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 others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE IMPACT FUND, CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, DISABILITY RIGHTS ADVOCATES, THE LEGAL AID SOCIETY, PUBLIC ADVOCATES, AND PUBLIC INTEREST LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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SUMMARY OF ARGUMENT AND INTEREST OF *AMICI CURIAE*

This brief addresses the procedural irregularities that infect the second question presented in Tyson Foods' petition for certiorari: Tyson urged the Court to take this case to decide whether plaintiffs seeking class certification must prove injury to all class members. But Tyson now concedes that point. It disclaims the notion that a class action cannot be "certified in the absence of proof that all class members were injured." Pet. Br. 49. And for good reason: A contrary rule would set Rule 23 against itself, conflict with the substantive law, and pose practical problems for courts and litigants—especially for low-wage workers and civil-rights claimants like those represented by *amici curiae* nonprofit groups.

Abandoning the second question in its petition, Tyson now advocates an entirely new hurdle, which it locates in Rule 23(b)(3)'s predominance requirement—that plaintiffs must prove, at the threshold, "some mechanism" to cull uninjured class members. *Id.* This argument was neither presented nor passed on below. Indeed, Tyson requested the classwide verdict about which it now complains and rejected a contrary procedure.

The Court should therefore follow one of three paths: (1) dismiss the abandoned question, as it recently did in *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772 (2015); (2) dismiss both questions presented, so as not to reward "bait-and-switch tactics," *id.* at 1779; or (3) "stick to the question on which certiorari was sought and granted," *Norfolk So. Ry. v. Sorrell*, 549 U.S. 158, 164 (2007), and affirm the decision below.[1]

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[1] All parties consent to this brief, and no party's counsel authored it in whole or part. Apart from *amici*, no person contributed money to fund its preparation or submission.

STATEMENT

Workers at a Tyson Foods slaughterhouse in Iowa brought this lawsuit, alleging that the company failed to pay them overtime for the time they spent donning and doffing protective gear and walking to and from the processing line, in violation of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), and its state-law analogue. Because Tyson failed to keep time records for those activities—in violation of the FLSA and a federal-court injunction naming the Iowa slaughterhouse at issue here, *see Reich v. IBP, Inc.*, No. 2:88–cv–02171, Dkt. 238 (D. Kan. July 30, 1996)—the workers sought to establish damages using inferential proof. They also sought certification of the case as an FLSA collective action and a class action under Rule 23(b)(3).

1. Class certification. In opposition, Tyson did not argue that certification was improper because some class members did not qualify for overtime. Nor did it contend that the plaintiffs had failed to establish a mechanism to ensure that such class members would not contribute to, or share in, any damages award. Instead, Tyson argued that the issues concerning compensability of donning, doffing, and walking were individualized and would "dominate" the litigation. Dkt. 49, at 3. The court rejected that argument and certified the class. App. 41a–113a.

Tyson later moved to decertify the class, this time contending that it failed Rule 23(a)'s commonality requirement because some members had no compensable injury, so "there is no common answer to liability." Dkt. 212-1, at 7. Tyson primarily argued that the "variation in the time that employees spend donning and doffing" meant that some class members might have been fully compensated by Tyson's "K-Code" time (the amount of time Tyson paid class members for donning and doffing, based on its own study of average times). *Id.* at 7–10.

Tyson also argued that the plaintiffs' evidence showed that a small part of the class (about 6%) had not worked overtime. *Id.* at 9. Tyson never argued, however, that the plaintiffs had failed to establish an adequate mechanism for culling those members or that Rule 23 required one. The court denied Tyson's motion. App. 31a–38a.

2. Trial. Before trial, the plaintiffs proposed a bifurcated proceeding that would address Tyson's concerns about individualized damages. JA 112–13. The first phase would determine common liability issues; the second, damages. But Tyson successfully opposed this proposal, so both issues were tried together. JA 115.

