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

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' suit seeking unpaid overtime on behalf of employees at a meat-processing plant was properly maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) and a collective action under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, where the compensability of the disputed activities turned on common questions of law and fact and where respondents established the extent of the employees' unpaid work on a class-wide basis by using the burden-shifting framework set forth in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

2. Whether a Rule 23(b)(3) class action or an FLSA collective action may be certified or maintained when the class members or collective-action plaintiffs include individuals who may ultimately be shown to have no entitlement to recover damages.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations and rules:

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

The Secretary of Labor administers the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, by, *inter alia*, bringing enforcement actions to recover unpaid wages for employees. 29 U.S.C. 204, 216(c), 217. Private collective actions under 29 U.S.C. 216(b) are an essential supplement to the Secretary's enforcement. Such actions also supplement enforcement of the Equal Pay Act of 1963, 29 U.S.C. 206(d), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See 29 U.S.C. 216(b), 626(b). The government similarly relies on class actions under Federal Rule of Civil Procedure 23(b)(3) to supplement its enforcement of other statutes. And the Unit-

ed States is a potential defendant in both class and collective actions.

STATUTORY PROVISIONS, REGULATIONS, AND RULE INVOLVED

Pertinent statutory provisions, regulations, and provisions of Federal Rule of Civil Procedure 23 are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

A. The Fair Labor Standards Act and *Mt. Clemens*

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires employers to pay a minimum wage for all hours worked and an overtime rate of one and one-half times an employee's regular wage for work in excess of 40 hours in a workweek. 29 U.S.C. 206, 207. This Court has long held that "the statutory workweek" ordinarily includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25-26 (2005) (citation omitted).

Congress responded to that broad interpretation by enacting the Portal-to-Portal Act of 1947 (Portal Act), 29 U.S.C. 251 *et seq.* The Portal Act did not alter "this Court's earlier descriptions of the terms 'work' and 'workweek,'" but it created "express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity." *Alvarez*, 546 U.S. at 28 (quoting 29 U.S.C. 254(a)). Those exceptions apply only "prior to the time on any particular workday at which [an] employee commences, or subsequent to the time on any particular workday at

which he ceases, [his] principal activity or activities." 29 U.S.C. 254(a). Accordingly, the compensable workday generally encompasses "the period between the commencement and completion" of an employee's principal activities. 29 C.F.R. 790.6(b); see *Alvarez*, 546 U.S. at 28-29.

The term "principal activities" includes "all activities which are an 'integral and indispensable part of the principal activities'" a worker is employed to perform. *Alvarez*, 546 U.S. at 29-30 (citation omitted). For example, "the donning and doffing of specialized protective gear" by factory workers is a compensable principal activity if it is an integral and indispensable part of their job. *Id.* at 30. And "any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity"—including time spent walking between a locker room and the production line after donning and before doffing protective gear—is therefore "covered by the FLSA." *Id.* at 37.

2. The Secretary of Labor is authorized to sue to compel an employer to pay wages owed under the FLSA. 29 U.S.C. 216(c), 217. The FLSA also authorizes "any one or more employees" to bring an action—known as a "collective action"—to recover unpaid wages "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. 216(b); see *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1527 (2013). Such actions are "fundamentally different" from class actions under Federal Rule of Civil Procedure 23. *Id.* at 1529. Among other things, a collective action binds only employees who opt in by filing written consents, and those employees become "party plaintiff[s]." 29 U.S.C. 216(b).

Courts hearing collective actions typically follow a two-step joinder process commonly—albeit somewhat imprecisely—called "certification." *Comer* v. *Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-547 (6th Cir. 2006); see *Genesis Healthcare*, 133 S. Ct. at 1527 n.1. First, if the named plaintiffs make a preliminary showing that other employees are "similarly situated," the court may "conditionally certify" the collective action—*i.e.*, allow the plaintiffs to take discovery of the names and addresses of potential opt-in plaintiffs and notify them of the action. *Genesis Healthcare*, 133 S. Ct. at 1530. Second, after the filing of opt-in consents and further discovery, the employer may move to "decertify" the collective action in whole or in part. *Comer*, 454 F.3d at 546-547, 549. The court must then determine whether the challenged opt-in plaintiffs are, in fact, "similarly situated" to the named plaintiffs. *Id.* at 549.

