IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MICHELLE BRAUN, on behalf of herself and all others similarly situated, Appellee, v. WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an Operating segment of Wal-Mart Stores, Inc., Appellants.	:	No. 32 EAP 2012 Super. Dkt. Nos. 3373 EDA 2007 3376 EDA 2007
DOLORES HUMMEL, on behalf of herself and all others similarly situated, Appellee, v. WAL-MART STORES, INC., a Delaware Corporation, and SAM'S CLUB, an Operating segment of Wal-Mart Stores, Inc., Appellants.	:	No. 33 EAP 2012 Super. Dkt. Nos. 3376 EDA 2007 3373 EDA 2007

BRIEF OF AMICI CURIAE IMPACT FUND, AARP, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER OF SOUTHERN CALIFORNIA, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C. IN SUPPORT OF AFFIRMANCE

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STATEMENT OF INTERESTS OF AMICI CURIAE

The public interest organizations appearing as friends of the Court ("Amici") submit this brief in support of appellees Michelle Braun and Dolores Hummel to explain the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), as it pertains to aggregate proof. We demonstrate that the arguments advanced by appellants Wal-Mart Stores, Inc., *et al.*, ("Wal-Mart") and their amici regarding *Dukes* are erroneous and that the Supreme Court's reference to "Trial by Formula" does not preclude the use of aggregate evidence in the enforcement of important rights. Indeed, as we describe below, courts around the country have employed various techniques to manage class-wide evidence without resorting to mini-trials of each class member's claim and without violating due process.

Amici represent plaintiffs in aggregate litigation under Federal Rule of Civil Procedure 23, the Fair Labor Standards Act, 29 U.S.C. § 216(b), and other state and federal laws that permit claims to be brought as class and collective actions. Amici advocate for the interests of those who cannot safeguard their rights without access to these forms of litigation and who rely on aggregate proof, including statistics, surveys, extrapolation, and representative testimony, to establish their claims and to estimate damages. Amici also advocate more broadly for the preservation and fair application of the class action device as a critical mechanism to enable the vindication of important legal rights. The statements of interest of the Amici are attached as Exhibit A.[1] Amici incorporate by reference the Counter-Statement of the Questions Involved and Counter-Statement of the Case as set forth in the Brief of the Appellees.

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[1] Amici are: The Impact Fund, AARP, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, California Rural Legal Assistance Foundation, Disability Rights Education & Defense Fund, the Legal Aid Society-Employment Law Center, the National Consumer Law Center, Public Citizen, Inc., and Public Justice, P.C.

SUMMARY OF ARGUMENT

Wal-Mart assigns a meaning to the "Trial by Formula" phrase from *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that is not supported by the case. The expression is not, by its terms and read in context, a sweeping condemnation of the use of aggregate proof. Nor does the *Dukes* case assume, let alone enshrine, a constitutional due process right to litigate each class member's claim individually.

Instead, the phrase "Trial by Formula" refers to just one highly idiosyncratic model of class proof that the Ninth Circuit described as a possible means of calculating damages in its en banc opinion that the Supreme Court reversed in *Dukes*. That model of proof, used in the Ferdinand Marcos class action, *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), and in no case since, relied on a set of sample trials to extrapolate compensatory damages for victims of torture, "disappearance," or summary execution. *Id.* at 786. In *Dukes*, the Supreme Court merely observed that, since Title VII's unique statutory scheme mandates individual remedies hearings for backpay claims, the Ninth Circuit's proposal to substitute the *Hilao* methodology for those statutory hearings was unacceptable. 131 S. Ct. at 2550, 2561; *see also* 42 U.S.C. § 2000e et seq.

Significantly, the *Hilao* model bears no resemblance to the solid evidence—grounded in the employer's own business records, proper scientific methods, and admissions by its corporate executives—used in the trial of this case. This Court should not accept Wal-Mart's claim that the "Trial by Formula" language extends beyond the very limited purpose these words served in the *Dukes* opinion. Nor should this Court itself establish a constitutional due process right to litigate each class member's claim individually. That concept is at odds with historical and modern precedent and it is incompatible with important substantive rights that depend on

aggregate proof. Courts routinely allow parties to rely on aggregate proof in many contexts without offending due process.