At trial, the plaintiffs presented an expert report by Dr. Liesl Fox, a statistician who calculated the uncompensated time that each class member worked (based on average donning-and-doffing times measured by industrial-engineering expert Dr. Kenneth Mericle). JA 403–08. From those calculations, Dr. Fox determined—for each class member—whether the additional time entitled that member to overtime pay and, if so, how much. *Id.* Dr. Fox concluded that 3,132 members were entitled to damages, while 212 members (whom she identified by name) were not entitled to damages because they did not work overtime. JA 415.

3. Jury instructions and verdict. Tyson asked the court to instruct the jury that "any employee who already has received full compensation for all [activities that you find compensable] is not entitled to recover any damages." JA 101. Tyson also requested that the verdict form provide only an aggregate award—not individualized awards. JA 102–04. The court accepted both proposals. JA 481, 488.

After the jury found in favor of the class and awarded nearly $2.9 million in aggregate compensatory dam-

ages, Tyson again moved to decertify the class, arguing that the plaintiffs failed to prove that "each class member was denied overtime to which they were entitled for performing compensable activities." Dkt. 304-1, at 8. It also argued that the jury awarded damages to "employees to whom Tyson has no liability," *id.* at 13, notwithstanding the jury instructions to the contrary. The court again rejected Tyson's arguments. App. 25a–30a.

4. Appeal. Tyson renewed its arguments on appeal. As before, Tyson did not contend that the plaintiffs had failed (or were required) to propose an adequate culling mechanism. Rather, Tyson argued that "the class should be decertified because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson undercompensated their donning, doffing, and walking." App. 8a.

The Eighth Circuit rejected this argument, holding that "[i]ndividual damage calculations are permissible if they do not 'overwhelm questions common to the class,'" as here. App. 9a (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013)). The court noted that Tyson requested the aggregate award and thus "invited" the very thing about which it complained. App. 10a. Dissenting, Judge Beam reasoned that "[c]ommonality requires the plaintiff to demonstrate . . . that all class members suffered the same injury." App. 19a. Neither the majority nor the dissent said a word about a culling mechanism.

Tyson successfully sought certiorari in this Court on two questions, the second of which was "[w]hether 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 contains hundreds of members who were not injured and have no legal right to any damages." Pet. for Cert. i.

ARGUMENT

I. The Court should dismiss the second question presented as improvidently granted.

A. When Tyson filed its petition for certiorari, it claimed that "the circuit courts are divided" on the question whether "all class members must have standing to sue," such that "plaintiffs must be able to show injury to all class members" when seeking certification. *Id.* at 3, 25. Three circuits, Tyson told this Court, have answered yes, while four "have held that the requirements of Article III are satisfied as long as a single class member was injured and has standing to sue." *Id.* at 3–4; *see also id.* at 26. Tyson asked this Court to "grant review to resolve the circuit split," and represented that it would advocate one side. *Id.* at 30.

But now, "[h]aving persuaded [the Court] to grant certiorari," Tyson "effectively concedes" that neither Article III nor Rule 23 requires proof that all class members have been injured. *Sheehan*, 135 S. Ct. at 1772. Tyson's brief does not cite two of the three decisions on its side of the split, much less defend their holdings. And although it includes a single paragraph (at 48–49) asserting that the third decision (from the D.C. Circuit) was "correctly" decided, the very next sentence disavows that position: "The fact that federal courts lack authority to compensate persons who cannot prove injury," Tyson acknowledges, "does *not* mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." Pet. Br. 49 (emphasis added).

Rather than argue the question on which it sought certiorari, Tyson attempts "to rely on a different argument." *Sheehan*, 135 S. Ct. at 1772. It contends that, under Rule 23(b)(3)'s predominance requirement, class

plaintiffs must establish "that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured class members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." Pet. Br. 49–51.

