No. 14-1146

In the Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

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

BRIEF FOR THE DOW CHEMICAL COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHARLES J. KALIL
Executive Vice President and General Counsel
DUNCAN A. STUART
Deputy General Counsel
THE DOW CHEMICAL COMPANY
2030 Dow Center
Midland, MI 48674
(989) 636-1000

STEPHEN M. SHAPIRO
TIMOTHY S. BISHOP
Counsel of Record
JOSHUA D. YOUNT
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

BRIEF FOR THE DOW CHEMICAL COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae The Dow Chemical Company ("Dow") is a publicly traded company based in Midland, Michigan that has been in business for more than 117 years. It operates a diverse group of specialty chemical, advanced materials, agro-sciences and plastics businesses serving customers in more than 180 countries. Dow has approximately 200 manufacturing sites in 35 countries and 52,000 employees.[1]

The Court in this case will address two questions concerning the propriety of Rule 23(b)(3) class actions that are important to all U.S. businesses, which are frequent targets of class-action lawsuits. But beyond Dow's general interest in the proper application of Rule 23, Dow has a special interest in how the Court answers the questions presented here because they overlap with the questions Dow has asked this Court to review in *Dow Chemical Co.* v. *Industrial Polymers, Inc.*, No. 14-1091 (petition for certiorari filed Mar. 9, 2015), which this Court appears to be holding pending resolution of *Tyson Foods*. The ques-

[1] In accordance with Rule 37.6, Dow affirms that no counsel for a party authored this amicus brief in whole or in part and that no person other than Dow and its counsel has made any monetary contribution to fund the preparation or submission of this brief. Counsel of record in Dow's petition, No. 14-1091, is also counsel of record in *Tyson Foods*, but has not participated in the preparation of this amicus brief. The parties' blanket consents to the filing of amicus briefs have been filed with the Clerk's office.

tions Dow has asked this Court to resolve in No. 14-1091, so far as relevant here, are:

Whether, in certifying a class under Rule 23(b)(3), courts may presume class-wide injury from an alleged price-fixing agreement, even when prices are individually negotiated and individual purchasers frequently succeed in negotiating away allegedly collusive overcharges; and

Whether a class may be certified where plaintiffs' common "proof" of damages is an expert's model that does not purport to determine the actual damages of most class members, but instead applies an "average" overcharge estimated from a sample of transactions of very different purchasers.

Dow v. *Industrial Polymers* is an antitrust case involving allegations by industrial purchasers of various chemicals that Dow and other manufacturers agreed to issue coordinated list price announcements for certain products and then tried to make those prices "stick" in individual negotiations. A class was certified, the class action was tried to a jury, and a $1.1 billion treble-damages judgment was entered and subsequently affirmed by the Tenth Circuit in *In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014).

Dow asserted throughout that litigation that the case is inappropriate for class resolution under Rule 23(b)(3) because common issues do not predominate. The actual prices purchasers paid were set not by list price announcements but through robust individualized price negotiations. Class members—which included many sophisticated corporations with great buying power—frequently negotiated away any price increase, or avoided any increase by moving their

business. In consequence, many purchasers were not injured at all. Others paid widely different price increases. Identifying which purchasers were harmed, and by how much, could only be accomplished through individualized inquiry of each of the 2400 members of the class—something that was precluded by the trial of the case as a class action.

The only way plaintiffs and the courts below were able to make common issues appear predominant in Dow's case was by using illegitimate shortcuts and approximations that papered over enormous variations among class members. First, the Tenth Circuit presumed that all class members were injured by coordinated list price announcements, although the evidence showed that this was not the case. Second, it permitted plaintiffs to prove aggregate damages using an expert's model that submerged large disparities among class members with varying degrees of injury or no injury at all by extrapolating overcharges from a small sample to the rest of the class.

