No. 14-1146

IN THE
Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,
v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class includes hundreds of members who were not injured and have no legal right to any damages.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to express its view that federal courts should certify cases neither as class actions under Rule 23 of the Federal Rules of Civil Procedure, nor as collective actions under the Fair Labor Standards Act (FLSA), unless the plaintiffs can demonstrate that they have satisfied each of the requirements set forth in Rule 23 and the FLSA. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF has also repeatedly urged the judiciary to confine itself to deciding only true "cases or controversies" under Article III of the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for WLF provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

WLF is concerned that the decision below, by endorsing class certification based on estimates regarding the number of overtime hours a hypothetical "average" employee might have worked, deprives a defendant in a class or collective action of the right to litigate its statutory defenses to individual claims. Permitting class or collective claims to proceed in this manner is also unfair to those absent class members who worked more overtime hours than the "average" employee; under the appeals court's trial-by-formula approach, they may end up being undercompensated or even being classified as uninjured despite possessing evidence that they were not fully compensated for their overtime work.

WLF also believes the Court should grant review to ensure that Article III's threshold standing requirement applies with equal force to *all* class members. The Eighth Circuit erred as a matter of law by affirming certification of a class that created liability to uninjured plaintiffs, contravening the injury-in-fact requirement of Article III.

STATEMENT OF THE CASE

Respondents are employees of Petitioner Tyson Foods, Inc. at Tyson's meat-processing facility in Storm Lake, Iowa. They allege that Tyson violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., and the nearly identical Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 *et seq*., by failing to fully compensate them (*i.e.,* failing to pay time-and-a-half) for all hours worked in excess of 40 hours per week.

In calculating compensable working time for its Storm Lake employees, Tyson includes all hours when employees are at their work stations and the production line is moving. Tyson also pays employees for the time it estimates they require to perform other work-related duties, including the donning and doffing of personal protection equipment (PPE). Respondents' lawsuit contends that those estimates are too low, that many employees require more than the estimated time to complete their donning and doffing. Respondents contend that they are entitled to additional overtime pay whenever the extra required work is performed during a week in which an employee has already worked 40 hours.[2]

It is undisputed that the quantity of PPE worn at the Storm Lake facility varies considerably from worker to worker, and thus that the time required to don and doff PPE also varies considerably. Tyson has adopted several measures designed to ensure that employees are fully compensated for their donning and doffing time as well as the time spent walking to their work locations. In particular, throughout the class period, Tyson daily paid from four to eight minutes of "K-Code time" to most class members to compensate for donning/doffing-related activities. Also, employees assigned to come in early to set up or to stay late to tear down remained "on the clock" during those assignments, and they had ample opportunity during

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[2] Storm Lake employees are paid well in excess of the minimum wage. Thus, Respondents do not claim that Tyson's alleged failure to compensate them for all work time constituted a violation of the minimum-wage provisions of the FLSA and the IWPCL.

that compensated time period to complete all donning/doffing, cleaning, and walking activities. Depending on their work assignments, some employees were able to don and doff PPE during the regular work shift, and thus the time they spent on those activities was already included in their compensated time.

The considerable variation in time outside the regular work shift devoted by employees to donning and doffing would seem at first blush to preclude certification of a Rule 23(b)(3) class for Respondents' IWPCL claims (and of a collective action for their FLSA claims). Rule 23(b)(3) precludes certification unless "the questions of law or fact common to class members predominate over any questions affecting only individual members." The factual issues key to determining liability and damages—whether each employee spent more hours performing donning/doffing activity than the hours for which he was compensated and whether the employee worked more than 40 hours in any such week—would seem to require an individual-by-individual factual determination.

Respondents sought to avoid that problem by computing an average amount of time spent by each employee devoted to donning, doffing, and walking activity, based on a time study conducted by Dr. Kenneth Mericle. He observed a small sample of Tyson employees performing what he deemed to constitute donning and doffing activity. Extrapolating that observation to all employees, he concluded that the *average* class member spent between 18 and 21.25 minutes each work day (depending on the department in which he worked) on donning, doffing, and walking

activity.[3] Another of Respondents' experts, Dr. Liesl Fox, examined Tyson's time records to see which employees had worked overtime and—based on Dr. Mericle's conclusions regarding the "average" employee— calculated what she believed was the additional overtime compensation owed by Tyson to the class as a whole.

