No. 14-1124

IN THE

Supreme Court of the United States

WAL-MART STORES, INC., AND SAM'S EAST, INC.,
Petitioners,

v.

MICHELLE BRAUN, on behalf of herself and all others similarly situated,

and

DOLORES HUMMEL, on behalf of herself and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

Michael D. Donovan
DONOVAN AXLER, LLC
1845 Walnut St.
Suite 1100
Philadelphia, PA 19103
(215) 732-6067

Judith L. Spanier
ABBEY SPANIER, LLP
212 East 39th St.
New York, NY 10016
(212) 889-3700

Robert S. Peck
Counsel of Record
Andre M. Mura
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th St. NW, Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Respondents

QUESTIONS PRESENTED

This brief responds to the second of two petitions filed by Wal-Mart arising from the same case. This Petition seeks a writ of certiorari to the Supreme Court of Pennsylvania, which only accepted review of a question of state law. It specifically denied that it addressed any due-process question. Although this brief in opposition responds to the full panoply of arguments and issues raised in the virtually identical petition filed here as in No. 14-1123, seeking a writ of certiorari to the Superior Court of Pennsylvania, and thus, as in the Brief in Opposition filed in that case, believes the issues are more properly understood as presenting two separate questions, listed below as questions two and three, the only proper question arising from the Pennsylvania Supreme Court's ruling is question one:

1. Is a federal question presented by the Pennsylvania Supreme Court's ruling that the case was not an instance of "trial by formula" and was conducted in accordance with Pennsylvania law and procedure?

2. Does a trial based on corporate wide policies and practices, including payroll scheduling and controls, internal audits and executive admissions, in which class damages were calculated from an exacting examination of extensive business records covering every member of the class and utilized by the defendant to determine each employee's paycheck, withholding tax, and Social Security contributions, and not rebutted by defendant through its own decision not to call rebuttal witnesses, amount to a "trial by formula" that raises due process concerns?

3. Does the use of replicated damages proof through valid methods of extrapolation, necessary as a result of defendant's spoliation of business records, deny a defendant due process?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

BRIEF FOR RESPONDENTS IN OPPOSITION 1

COUNTERSTATEMENT OF THE CASE 4

A. Underlying Facts 4

B. Proceedings Below 6

REASONS FOR DENYING THE PETITION 13

I. The Underlying Record, As Well As the Spoliation of Evidence, Makes This Case a Particularly Poor Vehicle to Consider the Question Presented. 15

II. Wal-Mart Has Not Identified an Actual Conflict Among Lower Courts That Requires This Court's Attention. 19

A. Extrapolation supplied the jury with facts needed to implement its adverse inference from spoliated evidence, and its use created no conflict among lower courts. 19

B. Even if it were relevant to this case, which Respondents deny, the lower courts do not conflict on the appropriate use of classwide evidence. 22

C. This case presents no issue previously addressed by this Court. 31

CONCLUSION..... 34

TABLE OF AUTHORITIES

Cases

Armstrong v. Manzo, 380 U.S. 545 (1965) 18

Automated Solutions Corp. v. Paragon Data Systems, Inc., 756 F.3d 504 (6th Cir. 2014) 21

Beaven v. United States Department of Justice, 622 F.3d 540 (6th Cir. 2010) 21

Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (8th Cir. 2014), *petition for cert. filed*, No 14-1146 (Mar. 19, 2015) 29

Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008) 24, 25, 33

Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) 27

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 20

Duran v. United States Bank National Association, 325 P.3d 916 (Cal. 2014) 22, 23, 24

Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423 (2d Cir. 2001) 20

Hale v. Wal-Mart Stores, Inc., 231 S.W.3d 215 (Mo. Ct. App. 2007) 28

Hansberry v. Lee, 311 U.S. 32 (1940) 28

Harvis v. Roadway Exp. Inc., 923 F.2d 59 (6th Cir. 1991) 19

Iliadis v. Wal-Mart Stores, Inc., 922 A.2d 710 (N.J. 2007) 14, 30

In re Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990) 26

In re Urethane Antitrust Litigation, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015) 29

Jimenez v. Allstate Insurance Co., 765 F.3d 1161 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (Jan. 27, 2015) 29

Johnson v. Nextel Communications Inc., 780 F.3d 128 (2d Cir. 2015) 33

Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004) 33

Kriner v. Dinger, 147 A. 830 (Pa. 1929) 19

Kronisch v. United States, 150 F.3d 112 (2d Cir. 1998) 20, 22

McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008) 24, 25, 26

Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311 (Fed. Cir. 2011) 20

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 19

Philip Morris USA Inc. v. Jackson, 131 S. Ct. 3057 (2011) 28

Residential Funding Corp. v. DeGeorge Finance Corp., 306 F.3d 99 (2d Cir. 2002) 21

Richards v. Jefferson County, 517 U.S. 793 (1996) 28

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 33

Salvas v. Wal-Mart Stores, Inc., 893 N.E.2d 1187 (Mass. 2008) 14, 17, 30

Scott v. American Tobacco Co., 949 So. 2d 1266 (La. Ct. App. 2007) 28

Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001) 20

Smilow v. Southwest Bell Mobile Systems, Inc., 323 F.3d 32 (1st Cir. 2003) 32

Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) 28

Story Parchment Co v. Paterson Parchment Co., 282 U.S. 555 (1931)..... 32

Strawn v. Farmers Insurance Co., 258 P.3d 1199 (Or. 2011), *cert. denied*, 132 S. Ct. 1142 (2012) 28

Teamsters v. United States, 431 U.S. 324 (1977) 31

The Bermuda, 70 U.S. 514 (1865) 21

United States v. Armour & Co., 402 U.S. 673 (1971) 31

Vazquez-Corales v. Sea-Land Service, Inc., 172 F.R.D. 10 (D.P.R. 1997) 21

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 31

Wal-Mart Stores, Inc. v. Lopez, 93 S.W.3d 548 (Tex. App. 2002) 27

West v. Goodyear Tire & Rubber Co., 167 F.3d 776 (2d Cir. 1999) 20, 21

Statutes

La. Civ. Code art. 2315(A) 29

Or. Rev. Stat. § 742.520. 29

Wage Payment and Collection Law, 43 Pa. Stat. §§ 260.1-260.12 ..... 5, 7, 30

Other Authorities

Chitty, Sir T. Willes, *et al.*, *Smith's Leading Cases* (13th ed. 1929) 21

Gorelick, Jamie S., *et al.*, *Destruction of Evidence* (2015) 21

Rules

Fed. R. Civ. P. 23 ..... 28, 30

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Michelle Braun and Dolores Hummel, on their own behalf and as representatives of classes of similarly situated persons, respectfully request this Court deny the petition for writ of certiorari, seeking review of the Pennsylvania Supreme Court's decision in this case.

