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., and SAM'S CLUB, 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., and SAM'S CLUB Appellants.	:	No. 33 EAP 2012 Super. Dkt. Nos. 3376 EDA 2007 3373 EDA 2007

BRIEF OF AMICI CURIAE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, SERVICE EMPLOYEES INTERNATIONAL UNION, AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES

On Appeal from the Order of the Superior Court, entered June 10, 2011, at Nos. 3373 & 3376, E.D.A. 2007, affirming in part and reversing in part the Judgment of the Court of Common Pleas of Philadelphia County, entered November 14, 2007, at No. 3127, March Term 2002, and No. 3757, August Term 2004

IRA NEIL RICHARDS (PA BAR #50879)
TRUJILLO RODRIGUEZ & RICHARDS, LLC
SUITE 3838
1717 ARCH STREET
PHILADELPHIA, PA 19103
TELEPHONE: (215) 731-9004
FACSIMILE: (215) 731-9044

JOSEPH M. SELLERS
PETER ROMER-FRIEDMAN
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 NEW YORK AVE. NW
SUITE 500, WEST TOWER
WASHINGTON, DC 20005
TELEPHONE: (202) 408-4600
FACSIMILE: (202) 408-4699

Attorneys for Amici Curiae
(Additional Counsel Continued On Next Page)

DATED: JANUARY 22, 2013

RACHEL GEMAN
JAHAN C. SAGAFI
LIEFF CABRASER HEIMANN
& BERNSTEIN LLP
250 HUDSON STREET
8TH FLOOR
NEW YORK, NY 10013
TELEPHONE: (212) 355-9500
FACSIMILE: (212) 355-9592

NICHOLAS W. CLARK
UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION
1775 K STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE: (202) 466-1521
FACSIMILE: (202) 354-4542

JUDY SCOTT
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 MASSACHUSETTS AVE. NW
WASHINGTON, DC 20036
TELEPHONE: (202) 730-7455
FACSIMILE: (202) 898-3323

WILLIAM LURYE
AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO
1101 17TH ST. N.W., SUITE 900
WASHINGTON, DC 20036
TELEPHONE: (202) 775-5900
FACSIMILE: (202) 452-0556

TERISA E. CHAW
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
417 MONTGOMERY STREET,
FOURTH FLOOR
SAN FRANCISCO, CA 94104
TELEPHONE: (415) 296-7629
FACSIMILE: (866) 593-7521

Attorneys for Amici Curiae

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INTRODUCTION

Amici Curiae, the United Food and Commercial Workers International Union ("UFCW"), American Federation of State, County and Municipal Employees, Service Employees International Union, and the National Employment Lawyers Association ("NELA") (collectively "amici"), submit this brief in support of Plaintiffs-Appellees' request that the Court affirm the Superior Court's decision affirming the judgment in favor of thousands of employees of Wal-Mart Stores, Inc. ("Wal-Mart") in Pennsylvania. *See Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011). That judgment resulted from a carefully conducted 32-day trial, at the conclusion of which the jury found that Wal-Mart had unlawfully denied rest breaks to tens of thousands of its employees and consistently committed other wage and hour violations.

Amici specifically address issues that are of paramount importance to workers and working families in the Commonwealth. These issues include ensuring that (1) workers may continue to introduce their employers' business records as admissible evidence to prove their claims and damages, (2) employers will not be rewarded for failing to keep accurate employment records, (3) workers and all other parties may continue to use statistical evidence to prove liability and damages in class actions, and (4) workers can still rely upon the Commonwealth's express public policy against the waiver of workers' wages and benefits.

As organizations and attorneys who represent workers in the Commonwealth and throughout the country, amici believe it is vital that workers retain the ability, as they have enjoyed for decades, to proceed collectively in enforcing their rights to be paid fully for all time worked, rather than being left to enforce their rights individually (meaning, in practice, partially and incompletely). The economies associated with securing such rights collectively and the greater protection against reprisal for employees who proceed together helps ensure that these

rights will be protected and that the legislature's purpose in enacting these laws will be honored.

As described herein, this Court should reject Wal-Mart's attempt to overturn an ordinary jury verdict, supported by traditional, long-accepted forms of evidence. Contrary to Wal-Mart's argument that the Trial Court presided over a "Trial by Formula" in which ordinary procedures for proving liability and damages were allegedly disregarded, both class certification and the verdict were supported by a range of evidence that is commonly used to establish liability and damages in class cases in *all* areas of the law. That wealth of evidence included voluminous documents and testimony about Wal-Mart's corporate practices, Wal-Mart's own business records, and expert analyses of those business records. Wal-Mart had a fair opportunity to defend itself and rebut that evidence through procedures that are consistent with Pennsylvania's Rules of Civil Procedure and due process.

In attempting to overturn a well-supported jury verdict, Wal-Mart asks this Court to accept several novel legal propositions that would eviscerate vital protections for workers that the legislature created and this Court confirmed over the past century. Wal-Mart's argument, boiled down, is that it can fail to comply with its promises and legal obligations to thousands of workers and then escape liability by having this Court erect impractical and insurmountable barriers for workers who simply seek to collectively enforce their rights under state law. This Court has never been willing to tip the balance of justice to prevent ordinary workers from enforcing their rights, and should decline Wal-Mart's invitation to do so here.

Wal-Mart's one-sided approach would prevent workers from accessing the courts to vindicate basic and long-established rights and would undermine a Pennsylvania economy that relies upon the rule of law and effective law enforcement. Here, workers who were harmed by the same practice of the same major employer in the Commonwealth should be able to obtain

redress in a collective fashion. And Wal-Mart should not be provided a competitive advantage over its competitors who choose to comply with the law and keep their promises.

STATEMENT OF INTEREST

The United Food and Commercial Workers International Union ("UFCW") is a labor organization that represents 1.3 million members in the United States and Canada, and more than 37,000 members in Pennsylvania. The UFCW has an interest in this case given its primary purpose of representing its membership. Many UFCW members work in the food service and supermarket industries, where wage and hour violations are rampant. As a result, the UFCW has taken the lead in assisting workers and pursuing remedies for employer violations of wage and hour laws. Moreover, Wal-Mart is a non-unionized competitor of many employers whose retail workers the UFCW represents. To the extent that Wal-Mart fails to comply with all applicable wage and hour laws, Wal-Mart receives an unfair advantage over its unionized competitors.

The American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"), is a labor organization with 1.6 million members in hundreds of occupations who provide vital public and private services in Pennsylvania, 45 other states, the District of Columbia, and Puerto Rico. AFSCME advocates for fairness in the workplace, excellence in public services, and prosperity and opportunity for all working families.

The Service Employees International Union ("SEIU") represents over 2 million men and women working in health care, property services, and public services throughout the United States, including in the Commonwealth of Pennsylvania. As reflected in its Mission Statement, SEIU is committed to bettering the lives of service workers through collective action, and has long supported class action litigation to enforce national and state labor and employment laws. Unreasonable rules designed to hobble the ability to vindicate the labor rights guaranteed by the

state and national labor and employment laws, such as those proposed by Wal-Mart here, directly harm SEIU's members and the workers it seeks to represent, and also harms SEIU's ability to bring the benefits of collective bargaining to all service workers.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

CONCISE FACTUAL STATEMENT

In 2002 and 2004, employees of Wal-Mart filed class actions alleging that Wal-Mart broke its promises to its hourly employees in Pennsylvania to provide paid rest breaks and to pay for all time worked, giving rise to claims for breach of contract, unjust enrichment and violations of Pennsylvania's Wage Payment and Collection Law. After evidentiary hearings in 2004 in which the Trial Court admitted hundreds of exhibits into evidence about Wal-Mart's common policies, practices and recordkeeping, the Trial Court certified a class of "[A]ll current and former hourly employees of Wal-Mart in the Commonwealth of Pennsylvania from March 19, 1998, to [May 1, 2006]." *Braun*, 24 A.3d at 886.

After a 32-day trial in which the Plaintiffs introduced voluminous evidence, including

expert testimony on Wal-Mart's corporate-wide policies, practices, internal auditing, and payroll scheduling, and testimony from current and former high-ranking Wal-Mart officials about Wal-Mart's self-audits and the accuracy of Wal-Mart's computerized business records and systems, the jury returned a verdict in favor of Plaintiffs on their rest break claims and off-the-clock claims. The jury awarded damages of nearly $76 million for the rest break claims and $2.4 million for their off-the-clock claims, and the Trial Court awarded the Plaintiffs $10 million in statutory interest and $62 million in liquidated damages. On appeal, the Superior Court affirmed the Trial Court's certification of the class and affirmed the jury's verdict. *Id.* at 883.

INCORPORATION OF STATEMENTS

The amici incorporate by reference the Statements of Jurisdiction, Statement of the Scope and Standard of Review, Order or Other Determination in Question, Statement of the Questions Involved, and Statement of the Case, as it bears on the legal arguments herein, set forth in the Brief of the Appellees.

SUMMARY OF ARGUMENT

This case is fundamentally about integrity, responsibility and the rule of law. Over many years, Wal-Mart repeatedly broke binding promises it made to its Pennsylvania workers to provide rest breaks and pay for all time worked. Instead of ensuring that its own personnel practices were consistent with its promises, in 2001 Wal-Mart changed its recordkeeping policies so that it would no longer create or maintain records that would prove the magnitude of its violations. Now, instead of taking responsibility for its broken promises and the resulting harm to its employees, Wal-Mart invokes a concept of "Trial by Formula" from a highly inapposite case to argue that the damages calculations in this action were improper, and asks this Court to absolve Wal-Mart's failures.

In reality, far from being a "Trial by Formula," the record presented below incorporated the types and forms of evidence that are used by all parties, including businesses like Wal-Mart, in nearly every kind of litigation, not just class actions cases. And the judgment below comports with the longstanding rules and legal principles of the Commonwealth and the overwhelming weight of authority across the nation.