ARGUMENT

I. THE "TRIAL BY FORMULA" LANGUAGE FROM *DUKES* DID NOT CREATE A DUE PROCESS RIGHT TO LITIGATE CLASS CLAIMS INDIVIDUALLY

A. "Trial by Formula" Refers Only to *Hilao*'s Unusual Trial Plan and Was Rejected in *Dukes* Because Title VII Requires the Opportunity to Present Individual Defenses

In *Dukes*, the Supreme Court's reference to "Trial by Formula" appears at the tail end of its extended discussion of whether the claims for backpay in that case could properly be certified under Federal Rule of Civil Procedure 23(b)(2). Read in context, the limited import of the "Trial by Formula" shorthand is plain: it refers only to one trial plan adopted in an unusual case that the Court found incompatible with Title VII's statutory scheme.

The "Trial by Formula" phrase appears after the *Dukes* Court concluded that claims for backpay under Title VII could not be certified under Rule 23(b)(2). The Court reasoned that backpay was an "individualized monetary claim" and that, given the history and structure of Rule 23, such claims belonged under Rule 23(b)(3), where additional protections, like notice and the right to opt out, are mandatory. 131 S. Ct. at 2558.

The Court expressly did not reach the question of whether *any* forms of monetary relief might be certifiable under Rule 23(b)(2). It discussed, but did not adopt, the Fifth Circuit's formulation for what types of monetary relief could be certified under Rules 23(b)(2)—those "incidental to requested injunctive or declaratory relief." 131 S. Ct. at 2560 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). It said that *even if* that formulation were correct, the backpay claims in *Dukes* could not satisfy that test, since the Fifth Circuit defined "incidental" monetary relief, in part, as not requiring "*additional hearings* to resolve the

disparate merits of each individual's case." *Id.* (quoting *Allison*, 151 F.3d at 415) (emphasis added). Since Title VII's "detailed remedial scheme" required additional proceedings (known as *Teamsters* hearings[2]) to permit the employer to present individual statutory defenses specific to Title VII, the backpay remedy sought in *Dukes* could not be considered "incidental monetary relief." *Id.*

In one final paragraph following this "even if" discussion, the *Dukes* Court refers to "Trial by Formula." Having concluded that Title VII's statutory scheme requires additional individual proceedings before backpay can be awarded, the Court held that such proceedings could not be replaced with a "Trial by Formula." *Id.* at 2561.

There is no need to speculate what the Supreme Court meant by "Trial by Formula" as it specifically described the objectionable model:

> 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.

Id. The Court then cited to the portion of the Ninth Circuit's *Dukes* ruling that contains a lengthy exegesis of the *Hilao* method of proof and how it might provide a viable approach to evaluate the backpay claims before it. *Id.*; *see also supra* Part I.B. In other words, the Court's rejection of "Trial by Formula" refers only to the Ninth Circuit's proposal to apply the *Hilao* method of proof to the claims in *Dukes*. The Court "disapprove[d] that novel project,"—because it would not allow Wal-Mart to present statutory defenses to individual Title VII backpay claims and

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[2] The Court held that the two-stage trial model first articulated in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), "gives effect" to Title VII's statutory requirements. 131 S. Ct. at 2561.

therefore abridged a statutory right in violation of the Rules Enabling Act (*not* due process).[3] *Dukes*, 131 S. Ct. at 2561.

From this very narrow point concerning the possible frontiers of Rule 23(b)(2) as applied to Title VII backpay claims, Wal-Mart conjures a constitutional right to raise individualized defenses to any claim in a class action, whether statutory or common law. *See* Appellants' Brief at 22-24 (claiming that the right to present "'every available defense' [is] a longstanding right under both the Federal and Pennsylvania Constitutions and the entire Anglo-American system of adversarial justice"). But nowhere does the *Dukes* opinion refer to a due process right to present individualized defenses.[4] The Court's analysis is tied entirely to Rule 23, the Title VII statutory scheme, and the remedial scheme set forth in *Teamsters*.