Petitioners Wal-Mart Stores, Inc. and Sam's East, Inc. (collectively, "Wal-Mart") were found liable after a jury trial for failing to pay wages to their Pennsylvania employees for contractual paid rest breaks and work off-the-clock, but found not liable for alleged missed meal breaks.

Wal-Mart now claims[1] it was denied due process in two separate ways. First, it asserts that the 32-day jury trial of the class's claims, which relied on Wal-Mart's own regularly kept business records, manifold corporate admissions, internal corporate audits, and an unchallenged adverse-inference jury instruction for missing records, constituted a "trial by formula." Second, Wal-Mart claims it was foreclosed

[1] Wal-Mart has filed two petitions for certiorari arising from this matter. One Petition, seeks a writ of certiorari to the Superior Court of Pennsylvania, No. 14-1123, which addressed Wal-Mart's asserted due process issue and rejected it. A second Petition, this one, seeks a writ of certiorari to the Supreme Court of Pennsylvania, which accepted review only on whether the claim of a "trial by formula" violated Pennsylvania law and rules and stated that it was not addressing any federal due process claims. Wal-Mart stated that "due to an absence of authority regarding the court to which a petition should be directed," it filed simultaneous identical petitions. Pet. 13 n.2. Respondents respond to both in full separately, but call attention to the fact that the Pennsylvania Supreme Court decision rested on state law grounds.

from presenting individualized defenses, though it identifies no court order or other basis to support the argument because, in fact, the trial court imposed no restriction on Wal-Mart's presentation of evidence.

Both appellate courts below rejected the factual premises of Wal-Mart's due-process claims. The two courts concluded that "the evidence of Wal-Mart's *liability* to the entire class for breach of contract and WPCL [Pennsylvania Wage Payment and Collection Law] violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits." Pet. App. 19a (emphasis in original). In fact, the jury was presented with exacting evidence and corporate admissions of systemic wage payment violations arising from payroll pressure "to increase profits and decrease payroll by understaffing stores." *Id.* at 20a. Wal-Mart's own regularly maintained business records—relied on by Wal-Mart itself to audit stores and to deduct automatically one minute's pay from employees who clocked out for 16 minutes rather than the mandatory 15-minute break—evidenced damages from missed breaks and off-the-clock work.

The jury was also presented with the stipulated fact that Wal-Mart stopped keeping the records after it had been sued in eight other states for wage-payment violations. *See id.* at 137a, 340a n.5, 285a. Without objection from Wal-Mart, the trial court instructed the jury that it may take an adverse inference from Wal-Mart's failure to keep records during that period and could utilize expert testimony to reach a verdict. For that period of time, expert testimony extrapolated missed breaks and the wages owed from the years of existing records. Wal-Mart's

expert testified that there was nothing wrong with the methodology utilized by the class's experts. The courts below uniformly found the evidence sufficient to present a jury question, which the jury resolved in favor of the plaintiff class with respect to rest breaks and off-the-clock work and in favor of Wal-Mart with respect to meal breaks.

Wal-Mart, though claiming it was "foreclosed" from presenting individualized evidence, in fact cross-examined its own senior corporate officers, all of whom swore to the accuracy of the company's payroll records. *Id.* at 133a. Wal-Mart also cross-examined the six named class representatives and called nine other hourly employees in an attempt to demonstrate that its own self-corrected business records, which were used for determining payroll, tax withholding, and various other official reporting requirements, were somehow inaccurate. Despite having the opportunity to do so, Wal-Mart voluntarily chose not to elicit explanations to counter evidence "sufficient to support the factfinder's determination that there was an extensive pattern of discrepancies between the number and duration of breaks earned and the number and duration of breaks taken" reflected in the business records themselves. *Id.* at 19a. No ruling from the court prevented Wal-Mart from calling any witness for its "individualized defenses." *Id.* at 270a n.4.

Wal-Mart's Question Presented in this case lacks the factual predicates that would warrant certiorari review. The courts below properly allowed the jury to consider Wal-Mart's uniform business practices and its business records in answering "the single, central, common issue of liability . . . : whether Wal-Mart failed to compensate its employees in

accordance with its own written policies." *Id*. at 23a. This was a trial by corporate record and admission, not a "trial by formula."

Wal-Mart's computerized record-keeping system accurately memorialized—down to the minute—each and every time an employee took a rest break or worked after a scheduled shift concluded. Wal-Mart mandated the editing and finalizing of these records daily to assure utmost accuracy. Wal-Mart's gambit to shut down its record-keeping in a transparent bid to make it impossible for employees to prove damages from systemic wage-and-hour violations for a period of the time covered by this lawsuit cannot be the predicate for Wal-Mart to claim a denial of due process. Yet, that is essentially the distillate of its legal argument against the use of common proof and extrapolation evidence in this case.

Based on its imaginative re-writing of the record, the absence of an underlying factual basis to raise the Question Presented, and the absence of an applicable circuit conflict, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Underlying Facts

This state-law wage-and-hour class action, brought on behalf of nearly 187,000 current and former Pennsylvania employees of Wal-Mart, sought unpaid wages for guaranteed, non-negotiable, and un-

waivable[2] paid rest breaks that workers were forced to miss during the period from 1998 to 2006. All Wal-Mart hourly employees were instructed—by an employee handbook, break-room postings, computer-based training programs, and employee orientations—that they were to receive paid rest breaks and full compensation for all hours worked under corporate policies known internally as PD-07 and PD-43. *Id*. at 35a-37a. The break policy established that hourly associates earned one 15-minute paid rest break for every three hours worked. *See id*. at 35a-37a, 37a ("Take a break and get paid for it!").[3] Associates were also informed that disciplinary action would be taken for missed breaks or breaks that were "too long, too short, or untimely." *Id*. at 35a. Supervisors and managers were not permitted to require or request associates to work during their paid breaks, and employees were otherwise told that Wal-Mart was committed to paying every associate for the work they performed. *Id*. at 36a-37a, 71a-72a. Volunteered off-duty work without pay was forbidden. *Id*. at 74a, 105a. These policies were undisputed during the litigation. *Id*. at 169a.

Wal-Mart used a centralized "payroll scheduling system" that staffed its stores not by the man-hours required to do the job but instead by the total wage expense necessary to improve store profits year-to-year. R.9121 ("Operations' goal is to have

---

[2] *See* Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Stat. § 260.7 (prohibiting any "private agreement" to forgo wages).

