No. S200923

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAM DURAN, MATT FITZSIMMONS, individually and on behalf of other members of the general public similarly situated,
Plaintiffs and Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,
Defendant and Appellant.

Review of a Decision of the Court of Appeal, First Appellate District, Division One, Case Nos. A12557 and A12687, Reversing Judgment and Decertifying Class in Case No. 2001-035537
Superior Court of Alameda County
Honorable Robert B. Freedman

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IMPACT FUND, AARP, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C.

JOCELYN LARKIN (SBN 110817)
DELLA BARNETT (SBN 88679)
MICHAEL CAESAR (SBN 280548)
125 University Avenue, Suite 102
Berkeley, CA 94710
(510) 845-3473
jlarkin@impactfund.org
Attorneys for Amici Curiae

SERVICE ON THE STATE OF CALIFORNIA ATTORNEY GENERAL'S OFFICE, CONSUMER LAW SECTION, AND DISTRICT ATTORNEY OF ALAMEDA COUNTY REQUIRED BY CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17209

TABLE OF CONTENTS

Page

INTRODUCTION 2

ARGUMENT 4

I. AGGREGATE PROOF IS COMMONLY USED TO SUPPORT MANY SUBSTANTIVE CLAIMS 4

A. The Admissibility of Aggregate Proof Is Governed By the General Rules of Evidence 4

B. Aggregate Proof Is Crucial to Many Substantive Areas of the Law 5

II. THE ACCURACY AND ADMISSIBILITY OF AGGREGATE PROOF IS ACCEPTED IN THE CLASS ACTION CONTEXT 11

III. THERE IS NO GENERAL DUE PROCESS RIGHT TO PRESENT INDIVIDUALIZED DEFENSES 13

A. "Trial By Formula" Was Rejected In *Dukes* Because of the Specific Requirements of Title VII, Which Affords Employers the Opportunity To Present Individual Defenses 13

B. Due Process Does Not Mandate Individualized Defenses or Undermine the Use of Aggregate Proof 17

IV. THE USE OF AGGREGATE PROOF AND THE CLASS ACTION MECHANISM ARE ESSENTIAL TO COMBATING THE SERIOUS PROBLEM OF EMPLOYEE MISCLASSIFICATION 20

A. The State Has A Strong Commitment to the Enforcement of Labor Standards 20

B. Employers Who Misclassify Workers Generally Do Not Keep Appropriate Records and Employees Must Rely on Aggregate Means to Prove Their Losses 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CALIFORNIA CASES

Acree v. Gen. Motors Acceptance Corp.,
92 Cal. App. 4th 385 (2001) 12

Aguiar v. Cintas Corp. No. 2,
144 Cal. App. 4th 121 (2006) 25

Alch v. Superior Court,
165 Cal. App. 4th 1412 (2008) 16

Bell v. Farmers Ins. Exchange,
115 Cal. App. 4th 715 (2004) 12, 19

Brinker Rest. Corp. v. Superior Court,
53 Cal. 4th 1004 (2012) 12, 24

Bruno v. Superior Court,
127 Cal. App.3d 120, 129 n.4 (1981) 4

Butte View Farms v. Agric. Labor Relations Bd.,
95 Cal. App. 3d 961 (1979) 6

Capitol People First v. Dep't of Developmental Service,
155 Cal. App. 4th 696 (2007) 9

In re Cipro Cases I and II,
121 Cal. App. 4th 402 (2004) 12

Daar v. Yellow Cab Co.,
67 Cal. 2d 695 (1967) 12

Duran v. U.S. Bank Nat'l Assn.,
137 Cal. Rptr. 3d 391 (Cal. Ct. App. 2012) 17, 18

Earley v. Superior Court,
79 Cal. App. 4th 1420 (2000) 21

Frudden Enters., Inc. v. Agric. Labor Relations Bd.,
153 Cal. App. 3d 262 (1984) 6

Hernandez v. Mendoza,
199 Cal. App. 3d 721 (1988) 24, 25, 26

JKH Enterprises v. Dep't of Indus. Relations,
142 Cal. App. 4th 1046 (2006) 20

Monzon v. Schaefer Ambulance Service, Inc.,
224 Cal. App. 3d 16 (1990) 24, 26

Morillion v. Royal Packing Co.,
22 Cal. 4th 575 (2000) 26

Nordquist v. McGraw–Hill Broad. Co.,
32 Cal. App. 4th 555 (1995) 24

Oberholzer v. Comm'n on Judicial Performance,
20 Cal. 4th 371 (1999) 17, 19

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,
116 Cal. App. 4th 1253 (2004) 9, 10

Prince v. CLS Transp., Inc.,
118 Cal. App. 4th 1320 (2004) 12

Ramirez v. Yosemite Water Co., Inc.,
20 Cal. 4th 785 (1999) 24

Richmond v. Dart Indus.,
29 Cal. 3d 462 (1981) 11

S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations,
48 Cal. 3d 341 (1989) 20

Sargon Enters., Inc. v. Univ. of S. Cal.,
55 Cal. 4th 747 (2012) 19

Sav-On Drug Stores, Inc. v. Superior Court,
34 Cal. 4th 319 (2004) 9, 11, 12, 21

Wolf v. Super. Ct.,
107 Cal. App. 4th 25 (2003) 25

FEDERAL CASES

A H Phillips, Inc. v. Walling,
324 U.S. 490 (1945) 24

Amgen Inc. v. Conn. Ret. Plans and Trust Funds,
133 S. Ct. 1184 (2013) 8

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 6, 24

Ansoumana v. Gristede's Operating Corp.,
201 F.R.D. 81 (S.D.N.Y. 2001) 21

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 8

Bureerong v. Uvawas,
922 F. Supp. 1450 (C.D. Cal. 1996) 21

Butler v. Sears, Roebuck and Co.,
702 F.3d 359 (7th Cir. 2012) 8

Clark v. Arizona,
548 U.S. 735 (2006) 5

Comcast Corp. v. Behrend,
No. 11–864, 2013 WL 1222646 (U.S. Mar. 27, 2013) 5, 7

Connecticut v. Doehr,
501 U.S. 1 (1991) 17, 19

Dilts v. Penske Logistics, LLC,
267 F.R.D. 625 (S.D. Cal. 2010) 12

Donovan v. Bel-Loc Diner, Inc.,
780 F.2d 1113 (4th Cir. 1995) 6

Driver v. AppleIllinois, LLC,
No. 06 C 6149, 2012 WL 689169 (N.D. Ill. Mar. 2, 2012) 16

Eddings v. Health Net, Inc.,
2011 WL 4526675 (C.D. Cal. July 27, 2011) 6

Flores v. Albertsons,
No. CV0100515, 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002) 20

Hilao v. Estate of Marcos,
103 F.3d 767 (9th Cir. 1996) 15

Holmes v. South Carolina,
547 U.S. 319 (2006) 5

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 14, 16

In re Bulk (Extruded) Graphite Prods. Antitrust Litig.,
No. Civ. 02-6030, 2006 WL 891362 (D.N.J. Apr. 4, 2006) 7