In the district court, Tyson repeatedly voiced its objection to class certification, arguing that any effort to prove class-wide liability on the basis of Dr. Mericle's time study amounted to "trial by formula" and prevented it from litigating its defenses to individual claims. The district court nonetheless certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members. It also denied Tyson's repeated efforts to decertify. The jury found Tyson liable for failing to pay all required overtime for time spent on donning and doffing activity and awarded $2.9 million in damages to the class as a whole. After trial, the district court denied Tyson's renewed objections to class certification and for judgment as a matter of law, finding that the testimony of Dr. Mericle and Dr. Fox provided sufficient evidence upon which the jury could base class-wide findings of liability and damages. Pet. App. 25a-30a.

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[3] Dr. Mericle readily conceded wide variations in individual donning and doffing time (because some employees were required to wear considerably more PPE than others and because completion times vary based on the manner in which PPE is donned and doffed), with some employees requiring considerably less than the "average" time to complete the activity.

A divided Eighth Circuit panel affirmed. *Id.* at 1a-24a. While conceding that "individual plaintiffs varied in their donning and doffing routines," the appeals court held that Dr. Mericle's study created a "just and reasonable inference" that *all* class members worked more hours than the hours for which they were compensated. *Id.* at 12a. Rejecting Tyson's assertion that Dr. Mericle's study was incapable of providing a class-wide answer to the liability and damages questions, the court said that "using statistics or samples in litigation is not necessarily trial by formula." *Id.* at 10a-11. It cited this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 546 U.S. 21 (1946), to support its conclusion that the jury could infer both class-wide liability and damages from the study. *Id.* at 11a-13a.

Nor did the Court deem it significant that Respondents' own expert, Dr. Fox, concluded that a significant percentage of the plaintiff class did not work overtime (even when Dr. Mericle's "average" donning, doffing, and travel time were added to their time records) and thus could not establish liability or damages. *Id.* at 8a-9a. The court said, "The fact that individuals will have claims of differing strengths does not impact on the commonality of the class as structured." *Id.* at 9a (citation omitted).

Judge Beam dissented. *Id.* at 14a-24a. He concluded that the class- and collective-action certifications were improper because—in light of the wide disparity in work performed by class members—a class-wide proceeding lacked "the capacity . . . to generate common answers apt to drive the resolution of the litigation." *Id.* at 23a (quoting *Wal-Mart*, 131 S.

Ct. at 2251). He noted that, according to Respondents' own calculations, at least 212 class members could establish neither liability nor damages, and said that—given the jury's decision to award less than half the damages computed by Dr. Fox—it was likely that "more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* at 22a. The Eighth Circuit denied Tyson's petition for rehearing *en banc*; six judges voted to grant the petition. *Id.* at 114a.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance to the business community. The Eighth Circuit held that even when the claims of individuals are widely disparate, a trial court may manufacture common issues of fact by assuming that each individual's claims are identical to a hypothetical "average" plaintiff, and then base certification of class or collective actions on the manufactured common issue of fact. That holding is unfair to defendants because it denies them the opportunity to defend against actual, individual claims rather than the claims hypothesized by the trial court. It is also often unfair to absent class members, many of whose claims will end up being compromised for the sake of obtaining class certification.

Review is warranted because the Eighth Circuit's decision cannot be squared with this Court's decision in *Wal-Mart* and directly conflicts with a post-*Wal-Mart* decision from the Seventh Circuit. The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named

parties." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Departure from that general rule is permissible only when the requirements of Rule 23 have been met, requirements designed to ensure that the rights of all parties are fully protected and that certification does not modify existing rights.

By permitting this case to proceed as though the claims of all class members were identical to those of a hypothetical, "average" class member—thereby preventing Tyson from defending against the claims of individual class members—the Eighth Circuit violated the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Respondents' class-wide damage model significantly increases Tyson's potential damages above what it would incur if claims were litigated individually.

Moreover, by allowing liability and damages to be determined by statistical techniques that presume all class members are identical to the average observed in a sample, the appeals court improperly uses the class-action device to grant plaintiffs access to federal court without satisfying the "irreducible constitutional minimum of standing" under Article III. In doing so, the Eighth Circuit endorsed a class that includes *at least* 212 members who lack any injury traceable to the defendant's conduct. The Eighth Circuit's holding thus strips Article III of its vital gatekeeping function, which is critical to safeguarding the "proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

But this Court has been vigilant in ensuring that federal courts do not allow use of class-action procedures to adversely affect the substantive rights of any party. By permitting the expediency of the class-action device to substitute for actual, redressable harm caused by the defendant, the panel below effectively gutted Article III and required the defendant to litigate claims without being able to challenge the standing of uninjured class members. The district court's certification, and the Eighth Circuit's affirmance, of a class that includes numerous members who lack any cognizable injury is sharply at odds with this Court's historical understanding of Article III, and it runs contrary to the settled law of several circuits.