This Court, however, is "typically reluctant to permit parties to smuggle additional questions into a case . . . after the grant of certiorari." *Sorrell*, 549 U.S. at 164. If the Court were to allow Tyson "to switch gears" in this way, it "would be unfair" to the respondents, who did not have the chance to explain why Tyson's new question does not warrant review. *Id.* at 165. It would also disserve the development of the law by rewarding (and thus inviting) such tactics, thereby depriving the Court "of the opportunity to consider, and settle, a controverted question of law that has divided the Circuits." *Sheehan*, 135 S. Ct. at 1779–80 (Scalia, J., concurring in part, dissenting in part). Because Tyson no longer asks this Court to resolve the split on which it sought certiorari, the Court should dismiss the second question as improvidently granted. *See id.* at 1773–74.

B. Dismissal is especially appropriate here because Tyson's new argument was neither pressed nor passed upon below. Until its merits brief in this Court, Tyson never contended that Rule 23(b)(3)'s predominance requirement (or anything else, for that matter) demands that class plaintiffs produce, at the threshold of a case, a "mechanism for culling uninjured class members." Pet. Br. 49. If anything, Tyson did the opposite: Whereas it now claims (at 51) that "the individual questions of which class members were injured" preclude a finding of predominance, Tyson argued below that *other* questions would "dominate" this litigation. Dkt. 49, at 3. And Tyson never made *any* predominance argument to the court of

appeals—let alone one focusing on a culling mechanism—and hence that court never considered the question. Tyson Br., *Bouaphakeo v. Tyson Foods*, No. 12–3753 (8th Cir. filed Feb. 8, 2013), at 38–41; App. 8a–10a.

This Court "does not ordinarily decide questions that were not passed on below." *Sheehan*, 135 S. Ct. at 1773; *see Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (per curiam) (dismissing writ). Under the Court's "traditional rule," when a question "was not pressed or passed upon below," it "precludes a grant of certiorari." *United States v. Williams*, 504 U.S. 36, 41 (1992). This rule "promote[s] respect" for the Court's "adjudicatory process" and ensures that the Court will not be "tempted to engage in ill-considered decisions of questions not presented in the petition" and not considered below. *Adarand Constructors*, 534 U.S. at 110–11. "[O]nly in exceptional cases" will this Court consider a question not preserved below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

This is not such a case. Tyson has pointed to "no special circumstances explaining its failure to preserve this question." *City of Springfield v. Kibbe*, 480 U.S. 257, 258–59 (1987) (per curiam). To the contrary, the Court's traditional rule "has special force" here because Tyson "itself requested" the classwide verdict about which it now complains, and successfully opposed a bifurcated proceeding that would have generated individualized awards (and thus ensured that no uninjured class member received compensation). *Id.* at 259; *see* JA 11–15, 102–04. In light of the "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested," this Court has dismissed a writ as improvidently granted even when the issue it presented "was passed on by the

Court of Appeals below." *Kibbe*, 480 U.S. at 259. This case is an even stronger candidate for dismissal.[2]

C. Nor would Tyson's new question have been worthy of this Court's review had it been included in the petition and preserved below. The question is splitless, and this case is an especially poor vehicle for exploring it. The jury instructions (which Tyson proposed, *see* JA 101, 481) make clear that class members without compensable injuries did not "contribute to the size of [the] damage award" and "cannot recover . . . damages under it." Pet. Br. 49. To the extent that Tyson is now objecting to how the award will be allocated, that has not happened yet, and Tyson lacks standing to make the argument anyway. *See* Resp. Br. 58. To the extent that Tyson is complaining that the plaintiffs failed to submit evidence showing that it is possible to identify class members who lack damages, that is simply wrong. The plaintiffs' expert, Dr. Fox, produced a report calculating the uncompensated time that each individual class member worked based on the estimated time that workers spent donning and doffing, and then determined whether each member was entitled to overtime pay. JA 403–08.

No court to our knowledge has ever held that Rule 23 requires more. That is hardly surprising. If the rule forced plaintiffs, at the certification stage, to account for every possible jury verdict for any class with at least one uninjured person then Rule 23 would, in practical effect, preclude certification of such a class—the very argument Tyson has now rightly abandoned.