In re Linerboard Antitrust Litig.,
305 F.3d 145 (3d Cir. 2002) 7

In re Monumental Life Ins. Co.,
365 F. 3d 408 (5th Cir. 2004) 10

In re New Motor Vehicles Canadian Export Antitrust Litig.,
522 F. 3d 6 (1st Cir. 2008) 7

In re Pharmaceutical Industry Average Wholesale Price Litig.,
582 F. 3d 156 (1st Cir. 2009) 11

In re Neurontin Antitrust Litig.,
MDL No. 1479, Master File No. 02–1390, Civil Action Nos. 02–1830 (FSH), 02–2731(FSH), 2011 WL 286118 (D.N.J. Jan. 25, 2011) 7

Lewis v. City of Chicago,
130 S. Ct. 2191 (2010) 16

Mathews v. Eldridge,
424 U.S. 319 (1976) 17

Marshall-Mosby v. Corporate Receivables, Inc.,
205 F.3d 323 (7th Cir. 2000) 9

McLaughlin v. Ho Fat Seto,
850 F.2d 586 (9th Cir.1988) 6

Morris v. Affinity Health Plan, Inc.,
859 F. Supp. 2d 611 (S.D.N.Y. 2012) 6

Ratanasen v. Cal. Dep't of Health Servs.,
11 F.3d 1467 (9th Cir.1993) 10

Real v. Driscoll Strawberry Assocs., Inc.,
603 F. 2d 748 (9th Cir. 1979) 20

Romero v. Florida Power & Light Co.,
Nos. 3:09 CV 2879, 3:10 CV 417, 3:10 CV 2200, 2012 WL 1970125 (M.D. Fla. June 1, 2012) 16

Sec'y of Labor v. DeSisto,
929 F.2d 789 (1st Cir.1991) 6

Smilow v. Sw. Bell Mobile Sys., Inc.,
323 F.3d 32 (1st Cir. 2003) 10

Southland Sod Farms v. Stover Seed Co.,
108 F.3d 1134 (9th Cir. 1997) 8

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555 (1931) 5

Taylor v. Cavalry Inv., L.L.C.,
365 F.3d 572 (7th Cir.2004) 9

Torres-Lopez v. May,
111 F. 3d 633 (9th Cir. 1997) 20

United States v. Freitag,
230 F.3d 1019 (7th Cir. 2000) 10

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

Wang v. Chinese Daily News,
No. 08-55483, 08-56740, 2013 WL 781715 (9th Cir. March 4, 2013) 17

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 16

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 24

CALIFORNIA STATUTES

California Evidence Code
§ 352 5
§ 801 ..... 4, 19
§ 802 19
§ 1105 4
§ 1340 10

California Government Code § 12940 6

California Labor Code
§ 90.5(a) 21
§ 226.8 23
§§ 1140-1166.3 6

CALIFORNIA RULES

California Rule of Court 8.520(f) 1

California Welfare and Institutions Code §§ 4400-4906 9

FEDERAL STATUTES

15 U.S.C. §§ 1051-1141n 8
15 U.S.C. §§ 1601-1692 8

28 U.S.C. § 2072(b) 15

29 U.S.C. §§ 201-11 5
29 U.S.C. § 216(b) 6

42 U.S.C. § 2000e-5(g)(1) 14
42 U.S.C. § 2000E-5(G)(2)(A) 1, 3, 14

FEDERAL RULES

Federal Rule of Civil Procedure
23 ..... 15, 16
23(b)(2) 13

OTHER AUTHORITIES

Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 10:5 (4th ed. 2002) 6, 7, 11

American Law Institute, *Principles of the Law, Aggregate Litigation* (2010) 4

Annette Bernhardt, Ruth Milkman, Nik Theodore, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* at 20 (2009) 21

Cal. Dep't of Indus. Relations, *Worker Misclassification* (last visited April 1, 2013) 23

Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification* U.C. Davis Bus. L.J. 111, 111-19 (2009) 22

Dave Gram, IRS, *States Crack Down on Independent Worker Abuse*, The Associated Press, Feb. 11, 2010 23

Ellen C. Kearns, The Fair Labor Standards Act § 18.IX.B (ABA 2002) 6

Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed. 2011) 4

Francois Carre & Randall Wilson, *The Social and Economic Costs of Employee Misclassification in Construction* (2004) 22

Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 366, 392 (2012) 18, 19

Michael Barclay & Frank C. Torchio, *A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation*, 64 Law & Contemp. Probs. 105 (2001) 7

Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 Vand. L. Rev. 727, 737 (2010) 22

N.Y. State Dep't of Labor et al., *Report of the Joint Enforcement Task Force on Employee Misclassification to Eliot Spitzer, Governor of New York* at 5 (2008) 23

Robert B. Fitzpatrick , *FLSA Developments: Misclassification as Independent Contractors, Unpaid Interns* (American Law Institute 2010) 23

Sarah Leberstein, National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (October 2011) 22

Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules,* 61 Am. U. L. Rev. 523, 560-61 (2012) 21

Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide Employment Tax Program and Better Data Are Needed* (2009) 22

18 No. 1 SMNYEMPLL, New York Employment Law Letter, *New York Targets 1099 Workers as Misclassified Employees* at 2, 5 (January 2011) 23

U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009) 22

U.S. Department of Labor, *Employee Misclassification as Independent Contractors* (last visited April 1, 2013) 23

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rule of Court 8.520(f), non-profit and public interest organizations the Impact Fund, AARP, Asian Law Caucus, Asian Pacific American Legal Center, Disability Rights Education & Defense Fund, Disability Rights Legal Center, National Consumer Law Center, Public Citizen, Inc., and Public Justice, P.C. ("Amici") respectfully request leave to file this amicus brief in support of Appellants. The statements of interest of the individual Amici are attached as Exhibit A.

Amici submit this brief in order to offer a different perspective on the United States Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), as it pertains to aggregate proof. We explain that the arguments of Appellee U.S. Bank National Association ("USB") regarding *Dukes* are misplaced and that the Supreme Court's critique of "Trial by Formula" was not intended to and did not create a due process right to individualized defenses. On the contrary, the *Dukes* Court's rejection of formula damages was based solely upon the unique language of Title VII, 42 U.S.C. § 2000e–5(g)(2)(A), which specifically allows individualized defenses. Outside the Title VII remedial context, aggregate proof plays a well-accepted role in in many substantive areas of the law and is of vital importance in the enforcement of minimum labor standards.

Amici are public interest advocacy organizations dedicated to advancing and protecting the rights of traditionally disenfranchised groups, including low-wage workers, minority groups, women, the elderly, and persons with disabilities. Amici often litigate class and collective actions on behalf of clients who cannot otherwise safeguard their rights and who

rely on aggregate proof, including statistics, surveys, extrapolation, and representative testimony, to establish their claims and to estimate damages. Consistent with California's long-standing commitment to furthering access to justice, amici advocate more broadly for the preservation and fair application of the class action device as a critical means to vindicate many important legal rights.