REASONS FOR GRANTING THE PETITION

I. CLASS CERTIFICATION IS IMPROPER WHERE THE ONLY COMMON ISSUE TYING TOGETHER DISPARATE CLASS MEMBERS IS THE HYPOTHESIZED DESCRIPTION OF AN "AVERAGE" CLASS MEMBER

The Eighth Circuit certified a plaintiff class consisting of more than 3,300 employees seeking to recover overtime wages, despite wide variations among the employees in terms of hours worked time and working conditions. Indeed, the *only* relevant issues identified by the Eighth Circuit as common to the class were not contested and thus did not need to be adjudicated by the district court.[4] The appeals court

[4] In an effort to distinguish *Wal-Mart*, the Eighth Circuit identified the following issues that supposedly tied the class

held that the absence of significant common issues could be overlooked and a class certified on the basis of a counter-factual presumption: that every class member engaged in the same amount of donning, doffing, and walking as the "average" employee. Respondents were permitted to demonstrate the amount of work performed by the "average" employee based on non-random observations of a small sample of employees. That holding cannot be squared with *Wal-Mart* and is in direct conflict with a post-*Wal-Mart* Seventh Circuit decision that rejected class certification in a wage-and-hour case with facts materially identical to the facts of this case. Review is warranted to resolve those conflicts.

A. The Class-Wide Issue that Served as the Basis for Class Certification Focused on a Hypothetical "Average" Employee

To obtain class certification in a case seeking damages (as here), a plaintiff must demonstrate, *inter alia*, that "there are questions of law or fact common to the case," Rule 23(a)(2), and that "questions of law or fact common to class members predominate over any

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together: "Unlike [*Wal-Mart*], Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members. Unlike [*Wal-Mart*], class members worked at the same plant and used similar equipment." Pet. App. 8a. Those factual issues were uncontested by the parties. Indeed, uncontested issues such as whether putative class members all worked for one company were singled out in *Wal-Mart* as precisely the sort of issues that do *not* qualify as common issues for purposes of Rule 23(a)(2). *Wal-Mart*, 131S S. Ct. at 2551.

questions affecting only individual members." Rule 23(b)(3). *Wal-Mart* made clear that the Rule 23(a)(2) "commonality" requirement is demanding:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 131 S. Ct. at 2551.

The Court has described Rule 23(b)(3)'s predominance requirement as "even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. at 1432. It imposes on courts a "duty to take a close look at whether common questions predominate over individual ones." *Ibid.*

Individual issues abound in this case. All agree that the number of hours—outside of regular work shifts—devoted to donning, doffing, and walking by Storm Lake employees varied considerably from employee to employee. Moreover, whether such work entitled a given employee to overtime compensation

depended entirely on whether that employee otherwise worked 40 or more hours during the week in question. Those individual issues of fact determine whether Tyson is liable to an employee for unpaid wages and, if so, what amount of damages are recoverable.

In contrast, the Eighth Circuit did not identify any issue of contested fact that is common to the class in the sense that its resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. Instead, it presumed counterfactually that every employee performed the same amount of donning, doffing, and walking outside of regular work shifts, thus permitting the class trial to turn on whether Tyson had paid sufficient overtime wages to the hypothetical average employee.

B. The Eighth Circuit's Class Certification Decision Cannot Be Squared With *Wal-Mart* and Conflicts with a Post-*Wal-Mart* Decision from the Seventh Circuit

The effect of class certification in this case was to deprive Tyson of the ability to litigate its statutory defenses to individual claims. Once the district court held that Tyson's liability to the entire class turned on whether Tyson had paid sufficient overtime to the hypothetical average employee, it could no longer avoid liability by demonstrating that class counsel had failed to demonstrate that specific class members were inadequately compensated. As Tyson has explained, "In a class trial, . . . Tyson was reduced to attacking the

methodology used by plaintiffs' experts to determine the 'average' donning/doffing time." Pet. at 23.