The certification in Dow's case of a class action that encompassed many uninjured class members, as well as the use of a damages model that ignored individual differences among class members, squarely implicate the questions presented in *Tyson Foods*. Dow believes that its experience as one of the rare defendants to litigate an antitrust class action through trial and appeal sheds a strong light on the ways in which class actions in which many class members "avoid[ed] injury altogether" (768 F.3d at 1254), and in which courts use aggregate damages models that fail to account for disparate circumstances, violate Rule 23 criteria and abridge the rights of defendants to assert defenses to individual

claims, in violation of Due Process and the Rules Enabling Act.

Whether in employment, antitrust, product liability, or other cases, this Court should not allow reflexive certification of classes that contain a substantial number of members who suffered no injury. Nor should the Court countenance class-action judgments where damages are "proved" formulaically by extrapolation from unrepresentative samples and then awarded to disparately injured and completely uninjured class members. Dow accordingly submits this brief in support of petitioner Tyson Foods.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should vacate the judgment in this case because it should never have been tried as a class action. It is far from meeting the "stringent requirements" of Rule 23 that "exclude most claims" from class treatment. *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). Because it involves "significant questions, not only of damages but of liability and defenses of liability," which affect "individuals in different ways," it was "not appropriate for a class action." Rule 23(b)(3) 1966 Adv. Comm. Notes.

The courts below held this case suitable for class adjudication only by glossing over substantial, highly individualized issues central to plaintiffs' overtime claims—namely, that class members had different jobs, and wore different clothes and used different equipment that took different amounts of time to don, doff, and clean. Furthermore, many employees were already fully compensated for donning, doffing, and washing time through Tyson's overtime policy,

and many others were fully compensated because these activities occurred during their shift time. So many class members had no injury at all.

Those facts, which were documented by the testimony of plaintiffs at trial, mean that class certification under Rule 23(b)(3) should have been denied. Claims are not sufficiently homogeneous to justify class resolution where many class members suffered no injury and lacked standing. Nor is a class sufficiently coherent when substantial and ubiquitous differences among class members would require countless mini-trials to resolve questions of injury and damages. In those circumstances individual issues inevitably predominate at trial. Because individual resolution is impossible in the class action format, class trials of such disparate claims violate a defendant's Due Process right to present every defense, as well as the Rules Enabling Act prohibition on procedural devices altering the substantive rights of the litigants.

This Court has made clear that class certification is improper unless "the existence of individual injury" is "capable of proof at trial through evidence that [is] common to the class rather than individual to its members." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1430 (2013). The courts below improperly permitted plaintiffs to manufacture common evidence of injury and damages using an expert methodology that relied on the calculation of "averages" that overrode substantial individual differences in circumstances, including the lack of any injury and divergent donning, doffing, and washing times.

ARGUMENT

CLASS CERTIFICATION IN THIS CASE CONTRADICTS THIS COURT'S RULE 23 PRECEDENTS AND VIOLATES DUE PROCESS AND THE RULES ENABLING ACT

A. The Eighth Circuit Improperly Substituted Labels And Generalizations For Rigorous Analysis Of Whether The Rule 23 Requirements Were Satisfied.

This Court has often observed that "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2550 (2011). It has emphasized that Rule 23 imposes "stringent requirements" for certification of a case as a class action—requirements that "exclude most claims." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013). And the requirement at issue here—that common questions "predominate over any questions affecting only individual members" (Rule 23(b)(3))—is particularly stringent and "far more demanding" than the Rule 23(a) commonality requirement. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623-624 (1997).

The courts below paid lip service to these principles, but like all too many lower courts they failed to apply Rule 23 with any rigor. The district court certified, and the Eighth Circuit affirmed, a class action by 3000-plus current and former hourly workers at a Tyson Foods pork-processing plant who alleged that they were due overtime pay, or additional overtime pay, for time spent donning and doffing safety equipment and cleaning that equipment. The lower courts approved that class action even though the

claimants worked in two distinct areas of Tyson's plant, "kill" and "fabrication"; even though, within those areas, workers with some 420 different jobs wore different clothing and used different equipment; and even though Tyson already made overtime ("K-Code") payments for pre- and post-shift donning, doffing, and washing where, according to Tyson's studies, these actions occurred. Because many class members received those overtime payments, and because many others spent no out-of-shift time donning, doffing, or cleaning equipment, many class members had no injury at all. Pet. 4-5; Pet. App. 115a.