Just as corporations like Wal-Mart regularly rely on ordinary business records to prove their claims and defenses (as well as to simply conduct daily business, report to the government, and make strategic decisions), hourly workers must be able to rely upon these same business records to establish their claims and damages. Pennsylvania's Business Records Act provides a means for *all* litigants—including employers and employees—to introduce business records as admissible evidence, based on the sound view that business records kept for tax, payroll, and other purposes are ordinarily reliable. This Court should reject the double-standard that Wal-Mart proposes to deny workers, but not employers, the right to introduce business records in support of their claims. Wal-Mart's proposed rule is not only unfair, but also would contradict this Court's longstanding view that the Business Records Act must be applied neutrally so that businesses of all sizes can be held accountable in a court of law. There is nothing improper or novel about the Plaintiffs' reliance on Wal-Mart's own business records to establish liability and damages.

Moreover, this Court should reaffirm that no party will be rewarded for failing to keep required records, and that when employers fail to keep accurate records workers must be able to prove their damages through just and reasonable inferences, in accordance with well-established principles of trial management and evidence. Here, given that in 2001 Wal-Mart consciously decided to stop creating records of when employees take rest breaks so that its employees could

not prove the exact amount of damages that they suffered, it was both necessary and appropriate for the Plaintiffs to use statistical evidence on missed rest breaks during the pre-2001 period in which Wal-Mart properly kept records on its employees' hours and breaks, as well as other evidence, to reasonably estimate the damages suffered by class members during the later period in which Wal-Mart did not keep records. Plaintiffs' reliance on well-established techniques to estimate damages when payroll records were not properly kept is a far superior means of adjudication for *all* of the parties than the unworkable solution that Wal-Mart proposes of having 187,000 individual trials or proceedings.

Contrary to Wal-Mart's arguments, the use of aggregate or statistical evidence to establish the existence of a pattern of conduct and prove the claims of class members has long been accepted within and outside the courts, and is fully consistent with the Pennsylvania Rules of Civil Procedure and due process. Moreover, Wal-Mart's assertion that its right to due process has been infringed is one-sided, ignoring the balance of interests that the due process clause serves, and flies in the face of trial courts' ability to manage their courtrooms efficiently. Far from offending Wal-Mart's due process rights, the Trial Court oversaw a 32-day trial that was fundamentally fair and respected the rights of all the parties at all times.

While aggregate and statistical evidence is often proffered in wage and hour cases like this one, courts and leading commentators consistently support the use of statistical evidence in a range of areas of law, including antitrust, securities, consumer, toxic torts, employment discrimination, and even commercial litigation between companies. Astonishingly, Wal-Mart lambasts the use of statistical evidence to calculate damages in class actions despite the fact that *Wal-Mart itself* relied on the logic of statistical evidence when serving as a class representative in a class action that yielded it and fellow class members $3 billion in damages.

Furthermore, this Court should reject Wal-Mart's unjustified attack on the Commonwealth's explicit public policy against the waiver of employees' wages and benefits. Generations of workers have relied on Pennsylvania's strong protections against the waiver of wages and benefits, and Wal-Mart has offered no reason for this Court to depart from its unbroken record of enforcing the Commonwealth's express public policy against such waiver.

None of these longstanding legal principles or public policies is undermined by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) ("*Dukes*"), as Wal-Mart contends. In *Dukes*, the U.S. Supreme Court reaffirmed the importance of and plaintiffs' ability to rely upon statistical evidence to prove their claims and damages in class actions. Thus, federal courts since *Dukes* have readily certified dozens of wage and hour class and collective actions, illustrating how statistical evidence remains a critical part of proving liability and damages in class actions and how the calculation of class members' individual damages does not pose an obstacle to class-based adjudication.

The "Trial by Formula" rejected in *Dukes* has no relevance to the certification or the trial that occurred in this case. Pennsylvania's wage and hour law does not mandate individualized hearings, as Title VII of the federal Civil Rights Act of 1964 has been interpreted to ordinarily provide in contested litigation. In addition, the evidence and procedures here did not bear any resemblance to the unique sampling procedure that the U.S. Supreme Court found to be inconsistent with prosecuting a Title VII class action under Federal Rule of Civil Procedure 23(b)(2). Far from the alleged "Trial by Formula" that Wal-Mart contends was used below, the certification and verdict below were based on *common* evidence that "Wal-Mart violated its own corporate policies promising benefits to associates," including "Wal-Mart's own internal memos, audits, payroll records, and policies." *Braun*, 24 A.3d at 946 (citation omitted).

ARGUMENT

I. WORKERS AS WELL AS EMPLOYERS MUST BE ALLOWED TO INTRODUCE BUSINESS RECORDS TO PROVE OR DEFEND THEIR CLAIMS

This Court should reject Wal-Mart's argument that the Trial Court erred by allowing the Plaintiffs to introduce evidence of Wal-Mart's own personnel records to support their arguments on liability and damages. Brief of Appellants ("Wal-Mart Br.") at 27-33. As described herein, Pennsylvania's Business Records Act[1] has always been and must continue to be a two-way street for workers and employers to introduce business records as admissible evidence.

A. Pennsylvania's Business Records Act Has Always Been A Two-Way Street For Employers and Employees To Introduce Business Records

Since 1939, the Business Records Act has allowed all parties in civil and criminal litigation to introduce business records as admissible evidence. "The basic justification for the business records exception to the hearsay rule is that the purpose of keeping records builds in reliability which obviates the need for cross-examination." *Williams v. McClain*, 513 Pa. 300, 305 (1987) (citing *Fauceglia v. Harry*, 409 Pa. 155 (1962) (citing 5 Wigmore, Evidence, § 1632 at 514 (3d. ed. 1940)). As the Trial Court and the Superior Court correctly noted below, "'[b]ecause important business decisions routinely depend upon the accuracy of regularly kept records, they are admissible and constitute prima facie proof of their contents whether offered by their creator or an antagonist.'" *Braun*, 24 A.3d at 946 (quoting Trial Court Op., 12/27/05), at 11-12). Indeed, employers throughout the Commonwealth create and retain a range of business records to comply with or receive benefits from federal and state tax laws, employment laws, and

[1] 42 Pa. C.S. § 6108(b) (2012) ("A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.").

other laws.

The Business Records Act reflects a strong public policy of the Commonwealth that business records are often critical to prosecuting or defending against an action that involves corporations of all shapes and sizes and should ordinarily be admissible. Critically, when the Pennsylvania legislature enacted the Business Records Act, it intended to "eliminat[e] the many illogical distinctions which had evolved" between admitting records of "the one-man type of business enterprise [that] was [once] the predominant form of business organization," as opposed to large corporations. *Fauceglia*, 409 Pa. at 158-59. Rejecting the argument that business records must be introduced with testimony from an individual who has personal knowledge of the relevant events, this Court explained why the Commonwealth's judicial system must be able to adjudicate disputes involving massive corporations:

> Today, instead of a single shopkeeper who transacts and records the sale, there are a myriad of sales girls, department heads, bookkeepers . . . who compile summaries and consolidate the records made by others. Quite often different individuals have personal knowledge of the various phases of a transaction so that no one individual has knowledge of the entire transaction. In addition, the frequent turnover of personnel often makes it impossible to identify the employee - if it were only one - who took part in the transaction. Under these circumstances, to require the entrant to have personal knowledge of the event recorded, and to require proof of the identity of the recorder, would exclude almost all evidence concerning the activities of large business organizations - a result diametrically opposed to the purpose and spirit of the Uniform Business Records [] Act.

Id.

Like most procedural rules, the Business Records Act is a neutral rule that is not intended to favor a particular type of litigant. Thus, employers routinely rely on their own personnel records and a range of other business records to successfully defend against actions filed by their current or former employees, and even when those business records are less critical to merits of

the claims than records were in the instant action.[2] And while workers commonly rely on their employers' records to prove their employment-related claims, workers usually have a *far greater* need to discover and proffer employers' records as evidence, because workers ordinarily have the burden of proving that their employers violated the law and employers ordinarily have exclusive access to the relevant records.[3] For example, to successfully prove an employment discrimination claim, an individual worker will often need to rely on the employer's personnel records about her *and other employees* in order to rebut the employer's common defenses, such as other workers' relative qualifications or the employer's need to downsize or "reorganiz[e]." *Allegheny Housing Authority v. Human Relations Commission*, 516 Pa. 124, 132 (1987) (following "the analytical model" of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for proving employment discrimination claim, and noting a female plaintiff introduced

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[2] *See, e.g.*, *Miles v. Workers' Comp. Appeal Bd.*, 2008 Pa. Commw. Unpub. LEXIS 677, at *12-17 (Pa. Cmwlth. Ct. June 18, 2008) (affirming employer's view of average weekly wage for calculating workers' compensation benefit based on payroll records and absence records that were admissible as business records under § 6108(b)); *Turner v. UCBR*, 899 A.2d 381, 386 (Pa. Cmwlth. Ct. 2006) (affirming denial of unemployment benefits to employee who was terminated for failing a drug test and allowing the report on drug test to be admitted as business record under without testimony from the record custodian); *Artis v. UCBR*, 699 A.2d 849, 852 (Pa. Cmwlth. Ct. 1997) (same); *Virgo v. Workers' Comp. Appeal Bd.*, 890 A.2d 13, 20-22 (Pa. Cmwlth. Ct. 2003) (affirming employer's termination of employee for misconduct based on performance evaluations and disciplinary records that were admissible as business records under § 6108(b)); *Toth v. Workers' Comp. Appeal Bd.*, 737 A.2d 838, 841-42 (Pa. Cmwlth. Ct. 1999) (affirming denial of benefits to employee who claimed he was exposed to hazardous occupational noise based on the employer's records of noise surveys that were admitted as business records under § 6108(b)); *Washington v. UCBR*, 105 523 A.2d 1196, 1198 (Pa. Cmwlth. Ct. 1987) (affirming denial of benefits to employee terminated for failing to report for watch based on a discharge letter admitted into evidence as a business record under § 6108(b)); *Johnston v. UCBR*, 487 A.2d 106, 108 & n.1 (Pa. Cmwlth. Ct. 1985) (affirming denial of unemployment benefits to employee who abandoned his position as a security guard based on evidence of work schedules admitted as business records under § 6108).

[3] *See, e.g.*, *Galosi v. Miller Brewing Co.*, 26 Phila. 16, 20-21 (Ct. Phila. Cty. 1993) (affirming judgment for worker who was injured because there were not enough separators in load of pallets he was unloading in light of admissible business records that his supervisor kept on the number of separators in each load); *see also infra* at 12 n.4.

employer's "[p]ayroll records" on "the number of people working and the number of hours worked during the relevant periods before and after [her] dismissal" to show that the employer was lying about the need for the discharge).

