No. S200923

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAM DURAN et al.,

Plaintiffs and Respondents,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

On Review from the California Court of Appeal
First Appellate District, Division One, Nos. A125557 & A126827
Appeal from Alameda County Superior Court
Honorable Robert B. Freedman
Super. Ct. Case No. 2001-035537

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APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS SAM DURAN ET AL.

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TABLE OF CONTENTS

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION 1

I. INTRODUCTION 4

II. ARGUMENT 7

A. Class Actions Are an Established Component of California Jurisprudence 7

1. Development of the Doctrine of Virtual Representation in California: The Path to *Sav-on* 10

2. Courts May Impose on Litigants Procedures to Manage Individualized Evidence of Liability, Defenses and Damages 16

3. Defendants Do Not Have a Due Process Right to Insist On Individualized Proof of Any Element of the Plaintiff's Claim or of Any of Their Defenses 28

B. Recent Federal Decisions, Including *Wal-Mart Stores, Inc. v. Dukes*, Do Not Bar the Use of Representative Sampling Evidence or Statistical Inference, and *Amgen* Supports It 35

1. *Wal-Mart Stores Inc. v. Dukes* 35

2. *Comcast Corp. v. Behrend* 45

3. *Amgen Inc. v. Connecticut Retirement Plans* 48

4. Federal Decisions Under Rule 23 Should Not Guide this Court in Construing California Class Action Law 49

III. CONCLUSION 51

CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITS 51

TABLE OF AUTHORITIES

Cases

Alch v. Superior Court,
165 Cal.App.4th 1412 (2008) 8

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds,
133 S. Ct. 1184 (2013) 2, 35, 40, 48

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 47

Arias v. Superior Court,
46 Cal.4th 969 (2009) 12

Bell v. Farmers Insurance Exchange,
115 Cal.App.4th 715 (2001) .... *passim*

Bernhard v. Wall,
184 Cal. 612 (1921) 12, 13

Bradley v. Networkers Int'l, LLC,
211 Cal.App.4th 1129 (2012) 21

Braun v. Wal-Mart, Inc.
2003 WL 22990114 (Minn. Dist. Ct. 2003) 26

Brinker Restaurant Corp. v. Superior Court,
53 Cal.4th 1004 (2012) 1, 16, 17, 22, 24, 26

Brock v. Norman's Country Market, Inc.,
835 F.2d 823 (11th Cir. 1988) 9

Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of
Health & Human Res., 532 U.S. 598 (2001) 50

Capitol People First v. Department of Developmental Services,
155 Cal.App.4th 676 (2007) 8, 27

Chance v. Superior Court,
58 Cal.2d 275 (1962) 17, 18, 20, 23

City of Burlington v. Dague,
505 U.S. 557 (1992) 50

City of San Jose v. Superior Court,
12 Cal.3d 447 (1974).. 15

Civil Service Employees Ins. Co. v. Superior Court,
22 Cal.3d 362 (1978).. 14, 29

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 33

Collins v. Rocha,
7 Cal.3d 232 (1972)... 20, 25

Comcast Corp v. Behrend,
133 S. Ct. 1426 (2013) ....*passim*

Connecticut v. Doehr,
501 U.S. 1 (1991) 29, 30, 31, 32, 34

Cruz v. Dollar Tree Stores, Inc.,
2011 WL 2682967 (N.D. Cal. Jul. 8, 2011) 43

Daar v. Yellow Cab Co.,
67 Cal.2d 695 (1967)...*passim*

Day v. NLO,
851 F. Supp. 869 (S.D. Ohio 1994).. 25, 26

Donovan v. Burger King Corp.,
672 F.2d 221 (1st Cir. 1982) 9

Driver v. AppleIllinois, LLC,
2012 WL 689169 (N.D. Ill. Mar. 2, 2012) 41

Dukes v. Wal-Mart Stores, Inc.,
603 F.3d 571 (9th Cir. 2010)... 40

Duran v. U.S. Bank Nat. Assn.,
203 Cal.App.4th 212 (2004)... 43, 44

Ellis v. Costco Wholesale Corp.,
285 F.R.D. 492 (N.D. Cal. 2012) 39

Employment Devel. Dept. v. Superior Court,
30 Cal.3d 256 (1981).. 19, 22

Estrada v. FedEx Ground Package System, Inc.,
154 Cal.App.4th 1 (2007) 8

Fanucchi v. Coberly-West Co.,
151 Cal.App.2d 72 (1957) 21

General Telephone Co. v. Falcon,
457 U.S. 157 (1982) 36, 38

Gentry v. Superior Court,
42 Cal.4th 443 (2007) 1, 16, 50

Gorman v. Russell,
14 Cal. 531 (1860) 11, 12

Graham v. DaimlerChrysler Corp.,
34 Cal.4th 553 (2004) 50

Granberry v. Islay Investments,
9 Cal.4th 738 (1995) 23

Green v. Obledo,
29 Cal.3d 126 (1981) 49

Green v. Superior Court,
10 Cal.3d 616 (1974) 47

Grochowski v. Phoenix Constr.,
318 F.3d 80 (2d Cir. 2003) 9

Harris v. comScore, Inc.,
__ F. Supp. 2d __, 2013 WL 1339262 (N.D. Ill. Apr. 2, 2013) 45

Heffernan v. Bennett & Armour,
110 Cal.App.2d 564 (1952) 21

Hernandez v. Mendoza,
199 Cal.App.3d 721 (1988) 32, 47

In re High-Tech Employee Antitrust Litig.,
2013 WL 1352016 (N.D. Cal. Apr. 5, 2013) 45

Hurlbutt v. Butenop,
27 Cal. 50 (1864) 17, 18

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) .... *passim*

Jaimez v. DAIHOS USA, Inc.,
181 Cal.App.4th 1286 (2010).. 8, 32

Jankowski v. Castaldi,
2006 WL 118973 (E.D. N.Y. 2006).. 9

Johnson v. General Mills, Inc.,
276 F.R.D. 519 (C.D. Cal. 2011) 41

Ketchum v. Moses,
24 Cal.4th 1122 (2001).. 50

Kraus v. Trinity Management Services, Inc.,
23 Cal.4th 116 (2000).. 18, 23, 24, 26, 27

La Sala v. American Sav. & Loan Assn.,
5 Cal.3d 864 (1971).. 15, 19, 26, 49

Linder v. Thrifty Oil Co.,
23 Cal.4th 429 (2000).. 13, 15, 16, 20, 26

Lindsey v. Normet,
405 U.S. 56 (1972) 34

Lockheed Martin Corp. v. Superior Court,
29 Cal.4th 1096 (2003).. 7, 24, 25, 28

MacManus v. A.E. Realty Partners
195 Cal.App.3d 1106 (1988).. 26

Martinez v. Combs,
49 Cal.4th 35 (2010).. 49

Medrazo v. Honda of North Hollywood,
166 Cal.App.4th 89 (2008).. 19

Morillion v. Royal Packing Co.,
22 Cal.4th 575 (2000).. 50

Morrison Entm't Group v. Nintendo,
56 Fed. App'x. 782 (9th Cir. 2003).. 33

In re Motor Fuel Temperature Sales Practices Litig.,
__ F. Supp. 2d __, 2013 WL 1397125 (D. Kan. Apr. 5, 2013)........45

Mullane v. Central Hanover Tr. Co.,
339 U.S. 306 (1950) 33

Murphy v. Kenneth Cole Productions, Inc.,
40 Cal.4th 1094 (2007)...1

National R.R. Passenger Corp. v. Morgan,
536 U.S. 101 (2002) 50

Natural Soda Products Co. v. City of Los Angeles,
23 Cal.2d 193 (1943)..47

Occidental Land, Inc. v. Superior Court,
18 Cal.3d 355 (1976)..13, 15, 19, 26

Osborne v. Subaru of America, Inc.,
198 Cal.App.3d 646 (1988)..13

Parra v. Bashas', Inc.,
536 F.3d 975 (9th Cir. 2008)..8

People v. Sandoval,
206 Cal.App.3d 1544 (1989)..33

Ramirez v. Yosemite Water Co.,
20 Cal.4th 785 (1999)..49

Reich v. Gateway Press, Inc.,
13 F.3d 685 (3d Cir. 1994)..9

Reyes v. Board of Supervisors,
196 Cal.App.3d 1263 (1987)...7, 25

Richmond v. Dart Indus., Inc.,
29 Cal.3d 462 (1981)..13, 14, 15, 19, 50

Sanders v. City of Los Angeles,
3 Cal.3d 252 (1970)..30

Sav-on Drug Stores, Inc. v. Superior Court,
34 Cal.4th 319 (2004)...*passim*

Smith v. Bayer Corp.,
131 S. Ct. 2368 (2011) 49

Southern California Edison Co. v. Superior Court,
7 Cal.3d 832 (1972)... 14, 15, 18, 49

State of California v. Levi Strauss, Inc.,
41 Cal.3d 460 (1986)... 18, 19, 23

Stearns v. Ticketmaster Corp.,
655 F.3d 1013 (9th Cir. 2011)... 46

Stephens v. Montgomery Ward & Co.,
193 Cal.App.3d 411 (1987)... 8

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555 (1931) 46, 47

Sullivan v. Oracle Corp.,
51 Cal.4th 1191 (2011).. 30

In re TFT-LCD (Flat Panel) Antitrust Litig.,
2012 WL 253298 (N.D. Cal. Jan. 26, 2012) 41

In re Tobacco II Cases,
46 Cal. 4th 298 (2009)... 43

Troy v. Kehe Food Distributors, Inc.,
276 F.R.D. 642 (W.D. Wash. 2011)....................................... 41

Vasquez v. Superior Court,
4 Cal.3d 800 (1971)... *passim*

In re Vitamin Cases,
107 Cal.App.4th 820 (2003)... 18

Von Schmidt v. Huntington,
1 Cal. 55 (1850).. *passim*

Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.,
281 F.R.D. 477 (D. Kan. 2012)... 41

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

Wang v. Chinese Daily News, Inc.,
709 F.3d 829 (9th Cir. 2013) 42, 43

Weaver v. Pasadena Tournament of Roses Ass'n,
32 Cal.2d 833 (1948) 13

Wheelock v. First Presbyterian Church,
119 Cal. 477 (1897) 17

Yanowitz v. L'Oreal USA, Inc.,
36 Cal.4th 1028 (2005) 50

Statutes

California Code of Civil Procedure
§382 .... 5, 6, 13, 14, 36, 49
§384 .... 18, 23

California Evidence Code
§352 27

California Rules of Court
Rule 8.520(c)(1) 51
Rule 8.520(f) 1
Rule 8.520(f)(4) 2

Federal Rules of Civil Procedure
Rule 23 .... 6, 45, 48, 49, 50
Rule 23(b)(2) 39, 40, 41, 45
Rule 23(b)(3) 40, 45

United States Code
28 U.S.C. 2072(b) 44
42 U.S.C. §2000e 36
42 U.S.C. §2000e-5(g)(2) 44
42 U.S.C. §2000e-5(g)(2)(A) 39
42 U.S.C. §2000e-5(g)(2)(B)(ii) 40, 42

Secondary Authorities

Cabraser, "California Class Action Classics,"
Forum 10 (Jan./Feb. 2009) 27, 49

Federal Judicial Center,
Reference Manual on Scientific Evidence (West 2000) 33

Moller, "Class Action Defendants' New Lochnerism,"
2012 *Utah L. Rev.* 319 (2012) 33

Note, "Class Action and Interpleader: California Procedure and the
Federal Rule," 6 *Stan. L. Rev.* 120 (1953) 12, 17

Story, *Equity Pleadings* (4th ed. 1850) 10

Story, *Equity Pleadings* (8th ed. 1870) .... *passim*

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

Pursuant to California Rule of Court 8.520(f), the California Employment Lawyers Association ("CELA") respectfully requests leave to file the attached amicus curiae brief in support of plaintiffs and respondents Sam Duran et al.