Similarly, the *Dukes* opinion nowhere equates "Trial by Formula" with the use of statistical or aggregate proof in class actions or litigation generally. Indeed, the opinion strongly endorses the use of statistical evidence to demonstrate "significant proof" of a general policy of discrimination sufficient to satisfy Rule 23(a)(2) commonality. 131 S. Ct. at 2554-55. The Court held only that the specific statistical analyses offered by the *Dukes* plaintiffs were insufficient to meet the legal standard. *Id.*

Properly understood, the Supreme Court's rejection of "Trial by Formula" means no more than that the *Hilao* method of proof cannot be substituted for individual *Teamsters* remedial hearings to determine backpay under Title VII. As other courts have found, it has no

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[3] The Court explained that "[b]ecause the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999)).

[4] The *Dukes* Court did refer to Due Process in connection with the rights of *class members* to notice under Rule 23(b)(3) in suits primarily for money damages. 131 S. Ct. at 2559 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

relevance where, as here, the operative statute affords no specific right to individualized proof. *See Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 n.7 (7th Cir. 2011) (holding that the presence of individual affirmative defenses in wage and hour action did not prevent 23(b)(3) certification; *Dukes* prohibited only backpay under Rule 23(b)(2) because of affirmative statutory defense under Title VII); *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 WL 689169, at *3 (N.D. Ill. Mar. 2, 2012) (holding that *Dukes*' "Trial by Formula" language did not prevent assessment of damages in wage and hour class action with class-wide proof).

B. The "Trial by Formula" Criticized in *Dukes* is Entirely Unlike the Method of Proof Used in this Case

As noted above, the target of the Supreme Court's criticism in *Dukes* was the very specific and unusual trial model used in *Hilao*, 103 F.3d 767, "a 10,000+ plaintiff class action filed by Philippine nationals and their descendants who were alleged victims of torture, summary execution, and 'disappearance' at the hands of Ferdinand E. Marcos, the Philippines' former president." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 625 n.54 (9th Cir. 2010) (en banc). That trial model, adopted to address an extraordinary set of facts and circumstances, has nothing to do with the kinds of routine evidence used here, which was based on mathematical extrapolation from Wal-Mart's own time card records, bolstered by other business records, corporate admissions, and worker testimony.

In *Dukes*, the Ninth Circuit declined to rule on the specifics of the district court's proposed trial plan, concluding that Rule 23 manageability had been met. "At this stage, we express no opinion regarding Wal-Mart's objections to the district court's tentative trial plan (or that trial plan itself) . . . ." *Dukes*, 603 F.3d at 625. The Ninth Circuit then observed that there were "a range of possibilities . . . that would allow this class action to proceed in a manner that is both manageable and in accordance with due process . . . ." *Id.*

One possible approach, according to the en banc majority, would be to utilize the method used to determine compensatory damages in *Hilao*. *Id.* at 625. The components of that methodology were:

- *Claim Forms* – Class members filed written claims. The district court determined that over 500 were facially invalid, leaving over 9500 claims. *Id.*
- *Sample of Claims* – A computer randomly selected 137 claims, based upon a statistician's testimony about the probability that the percentage of valid claims among that sample could be generalized to all claims. *Id.* at 625-26.
- *Special Master* – A special master supervised the depositions of the sample claimants, reviewed the claims, determined which claims were valid, and recommended an amount of damages to be awarded as to those claims. The special master recommended a total compensatory damage award based upon the percentage of valid claims, multiplied by the average recommended award. *Id.*
- *Jury Trial* – The district court then held a jury trial on compensatory damages. The jury heard the testimony of the sample of claimants, the statistical expert, and the Special Master concerning his recommendations. It accepted some of the Special Master's recommendations and rejected others. *Id.*
- *Pro Rata Distribution of Compensatory Award* – The district court entered judgment for the sample claimants, based on the jury's findings, and divided the compensatory damage award among the remaining claimants pro rata. *Id.*

The Ninth Circuit did not explain how specifically the *Hilao* methodology might be used, other than suggesting that Wal-Mart could litigate its individual defenses in the randomly selected "sample cases." *Id.* at 628 n.56. The "Trial by Formula" used in *Hilao* and criticized by the

Supreme Court in *Dukes* bears no similarity to the process used in this case. Indeed, the differences are legion.