Amici include several organizations funded by the California State Bar Legal Services Trust Fund Program to provide legal services free of charge to indigent people, seniors, and people with disabilities. This funding through the Interest on Lawyers Trust Accounts ("IOLTA") program is an integral part of a comprehensive system to ensure that low-income Californians have access to justice in the State of California.

INTRODUCTION

The decision below reflects a fundamental misunderstanding of the role of aggregate evidence in cases alleging violations of minimum labor standards, where such evidence often provides the most accurate and efficient method for proving both liability and damages. There is no due process impediment to its use. Reliance on aggregate proof is especially important in cases based on misclassification, where the employer has treated a class of workers unlawfully, but failed to keep records of who it has harmed and the extent to which they were underpaid.

The need for effective means to manage and resolve misclassification cases on an aggregate basis cannot be overstated. The growing phenomenon of employee misclassification has significantly undermined minimum labor standards enforcement in California and throughout the nation. Some misclassification cases, such as this, involve

workers whom the employer wrongly classified as exempt from overtime pay requirements. Others involve workers wrongly classified as non-employees, such as "independent contractors," for whom the employer claims no responsibility. By using these contrivances, unprincipled employers avoid paying lawful wages, pay less than their share of workers' compensation premiums and payroll taxes, gain a significant advantage over their law-abiding competitors, and cost the state and federal governments billions of dollars in lost revenue every year. Without effective means to challenge these practices, employees will remain unprotected and offending employers will retain their illegal cost savings.

USB erroneously asserts a due process right to litigate individualized defenses to *every* class member's claim for liability and damages. This argument finds no support in the *Dukes* Court's rejection of "Trial by Formula," which was based on the unique language of Title VII and the employer's right *under that statute* to offer individualized defenses at the remedial stage of a case. 131 S. Ct. at 2561 (citing 42 U.S.C. § 2000e–5(g)(2)(A)). USB wrongly tries to import an analysis inextricably tied to Title VII into a different substantive area of the law where aggregate proof is routinely (and properly) used. In doing so, USB disregards the State's interest in enforcing labor standards and in conserving scarce judicial resources, as well as plaintiffs' interest in obtaining a class-wide remedy. These interests are germane to the due process analysis and strongly favor the use of aggregate proof.

In this time of diminished funding for government agencies charged with enforcement of labor standards, as well as economy-driven limitations and cutbacks on civil legal services and access to courts, effective mechanisms for private enforcement must be maintained and strengthened.

If allowed to stand, the decision below will significantly erode workers' ability to challenge unlawful practices collectively. At the same time, it will reward employers who skirt labor standards by unilaterally, but unlawfully, classifying their employees as unprotected.

ARGUMENT

I. AGGREGATE PROOF IS COMMONLY USED TO SUPPORT MANY SUBSTANTIVE CLAIMS

A. The Admissibility of Aggregate Proof Is Governed By the General Rules of Evidence

There is nothing inherently untrustworthy about aggregate proof—indeed, most scientific research depends on it. In the legal realm, such proof is commonly used to calculate probabilities, estimate damages, and show the broad impact of a defendant's wrongdoing. *See generally* American Law Institute, *Principles of the Law, Aggregate Litigation* (2010); Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed. 2011). As the court of appeal explained in *Bruno v. Superior Court*, "[i]n many cases such an aggregate calculation will be far more accurate than summing all individual claims." 127 Cal. App.3d 120, 129 n.4 (1981).

Due process does not bar the use of aggregate evidence if it is otherwise probative and helpful to the trier of fact. So long as such proof complies with the relevant rules of evidence, it can be relied upon in many different contexts. *See* Cal. Evid. Code § 801 (expert testimony); Cal. Evid. Code § 1105 (evidence of habit or custom to prove conduct).

Although, as explained in *Dukes*, a statutory right to present individualized defenses cannot be supplanted with a "Trial by Formula," there is no constitutional due process right to individualized proof, just as

there is no right to unlimited trial time or to call every conceivable witness. *See* Cal. Evid. Code § 352. "[T]he right to introduce relevant evidence can be curtailed if there is a good reason for doing so," *Clark v. Arizona*, 548 U.S. 735, 739 (2006), and trial judges may "exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006).

The United States Supreme Court made clear long ago in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), that it would be an injustice to relieve a wrongdoer of all liability just because damages cannot be ascertained with certainty. "In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Id.* at 563. Moreover, "[j]uries are allowed to act upon probable and inferential as well as direct and positive proof . . . . so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit." *Id.* (internal quotation marks omitted). In a decision this Term, *Comcast Corp. v. Behrend*, No. 11–864, 2013 WL 1222646 (U.S. Mar. 27, 2013), the United States Supreme Court cited *Story Parchment* for the proposition that aggregate class action damages calculations need not be exact. *Id.* at *5.

B. Aggregate Proof Is Crucial to Many Substantive Areas of the Law

Aggregate proof is not only common, it is often indispensable to proving many types of claims, including collective actions under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. §§ 201-11, enforcement

actions under California's Agricultural Labor Relations Act ("ALRA"), Cal. Labor Code §§ 1140-1166.3, disparate impact cases under Title VII and California's Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940, as well as antitrust, securities, consumer, and trademark infringement claims. *See also* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 10:5 (4th ed. 2002) ("Newberg") (stating that "[a]ggregate computation of class monetary relief is lawful and proper").

For example, in actions under the FLSA, which is the federal analogue to the Labor Code provisions at issue here, plaintiffs' proof commonly consists of testimony by a representative sample of affected workers. 29 U.S.C. § 216(b); *see Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1995); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir.1991); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir.1988); *see also Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (affirming judgment based on representative testimony). Where appropriate, formulas can be applied to estimate backpay. *See* Ellen C. Kearns, The Fair Labor Standards Act § 18.IX.B (ABA 2002). Similarly, formulas are used to calculate back wages under the ARLA. *See Frudden Enters., Inc. v. Agric. Labor Relations Bd.*, 153 Cal. App. 3d 262, 268 (1984) (upholding formula back pay award to tomato workers because it was not "'so irrational as to amount to an abuse of discretion'" (quoting *Butte View Farms v. Agric. Labor Relations Bd.*, 95 Cal. App. 3d 961, 967 (1979)). *Dukes* does not undermine these long-standing principles. *See Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611 (S.D.N.Y. 2012) (noting that "[t]he weight of authority rejects the argument that *Dukes* bars certification in wage and hour cases"); *Eddings v. Health Net, Inc.*, 2011 WL 4526675, at *1 (C.D. Cal. July 27, 2011) (holding that *Dukes* did not

address collective actions under FLSA and therefore does not affect the analysis of conditional class certification),

Aggregate proof is often the only way to establish liability and to calculate damages in antitrust actions. *See, e.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F. 3d 6, 23 (1st Cir. 2008) (stating that "variations [in damages] can be determined according to a universal mathematical or formulaic calculation, obviating the need for evidentiary hearings on each individual claim"); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153-54 (3d Cir. 2002) (approving multiple regression and benchmark methodologies to prove antitrust impact); *In re Neurontin Antitrust Litig.*, MDL No. 1479, Master File No. 02–1390, Civil Action Nos. 02–1830 (FSH), 02–2731(FSH), 2011 WL 286118, at *10 (D.N.J. Jan. 25, 2011) (finding that "the use of an aggregate approach to measure class-wide damages may be appropriate" in antitrust action); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig.*, No. Civ. 02-6030, 2006 WL 891362, at *12-*13, *15 (D.N.J. Apr. 4, 2006) (accepting at certification stage that plaintiffs may show class-wide impact and injury through generalized class-wide evidence, and formulaic methodologies to estimate damages); *see also Comcast*, 2013 WL 1222646, at *5 (concluding that damage model for determining aggregate antitrust injury must match the theory of liability); Newberg at § 10:7 n.1 (collecting cases).