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions similar to *Duran*. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embodied in California employment laws, including by advocating for effective labor law enforcement procedures such as class actions in appropriate cases. CELA has taken a leading role in advancing and protecting the rights of California workers by, among other things, submitting amicus briefs and letters on issues affecting these rights, including Supreme Court amicus briefs in *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), and *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012).

CELA's proposed amicus brief will assist the Court by offering additional perspective on the historical development of California's class action procedure, and explaining how that history has impacted this Court's precedents on common proof and manageability of individualized issues. As CELA's proposed brief shows, California class actions necessarily involve proving facts for absent class members based on representative evidence, including sampled evidence. What is more, under California law,

individualized *liability* issues, as well as individualized *defenses*, pose no barrier to certification, any more than individualized *damages* questions, so long as the Court is able to effectively manage the evidence.

CELA's proposed brief also discusses and distinguishes two recent federal cases on which defense-side amicus participants rely heavily, *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) and *Comcast Corp v. Behrend*, 133 S.Ct. 1426 (2013). The latter case was decided after the principal briefing was completed, but before the filing of the first amicus briefs in this case, some of which rely on it. The proposed brief also discusses *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S.Ct. 1184 (2013), which was decided one month before *Comcast* and stands in stark contrast to both *Comcast* and *Dukes*. *Amgen* has not been addressed in any other briefs.

CELA supports plaintiffs and respondents Sam Duran et al. Recognizing that the Court's forthcoming opinion may impact California's broader class action jurisprudence, however, CELA's brief does not focus on the particular facts and circumstances of Mr. Duran's case, but rather attempts to provide a wider-ranging and historical perspective on the issues the case presents.

Pursuant to Rule of Court 8.520(f)(4), CELA affirms that no party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

For the reasons stated above, CELA respectfully submits that its proposed brief may be of assistance to the Court in deciding the matter, and therefore requests the Court's leave to file it.

Dated: May 3, 2013

Respectfully submitted,

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I. INTRODUCTION

This Court's oft-quoted language in *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319 (2004), approving the use of sampling evidence, statistical evidence, and other forms of representative evidence in California class actions, stands at the crossroads of this case.

This brief examines the historical origins of the class action device as it emerged, developed, and now exists in California in attempt to answer the following question: How did we get to *Sav-on*?

A review of this Court's class action precedents dating back to 1850 shows that the *Sav-on* passage stands on bedrock.

In California, the class action emerged out of one of the first principles of the court of equity: Do complete justice. This principle developed to prevent incomplete litigation that would leave the rights of some parties unsettled, leading to future litigation for the court to handle. From this principle came mandatory joinder rules, requiring that all interested persons be formally joined as parties to any litigation affecting their rights. Those rules were soon found unworkable when the interested parties were unknown or numerous. Requiring their joinder delayed and otherwise frustrated the court's efforts to resolve the case. Rather than dismissing it, and dispensing no justice at all, the court allowed the named parties to act as representatives of the absent ones.

The modern class action is a form of virtual representation. It rests on pragmatic considerations including the court's interest in issuing a comprehensive decree that resolves the controversy, prevents future litigation, and furthers the efficient administration of the court's affairs. It also rests on public policy, including the public's interest in effective judicial resolution of group disputes when it is impracticable to join all the

interested persons individually. This public interest is especially strong in cases involving important substantive rights, including statutory rights.

The Legislature codified the doctrine of virtual representation in 1872 in Code of Civil Procedure section 382.[1]

As early as 1850, this Court recognized its own duty to develop procedures to accommodate representative litigation. Because the alternative is dispensing no justice or partial justice, rather than complete justice, the Court has been diligent in fulfilling this duty.

This is the origin of the modern concept of "managing" individualized questions in class action litigation. The result is a series of decisions recognizing the utility of numerous management tools. The earliest such tool was separate trials of any individualized issues following the trial of the common issues. Later decisions replaced these trials with hearings. More modern decisions recognized the utility of subclassing, redefined classes, and claim forms to streamline the proceedings further.

The decisions also recognize tools that incorporate individualized issues into the "litigative process." Pattern and practice evidence, sampling evidence, and statistical inference are three examples noted by this Court in *Sav-on*. These tools, properly deployed, function as methods of common proof in their own right. Because courts are to be innovative in fashioning new tools to manage class action litigation, more are sure to develop.

This Court's decisions also make clear that these management tools may be used not only for damages questions, but also to manage individualized liability questions, and to manage any individualized

[1] All undesignated statutory references are to the Code of Civil Procedure.

defenses. This makes sense from a historical perspective, because it is the only way to accomplish the court's goal of dispensing a complete decree that avoids further litigation.

The defendant in this case, U.S. Bank, and its amici, contend that this Court's case management tools dating back to its earliest decisions are not good enough. They argue that these tools may not be used when liability or defenses are involved, and they claim an absolute right to put on individualized evidence, including an endless stream of live witnesses, in support of any affirmative defense they may try to muster. They say that if they choose to assert this right, there can be no class action.

Their position finds no historical support in this Court's class action jurisprudence. No litigant can take away the Court's power to choose the management tool best suited to the litigation before it. In a class action, the Court has discretion to require the parties to present their claims and defenses using representative, rather than individualized, evidence.

No one disputes that defendants have a due process right to defend themselves, but the tools that this Court has developed over the years to manage individualized issues in class action litigation do not infringe on that right. These tools allow defendants to put on every available defense; they simply require that the evidence supporting the defenses be presented in a particular manner, which is a question of procedure well within the courts' power to control. California has a strong interest in enabling virtual representation, including class actions, through such procedures.

U.S. Bank and its amici also rely on two recent U.S. Supreme Court decisions, both of which involved Federal Rule of Civil Procedure 23, not section 382, and not due process: *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011) ("*Dukes*"); *Comcast Corp v. Behrend*, 133 S.Ct. 1426 (2013).

As explained below, neither of these cases stands for the propositions for which U.S. Bank and its amici cite them. In fact, interpreting these decisions as amici urge would undermine the very idea of class actions, frustrate the policy of providing for group resolution of disputes, and drain judicial resources—all of which runs contrary to California jurisprudence.

II. ARGUMENT

A. Class Actions Are an Established Component of California Jurisprudence

In a frequently-cited passage from *Sav-on*, this Court endorsed the use of statistical and other types of representative evidence as a method of common proof in California class action cases:

> California courts and others have in a wide variety of contexts considered pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate.

34 Cal.4th at 333.

In a footnote, *Sav-on* cited several examples of cases in which sampling evidence, survey results, and statistical proof were all used (or recognized as available) to establish facts as to absent class members classwide. *Id.* at 333 n.6 (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 337-340 (1977) ("*Teamsters*") (statistics bolstered by specific incidents "are equally competent in proving employment discrimination"); *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096, 1106-08 (2003) ("well sampling and other hydrological data" about "the pattern and degree of contamination" could support liability); *Reyes v. Board of Supervisors*, 196 Cal.App.3d 1263, 1279 (1987) (classwide liability "can be proved by reviewing … a sampling of

representative cases"); *Stephens v. Montgomery Ward & Co.*, 193 Cal.App.3d 411, 421 (1987) (certification proponent used "statistical data" and analysis of the defendant's corporate structure to show centralized control over employment decisions).

A series of post-*Sav-on* decisions similarly recognizes the importance and operation of this kind of proof in various contexts. *See, e.g.*, *Jaimez v. DAIHOS USA, Inc.*, 181 Cal.App.4th 1286, 1302-03 (2010) ("[Plaintiffs] could attest to the *typical* amount of overtime time they worked each day, even in the absence of time records. .... The possible use of survey evidence or testimony from a random and representative sampling of class members can certainly be explored to facilitate the necessary calculations." (emphasis added)); *Alch v. Superior Court*, 165 Cal.App.4th 1412, 1428 (2008) ("[Plaintiffs] cannot prove their disparate impact claims without access to evidence from which they can perform a statistical analysis."); *Capitol People First v. Department of Developmental Services*, 155 Cal.App.4th 676, 692-96 (2007) (reversing denial of class certification because "use of sampling or statistical proof" had been improperly "restricted"; "the trial court turned its back on methods of proof commonly allowed in the class action context"); *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 13-14 (2007) (affirming class certification based on representative testimony); *Bell v. Farmers Ins. Exchange*, 115 Cal.App.4th 715, 751 (2004) (trial court has discretion "to weigh the advantage of statistical inference ... with the opportunity it afforded to vindicate an important statutory policy without unduly burdening the courts"); *see also Parra v. Bashas', Inc.*, 536 F.3d 975, 979

(9th Cir. 2008) (commonality established through "statistical and anecdotal evidence of discrimination").[2]

Notwithstanding the seemingly well-established acceptance of representative testimony, survey evidence, and statistical extrapolations in California class action cases, defendant U.S. Bank and its amici argue that such evidence cannot be used to establish any element of liability, and further assert that defendants cannot be compelled to present any defenses through representative evidence. According to U.S. Bank and its amici, defendants are entitled to insist on individualized proof of all defenses, effectively defeating class certification in virtually every case.[3]

But the rule stated in *Sav-on* and other California decisions stems from well-established, constitutionally sound equitable principles dating

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[2] Representative evidence has long been used in FLSA actions to establish liability. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) (court determined on classwide basis that reporters were misclassified based on testimony of 22 of 70 employees); *Brock v. Norman's Country Market, Inc.*, 835 F.2d 823 (11th Cir. 1988) (court determined on classwide basis that eight employees misclassified without the testimony of all eight employees); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224-25 (1st Cir. 1982) (court determined classwide liability for 246 assistant managers in 44 different restaurants based on testimony regarding overtime exemption from witnesses at six stores); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (not all employees need testify in order to prove FLSA violations provided sufficient evidence provided for jury to make reasonable inference as to non-testifying employees); *Jankowski v. Castaldi*, 2006 WL 118973, *7 (E.D. N.Y. 2006) (plaintiffs need only present testimony of representative sample of employees as part of proof of prima facie case under FLSA).