These substantial and pervasive differences among class members went directly to the core issue of plaintiffs' claims: was each employee properly compensated for time spent donning, doffing, and washing? That should have been enough to deny class certification, because these key differences "ha[d] everything to do with the issue of predominance at the class certification stage." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2416 (2014). They meant that questions of liability for overtime payments and any damages due were not "capable of classwide resolution * * * in one stroke" but could only be resolved by highly individualized inquiry of each claimant. *Wal-Mart*, 131 S. Ct. at 2551. And those individualized inquiries would predominate over common issues at any fair trial. As Judge Beam correctly explained in dissenting from the panel decision, "the differences in donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation and a myriad of other relevant factors" meant that questions of who (if anyone) was owed overtime pay and how much each person was owed could not conceiva-

bly be resolved "'in one stroke'" for every class member and were not "'capable of class-wide resolution.'" Pet. App. 23a.

Despite this Court's call for "rigorous analysis" at the class certification stage (*Comcast*, 133 S. Ct. at 1432), the Eighth Circuit majority was remarkably lax in addressing these barriers to class adjudication. The majority thought *Wal-Mart* irrelevant because "Tyson had a specific company policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members." Pet. App. 8a. The majority stated that "class members worked at the same plant and used similar equipment." *Ibid.* It pointed to "average" times for donning, doffing, and cleaning of 18 minutes in the fabrication department and 21 minutes in the kill department. *Ibid.* And it dismissed the presence of many uninjured employees in the class as a matter of "small" variations in amount of damages that did not interfere with commonality or predominance. Pet. App. 9a & n.5.

Those conclusory explanations are the very opposite of rigorous analysis. Tyson's K-Code "policy" establishes the company's rules for payment of overtime but has nothing to do with the question of whether the actual experiences of claimants are sufficiently homogenous to warrant class adjudication of their claims. Statements about workers having jobs in the "same plant" and using "similar" equipment gloss over the substantial variations in jobs made evident by the undisputed record facts. And references to "average" times generalize away important individual differences, including the fact that many class members were not injured at all. In short, the majority used generalizations, averages, and empty labels in place of the rigorous analysis of Rule 23 factors

that this Court's precedents demand. Only by substituting conclusory labels for close examination of the record could the majority conclude that, "[w]hile individual plaintiffs varied in their donning and doffing routines, their complaint is not 'dominated by individual issues.'" Pet. App. 8a.

To be clear, the problem here is not that, in a largely homogenous class, Tyson was prevented from "attempt[ing] to pick off the occasional class member here or there through individualized rebuttal" at trial—something that would "not cause individual questions to predominate." *Halliburton*, 134 S. Ct. at 2412. Rather it is that (1) the class is riven with hundreds of members who suffered no injury at all because they were already compensated for donning, doffing, and washing either through K-Code payments or regular shift pay and (2) any claimants who were potentially injured had disparate experiences depending on their specific job and what clothes and equipment they used. Those are just the sorts of pervasive "[d]issimilarities within the proposed class" that "impede the generation of [the] common answers" necessary for class certification and that cause individual issues to predominate. *Wal-Mart*, 131 S. Ct. at 2551; see *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1197 (2013) (such a "'fatal dissimilarity' among class members * * * would make use of the class-action device inefficient" and "unfair").

Once a class is certified, the practical realities of trial mean that such individualized differences among class members will never be examined. Discovery of class members other than the named plaintiffs is generally not permitted. See 3 William Rubenstein, *Newberg on Class Actions* § 9:16 (5th ed.