First, this case involved one trial of all claims before one jury. *Hilao* was a trifurcated proceeding with the disputed methodology applied to only one phase: class compensatory damages. *Hilao* involved evidence as to only 1.5% of all claims submitted by class members, with the results extrapolated to the entire class. Here, Wal-Mart's own voluminous, but incomplete, time records were used as the basis for reconstructing the missing data as to all class members. And Wal-Mart itself was responsible for the holes in the data because it instructed workers not to record the missing time.[5]

Second, *Hilao* involved the use of a special master, who reviewed claims, supervised the taking of deposition testimony in the Philippines, and presented recommendations to the jury. No such intermediary fact-finder was used here. The evidence was presented directly to the jury.

Third, the evidence in *Hilao* consisted of anecdotal testimony regarding a wide range of events, physical injuries, and subjective emotional distress. The evidence here consisted of objective proof provided by company business records, buttressed by compelling corporate admissions and worker testimony. Based on this evidence, plaintiffs' expert extrapolated the missing data and drew proper conclusions from that objective proof.

Fourth, the illegal conduct in *Hilao* occurred in a wide array of circumstances, resulting in vastly different types of injuries. In this case, the illegal conduct was one specific type of conduct (failure to permit breaks), in one specific type of environment (Wal-Mart retail store

[5] Until February 9, 2001, Wal-Mart's hourly employees were required to clock out for breaks. After that date, a company directive eliminated clocking out for breaks. R.7612a-20a; R.7547a. The change was made in order to reduce Wal-Mart's acknowledged exposure in lawsuits such as this one. R.1696a-99a; Supp.R.8145a-50a; Supp.R.7954a; Supp.R.8086a.

workplace), resulting from the implementation of a uniform company policy, and which affected each class member in the same way (depriving each of a break from work duties).

The properly conducted proceedings in this case bear no resemblance to the "Trial by Formula" rejected by the Supreme Court in *Dukes*.

II. THIS COURT SHOULD NOT ADOPT A DUE PROCESS RULE THAT UNDERMINES THE USE OF AGGREGATE PROOF

Wal-Mart seeks to expand the "Trial by Formula" dictum into a broad limitation on aggregate proof, claiming a due process right to assert "every available defense" and to contest each class member's claim individually. Appellants' Brief at 22-24. There is no such right.

As one scholar recently explained in a comprehensive historical study of the due process theory Wal-Mart espouses, its faulty argument derives from cases beginning with *Lochner v. New York*, 198 U.S. 45 (1905), whose theory of due process has long been discredited:

> In effect, modern procedural due process cases and the nineteenth century tradition converge on essentials: Neither construes due process as a fixed limit on the type or quantity of evidence presented in ordinary civil proceedings. Then and now, due process leaves a great deal of room for courts to regulate parties' opportunities to present relevant evidence in civil proceedings in the service of equity and convenience. Class action defendants' arguments are rooted in a brief, and brief-lived, deviation from this tradition—the *Lochner* era. If history provides the "baseline" against which constructions of due process should be tested, class action defendants' claims are losers.

Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 324 & n.30 (2012) (discussing convincing historical evidence "that defendants' due process argument is without merit").[6]

[6] In this 2012 article, the author repudiates his own earlier contrary view. *See* 2012 Utah L. Rev. at 324 n.30 (repudiating argument that class-specific evidentiary shortcuts are inconsistent with due process, developed in Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 857 (2005)).