B. As The Plaintiffs Did Here, Workers Often Rely On Employers' Business Records in Wage and Hour Class Actions, Because The Records Answer Questions That Are Common To the Class

When workers seek to vindicate their rights collectively, it is vital that they can rely on their employers' business records to prove their claims. In actions seeking to recover lost wages or employee benefits, employers' payroll and other business records are often capable of answering common questions for all class members regarding both liability and damages.[4] Thus, it is unsurprising that "numerous courts have found that wage claims are especially suited to class litigation – perhaps the most perfect questions for class treatment – despite differences in hours worked, wages paid, and wages due." *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346,

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[4] *See, e.g.*, *Kelly v. County of Allegheny*, 519 Pa. 213, 215 (1988) (reversing denial of certification of class that sought to recoup unlawful social security contributions illegally deducted from sick pay benefits in varying amounts); *Pa. Ass'n of State Mental Hosp. Physicians v. State Employees' Retirement Bd.*, 484 Pa. 313, 320 & n.11 (1979) (approving of certification of class that challenged improper calculation of pension benefits); *Alvarez v. City of Chicago*, 605 F.3d 445, 449 &.1 (7th Cir. 2010) (reversing the denial of certification and dismissal of federal overtime collective action and noting that the individual facts in "payroll and time records" will determine how much individual class members are owed); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1239, 1277 (11th Cir. 2008) (affirming jury verdict in favor of class of employees who used employer's payroll records to establish that they "routinely worked 60 to 70 hours a week and to quantify the overtime wages owed to each Plaintiff" and noting that the business records introduced constituted "good old-fashioned direct evidence"); *United States Dep't of Labor v. Cole Enters.*, 62 F.3d 775, 780 (6th Cir. 1995) (holding payroll records undermined employer's claim that it had paid its restaurant workers the minimum wage); *Sperling v. Hoffman-La Roche*, 24 F.3d 463, 472 n.16 (3rd Cir. 1994) (noting that "employers generally have business records containing the vital statistics and work histories of their [] employees"); *Graham v. Overland Solutions, Inc.*, No. 10-CV-0672 BEN (BLM), 2012 U.S. Dist. LEXIS 130113, at *12 (S.D. Cal. Sept. 12, 2012) (certifying a class challenging employer's practice of reducing billable hours and pressuring employees to under-report hours as "manageable because damages may be determined through analysis of Defendant's employee and payroll records" and "more manageable than many individual lawsuits").

359-60 (E.D.N.Y. 2011) (internal quotations and citations omitted) (granting certification of class alleging prevailing wage violations and concluding "a class action is the most efficient way to resolve the same claims at issue here" as "plaintiffs may calculate class damages by applying a common formula to data culled from defendant's electronic records").

The instant action is no different than myriad wage and hour actions that proceed on a collective basis and rely on a range of business records to prove liability and damages. As the Superior Court correctly recognized, the Trial Court certified the class and the jury ruled in favor of the Plaintiffs based on *common* evidence that "Wal-Mart violated its own corporate policies promising benefits to associates," including "Wal-Mart's own internal memos, audits, payroll records, and policies." *Braun*, 24 A.3d at 946. Indeed, for every single employee who worked during a period for which Wal-Mart retained payroll records, Plaintiffs introduced payroll records and expert analysis to establish the full extent of missed rest breaks and to identify the relevant damages.

C. This Court Should Not Adopt A Rule Barring Workers From Introducing Employers' Business Records In Class Actions

Wal-Mart's argument that the jury verdict should be reversed because the Plaintiffs were allowed to introduce evidence of Wal-Mart's payroll records is a brazen attempt to transform Pennsylvania's Business Records Act from a two-way street where both employers and employees may proffer business records into a one-way street where only employers may use their own business records to advance their own interests before tax authorities, in litigation with other corporations, and as a shield against employees' claims. Despite the fact that Wal-Mart audited its own payroll records to ascertain the extent of its rest break violations, *Braun*, 24 A.3d at 887 & n.7 (the "Shipley Audit"), Wal-Mart nevertheless asserts that the Trial Court should have barred the Plaintiffs from using the same payroll records to prove the same type of facts

regarding missed breaks. *See* Wal-Mart Br. at 27-33.

This Court should firmly reject the unprecedented double standard that Wal-Mart asks this Court to adopt—that only employers, not employees, can use an employer's business records in litigation involving employees' rights. First, this Court has never applied the Business Records Act in a manner that arbitrarily favors one type of party over another—whether the party is the Commonwealth, a criminal defendant, a store clerk, or a publicly traded company. Second, such a rule would contravene this Court's sound conclusion in *Fauceglia* that a modern judicial system must be capable of adjudicating disputes involving parties of all shapes and sizes. 409 Pa. at 158-59. Third, it would be unfair to allow Wal-Mart or any other employer to create millions of records for its own benefit, protection, and self-analysis, and then bar *only* employees from using the same exact records to enforce their workplace rights.

Accordingly, this Court should reaffirm that both employers *and* employees may use an employer's business records to advance their claims in litigation in the Commonwealth and that the largest corporation in the world—Wal-Mart—is subject to the same evidentiary rules as all other parties that seek justice in this jurisdiction.

II. EMPLOYERS MUST NOT BE REWARDED FOR FAILING TO KEEP ACCURATE RECORDS

This Court should reject Wal-Mart's repeated argument that the Plaintiffs could not properly rely upon payroll records from before February 2001 and other evidence to estimate the damages that class members sustained after February 2001 when Wal-Mart intentionally stopped keeping records on its employees' rest breaks.

As the previous section explained, timekeeping records – like other business records – are a two-way street: when properly maintained, they ensure proper payment for hours worked, and no more. However, when the employer fails to maintain (or manipulates) time records, this

conduct unfairly burdens employees who seek fair and proper payment. Thus, more than sixty years ago, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the U.S. Supreme Court held that employees may establish their right to recover unpaid wages under the federal Fair Labor Standards Act ("FLSA") through "just and reasonable inference" where their employer's failure to maintain required wage records makes it difficult to prove their losses with precision. *Id.* at 687. To prevent employers from being unjustly enriched by their own violations of record-keeping requirements, the employee's threshold burden of proving loss is satisfied where the employee:

> produces sufficient evidence to show the amount and extent of that [improperly compensated work] *as a matter of just and reasonable inference.* The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence the Court may then award damages to the employee, *even though the results be only approximate.*

Id. at 687-88 (emphasis added). These standards are applicable here. Pennsylvania law provides that "'every employer of employees shall keep a true and accurate record of the hours worked by each employee and the wages paid to each[.]'" *Braun, Inc.*, 24 A.3d at 936 (quoting Trial Ct. 1925(a) Op., 9/3/08 at 5-6 (quoting Pennsylvania Minimum Wage Act of 1968); *see also, e.g.*, *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 296 (Pa. Super. 2005) ("The provisions of the WCPL are analogous to the protections afforded employees by the Fair Labor Standards Act[.]").

Against this backdrop, it is important to underscore that the evidence the *Braun* jury considered was even *more* robust than is usually available in cases where records are missing. In the prototypical case, all the fact-finder has is the testimony of the employer and a small number of employees about hours worked.[5]

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[5] There are numerous FLSA cases where courts have awarded backpay based on the testimony of

Here, based on Wal-Mart's comprehensive (albeit selective) record-keeping, extensive and detailed records existed before February 2001 for all rest breaks. But after its own high-level auditors and other sources of internal evidence revealed that missed rest breaks were rampant, Wal-Mart changed its policy so that employees were no longer required to punch the time clock before and after their breaks, eliminating any further records on employees' prescribed rest breaks. However, the pre-February 2001 evidence, coupled with other sources of evidence that permitted the extrapolation of the pre-2001 findings into the post-2001 period (*e.g.*, employee testimony and corporate documents), was robust. Indeed, Wal-Mart had the full opportunity to demonstrate that its practices changed after February 2001 and persuade the jury that pre-2001 evidence was unreliable to estimate post-2001 damages. Wal-Mart chose not to make this argument.

Thus, rather than exceeding the burden shifting prescribed by *Anderson* when employers fail to maintain required employment records, this case presents a standard, fairly conservative application of the basic principle that Wal-Mart's failure to maintain business records cannot provide it wholesale exculpation from liability. In practice, that is the novel result Wal-Mart seeks in urging this Court to reject applicable substantive law. Wal-Mart would insist on 187,000 individual trials brought by 187,000 low-wage workers, though none has the incentive or means to bring an individual action. As discussed more fully below, this would turn Supreme Court authority and the rules of evidence on their head.

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a tiny percentage of employees. *See, e.g.*, *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 68 (2d Cir. 1997) (discussing *Anderson* and this principle). Here, by contrast, employee testimony had a relatively circumscribed, although important, role in the evidence. Standard off-the-clock work, which was a small part of this case and resulted in a small part of the verdict, was based primarily on record evidence reflecting instances where employees, though ostensibly clocked out (not working and not getting paid) were in fact working cash registers and checking in merchandise, as proven by other record evidence.

III. PROVING LIABILITY AND DAMAGES THROUGH STATISTICAL AND OTHER EVIDENCE APPLICABLE TO THE ENTIRE CLASS IS COMPATIBLE WITH THE RULES OF CIVIL PROCEDURE AND DUE PROCESS

In this case, having established liability, Plaintiffs based their damages proof on (1) Wal-Mart's own time-keeping records, (2) for rest-break related damages, an extrapolation from the pre-2001 records to the time period during which Wal-Mart intentionally chose to stop keeping records of its known violations, and (3) other evidence confirming the appropriateness of this extrapolation. Contrary to Wal-Mart's arguments, the Trial Court oversaw a trial that was consistent with the Pennsylvania Rules of Civil Procedure and Evidence and the requirements of due process.

A. Pennsylvania Rules Of Civil Procedure

The Rules of Civil Procedure direct courts "to secure the just, speedy and inexpensive determination of every action or proceeding." Pa. R. Civ. P. 126. This rule, to be "liberally construed," empowers courts "at every stage [to] disregard any error or defect of procedure which does not affect the substantial rights of the parties." *Id.* Courts managing class actions "may make appropriate orders . . . determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument," and "dealing with other administrative or procedural matters." Pa. R. Civ. P. 1713(1) & (6).