2013) ("propound[ing] discovery on each class member's individualized issues * * * would frustrate the rationale behind Rule 23's representative approach to litigation"). And no judge will extend the trial to allow inquiry into each of thousands of class members' circumstances, for that would defeat the "efficiency and economy" the class format is designed to achieve, in which the class representatives stand in for all the class's members. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 553 (1974). Accordingly, once variations in the class are glossed over at the class certification stage, as they were here, the defendant has no opportunity to present individualized defenses to liability or damages as to each class member at trial. The consequence of ignoring individual variations at the class certification stage is therefore exactly what this Court forbade in *Wal-Mart*: the defendant is deprived of its right "to litigate its statutory defenses to individual claims" (131 S. Ct. at 2561), and hence of its "[d]ue process" right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972).

This is not the only instance in which a court has ignored pervasive individual differences among class-action claimants and thereby deprived a defendant of a fair trial. As Dow detailed in its certiorari petition (No. 14-1091), the $1.1 billion judgment in the *Urethane* antitrust litigation followed a class trial in which the varied experiences of buyers in avoiding some or all of the announced price increases—and therefore injury and damages—were hidden behind a judicial "presumption" that the price *announcements* resulted in harm, even though the prices that customers *actually paid* varied enormously and were often unaffected by the price announcements. The constraints of class discovery and trial meant that Dow

was unable to expose all those dissimilarities among class members. It was prevented from introducing the sort of "direct, more salient evidence" that "sever[ed] the link" between price announcements and the actual prices that individual purchasers paid. *Halliburton*, 134 S. Ct. at 2415-2416 (holding that defendants can rebut a presumption of price impact—at both the merits and class certification stages—with "direct, more salient evidence" showing that the alleged violations "did not actually affect * * * market price"; and "without the presumption," a "suit cannot proceed as a class action"). But the predominance of individualized questions of injury should have precluded class certification because antitrust injury, essential to liability to any claimant, could not be resolved class-wide "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

The trial in *Tyson* showed very clearly why class adjudication should never have been allowed and was hopelessly unfair. Many class members lacked injury and therefore standing. And plaintiffs' claims depended on an expert's extrapolated approximations of injury and damages.

B. A Class Full Of Uninjured Employees Should Not Have Been Certified.

Plaintiffs' damages expert Dr. Liesl Fox testified at trial that adding plaintiffs' estimated average donning-and-doffing times left 212 members of the class who still worked less than 40 hours a week and so were entitled to no overtime. Pet. 11. Many more employees, who spent less than the average time donning and doffing, would not be entitled to overtime. Indisputably, therefore, the certified class was full of members who had suffered no injury. Yet

these uninjured employees were included in the aggregate damages award.

Class certification should not have been permitted in those circumstances. The many uninjured employees would lack Article III standing to sue in their own right. See *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed"). Had these uninjured employees brought individual claims, those claims would not have survived a motion to dismiss for lack of standing. Under the Rules Enabling Act, 28 U.S.C. § 2072, the rights of uninjured employees may not be enlarged or modified merely as a result of the class action device: those employees may not maintain claims that would be dismissed if the employees were not members of a class. See *Wal-Mart*, 131 S. Ct. at 2561 (the "Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right'"). To the contrary, as this Court held in *Amchem*, "Rule 23's requirements must be interpreted in keeping with Article III constraints." 521 U.S. at 612-613; accord *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999). In fact,"[i]n an era" of "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).