[3] "Essentially, Wal-Mart promised to pay a full-time employee for a forty-hour workweek in exchange for thirty-seven-and-a-half hours of labor (including meal periods) and two-and-a-half hours of rest." *Id*. at 212a-13a.

payroll below last year's percentages by two tenths of a percent . . . The Preferred Scheduling sets up the ideal number of hours based on sales volume of the store."). As part of that system, payroll was by far the largest "controllable expense," and computerized time clocks tracked employee hours and breaks. Pet. App. 145a. The system automatically deducted from an employee's paycheck for even a single minute over the authorized 15-minute paid break, without any individual inquiry. *Id*. at 67a, 101a, 111a, 131a, 155a. The system generated Time Clock Punch Exception Reports ("TPERS") that specifically listed by employee and by shift "SHORT BREAK," "TOO FEW BREAKS" and "TOO FEW MEALS." R.8644a-8648a, 8964a; Pet. App. 37a, 131a. Wal-Mart's own records indicated that the average store would adjust time records 300 to 600 times daily to address exceptions. *Id*. at 152a. All punch exceptions were required to be resolved before Wal-Mart cut paychecks. *Id*. at 95a.

Wal-Mart eliminated rest-break punching on February 10, 2001, after litigation was filed in eight states over violations of its rest-break policy, a fact it stipulated to at trial. *Id*. at 8a n.5. The trial court expressly held that "[n]o explanation other than the desire to eliminate evidence of corporate conduct was ever presented as to why corporate policy changed to stop this record keeping." *Id*. at 285a (footnote omitted). Wal-Mart did not otherwise change its policies with respect to rest breaks and off-the-clock work.

B. Proceedings Below

Michelle Braun brought this class action on March 21, 2002, alleging Wal-Mart failed to compensate hourly employees for rest breaks and off-

the-clock work as mandated in Wal-Mart's policies. *Id.* at 38a. Dolores Hummel filed a separate class action with similar allegations on August 30, 2004. *Id.* at 39a. The complaints alleged breach of contract, unjust enrichment, and violation of a state wage law, the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Stat. §§ 260.1-260.12. As a matter of substantive state law, the WPCL expressly authorized a class action on behalf of "employes similarly situated." *Id.* at § 260.9a(b).

The parties engaged in wide-ranging class certification discovery, during which, *inter alia*, Wal-Mart deposed 60 current and former hourly employees. R.4225a, App. F, Tr. FofF at ¶16. After two separate two-day evidentiary hearings in *Braun* and in *Hummel*, and after considering "hundreds of exhibits regarding Wal-Mart's policies, practices, and record-keeping, and consider[ing] arguments, testimony and Appellees' expert reports . . . analyzing Wal-Mart's business records," the trial court concluded that plaintiffs had "demonstrated the systemic loss of contractual break time," thereby establishing the existence of common questions of law or fact that predominated. Pet. App. 40a.

The court certified classes in both actions on December 27, 2005, consisting of "all current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998 to the present." *Id.* The cases were consolidated for trial, after Wal-Mart's petition for interlocutory review was denied by the Superior Court. *Id.*

Trial began September 8, 2006 and lasted 32 days. *Id.* The class called 18 fact witnesses and presented three expert witnesses. *Id.* at 41a. Among

the fact witnesses were Wal-Mart's corporate designee for Information Systems, who testified about the reliability and accuracy of Wal-Mart's computerized business records and systems, R.4436a-47a (Greg Campbell video), and Cheryl Lippert, Wal-Mart's director of human resources. Pet. App. 182a-83a. Former Wal-Mart Regional Vice President for the region including Pennsylvania, Castural Thompson, testified about the extensive payroll pressure to reduce store costs, the fact that Wal-Mart's internal audits showed extensive violations of its paid rest-break commitment, and that "major" violations were still occurring when Mr. Thompson left the company in April 2006. R.4408a-14a, 4416a-18a, 4421a (Thompson Video). Other testimony from senior corporate officers confirmed this payroll pressure and the reliability of Wal-Mart's corporate records, including Canetta Ivy Reid (Wal-Mart's corporate designee and Director of Corporate Employment Compliance) R.4373a-85a, Michael Huffaker (Divisional Vice President) R.43291-45a, Charles Holley (Senior Vice President of Finance) R.4448a-50a, Don Swann (Executive Vice President for People Division) R.4381a-406a, Don Harris (Chief Operating Officer), and Thomas Coughlin (Chief Executive Officer) R.4269a-305a.

The class's industry expert, Dr. Frank Landy, testified as to Wal-Mart's corporate-wide policies, practices, payroll scheduling, internal auditing, and store manager bonus plans, among other things. He explained that pressure to reduce payroll costs, combined with the store manager bonus scheme that rewarded payroll-cost reductions, led to understaffing and rest break violations. Pet. App. 42a. *See also id.* at 82a, Ex. 480 (Wal-Mart CEO's "Top Five Reason [sic] Cashiers Quit," identifying "can't get breaks, and

Understaffed.").[4] Wal-Mart was aware of this issue because it had conducted a series of internal audits culminating in a nationwide audit, the "Shipley Audit," that discovered 76,472 meal- and rest-break violations over a one-week period covering 128 stores. *Id*. at 151a-53a. This audit (and others) had been sent to the most senior members of Wal-Mart management. *Id*. at 150a. That Wal-Mart had eliminated rest-break punching following this audit led Dr. Landy to opine that Wal-Mart had destroyed the "smoking gun" evidence of its policy violations. *Id*. at 42a & n.7.[5]

Another expert for the class, Dr. L. Scott Baggett, conducted a meticulous computerized analysis using Wal-Mart's own business records to determine the number of missed rest and meal breaks by Pennsylvania hourly employees, which covered all 139 Pennsylvania Wal-Mart stores from 1998 to 2006. *Id*. at 43a-44a, 88a-89a. A third expert, Dr. Shapiro, examined records reflecting the log-ins and -outs of cash register operators, using records for 2001 through 2006 and extrapolating data for 1998 through 2000, as well as a number of Pennsylvania stores for which records were unavailable. *Id*. at 15a, 87a (Wal-Mart had "purged" data). In total, the records

---

[4] Dr. Landy observed that a manager who recaptured one hour in associate break time per week for all store employees would enhance his annual bonus by $82,000. *Id*. at 146a. From an associate's perspective, one hour per week in stolen wages would amount to the loss of one week's pay per year.