[3] ABM at 37-49, 65-77; Brief of Amici Curiae National Assn. of Security Companies et al. ("NASC Br.") at 21-26; Brief of Amici Curiae California Business Roundtable et al. ("CBR Br.") at 7-17; Brief of Amici Curiae Chamber of Commerce et al. ("Chamber Br.") at 1-2, 16-18; Brief of Amicus Curiae Pacific Legal Foundation ("PLF Br.") at 10-17.

back to this Court's earliest class action precedents. A review of this history of the development of the class action device in California, which this brief presents below, demonstrates that (1) the use of representative testimony, survey evidence, and evidentiary inferences (including statistical ones) is proper and necessary if class actions are to exist at all; (2) such evidence may be used not just for damages, but also for liability and defenses; and (3) the trial court can indeed require defendants to adhere to the trial management procedure the court has selected as most efficient for the particular case, and can do so without offending federal due process.

1. Development of the Doctrine of Virtual Representation in California: The Path to *Sav-on*

Modern California class action law originates from principles of equity discussed in one of this Court's earliest decisions, *Von Schmidt v. Huntington*, 1 Cal. 55 (1850):

> Where the question is one of common or general interest, or where parties form a voluntary association for public or private purposes, the persons interested are commonly numerous, and any attempt to unite them all in the suit would be, even if practicable, exceedingly inconvenient … Courts will allow a bill brought by some of them on behalf of themselves and others ….

Id. at 66 (citing Story, *Equity Pleadings* (4th ed. 1850)).

These equity principles have a deep-rooted history. The class action emerged from one of the "leading principles" developed by courts of equity "for determining the proper parties to the suit." Story, *Equity Pleadings* §72 (8th ed. 1870) (hereafter "Story") (4th ed. cited in *Von Schmidt*).

This leading principle is that "when a decision is made upon any particular subject-matter, the rights of all persons, whose interests are immediately connected with that decision, and affected by it, shall be

provided for, as far as they reasonably may be." *Id.* The aim is "to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the court may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented." *Id.*; *see id.* §75 (joinder of all affected persons avoids "the evils of fruitless or inadequate litigation").

The original rule required that all interested persons be formally joined as parties to the action. If they could not be joined, the action could not proceed. *Id.* §§73-75; *see Gorman v. Russell*, 14 Cal. 531, 539 (1860) (original, "strict rule" required "that all persons materially interested must be parties"); *Von Schmidt*, 1 Cal. at 66 ("general rule" is that "all persons materially interested in the subject matter of the suit ought to be made parties").

The mandatory joinder rule was founded on considerations of "public convenience and policy," and "the convenient administration of justice," as well as the principle that the court system, when asked to "do justice" by resolving a controversy, will not do it "by halves." Story, *supra*, §§72, 77, 96. Joinder "enable[s] *the court* to make a complete decree between the parties," "to prevent future litigation by taking away the necessity of a multiplicity of suits," and "to make it perfectly certain, that no injustice is done." *Id.* §72 (emphasis added).

Even in the earliest years of equity jurisprudence, however, an inflexible mandatory joinder rule was widely recognized as unworkable when the interested parties were unknown or numerous. In such cases, "any obligation to join them all would amount to a positive denial of justice." *Id.* §100; *see Gorman*, 14 Cal. at 539 (usual joinder rule "is

dispensed with, where it is impracticable or very inconvenient" to join all interested parties (citing Story, *supra*, §135)); *Von Schmidt*, 1 Cal. at 66 (joinder rule set aside where adherence to it would create "interminable delays, and other inconveniences which would obstruct and probably defeat the purposes of justice").

Rather than "wholly deny[ing]" the plaintiff the "relief to which he is entitled," the courts of equity held that "the relief must be granted without making other persons parties." Story, *supra*, §96. "The latter is deemed the least evil, whenever the court can proceed to do justice between the parties before it, without distributing the rights or injuring the interests of the absent parties, who are equally entitled to its protection." *Id.*

A series of exceptions to the mandatory joinder rule thus emerged, grounded in the same principles of "public convenience and policy" and "the convenient administration of justice." *Id.* §§ 77, 96; *see* Note, "Class Action and Interpleader: California Procedure and the Federal Rule," 6 *Stan. L. Rev.* 120, 121 (1953) ("the class action developed as a necessary exception to the equity rules of compulsory joinder" (citing *Von Schmidt*, 1 Cal. at 66; *Gorman*, 14 Cal. at 539)).

The exceptions, which are "just as old and well founded as the rule itself," Story, *supra*, §96 n.4, all provide for "virtual representation" of absent parties by the parties who are present, *Bernhard v. Wall*, 184 Cal. 612, 629 (1921).[4]

Such representation is permitted precisely because "[c]ourts will not suffer the [mandatory joinder] rule to be so applied as to defeat the very

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[4] *See also Arias v. Superior Court*, 46 Cal.4th 969, 988-89 (2009) (conc. opn. of Werdegar, J.).

purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable." *Von Schmidt*, 1 Cal. at 66; *see Bernhard*, 184 Cal. at 629 ("the doctrine of virtual representation rests upon considerations of necessity and convenience, and was adopted to prevent a failure of justice").

On the contrary, "it is ***the duty*** of the Court to adopt its practice and course of proceeding as far as possible" to accommodate the action, rather than "declin[ing] to administer justice and to enforce rights for which there is no other remedy." *Von Schmidt*, 1 Cal. at 67 (emphasis added).

In 1871, Code of Civil Procedure section 382 was enacted to codify this "long-prevailing equity rule," and to make it applicable "both to legal and to equitable causes of action." *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal.2d 833, 837 (1948). The statute has not been substantively amended since.

Three lessons so far can be drawn.

First, the modern concept of "managing" individualized questions is rooted in this Court's directive in *Von Schmidt*. *This* is why "[c]ourts seeking to preserve efficiency and other benefits of class actions routinely fashion methods to manage individual questions," and why "'the trial court has ***an obligation*** to consider the use of … innovative procedural tools proposed by a party to certify a manageable class.'" *Sav-on*, 34 Cal.4th at 339 (citing *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 440 (2000); *Occidental Land, Inc. v. Superior Court*, 18 Cal.3d 355, 360 n.3 (1976); *Osborne v. Subaru of America, Inc.*, 198 Cal.App.3d 646, 653 (1988)) (footnote omitted); *see also Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462,

474 (1981) ("Since the judicial system substantially benefits by the efficient use of its resources, class certifications ***should not be denied*** so long as the absent class members' rights are adequately protected." (emphasis added)).

Second, the equity principles that form the foundation of the virtual representation doctrine, and their codification in section 382, are what led to this Court's repeated statements that California "has a public policy which encourages the use of the class action device," and that "rules promulgated by this court ***should*** reflect that policy." *Richmond*, 29 Cal.3d at 473 (emphasis added); *see also Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal.3d 362, 378 (1978) (noting "public interest in establishing a procedure that permits [class] actions to be decided on their merits"). "As [the] court has observed on many occasions ..., the adoption of efficient class action procedures unquestionably ... vindicat[es] a wide range of legitimate public purposes." *Civil Service*, 22 Cal.3d at 377 (citing *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 714-15 & n.14 (1967); *Vasquez v. Superior Court*, 4 Cal.3d 800, 808 (1971); *Southern California Edison Co. v. Superior Court*, 7 Cal.3d 832, 841-42 (1972)).

As mentioned above, a significant component of that foundational public policy is the benefit to the judicial system of class proceedings over the alternatives—individual proceedings or mandatory joinder. *Von Schmidt*, 1 Cal. at 66. In numerous cases, the Court has adopted rules precisely because they facilitate use of the class action device. *See, e.g.*, *Civil Service*, 22 Cal.2d at 377 (holding that defendants may be ordered to bear notice costs because "[i]n the absence of such a cost-shifting

procedure, the class action mechanism might frequently be completely frustrated").[5]

Finally, because in many cases the practical effect of denying a class proceeding may be no proceeding at all (*Von Schmidt*, 1 Cal. at 66; *see Linder*, 23 Cal.4th at 441), this Court has consistently examined the nature of the claim and the importance of the rights to be vindicated by the proposed class action. *See Linder*, 23 Cal.4th at 445-46 ("courts remain under the ***obligation*** to consider 'the role of the class action in deterring and redressing wrongdoing'" (emphasis added)). In *Daar*, the Court observed that "absent a class suit, recovery by any of the individual [class members] is unlikely. .... [Instead], defendant will retain the benefits from

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[5] *See also Richmond*, 29 Cal.3d at 479 (declining to adopt rule proposed by defendant that "would unnecessarily interfere with the rights of the class members to use this equitable procedure. .... To rule otherwise would eliminate a substantial number of class action suits in this state."); *Occidental Land*, 18 Cal.3d at 363 n.6 (rejecting defense argument that materiality of misrepresentations about fees depends on each plaintiff's individual "financial status"; "[r]equiring proof of this nature would necessarily preclude the certification of virtually all class actions based on allegations of fraud."); *City of San Jose v. Superior Court*, 12 Cal.3d 447, 457 (1974) (rejecting argument that individual pre-suit government claim forms were required for each class member; such a requirement "would severely restrict the maintenance of appropriate class actions—contrary to recognized policy favoring them"); *Southern Cal. Edison*, 7 Cal.3d at 842 (rejecting defendants' bid to depose unnamed class members and scheme to exclude those who fail to appear because it is "vital to prevent such 'chilling' of class actions in light of their new importance as a litigation tool"); *La Sala v. American Sav. & Loan Assn.*, 5 Cal.3d 864, 873 (1971) (rejecting defense attempt to "pick off" class representatives by offering full relief because it would mean that "only members of the class who can afford to initiate or join litigation will obtain redress; relief for even a portion of the class would compel innumerable appearances by individual plaintiffs. Yet the function of the class action is to avoid the imposition of such burdens upon the class and upon the court.").

its alleged wrongs. A procedure that would permit [class members] to recover the amount of their overpayments is to be preferred over the foregoing alternative." *Daar*, 67 Cal.2d at 715. In *Vasquez*, the Court said more forcefully that "[p]rotection of unwary customers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society," and that the alternatives to a class action "do not sufficiently protect the consumer's rights." *Vasquez*, 4 Cal.3d at 808.

And in *Gentry*, the Court's ruling was driven by the recognition that "class actions play an important function in enforcing overtime laws," and that "absent effective enforcement, the employer's cost of paying occasional judgments and fines may be significantly outweighed by the cost savings of not paying overtime." *Gentry v. Superior Court*, 42 Cal.4th 443, 459, 462 (2007) (citing *Sav-on*, 34 Cal.4th at 340). "By preventing 'a failure of justice in our judicial system,' the class action not only benefits the individual litigant but serves the public interest in the enforcement of legal rights." *Id.* at 462 (quoting *Linder*, 23 Cal.4th at 434; *Bell*, 115 Cal.App.4th at 741); *see also* Amicus Curiae Brief of The Impact Fund et al. at 20-26 (explaining why class actions are essential to effective enforcement of California's overtime laws).

2. Courts May Impose on Litigants Procedures to Manage Individualized Evidence of Liability, Defenses and Damages

The manageability tools available to courts also have deep roots, traceable back to some of this Court's earliest decisions.[6]

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[6] *See Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1054 (2012) (conc. opn. of Werdegar, J.) (noting Court's "historic endorsement of a variety of methods that render collective actions judicially manageable").