Review is warranted because the decision to certify a plaintiff class under such circumstances cannot be squared with *Wal-Mart*. The Court explained in *Wal-Mart* that class certification under such circumstances amounts to an impermissible "Trial by Formula." 131 S. Ct. at 2541. Under a trial plan approved by the Ninth Circuit in *Wal-Mart*, a master was to determine the liability and backpay claims of a small group of class members. The trial court would then extrapolate "the entire class recovery" (for a class of 1.5 million employees) from the verdicts rendered in those initial proceedings. In other words, Wal-Mart would not be permitted to contest the remaining 1.5 million claims by asserting that it did not discriminate against the specific employees in question. *Id.* This Court held that Rule 23 class certification could not be employed in that manner. It stated, "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 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." *Id.*

In an effort to distinguish *Wal-Mart*, the Eighth Circuit said, "Here, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a. That effort to distinguish *Wal-Mart* is unavailing because it is based on a false premise: Respondents do, in fact, seek to "prove liability only for a sample set of class

members." Plaintiffs' claim rests entirely on Dr. Mericle's time study that purported to determine average donning and doffing time, and that study was based on a small, non-random sample of Tyson employees.[5]

The Petition demonstrates that the Eighth Circuit's endorsement of class certification conflicts with numerous circuit court decisions. One of those decisions (from the Seventh Circuit) merits special mention, both because of its factual similarity to this case and because it demonstrates that appeals courts have reached conflicting decisions regarding the meaning of *Wal-Mart*. In *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the Seventh Circuit affirmed class decertification in a case brought by individuals claiming that their employer failed to pay them time-and-a-half for overtime work. The Court concluded that Rule 23(b)(3) did not permit class counsel to litigate the claims of 2,341 putative class members based on the testimony of 42 "representative"

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[5] This Court's *Mt. Clemens* decision does not support the district court's reliance on sampling evidence as its basis for class certification. At issue in *Mt. Clemens* was the *legal* issue of whether employees' donning, doffing, and walking time was compensable under the FLSA, not the *factual* question of how much donning, doffing, and walking time there was. In concluding that the donning, doffing, and walking time of all employees was compensable, the Court examined the evidence submitted by eight employees regarding plant-wide working conditions. But the court did *not* attempt to extrapolate class-wide compensable time from the evidence submitted by the eight employees. Rather, it remanded the case so that the district court could determine class-wide compensable time in the first instance. *Mt. Clemens*, 328 U.S. at 691-94.

members of the class—in part because there was no evidence that the experiences of the 42 were representative of the class as a whole. *Id.* at 774.

Moreover, the Seventh Circuit held that class certification would be inappropriate *even if* their experiences were representative of the entire class because it is impermissible to award averaged damages to class members whose damages are not identical:

> To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage. No one thinks there was such uniformity. And if the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) undercompensate him by half.

Id. The conflict between the Seventh and Eighth Circuits could not be starker. Both cases involved overtime claims under the FLSA; in both cases the parties understood that the relevant facts varied considerably from employee to employee. The Eighth Circuit permitted class certification in reliance on a study of a small, non-random sample of class members, based on the counterfactual presumption that every employee's experience was roughly similar to the

hypothetical "average" employee identified by the study. In contrast, the Seventh Circuit concluded that class certification is *never* permissible under such circumstances; it determined that, even if the 42 employees providing evidence were representative of the class as a whole, class certification would be inappropriate as a vehicle for awarding averaged damages that would overcompensate some and undercompensate others. Review is warranted to resolve this sharp inter-circuit conflict over a frequently recurring issue.

C. Review Is Warranted Because the Assumption that Every Employee's Claim Is Identical to That of the "Average" Employee Is Unfair to Absent Class Members

By certifying the class on the basis of a counter-factual presumption—that every employee devoted an identical number of hours (outside of regular work shifts) to donning, doffing, and walking—the decision below is also unfair to absent class members. Given the acknowledged wide disparity in time devoted to donning and doffing, by definition there will be a significant number of employees with above-average donning and doffing times and (if their work-weeks exceeded 40 hours) above-average overtime claims. As the Seventh Circuit pointed out, those above-average employees will be shortchanged if they are limited to an undifferentiated, per capita share of any class award. *Espenscheid*, 705 F.3d at 774.