The Rules of Evidence likewise facilitate efficient conduct of trials. Pa. R. Evid. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); Pa. R. Evid. 403 (allowing exclusion of relevant testimony based on "considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); *Morrison v. Commonwealth, Dept. of*

Pub. Welfare, 538 Pa. 122 (1994).

Here, the trial court's decision to allow the jury to make classwide findings based on Wal-Mart's electronic records and Plaintiffs' expert analysis of those records – instead of holding thousands of individual trials – was fair and just. This approach, which took 32 days of trial, afforded the jury an ample record on which to render its verdict. Consistent with the Rules of Civil Procedure and Evidence, the Trial Court's careful management of the case was substantially more efficient than holding a series of thousands of repetitive individual trials and provided a more reliable means of constructing evidence on the incidence of missed rest breaks.

B. Due Process

Like the Rules of Civil Procedure and Evidence, due process takes into account efficiency. Specifically, due process "requires consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an improper deprivation of such interest under the procedures followed; and (3) the fiscal and administrative burdens that additional or substitute procedural requirement might entail." *S. Union Twp. v. Dep't of Entvl. Prot.*, 839 A.2d 1179, 1186 (Pa. Commw. Ct. 2003) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). Due process "embod[ies] the principle of fundamental fairness, entitling every individual to be free from arbitrary or oppressive government conduct." *Commonwealth v. Kratsas*, 564 Pa. 36, 49 (2001). "The due process inquiry, in its most general form, entails an assessment as to whether the challenged proceeding or conduct offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, and that defines the community's sense of fair play and decency." *Id.* (internal quotations and citations omitted). "[D]ue process is a 'flexible' concept, not a technical one, and it imposes only such procedural safeguards as the situation warrants." *Fountain Capital Fund, Inc. v. Pa. Secs.*

Comm'n, 948 A.2d 208, 214 (Pa. Commw. Ct. 2008); *see, e.g.*, *Commonwealth v. Snyder*, 599 Pa. 656, 672 (2009) (finding no violation of criminal defendant's due process rights where state destroyed evidence that was merely "potentially useful"). This Court's due process jurisprudence is consistent with the Rules of Civil Procedure and Evidence discussed above.

Wal-Mart's reading of the Due Process Clause, if accepted by this Court, would undermine trial judges' ability to run their courtrooms efficiently. Its reading is not supported by historical practice, modern practice, or common sense. Rather, due process must reflect the on-the-ground realities of litigation – what evidence is actually available, what evidence is sufficient to satisfy a party's burden, and how much of a court's time and resources the parties can demand to be spent on a particular dispute.

Here, allowing the jury to hear evidence of Wal-Mart's business records and Plaintiffs' expert analysis of those records was comfortably within the bounds of due process. The risk of an "improper deprivation" of Wal-Mart's property was minimal, given the careful gatekeeping function played by the Trial Court in determining the admissibility of the evidence. *S. Union Twp.*, 839 A.2d at 1186. On the other side of the scale, the "fiscal and administrative burdens" of requiring an individual proceeding for each and every violation for each of the 187,000 class members would have been Sisyphean. Particularly in light of the flexibility with which this Court has approached the right to due process, this is a fundamentally fair result, consistent with Pennsylvania's sense of fair play and decency. *Kratsas*, 564 Pa. at 49.

As will be discussed in the next section, the Trial Court's admission of the statistical evidence here was perfectly consistent with the requirements of civil procedure, evidentiary rules, and due process.

IV. STATISTICAL EVIDENCE IS ROUTINELY ADMITTED IN CLASS ACTIONS AND BUSINESS DISPUTES, BECAUSE IT CAN BE (AND HERE IS) A MORE ACCURATE AND EFFICIENT MEANS OF PROVING LIABILITY AND DAMAGES THAN CONDUCTING 187,000 INDIVIDUAL TRIALS THAT MAY RELY ON POST HOC RATIONALIZATIONS

Despite the fact that the courts and commentators endorse the use of statistical evidence in class actions, Wal-Mart repeatedly criticizes the Trial Court for allowing the Plaintiffs to proffer statistical evidence in support of its claims and damages.

Contrary to Wal-Mart's arguments, parties frequently use statistical evidence to support factual findings. When properly compiled and described, such evidence is routinely admitted on questions of liability and damages. In class actions and complex business disputes, such evidence is often the only feasible way for the fact finder to answer certain questions. Here, the Trial Court wisely exercised its power to ensure the prompt, fair, and efficient administration of justice by admitting into evidence Wal-Mart's objective, contemporaneously recorded data regarding class members' hours worked. Allowing Plaintiffs to present evidence and arguments to the jury based on Wal-Mart's data was far more faithful to Pennsylvania's procedural and evidentiary rules and constitutional due process than the alternatives of holding 187,000 trials based on hazy memories and few or no contemporaneous records or letting most of these claims lapse over the insurmountable burdens the claimants would face prosecuting them. The objective, contemporaneously recorded evidence of rest breaks on which the Plaintiffs relied was more reliable evidence of (1) a pattern of Wal-Mart denying rest breaks and (2) the amount of break time denied to each employee, than inevitably hazy recollections reaching back through the years about particular rest breaks on particular days.

Litigants commonly rely on aggregate, statistical evidence in a variety of areas of the law – such as securities, antitrust, and commercial litigation – and the courts, juries, and parties are capable of comprehending and using this evidence in civil litigation. Precluding the use of this

evidence, as Wal-Mart seeks to do here, would deny factfinders access to an important category of evidence frequently used in courtrooms across Pennsylvania and America, as well as in science and business (including Wal-Mart's own business) every day. And because the underlying data are admissible, the alternative to the approach taken by the Trial Court would be admission of the very same evidence, sliced into individual strands, in an endless series of individual trials, along with the other common evidence, such as the records of the contract's provisions on rest breaks, its binding nature, evidence of Wal-Mart's bad faith through the Shipley Audit, among other things. Therefore, both fairness and efficiency mandate the approach taken by the Trial Court in conducting a single class action relying on the same types of evidence that are typically used in individual cases and class actions. In short, this was a quintessential candidate for classwide adjudication, and the Trial Court handled it appropriately.

A. Courts And Commentators Consistently Approve The Use Of Statistical Evidence

The use of statistics has been overwhelmingly endorsed by the courts, by the Federal Judicial Center, and by commentators. *See, e.g.*, *Manual for Complex Litigation* § 11.493 at 132-33 (4th ed. 2011) (use of sampling acceptable in pretrial procedures). For example, the Federal Judicial Center approves of statistical sampling as long as it is conducted properly, as here. Federal Judicial Center, *Reference Manual on Scientific Evidence* 381 (3d ed. 2011). The Federal Judicial Center's *Reference Manual* notes that "[t]raditionally scientists adopt the 95% level of confidence," which means that the expected error rate is 5%. *Id.*; *see, e.g.*, *Bayer Corp. & Subsidiaries v. United States*, 850 F. Supp. 2d 522, 538-39 (W.D. Pa. 2012) ("[S]ampling has long been considered an acceptable method of determining the characteristics of a large universe."); *Sunset Taxi Co. Inc. v. Blum*, 423 N.Y.S.2d 231, 232 (2d Dept. 1979) ("[T]he contention that sample evidence provides no evidence for the goods or claims not sampled was

rejected long ago"). Similarly, an aggregate approach to class damages is well established. *See In re Neurontin Antitrust Litig.*, 2011 WL 286118, at *10 (D.N.J. Jan. 25, 2011) (collecting authority approving aggregate class damages); *Meijer, Inc. v. Warner-Chilcott Holdings Co. III. Ltd.*, 246 F.R.D. 293, 312 (D.D.C. 2007) (approving aggregate approach to class damages); 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10.5 (4th ed. 2002) ("Aggregate computation of class monetary relief is lawful and proper.").

B. Statistical Evidence Is Routinely Admitted In Class Actions

Statistics have been used successfully in myriad class cases, as well as non-class cases. The leading commentator on class action jurisprudence explains:

> Aggregate computation of class monetary relief is lawful and proper. Courts have not required absolute precision as to damages . . . . Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually[] will not withstand analysis.

3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10.5, at 483-86 (4th ed. 2002). This commonsense logic is borne out across the spectrum of different types of litigation.

1. Wage And Hour

Last year in *Brinker Restaurant Corp v. Superior Court*, 53 Cal. 4th 1004 (Cal. 2012), the California Supreme Court reiterated that "[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability." *Id.* at 1054 (citing *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010) (certifying a meal break subclass because liability could be established through employer records and representative testimony, and class damages could be established through statistical sampling and selective direct evidence); *Bell v. Farmers Ins. Exchg.*, 115 Cal. App. 4th 715, 755 n.32 (2004) (relying on Reference Guide on Statistics in the Reference Manual on Scientific Evidence in upholding as consistent with due process the use of surveys and statistical analysis

to measure a defendant's aggregate liability); *Sav-on Drug Stores, Inc. v. Superior Court*, 17 Cal. Rptr. 3d 906, 918 n.6, 923 n.12 (Cal. 2004) (noting with approval the use of statistical sampling in overtime compensation and aggregate techniques in other cases)). The *Brinker* Court observed that "statistical inference offers a means of vindicating the policy underlying [applicable state law] without clogging the courts or deterring small claimants with the cost of litigation." 53 Cal. 4th at 1054; *see also id.* (encouraging "a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts").

Separately, the U.S. Supreme Court has approved representative testimony in wage and hour cases to establish liability and damages. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (all plaintiffs need not testify in FLSA overtime action); Ellen C. Kearns, *The Fair Labor Standards Act* 1333 (1999) (recognizing the "well settled" rule that "not all affected employees must testify in order to prove violations or to recoup back wages," and that "in most cases, . . . representative testimony" suffices); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d Cir. 1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (granting back wages under the FLSA to non-testifying employees based upon the representative testimony of a percentage of the employer's employees).