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[2] The dissenters in *Kibbe* would have reached the issue only because "the Court of Appeals expressly ruled on the question." 480 U.S. at 266 (O'Connor, J., dissenting). Not so here.

That, at least, would be the result for employers like Tyson, who violate statutory recordkeeping obligations. For let us not forget what the usual "culling mechanism" is in a wage-and-hour class action: the employee time records that federal law mandates employers to keep, and that Tyson did not keep (notwithstanding a federal-court order requiring those records at this particular Iowa slaughterhouse). Rule 23 should not be interpreted to *allow* class actions against employers who dutifully comply with recordkeeping requirements, but *prohibit* class actions against employers like Tyson, who repeatedly flout those requirements. For this reason, too, the Court should dismiss the second question presented as improvidently granted.

II. Rather than reward Tyson's bait-and-switch tactics, the Court may dismiss both questions presented as improvidently granted.

The Court may also wish to follow the path urged by Justice Scalia in *Sheehan* and dismiss *both* questions presented. 135 S. Ct. 1779–80 (Scalia, J., concurring in part and dissenting in part). To do otherwise would "reward" Tyson's "bait-and-switch tactics" and "encourage future litigants to seek review premised on arguments they never plan to press, secure in the knowledge" that the Court will consider whatever arguments "they choose to present in their merits brief." *Id.* at 1779.

It is true that the majority in *Sheehan* declined to dismiss both questions presented by San Francisco's petition. But it did so for two reasons: (1) because San Francisco's unabandoned question concerned "the liability of individual officers," who had their own "personal interest in the correctness of the judgment," and (2) because the Court, given the importance of qualified immunity to "society as a whole," frequently engages in

error-correction in cases subjecting individual officers to liability. *Id.* at 1774 n.3. Neither reason applies here.

Tyson's first question presented is whether a class may be certified "where liability and damages will be determined by statistical techniques that presume all class members are identical to the average observed in a sample." Pet. for Cert. i. That question concerns only Tyson's liability, not the individual liability of those tasked with protecting and serving the public. And Tyson itself proposed a jury instruction (adopted by the district court) explaining that the jury could award damages to non-testifying class members based on "representative evidence," even though "those damages will only be approximate." JA472, 481.

More importantly, the first question presented (like the second) has evolved since the Court granted certiorari. At that point, the question concerned the meaning of the prohibition on a "Trial by Formula" in *Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)—a question that Tyson claimed has divided the circuits. Pet. for Cert. 2–3. But now the question is less about *Wal–Mart* and more about the applicability of this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which provides the substantive rule of law for wage-and-hour cases like this one, where the employer fails to comply with statutory recordkeeping requirements. In such cases, employees may use reasonable inferential evidence to prove damages.

Whether the inferential evidence submitted by the plaintiffs at trial satisfies *Mt. Clemens*' evidentiary standard is a fact-bound question that does not implicate a circuit split and whose resolution does not benefit society as a whole. And Tyson has not asked this Court to overrule *Mt. Clemens*. Had this been the only issue presented in Tyson's petition for certiorari, "there was

little chance that [the Court] would have taken this case to decide only [this] fact-bound QP." *Sheehan*, 135 S. Ct. at 1779 (Scalia, J., concurring in part and dissenting in part). Under these circumstances, "there is no injustice" in dismissing both questions as improvidently granted. *Id.* at 1780. Quite the opposite, "the fair course—the just course—is to treat this now-nakedly uncertworthy question the way [the Court] treat[s] all others: by declining to decide it." *Id.* Indeed, there is an even stronger reason for the Court to follow that approach here given Tyson's turnabout on the second question: "to avoid being snookered, and to deter future snookering." *Id.*

III. Alternatively, because Tyson has conceded the answer to the petition's second question, this Court should stick to that question and affirm.