Moreover, any distribution of a class award on the basis of Dr. Fox's calculations regarding who was injured could end up denying all recovery to some employees with potentially meritorious claims—*e.g.*, employees with above-average donning and doffing times but below-average overtime hours.[6] Such employees arguably are entitled to compensation if their above-average donning and doffing times are sufficient to push their total work per week above 40 hours. But because Dr. Fox's overtime calculations give them credit only for an average amount of donning and doffing time, Respondents' theory of liability might not credit them with overtime hours and thus would deny them any compensation claim.

One can understand why it is in the interest of plaintiffs' attorneys to average out the monetary claims of all class members; doing so arguably increases the chances of obtaining a lucrative class-certification order (at least it did here). But averaging out monetary claims will harm the interests of many of the attorneys' supposed clients. Rule 23(a)(4) prohibits

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[6] The author of the Eighth Circuit panel decision has suggested that, on remand, class members determined to be uninjured should not be included in the distribution of damages. *See* Pet. App. 131a (Opinion of Benton, J., respecting the denial of rehearing *en banc*) ("In this case, employees without damages are not entitled to allocation of the award."). WLF notes, however, that in light of the jury's decision to award lump-sum damages that were substantially less than the damages calculated by Dr. Fox, any distribution of the award among class members will be essentially arbitrary. As Judge Beam pointed out, it is impossible to determine who the jury thought was uninjured. Pet. App. 22a.

class certification unless counsel can demonstrate that (s)he "will fairly and adequately protect the interests of the class." Review is warranted to determine whether Rule 23(a)(4) bars class certification based on the counterfactual presumption that all class members possess the same characteristics as the hypothetical "average" class member.

Indeed, in light of the inherent conflict between class counsel and absent class members with above-average donning and doffing time, the latter would have a plausible claim that they are not bound by the judgment in this case. A court may not bind absent class plaintiffs to a judgment concerning money damages unless it provides "minimal procedural due process protection." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Those "minimal" protections include adequate representation "at all times" by the named plaintiffs and their counsel. *Id.* at 812. Review is warranted to determine whether class-action defendants should be subjected to class-action judgments that arguably are not equally binding on all members of the plaintiff class.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT ARTICLE III's INJURY-IN-FACT REQUIREMENT APPLIES TO ALL MEMBERS OF A CERTIFIED CLASS

Article III, § 2 of the Constitution extends the "judicial Power" of the United States to only "Cases" and "Controversies." To be justiciable, every suit brought in federal court must seek to redress an "injury in fact" caused by the defendant. *Whitmore v.*

Arkansas, 495 U.S. 149, 155 (1990). This Court has explained Article III's standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. … First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.'" … Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. … And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-103 (1998) (citations omitted). A plaintiff thus lacks standing unless he has suffered "a distinct and palpable injury to himself." *Warth*, 422 U.S. at 501. This bedrock requirement of Article III jurisdiction "cannot be removed." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

Article III's injury-in-fact requirement is no "mere pleading requirement" but must be satisfied at each "stag[e] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Even under Rule 23, plaintiffs may aggregate only those claims that could be brought individually. That is why this Court has consistently held that class certification cannot provide individuals a right to relief in federal court that the Constitution would otherwise deny them if

they sued separately. *See, e.g., Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (recognizing a due-process violation when "individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III's constraints.").

Rather than heed this Court's directives, the courts below ignored uncontested record evidence that substantial variations existed in the donning, doffing, and walking times of employees, who held different positions, used different combinations of equipment, and had different work routines. Despite the highly individualized donning, doffing, and walking times of class members, the district court simply assumed that every class member spent the same "averaged" amount of additional time on the job. Yet Respondents' own damages expert conceded that the class included over 212 members who suffered no injury whatsoever. *See* Pet. App. 22a, 122a. And because the jury issued an aggregate damages award *less than half* that requested by Respondents, it is likely that more than half of the putative class suffered no damages. *Id.* at 22a, 125a. Nevertheless, the district court included those uninjured plaintiffs in the aggregate damages award.