Formulas are also commonly used in securities cases, where statistical modeling is essential. *See generally* Newberg at § 10.8 & n.2; Michael Barclay & Frank C. Torchio, *A Comparison of Trading Models Used for Calculating Aggregate Damages in Securities Litigation*, 64 Law & Contemp. Probs. 105, 106 (2001). The Supreme Court has adopted a presumption of reliance on material misrepresentations when shares are

traded in an efficient market—a presumption that facilities aggregate determinations of both liability and damages. Otherwise, class-wide damage recoveries would ordinarily be precluded because individual reliance issues would overwhelm questions common to the class. *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1193 (2013). The Court has adopted this rule because requiring individualized proof would imperil enforcement of the laws against securities fraud. *Basic Inc. v. Levinson*, 485 U.S. 224, 242 (1988). Aggregation is also typical, and often essential, in consumer class actions. *See, e.g., Butler v. Sears, Roebuck and Co.*, 702 F.3d 359, 363 (7th Cir. 2012) (holding that a class action was the more efficient procedure for determining whether washers were defective than litigating the issue "separately in hundreds of different trials").

Cases arising under the Lanham Act, 15 U.S.C. § 1051-1141n, including trademark infringement disputes and false advertising cases, can turn on statistical evidence of whether unsophisticated consumers would be deceived by the challenged trademark or advertisement. That likelihood is typically measured by surveys of consumer reactions to the mark or advertisement at issue. The parties in such cases usually retain expert witnesses to design and conduct surveys of consumers, and to extrapolate the likelihood of confusion from the degree of actual confusion shown by the survey. *See, e.g., Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1140 (9th Cir. 1997) (noting that in Lanham Act cases, "[r]eactions of the public are typically tested through the use of consumer surveys"). Similarly, cases under the Fair Debt Collection Practices Act ("FDCP"), 15 U.S.C. §§ 1601-1692, often turn on survey evidence showing that unsophisticated consumers are likely to be deceived by the challenged

communication. *See, e.g., Taylor v. Cavalry Inv., L.L.C.*, 365 F.3d 572, 575 (7th Cir.2004) (plaintiff in FDCP case may "present objective evidence of confusion, for example the results of a consumer survey"); *Marshall-Mosby v. Corporate Receivables, Inc.*, 205 F.3d 323, 326-27 (7th Cir. 2000) (same).

In *Capitol People First v. Dep't of Developmental Service*, 155 Cal. App. 4th 696 (2007), representative plaintiffs, two taxpayer plaintiffs, and three organizational plaintiffs brought an action under the Lanterman Developmental Disabilities Services Act, Cal. Welf. & Inst. Code §§ 4400-4906, to enforce the rights of persons with developmental disabilities to live in the least restrictive environment commensurate with their needs, thereby avoiding unnecessary institutionalization. The court noted that "courts may consider pattern and practice [or] statistical and sampling evidence . . . to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate." *Capitol People First*, 155 Cal. App. 4th at 692-93 (citing *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 333 (2004)). It noted with approval that "consistent with California law, appellants' theory of recovery and approach is to reveal the patterns and practices in the first instance, through expert testimony, admissions, statistical proof, documentary evidence and the like, and then support the findings with corroborative, anecdotal evidence and sampling." 155 Cal. App. 4th at 696.

In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253 (2004), a case brought by the State of California to enforce a consent decree, survey data was used to prove that the defendant was targeting youth in advertising of tobacco products in violation of the decree. Although the survey evidence itself was hearsay, it was properly admitted

under the exception provided for "'a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation . . . if the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270'." *Id.* at 1269 (quoting Cal. Evid. Code § 1340).

Statistical sampling is also routinely used in cases seeking recoupment of Medicaid and Medicare overpayments from providers. *See, e.g., United States v. Freitag*, 230 F.3d 1019, 1025 (7th Cir. 2000) (approving use of sampling and extrapolation to estimate loss in Medicare criminal fraud case); *Ratanasen v. Cal. Dep't of Health Servs.*, 11 F.3d 1467, 1471 (9th Cir.1993) (rejecting doctor's argument that the audit on which Medicaid claim was based was invalid because it relied on sampling and extrapolation). Aggregate evidence has been accepted in numerous other contexts as well. *See In re Monumental Life Ins. Co.*, 365 F. 3d 408 (5th Cir. 2004) (holding that damages could be determined on a class-wide basis in action challenging alleged practice of paying lower life insurance benefits and charging higher premiums to African Americans); *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 40 (1st Cir. 2003) (explaining that "common issues predominate where individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria—thus rendering unnecessary an evidentiary hearing on each claim").

USB's insistence that defendants have a due process right to individualized proof in every case ignores this enormous body of law.

II. THE ACCURACY AND ADMISSIBILITY OF AGGREGATE PROOF IS ACCEPTED IN THE CLASS ACTION CONTEXT

Aggregate proof can play a particularly important role in the class action context, ensuring the manageability of numerous claims in a single proceeding and enabling the private enforcement of important substantive laws. *See Sav-On*, 34 Cal. 4th at 333 (approving the use of "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices" in a misclassification case). Aggregate proof promotes the deterrence objectives of the substantive laws and the policy favoring judicial access for small claims. *See id.* at 340; *Richmond v. Dart Indus.*, 29 Cal. 3d 462, 469 (1981); *see also* Newberg § 10:5 & n.20.

As the First Circuit noted in *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F. 3d 156 (1st Cir. 2009), rejecting a due process challenge to aggregate damages in a deceptive business practices case, "class-action litigation often *requires* the district court to extrapolate from the class representatives to the entire class" and "it would quickly undermine the class-action mechanism were we to find that a district court presiding over a class action lawsuit errs every time it allows for proof in the aggregate." *Id.* at 195.

The class action mechanism, which often depends on aggregate proof, plays a critical role in labor standards enforcement in this State. It enables employees to achieve remedies for themselves and their co-workers in a single proceeding, share the financial burden of the litigation, and reduce the likelihood of retaliation through safety in numbers. It also promotes judicial efficiency by discouraging seriatim litigation of similar

claims and reduces the likelihood of inconsistent and fragmentary enforcement. The alternative to class actions in many cases is no protection at all. For these reasons, "wage and hour disputes (and others in the same general class) routinely proceed as class actions." *Prince v. CLS Transp., Inc.*, 118 Cal. App. 4th 1320, 1328 (2004) (internal citations omitted).