Due process requires the balancing of three separate interests: vindicating a plaintiff's interest in obtaining a remedy, avoiding an erroneous deprivation of a defendant's property, and "any ancillary interest the [Court] may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991). The Supreme Court has never recognized a constitutional right to particular forms or methods of proof. Such case management decisions lie within the discretion of the trial courts, subject to appropriate review. *See, e.g.*, Pa. R. Evid. 102 (stating that rules "shall be construed to secure fairness in administration" and "elimination of unjustifiable expense and delay"); Pa. R. Evid. 403 (stating that relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence).

Due process does not limit courts from exercising their discretion to regulate the quantum, method, or order of proof when doing so is necessary to facilitate class proceedings.

III. *DUKES* DID NOT AFFECT THE ENORMOUS BODY OF LAW APPROVING THE USE OF AGGREGATE PROOF IN MANY TYPES OF CASES

Class actions are not simply a procedural device for joining claims. They are crucial means to enable private enforcement of important substantive laws. *See Kelly v. County of Allegheny*, 546 A.2d 608, 612-13 (Pa. 1988) (noting a "long-standing public policy of this Commonwealth to permit the aggregation of small claims which otherwise could not be litigated in individual actions"); *see also* Alba Conte & Herbert Newberg, Newberg on Class Actions § 10:5 & n.20 (4th ed. 2002) ("Newberg") (noting that "aggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objectives of Rule 23"). If class plaintiffs were unable to rely on such proof, the class action device would often be

rendered entirely infeasible, serious harms would remain unremedied, and widespread illegal conduct of many sorts would continue unabated.

Probative evidence comes in various forms. Scientific and mathematical proof is commonly used to calculate probabilities, estimate damages, and show the broad impact of a defendant's wrongdoing. Representative or sampling evidence can be used to create inferences with respect to others who are similarly-situated. Subject to the rules governing evidence generally and the statutes defining specific claims and defenses, due process does not impede the use of aggregate evidence that is otherwise probative and helpful to the trier of fact.

The courts have developed burdens of proof, presumptions, inferences, evidentiary standards of review, standards for the admission of scientific evidence, and other techniques to manage the admission of evidence in complex cases without violating due process. Although the right to present statutory defenses must be respected, there is no constitutional right to unlimited trial time or to question every conceivable witness.[7] Even in criminal cases, "the right to introduce relevant evidence can be curtailed if there is a good reason for doing so." *Clark v. Arizona*, 548 U.S. 735, 739 (2006). Trial judges may "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006). The Supreme Court made clear long ago in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555

[7] Wal-Mart was not restricted in terms of the time allowed to present its case or the number of witnesses it chose to call. However, in arguing for an entitlement to present individualized defenses to 187,000 class members, Wal-Mart in essence claims a due process right to unlimited trial time to question them. *But see* Pa. R. Evid. 403 (allowing exclusion of relevant evidence based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). The only means of proving class-wide liability and damages in this case was through aggregate proof, in part because of the large number of persons Wal-Mart harmed and in part because Wal-Mart cut off the continued collection of timecard evidence which would have showed the extent of its wrongdoing more precisely. Wal-Mart's due process rights were not violated by the admission of reliable estimates based on the existing records.

(1931), that it would be an injustice to relieve a wrongdoer of all liability just because damages cannot be ascertained with certainty. "In such cases, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate." *Id.* at 563. Moreover, "[j]uries are allowed to act upon probable and inferential as well as direct and positive proof . . . . so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." *Id.* (citation omitted).

Consistent with these principles, aggregate proof is not only common, it is often indispensable to proving many class claims, including antitrust, securities, RICO, state law wage and hour class actions, and collective actions under the Fair Labor Standards Act.[8] *See, e.g.*, *In re Neurontin Antitrust Litig.*, MDL No. 1479, Master File No. 02–1390, Civil Action Nos. 02–1830 (FSH), 02–2731(FSH), 2011 WL 286118, at *10 (D.N.J. Jan. 25, 2011) (finding that "the use of an aggregate approach to measure class-wide damages may be appropriate" in anti-trust action); *see also* Newberg § 10:5 (stating that "[a]ggregate computation of class monetary relief is lawful and proper"). The Supreme Court's decision in *Dukes* said nothing to undermine the use of aggregate proof in such cases.