3. To facilitate enforcement of the FLSA, Congress mandated that every covered employer keep "records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him" in accordance with regulations issued by the Secretary. 29 U.S.C. 211(c). Those regulations require employers to record each employee's "[h]ours worked each workday," "total hours worked each workweek," and regular and overtime pay. 29 C.F.R. 516.2(6)-(9). If an employer has kept those records, the Secretary or employee plaintiffs can "easily" establish the extent of any uncompensated work in an action to recover backpay. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (*Mt. Clemens*). But "where the employer's

records are inaccurate or inadequate," the task becomes far more difficult. *Ibid.*

This Court addressed that problem in *Mt. Clemens*, which was a collective action brought by approximately 300 factory workers seeking to recover overtime for pre-shift activities, including time spent walking to their workstations, putting on gear, and preparing equipment. *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 461-464 (6th Cir. 1945). Because the employer had not recorded the time spent on those pre-shift tasks, the workers relied on testimony from eight employees. *Id.* at 462. The court of appeals found that evidence inadequate, concluding that "the burden rested on each of the plaintiffs to prove by a preponderance of the evidence that he did not receive the wages that he was entitled to receive under the [FLSA], and to show by evidence, not resting upon conjecture, the extent of overtime worked." *Id.* at 465. "It does not suffice," the court held, "for the employee to base his right to recovery on a mere estimated average of overtime worked." *Ibid.*

This Court disagreed, holding that the court of appeals had imposed "an improper standard of proof" that would have had "the practical effect of impairing many of the benefits of the [FLSA]." *Mt. Clemens*, 328 U.S. at 686. The Court reasoned that employees should not be penalized for their employer's "failure to keep proper records in conformity with his statutory duty," and that such a failure instead calls for a burden-shifting framework. *Id.* at 687.

Under that framework, employees carry their burden if they show that they "in fact performed work for which [they were] improperly compensated and if [they] produce[] sufficient evidence to show the

amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. The burden then shifts to the employer, who must "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference" from the employees' proof. *Id.* at 687-688. If the employer fails to do so, "the court may then award damages to the employee[s], even though the result be only approximate." *Id.* at 688. The Court made clear that "even where the lack of accurate records grows out of a bona fide mistake" about the compensability of the unrecorded work, "the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances." *Ibid.*

In *Mt. Clemens* itself, the Court determined that the workers were entitled to be paid for time spent walking to their workstations and for any preliminary activities performed there, subject to a de minimis rule. 328 U.S. at 690-693.[1] The Court further held that the workers could not "be barred from their statutory rights" on the ground that "the amount of time taken up by the activities ... had not been proved by [them] with any degree of reliability or accuracy." *Id.* at 693. The Court remanded to the district court to determine the amount of compensable time, reiterating that "[u]nless the employer can provide accurate estimates, it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence." *Id.* at 693-694.

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[1] That aspect of *Mt. Clemens* was abrogated in part by the Portal Act. *Alvarez*, 546 U.S. at 28.

For nearly 70 years, the *Mt. Clemens* framework has been essential to effective enforcement of the FLSA because it allows the Secretary or private plaintiffs to establish the amount of unrecorded work performed by a group of employees using "representative testimony from a sampling of [the] affected employees." Laurie E. Leader, *Wages and Hours: Law and Practice* § 9.03[2], at 9-32 (2015) (*Wages and Hours*). Although such proof necessarily relies on approximations, "[i]t is firmly established [that] where an employer has not kept adequate records," employees "will not be denied a recovery of back wages on the ground that their uncompensated work cannot be precisely determined." *Brock* v. *Norman's Country Mkt., Inc.*, 835 F.2d 823, 828 (11th Cir.), cert. denied, 487 U.S. 1205 (1988).