This Court has "encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts." *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012) (Werdegar, J., concurring) (citing *Sav-On*, 34 Cal. 4th at 339-40; *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 714-15 (1967)). Consistent with this principle, representative testimony, surveys, and statistical analysis all are commonly accepted. *Id.* (citing *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 749-50 (2004); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 638 (S.D. Cal. 2010)). "The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." *In re Cipro Cases I and II*, 121 Cal. App. 4th 402, 411 (2004) (quoting *Acree v. Gen. Motors Acceptance Corp.*, 92 Cal. App. 4th 385, 398 (2001)). The evidence in this case established a sufficiently reliable approximation to meet the standards of proof by a preponderance of the evidence.

III. THERE IS NO GENERAL DUE PROCESS RIGHT TO PRESENT INDIVIDUALIZED DEFENSES

A. "Trial By Formula" Was Rejected In *Dukes* Because of the Specific Requirements of Title VII, Which Affords Employers the Opportunity To Present Individual Defenses

USB asserts that there is a due process right, derived from the "Trial by Formula" discussion in *Dukes*, to rebut each class member's claim individually. Answer Br. at 73, 98-99. But the portion of the *Dukes* opinion that addressees "Trial by Formula" did not rest on the Due Process Clause and is not a sweeping condemnation of aggregate proof in general. *Dukes* does not contemplate, let alone enshrine, a constitutional due process right to litigate each class member's claim individually.

Under USB's theory, it would also have a due process right to contest each separate component of each plaintiff's claim, i.e., each pay period, each overtime hour, each false or nonexistent record. If this were true, even individual cases would often become completely unmanageable. Properly understood, the Supreme Court's rejection of "Trial by Formula" means no more than that class-wide formulas cannot be substituted for the individual remedial hearings explicitly guaranteed by Title VII.

In *Dukes*, the Supreme Court's reference to "Trial by Formula" appears at the tail end of its extended discussion of whether claims for backpay under Title VII could properly be certified under Federal Rule of Civil Procedure 23(b)(2), which applies where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." The Court left open the possibility that (b)(2) certification might be used in certain cases involving "incidental" monetary relief that did not require individualized proof, but held that such relief could not awarded in the Title VII case before it. Read in context, the limited import of the

"Trial by Formula" shorthand is plain: it refers only to a proposed plan for proving aggregate damages that the Court found incompatible with Title VII's statutory scheme.

The Supreme Court explained:

> Contrary to the Ninth Circuit's view, Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay."
>
> § 2000e–5(g)(2)(A).
>
> We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief." At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."

Dukes, 131 S. Ct. at 2561-62 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 367 (1977)).

The *Dukes* Court rejected the Ninth Circuit's view "that it was possible to replace such proceedings with Trial by Formula" without further

individualized proceedings. 131 S. Ct. at 2561. Pointing specifically to the language of Title VII, the Court "disapprove[d] that novel project." *Id.*[1]

The Supreme Court explained that the individualized defenses guaranteed by Title VII cannot be replaced with formulaic proof under Rule 23 because to do so would override Wal-Mart's substantive statutory rights in violation of the Rules Enabling Act (not the Due Process Clause). "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S. Ct. at 2561 (internal citation omitted).

From this very narrow discussion of the individual proof requirement for relief under Title VII, UBS asks this Court to confer for the first time a constitutional right to raise individualized defenses that would apply to *every* type of claim, regardless of the requirements of the underlying statute. But nowhere does the *Dukes* opinion establish a trans-substantive right to present individualized defenses in every case. The Court's analysis is tied entirely to the Title VII remedial scheme.

Nor did the Supreme Court in *Dukes* condemn the commonplace use of statistical or aggregate proof outside the Title VII remedial context.

---

[1] The formulaic proof rejected in *Dukes* involved a highly idiosyncratic model used by victims of human rights violations in a class action damages case against the estate of Ferdinand Marcos. That approach, used in *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir. 1996), and in no case since, relied on a set of sample trials to extrapolate compensatory damages for victims of torture, "disappearance," or summary execution. *Id.* at 786. In *Dukes*, the Supreme Court merely observed that, since Title VII's statutory scheme mandates individual remedial hearings, the Ninth Circuit's proposal to substitute the *Hilao* methodology for those statutory hearings was unacceptable. 131 S. Ct. at 2550, 2561.

Indeed, the opinion strongly *endorsed* the use of statistical evidence at the *liability* stage of a Title VII case to demonstrate a general policy of discrimination sufficient to satisfy commonality under Rule 23 and the Court held only that the specific statistical analyses offered by plaintiffs in that case were insufficient. 131 S. Ct. at 2554-55[2]; *see also Alch v. Superior Court*, 165 Cal. App. 4th 1412, 1428 (2008) (explaining that, under FEHA, "[s]tatistical proof is indispensable in a disparate impact case"). As other courts have found, the criticism of "Trial by Formula" in *Dukes* has no relevance where, as here, the operative statute affords no specific right to individualized proof. *See Driver v. AppleIllinois, LLC*, No. 06 C 6149, 2012 WL 689169, at *3 (N.D. Ill. Mar. 2, 2012) (holding that *Dukes*' "Trial by Formula" language did not prevent assessment of damages in wage and hour class action with class-wide proof); *Romero v. Florida Power & Light Co.*, Nos. 3:09 CV 2879, 3:10 CV 417, 3:10 CV 2200, 2012 WL 1970125 *4 (M.D. Fla. June 1, 2012) (finding *Dukes* inapplicable in FLSA case in part because "the individual equitable

---

[2] In disparate impact discrimination cases under both Title VII and FEHA, the entire theory of liability presupposes and depends upon aggregate proof. In such cases, "'[o]nce the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.'" *Alch*, 165 Cal. App. 4th at 1428 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)). The burden then shifts to the defendant to rebut the inference of discrimination raised by these statistics. Defendants may rebut the inference with statistical evidence of their own that is more refined, accurate and valid, *Teamsters*, 431 U.S. at 339-40, 360, or by showing that the challenged standards causing the discriminatory pattern are job-related and justified by business necessity. *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) (explaining the burden-shifting analysis required under Title VII).

remedies that would be available under Title VII, such as employee reinstatement, are not available in an FLSA action").[3]

B. Due Process Does Not Mandate Individualized Defenses or Undermine the Use of Aggregate Proof

Due process does not limit courts from exercising their discretion to regulate the quantum, method, or order of proof when necessary to facilitate the fair and efficient adjudication of claims. Nor can due process questions be answered by reference to a bright line test. Due process requires the balancing of three separate interests: a plaintiff's interest in obtaining a remedy, a defendant's interest in avoiding the erroneous deprivation of its property, and "any ancillary interest the [Court] may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991); *Oberholzer v. Comm'n on Judicial Performance*, 20 Cal. 4th 371, 390-91 (1999). Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 348 (1976) (holding that live hearing not required prior to termination of Social Security benefits, given the government's interest "in conserving scarce fiscal and administrative resources"). It calls for a "flexible" approach requiring only "such procedural protections as the particular situation demands." *Id.* at 333, 334.