2. Employment Discrimination

Statistics are also routinely admitted in employment discrimination cases. As discussed below, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court reaffirmed that plaintiffs may establish a pattern or practice of discrimination under Title VII through the introduction of statistical evidence, and courts continue to certify Title VII classes based on

statistical and other evidence. *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012); *see also Lavin-McEleney v. Marist College*, 239 F. 3d 476, 481 (2d Cir. 2001) (allowing statistical sampling to show gender-based salary disparity for both liability and damages).

3. Antitrust

It is a settled practice for courts in antitrust class actions to rely on classwide aggregate techniques in calculating individual damages awards without individualized hearings of class member claims.

One prominent example is *Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96 (2d Cir. 2005), where Wal-Mart was a named plaintiff and served as a class representative of approximately five million other merchants. *Id.* at 101. In that case, the Second Circuit approved Wal-Mart's use of a statistical formula to calculate damages, despite potential differences in individual circumstances. *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001), *disapproved in part on other grounds by In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 39-40, 42 (2d Cir. 2006). Ultimately, Wal-Mart secured a $3 billion settlement for itself and its fellow class members. *Visa USA Inc.*, 396 F.3d at 101.

Likewise, in *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F.3d 156 (1st Cir. 2009), the First Circuit rejected the defendant's due process argument that the trial court improperly awarded "aggregate damages 'without any individualized determination of damages as to a single class member (including the named plaintiffs),'" and concluded that the defendant's argument "fails in the starting gate." *Id.* at 197-98 (citing 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 10.5, at 483-86 (4th ed. 2002)). Elsewhere, the court explained that it is "obvious that class-action litigation often *requires* the district court to extrapolate from the class representatives to the entire class." *Id.* at 195; *see also In re*

Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18, 29-31 (N.D. Ga. 1997) (holding that aggregate proof of damages through econometric techniques is appropriate); *In re Potash*, 159 F.R.D. 682, 697 (D. Minn. 1995) (suggesting feasibility of computation of damages by formula).

4. Securities

Courts also routinely employ classwide, formula-based techniques to calculate individual damages in securities class actions. *See* 3 Newberg on Class Actions § 10:8 (4th ed. 2002). The large volume of trades and difficulty of identifying each security owner for each trade make precise individual damages determinations infeasible or impossible. 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). Given the large numbers of class members involved in many securities class actions and the correspondingly large number of shares and transactions at issue, requiring individual proof of damages would imperil enforcement of the nation's laws against large-scale securities fraud. Thus, securities cases regularly involve aggregate damages awards based on class-wide statistical analyses. *See, e.g.*, *Harmsen v. Smith*, 693 F.2d 932, 945-46 (9th Cir. 1982) (aggregate damages need not be proved to a "mathematical certainty").

5. Consumer

Similarly, courts regularly approve aggregate techniques for computing classwide damages in numerous consumer class actions. For example, in *Smilow v. Southwestern Bell Mobile System, Inc.*, 323 F.3d 32 (1st Cir. 2003), the First Circuit rejected a defendant's argument that damages should not be calculated based on its computer records and analysis through a "mechanical process." *Id.* at 40 & n.8. Other courts agree. *See, e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 419 (5th Cir . 2004) (insurance rates); *Roper v.*

Consurve, Inc., 578 F.2d 1106, 1115 (5th Cir. 1978) (credit card charges); *Occidental Land, Inc. v. Super. Ct.*, 134 Cal. Rptr. 388, 393 (Cal. 1976) (developer fraud); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (stating that "Rule 23 allows district courts to devise imaginative solutions to problems created by . . . individual damages issues" and affirming trial court's certification of a class of 17 million class members).

6. Mass Torts And Human Rights

Mass torts cases, too, often involve aggregate proof. *See, e.g., Gintis v. Bouchard Transp. Co.*, 596 F.3d 64, 66 (1st Cir. 2010) (Souter, J.) (observing that "Rule 23(b)(3) . . . would be blunted beyond utility" if defendant were allowed to litigate oil-spill damages questions parcel by parcel); *In re Oil Spill by Amoco Cadiz Off Coast Of France*, 954 F.2d 1279, 1320 (7th Cir. 1992) (holding that, when properly performed, "regression analysis permits an inference of causation, and the size of the effect"); *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 503-05 (S.D.N.Y. 2009) (providing in a Case Management Order a "methodology for sampling in relation to the general run of cases, severe, mild, and everything between, in order that rulings on liability, damages, and responsibility might be extended from the particular case in which rulings are made to the rest of the cases" that was a "flexible, fair, and efficient plan to move [9,090] cases through discovery and to trial in reasonable time").

C. Businesses Use Statistical Evidence In Litigation Against Each Other

Even conventional commercial litigation often involves liability and damages determinations based on aggregate proof. *See, e.g., MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 30 Misc. 3d 1201A, 2010 N.Y. Misc. LEXIS 6182, at *13 (N.Y. Sup. Ct. Dec. 22, 2010) (approving plaintiff's request to analyze samples of loans in support of allegations that defendant misrepresented the origination and quality of loans); *I4I Limited Partnership v.*

Microsoft Corp., 598 F.3d 831, 855 (Fed. Cir. 2010) (affirming calculation of damages in patent case based in part on responses from 46 businesses out of 988 surveyed, which were "randomly selected from a database of 13 million U.S. companies"); *Ratanasen v. State of Cal. Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir. 1993) (approving "the use of sampling and extrapolation as part of audits in connection with Medicare and other similar programs, provided the aggrieved party has an opportunity to rebut such evidence").

D. Businesses Use Statistics Every Day, Just As Wal-Mart Did Here

The use of statistics and other aggregate proof in class actions is not only commonplace and well-accepted, but it also mirrors how defendants themselves, in conducting their business, handle information and make decisions. "Most important management decisions in the business world . . . are made through the intelligent application of statistical and computer techniques[,] and these class members should be entitled to use the same techniques in proving the elements of their cause of action." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525 (S.D.N.Y. 1996) (quoting *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 289 (S.D.N.Y. 1971), *amended*, 333 F. Supp. 291 (S.D.N.Y.), *mandamus den'd*, 449 F.2d 119 (2d Cir. 1971)) (rejecting the notion "that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages").

V. THIS COURT SHOULD CONTINUE TO RESPECT AND ENFORCE THE COMMONWEALTH'S EXPRESS PUBLIC POLICY PROHIBITING THE WAIVER OF EMPLOYEES' WAGES AND BENEFITS

As organizations that represent and advocate for workers in the Commonwealth, amici are troubled by Wal-Mart's assertion that thousands of its workers allegedly voluntarily waived their rights to breaks that Wal-Mart had contractually promised them for many years, because Pennsylvania law flatly precludes such a waiver. *See* Wal-Mart Br. at 12-13, 16 (criticizing Trial Court for allowing Plaintiffs to introduce payroll records and expert testimony on those records because "employees might voluntarily skip breaks or voluntarily take shorter breaks"); *id.* at 15 (pointing to testimony of a single employee that on occasion she voluntarily skipped a break); *id.* at 19, 25, 30, 33-34 (arguing that Plaintiffs did not show that Wal-Mart intentionally forced employees to miss breaks involuntarily).

A. Pennsylvania Courts Have Stalwartly Enforced The Commonwealth's Ban On The Waiver Of Workers' Rights

In a range of statutes, the Pennsylvania General Assembly has joined many other states in making a definitive public policy choice not to permit the waiver of employees' wages or benefits once they have been extended. *See* 43 P.S. § 260.7 (2012) ("No provision of [the Wage Payment and Collection Law] shall in any way be contravened or set aside by private agreement."); 43 P.S. § 861 (2012) ("No agreement by an employe to waive, release, or commute his rights to compensation, or any other rights under this [Unemployment Compensation Law], shall be valid."); 77 P.S. § 731 (2012) (agreement between an employer and employee to alter workers' compensation benefits "made prior to the seventh day after the injury shall have occurred . . . shall be wholly null and void"). These protections against the waiver of wages and benefits are a critical part of the "Commonwealth's solicitous protection of employees' compensation" and comprehensive scheme for safeguarding workers' rights. *Kelly*

v. County of Allegheny, 519 Pa. 213, 223 (1988) (recognizing a range of key protections for workers in the Commonwealth, including liquidated damages under the WPCL, "judicial recognition of vested employees' contractual rights [] for past service," and preferential treatment for wages when placing a lien on employers' property).

Both federal and state courts have faithfully respected and executed the Commonwealth's public policy against waiver of employees' wages and other workplace rights—in individual and class actions. *See, e.g.*, *Urbano v. Stat Courier, Inc.*, 878 A.2d 58, 62 (Pa. Super. Ct. 2005) (reversing dismissal of class action and stating that a private agreement requiring drivers to dispute amount of compensation within 30 days would not be binding if drivers show they are employees subject to the WPCL); *O'Donnell v. LRP Publ'ns, Inc.*, 694 F. Supp. 2d 350, 358-59 (E.D. Pa. 2010) (stating that the "WPCL requires that an employer pay all wages that are earned," including wages promised via a contract, and "parties are prohibited from contracting around the WPCL") (citing *Weldon v. Kraft, Inc.*, 896 F.2d 793, 801 (3rd Cir. 1990)); *Healthcare Mgmt. & Inv. Holdings, LLC v. Feldman*, No. 1:04CV0883, 2006 U.S. Dist. LEXIS 66038, at *16-17 (N.D. Ohio Sept. 15, 2006) (holding the WPCL bars an employer from enforcing a Ohio choice of law provision in a private agreement against an employee who worked in Pennsylvania, because "Section 260.7 clearly prohibits parties from contracting away an employee's statutory right to wages due").[6]

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[6] *See also Big Mt. Imaging v. UCBR*, 48 A.3d 492, 496 (Pa. Cmwlth. Ct. 2012) (holding employee could not be forced to accept a position from an employer that terminated him when employer's offer was contingent on waiving unemployment benefits he was owed, "illustrat[ing] he potential abuse the General Assembly sought to alleviate by prohibiting employees from contractually waiving their right to collect unemployment benefits"); *Pitt Chem. & Sanitary Supply Co., Inc. v. UCBR*, 9 A.3d 274, 275 (Pa. Cmwlth. Ct. 2010) (affirming the award of unemployment benefits to employee on the ground that "[i]t is the Law that determines a claimant's eligibility for unemployment compensation, not the employer," and 43 P.S. § 861 mandates that "any contract in which an employee waives his or her right to unemployment

As it has done many times before, this Court should reaffirm the principle that "[w]here a statute of the Commonwealth expresses a public policy designed to alleviate a condition of possible distress among the public or a segment thereof and *explicitly proscribes waiver of the benefits of the act*, no private agreement, however valid between the parties, can operate as such a waiver." *Warner Co. v. UCBR*, 396 Pa. 545, 553-54 (1959) (holding that employee who was forced to retire under contract between union and employer was entitled to unemployment benefits) (following *United States ex rel. Johnson v. Morley Construction Co.*, 98 F.2d 781, 788-89 (2d Cir. 1938) (Hand, J.)); *accord McIlvaine Trucking, Inc. v. Workers' Comp. Appeal Bd.*, 570 Pa. 662, 672-73 (2002) (affirming the refusal to apply a choice of law provision in private agreement that would override Pennsylvania's explicit statutory direction not to enforce private agreements limiting workers' compensation) (citing *Bell v. McAnulty*, 349 Pa. 384, 386 (1944) ("Where the legislature has, by definite and unequivocal language, determined the public policy of this Commonwealth with regard to a particular subject, that pronouncement cannot be set aside and rendered unenforceable by a contract between individuals")); *Smith v. UCBR*, 396 Pa. 557, 559-60 (1959) (applying same principle to grant unemployment benefits to female employee who was banned by a private agreement from working after fifth month of pregnancy).