[5] The Shipley Audit reviewed and collected missed rest and meal breaks from Wal-Mart's "Time Clock Archive Reports." *Id*. at 151a. The class's experts used the same business records in precisely the same manner as the Shipley Audit. *Id*. at 102a-03a.

represented 46 million individual shifts reflecting hours worked, breaks earned and actual rates of pay for all class members. *Id*. at 9a. To account for missing shift records that Wal-Mart had failed to produce, statistical extrapolation provided information for an additional 6 million shifts. *Id*. During the period in which rest break information was not maintained, Wal-Mart did not change its payroll scheduling system or manager bonus program, thereby maintaining the same payroll pressures that existed during the period in which records were kept and that resulted in understaffing and rest-break and off-the-clock violations.

All damages analyses by the class's experts relied on Wal-Mart's "own computer records maintained in the regular course of their business for business purposes, namely to determine the pay earned by hourly employees." *Id*. at 163a. Keeping these records and keeping them accurately were also mandated by state law. *Id*. at 163a, 312a, 334a, 339a. Wal-Mart maintains these records for federal, state, and municipal tax purposes, unemployment compensation assessments, social security deductions and employee contributions, other regulatory purposes, and payroll. *Id*. at 312a. Wal-Mart "presented no evidence at trial, which . . . contested the accuracy of these records." *Id*. at 291a; 312a. The records established the hours worked and rest breaks taken by employees. The electronic records also established when employees were operating cash registers, for which they had to log-in, while they were also clocked-out as if on a rest break.

Wal-Mart's expert, Dr. Martin, testified that Dr. Baggett's analysis counted the Wal-Mart data correctly and was easily replicated. *Id*. at 128a. She

also testified that, if the data was good, Dr. Baggett's extrapolation used a proper methodology; she just contended that Wal-Mart's own data was inaccurate. *Id*. at 129a. Dr. Martin admitted that as a witness for Wal-Mart in other wage-violation class cases she had used extrapolation. *Id*. at 139a. She conceded that if Wal-Mart had not ended its time clock record-keeping, Dr. Baggett would not have had to extrapolate from other data because "he would have data rather than extrapolation." *Id*. at 138a.

Despite designating more than 130 witnesses on its witness list, Wal-Mart called only 12 fact witnesses and two expert witnesses (out of eight retained experts). Confronted with its own records that showed "SHORT BREAK," "TOO FEW BREAKS," and "TOO FEW MEALS," Wal-Mart made the strategic decision to assert a common defense: that the records did not mean what they said. *Id*. at 129a (Superior Court finding that "Dr. Martin's criticism was based on her opinion that the data was 'bad,' rather than that the methodology of extrapolation was flawed.").[6] The employees Wal-Mart called testified that they had never been forced to miss a rest break and had always been paid for the breaks they took. *Id*. at 12a-13a.

The trial court imposed no restrictions on the number of witnesses any party could call or any time

---

[6] At class certification, the trial court had anticipated this common defense: "the defendants' contention that their records cannot be relied upon and that individualized explanations make the records questionable as proof of liability or damages are questions of fact for jury determination." *Id*. at 344a.

constraint on the length of the trial.[7] Although Wal-Mart had pleaded the affirmative defense of "voluntary waiver", at trial Wal-Mart made the tactical decision to abandon the defense. Pet. App. 186a ("Wal-Mart withdrew this defense at the close of Appellees' case."). As the trial court later stated, the jury also rejected the idea that hourly employees had voluntarily renounced their breaks and the pay for those breaks. *Id.* at 291a, 312a. Wal-Mart failed to move to decertify the class at the close of the class's case or anytime thereafter.[8]

Because Wal-Mart had eliminated business record evidence that could be used against it in litigation, the jury was instructed that it was permitted to make an adverse inference from the fact that the records were missing, *id.* at 285a n.19, and Wal-Mart did not object to the instruction.

On October 12, 2006, the jury returned a unanimous verdict in favor of Wal-Mart on all claims relating to missed meal periods,[9] and a unanimous verdict in favor of the class on claims related to rest breaks and off-the-clock work. *Id.* at 46a. The special

---

[7] On the weekend before trial, Wal-Mart identified "hundreds of new witnesses never listed on their pre-trial memorandum," but that request was withdrawn before trial. *Id.* at 270a n.4.

[8] Absent a later-filed motion enabling the lower court to address a developing error, Wal-Mart waived any claim that subsequent proceedings had rendered class certification improper under Pennsylvania law. *See Samuel-Bassett v. Kia Motors America, Inc.*, 34 A.3d 1, 21 (Pa. 2011), *cert. denied*, 133 S. Ct. 51 (2012).

[9] Wal-Mart did not appeal from class certification of this claim.

jury verdict interrogatories as to damages reflected that the class suffered unpaid wages for more than 37 million missed rest breaks during the class period. R.3982. Wal-Mart raised multiple issues on appeal. The Superior Court largely affirmed the judgment, reversing only the calculation of attorneys' fees by the trial court. Pet. App. 264a. The Pennsylvania Supreme Court granted discretionary review limited to whether "trial by formula" violates Pennsylvania law with regard to class actions. *Id*. at 4a. It stated, "[t]here are no federal due process claims asserted." *Id*. at 6a n.4. The Supreme Court specifically held that

> the now-disapproved "trial by formula" process at issue in *Dukes* was not at work here, because there was no initial or prior adjudication of Wal-Mart's liability to a subset of employees that would then be extrapolated to the rest of the class. . . . [T]he evidence of Wal-Mart's *liability* to the entire class for breach of contract and WPCL violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits.

Id. at 19a (emphasis in original). The court also held that "[b]oth parties had ample opportunity to present evidence to explain these [rest-break] discrepancies, *i.e.*, to show that the discrepancies were or were not evidence of class-wide wage-and-hour violations." *Id*.

REASONS FOR DENYING THE PETITION

Wal-Mart's petition should be denied because the actual facts of this case do not present the issue

Wal-Mart asserts. Wal-Mart was not subjected to a "trial by formula," was not precluded from calling any witness, and was not denied a full and fair opportunity to confront or contest the inferences arising from its own business records. Extrapolation evidence to calculate damages was only required because Wal-Mart had spoliated its business records, resulting in an adverse inference jury instruction to which it did not object and from which it did not appeal. All the business records here constituted class-wide common evidence that covered all Pennsylvania employees. The record here established, as other courts have found, that "[t]he operations of individual Wal-Mart stores, including payroll controls, are directed by corporate-wide policies established, disseminated, and carefully controlled by the home office." *Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187, 1192 (Mass. 2008); *see also Iliadis v. Wal-Mart Stores, Inc.*, 922 A.2d 710, 714-15 (N.J. 2007).