The Court of Appeals in this case acknowledged, but did not properly apply, this due process balancing process. *Duran v. U.S. Bank Nat'l Assn.*, 137 Cal. Rptr. 3d 391, 420-21 (Cal. Ct. App. 2012). While its

---

[3] *But see Wang v. Chinese Daily News*, No. 08-55483, 08-56740, 2013 WL 781715, *6 (9th Cir. March 4, 2013), *pet. for reh'g filed.*

analysis is not entirely clear, the court concluded that due process principles were "implicated" by "the unprecedented and inconsistent use of statistical procedures in the liability and damages phases," the "manner in which USB was hobbled in its ability to prove its affirmative defense," and the fact that USB was "barred from introducing manifestly relevant evidence" because its demand to call every class member as a witness was denied. *Id.* at 425. Ultimately, the Court of Appeal held that the trial court "exceeded acceptable due process parameters" by "limiting the presentation of evidence of liability to the testifying [class members] only." *Id.* at 425. It gave little consideration to the competing interests of plaintiffs and the State in an aggregate resolution, but treated USB's interests as inviolate. It ultimately concluded that due process requires "individualized inquiries where the applicability of an exemption turns on the specific circumstances of each employee, even in cases where the employer's misclassification may be willful." *Id.* at 426. In other words, the court held that due process allows defendants to force every single class member to testify. That, emphatically, is not the law.

Due process does not require perfect decision-making. Indeed, the concept of proof by a preponderance of the evidence itself tolerates a large degree of imperfection. "[A]s a matter of due process, courts have broad discretion to regulate opportunities to present evidence in civil cases," and treat "many choices in the realm of civil procedure and evidence as a subconstitutional matter left to judicial or legislative choice." Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 Utah L. Rev. 319, 366, 392 (2012). Allowing aggregate proof in class action cases is one such choice.

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

Id. at 324.

In this case, the interests of class plaintiffs in obtaining a remedy, the interest of the public in effective enforcement of minimum labor standards, and the interest of the Court in judicial economy, efficiency, and deterrence all weigh heavily in favor of aggregate proof as an essential tool in achieving the policy goals of labor standards enforcement. *Doehr*, 501 U.S. at 11; *Oberholzer*, 20 Cal. 4th at 390-91. Of course, those interests must be balanced against a defendant's interest in avoiding the erroneous deprivation of its property. However, a defendant has a due process interest was in the proper determination of its overall liability only, and not the amount of damages awarded to any particular class member. *Bell*, 115 Cal. App. 4th at 751-52. So long as reasonable standards of reliability are met, aggregate proof does not unduly impair that interest.[4]

---

[4] As this Court has recognized, the trial court may admit expert opinion testimony if it is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons supported by the material on which the expert relies, and (3) not speculative. *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 771 (2012) (citing Cal. Evid. Code §§ 801 and 802). Plaintiffs' expert testimony in this case was properly admitted under this test and USB was permitted a fair opportunity to rebut it with its own expert testimony. The weight given to the respective experts was for the trial court, whose findings of liability and damages are supported by substantial evidence.

IV. THE USE OF AGGREGATE PROOF AND THE CLASS ACTION MECHANISM ARE ESSENTIAL TO COMBATING THE SERIOUS PROBLEM OF EMPLOYEE MISCLASSIFICATION

A. The State Has A Strong Commitment to the Enforcement of Labor Standards

This Court must provide direction to the lower courts about managing misclassification cases on a class-wide basis to prevent such schemes from becoming safe havens for dishonest employers seeking to evade labor standards. Access to effective private enforcement mechanisms, including class actions based on aggregate proof, must be preserved and protected.

Employee misclassification has seriously eroded the enforcement of minimum labor standards in this State and nationwide. While some misclassification cases, such as this one, involve employees who have been erroneously exempted from overtime pay, others involve extreme levels of abuse where employers classify workers as non-employees and disclaim any responsibility for them at all.[5] Through the false use of categories such as "subcontractors," "independent contractors," "unpaid interns," "franchisees," and "volunteers," employers have sometimes subjected workers to treatment bordering on modern-day slavery. *See, e.g., Flores v. Albertsons*, No. CV0100515, 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002)

---

[5] *See, e.g., S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989) (agricultural laborers misclassified as independent contractors); *JKH Enterprises v. Dep't of Indus. Relations*, 142 Cal. App. 4th 1046 (2006) (drivers misclassified as independent contractors were entitled to workers compensation coverage); *see also Real v. Driscoll Strawberry Assocs., Inc.*, 603 F. 2d 748, 754 & n.12 (9th Cir. 1979) (misclassified agricultural workers); *Torres-Lopez v. May*, 111 F. 3d 633 (9th Cir. 1997) (same).

(supermarket janitors treated as employees of subcontractor worked up to seven day weeks without overtime pay); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001) (indigent workers misclassified as independent contractors delivered grocery orders for tips only); *Bureerong v. Uvawas*, 922 F. Supp. 1450 (C.D. Cal. 1996) (garment workers found working as virtual slaves).

This State strongly favors the vigorous enforcement of minimum labor standards, to ensure that employees do not work under unlawful conditions and to protect law-abiding employers from unscrupulous competitors. Cal. Labor Code § 90.5(a); *see also Sav-on*, 34 Cal. 4th at 340; *Earley v. Superior Court*, 79 Cal. App. 4th 1420, 1429-30 (2000). Despite this long-standing policy commitment, violations of minimum labor standards continue to occur at an alarming rate. One nationwide study of low-wage workers found that, in the previous week alone, 26% were not paid the minimum wage, 19% were not paid overtime compensation, and 57% did not receive paystubs documenting their hours and rates of pay. Annette Bernhardt, Ruth Milkman, Nik Theodore, et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* at 20 (2009), http://www.nelp.org/page/-/brokenlaws/BrokenLawsReport2009.pdf?nocdn=1. The same study showed that twenty percent of low-wage workers worked "off-the-clock" hours, while almost two-thirds of those entitled to uninterrupted meal breaks did not receive them. *Id.* Workers in low-skilled industries such as construction, garment manufacturing, elder care, agriculture, poultry processing, and restaurants suffer disproportionate losses. *See* Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 Am. U. L. Rev.

523, 560-61 (2012) (collecting studies); *see also* Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 Vand. L. Rev. 727, 737 (2010).

Misclassification deprives workers of lawful wages, workers' compensation coverage, Social Security and Medicare contributions, unemployment benefits, and other critical protections.[6] It also deprives the government of billions of dollars in payroll taxes and other revenue, thereby increasing the burden on law-abiding employers and other taxpayers. *See* U.S. Government Accountability Office, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (August 2009), http://www.gao.gov/assets/300/293679.pdf (describing negative impact of misclassification on federal and state revenues and employee rights); *see also* Sarah Leberstein, National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (October 2011) (collecting studies); Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. Davis Bus. L.J. 111, 111-19 (2009) (discussing studies from various states).