Because the equity rule dispensing with joinder is grounded in public policy and the court's convenience, these decisions teach that the rule has *always* contemplated that a class action may proceed even if a complete adjudication requires addressing, in some fashion, issues specific to individual unnamed class members. This is why, in *Brinker*, this Court held that a class action may proceed when "***the elements necessary to establish liability*** are susceptible of common proof ***or, if not,*** [when] there are ways to manage effectively proof of any elements that may require individualized evidence." *Brinker*, 53 Cal.4th at 1024 (citing *Sav-on*, 34 Cal.4th at 334) (emphasis added).

In the earliest cases, courts conducted trials of the common issues, "rendering … a 'class judgment'" resolving "whatever questions were common among the … class,"[7] then presided over subsequent proceedings in which unnamed class members were permitted to "come in under the decree, and take the benefit of it, or show it to be erroneous, or entitle themselves to a rehearing." Story, *supra*, §96; *see Hurlbutt v. Butenop*, 27 Cal. 50, 56 (1864) (illustrating this approach); Note, *supra*, at 129-30 (describing early procedures used to afford "individual relief" in class action cases, including "enter[ing] judgment for the entire amount of the overcharge and permit[ting] the class members to come in under the decree and prove their claims").

During the trial of the class issues, the evidentiary showing made by the class representatives would be applied to and binding on the class as a whole, *see*, *e.g.*, *Daar*, 67 Cal.2d at 704-06; *Wheelock v. First Presbyterian*

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[7] *Chance v. Superior Court*, 58 Cal.2d 275, 285 (1962); *see* Story, *supra*, §96.

Church, 119 Cal. 477, 481 (1897); *Hurlbutt*, 27 Cal. at 56,[8] and any "conflict over division of the proceeds" of the suit would be resolved in post-trial proceedings, during which "individual [class members] or groups thereof contest issues among themselves." *Chance*, 58 Cal.2d at 287.[9]

In 1993, section 384 was enacted to require that class action judgments "determine the total amount that will be payable to all class members."[10] Modern decisions continued to recognize the utility in some cases of a post-judgment claims process whereby each class member "comes forward, identifies himself, and proves the amount of [his or her damages]." *Daar*, 67 Cal.2d at 706. Rules of fluid recovery developed for distributing any residue. *See State of California v. Levi Strauss, Inc.*, 41 Cal.3d 460, 471-72 (1986). These rules facilitated use of the class action device even where "proof of individual damages by competent evidence is not feasible," or where "each individual's recovery may be too small to make traditional methods of proof worthwhile." *See id.*

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8 *Cf. Bell*, 115 Cal.App.4th at 747 (stating that *Daar* "offers a precedent for determining aggregate classwide damages through a process of logical inference").

9 In some cases, a special master presided over these subsequent proceedings. Story, *supra*, §99. The proceedings also allowed for the unnamed class members to "bear their proportion of the expenses of the litigation." *Id.* §99 n.1. If some class members failed to appear after reasonable notice, "the fund [would] be distributed without reference to" their claims. Story, *supra*, §99 n.1. The default distribution method was (and is) *pro rata*. *Southern Cal. Edison*, 7 Cal.3d at 839 (unnamed class members "have the immediate right to share pro rata with the named plaintiffs in the amount of the judgment actually recovered").

10 *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 128 n.12 (2000); *see In re Vitamin Cases*, 107 Cal.App.4th 820, 827-28 (2003) (discussing section 384 applicability in different scenarios).

Other, more streamlined procedures for managing class litigation have developed since the early days of California class action practice, which can obviate the need for traditional post-judgment claims or hearing processes. For example, numerous opinions of this Court acknowledge the propriety of subclassing as a management tool. *See, e.g.*, *Occidental Land*, 18 Cal.3d at 360 n.3 (trial court "may divide the class into subclasses"); *Richmond*, 29 Cal.3d at 471 ("the minority may have its views presented either as a subclass or as interveners"); *La Sala*, 5 Cal.3d at 882 ("aggregat[ing] claims into a few subclasses"); *Medrazo v. Honda of North Hollywood*, 166 Cal.App.4th 89, 99 (2008) ("the court ***should determine*** if it would be feasible to divide the class into subclasses to … allow the class action to be maintained" (citing *Richmond*, 29 Cal.3d at 470-71) (emphasis added)). Redefining the class is another established management technique that courts must consider. *La Sala*, 5 Cal.3d at 875, n.10 (admonishing trial courts to define classes so as to "permit utilization of the class action procedure"); *see Richmond*, 29 Cal.3d at 474 (same). Use of claim forms also developed to substitute for hearings. *E.g.*, *Levi Strauss*, 41 Cal.3d at 470-73, 479; *Bell*, 115 Cal.App.4th at 725-26, 761-63.

Some of the available management tools "incorporate the class differences into the litigative process," and by that means avoid the need for traditional post-trial procedures. *Richmond*, 29 Cal.3d at 473; *see Sav-on*, 34 Cal.4th at 340 n.13 (same).[11] The passage from *Sav-on* cited at the beginning of this brief lists many such tools, including sampling evidence

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[11] *See also Employment Devel. Dept. v. Superior Court*, 30 Cal.3d 256, 266 (1981) ("The past decisions … demonstrate that in most circumstances a court can devise remedial procedures which channel the individual determinations that need to be made through existing administrative forums.").

and statistical proof (a form of which was utilized in the case at bar). 34 Cal.4th at 333. These tools, in effect, function as alternative methods of common proof that avoid the individualized proof issues that might otherwise arise. *See id.*

Because trial courts are to be procedurally "innovative" in managing class action litigation, as the needs of the particular case may require, *see Linder*, 23 Cal.4th at 440, additional techniques may yet be developed. Modern trial plans continue to evolve.

All of these management tools have one thing in common. They exist, and were developed, "to remedy the practical inconvenience of making a great number of parties to the suit," and to ameliorate "the manifest inconvenience of adopting any other course." Story, *supra*, §§97, 99 n.1. These "[f]actors of convenience and practicability" are so important that they "are permitted to override the individual claimant's reluctance" to participate in them. *Chance*, 58 Cal.2d at 284; *see also Vasquez*, 4 Cal.3d at 810 ("if a class suit were not permitted … [t]he result would be manifold burdens on the parties and on the judicial process").

These procedures, moreover, are not limited to resolving individualized damages awards or fund allocation issues. Although this Court has repeatedly observed that individualized damages questions do not defeat certification,[12] a close reading of the Court's leading precedents shows that individualized *liability* issues, as well as individualized *defenses*, likewise do not defeat certification, so long as the Court is able to manage them through one or more management tools. All of the tools at the court's disposal—including the survey and statistical methods of proof

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[12] *See*, *e.g.*, *Sav-on*, 34 Cal.4th at 332-33; *Collins v. Rocha*, 7 Cal.3d 232, 238 (1972); *Chance*, 58 Cal.2d at 287.

cited in *Sav-on*—may be used to manage liability, defenses, and damages questions alike.

In *Daar*, this Court recognized that defenses to a breach of contract claim, such as actual knowledge and consent, could not defeat certification because the individualized questions they raised could be managed:

> *If, as the respondents suggest, the defendant might have a defense* as to a particular grower, such as the fact that he actually knew of and consented to the method by which he had been partially paid for his cotton seed, *that situation could well be cared for in this action with fairness to both parties.*

Daar, 67 Cal.2d at 712-13 (emphasis added) (quoting *Fanucchi v. Coberly-West Co.*, 151 Cal.App.2d 72, 80 (1957)). In *Fanucchi*, the individual defenses were to be managed by adjudicating them in the proceedings to follow the trial of the common issues, which the Court determined would be "fair[] to all parties":

> [O]nce the common questions of law and fact are determined in such a class action the members of the class who wish to participate can, after notice, file their claim and the *defendants may then assert and have determined any defense they may have* as to the claim of any particular grower.

Fanucchi, 151 Cal.App.2d at 78, 80 (emphasis added). In a second case cited in *Daar*, the court held that defenses of laches and statutes of limitations could likewise be managed by addressing them in post-trial proceedings. *Heffernan v. Bennett & Armour*, 110 Cal.App.2d 564, 596 (1952), *cited in Daar*, 67 Cal.2d at 713; *see also Bradley v. Networkers*

Int'l, LLC, 211 Cal.App.4th 1129, 1145 (2012) ("individual issues arising from an affirmative defense … pose no per se bar [to certification]").[13]

Similarly, in *Vasquez*, the Supreme Court reversed an order striking the class allegations from the complaint in a common-law fraud case, even though one of the elements of liability—false representations—would have to be established using statistical proof. 4 Cal.3d at 811-14. The defendant, who sold freezers and supplies of food to the plaintiffs, represented that "each [food] order would last a minimum of seven months." *Id.* at 812. The defendant argued that "it would be impossible without the individual testimony of each plaintiff" to prove that this statement was false, because "individual proof of consumption of each plaintiff's family during the period would be required." *Id.* at 812-13. This Court disagreed, holding that this element of liability could "be demonstrated by proof of such factors as the average monthly consumption of food for a family of a particular size." *Id.* at 813.

Vasquez thus exemplifies a "litigative process" management tool that functions as common evidence in its own right. *See id.* at 811-13.

Vasquez also took pains to emphasize that class certification is proper even if "some of the matters bearing on the right to recovery" require individualized proof, so long as that proof can be managed:

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[13] *Accord Brinker*, 53 Cal.4th at 1054, 1055 (conc. opn. of Werdegar, J.) ("whether in a given case affirmative defenses should lead a court to approve or reject certification will hinge on the manageability of any individual issues"; "[defendant] has not shown that the defense it raises, waiver, would render a certified class categorically unmanageable"); *Employment Devel. Dept.*, 30 Cal.3d at 266 ("[A] class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her *eligibility for recovery* or as to the amount of his or her damages." (emphasis added)).

> It may be, of course, that the trial court will determine in subsequent proceedings that *some of the mattersf bearing on the right to recovery require separate proof by each class member*. If this should occur, the applicable rule as stated in *Daar* is that the maintenance of the suit as a class action *is not precluded* so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action.

Id. at 815 (emphasis added); *see also Levi Strauss*, 41 Cal.3d at 471 (*Vasquez* "challenged the trial courts to develop 'pragmatic procedural devices' to 'simplify the potentially complex litigation while at the same time protecting the rights of all the parties'").