Should this Court decline to dismiss the second question as improvidently granted, then it "should stick to the question on which certiorari was sought and granted." *Sorrell*, 549 U.S. at 165. That question asks whether a class "may be certified or maintained" when it includes "members who were not injured and have no legal right to any damages." Pet. for Cert. i. As Tyson concedes, the answer is yes. Precluding certification of such classes—as the Chamber of Commerce advocates (at 6–11)—would pit Rule 23 against itself, conflict with the relevant substantive law, and create perverse incentives for defendants to keep poor records at the expense of civil-rights claimants and low-wage workers.[3]

A. Start with Rule 23. Nothing in the rule's text, structure, or purpose requires the plaintiff to prove that

[3] Although the Chamber grounds its theory in Article III, that is wrong for the reasons laid out in the respondents' brief (at 51–54).

all class members suffered a compensable injury. Rule 23(a) requires that a class contain at least one question of law or fact "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. But this does not mean that the common question must concern damages.

Nor does Rule 23(b)(3) contain such a requirement. To the contrary, the rule's text "itself contemplates" that "individual questions will be present." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012). The rule requires that common questions *predominate* over individuals issues, not that there be *no* individual issues. As this Court has stressed, the rule "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to common proof." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*. 133 S. Ct. 1184, 1196 (2013) (brackets and internal quotation marks omitted). That includes damages. If all other elements in a case are susceptible to common proof, as they are here, then those issues can predominate over the individualized question of damages. The "focus of the predominance inquiry" is on whether the "proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Id.* at 1196–97 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

This class satisfies that standard. Just as the "black letter rule" is "that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members"—a rule Tyson does not challenge—the same is true when some class members might later turn

out to have no damages. *Comcast*, 133 S. Ct. at 1437 (Ginsburg and Breyer, JJ., dissenting); *see also Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).[4]

Were the rule otherwise, class plaintiffs would be required either to prove the merits of their claims at the outset or else to define the class by reference to the merits (to include, for example, only those members who suffered a compensable injury as a result of the defendant's unlawful conduct). "But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009). That result is impermissible under Rule 23, which "grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen*, 133 S. Ct. at 1194–95.

Moreover, a damages class must be capable of definition *before* a decision on the merits, because the dis-

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[4] Tyson suggested below that, even if Rule 23 permits certification of classes with individualized damages, it does not permit certification when at least one member has no damages, because that member should lose on the merits (rather than receive no compensation, but technically be part of the class). *See, e.g.*, Tyson Br., *Bouaphakeo v. Tyson Foods*, No. 12–3753 (8th Cir. filed Feb. 8, 2013), at 33. Although Tyson continues to press this argument as to the *Mt. Clemens* question, it no longer does so as to the second question. Tyson's distinction, in any event, is purely academic. It is not required by Rule 23, Article III, or due process, nor would it serve their purposes. If 3,000 people have individualized damages amounts, why should they be permitted to form a class action only if each amount is guaranteed to be at least $0.01? Nothing in the concept of predominance compels that rule, and it is not needed to "ensure that uninjured class members do not contribute to the defendant's liability or share in any class recovery," but serves only to waste resources. Pet. Br. 44 (capitalization removed).

trict court must notify the class of the suit. *See* Fed. R. Civ. P. 23(c)(2)(B). But if a class were defined by reference to the merits, "so that whether a person qualifies as a member depends on whether the person has a valid claim," who would receive notice? *Messner*, 669 F.3d at 825. And how would such a definition be fair to defendants, if "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment"? *Id.* For these reasons, courts have generally refused to certify such "fail-safe" classes that "cannot be defined until the case is resolved on its merits." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 538 (6th Cir. 2012); *see* 7A Wright & Miller, *Federal Practice and Procedure* § 1760 (3d ed.) (explaining that courts "have ruled that requiring fail-safe classes for certification is improper").