Collective actions under the Fair Labor Standards Act (FLSA) are typically based on a form of aggregate proof consisting of testimony by a representative sample of affected workers. 29 U.S.C. § 216(b). Where appropriate, formulas can be applied to estimate backpay. *See Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1995); *Sec'y of Labor v. DeSisto*,

[8] Reconstruction, extrapolation, and inferences from aggregate evidence can also be appropriate in nonclass contexts. *See, e.g.*, *Jahanshahi v. Centura Dev. Co., Inc.*, 816 A.2d 1179, 1184 (Pa. Super. Ct. 2003) (explaining that "lost profits from a new business may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like").

929 F.2d 789, 792 (1st Cir.1991); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir.1988); *see also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (affirming judgment based on representative testimony where employer's records were incomplete); Ellen C. Kearns, The Fair Labor Standards Act § 18.IX.B (ABA 2002) (explaining that "the court may adopt formulas to estimate the amount of back pay due"). Allowing employees to rely on representative testimony is a well-accepted and practical means of resolving the case where, as here, individualized adjudication would impose impossible burdens on the courts and litigants. This practice accords with the principle that facts may be established by the testimony of a single witness, *Weiler v. United States*, 323 U.S. 606, 608 (1945), and with the admissibility of "routine practice" evidence under Pa. R. Evid. 406, to show that a company acted in the same way toward persons similarly-situated.[9]

Aggregate proof is often the only way to establish liability and to calculate damages in antitrust actions. *See In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-54 (3d Cir. 2002) (approving multiple regression and benchmark methodologies to prove antitrust impact); *In re Bulk (Extruded) Graphite*, No. Civ. 02-6030(WHW), 2006 WL 891362, at *12-*13, *15 (D.N.J.

[9] This case involved mathematical extrapolation from Wal-Mart's own data, a higher level of rigor than is often required in wage and hour cases. Numerous FLSA cases have based liability for back wages on non-random representative testimony of a limited number of employees. *See, e.g., Mt. Clemens*, 328 U.S. at 684 (testimony from seven employees sufficient for award to a workforce of 300); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (testimony from 39 out of approximately 1500 employees, or 2.5 percent, was adequate to support an award of backpay for all); *Romero v. Fla. Power & Light Co.*, No. 6:09-cv-1401-Orl–36GJK, 2012 WL 1970125, at *5-*6 (M.D. Fla. Jun. 1, 2012) (granting plaintiffs' motion for use of representative evidence for extrapolation to non-testifying class members in FLSA claim by workers required to work during meal breaks); *Herman v. Hector I. Nieves Transp., Inc.*, 91 F. Supp. 2d 435, 446 (D.P.R. 2000) (testimony of 14 employees sufficient for over 100 employees); *cf. Renteria-Marin v. Ag-Mart Produce, Inc.*, 488 F. Supp. 2d 1197, 1200 (M.D. Fla. 2007) (in non-FLSA case, damages awarded to class of hundreds of migrant workers for substandard housing based on testimony of four workers), *aff'd in part and reversed in part on other grounds*, 537 F.3d 1321 (11th Cir. 2008).

Apr. 4, 2006) (accepting at certification stage that plaintiffs may show class-wide impact and injury through generalized class-wide evidence, and formulaic methodologies to calculate damages); Newberg at § 10:7 n.1 (collecting cases). In the recent case of *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935, 2012 WL 6652501, at *7 & n.14 (M.D. Pa. Dec. 7, 2012), the district court endorsed multiple regression models as accepted and reliable methods of proving class-wide damages in an antitrust case.

Indeed, Wal-Mart was itself the lead plaintiff in an antitrust class action on behalf of five million merchants in which it successfully advocated for the use of class-wide aggregate techniques to determine individual damages, and overcame defendants' objection that due process required individual hearings on mitigation. *See In re Visa Check/MasterMoney Antitrust Litig.* (*"Visa Check"*), 280 F.3d 124, 140 (2d Cir. 2001) *disapproved in part on other grounds in In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-40 (2d Cir. 2006). Now, with the shoe on the other foot, Wal-Mart argues the opposite, claiming that aggregate damages violate its due process rights. As in *Visa Check*, the argument should be rejected. 280 F.3d at 139.