These same business records, which exonerated Wal-Mart from liability for the class's meal-break claims, provided an equally valid basis for the jury's verdict as to rest-break and off-the-clock work violations. That Wal-Mart used the same systems to electronically dock employee pay for rest breaks that were even a minute longer than permitted without any individual inquiry of the employees reinforced the reliability of the business records. Pet. App. 37a, 101a, 111a, 131a, 155a. Thus, Wal-Mart seeks to have it both ways: an opportunity to impeach its own records when they work against it and reliance on the same records when they work for it. Due process does not operate that way.

Nothing prevented Wal-Mart from calling as many class members as it wanted to demonstrate that its records were inaccurate. Rather than call the witnesses it noticed for trial, Wal-Mart made a strategic decision to call only a small handful. A sophisticated corporate defendant's strategic decisions—including the spoliation of evidence, the abandonment of an affirmative defense, and the failure to call listed witnesses—are not the ingredients of a legitimate due-process challenge. Wal-Mart's Petition constitutes nothing but legal gamesmanship in a case where the issues they assert simply do not arise.

I. The Underlying Record, As Well As the Spoliation of Evidence, Makes This Case a Particularly Poor Vehicle to Consider the Question Presented.

Contrary to its Petition, Wal-Mart was never denied an opportunity to examine class members in this case. As the corporate entity that designed, directed, maintained, audited, and reported on its business records, Wal-Mart had as much if not more of an opportunity to contest those business records at trial as Respondents. Stripped of its rhetorical framing about "inherently individualized claims," proof of damages through employee shift records provided precise individualization, while Wal-Mart presented a *common*, fact-based defense that its records did not mean what they said. That Wal-Mart stopped keeping some records because it faced litigation for which the records would serve as damning damages evidence did not transform this *common*, fact-based defense into a challenge to any expert analyses. All of the courts below and even Wal-Mart's own expert concluded that the class's

methodologies were not flawed. Instead, a classic jury question was presented about the inferences to be drawn from internal audits and other corporate records that themselves used the terms "SHORT BREAK," "TOO FEW BREAKS," and "TOO FEW MEALS."

This case was not the product of the testimony of only six employees and an extrapolation of "a small subset of class members and a portion of the relevant time period to *all* class members over the *entire* eight-year class period." Pet. 2. Instead, as the Pennsylvania Supreme Court held, "there was no initial or prior adjudication of Wal-Mart's liability to a subset of employees that would then be extrapolated to the rest of the class." Pet. App. 18a-19a. Wal-Mart's centralized payroll scheduling system (which sought "to have payroll below last year's percentages by two-tenths of a percent"), its manager bonus scheme, its internal auditing practices and its business records were the focal point of this trial. The testimony of Wal-Mart executives, confirming those systems and practices along with the resulting understaffing, the problem of missed breaks and off-the-clock work, and the accuracy of the extensive business records that recorded the shifts, provided the bulk of the evidence that determined liability.

The class's experts did not use a "sample" at trial; they used all of the business records Wal-Mart had produced. To calculate damages, they examined 46 million individual shift records that reflected actual hours worked, breaks earned, and actual rates of pay for all class members. *Id.* at 9a. All of these class members were specifically identified and will participate in the judgment recovery. The experts did not construct a financial, market-price or socio-

economic model; they applied arithmetic to extend observations about existing records to periods where the same business records were missing, purged, or no longer kept—something every business enterprise or government entity does practically every day. That Wal-Mart's own internal audits matched these assessments, and the fact that Wal-Mart prevailed on the class's meal-break violation claims, which were tried on a unitary basis using the same time-clock records, refutes the contention that Wal-Mart was denied due process or somehow subjected to a "trial by formula."

Wal-Mart's insinuation that its due-process rights could have been met only had it been permitted to challenge the accuracy of its shift records through "claimant specific inquiries" (Pet. 21) was waived at trial because it made the tactical decision not to present or examine any class member about the missed or short breaks reflected in Wal-Mart's own records. Besides, no court order denied Wal-Mart that opportunity, and the trial judge expressly found that "no prohibition on calling 126,000 witnesses was ever imposed beyond the Court commenting on the absurdity of the 'threat.'" Pet. App. 270a n.4. Contrary to Wal-Mart's contentions, due process does not require a memory test whenever a business disputes the accuracy of its own business records. Whether an individual class member remembered at trial in 2006 if he or she was able to take a break on one particular day during a class period that began in 1998 would say little, if anything, about the reliability of the business record, which is why business records have been admissible under substantive state and federal laws for scores of decades or more. *Id*. at 339a; *see also Salvas*, 893 N.E.2d at 1205-06 ("Business records have a special place in our law of evidence"). This case

is not the appropriate vehicle for the re-examination of the substantive or due process limits of state and federal laws governing the admissibility of business record evidence.

The Pennsylvania courts repeatedly found below that Wal-Mart had "ample opportunity to present evidence to explain these [rest-break] discrepancies, *i.e.*, to show that the discrepancies were or were not evidence of class-wide wage-and-hour violations." Pet. App. 19a. Rather than reject Wal-Mart's desire to examine thousands of employees, the trial court "reject[ed] defendant's contention that thousands of employees will be needed to testify that the time records are inaccurate and do not explain individual reasons for inadequate breaks and off the clock work without pay." *Id.* at 344a-45a. The court correctly observed that Wal-Mart's case "can surely be more convincingly demonstrated than through employee rote testimonials of company loyalty." *Id.* at 345a. The trial judge further noted that "such testimony is routinely rejected by jurors and . . . that experienced defense counsel would never present a case to a jury in such an amateur and ultimately dysfunctional manner." *Id.* The record therefore makes clear that Wal-Mart was free to call anyone it wanted, despite the trial judge's advice that doing so would not likely convince the jury.

Despite having ample opportunity, Wal-Mart "presented *no evidence* whatsoever, either at trial or by affidavit on this [post-trial] motion, which has contested the accuracy of these records." *Id.* at 312a (emphasis added), 291a. While due process guarantees an opportunity to present a defense "at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), the

right is not unbounded and must still be an opportunity "appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Here, Wal-Mart had that opportunity, chose not to take advantage of it, and cannot now complain that the Constitution provides a basis for correcting a choice it now regrets. After all, a party "may not complain on appeal of errors that he himself invited or provoked." *Harvis v. Roadway Exp. Inc.*, 923 F.2d 59, 60 (6th Cir. 1991); *Kriner v. Dinger*, 147 A. 830, 832 (Pa. 1929) (same).