In *Granberry v. Islay Investments*, 9 Cal.4th 738 (1995), the defendants unlawfully withheld security deposits from their tenants. The trial court refused to enter judgment for the aggregate amount of deposits (as had been expressly approved in *Daar* and *Chance*), instead entering judgment in favor only of those class members who "might actually come forward and file individual claims." *Id.* at 750. This Court reversed, holding that such a procedure ran afoul of section 384. *Id.* at 750-51. It also held that the defendants were entitled to assert a setoff defense for "amounts owed for unpaid rent, repair, and cleaning." *Id.* at 743-49, 751. The Court directed that an evidentiary hearing be held to give them "an opportunity to prove their right to setoff," and that the amount of "aggregate class recovery" be calculated following that hearing. *Id.* at 751-52. In other words, the Court found the defense could be managed through presentation of aggregate evidence at a special evidentiary hearing after the trial of the common issues. *See id.*

In *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116 (2000), another landlord-tenant case, the Court held that a similar

defense—that the defendant had already repaid some of the tenants—could be managed in post-trial proceedings, consistently with due process:

> On remand the trial court should order defendants to identify, locate, and repay to each former tenant charged liquidated damages the full amount of funds improperly acquired from that tenant, retaining the power to supervise defendants' efforts to ensure that all reasonable means are used to comply with the court's directives.
>
> If defendants have already made restitution to any claimant, *defendants may introduce evidence of prior payment* and need not pay any tenant twice, thus alleviating the due process concerns of defendants.

Id. at 138 (emphasis added); *see id.* at 158 (conc. opn. of Werdegar, J.) ("the remedial order in this case, understood as foreclosing the possibility of double recovery by accommodating any evidence of prior payment, does not raise due process concerns").[14]

In *Lockheed*, the Court rejected the defendant's argument that "each of the elements of the claims asserted" and "all applicable defenses" must be "capable of common proof." 29 Cal.4th at 1105. Instead, the Court held that there is "no per se or categorical bar" to class certification of a medical monitoring claim, "so long as any individualized issues the claims present are manageable." *Id.* at 1105-06.

In *Brinker*, the Court explained again that class certification can be granted even if the "elements necessary to establish liability" are not susceptible to common proof. 53 Cal.4th at 1024. If some of the elements

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[14] *Kraus* was a pre-Proposition 64 representative action under the UCL, not a class action. 23 Cal.4th at 118. Nevertheless, its analysis is instructive and fully consistent with the Court's approach to managing defenses raised in class action litigation.

"require individualized evidence," the relevant question for class certification purposes is "whether there are ways to *manage* [this proof] effectively." *Id.* (emphasis added).

In *Sav-on*, the defendant argued that individualized proof of "the actual tasks performed by class members and the amount of time spent on each of those tasks" was necessary to establish liability. 34 Cal.4th at 334. The Court held that "even if some individualized proof of such facts ultimately is required to parse class members' claims," class certification was nonetheless proper:

> We long ago recognized "that each class member might be required ultimately *to justify an individual claim* does not necessarily preclude maintenance of a class action." (*Collins v. Rocha*, *supra*, 7 Cal.3d at p. 238.) Predominance is a comparative concept, and "the necessity for class members to individually establish eligibility and damages does not mean individual fact questions predominate." (*Reyes v. Board of Supervisors*, *supra*, 196 Cal.App.3d at 1278; see *Lockheed*, *supra*, 29 Cal.4th at p. 1105; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 707-710.) Individual issues do not render class certification inappropriate so long as such issues may effectively be managed.

Id. That this paragraph refers to *liability*, and not merely *damages*, is clear from the next paragraph, where the Court said: "*Nor* is it a bar to certification that individual class members may ultimately need to itemize their *damages*." *Id.* (emphasis added).

As for defenses, the Court held that these, too, are subject to the same management tools as any other part of the class action case. Such tools "permit defendants to 'present their opposition, and to raise certain affirmative defenses.'" *Id.* at 339-40 (quoting *Day v. NLO*, 851 F.Supp.

869, 874-76 (S.D. Ohio 1994)).[15] The Court elaborated on some of the available tools:

> Courts on occasion have conducted separate judicial or administrative miniproceedings on individualized issues. [Citation.] Individualized hearings may sometimes efficiently be assigned to special masters. [Citation.] Perhaps, as plaintiffs suggest, in this case each class member's particularized overtime 'damages sought may be calculated according to a standard formula' (*Occidental Land, Inc.*, *supra*, 18 Cal.3d at p. 364) based on survey results (see, e.g., *MacManus v. A.E. Realty Partners* (1988) 195 Cal.App.3d 1106, 1117; *Braun v. Wal-Mart, Inc.* (Minn. Dist. Ct. 2003) 2003 WL 22990114). It is not our role at this stage either to devise or to dictate the methods by which a trial court conducting a particular class action may choose to manage it.

Id. at 340 n.12.

As *Sav-on* and many other decisions make clear, the trial court has broad discretion in selecting appropriate management tools and deciding which of the available tools is best-suited to the particular class proceeding. *See id.*; *see also Brinker*, 53 Cal.4th at 1024; *Linder*, 23 Cal.4th at 440. Once selected by the trial court, these management tools are not optional for the litigants. *See*, *e.g.*, *Occidental Land*, 18 Cal.3d at 363 n.6 (defendant cannot insist on individualized proof of class members' "financial status" where common proof was available and "requiring proof of this nature" would "preclude the certification of virtually all class actions"); *La Sala*, 5 Cal.3d at 877 (rejecting defense proposal to require individualized proof of each class member's bargaining power where fact could be established through common proof); *Vasquez*, 4 Cal.3d at 813 (defendant may not insist on individualized testimony of class members,

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[15] In the cited case, the court required the defenses to be presented in separate post-trial proceedings, as in *Kraus*. *Day*, 851 F.Supp. at 876.

and thereby defeat certification, when reliable statistical proof was available); *Capitol People*, 155 Cal.App.4th at 691 ("under California law, courts can take an aggregate approach to plaintiffs' claims"). In *Sav-on*, the Court found that common methods of proof (and management tools) could be used *in lieu of* the individual proof the defendant proposed, and nothing in the opinion contemplates that the defendant may defeat the Court's purposes by choosing not to litigate its case within that framework.[16]

All of these authorities amply support the conclusion that in a class action, trial courts can require defendants to present their defenses through aggregate, rather than individualized, evidence. Defendants are not allowed to insist on presenting their case with individualized proof, any more than they can insist on calling an unlimited number of witnesses.[17]

Any other rule would undermine the original principles behind the emergence of the class action, which were to "enable *the court* to make a complete decree" without joining all interested parties, thereby "prevent[ing] future litigation," in furtherance of "the convenient administration of justice." Story, *supra*, §§72, 96 (emphasis added); *see Von Schmidt*, 1 Cal. at 66; Cabraser, *supra*, at 14 ("the judicial system itself

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16 If a defendant refused to cooperate or comply with the court's orders, sanctions would be appropriate. *See also Kraus*, 23 Cal.4th at 138 (court should "ensure that all reasonable means are used [by the defendant] to comply with the court's directives" to "identify, locate and repay" the former tenants).

17 Evid. Code §352; *see* Cabraser, "California Class Action Classics," *Forum* 10, 16 (Jan./Feb. 2009) ("*Sav-on Drug* affirms the propriety of utilizing statistical and other objective evidentiary techniques to prove liability and damages, where to do so is both fairer and more realistic than reverting to (often obsolete or nonexistent) individualized proof ....").

is a public resource, which must be conserved, and … its highest and best use is to adjudicate the common claims of groups of that public").

This is not to say that every proposed class action can proceed using "litigative process" management tools, such as common survey and statistical evidence. This Court found such tools insufficient in *Lockheed*, in light of the particular claims and issues raised in that case, and due to infirmities in the proffered expert testimony. 29 Cal.4th at 1108-1111. But defendants are wrong to assert that such tools are unavailable, or that they may be used only to manage damages questions. On the contrary, the use of such tools for liability, defenses, ***and*** damages is woven into the fabric of California class action jurisprudence and the policies that inform it.

3. Defendants Do Not Have a Due Process Right to Insist On Individualized Proof of Any Element of the Plaintiff's Claim or of Any of Their Defenses

In the judicial system's long history of managing class actions for the benefit of the courts and the public, no published California opinion has found use of representative evidence, including statistical extrapolations from the testimony of a proper representative sample of class members, to be constitutionally infirm. In fact, the amicus brief of The Impact Fund (at pp. 5-12) canvasses the wide variety of cases, including class actions, in which courts have approved the use of statistical proof.[18] There is simply no constitutional bar to the use of such evidence in a class action, as U.S. Bank and its amici assert.[19] Their position flies in the face of the authorities

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[18] *See also Bell*, 115 Cal.App.4th at 747-54 & n.22 (citing myriad cases); *supra* Part II, above (citing pre- and post-*Sav-on* decisions).

[19] ABM at 98-101; NASC Br. at 16-17; CBR Br. at 5-7; PLF Br. at 7-10.

collected by The Impact Fund and cited above (*supra* pp. 7-9), as well as the historical development of the class action device in California.

In *Bell*, the Court of Appeal summarized the legal standards governing a due process challenge of this kind:

> Under *Connecticut v. Doehr*, 501 U.S. 1, 11, (1991), the question whether a procedural device used in judicial proceedings to deprive a defendant of property comports with due process is determined by a balancing of interests: "[F]irst, consideration of the private interest that will be affected by the [procedure]; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, ... principal attention to the interest of the party seeking the [procedure], with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections."

Bell, 115 Cal.App.4th at 751-52.

This Court applied these principles in the class action context in *Civil Service Employees*, 22 Cal.3d at 377-81, where the defendant challenged the trial court's order requiring it to bear the cost of the class notice. *Id.* at 374. The Court found the strong public policies behind the California class action device determinative. "[T]he adoption of efficient class action procedures unquestionably rationally relates to the vindication of a wide range of legitimate public purposes. .... In light of the public interest in establishing a procedure that permits such actions to be decided on their merits, such a cost-shifting procedure is neither arbitrary nor irrational and thus does not abridge substantive due process guarantees." *Id.* at 377-78.

The Court also addressed a due process argument in *Kraus*, finding the representative action to be constitutionally firm where the trial

management plan accommodated the defendant's defense (that it had already repaid some of the persons entitled to a refund). 23 Cal.4th at 137-38.

In *Bell*, the Court of Appeal addressed the constitutional firmness of evidence derived from a statistically reliable sample of class members in a class action for unpaid overtime. 155 Cal.App.4th at 751-57. The court's analysis focused on the propriety of such evidence as a method of establishing the aggregate damages to be awarded to the class. *See id.*[20]

Addressing the first *Doehr* factor, the court explained that the defendant's interest was in "its total aggregate liability to the plaintiff class," and that a defendant "may object to statistical sampling on due process grounds only to the extent that the procedure affected its overall liability for damages." *Id.* at 752 (citing *Sanders v. City of Los Angeles*, 3 Cal.3d 252, 263 (1970)). Because "the damage award was in fact calculated on the basis of an average weekly overtime figure that factored in the presence of nonclaimants," the defendant's "aggregate liability was *not* affected." *Id.* (emphasis in original).