Class-wide formulas are regularly used both to establish liability and to calculate damages in securities class actions. *See generally* Newberg at § 10.8 & n.2. In such cases, statistical modeling is essential. *See* Michael Barclay & Frank C. Torchio, *A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation*, 64 Law & Contemp. Probs. 105, 106 (2001). The Supreme Court has recognized that requiring individualized proof would imperil enforcement of the nation's laws against securities fraud and rejects such an approach. *See Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988) (approving rebuttable presumption of reliance supported by the "fraud-on-the-market" theory in order to prevent individualized proof of reliance from impairing enforcement of securities laws); *see also*

Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2187 (2011) (proof of loss causation not required to invoke the *Basic* presumption of reliance).

Aggregate techniques are often used to prove liability in consumer class actions. *See Samuel-Bassett v. Kia Motors Am., Inc.*, 34 A.3d 1, 25, 41 n.27 (Pa. 2011) (holding that plaintiff was not required to prove individual reliance on express warranty for each class member in product defect case; broader question of whether aggregate evidence is probative to calculate damages in a class action generally was waived). In the recent case of *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig*, 678 F.3d 409 (6th Cir. 2012), the Sixth Circuit upheld class certification of liability in a case alleging breach of warranty, negligent design, and negligent failure to warn of defects in front-load washing machines. Aggregate proof of causation was possible because while one consumer "might have followed [manufacturer's] suggested care instructions more conscientiously than [the other], [manufacturer's] own internal documents point to the conclusion that, no matter what consumers did or did not do, the mold problem persisted." *Id.* at 420.

Similarly, courts in consumer class actions have accepted aggregate proof of damages. In *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F.3d 156 (1st Cir. 2009), the First Circuit affirmed a judgment of liability for unfair and deceptive business practices and rejected a due process challenge to the methodology used to calculate aggregate damages to the class. The court noted that "class-action litigation often *requires* the district court to extrapolate from the class representatives to the entire class" and "it would quickly undermine the class-action mechanism were we to find that a district court presiding over a class action lawsuit errs every time it allows for proof in the aggregate." *Id.* at 195; *see also In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (holding, in action challenging alleged practice of paying

lower benefits and charging higher premiums to blacks in sale of life insurance, damages could be determined on a class-wide basis); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) (reversing decertification in class action alleging cell phone overcharges; explaining that "common issues predominate where individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria—thus rendering unnecessary an evidentiary hearing on each claim").

CONCLUSION

Dukes does not bar the use of aggregate proof in this case. Such evidence can be critical to the ability of traditionally disenfranchised groups to vindicate their rights and it is often the only practical means of proving harm. The decision below is fully consistent with accepted methodology for establishing aggregate harm in wage and hour cases. For the foregoing reasons, Amici respectfully urge this Court to affirm the decision of the Superior Court.

Respectfully submitted,

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EXHIBIT A

STATEMENTS OF INTEREST OF AMICI CURIAE

The **Impact Fund** is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund is a California State Bar Legal Services Trust Fund Support Center, providing assistance to legal services projects throughout the State of California. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

AARP is a nonprofit, nonpartisan organization with a membership that helps people 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. A significant percentage of AARP's members are in the workforce and the protections available to them under the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), and other statutes that safeguard the rights of employees are of the utmost importance to their economic security and self-esteem. In a variety of ways, including legal advocacy as an amicus curiae, AARP supports the rights and protections afforded older workers under federal and state employment laws.

The **Asian Law Caucus** ("ALC") was founded in 1972 as the nation's first Asian American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. ALC has a strong interest in this case because class and representative actions have been key tools that the ALC uses to vindicate the

rights of clients and community members who are too vulnerable to bring suit to enforce their rights on their own.