There is no reason to consider the other arguments in this matter because the case does not fairly present the Question Presented. Respondents, out of an abundance of caution, further submit that the decision below does not conflict with decisions of the lower federal courts.

II. Wal-Mart Has Not Identified an Actual Conflict Among Lower Courts That Requires This Court's Attention.

A. Extrapolation supplied the jury with facts needed to implement its adverse inference from spoliated evidence, and its use created no conflict among lower courts.

Wal-Mart suggests that "lower courts have split on whether it violates due process to facilitate classwide adjudication by permitting the use of extrapolation to relieve individual class members of their burden of proof and by eliminating class-action defendants' right to raise individualized defenses." Pet. 16-17. The cases cited by Wal-Mart demonstrate no conflict between the Pennsylvania courts'

treatment of this matter and rulings by the California Supreme Court and three federal courts of appeals, even if the factual predicates were present in the instant matter.

Here, extrapolation took place primarily because Wal-Mart purposefully stopped keeping records during the pendency of wage and hour class actions. *See* Pet. App. 167a, 340a n.5, 285a. This Court has recognized that all courts have the inherent authority "to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). Sanctions can be as draconian as "outright dismissal of a lawsuit," when the sanctionable conduct is committed by a plaintiff. *Id.* at 45. Spoliation of evidence by a defendant is equally also sanctionable.

Spoliation occurs when evidence is not preserved, and "litigation is 'pending or reasonably foreseeable.'" *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). *See also Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001). The sanction for spoliation "should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The sanction "should be designed to" deter future spoliations, "place the risk of an erroneous judgment on the party who wrongfully created the risk," and "restore 'the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" *Id.* (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). After all, "[i]t has long been the rule that spoliators should not benefit from

their wrongdoing, as illustrated by 'that favourite maxim of the law, omnia presumuntur contra spoliatorem.'" *Id.* (quoting 1 Sir T. Willes Chitty, *et al.*, *Smith's Leading Cases* 404 (13th ed. 1929)).

At least since 1865, this Court has regarded the destruction of documents in anticipation of litigation to be spoliation "of unusual aggravation, and warrants the most unfavorable inferences as to ownership, employment, and destination." *The Bermuda*, 70 U.S. 514, 550 (1865). The range of sanctions for spoliation "include dismissal of the case, the exclusion of evidence, or a jury instruction on the 'spoliation inference.'" *Vazquez-Corales v. Sea-Land Serv., Inc.*, 172 F.R.D. 10, 13 (D.P.R. 1997) (citation omitted); *see also Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 513 (6th Cir. 2014) (same) (internal quotation marks omitted).

A learned treatise establishes that the "most frequently-awarded issue-related sanction is deeming facts established for purposes of the litigation." Jamie S. Gorelick, *et al.*, *Destruction of Evidence* § 3.16, at 111 (2015).

No circuit and no state supreme court has ever suggested that an adverse inference instruction raises a due-process concern. Instead, all are plainly comfortable with such a sanction. *See*, *e.g.*, *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 554 (6th Cir. 2010); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002). Moreover, courts consistently find that "holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have

intentionally destroyed evidence to profit from that destruction." *Kronisch*, 150 U.S. at 128.

Simply put, Wal-Mart's complaint about extrapolation is misplaced. It was a remedy for spoliation of relevant evidence and raises no due-process issue.

B. Even if it were relevant to this case, which Respondents deny, the lower courts do not conflict on the appropriate use of classwide evidence.

In attempting to manufacture a conflict with the decisions of the Pennsylvania courts in this case, Wal-Mart points to the California Supreme Court decision in *Duran v. U.S. Bank Nat'l Ass'n,* 325 P.3d 916 (Cal. 2014), a case that did not involve the accuracy and reliability of an employer's voluminous business records, spoliation of such records, and a resulting adverse inference instruction. In contrast to this class's case—where damages were shown by counting up all hours worked and breaks earned from Wal-Mart's business records, extrapolating only where Wal-Mart's spoliation caused gaps in the business records—*Duran* was one of a series of California cases where workers claimed they were wrongly classified as exempt from overtime laws and regulations. Whether an employer was liable for misclassification under California law turned on "how individual employees perform[ed] their jobs," *id.* at 928, and not—as here—on the number of hours worked and breaks earned, all of which were meticulously recorded and maintained by Wal-Mart's computerized systems. Because the exemption issue presented a "particularly thorny" problem for

managing a class action, *Duran* held that labor-exemption class actions could proceed as long as the trial plan "permit[s] the litigation of relevant affirmative defenses, even when these defenses turn on individual questions." *Id.* at 929.

Unlike this case where liability and damages were tried for the entire class based on classwide common evidence including hours worked and breaks earned in 46 million shifts, in *Duran*, the trial court devised a plan to determine the defendant's liability to all class members based exclusively on a "profoundly flawed" 21-person sample testifying about their work habits. *Id.* at 920. In a second phase, the trial court determined the amount of overtime due to the sample members, averaged the sample members' damages and multiplied that average damage amount by the total number of people in the class. In *Duran* (but not here), the defendant was denied leave "to introduce [some 70] declarations and live testimony from class members," including class members who had opted out of the class. *Id.* at 923, 925. No such proffer was made here, and no such denial occurred here. Nor does Wal-Mart identify a single instance during the 32-day trial in which the trial court in any way limited it from putting on any witness or introducing any document into evidence.[10] The trial court's exclusion of this evidence in *Duran*, the California Supreme Court said, made it "very likely that a classwide judgment would encompass some employees who were properly classified, and the

[10] Wal-Mart's Petition does cite to record evidence, otherwise unidentified, where the record shows that one defense witness who could not hear the questions posed by her own counsel or by the court was excused from testifying. Pet. 8 (citing N.T. 10/04/06 p.m. at 32).

damages estimate extrapolated from the small sample would be highly inaccurate." *Id.*

In *Duran*, the court noted that the trial court proceeded with its sampling approach even though "[t]here was no precedent for using random sampling to establish *liability* in a class action involving the outside sales exemption." *Id.* at 922 (emphasis added). Later in the opinion, the court emphasized the different considerations applicable to defenses that raise individual questions about liability as opposed to the calculation of damages, calling it an "important distinction." *Id.* at 932. In this respect as well, the California decision does not conflict with the Pennsylvania one at issue here, where the Pennsylvania Supreme Court drew the same important distinction between liability and damages, noting that extrapolation was only required to add-up the damages in the present case. Pet. App. 19a.