The Court of Appeal then addressed the third *Doehr* factor, holding that "the interest of the plaintiffs in using statistical inference as a basis for an aggregate classwide recovery 'is enormous, since adversarial resolution

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[20] As this Court has recognized, misclassification of an employee, standing alone, is not unlawful; rather, liability attaches when the employer fails to pay the employee earned overtime wages. *Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 1208 (2011). Hence, the statistical extrapolation in *Bell* was necessary and admissible to establish the extent of liability and the amount of damages. Nevertheless, the Court of Appeal's due process analysis focused largely on damages.

of each class member's claim would pose insurmountable practical hurdles.'" *Id.* at 752. The court went on:

> Relatively few class members have a realistic capability of assuming the costs and personal risks involved in judicial and administrative remedies. The ancillary interest of the government (i.e., the Industrial Welfare Commission *and the courts*) in using statistical inference for the award of damages lies in the means it affords to enforce the objectives of the Industrial Welfare Commission's wage orders, advance the judicial policy of giving small claimants access to the courts, and *avoid imposing unreasonable burdens on the judicial system in the enforcement of the law.*

Id. (emphasis added). Each of these principles from *Bell* is fully supported by myriad opinions of this Court discussed in detail above.[21]

Finally, the Court of Appeal turned to the "second part of the *Doehr* test—the risk of erroneous deprivation," which "in the end ... reveals a serious constitutional issue only" when the statistical and sampling methodologies proposed to be used are infirm. *Id.* at 753.

The "statistical methods used to determine [the defendant's] aggregate liability for time-and-a-half compensation" were sound, but those used to determine aggregate liability for double-time compensation were not. *Id.* at 753-58. The Court of Appeal explained that "[a] due process

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[21] U.S. Bank's amici NASC argue that *Bell* is no longer good law because it cited, among many other decisions, two federal cases that NASC says have been "discredited." NASC Br. at 21-26. This spin on *Bell* is disingenuous and grossly oversimplified. *Bell* was based on a much wider foundation and relied on scores of state and federal decisions discussing due process generally (including *Doehr*) and the proper use of statistical evidence more specifically—decisions that remain good law. NASC's claim that *Sav-on* has lost its "underpinnings" because it cited *Bell* (*id.* at 25) is equally disingenuous, given the broad foundation of California class action precedents, discussed above, on which *Sav-on* firmly stands.

critique of the accuracy of statistical inference implicitly assumes that it is a less reliable method of reaching a correct verdict than individual adjudication." *Id.* at 754. "But the proof of damages in an individual claimant's trial may also involve estimates, inferences and other sources of error." *Id.* Statistical proof differs from individualized proof only in that it "openly acknowledges the possibility of error and offers a qualitative measure of possible inaccuracy." *Id.* Hence, there is "little basis for skepticism regarding the appropriateness of the scientific methodology of inferential statistics as a technique for determining damages in an appropriate case." *Id.* at 755.

The court concluded that "the proof of aggregate damages for the time-and-a-half overtime by statistical inference reflected a level of accuracy consistent with due process under the *Doehr* balancing test." *Id.*

Bell teaches that use of sampling and statistical inference is perfectly acceptable in a class action from a due process standpoint, so long as the experts' methodologies are sound. Like proof of damages, proof of liability "may also involve estimates, inferences and other sources of error." *Id.* at 754. For example, even an individual plaintiff's trial would necessarily involve "estimates" and other "sources of error," as a plaintiff attempted to recollect and summarize his or her tasks over a four-year period. *Cf.* *Jaimez*, 181 Cal.App.4th 1302 (without records, class members would have to "attest to the typical amount of overtime time they worked each day"); *Hernandez v. Mendoza*, 199 Cal.App.3d 721, 725 (1988) (plaintiff reconstructed his hours of work over a nine-month period a year later "solely from ... memory"). As explained in a leading practice guide:

> [P]resenting the results of a well-done survey through the testimony of an expert is an efficient way to inform the trier of fact about a large and representative group of potential

> witnesses. In some cases, courts have described surveys as *the most direct form of evidence that can be offered.*

Federal Judicial Center, *Reference Manual on Scientific Evidence* 372 (3d ed. 2011) (emphasis added) (citing, *e.g.*, *Morrison Entm't Group v. Nintendo*, 56 Fed. App'x. 782, 785 (9th Cir. 2003)).

Given this practical reality, the numerous decisions collected in the Impact Fund's brief (at pp. 5-12) and cited above have approved the use of statistical inferences to establish elements of liability.

The Court of Appeal in *Bell* then turned to the trial management plan, and the defendant's claim that it was "barred from contesting the plaintiffs' proof of damages." 151 Cal.App.4th at 757. The court agreed that "the trial management plan would raise due process issues *if* it served to restrict [the defendant's] right to present evidence against the claims." *Id.* (citing *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314 (1950); *People v. Sandoval*, 206 Cal.App.3d 1544, 1550 (1989)).

The trial management tools endorsed by this Court for California class actions, including sampling and statistical inference, do not "restrict [the defendant's] right to present evidence against the claims." The only restriction is on the *manner* and *timing* of the presentation of that evidence. California may constitutionally set boundaries of this kind on the parties' evidentiary presentations. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 552 (1949) ("A state may set the terms on which it will permit litigations in its courts."); *see Sandoval*, 206 Cal.App.3d at 1550 (due process requires only "a reasonable opportunity to be heard"); Moller, "Class Action Defendants' New Lochnerism," 2012 *Utah L. Rev.* 319, 366 (2012) ("[A]s a matter of due process, courts have broad discretion to regulate opportunities to present evidence in individual cases," and "many

choices in the realm of civil procedure and evidence [are] a subconstitutional matter left to judicial or legislative choice.").

U.S. Bank's amici cite *Lindsey v. Normet*, 405 U.S. 56 (1972), for the proposition that "[d]ue process requires that there be an opportunity to present every available defense." NASC Br. at 16; Chamber Br. at 7. But *Lindsey* holds that due process requires only that there be "available procedures" to present the defenses. *Lindsey*, 405 U.S. at 66. In *Lindsey*, the U.S. Supreme Court upheld a procedure that barred the defenses from being presented at all until a later, "separate action" was filed. *Id.*

Statistical sampling is an available trial management tool for purposes of both liability and defenses, and one that California courts may in their discretion resort to under *Lindsey* and *Doehr*. The alternative is individual joinder, or calling hundreds of class members to the stand. No principle of "due process" compels California to operate its court system that way. Instead, our courts may conduct class action trials in which the parties put on their case (claims and defenses alike) through common and representative, rather than individualized, evidence.

Such a trial plan fully comports with due process and protects the rights of all parties, while at the same time allowing the court to protect its own interests in "making a complete decree," "preventing future litigation," and conducting the trial in an administratively feasible manner[22]—which are some of the main reasons class actions exist in California as an alternative to individual joinder.

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[22] *See Von Schmidt*, 1 Cal. at 66; Story, *supra*, §§72, 96. These considerations are all the more important in this time of budget cuts and limitations on judicial resources.

B. Recent Federal Decisions, Including *Wal-Mart Stores, Inc. v. Dukes*, Do Not Bar the Use of Representative Sampling Evidence or Statistical Inference, and *Amgen* Supports It

Unable to find support for their positions in California law, U.S. Bank and its amici resort to citing federal decisions construing Rule 23, including *Dukes* and *Comcast*. This Court need not consider these federal decisions when its own law is so well developed. But even if these decisions were relevant to or binding on this Court, any reliance on them would be misplaced because they are readily distinguishable. Moreover, U.S Bank's amici ignore *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013), decided one month before *Comcast*, which upheld class certification and fully supports certification in this case.

1. Wal-Mart Stores Inc. v. Dukes

U.S. Bank and its amici rely heavily on the "trial by formula" catchphrase found in *Dukes*. Seizing on this catchphrase, US Bank and its amici assert, in effect, that any form of common proof relying on evidentiary extrapolations or inferences, including statistical sampling, is barred by *Dukes* as "trial by formula." ABM at 73-73.[23]

Dukes does not support this conclusion. To the contrary, the opinion endorses the use of statistical evidence, survey evidence, and other forms of representative evidence in class litigation. Whether such evidence is sufficient to support certification depends on the nature and strength of the evidentiary showing, as with any other type of contested motion. The "trial by formula" catchphrase, which appears in a section of the opinion in

[23] *Accord* NASC Br. at 9-12; CBR Br. at 9; Chamber Br. at 10.

which the Court addressed procedures unique to Title VII[24] cases, provides no support for U.S. Bank and amici's interpretation of *Dukes*.

Moreover, were this Court to adopt such an interpretation, the new rule would swallow up section 382, as well as this Court's 150-year class action jurisprudence history, discussed above.

In *Dukes*, the U.S. Supreme Court explained that in a Title VII class action, the named plaintiffs must offer evidence to "bridge the gap" between claimed discrimination against an individual and the conclusion that a class of similarly situated individuals was similarly injured. *Dukes*, 131 S.Ct. at 2553. One "manner of bridging the gap requires 'significant proof' that [the defendant] 'operated under a general policy of discrimination.'" *Id.* (quoting *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("*Falcon*")).[25]

The *Dukes* plaintiffs "attempt[ed] to make that showing by means of statistical and anecdotal evidence, but their evidence [fell] well short" of "significant" proof. *Id.* at 2555. The statistical evidence consisted of expert regression analyses, which the Court found deficient in a number of respects, including the fact that the analyses did not purport to offer a common link between the defendant's common practice (delegation of unfettered discretion to make promotional decisions) and the experienced common impact (statistically significant disparities in managers' genders on a regional basis). *Id.* Put another way, the expert statistical proof fell

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[24] Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e-1 *et seq.*

[25] The term "significant" derives from *Falcon*, another Title VII case. The required showing is also described in *Dukes* as "substantial" proof (*Dukes*, 131 S. Ct. at 2556) or "convincing" proof (*id.* at 2554, 2556).

short of establishing an inference of a classwide discriminatory motive, which is an element of a Title VII disparate impact claim. *See id.*[26]

Discarding the proffered statistical proof, the Court then turned to the representative testimony of individual class members, which the Court referred to as "anecdotes." That evidence, the Court determined, was "too weak to raise any inference that all the individual, discretionary personnel decisions [were] discriminatory." *Id.* at 2556. The Court compared the anecdotal evidence to the better-quality proof offered in *Teamsters*, 431 U.S. 324. In *Teamsters*, the Court observed, the plaintiff offered *both* "substantial statistical evidence" *and* "significant" anecdotal accounts from individual class members. *Dukes*, 131 S.Ct. at 2556.[27] Taken together, this evidence raised the requisite inference of a link between the defendant's common practice (which included a collectively bargained seniority system) and the experienced common impact (fewer minority workers holding the relevant jobs). *See id.*

Notably, the "significant" anecdotal evidence in *Teamsters* was not *statistically* significant—*Teamsters* did not consider the evidence in that

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[26] Of course, nothing in *Dukes* holds that statistical analysis of any form is *required* in order to obtain class certification in a Title VII case. In many Title VII cases, evidence of the employer's common, classwide testing procedures or other common policies can and will suffice, standing alone. Only in the absence of such evidence would turning to other forms of common proof (such as statistical extrapolation) be necessary.