Even apart from this standing defect, the predominance requirement forbids certification when many claimants are uninjured. As the D.C. Circuit correctly held in *In re Rail Freight Fuel Surcharge Antitrust Litigation,* 725 F.3d 244, 252-253 (D.C. Cir. 2013), "[c]ommon questions of fact cannot predominate where there exists no reliable means of proving

classwide injury in fact." See also *Lewis* v. *Casey*, 518 U.S. 343, 357-358, 360 n.7 (1996) ("Courts have no power to presume and remediate harm that has not been established," whether in "class actions [or] other suits"). Class certification must be denied when, as here, plaintiffs cannot show with "common evidence" that "all class members suffered some injury." *Rail Freight*, 725 F.3d at 252. That is because adjudication would require countless "individual trials" to determine whether each "particular [class member] suffered harm," and those individualized injury questions would inevitably predominate over any common questions. *Ibid.*

Strict adherence to the predominance requirement is especially important when many putative class members suffered no injury. When the injured and uninjured are lumped together in a class with no opportunity for the defendant to segregate them, there is even more than the usual "risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). As this Court has recognized, the "pressure to settle" is "heightened" when "a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010).

C. Plaintiffs' Need To Use Extrapolated Approximations To Show Injury And Damages Demonstrates That Class Certification Was Improper.

Plaintiffs' expert Dr. Kenneth Mericle categorized various donning/doffing activities, measured the time it took a small sample of employees to perform those activities, computed an average time for each activity based on those small samples, and then

added average times for cleaning equipment to arrive at an overall average time for donning, doffing, and washing for all jobs in Processing (18 minutes) and Slaughter (21.25 minutes). Dr. Fox then assumed that all class members spent those average times donning, doffing, and washing to calculate overtime pay figures and an aggregate damages award. Pet. 7-8.

These averages, however, obscured substantial differences between individual employees, who had different jobs, wore different clothes and used different equipment for those jobs—at least 212 of whom, Dr. Fox conceded, suffered no harm at all. See Pet. 5, 11. Trial evidence from the few class members who testified confirmed these differences. Pet. 9, 16. Though Dr. Mericle conceded "a lot of variation" (Tr. 1158) and observed a wide range of different times for donning and doffing (Pet. App. 137a-138a; Pet. 16), his averaging methodology wiped out these differences. See Pet. 9-10.

Class certification is improper unless "the existence of individual injury" is "capable of proof at trial through evidence that [is] common to the class rather than individual to its members." *Comcast*, 133 S. Ct. at 1430. But evidence common to the class cannot be manufactured, as it was here, by expert methodologies that hide substantial individual differences under averages.

Courts considering certification must ask whether "significant questions, not only of damages but of liability and defenses of liability," would affect "individuals in different ways," and must thoroughly test any proffered expert theory that purports to account for those differences on a class-wide basis. Rule 23(b)(3) 1966 Adv. Comm. Notes. Averaging diver-

gent class member experiences does not pass that test. See *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008) (a class cannot be certified based "on an estimate of the average loss for each plaintiff"); *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (a class may not be certified if it would require the defendant "to defend against a fictional composite").

Because "actual, not presumed, conformance" with Rule 23 is "indispensable," it cannot be generated by methodologies for showing injury and damages that operate by averaging away individual differences. *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982); see *id.* at 157 (even for employees working in the same plant "there is a wide gap" between "an individual's claim" and "the existence of a class of persons who have suffered the same injury as that individual"). That is precisely the type of "Trial by Formula" held to be inadequate in *Wal-Mart* (131 S. Ct. at 2561), and the sort of "speculative" and "arbitrary * * * measuremen[t]" condemned in *Comcast*. 133 S. Ct. at 1432-1433. There is no doubt that without plaintiffs' experts' formulaic extrapolation of damages to the entire class, individual questions of injury and "individual damage calculations [would] inevitably [have] overwhelm[ed] questions common to the class." *Comcast*, 133 S. Ct. at 1433.

As a result of the shortcuts approved by the courts below, plaintiffs at no stage had to prove, and Tyson at no point had the opportunity to address on an individual basis, whether each class member was injured and by how much—the very essence of trial by formula. Drs. Mericle's and Fox's extrapolations fundamentally altered Tyson's substantive right to contest the fact and extent of injury for any individ-

ual plaintiff, in violation of Due Process and the Rules Enabling Act.