Employers have a strong incentive to misclassify employees in order to avoid these expenses and inadequate enforcement has allowed the practice to proliferate.[7] According to U.S. Department of Labor estimates,

---

[6] Francois Carre & Randall Wilson, *The Social and Economic Costs of Employee Misclassification in Construction* (2004), http://www.law.harvard.edu/programs/lwp/Misclassification%20Report%20Mass.pdf.

[7] Treasury Inspector General for Tax Administration, *While Actions Have Been Taken to Address Worker Misclassification, an Agency-Wide*

up to 3.4 million employees have been erroneously classified as "independent contractors" and 30 percent of all employers may be liable for back taxes (as well as back wages) as a result.[8]

California bears a disproportionate share of these losses. According to the Division of Labor Standards Enforcement, "The misclassification of workers results in a loss of payroll tax revenue to the State, estimated at $7 billion per year, and increased reliance on the public safety net by workers who are denied access to work-based protections."[9]

B. Employers Who Misclassify Workers Generally Do Not Keep Appropriate Records and Employees Must Rely on Aggregate Means to Prove Their Losses

A common feature of misclassification cases is the challenge of estimating back pay and work hours in the absence of accurate,

---

(Continued . . .)

Employment Tax Program and Better Data Are Needed (2009), http://www.treasury.gov/tigta/auditreports/2009 reports /200930035fr.pdf (last visited April 1, 2013); *see also* U.S. Department of Labor, *Employee Misclassification as Independent Contractors,* http://www.dol.gov/whd/workers/misclassification (last visited April 1, 2013)(describing U.S. Department of Labor's Misclassification Initiative).

[8] 18 No. 1 SMNYEMPLL, New York Employment Law Letter, *New York Targets 1099 Workers as Misclassified Employees* at 2, 5 (January 2011); *see also* N.Y. State Dep't of Labor et al., *Report of the Joint Enforcement Task Force on Employee Misclassification to Eliot Spitzer, Governor of New York* at 5 (2008), http://www.labor.state.ny.us/pdf/Report%20of%20the%20Joint%20Enforcement%20Task%20Force%20on%20Employee%20Misclassification%20to%20Governor%20Spitzer.pdf; s*ee also* Robert B. Fitzpatrick , *FLSA Developments: Misclassification as Independent Contractors, Unpaid Interns* (American Law Institute 2010); Dave Gram, IRS, *States Crack Down on Independent Worker Abuse*, The Associated Press, Feb. 11, 2010, available at http://www.google.com/hostednews/ap/article/ALeqM5hdqC3b6B0eLuQ1C7O_ sJPB7qNmAD9DQ5KL80.

[9] *See* Cal. Dep't of Indus. Relations, *Worker Misclassification*, http://www.dir.ca.gov/dlse/worker_misclassification.html (last visited April 1, 2013) (announcing new statutory penalties for misclassifying workers as independent contractors, codified in Cal. Lab. Code § 226.8).

contemporaneous records.[10] Courts have dealt with this problem by placing the burden of proving an overtime exemption squarely on the employer who claims it.[11] If the employer fails to keep records that would tend to prove or disprove liability or the extent of plaintiffs' damages, that failure has evidentiary consequences. If the missing records are mandated by law (such as records of employees' identities, hours, and wages paid), the employees' threshold burden of proof is lessened, and the employees need only prove their entitlement to back wages "as a matter of just and reasonable inference."[12] That is the standard to be applied here because UBS did not track employees' hours of work on the mistaken assumption that they could be required to work unlimited hours without extra pay.[13]

---

[10] Similar problems are encountered in cases alleging violations of the right to meal and rest breaks and cases alleging off-the-clock work. This Court has held that such cases may be certified as class actions where plaintiff alleges "a uniform policy consistently applied to a group of employees" or where the employer "exert[s] coercion against the taking of, creat[es] incentives to forego, or otherwise encourage[es] the skipping of legally protected breaks." *Brinker*, 53 Cal. 4th at 1033, 1040.

[11] Exemptions from statutory overtime protections are narrowly construed. *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 794 (1999) (citing *Nordquist v. McGraw–Hill Broad. Co.*, 32 Cal. App. 4th 555, 562 (1995)); *see also A H Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The assertion of an exemption is an affirmative defense for which the employer bears the burden of proof. *Ramirez*, 20 Cal. 4th at 794 (citing *Nordquist* at 562; *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974)).

[12] *See Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (affirming judgment based on representative testimony where employer's records were incomplete); *Hernandez v. Mendoza*, 199 Cal. App. 3d 721 (1988) (adopting *Mt. Clemens* approach).

[13] In *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal. App. 3d 16, 46 (1990), the court held that the employer had the duty to keep track of its employees' sleep time, even though sleep time records were not explicitly required by the applicable Wage Order. The language of the Wage Order requiring "[t]ime records showing when the employee begins and ends each work period" and "total daily hours" was read as requiring the employer to record sleep and wake times as they defined the beginning and end of the work period. Similarly in this case, if employees spent less than 50% of their hours off-premises, that was a work period for which they were

An employer's failure to maintain records of its employees' compensable time should not operate to disadvantage the affected workers by depriving them of the right to proceed as a class and forcing them to prove their cases one-by-one. Aggregate proof such as representative testimony, surveys, or extrapolation from existing records can provide a plausible reconstruction of the missing information. As the court of appeal explained in *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 134-35 (2006):

> where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation.

See also Wolf v. Superior Court, 107 Cal. App. 4th 25, 36 (2003); *Hernandez*, 199 Cal. App. 3d at 727.

If, as USB contends, individualized proof were required in every class action case, many unlawful practices, including most misclassification schemes, would go unchallenged. While a few brave individuals might risk retaliation and achieve small recoveries, the economic incentive to violate the law would remain. Indeed, even individual cases would become unmanageable if defendant could insist on a due process right to challenge

---

(Continued . . .)

nonexempt and entitled to overtime pay. USB should have kept track of those hours, even though such records are not expressly specified in the Wage Order. Its failure to do so should not increase the employees' burden of proof or deprive them of the opportunity to proceed as a class.

the details of every single claim, including, for example, every deficient paycheck, every missed meal or rest break, or every shirtsleeve sewn under a piece rate pay system. In the absence of adequate records that are the employer's burden to keep, employees would face an insurmountable burden of proof and defendants, for the most part, would be permitted to retain their ill-gotten gains.[14]

CONCLUSION

The class action device is critical to the ability of traditionally disenfranchised groups, including low-wage and misclassified workers, to vindicate their rights. Aggregate evidence is often the key to proving such cases. While such evidence is not perfect, it can sometimes be the only way to prove aggregate harm and to estimate damages. The decision below is at odds with accepted methods for proving liability and damages in wage and hour cases. It should be reversed.