[27] In *Teamsters*, the "statistical evidence" was "bolstered … with the testimony of individuals who recounted over 40 specific instances of discrimination." 431 U.S. at 337. All of this was "substantial evidence" of the employer's "systematic and purposeful employment discrimination," sufficient to establish a prima facie case of companywide Title VII violations. *Id.* at 342.

light and no expert statistical analysis was offered[28]—but rather carried the requisite level of *evidentiary* significance. The *Dukes* Court explicitly rejected the suggestion that its ruling meant "that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." *Dukes*, 131 S.Ct. at 2556 n.9. The problem in *Dukes* was that the anecdotal evidence that the plaintiffs presented was not "significant" or "substantial" enough to "demonstrate that the entire company 'operate[d] under a general policy of discrimination.'" *Id.* at 2556 (quoting *Falcon*, 457 U.S. at 159 n.15). That was particularly true because, once the Court rejected all the remaining evidence, the case had to stand or fall on the anecdotal evidence alone. *See id.* at 2556-57. That evidence was too insubstantial to carry the whole 1.5 million-member class action.

Thus, nothing in *Dukes* suggests that, in a proper case, expert statistical and representative testimony could not be "significant" enough to warrant class certification under Rule 23(b)(3). *Dukes* held only that the evidence in the case before it was not enough, given: (a) the particular elements of a Title VII claim; (b) the plaintiffs' chosen theory—that because of the defendant's "corporate culture" of gender bias, unfettered managerial discretion led to gender discrimination; and (c) the weaknesses in the evidence presented there. For the *Dukes* court, *Teamsters* remains an example of a Title VII case in which anecdotal testimony, coupled with "significant" expert survey and statistical proof, *was* sufficient to support class certification.

Put another way, *Dukes* did not overrule *Teamsters*' strong endorsement of competent statistical proof in a variety of contexts:

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[28] *See Teamsters*, 431 U.S. at 338.

> [O]ur cases make it unmistakably clear that "[s]tatistical analyses have served and will continue to serve an important role" in cases in which the existence of discrimination is a disputed issue. We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial discrimination in jury selection cases. Statistics are equally competent in proving employment discrimination. We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Teamsters, 431 U.S. at 339-40 (citations and footnote omitted).

Nor does the *Dukes* "trial by formula" language amount to a categorical rejection of expert survey and statistical proof in all class actions, as US Bank and its amici claim. That language appears in the opinion's discussion of whether "claims for monetary relief"—namely, back pay under Title VII—may be certified under Rule 23(b)(2). The court said no, "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief." *Dukes*, 131 S.Ct. at 2557.

In so holding, *Dukes* observed that Title VII, as interpreted in *Teamsters*, generally requires a separate phase of trial, distinct from the case-in-chief, at which the defendant may attempt to "'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.'" *Id.* at 2561 (citing 42 U.S.C. §2000e-5(g)(2)(A); quoting *Teamsters*, 431 U.S. at 361).[29] If the defendant does so, Title VII states that

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[29] *Teamsters*, 431 U.S. at 361 (if "individual relief" is sought "for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief"); *see Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492, 539 (N.D. Cal. 2012) ("Although this [Title VII] case does present individualized questions with respect to any particular class

the court "shall not award damages." 42 U.S.C. §2000e-5(g)(2)(B)(ii). *Dukes* held that the need to adjudicate this question in the second phase of trial meant that the monetary back pay component of the case was not "incidental" to the injunctive relief component.[30] For *that* reason, the class could not be certified under Rule 23(b)(2).[31]

The district court had adopted (and the Ninth Circuit had affirmed) a trial plan for this statutorily-mandated phase of the case, but the plan would have allowed the defendant *no* opportunity to defend itself by proving a lawful reason for its employment decisions—either individually *or* classwide. *Dukes*, 131 S.Ct. at 2561; *see Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 626 (9th Cir. 2010). Instead, the procedure would have

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member's entitlement to relief, Plaintiffs' proposed trial plan addresses these concerns by employing the *Teamsters* framework, in which individual class members will present their claims for relief in a second phase of trial if liability is established, and Defendant will have an opportunity to present individualized defenses with respect to each class member.").

[30] *Dukes*, 131 S. Ct. at 2561 ("because the necessity of that litigation will prevent back pay from being 'incidental' to the classwide injunction, [the] class could not be certified [under Rule 23(b)(2)]").

[31] The opinion does not hold that these individualized issues could not be managed in a class action brought under Rule 23(b)(3), rather than under Rule 23(b)(2). The opinion's text says no such thing; rather, it says only that this phase of trial would not be "incidental" to the rest of the case, which is a requirement of Rule 23(b)(2), but not Rule 23(b)(3). The dissenting Justices' decision to join this part of the opinion bears this out. Those Justices believed that the claims "*may be* certifiable under Rule 23(b)(3)" if a proper evidentiary showing of predominance were made. *Dukes*, 131 S. Ct. at 2561 (Ginsburg, J., dissenting) (emphasis added). If the "trial by formula" language precluded the use of sampling and representative testimony in a Rule 23(b)(3) Title VII case, the dissenting justices would not have joined this part of the opinion. What is more, in two recent post-*Dukes*, non-Title VII decisions involving Rule 23(b)(3), the Supreme Court made no mention of this part of *Dukes*. *Amgen*, 133 S. Ct. 1184; *Comcast*, 133 S. Ct. 1426.

focused only on proving the amount of backpay owed. *See id.* This problem—which the Supreme Court derided as "trial by formula"—rendered the second phase inadequate to satisfy Title VII as construed in *Teamsters*, elevated that phase from "incidental" to primary, and created a statutory infirmity unique to Title VII cases. *Dukes*, 131 S.Ct. at 2561.

Unlike Title VII, most statutory causes of action, including the UCL claims in this case, provide for no statutorily-mandated second phase of trial of the kind established by *Teamsters* and examined in *Dukes*. The "trial by formula" problem in *Dukes*—which meant that this mandatory second-phase trial would not be "incidental" to the rest of the case under Rule 23(b)(2)—simply does not exist in most litigation.

Accordingly, numerous courts have rejected efforts to extend this part of the *Dukes* analysis beyond the Title VII context. *See, e.g.*, *Driver v. AppleIllinois, LLC*, 2012 WL 689169, *3 (N.D. Ill. Mar. 2, 2012) (denying motion to decertify predicated on "trial by formula" language; "What the Court rejected in *Wal-Mart* was the plaintiffs' effort to shoehorn the individual claims for money damages provided by Title VII into a Rule 23(b)(2) class, for which the relief is injunctive or declaratory."); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 281 F.R.D. 477, 486 (D. Kan. 2012) (granting class certification; *Dukes* "focused ... only on the remarkable procedure proposed by the Ninth Circuit for considering the plaintiffs' claims for backpay" under Title VII); *Troy v. Kehe Food Distributors, Inc.*, 276 F.R.D. 642, 656-57 (W.D. Wash. 2011) (granting class certification; distinguishing *Dukes* "trial by formula" language); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 253298, *5 (N.D. Cal. Jan. 26, 2012) (denying decertification; Cartwright Act claims are not "subject to a 'detailed remedial scheme' equivalent to that in Title VII" (quoting *Dukes*, 131 S.Ct. at 2560)); *Johnson v. General Mills, Inc.*, 276

F.R.D. 519, 524 (C.D. Cal. 2011) (correctly interpreting *Dukes* "trial by formula" language; denying motion to decertify CLRA and UCL claims).

Each of these decisions correctly rejected the notion that *Dukes* entitles defendants to insist on individualized determinations of any defenses they may choose to assert, in every class action case. According to that view, *Dukes* establishes a general rule that defenses can be tried, consistent with due process and (in federal court) the Rules Enabling Act, only through individualized proof. But a careful reading of *Dukes* shows that this is just not so. The only thing a defendant is entitled to insist on in a Title VII case is an opportunity to defend itself in the separate phase of trial mandated by that statute as construed in *Teamsters*. *See* 42 U.S.C. §2000e-5(g)(2)(B)(ii).

The contrary decisions cited by U.S. Bank and its amici are unpersuasive because those decisions misconstrued *Dukes*. *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829 (9th Cir. 2013), for example, was a wage and hour class action for non-payment of overtime and other violations of the federal Fair Labor Standards Act ("FLSA"), the California Labor Code, and the UCL. *Id.* at 832. A Ninth Circuit panel cited the *Dukes* "trial by formula" language to suggest that damages determined for a sample set of class members and then applied by extrapolation to the rest of the class "without further individualized proceedings" may be insufficient because "[e]mployers are 'entitled to individualized determinations of each employee's eligibility' for monetary relief." *Id.* at 836.

This is an unwarranted and overbroad reading of *Dukes*, whose reasoning applies only in cases involving claims with special statutory defense rights akin to those of Title VII. The FLSA, the Labor Code, and the UCL have no such statutory analog. To the contrary, "relief under the

UCL is available without individualized proof of … injury." *In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009). A rehearing petition is now pending in *Wang*,[32] but regardless of its outcome, this Court should not follow *Wang* down this path of error.

A federal district court decision cited by U.S. Bank made the same error. In *Cruz v. Dollar Tree Stores, Inc.*, 2011 WL 2682967 (N.D. Cal. Jul. 8, 2011), a misclassification case brought under the Labor Code, the judge held that any "trial by formula" that could be characterized as depriving a defendant "of its right to assert statutory defenses to the individual claims of all class members" necessarily defeats certification. *Id.* at *6 (citing *Dukes*). But, like *Wang*, *Cruz* failed to recognize that the *Dukes* "trial by formula" language derived from the distinctive procedures of Title VII, which do not exist in Labor Code cases. *See id.*

The Court of Appeal in this case, likewise, misconstrued *Dukes* and in so doing, came perilously close to incorrectly elevating a principle unique to Title VII class actions to the level of a federal due process right. According to the Court of Appeal, *Dukes* "found [that] representative sampling studies did not justify certification." *Duran*, 203 Cal.App.4th at 258 (citing *Dukes*, 131 S.Ct. at 2555). However, the panel failed to perceive that *Dukes* held only that the particular studies presented by the plaintiffs in *Dukes* itself were inadequate; as discussed above, nothing in *Dukes* held that such studies could never be adequate if prepared properly. The panel then construed *Dukes* as requiring individual proof of "*any* individual affirmative defense"—including the outside salesperson exemption under the Labor Code—and said that the trial procedure used in

[32] *Wang v. Chinese Daily News, Inc.*, Nos. 08-55438 & 08-56740 (9th Cir.) (rehearing petition filed 03/18/13).

Duran was "the same type of 'trial by formula'" disapproved in *Dukes*. *Id.* (citing *Dukes*, 131 S.Ct. at 2561) (emphasis added). But again, in *Dukes*, the Supreme Court "disapproved" what it called "trial by formula" *only* as proposed to be used in the special phase of trial required by statute under Title VII and *Teamsters*, where the defendant would have had *no* opportunity to defend itself by proving a lawful reason for its employment decisions.

Contrary to what many urge, *Dukes* placed no constitutional due process limitation on use of the class action device generally, or of representative evidence in class litigation particularly. Below, the defendant in *Dukes* argued that the plaintiffs' proposed second-phase trial plan was infirm for four separate reasons, only *one* of which was asserted violation of due process rights.[33] The Supreme Court accepted the defendant's three *other* arguments, holding that Rule 23(b)(2) could not be interpreted, consistent with the Rules Enabling Act, to abridge the "additional proceedings" required by Title VII, as interpreted in *Teamsters*. *Dukes*, 131 S.Ct. at 2560-61 (citing 28 U.S.C. § 2072(b); 42 U.S.C. § 2000e-5(g)(2); *Teamsters*, 431 U.S. at 361).