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compensation is unenforceable."); *Port Auth. of Allegheny Cty. v. UCBR*, 955 A.2d 1070, 1075 (Pa. Cmwlth. Ct. 2006) (rejecting employer's argument that employees waived their right to collect unemployment by giving notice of their intent to retire, and "not[ing] that under Section 701 of the Law, 43 P.S. § 861, employees cannot agree to waive their unemployment compensation benefits"); *Defelice v. UCBR*, 649 A.2d 485, 487 (Pa. Cmwlth. Ct. 1994) (concluding that because 43 P.S. § 861 "is a penal provision," it "must be strictly construed," and noting that the statute "is clearly intended to protect the rights of employees" and "prohibits an employee from agreeing to relinquish rights under the Law") (citing *In re Williams Unemployment Comp. Case*, 193 Pa. Super. Ct. 320, 323 (1960) (holding that a union contract that purports to determine that an employee voluntarily quit "when his separation from work was not in fact voluntary" is invalid)).

B. The Need for a Public Policy Against Waiver Of Workers' Wages Remains As Necessary Today As When the Legislature Adopted This Policy

The rationale for refusing to enforce waivers of employees' wages is as compelling today as it was in 1961 when the Pennsylvania legislature enacted 43 P.S. § 260.7. For as long as employment laws have existed in the Commonwealth, employers have had a disproportionate amount of power to coerce and strong-arm their employees into forfeiting rights that the legislature guaranteed them or that employers promised to induce workers to accept employment. Indeed, the "imperative" of addressing gross disparities in bargaining power between individual employees and employers that would otherwise result in the "evils of unreasonable and unfair wages" is why the Commonwealth adopted a minimum wage.[7]

As Justice White aptly observed for a unanimous U.S. Supreme Court, if an exemption to wage and hour law "were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the [Fair Labor Standards] Act." *Tony & Susan Almo Found. v. Secretary of Labor*, 471 U.S. 290, 302 (1985) (citing *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 (1981) ("we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate"); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) (employee cannot waive his right to pursue liquidated damages for FLSA violations)). Similarly, as Judge Learned Hand explained 75 years ago in

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[7] *See* Act 1968-5 (H.B. 534), P.L. 11, § 1, 43 P.S. § 333.101 (2012) (stating that employees "employed in [some] occupations are not as a class on a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory," and "[t]he evils of unreasonable and unfair wages as they affect some employees employed in [] Pennsylvania are such as to render imperative the exercise of the police power of the Commonwealth for the protection of industry and of the employees employed therein and of the public interest of the community at large").

refusing to honor releases signed by employees whose federal prevailing wage rights were violated, when a wage "statute was passed to protect [workers] against the economic pressure it was assumed they would be unable to resist, if offered a job. To this end it was as necessary to deny [workers] the power to bargain away their privilege after they had performed their labor, as before." *Morley Const. Co.*, 98 F.2d at 788-89.

Today, millions of American workers face the same unbearable pressure to forfeit their workplace rights at the hands of global corporations like Wal-Mart that earn billions in profits by keeping labor costs at a minimum and often break the law or their own contractual promises to do so. *See, e.g.*, *Big Mt. Imaging*, 48 A.3d at 496 (disapproving of offer to re-hire employee on condition that he waive unemployment benefits already owed, and noting he "would likely lose his apartment if he did not soon receive benefits" and "[a]s such, Employer's offer placed Claimant in the untenable position that he either: forfeit over two months of benefits and accept the job offer; or, accept the needed benefits and reject suitable work.").

This pressure is particularly acute in the Commonwealth, which has experienced stubbornly high unemployment for a number of years and has seen hundreds of thousands of laid-off manufacturing workers turn to lower-wage service sector companies for work.[8] And given the dramatic decline in private sector unions over the past 50 years, less than 7% of all private sector employees have a voice at work to help them resist the intimidating efforts of Wal-Mart and other companies that coerce their workers into surrendering their fundamental rights

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[8] Pennsylvania's unemployment rate has remained above 7 percent since February 2009, and currently stands at 7.8 percent. Bureau of Labor Statistics, Databases, Tables & Calculators by Subject: Local Area Unemployment Statistics, Pennsylvania, Statewide, *available at* http://data.bls.gov/timeseries/LASST42000003?data_tool=XGtable (last visited Jan. 17, 2013); Alliance for American Manufacturing, Information About Your State: Pennsylvania, *available at* http://americanmanufacturing.org/in-your-state/PA (last visited Jan. 17, 2013) (stating that the number of manufacturing jobs in Pennsylvania fell from 864,000 in 2000 to 643,800 in 2010).

when they clock into work each day.[9]

Without strong and sustained judicial enforcement of the Commonwealth's public policy against the waiver of employees' rights, the statutory rights that are critical to supporting and sustaining Pennsylvania's working families will no longer receive the "solicitous protection" that they deserve. *Kelly*, 519 Pa. at 223. Accordingly, this Court should emphatically reject Wal-Mart's assertion that this Court should disregard or overrule the longstanding public policy established by the Pennsylvania legislature on the inability of employees to waive their rights to wages and other benefits.

VI. WAL-MART MISCHARACTERIZES THE RELEVANCE OF *DUKES V. WAL-MART STORES, INC.*

In an effort to analogize the instant case to the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), Wal-Mart completely mischaracterizes the impact of *Dukes* on class actions generally and to this wage and hour action specifically. Wal-Mart incorrectly invokes the "Trial by Formula" from *Dukes*, misreading *Dukes* to guarantee employers *in every type of case* a right to hold individual trials or sub-trials for each class member subject to a possible individual defense, and to prohibit plaintiffs from using statistical evidence to prove the injuries or damages of class members collectively.

Dukes does not support these arguments, either generally or under the circumstances of the instant action. This Court should join the myriad courts that have rejected defendants' attempts to use *Dukes* to support a cramped and improper interpretation of class certification

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[9] *See* Stephen Greenhouse, *Union Membership Rate Fell Again in 2011*, N.Y. Times at B3 (Jan. 27, 2012) (noting that the Bureau of Labor Statistics reported that in 2011 only 6.9 percent of private sector workers were union members, while "more than 35 percent of private sector workers were in unions" in the 1950s); Human Rights Watch, DISCOUNTING RIGHTS: WAL-MART'S VIOLATION OF US WORKERS' RIGHT TO FREEDOM OF ASSOCIATION (2007) (documenting Wal-Mart's suppression of its employees' fundamental labor rights in the United States).

under Federal Rule of Civil Procedure 23. In fact, the opinions discussed below not only flatly dispel the interpretation of *Dukes* that Wal-Mart advances here, they illustrate courts' continued insistence on the proper interpretation of wage and hour laws and their commitment to ensuring that corporations behave responsibility and lawfully toward their employees.

A. *Dukes* Affirmed The Use Of Statistical Evidence in Class Actions

Contrary to Wal-Mart's suggestion, *Dukes* did not abolish the use of aggregate or statistical evidence in adjudicating class or collective claims. Instead, *Dukes confirmed* that statistical evidence will often be critical to establishing liability or damages in a class action. In *Dukes*, the Supreme Court explained that the plaintiffs should have presented store-level statistical analysis instead of region-wide analysis in support of their Title VII pattern or practice claim, and reaffirmed that under *Teamsters v. United States*, 431 U.S. 324 (1977), the same type of claim can be proven through "substantial statistical evidence of companywide discrimination" and anecdotal evidence of discrimination. *Dukes*, 131 S. Ct. at 2555-56. Consistent with the Supreme Court's endorsement of statistical evidence as a means of supporting class claims, courts have, in the subsequent year and a half, certified *dozens* of class or collective actions in wage and hour and other employment cases that routinely rely on statistical evidence to prove liability and damages owed to individual class members.[10] Indeed, many of these courts