Thus, *Duran* does not create the categorical ban Wal-Mart suggests it does. Instead, it permits "use of surveys and statistical sampling," as long as they are rigorously developed, common questions exist, and common proof provides "some glue that binds class members together apart from statistical evidence." *Id.* at 933. The flaw in the *Duran* trial court's use of sampling was due to its refusal to admit defendant's rebuttal evidence to the classwide evidence. *Id.* at 935. No proffer and no denial took place here, so that no conflict exists between this action and *Duran*.

Wal-Mart also claims the decision below conflicts with *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). Pet. 18. *McLaughlin* held, in the context of a

RICO case alleging that tobacco companies fraudulently induced class members to smoke "light" cigarettes having marketed them as healthier than full-flavored cigarettes, that it was not clear that all class members had chosen to smoke lights for that reason. Because reliance on a misrepresentation was an element of the action,[11] the court found individualized proof necessary "to overcome the possibility that a member of the purported class purchased Lights for some [other] reason," such as taste. *Id*. at 223. Here, reliance was not an issue, and Wal-Mart's testimony and admissions concerning its payroll scheduling system proved that it was the "root cause" of the systemic wage-violations, and these same business records provided classwide proof that established Wal-Mart's liability.

Still, Wal-Mart's brief focuses for its alleged conflict on *McLaughlin's* rejection of a "fluid recovery" approach to damages. Pet. 18 (citing 522 F.3d at 231). Under that approach, a class fund was to be established with individual shares collected after a simplified proof of claim, with any remaining funds distributed to the class's benefit under *cy pres* or other doctrines. *Id*. *McLaughlin* noted that such "'fluid recovery' has been forbidden in this circuit." 522 U.S. at 231. Still, it held that "the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *Id*. The *McLaughlin* court further explained that plaintiffs' method would result in "[r]oughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of

---

[11] This Court subsequently contradicted *McLaughlin*'s reliance analysis in *Bridge*, 553 U.S. at 655 (holding that reliance is not an element of a RICO claim).

individual claims" and "would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." *Id*.

Here, by contrast, the class calculated their damages by counting all hours worked and breaks earned from Wal-Mart's own business records. Nothing remotely approaching the "fluid recovery" condemned in *McLaughlin* was proposed or implemented. As a result, *McLaughlin* is entirely off-point.

Wal-Mart also asserts that the Pennsylvania decisions here conflict with *In re Fibreboard Corp.,* 893 F.2d 706 (5th Cir. 1990). *Fibreboard* involved more than three thousand individual personal injury cases where plaintiffs suffered from different diseases attributable to different defendants, the severity of physical injury varied from plaintiff to plaintiff, and the timing of the exposure and the products exposed to also varied. *Id*. at 707-08. The Fifth Circuit rejected full trials of 11 plaintiffs, illustrative evidence from 30 more, and extrapolation to 2,990 other class members as being "beyond the scope of federal judicial authority," infringing "upon the dictates of *Erie* that we remain faithful to the law of Texas, and upon the separation of powers between the judicial and legislative branches." *Id*. at 711.

Here, however, all class members suffered the same breach of contract at Wal-Mart's hands as evidenced by the common testimony of Wal-Mart's corporate officers, Wal-Mart's admissions, and its payroll scheduling system. Unlike the procedure rejected in *Fibreboard*, there was "no initial or prior adjudication of Wal-Mart's liability to a subset of employees that would then be extrapolated to the rest

of the class. . . . [T]he evidence of Wal-Mart's liability to the entire class for breach of contract and WPCL violations was established at trial by presentation of Wal-Mart's own universal employment and wage policies, as well as its own business records and internal audits." Pet. App. 19a. *In re Fibreboard* is plainly inapposite.

Finally, Wal-Mart invokes *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), as conflicting because it holds that a class-action defendant "has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in any way that eviscerates this right or masks individual issues." Pet. 19 (quoting 727 F.3d at 307). As noted above, Wal-Mart was not enjoined from raising individual defenses but, having been permitted to do so, chose not to. In any event, *Carrera* concerned the sole issue of ascertainability of class membership where the defendant had no record of class members' purchases. Wal-Mart nowhere contends that some or all of the 187,000 class members were unascertainable from the business payroll records it created and maintained. *Carrera* provides no basis to assert a conflict.

Without an actual conflict among the circuits, Wal-Mart then raises the specter of conflicting adjudications of its wage-and-hour cases in intermediate appellate courts in different states. In Texas, for example, the Court of Appeals found class certification inappropriate because it held individual issues of oral contract formation predominated over common issues, making class certification not the superior method for litigating the claims. *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 561 (Tex. App. 2002). Neither the appellate court in *Lopez* nor the

trial court mentioned any reports or testimony by Drs. Baggett and Shapiro, nor were the courts aware of the Shipley Audit. Missouri utilized a different approach, applying its state class-action rules to permit certification. *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo. Ct. App. 2007).

That different states apply different rules on class actions involving different state law claims and different evidence creates no warrant for this Court to review this case. This Court has repeatedly rejected the claim that Federal Rule of Civil Procedure 23 is the only method compatible with due process to prosecute a class action or that due process should "compel the [States'] adoption of the particular rules thought by this court to be appropriate for the federal courts." *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).

In *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), this Court recognized that even identically worded state rules do not require a lockstep approach with the federal rule. *Id.* at 2377-78. States remain "free to develop their own rules for protecting against . . . the piecemeal resolution of disputes," and only overstep this authority when they adopt "extreme applications" "inconsistent with a federal right that is 'fundamental in character.'" *Richards v. Jefferson Cnty.*, 517 U.S. 793, 797 (1996).

Nor does Wal-Mart's invocation of the rejected petitions for certiorari in *Strawn v. Farmers Ins. Co.*, 258 P.3d 1199 (Or. 2011), *cert. denied*, 132 S. Ct. 1142 (2012), or *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266 (La. Ct. App. 2007), *cert. denied sub nom. Philip Morris USA Inc. v. Jackson*, 131 S. Ct. 3057 (2011), supply a basis for this Court's review. *Strawn* involved a claim that due process required individualized proof

of reliance on terms of an insurance contract in a fraud claim, when state law did not and when state law required that such contracts provide full coverage for the claims at issue in every automobile insurance policy in the state. Or. Rev. Stat. § 742.520. *Strawn* provided no basis for this Court's review of the Oregon Supreme Court's decision and provides no basis for review of the Pennsylvania decisions here.

Scott also provides no basis to consider individualized proof. In *Scott*, Philip Morris was found liable on multiple, overlapping causes of action, several of which did not involve issues of reliance that would permit consideration of whether due-process requires individualized proof, rather than classwide proof, such as negligent design. *See* La. Civ. Code art. 2315(A).