The Court did *not* reject the second-phase trial plan on due process grounds. The Due Process Clause is not mentioned anywhere in this part of

[33] *Dukes*, 603 F.3d at 624-25 (defendant and amici argued that "at least some aspects of this trial plan violate [1] their due process rights, as well as [2] section 706(g)(2) of Title VII [codified at 42 U.S.C. § 2000e-5(g)(2)], [3] the Rules Enabling Act [28 U.S.C. § 2072(b)], and [4] the Supreme Court's decision in *Teamsters*." (footnotes omitted)).

the Court's analysis. *See Dukes*, 131 S.Ct. at 2557-61.[34] It is therefore error to read *Dukes* either as resting on federal constitutional principles of any kind, or as binding on state courts for that reason. By its plain text, *Dukes* rests on Rule 23, the Rules Enabling Act, and Title VII. *See id.*

2. *Comcast Corp. v. Behrend*

In addition to *Dukes*, U.S. Bank's amici rely on another U.S. Supreme Court case, *Comcast*, 133 S.Ct. 1426, an antitrust action.[35] In *Comcast*, the parties made a significant concession—that class certification under Rule 23(b)(3) requires common proof of damages. *Id.* at 1430. The concession permeates the opinion's analysis.[36] As a result, the opinion provides no guidance in California, where this Court's long-established rule is that class certification may be granted even when damages *cannot* be established by common proof. *See*, *e.g.*, *Vasquez*, 4 Cal.3d at 815 ("*Daar* makes it clear that although ultimately each class member will be required

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[34] Due process is mentioned in the opinion only in the context of describing the limited notice and opt-out procedures afforded in Rule 23(b)(2) class actions. *See Dukes*, 131 S. Ct. at 2557-61.

[35] NASC Amicus Brief at 18-19.

[36] Numerous post-*Comcast* decisions have already recognized that the opinion should not be read as creating a new requirement for Rule 23(b)(3) certification that had never existed before. *See*, *e.g.*, *In re Motor Fuel Temperature Sales Practices Litig.*, ___ F.Supp.2d ___, 2013 WL 1397125, *18 (D. Kan. Apr. 5, 2013); *In re High-Tech Employee Antitrust Litig.*, 2013 WL 1352016, *29 (N.D. Cal. Apr. 5, 2013); *Harris v. comScore, Inc.*, ___ F.Supp.2d ___, 2013 WL 1339262, *10 n.9 (N.D. Ill. Apr. 2, 2013); *see also Comcast*, 133 S. Ct. at 1436 (Ginsburg & Breyer, JJ. dissenting) (majority opinion "should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable 'on a class-wide basis,'" because majority's analysis "depend[ed] on the absence of contest on the matter").

in some manner to establish his individual damages this circumstance does not preclude the maintenance of the suit as a class action.").[37]

To the extent *Comcast* has any relevance, it stands for the "unremarkable" proposition that "a model [used] as evidence of damages" must be "consistent with [the plaintiff's] liability case," and should "measure the damages attributable to that theory," rather than measuring some other, unpleaded or dismissed theory. 133 S.Ct. at 1433. That requirement is not an onerous one, and it was satisfied in this case.

Contrary to amici's position, nothing in *Comcast* disapproved the use of aggregate evidence to prove damages (or liability) in class litigation. The problem in *Comcast* was not that the proposed damages model would have calculated aggregate, as opposed to individualized, damages, but rather that the model was not tied to the liability theory. *See id.* at 1432-35. Like *Dukes*, *Comcast* held only that the particular aggregate evidence before it was infirm. *Id.* at 1434 (noting that the proffered evidence "might have produced commonality of damages" if not for the case-specific infirmities in it).

Citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), *Comcast* reaffirmed the rule that damages "[c]alculations need not be exact." *Id.* at 1433 (citing *Story Parchment*, 282 U.S. at 563). On the cited page of *Story Parchment*, the Court explained that when damages cannot be ascertained "with certainty,"

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[37] This is also the long-established federal rule. *See, e.g.*, *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1026 (9th Cir. 2011); *see also Comcast*, 133 S. Ct.. at 1436-37 (Ginsburg & Breyer, JJ., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.").

> *it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.* In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages *as a matter of just and reasonable inference, although the result be only approximate.* The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. … *[T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.*

Story Parchment, 282 U.S. at 563 (citations omitted) (emphasis added). In the employment context, the U.S. Supreme Court relied on the same principle to hold that "an estimated average of overtime worked" is sufficient proof in FLSA cases. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686 (1946) ("*Mt. Clemens*"). "The remedial nature of the statute and the great public policy which it embodies … militate against making that burden [of establishing damages] an impossible hurdle for the employee." *Id.* at 687.

This Court's precedents concur with *Story Parchment* and *Mt. Clemens*. *See*, *e.g.*, *Green v. Superior Court*, 10 Cal.3d 616, 638-39 (1974) (citing *Story Parchment*; when "damages cannot be computed with complete certainty … trial courts must do the best they can and use all available facts to approximate the fair and reasonable damages under all of the circumstances"); *Natural Soda Products Co. v. City of Los Angeles*, 23 Cal.2d 193, 200 (1943) ("Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated."); *see also Hernandez*, 199 Cal.App.3d at 727 (citing *Mt. Clemens*; "imprecise evidence by the employee can provide a sufficient

basis for damages … [and] public policy prohibits making that burden an impossible hurdle").

Applied to class action litigation, these principles mean that damages evidence may be aggregate rather than individualized, and that damages may be reasonably estimated rather than exactly calculated. Survey and statistical sampling techniques can be, and are, sufficient to meet this standard.

In short, amici's reliance on *Comcast* is misplaced.

3. *Amgen Inc. v. Connecticut Retirement Plans*

Though U.S. Bank and its amici discuss *Dukes* and *Comcast*, they ignore *Amgen*, decided one month before *Comcast*.

In *Amgen*, the U.S. Supreme Court upheld class certification in a securities case, explaining that Rule 23 "does *not* require a plaintiff seeking class certification to prove that each 'elemen[t] of [her] claim [is] susceptible to classwide proof.'" *Amgen*, 133 S.Ct. at 1196 (emphasis and alterations in original). Certification would be inappropriate only if the record "'exhibits some *fatal* dissimilarity' among class members that would make use of the class-action device *inefficient or unfair*." *Id.* at 1197 (emphasis added). Rule 23 confers on the lower courts the discretion to "select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Amgen*, 133 S.Ct. at 1191 (quoting Rule 23).[38]

U.S. Bank and its amici read *Dukes* as allowing defendants to insist on presenting individualized evidence of all of their defenses, and *Comcast* as requiring common proof of damages. The law on both points is actually

[38] Pleas for the Court's "aid in warding off 'in terrorem' settlements" were met with little sympathy. 133 S. Ct. at 1199-1201.

the reverse (with the exception of Title VII cases). Taken as a whole, the U.S. Supreme Court's recent jurisprudence reiterates the importance of the trial court's role in fashioning an efficient and fair class action proceeding.

4. Federal Decisions Under Rule 23 Should Not Guide this Court in Construing California Class Action Law

Even if *Dukes* and *Comcast* were apposite, they would still not be controlling. Whatever standards those cases may have announced for federal courts under Rule 23, this case involves California claims, in a California court, that were certified under the well-settled standards of section 382, discussed in detail above.[39]

As the U.S. Supreme Court recognized just six days before deciding *Dukes*, state class certification procedures can and do differ widely from federal procedures. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2377-78 (2011). In California, federal class certification cases are considered only "in the absence of controlling California authority," and then as "constructional aids" at best. *Southern Cal. Edison*, 7 Cal.3d at 839.[40] Historically, this Court has never hesitated to reject federal case law in favor of providing greater protections to California workers and consumers when appropriate to further the Legislature's intent.[41]

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[39] *See* Cabraser, *supra*, at 10 ("Our California courts were establishing enduring class action principles decades before the modern Federal Rules were devised.").

[40] *Accord Green v. Obledo*, 29 Cal.3d 126, 145 (1981); *La Sala*, 5 Cal.3d at 872; *Vasquez*, 4 Cal.3d at 822; *Daar*, 67 Cal.2d at 709.

[41] *See Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 798 (1999) ("where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced"); *see also Martinez v. Combs*, 49 Cal.4th 35, 66 (2010) (rejecting federal definitions of "employ" and "employer" in favor

California class action jurisprudence has always supported the class action process. Unlike federal law, California has a "'public policy which encourages the use of the class action device.'" *Sav-on*, 34 Cal.4th at 340 (quoting *Richmond*, 29 Cal.3d at 473). That policy "rests on considerations of necessity and convenience, adopted to prevent a failure of justice." *Daar*, 67 Cal.2d at 704. Consistent with that policy, this Court has been vigilant to protect against the exculpatory consequences of depriving employees of their right to prosecute their commonly held wage-and-hour claims on a class action basis. *See, e.g.*, *Gentry*, 42 Cal.4th at 457.

Rule 23, by contrast, is just one federal rule of civil procedure, with no greater significance than any other federal rule; it is not founded on the public policies that undergird California's class action jurisprudence. Its drafters were hampered by rules that find no counterpart in California, such as the need to comply with the Rules Enabling Act.

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of IWC definitions in effect since 1916 and 1947); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th 1028, 1057-59 (2005) (rejecting limitation on continuing violation doctrine for retaliation claims announced in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002) because adopting the federal rule "would mark a significant departure from the reasoning and underlying policy rationale of our previous cases"); *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553, 568, 570 (2004) (rejecting "catalyst" fee-shifting restriction of *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598 (2001), noting that "United States Supreme Court interpretation of federal statutes does not bind us to similarly interpret similar state statutes"); *Ketchum v. Moses*, 24 Cal.4th 1122, 1131, 1137 (2001) (rejecting limitation on fees multipliers in *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992)); *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 592 (2000) (rejecting less protective federal "travel time" standard: "we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication").

III. CONCLUSION

For the reasons stated above, the judgment of the Court of Appeal should be reversed.

Dated: May 3, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITS

The undersigned hereby certifies that the computer program used to generate this brief indicates that the text does not exceed 14,000 words, including footnotes. *See* Cal. Rules of Court, rule 8.520(c)(1).

Dated: May 3, 2013

Kimberly A. Kralowec

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 188 The Embarcadero, Suite 800, San Francisco, California 94105, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. APPLICATION FOR LEAVE TO FILE AND BRIEF OF AMICUS CURIAE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS SAM DURAN ET AL.; and
2. PROOF OF SERVICE.

☑ **By Mail**: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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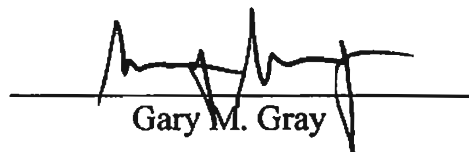

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