[10] *See, e.g., Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 615 (S.D.N.Y. 2012) (certifying class of marketing specialists and representatives who brought overtime claims); *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346, 361 (E.D.N.Y. 2011) (granting certification of class of construction workers employed throughout New York who brought prevailing wage claims); *Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819 (N.D. Ohio 2011), *aff'd* 2011 U.S. Dist. LEXIS 77170, at *3-5 (N.D. Ohio July 1, 2011) (holding *Dukes* did not impact the prior certification of collective action involving meal break claims of personnel in nursing and assisted living facilities spread across multiple states); *Troy v. Kehe Food Distribs.*, 276 F.R.D. 642, 645 (W.D. Wash. 2011) (certifying class of sales representatives of regional food distributors who brought overtime claims); *Campbell v. PricewaterhouseCoopers LLP*, No. Civ. S-06-2376 LKK/GGH, 2012 U.S. Dist. LEXIS 169957, at *37-38 (E.D. Cal. Nov. 29, 2012) (refusing to

decertify a class of junior associates of accounting firm who claimed they were denied overtime pay based on misclassification as exempt employees); *Whitlock v. FSL Mgmt., LLC*, No. 3:10CV-00562-JHM, 2012 U.S. Dist. LEXIS 112859, at *42-43 (W.D. Ky. Aug. 10, 2012) (certifying class of nightclub employees who claimed they had to work off the clock and under an illegal tip pool); *Ripley v. Sunoco, Inc.*, No. 10-1194, 2012 U.S. Dist. LEXIS 88889, at *42 (E.D. Pa. June 27, 2012) (certifying class of maintenance employees who brought overtime claims); *Sewell v. Bovis Lend Lease, Inc.*, 09 Civ. 6548 (RLE), 2012 U.S. Dist. LEXIS 53556, at *3-6 (S.D.N.Y. Apr. 20, 2012) (certifying class of project managers and engineers who brought overtime claims); *Lewis v. Alert Ambulette Serv. Corp.*, 11-CV-442, 2012 U.S. Dist. LEXIS 6269, at *3 (E.D.N.Y Jan. 19, 2012) (certifying class and collective action of ambulette drivers who brought minimum wage, overtime, and unlawful withholding claims); *O'Donnell v. Sw. Bell Yellow Pages, Inc.*, No. 4:11-CV-1107 (CEJ), 2012 U.S. Dist. LEXIS 68960, at *9-10 (E.D. Mo. May 17, 2012) (certifying collective action of sales representatives who claimed they were not compensated for time before or after work); *Morales v. Stevco, Inc.*, 1:09-cv-00704 AWI JLT, 2012 U.S. Dist. LEXIS 68640, at *26-27 (E.D. Cal. May 16, 2012) (certifying class of employees of farm contractor who alleged minimum wage, overtime and meal and rest break violations); *Hopkins v. Stryker Sales Corp.*, No. 5:11-CV-02786-LHK, 2012 U.S. Dist. LEXIS 67101, at *36 (N.D. Cal. May 14, 2012) (certifying class of sales representatives who claimed they were not properly reimbursed business expenses); *Schulz v. Qualxserv, LLC*, No. 09-cv-17-AJB (MDD), 2012 U.S. Dist. LEXIS 58561, at *28 (S.D. Cal. Apr. 26, 2012) (certifying class of service representatives who brought claims for failure to make payments for meal and rest breaks, minimum wages for off the clock work, and overtime); *Smith v. Pizza Hut, Inc.*, No. 09-cv-01632-CMA-BNBs, 2012 U.S. Dist. LEXIS 56987, at *30 (D. Colo. Apr. 21, 2012) (conditionally certifying national collective action of all Pizza Hut drivers who were denied the minimum wage due to business expenses); *Pina v. Con-Way Freight, Inc.*, No. C 10-00100 JW, 2012 U.S. Dist. LEXIS 59505, at *2 (N.D. Cal. Apr. 12, 2012) (certifying class of truck drivers who worked throughout California and brought meal and rest break claims); *Butler v. DirectSAT United States, LLC*, Civ. A. No. DKC 10-2747, 2012 U.S. Dist. LEXIS 50119, at *14-15 & n.9 (D. Md. Apr. 10, 2012) (certifying collective action of cable technicians who claimed employer did not follow policy of paying them overtime and also instructed that they work off the clock, and rejecting *Dukes*' application to federal wage and hour claims, and collecting similar cases) (following *Faust v. Comcast Cable Commc'ns Mgmt., LLC*, No. WMN-10-2336, 2011 U.S. Dist. LEXIS 125949, at *1-2 & n.1 (D. Md. Nov. 1, 2011) (certifying class of Comcast Cable employees who performed "off the clock" work in violation of federal law)); *Vedachalam v. Tata Consultancy Servs.*, No. C 06-0963 CW, 2012 U.S. Dist. LEXIS 46429, at *2 (N.D. Cal. Apr. 2, 2012) (certifying national class of employees who brought breach of contract and various state wage claims against technology company); *Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 U.S. Dist. LEXIS 27659, at *14-15 (N.D. Ill. Mar. 2, 2012) (denying motion for decertification in filed in light of *Dukes* regarding a class of workers who were improperly paid sub-minimum tip credit wages); *Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ 3176 (RMB), 2011 U.S. Dist. LEXIS 115389, at *7-8 (S.D.N.Y. Oct. 4, 2011) (certifying class of thousands of store managers who worked in 333 retail stores in New York and brought overtime claims against the same employer); *Bouaphakeo v. Tyson Foods*, Inc., No. 5:07-cv-04009-JAJ, 2011 U.S. Dist. LEXIS 95814, at *12 (N.D. Iowa Aug. 25, 2011) (refusing to decertify a class of processing workers who claimed they were not paid for donning and doffing of equipment).

certifying wage and hour classes expressly reaffirmed the longstanding principle – undisturbed by *Dukes* – that the need to calculate the specific damages of individual class members does not undermine commonality, the predomination of common issues, the superiority of the class action mechanism, or the manageability of a class action.[11]

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[11] *See, e.g.*, *Sewell*, 2012 U.S. Dist. LEXIS 53556, at *13-14 ("that damages may vary and differ by person is irrelevant to certifying a class under Rule 23(b)(3)") (citing *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) (holding a Rule 23(b)(3) class may be certified "although class plaintiffs' individual damages will vary"); *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010) ("it is well-established that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification.")); *Lewis*, 2012 U.S. Dist. LEXIS 6269, at *25-28 ("[t]he need for an individualized determination of damages generally does not defeat the [commonality] requirement" and "[w]hile damages owed to each driver will require individual determinations, this computation issue is not enough to destroy commonality"); *Ripley*, 2012 U.S. Dist. LEXIS 88889, at *11 ("commonality requirement is met"; "while each Plaintiff's recovery might be different due to the number of hours that he or she worked without proper compensation, the wrong was from Defendant's alleged common timekeeping and payroll policies that precluded proper compensation for overtime work"); *Whitlock*, 2012 U.S. Dist. LEXIS 112859, at *36 ("individualized damage claims do not defeat the Rule 23(b)(3) class."); *O'Donnell*, 2012 U.S. Dist. LEXIS 68960, at *9 ("how much work went uncompensated—may indeed vary among the proposed class members. But this only implicates the amount of any damages, not the commonality of plaintiffs' claims."); *Morales*, 2012 U.S. Dist. LEXIS 68640, at *19-20 (stating that a "difference in the claims of class members" cannot defeat certification); *Hopkins*, 2012 U.S. Dist. LEXIS 67101, at *21 (stating "[t]he fact that [the employer] may have reimbursed some individuals more than others or that some individuals may have incurred more expenses than others does not destroy commonality," and "[d]ifferences in the amount of an individual class member's damages do not defeat class certification") (citing *Stearns v. TicketMaster Corp.*, 655 F.3d 1013, 1026 (9th Cir. 2011); *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975)); *Schulz*, 2012 U.S. Dist. LEXIS 58561, at *18-19 (rejecting argument that common issues do not predominate as those "arguments relate to the amount of damages incurred by an individual technician"); *Pina*, 2012 U.S. Dist. LEXIS 59505, at *22 (rejecting argument that individual inquiries into missed meal breaks prevents certification, as the case can be adjudicated in a manageable way by using the employer's electronic records as well as representative testimony); *Smith*, 2012 U.S. Dist. LEXIS 56987, at *17-18 (differences among employees that "relate to the calculation of damages for each individual plaintiff" "are not sufficient to preclude joining the claims in one action") (citations and internal quotations omitted).

B. The Trial Below Was Nothing Like the Novel Trial Procedure Rejected in *Dukes*, And *Dukes* Did Not Create A Right For Employers to Demand Individualized Proceedings For Each Class Member

The "novel" trial plan that *Dukes* rejected as a "Trial by Formula" bears no resemblance whatsoever to the trials that occur in nearly all class action lawsuits and the trial that *did occur* in this action, and the rejection of "Trial by Formula" in *Dukes* was based on the unique, specialized statutory scheme of Title VII that ordinarily requires individual hearings after a class-wide trial on liability. In *Dukes*, when considering whether a Rule 23(b)(2), non-opt out class had been properly certified, the U.S. Supreme Court faulted the Ninth Circuit for disregarding the "detailed remedial scheme" of Title VII that ordinarily requires "individualized determinations of each employee's eligibility for backpay" after a class-wide trial has occurred. 131 S. Ct. at 2561 (describing the two-step process where individual *Teamsters* hearings are held after a classwide trial that "establish[es] a pattern or practice of discrimination'") (quoting *Teamsters*, 431 U.S. at 361). Instead of authorizing a trial plan that would allow for individual *Teamsters* hearings ordinarily required by Title VII, *Dukes* explained that the Ninth Circuit "believed that it was possible to replace such [individual] proceedings with Trial by Formula." *Id.* The "Trial by Formula" of which *Dukes* "disapprove[d]" would have precluded individualized hearings by proceeding in the following manner:

> 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.

Because affirmative defenses under Title VII are very different from a defendant's arguments in a wage and hour case like this one, the "Trial by Formula" that *Dukes* rejected

plainly has no relevance to the instant action. Unlike Title VII, which has been interpreted to require "individualized proceedings," the Pennsylvania wage and hour law at issue in this action does not mandate – or even contemplate – individualized proceedings. *See Ross v. RBS Citizens, N.A.*, 667 F.3d 900, 909 & n.7 (7th Cir. 2012) (rejecting employer's argument that "it has a statutory right to present its affirmative exemption defenses on an individualized basis," because in "the *Dukes* passage the defendant cites in support of its argument" the Supreme Court "struck down the Ninth Circuit's attempt to circumvent 42 U.S.C. § 2000e-5(g)(2)(A)" that provides a statutory right "to avoid *equitable* damages" though a specific showing, ordinarily in an individual hearing, but this employer "has no such statutory right"); *accord In re TFT-LCD Antitrust Litig.*, MDL No. 1827, 2012 U.S. Dist. LEXIS 9449, at *48 (N.D. Cal. Ja. 26, 2012) (rejecting "Trial by Formula" argument as "Plaintiffs in this case propose nothing as 'novel' as" in *Dukes*, "[n]or are damages in the antitrust context subject to a 'detailed remedial scheme' equivalent to that in Title VII."). The same is true of nearly all other federal and state employment statutes that do not require or contemplate individualized proceedings. Accordingly, *Dukes* "does not stand for the proposition that an employer is entitled to an individualized determination of an employee's claim for back pay in all instances in which a claim is brought as a collective or class action." *Gilmer v. Alameda-Contra Costa Transit Dist.*, No. C 08-05186 CW, 2011 U.S. Dist. LEXIS 126845, at *21 (N.D. Cal. Nov. 2, 2011).