Thus, these additional cases do not constitute a thumb on the scale that might tip the balance in favor of granting the petition. Instead, they merely emphasize that only a proper case can raise an issue of appropriate interest to this Court. Like *Strawn* and *Scott*, this is not a proper case.

The present state-law class action is also wholly different from the Eighth, Ninth, and Tenth Circuit cases Wal-Mart cites. Pet. 25-26 (citing *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 798-99 (8th Cir. 2014), *petition for cert. filed*, No 14-1146 (Mar. 19, 2015); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1167 (9th Cir. 2014), *petition for cert. filed*, No. 14-910 (Jan. 27, 2015); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256-57 (10th Cir. 2014), *petition for cert. filed*, No. 14-1091 (Mar. 9, 2015)). Because the present case involved only state substantive labor laws and

procedures, it should not be lumped in with any of Wal-Mart's federal cases.

The class's damages experts here also did not construct a time-and-motion, time-and-task, or econometric study or regression as a basis for their analyses, as was utilized in the federal cases. Instead, the class's experts compiled and analyzed Wal-Mart's own voluminous business records by taking the records as they found them, accepting the precise terms used in the records themselves, and using the data exactly as Wal-Mart had used the data. Where certain Wal-Mart records were corrupted, not produced, or unavailable because Wal-Mart had improperly eliminated its statutorily required record-keeping systems, the experts applied ordinary and unremarkable arithmetic extrapolations to fill-in the gaps Wal-Mart itself had created.

Even assuming *Bouaphakeo*, *Jimenez*, or *In re Urethane* evince confusion among the lower federal courts—despite their uniform agreement that "trial-by-formula" did not and would not occur in those cases—the present case would not cure that confusion because (i) the Pennsylvania class action rules are materially different from Rule 23 of the Federal Rules of Civil Procedure; (ii) the Rules Enabling Act does not apply to this state-court class action, which was expressly authorized by substantive state law, 43 Pa. Stat. § 260.9a(b); (iii) at least two other state supreme courts expressly agree with the decision of the Pennsylvania Supreme Court below, *Salvas,* 893 N.E.2d at 1192 (certifying Massachusetts class alleging identical claims); *Illiadis*, 922 A.2d at 714-15 (certifying New Jersey class alleging identical claims); and (iv) the business record laws and rules of the

states do not necessarily control in proceedings before the lower federal courts.

Thus, there are no real conflicts or confusion arising from this case that would warrant the Court's discretionary review.

C. This case presents no issue previously addressed by this Court.

Despite its allusions to *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Wal-Mart also fails to show that the decision below conflicts with any decision of this Court. This includes *Dukes*. Respondents have already explained that the lower courts here permitted class-wide proof of damages through meticulously kept business records that reflected the actual work times of all Wal-Mart Pennsylvania employees, but did not endorse any "trial by formula" in the sense contemplated by *Dukes*. *Dukes* held only that Title VII's remedial scheme required additional, individualized proceedings, as outlined in *Teamsters v. United States*, 431 U.S. 324 (1977), and thus any back pay could not be considered "incidental monetary relief." 131 S. Ct. at 2560. That understanding of Title VII and Federal Rule of Civil Procedure 23 does not cast any doubt on the fairness of the state court proceedings here.

Despite Wal-Mart's protestations to the contrary, the lower courts respected its "right to litigate the issues raised." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Yet Wal-Mart simply sought an unfair advantage when it terminated its record keeping systems, which had memorialized, down to the minute, each time an employee took a rest break or worked off-the-clock. Wal-Mart's spoliation

was the predicate for extrapolation and the adverse-inference instruction. In these circumstances, it would be ironic indeed if Wal-Mart's insistence that it was denied a fair hearing were credited, given that it was Wal-Mart who sought to deprive Respondents of a fair hearing by terminating record-keeping programs that state and federal law otherwise required.

Contrary to Wal-Mart's claims, this Court has never endorsed, even in *dicta*, the expansive view of due process Wal-Mart now advances. Wal-Mart's insistence that it can cease its record-keeping systems mid-litigation, ask to examine 187,000 class members to impeach its own records yet choose not to call any of those witnesses, and then lodge a constitutional complaint about extrapolated replication of those records is not the law. Long ago, in *Story Parchment Co v. Paterson Parchment Co.*, 282 U.S. 555 (1931), this Court not only endorsed aggregate methods of proof, it recognized that "it would be a perversion of fundamental principles of justice to deny all relief to the injured person" when, as here, a defendant's actions "preclude the ascertainment of the amount of damages with certainty." *Id.* at 563.

Other courts agree, particularly in circumstances where the proof, as here, is based on computerized records. For example, the First Circuit has held that "[c]ommon 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." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003). Moreover, it is only "when there are significant individualized questions going to liability that the need for individualized assessments of

damages is enough to preclude 23(b)(3) certification." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1260 (11th Cir. 2004), *abrogated in part on other grounds by Bridge*, 553 U.S. 639. *See also Johnson v. Nextel Commc'ns Inc.*, 780 F.3d 128, 138-39 (2d Cir. 2015).

Wal-Mart also claims (Pet. 29-30) that the lower courts were wrong to interpret its handbook as establishing binding promises for rest-break and overtime pay; that this interpretation was "retroactive;" and that this exacerbated any due process problem. These arguments are incorrect and beside the point. The handbook's meaning presents a pure question of state law that was definitively (and correctly) decided below and is not reviewable by this Court. In no legal sense was this contractual interpretation "retroactive." The lower courts simply interpreted the handbook by applying settled contract law when a dispute about the handbook's meaning arose. This was the handbook's meaning before as well as after the lower courts' decisions giving rise to that construction. *Cf. Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (footnote omitted)).

The lower courts did not hold that Wal-Mart's due process rights had to "yield" to state court procedures. Pet. 30. Instead, the Superior Court found no due-process violation. The state Supreme Court declined to review that determination. For all the reasons discussed, this case does not present any

credible due-process question worthy of this Court's review.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Date: April 20, 2015 Respectfully submitted,

Robert S. Peck
Counsel of Record
Andre M. Mura
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th St., NW – Ste. 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Michael D. Donovan
DONOVAN AXLER, LLC
1845 Walnut St. – Ste. 1100
Philadelphia, PA 19103
(215) 732-6067

Judith L. Spanier
ABBEY SPANIER, LLP
212 East 39th St.
New York, NY 10016
(212) 889-3700

Counsel for Respondents

[12] Whether certified class actions are more often settled than tried (*see* Pet. 33-35), and thus not always reviewable on appeal, is beside the point here because this case, for the reasons discussed, does not present any constitutional issue meriting further review.