The **Asian Pacific American Legal Center of Southern California** (APALC) is a nonprofit organization dedicated to advocating for civil rights, providing legal services and education, and building coalitions to positively influence and impact Asian Americans, Native Hawaiians, and Pacific Islanders (AA/NHPIs), and to create a more equitable and harmonious society. As part of its civil rights work, APALC has served hundreds of workers and aided them in bringing claims for unpaid wages and other employment law violations. Since its founding in 1983, APALC has worked on numerous cases and policy initiatives to promote immigrants' rights and workers' rights, including the rights of workers to pursue their claims collectively through the class and collective action mechanisms. APALC is a member of the Asian American Center for Advancing Justice along with the Asian American Justice Center in Washington D.C., the Asian American Institute in Chicago, and the Asian Law Caucus in San Francisco.

California Rural Legal Assistance Foundation ("CRLAF") is a non-profit legal services provider which advocates for the rural poor in California and promotes the interests of low wage workers, particularly farm workers. Since 1986 CRLAF has recovered wages and other compensation for thousands of low-wage workers in multiple workforce-wide lawsuits including class actions. CRLAF often relies on meeting its clients' burden in these cases through means of representative testimony and aggregate proof. Without these mechanisms, many low-wage workers particularly farm workers, would not be able to vindicate their rights in court and receive their unpaid minimum wages, overtime, and other amounts owed for their work, as it is impossible in many cases for all affected workers to present individual testimony in court.

The **Disability Rights Education & Defense Fund** (DREDF), based in Berkeley, California, is a national non-profit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy and law reform efforts. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, and has served as party counsel in both individual and class action litigation to enforce the critical disability access entitlements mandated by those laws.

The **Legal Aid Society – Employment Law Center (ELC)** is a non-profit public interest law firm whose mission is to protect and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, ELC has represented plaintiffs in cases involving workplace rights, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. ELC often brings cases for low-wage workers as class and collective actions.

The **National Consumer Law Center** ("NCLC") is recognized nationally as an expert in consumer credit issues, and has drawn on this expertise to provide information, legal research, policy analyses and market insights to federal and state legislatures, administrative agencies, and the courts for over 43 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes a nineteen-volume Consumer Credit and Sales Legal Practice Series, many of which address issues related to aggregate litigation and the importance of collective actions in the enforcement of consumer rights including, inter alia, Unfair and Deceptive Acts and Practices (8th ed. 2012), Federal Deception

Law (1st ed. 2012), Credit Discrimination (5th ed. 2009, and 2012 Supplement) and Consumer Class Actions (7th ed. 2010 and 2012 Supplement). NCLC frequently is asked to appear as amicus curiae in consumer law cases before trial and appellate courts throughout the country and does so in appropriate circumstances.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, with members and supporters nationwide, including more than 5,000 in Pennsylvania, appears before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has long been concerned with the proper application of class-actions standards and protection of the due-process rights of non-named class members in class actions. Public Citizen attorneys have in many cases represented class members who objected to settlement of their claims. At the same time, Public Citizen understands that class actions are a critical tool for seeking justice where defendants have engaged in the same or similar unlawful conduct toward many people—consumers and employees especially—that have resulted in injuries that are large in the aggregate, but small on a per-person basis. In that situation, individual litigation is often impossible, and class actions offer the only means for both individual redress and class-wide remedies, as well as deterrence of wrongful conduct. Public Citizen has participated as lead counsel, co-counsel, or amicus curiae in many of the U.S. Supreme Court's decisions in class-action cases, including *ShadyGrove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010) (lead counsel for petitioner), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (co-counsel for respondents), *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (co-counsel for petitioner), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (counsel for amicus).

Public Justice, P.C. is a national public interest law firm dedicated to pursuing justice for the victims of corporate and governmental abuses. Public Justice specializes in precedent-setting and socially significant cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Public Justice regularly represents employees and consumers in class actions, and its experience is that the class action device is often the only meaningful way that individuals can vindicate important legal rights.

CERTIFICATE OF SERVICE

I, Alan M. Feldman, Esq., hereby certify that a true and correct copy of the foregoing was served on the below counsel by first-class mail and email on this 22nd day of January, 2013.

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