Dated: April 3, 2013

Respectfully submitted,

The Impact Fund

Michael Caesar

Jocelyn Larkin
Della Barnett
Michael Caesar
Attorneys for Amici Curiae

[14] The problem of missing records arises in a variety of other contexts, including meal and rest break cases, and cases where the employer treats certain hours as noncompensable. *See, e.g.*, *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000) (travel time); *Monzon*, 224 Cal. App. 3d 16 (sleep time). In such cases, depriving employees of the ability to estimate aggregate damages would effectively eliminate class-wide economic relief, rewarding the employer for failing to keep records of employees' hours. Yet, as the court noted in *Monzon*, "'the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages.'" *Id.* (quoting *Hernandez*, 199 Cal. App. 3d at 727).

EXHIBIT A

STATEMENTS OF INTEREST OF AMICI CURIAE

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

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

Asian Law Caucus ("ALC") was founded in 1972 as the nation's first Asian American legal organization dedicated to defending the civil rights of Asian Americans and Pacific Islander communities. A member of the Asian American Center for Advancing Justice, ALC has a long history of protecting low-wage immigrant workers through direct legal services, impact litigation, community education, and policy work. ALC has a

strong interest in this case because class and representative actions have been key tools that the ALC uses to vindicate the rights of clients and community members who are too vulnerable to bring suit to enforce their rights on their own.

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

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

litigation to enforce the critical disability access entitlements mandated by those laws.

Disability Rights Legal Center (DRLC) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with Disabilities Education Improvement Act and other federal and state laws. Its mission is to champion the rights of people with disabilities through education, advocacy and litigation. The DRLC is a recognized expert in the field of disability rights, and regularly files amicus briefs in state and federal courts, and is involved in policy-making activities on behalf of persons with disabilities both statewide and nationally. For example, DRLC filed an amicus brief on the merits at the United States Supreme Court in the cases of *Cullen v. Pinholster*, 131 S.Ct. 1388 U.S. (2011), addressing the impact of disability on the death penalty phase of a criminal matter, and *Graham v. Florida*, 130 S.Ct. 2011 (2010), on the issue of whether disability should be considered in charging and sentencing of minor youths charged as adults. DRLC also filed an amicus brief on the merits at the United States Supreme Court in *Forest Grove Sch. Dist. v. T. A.*, 129 S. Ct. 2484 (2009), on the issue of whether the Individuals with Disabilities Education Act allows reimbursement for private school placement without prior receipt of special education service, and in *Goodman v. Georgia*, 126 S. Ct. 877 (2005), a case addressing the issue of whether Congress properly abrogated state sovereign immunity when enacting Title II of the Americans with Disabilities Act.

National Consumer Law Center ("NCLC") is recognized nationally as an expert in consumer credit issues, and has drawn on this expertise to provide information, legal research, policy analyses and market insights to federal and state legislatures, administrative agencies, and the courts for over 43 years. A major focus of NCLC's work has been to increase public awareness of, and to promote protections against, unfair and deceptive practices perpetrated against low-income and elderly consumers. NCLC publishes a nineteen-volume Consumer Credit and Sales Legal Practice Series, many of which address issues related to aggregate litigation and the importance of collective actions in the enforcement of consumer rights including, inter alia, *Unfair and Deceptive Acts and Practices* (8th ed. 2012), *Federal Deception Law* (1st ed. 2012), *Credit Discrimination* (5th ed. 2009, and 2012 Supplement) and *Consumer Class Actions* (7th ed. 2010 and 2012 Supplement). NCLC frequently is asked to appear as amicus curiae in consumer law cases before trial and appellate courts throughout the country and does so in appropriate circumstances.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, with members and supporters nationwide, including more than 5,000 in Pennsylvania, appears before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has long been concerned with the proper application of class-actions standards and protection of the due-process rights of non-named class members in class actions. Public Citizen attorneys have in many cases represented class members who objected to settlement of their claims. At the same time, Public Citizen understands that class actions are a critical tool for seeking justice where defendants have engaged in the same or similar unlawful

conduct toward many people—consumers and employees especially—that have resulted in injuries that are large in the aggregate, but small on a per-person basis. In that situation, individual litigation is often impossible, and class actions offer the only means for both individual redress and class-wide remedies, as well as deterrence of wrongful conduct. Public Citizen has participated as lead counsel, co-counsel, or amicus curiae in many of the U.S. Supreme Court's decisions in class-action cases, including *ShadyGrove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010) (lead counsel for petitioner), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (co-counsel for respondents), *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (co-counsel for petitioner), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (counsel for amicus).

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

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.2024(c)(1).)

I, the undersigned appellate counsel, certify that this brief consists of 7,560 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.204(c)(3), relying on the word count of the Microsoft Word 2010 computer program used to prepare the brief.

Dated: April 3, 2013

Respectfully submitted,

The Impact Fund

Michael Caesar

Jocelyn Larkin
Della Barnett
Michael Caesar

Attorneys for Amici Curiae

PROOF OF SERVICE

Case: *Duran, et al. v. U.S. Bank National Association*
Case No. S200923

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 300 Lakeside Drive, Suite 1000, Oakland, California 94612.

I declare that on the date hereof I served a copy of

APPLICATION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE IMPACT FUND, AARP, ASIAN LAW CAUCUS, ASIAN PACIFIC AMERICAN LEGAL CENTER, DISABILITY RIGHTS EDUCATION & DEFENSE FUND, DISABILITY RIGHTS LEGAL CENTER, NATIONAL CONSUMER LAW CENTER, PUBLIC CITIZEN, INC., AND PUBLIC JUSTICE, P.C.

SEE ATTACHED SERVICE LIST

☒ BY U.S. MAIL: By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Oakland, California addressed as set forth below.

☒ BY OVERNIGHT DELIVERY: By depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☒ (***STATE***) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on April 3, 2013.

Stuart Kirkpatrick
Printed Name

Stuart Kirkpatrick
Signature

SERVICE LIST

By Overnight Delivery Timothy Freudenberger Alison Tsao Kent Sprinkle Carothers, DiSante & Freudenberger 601 Montgomery Street, Suite 350 San Francisco, CA 94111	Counsel for Defendants and Appellant, U.S. Bank National Association
By Overnight Delivery Ellen Lake Law Offices of Ellen Lake 4230 Lakeshore Avenue Oakland, CA 94610	Attorneys for Plaintiffs and Respondents
By Overnight Delivery Brad Selgiman Lewis, Feinberg, Lee, Renaker & Jackson, P.C. 476 9th Street Oakland, CA 94607	Attorneys for Plaintiffs and Respondents
By Overnight Delivery Edward J. Wynne Wynne Law Firm 100 Drakes Landing Road, Suite 275 Greenbrae, CA 94904	Attorneys for Plaintiffs and Respondents
By U.S. Mail Alameda County Superior Court Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612	Superior Court of California, County of Alameda
By U.S. Mail California Court of Appeal First Appellate District, Division One 350 McAllister Street San Francisco, CA 94102	California Court of Appeal

By U.S. Mail
Appellate Coordinator
Office of the Attorney General
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230

Attorney General
Pursuant to Bus. & Prof. Code
Sec. 17209

By U.S. Mail
Alameda County District Attorney
1225 Fallon Street, Suite 900
Oakland, CA 94612

District Attorney
Pursuant to Bus. & Prof. Code
Sec. 17209