As a result, if Rule 23 required plaintiffs to ensure, at the threshold, that the class contains no uninjured class members, it would put plaintiffs in a Catch-22, forcing them to propose a class that either fails predominance or is insufficiently defined. "Defining a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem" is hard enough as it is. *Messner*, 669 F.3d at 825. But it would be "almost impossible in many cases" if plaintiffs were forced to "exclud[e] all uninjured class members at the certification stage." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 22 (1st Cir. 2015). In many cases, "it is simply not possible"—at least not "[w]ithout the benefit of further proceedings"—"to entirely separate the injured from the uninjured at the class certification stage." *Id.*; *see also Kohen*, 571 F.3d at 677 ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they

are known still the facts bearing on their claims may be unknown."). The upshot, then, would not be a more narrowly drawn class, but no class at all—a result squarely at odds with Rule 23's purposes.

This case illustrates the point. If Rule 23 forced the respondents to eliminate any possibility that a class member would not have suffered a compensable injury, they would likely have sought to define the class to include all employees who worked more than 40 hours at the Iowa slaughterhouse in at least one week during the class period. But whether an employee worked more than 40 hours in a week may very well depend on whether donning and doffing counts as compensable time (and, if so, how much). That is, class membership may turn on the jury's determination of the merits.

That would be especially true if Tyson's primary argument below were accepted. In the district court, and again on appeal, Tyson took the position that "variation in the time that employees spend donning and doffing" could make some class members uninjured because they might have been fully compensated by the "K-Code" time. Dkt. 212-1, at 7–10. This argument, of course, merges with Tyson's *Mt. Clemens* argument. But it also raises an insurmountable fail-safe problem: The only way to bring this case as a class action would be to define the class to include anyone who spent more than the allotted K-Code time donning and doffing—a question that cannot be answered at the threshold. The net result would be to dismantle the class device in one of the scenarios in which it is most needed—small-dollar wage-and-hour class actions, where the defendant has refused to keep time records—to the detriment of low-wage workers.

B. Requiring plaintiffs to prove, at the certification stage, that all class members suffered a compensable

injury would also conflict with the relevant substantive law in a range of cases, which already presumes that some class members might not be able to prove their claims on the merits.

In securities cases, for instance, investors can recover damages only if they can "prove that they relied on the defendant's misrepresentation in deciding to buy or sell a company's stock." *Halliburton Co. v. Eric P. John Fund, Inc.*, 134 S. Ct. 2398, 2405 (2014). Last year, this Court reaffirmed the rule, first announced in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), that "investors could satisfy this reliance requirement by invoking a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misstatements." *Halliburton*, 134 S. Ct. at 2405.[5] But defendants may rebut this presumption with individualized evidence "showing that [a class member] did not rely on the integrity of the market price in trading stock." *Id.* at 2412.

The possibility that some class members will not be entitled to damages, however, does not defeat certification. As this Court explained in *Halliburton*, even though there may be "individualized questions of reliance in the case," certification is permissible because "there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3)." *Id.* (internal quotation marks omitted). "That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual

[5] This is a "substantive doctrine of federal-securities law that can be invoked by any . . . plaintiff," though it "has particular significance in securities-fraud class actions." *Amgen*, 133 S. Ct. at 1193.

questions to predominate." *Id. Halliburton* thus "contemplated that a class with uninjured members could be certified if the presence of a de minimis number of uninjured members did not overwhelm the common issues for the class." *In re Nexium*, 777 F.3d at 24. This Court's decision in *Amgen* did so as well. It affirmed certification of a securities class action despite "individual questions of reliance" that could defeat some class members' claims, 133 S. Ct. at 1197 (internal quotation marks omitted)—explicitly rejecting the dissent's argument that the plaintiffs had "fail[ed] to demonstrate that common questions predominate over the individualized questions of reliance that are inherent in a securities fraud claim," *id.* at 1211 n.8 (Thomas, J, dissenting).

