Falcon*, 54 Ohio St. L.J. 607, 609 (1993).

Indeed, while this Court's analysis in *Dukes* focused exclusively on the text of Federal Rule of Civil Procedure 23, that was only because the Court harmonizes all Federal Rules with sources of substantive law, including the Constitution. *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)). In defining class procedures based on the Federal Rules in *Dukes*, the Court, in effect, defined due process boundaries. *See* Saby Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality & Due Process Concerns in Modern Class Action Litigation*, 44 Loy. U. Chi. L.J. 467, 486-88, 498-99 (2012). Those boundaries apply to class actions in state courts, just

as they apply to class actions governed by the Federal Rules.[3]

The boundaries are necessary to preserve core aspects of due process, including the right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)); *see also Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007). A litigant's "right to litigate the issues raised" is "guaranteed . . . by the Due Process Clause." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). The boundaries stated in *Dukes* are also necessary to preserve each party's right to "cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269. Trial by formula here robbed Wal-Mart of its substantive individual defenses regarding contract formation and contract breach. And its right to cross-examine adverse witnesses was a farce;

[3] At least one other state supreme court has correctly recognized that the principles set forth in *Dukes* "derive from both class action rules and principles of due process." *Duran v. U.S. Bank Nat'l Ass'n*, 325 P.3d 916, 935 (Cal. 2014). In *Duran*, the California Supreme Court disapproved of a trial plan that employed the same tools at issue here – representative testimony and statistical extrapolation – that prevented the defendant from showing that some class-members fell outside the operative, liability-creating allegations. *Id.* at 935-36. The court held that "[w]hile representative testimony and sampling may sometimes be appropriate tools for managing individual issues in a class action, these statistical methods cannot so completely undermine a defendant's right to present relevant evidence." *Id.* Denying a defendant's right to present a defense merely because it is "cumbersome to litigate in a class action" violates due process. *Id.*

examining 6 "representative" witnesses who did not even claim to know the material subjective circumstances of others could not possibly substitute for cross-examining individuals about their own necessarily individual facts. Again, with 187,000 class-members, there could have been an equally large number of subjective circumstances to probe on cross-examination. The jury only heard 6 stories out of 187,000 – or, put another way, .0032% of the possible reasons *why* employees did not clock in and out for rest breaks or logged into a cash register without clocking in for work.

Due process boundaries also preserve fundamental fairness. Consider that in this case the courts extrapolated from cold statistics – without any discernible basis – that thousands of class members had cases equally strong as the thimbleful who testified. This allowed thousands of class-members "to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation," without any reason to assume they could have provided similar testimony or proven causation on their own. Ghoshray, *supra*, at 498.

The Pennsylvania courts were not free to disregard the Due Process Clause's protection of Wal-Mart's core rights merely by observing that the case had been certified as a class action. Instead, the courts were bound to apply the due process principles embedded in the United States Constitution. Those principles prohibit use of the class action device to deprive individual class members or defendants opposing

them of the right to prove individual circumstances that are material to the claims under applicable law.

II. This Case Presents An Opportunity To Curtail Due Process Abuses In State Court Class Actions.

This Court has acted on recent opportunities to curtail federal class action abuse. *See, e.g.*, *Comcast Corp. v. Behrend*, 131 S. Ct. 1426 (2013); *Dukes*, 131 S. Ct. 2541. But factors inherent in our federal system and the hard realities of class action litigation result in fewer opportunities for the Court to review abuses in state court class actions. That makes it more important than ever for the Court to seize this opportunity. With the benefit of this fully developed record, the Court should make clear that due process prohibits state courts from using the class action device to bar proof that individual facts negate the substantive elements of the claim, or trigger affirmative defenses, for individual class-members.

Procedurally, states have latitude at the certification stage that they often exercise in ways that do not reflect the controls built into the Federal Rules of Civil Procedure. *See, e.g.*, *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2377-79 (2011); *Hansberry*, 311 U.S. at 40. Even state procedural rules that are facially the same as the Federal Rules are often applied differently, and thus constitute "a different standard." *Smith*, 131 S. Ct. at 2377; *see also Felder v. Casey*, 487 U.S. 131, 138 (1988) (Generally speaking, states

may "establish the rules of procedure governing litigation in their own courts."). This simple truth of federalism will often impede this Court from preventing state courts' wrongfully certifying cases as "class actions." As this Court has recognized, once certification is complete, the "chance of a devastating loss" (a consequence of mass-aggregating claims) exerts substantial pressure on defendants to settle, regardless of a case's merits. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (citing *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677-78 (7th Cir. 2009)). In short, class action abuse in state courts will often evade review, as even cases that abuse class action procedure settle before trial.

This Court's precedent addressing federal class action procedures is extensive, but the cases almost all focus on the text of Federal Rule of Civil Procedure 23, to the exclusion of the Due Process Clause. Downs, *supra*, at 659, 707; *see also* G. Chin Chao, *Securities Class Actions & Due Process*, 1996 Colum. Bus. L. Rev. 547, 564 (1996).[4] Because this Court endeavors to harmonize the Federal Rules with the Constitution, constitutional questions related to class action procedures are often avoidable. "Nevertheless, by failing to comment on due process, the Court . . .

[4] Also, the Court's discussion of due process in class action litigation has tended to focus on the due process rights of absent class members, not the rights of defendants. *See, e.g.*, *Ortiz*, 527 U.S. at 846-48; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 806-22 (1985).

has left uncertain the identity of claims requirement on state courts under the Fourteenth Amendment." Downs, *supra*, at 707. State courts – like the Pennsylvania courts in this case – are taking the wrong message from this Court's silence on the constitutional implications of class action litigation.

Now is the time to intervene to prevent the disastrous effect of this wrong message from taking hold. Here, the Court is presented with a state court class action in which the defendant did not succumb to the pressure to settle. Instead, the case went to trial, and the Pennsylvania courts viewed class certification as authorization for the unconstitutional trial procedures described above. The trial record allows this Court to conduct a meaningful review based on due process, and to reject not only state court "trial by formula," but a state court's use of the class action procedural mechanism to trample constitutional rights. Mere procedure cannot bar a defendant from proving that material variations in individual facts negate substantive elements of claims, or from establishing affirmative defenses to specific claims. Constitutional rights cannot so easily be overrun.

CONCLUSION

The Court should grant certiorari to afford this case full consideration on the merits.

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