Moreover, the trial in the instant action looked nothing like the "Trial by Formula" rejected in *Dukes*. In the instant action, the Plaintiffs used statistical evidence to demonstrate the actual amount of damages suffered by each of thousands of plaintiffs during the several years that Wal-Mart retained and produced records. And for the time period in which Wal-Mart terminated its recordkeeping, Plaintiffs used longstanding and well-established techniques

endorsed by the U.S. Supreme Court to estimate the likely amount of damages that each class member suffered. *See supra* at 14-16 (discussing how plaintiffs properly relied upon the burden shifting approach endorsed by the U.S. Supreme Court in *Mt. Clemens*).[12] Accordingly, nowhere in this action did the plaintiffs commit the error described by *Dukes* – using a "sample set of class members" to determine damages for other class members when data or statistical evidence was actually available to determine damages for *all* class members. *Dukes*, 131 S. Ct. at 2561.[13]

C. Unlike The Title VII Statute At Issue In *Dukes*, Pennsylvania Wage And Hour Law Does Not Require The Factfinder To Determine The Subjective Intent Of Decisionmakers

Dukes is also inapposite to the instant action because wage and hour actions do not require any inquiry into the subjective intent of decisionmakers. They simply require plaintiffs to show that they were not paid the wages the employer was obligated to pay. *Ross*, 667 F.3d at 909 (affirming certification of a Rule 23 class that raised Illinois state overtime claims, and

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[12] As federal courts have made clear since *Dukes*, nothing in that opinion called into question the Court's prior approval of the burden shifting approach of *Mt. Clemens*. *Romero v. Florida Power & Light Co.*, No. 6:09-cv-1401-Orl-36GJK, 2012 U.S. Dist. LEXIS 76146, at *13 (M.D. Fla. June 1, 2012) (rejecting argument that *Dukes* bars representative testimony or burden shifting approach of *Mt. Clemens*); *see also, e.g.*, *Ramos*, 796 F. Supp. 2d at 377 (recognizing the burden shifting principle of *Mt. Clemens* after *Dukes*).

[13] Furthermore, the U.S. Supreme Court's discussion of "Trial by Formula" in *Dukes* was limited to its interpretation of Federal Rule 23(b)(2) that provides for non-opt out classes when, according to the Court, monetary relief is "incidental" to the injunctive relief sought, and did not rely upon the federal Due Process Clause. *Dukes*, 131 S. Ct. at 2561. Therefore, as federal courts have recognized, the "Trial by Formula" discussion has no impact whatsoever on the ability of courts to certify opt-out classes under Rule 23(b)(3) – or equivalent *state* class certification rules – where there is no requirement monetary relief is "incidental" to the injunctive relief sought. *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 524 (C.D. Cal. 2011); *see, e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 987-88 (9th Cir. 2011) (reversing certification of class under Rule 23(b)(2) in light of *Dukes*, but remanding and noting that the district court could certify a class under Rule 23(b)(3) that applies different standards than Rule 23(b)(2)); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012) (certifying a hybrid class under both Rule 23(b)(2) and 23(b)(3) after remand in light of *Dukes*).

stating that in contrast to *Dukes* where plaintiffs "were required to prove that thousands of store managers had the same discriminatory intent in preferring men over women," here plaintiffs' state overtime "claim requires no proof of individual discriminatory intent") (citing *Youngblood v. Family Dollar Stores, Inc.*, No. 09 Civ. 3176 (RMB), 2011 U.S. Dist. LEXIS 115389, at *13 (S.D.N.Y. Oct. 4, 2011) (distinguishing *Dukes* on the ground that New York's version of the FLSA does not require "an examination of the subjective intent behind millions of individual employment decisions"); *Bouaphakeo v. Tyson Foods, Inc.*, No. 5:07-cv-04009-JAJ, 2011 U.S. Dist. LEXIS 95814, at *7-8 (N.D. Iowa Aug. 25, 2011) (reasoning that because "*Dukes* was a Title VII case, the focus of the inquiry in resolving each individual's claim was the reason for [the] particular employment decision") (citing *Dukes*, 131 S. Ct. at 2552)). This is an important distinction that many courts have recognized since *Dukes*, and that confirms again that *Dukes* has no relevance to this wage and hour class action.[14]

CONCLUSION

For the reasons stated above, this Court should affirm the Superior Court's decision affirming the verdict for thousands of hard-working employees of Wal-Mart in Pennsylvania.

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[14] *See also Creely*, 2011 U.S. Dist. LEXIS 77170, at *3-5 ("the FLSA claims before this Court do not require an examination of the subjective intent behind millions of individual employment decisions; rather, the crux of this case is whether the company-wide policies, as implemented, violated Plaintiffs' statutory rights."); *Ramos*, 796 F. Supp. 2d at 356 (stating that in contrast to *Dukes*, "there is little discretion or subjective judgment in determining an employee's right to be paid prevailing wages"); *Driver*, 2012 U.S. Dist. LEXIS 27659, at *7 (noting that state wage and hour law "'requires no proof of individual discriminatory intent') (quoting *Ross*, 667 F.3d at 909); *Troy*, 276 F.R.D. at 654 (unlike *Dukes* where "the trial court would have been required to review the subjective intent behind those millions of employment decisions," "[h]ere, by contrast, the issue is whether [the employees] were properly classified as exempt under" state law and "no employee-by-employee analysis of the reasons for [the employer's] classification of its employees is necessary to resolve this question").

Respectfully Submitted,

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IRA NEIL RICHARDS (PA BAR #50879)
TRUJILLO RODRIGUEZ &
RICHARDS, LLC
SUITE 3838
1717 ARCH STREET
PHILADELPHIA, PA 19103
TELEPHONE: (215) 731-9004
FACSIMILE: (215) 731-9044

RACHEL GEMAN
JAHAN C. SAGAFI
LIEFF CABRASER HEIMANN
& BERNSTEIN LLP
250 HUDSON STREET
8TH FLOOR
NEW YORK, NY 10013
TELEPHONE: (212) 355-9500
FACSIMILE: (212) 355-9592

JUDY SCOTT
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 MASSACHUSETTS AVE. NW
WASHINGTON, DC 20036
TELEPHONE: (202) 730-7455
FACSIMILE: (202) 898-3323

TERISA E. CHAW
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
417 MONTGOMERY STREET,
FOURTH FLOOR
SAN FRANCISCO, CA 94104
TELEPHONE: (415) 296-7629
FACSIMILE: (866) 593-7521

JOSEPH M. SELLERS
PETER ROMER-FRIEDMAN
COHEN MILSTEIN SELLERS
& TOLL PLLC
1100 NEW YORK AVE., N.W.
SUITE 500, WEST TOWER
WASHINGTON, DC 20005
TELEPHONE: (202) 408-4600
FACSIMILE: (202) 408-4699

NICHOLAS W. CLARK
UNITED FOOD & COMMERCIAL
WORKERS INTERNATIONAL UNION
1775 K STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE: (202) 466-1521
FACSIMILE: (202) 354-4542

WILLIAM LURYE
AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO
1101 17TH ST. N.W., SUITE 900
WASHINGTON, DC 20036
TELEPHONE: (202) 775-5900
FACSIMILE: (202) 452-0556

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I, Ira Richards, 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.

Name:	**Means of Service:**	**Date of Service:**
Honorable Mark I. Bernstein Philadelphia Court of Common Pleas 532 City Hall Philadelphia, PA 19107 (215) 686-7335	Via First Class Mail	January 22, 2013
Mark A. Aronchick, Esq. Daniel Segal, Esq. HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER One Logan Square, 27th Floor Philadelphia, PA 19103 (215) 568-6200 Maronchick@hangley.com dsegal@hangley.com	Via First Class Mail and E-mail	January 22, 2013
William H. Lamb, Esq. Law Offices of LAMB McERLANE PC 24 East Market Street, Box 565 West Chester, PA 19381-0565 (610) 430-8000 wlamb@mcerlane.com	Via First Class Mail and E-mail	January 22, 2013
Theodore J. Boutrous, Jr GIBSON, DUNN & CRUTCHER LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 (213) 229-7000	Via First Class Mail	January 22, 2013
Marc J. Sonnenfeld MORGAN LEWIS & BOCKIUS, LLP 1701 Market Street Philadelphia, PA 19103	Via First Class Mail	January 22, 2013

Henry M. Sneath DRI-THE VOICE OF THE DEFENSE BAR 55 West Monroe St., Suite 1105 Chicago, IL 60603 (312) 795-1101	Via First Class Mail	January 22, 2013
Carter G. Phillips SIDLEY AUSTIN LLP 1501 K Street, N.W. Washington, D.C. 20005 (202) 736-8000	Via First Class Mail	January 22, 2013
Amanda D. Haverstick Proskauer Rose LLP (973) 27 4-3252 One Newark Center Newark, NJ 07102	Via First Class Mail	January 22, 2013
Hugh F. Young, Jr. Product Liability Advisory Council, Inc. (703) 264-5300 1850 Centennial Park Drive, Ste. 510 Reston, VA 20191	Via First Class Mail	January 22, 2013
James M. Beck ReedSmith (215) 851-8168 2400 One Liberty Place 1650 Market Street Philadelphia, PA 19103	Via First Class Mail	January 22, 2013
Michael D. Donovan, Esq. Donovan Axler, LLC 1845 Walnut Street, Suite 1100 Philadelphia, Pa 19103 (215) 732-6067 (215) 732-8060 mdonovan@donovanaxler.com	Via First Class Mail and Email	January 22, 2013

DATED: January 22, 2013

IRA NEIL RICHARDS (PA BAR #50879)
TRUJILLO RODRIGUEZ & RICHARDS, LLC
SUITE 3838, 1717 ARCH STREET
PHILADELPHIA, PA 19103
TELEPHONE: (215) 731-9004
FACSIMILE: (215) 731-9044