This problem also is not unique to Tyson's case. The same fatal defect occurred in Dow's antitrust class action: plaintiffs were permitted to rely on extrapolated aggregate damages, which gave a treble damages windfall to class members who suffered no injury, thus improperly increasing the total damages award against Dow. In *Dow*, the plaintiffs' expert developed models showing supposed "overcharges" for approximately 25% of the class, then extrapolated damages for the remaining 75% of class members—even though the expert had found *no* overcharges on 10% of the transactions he modeled and even though his assumption of a uniform overcharge on every transaction is flatly contradicted by the evidence that many purchasers avoided all or some of the announced increases in prices. See *Dow* Pet. 8-9 (No. 14-1091).

As in *Tyson*, the expert's formulaic extrapolation buried individual injury and damages questions that would have predominated over common questions and made class adjudication plainly improper. These sorts of "drastic simplifications" wrought by an "'economist's hypothetical model'" that does not fit record facts are not a proper basis for a billion-dollar class judgment. *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 742 (1977); see also *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986) (refusing to credit expert study that was based on "assumptions" that were "inconsistent with record evidence"); *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (refusing to credit antitrust expert's speculative testimony).

* * *

The Eighth Circuit's errors regarding the certification of the plaintiff class in this case are, unfortunately, far from unusual, as the example of Dow's *Urethane* case demonstrates. Lower courts routinely disregard this Court's direction in *Wal-Mart* and *Comcast* that Rule 23 is a limited procedural device that is not intended to expand substantive relief available to plaintiffs or abridge the rights of defendants to mount individualized defenses.

Large monetary awards in class actions like this, if allowed to stand, would have unsettling effects across industries and encourage careless class certification that would injure the economy and reduce consumer welfare. Lax certification standards harm both consumers and "innocent investors," who suffer "for the benefit of speculators and their lawyers." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). The high costs of class litigation inevitably are passed along to the public and make U.S. businesses less competitive.

Failure to reverse here would even further ratchet up the pressure on class action defendants to settle even the weakest claims. Paying a blackmail settlement would be perceived as cheaper and less risky than taking a chance on prevailing at trial, particularly where individual defenses are lost behind the class action mechanism. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); Henry Friendly, *Federal Jurisdiction: A General View* 120 (1973) ("urgent attention" is needed for class actions,

which "have gone radically wrong" and are "likely" to "produce blackmail settlements").

Trial after class certification is already "vanishingly rare." Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). If the class judgments in cases such as *Tyson* and *Dow* survive, trials will disappear altogether and the merits of claims will never be tested. Class action defendants will succumb to the disproportionate risks of class certification (and the attendant specters of joint and several liability and potential treble damages), because they will have no confidence that the lower courts will follow this Court's precedents and no hope of getting improper class certifications rectified.

The *Tyson* case is a "Frankenstein monster posing as a class action." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169 (1974). To prevent the important teachings of *Wal-Mart*, *American Express*, and *Comcast* from becoming dead letters, this Court should reverse. In doing so it should make clear to the lower courts that they cannot rely on presumptions of class-wide injury that are contradicted by the evidence, and that plaintiffs have the burden to put forward a damages measure that reflects actual damages to all or nearly all class members and may not rely on speculative theories of injury and damages that are based on averages and unrepresentative samples.

CONCLUSION

The judgment of the Eighth Circuit should be reversed. This Court should also grant certiorari in *Dow Chemical Co.* v. *Industrial Polymers, Inc.*, No.

14-1091, to allow plenary review or summary reversal.

Respectfully submitted.

CHARLES J. KALIL
Executive Vice President and General Counsel
DUNCAN A. STUART
Deputy General Counsel
THE DOW CHEMICAL COMPANY
2030 Dow Center
Midland, MI 48674
(989) 636-1000

STEPHEN M. SHAPIRO
TIMOTHY S. BISHOP
Counsel of Record
JOSHUA D. YOUNT
CHAD M. CLAMAGE
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
tbishop@mayerbrown.com

Counsel for Amicus Curiae

AUGUST 2015