Trying a lawsuit on a class-wide basis is improper unless there is some feasible means of distinguishing injured class members from uninjured plaintiffs. Here there is none. As Judge Beam recognized in his dissent from the court's denial of

rehearing, the district court's "lump sum judgment contains no discernible guidelines sufficient to establish the individual damages due to the limited number of members of the certified class with provable damages." Pet. App. 126a. And yet, "[n]either the district court nor the panel majority offer any instructions for, or insight into, how this judgment may be lawfully and fairly executed and by whom." *Id.*

The deeply flawed decisions below thus sidestep "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. As a result, the growing prospect that class-action lawsuits will result in recovery for uninjured plaintiffs poses a serious threat—not only to this Court's precedents, but to the rule of law. "In an era of frequent litigation [and] class actions, . . . courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

Three circuits have squarely held that *all* members of a certified class must satisfy Article III standing to have their claims adjudicated in federal court. *See In re Rail Freight Fuel Surcharge Antitrust Litigation*, 725 F.3d 244, 252 (D.C. Cir. 2013) (requiring plaintiffs to show "that all class members were in fact injured by the alleged conspiracy"); *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 594 (9th Cir. 2012) ("[N]o class may be certified that contains members lacking Article III standing."); *Denney v. Deutsche Bank* AG, 443 F.3d 253, 264 (2d Cir. 2006) (holding that the class must "be defined in such a way that anyone within it would have standing"). The

Eighth Circuit's decision in this case exacerbates an existing circuit split on this question, further underscoring the urgent need for this Court's discretionary review.[7]

Moreover, allowing uninjured persons to obtain recovery in federal court also violates the principle that the Federal Rules of Civil Procedure "do not extend" the "jurisdiction of the district courts." Fed. R. Civ. P. 82; *see Amchem*, 521 U.S. at 613; Theane Evangelis & Bradley J. Hamburger, *Article III Standing and Absent Class Members*, 64 EMORY L.J. 383, 398 (2014) ("Expanding [Article III] power to allow uninjured plaintiffs to litigate their claims in federal court solely because they are aggregated with others in a class action would violate the Rules Enabling Act, Rule 82, and due process.").

The question of whether a certified class may include individuals who lack an injury-in-fact under Article III is in desperate need of resolution by this Court. Although the Court has so far declined to

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[7] *See DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010) ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm."); *Kohen v. Pacific Investment Mgmt. Co.*, 571 F.3d 672, 676-77 (7th Cir. 2009) ("[A]s long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."); *Krell v. Prudential Ins. Co. of Am.*, 148 F.3d 283, 306-07 (3d Cir. 1998) ("Once threshold individual standing by the class representatives is met . . . there remains no further separate class standing requirement in the constitutional sense.").

answer that question, *see Carpenter Co. v. Ace Foam, Inc.*, 135 S. Ct. 1493 (2015); *and BP Exploration & Prod. Inc. v. Lake Eugenie Land & Develop., Inc.*, 135 S. Ct. 754 (2014), no good reason exists to allow this recurring problem to fester any longer.[8] Only this Court can provide a single, nationally uniform rule clarifying that district courts may not certify a class unless *all* members have suffered an injury caused by the defendant.

If anything, this case offers a more attractive vehicle than earlier petitions. Because this case was tried to verdict, here we know precisely the evidence Respondents used to "prove" class-wide injury and damages at trial. Rather than determine the actual damages of individual class members, Respondents relied on statistical techniques that improperly presumed that each class member was injured and should be awarded damages equal to the average observed in a sample. That egregious shortcut resulted in a lump-sum judgment to a class that includes hundreds of members who suffered no injury whatsoever. Given the increasing frequency with which lower federal courts have been willing to jettison the traditional threshold requirements of Article III,

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[8] The lower federal courts have also ignored Article III's injury-in-fact requirement in the context of congressionally created private rights of action. So far, that issue has likewise escaped the Court's review. *See Mut. First Fed. Credit Union v. Charvat*, 134 S. Ct. 1515 (2014) (denying petition for writ of certiorari); *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012) (per curiam) (dismissing writ of certiorari as improvidently granted); *cf. Spokeo, Inc. v. Robins*, No. 13-1339 (May 1, 2014) (petition for writ of certiorari pending).

review of the troubling class-certification decision below is particularly warranted.

It is beyond question that if any class member were to sue Tyson in an individual capacity in district court, he would need to satisfy Article III. But there is a constant temptation for district courts, which invariably face crowded dockets and finite resources, to adopt shortcut procedures designed to achieve quick resolution of cases raising similar issues. As this Court has cautioned, the "desire to obtain (sweeping relief) cannot be accepted as a substitute for compliance with [the standing requirements of Article III]." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974) (quoting *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 164 (1914)). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).

In sum, the Court should grant review to prevent the lower federal courts from continuing to use Rule 23 as a mechanism to avoid the constitutional limits of Article III jurisdiction.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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