Title VII provides another example. As interpreted by this Court, the statute permits the use of pattern-or-practice evidence to prove that an employer had a discriminatory policy. *See Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324 (1977). This Court has made clear that the government may bring an enforcement action relying on such evidence to establish liability, without having to prove that "each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy." *Id.* at 360. And the Court has allowed plaintiffs to do the same in the class context, permitting certification even though some class members "may not in fact have been actual victims of racial discrimination." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771–73 (1976). Any individualized questions of injury and entitlement to relief, the Court explained, are better addressed at the remedial stage—not class certification. *Id.*

C. Finally, precluding certification of any class or collective action with uninjured members would have the perverse incentive of encouraging poor recordkeeping by

employers and other potential defendants. After all, had Tyson complied with its statutory requirements (and a federal-court injunction) and kept time records, there would have been no need to resort to inferential proof under *Mt. Clemens*. The task of determining who is in the class, and whether they were injured, would have been made exponentially easier. But Tyson did not do so.

Tyson's willful noncompliance of federal law should not count as a point in its favor under Rule 23. If it did, unscrupulous employers of migrant farmworkers, to take just one example, could fend off accountability through a class or collective action by relying on their own failure to keep employment records. That result is inconsistent with the purposes of both Rule 23 and the FLSA (not to mention parallel state laws).

Long ago, in *Mt. Clemens*, this Court emphasized that workers seeking to band together to vindicate their rights should not be "penalize[d]" by their "employer's failure to keep proper records in conformity" with the law. 328 U.S. at 687. Just as the *Mt. Clemens* Court refused to interpret the FLSA "to allow [such] employer[s] to keep the benefits of an employee's labors without paying due compensation," this Court should refuse to allow those employers to achieve the same result by thwarting class or collective actions. *Id.* Rule 23, no less than the FLSA, should be read to encourage enforcement of the law—not its violation.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted. Alternatively, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX: IDENTITIES OF *AMICI CURIAE*

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund has been counsel in a number of major civil-rights class actions, including cases challenging wage-and-hour violations, employment discrimination, lack of access for those with disabilities, and violations of fair housing laws.

California Rural Legal Assistance Foundation (CRLAF) is a nonprofit California organization established to provide legal services to low-income individuals and families in rural California. CRLAF advocates have extensive experience and nationally recognized expertise in the interpretation of California wage-and-hour laws. CRLAF represents low-income families in rural California and engages in regulatory and legislative advocacy that promotes the interests of low-wage workers, particularly farm workers.

Disability Rights Advocates (DRA) is a nonprofit public-interest legal center that specializes in high-impact civil-rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology, and housing. DRA's clients, staff, and board of directors include people with various types of disabilities. With offices in Berkeley, California, and New York City, DRA strives to protect the civil rights of people with all types of disabilities.

The Legal Aid Society – Employment Law Center (LAS-ELC), founded in 1916, provides free legal services to low-income individuals who cannot afford private

counsel. Since the 1970s, the LAS-ELC has addressed its clients' employment through a combination of impact litigation, direct services, and administrative and legislative advocacy. The LAS-ELC offers direct assistance to thousands of low-wage workers with wage-and-hour legal problems, among other issues, and has prosecuted numerous wage-and-hour, employment-discrimination, and disability-rights class actions in the state and federal courts.

Public Advocates, Inc. is a nonprofit, public-interest law firm and one of the oldest public-interest law firms in the nation. Public Advocates uses diverse litigation and non-litigation strategies to handle exclusively policy and impact cases to challenge the persistent, underlying causes and effects of poverty and discrimination. Its work currently focuses on achieving equality in education, housing, and transportation. Throughout its history, Public Advocates has consistently employed the class-action mechanism to obtain relief on behalf of large numbers of individuals. As such, the organization has a strong interest in the continued effective functioning of the class action mechanism.

The Public Interest Law Project is a nonprofit state-litigation and advocacy-support center for California legal services and public-interest law programs. Its mission is to provide these local programs with the capacity to engage in law-reform efforts that will preserve and increase the rights and economic wellbeing of indigent and lower-income families in California. One of the services it provides to local programs is the ability to bring class-action litigation when such a strategy presents the best option for advancing or protecting the interests of the program's clients.