B. The Present Controversy

1. Petitioner operates a pork-processing plant in Storm Lake, Iowa. Pet. App. 45a. Most workers in the plant use knives or other cutting tools, and petitioner requires all employees to wear protective and sanitary gear. *Id.* at 26a, 46a-47a. The equipment is provided by petitioner and stored in lockers at the plant. J.A. 118-119. Employees generally don their equipment in locker rooms before walking to their stations on the production line, and they are required to be fully dressed before their work on the line begins. Pet. App. 26a, 47a; J.A. 120.

Petitioner pays its production employees on a system known as "gang time." Pet. App. 2a, 26a. Pay begins when the first hog of the day arrives at an employee's workstation and ends when the last hog leaves. J.A. 171. During the years at issue in this case, petitioner also paid some employees for a few

additional minutes per day—known as "K-code" time—intended to estimate the time required for some (but not all) required pre- and post-shift activities. J.A. 121-122. Before 2007, petitioner paid four minutes of K-code time to all production employees to cover the estimated time required to don and doff certain equipment worn to protect against knife cuts. *Ibid.*[2] In 2007, after this Court's decision in *Alvarez*, petitioner began paying knife-wielding employees for the time spent walking between the locker room and the production line. *Ibid.* Petitioner also revised the amount of donning and doffing time attributed to those employees, resulting in total K-code payments of between 4 and 8 minutes per day, depending on the

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[2] Petitioner began making those payments in 1998, following two enforcement actions brought by the Department of Labor against petitioner's predecessor, IBP. *Acosta* v. *Tyson Foods, Inc.*, No. 08-cv-86, 2013 WL 7849473, at .9-.11 (D. Neb. May 31, 2013), rev'd, No. 14-1582, 2015 WL 5023643 (8th Cir. Aug. 26, 2015). The first action resulted in an injunction requiring IBP to comply with the FLSA's overtime and recordkeeping requirements with respect to pre- and post-shift work at Storm Lake and other facilities. *Id.* at .10. In settling a second enforcement action brought to remedy IBP's violation of the injunction, the Department agreed that IBP could pay for the donning and doffing held to be compensable in the original action by paying four minutes of K-code time, but only "until such time as the Department announces its position with respect to recordkeeping in the industry." *Id.* at .11 (empha-sis and citation omitted). In 2001—well before the class period in this case—the Department clarified that meatpacking companies may not rely on such estimates and must instead "record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing, or gear." Dep't of Labor, Op. Letter, 2001 WL 58864, at .2 (Jan. 15, 2001), withdrawn in part on other grounds, 2002 WL 33941766 (June 6, 2002).

position. *Ibid.* At the same time, petitioner ceased paying K-code time to non-knife-wielding employees, taking the position that donning and doffing the standard sanitary and protective equipment those employees wore was not compensable. *Ibid.* At no point did petitioner record the actual amount of time workers devoted to any of their pre- and post-shift activities. Pet. App. 2a; J.A. 175.

2. Respondents are current and former production employees at the Storm Lake plant. They filed this action under the FLSA, alleging that petitioner unlawfully failed to pay overtime for pre- and post-shift activities and for donning and doffing during meal breaks. Pet. App. 1a, 5a. Respondents also brought a parallel claim under an Iowa statute that provides a cause of action to collect wages owed under another source of law—here, the FLSA. *Id.* at 56a; see Iowa Code Ann. §§ 91A.3, 91A.4 (West 2007). Respondents moved to certify their FLSA claim as a collective action and to certify the parallel Iowa law claim as a class action under Federal Rule of Civil Procedure 23(b)(3).

a. The district court conditionally certified a collective action and certified a class action, holding that the requirements of Section 216(b) and Rule 23 were satisfied. Pet. App. 41a-113a. The court rejected petitioner's contention that differences in the equipment worn by employees precluded certification for lack of similarity and commonality, finding that "there are far more factual similarities than dissimilarities" among the collective- and class-action members. *Id.* at 88a-89a; see *id.* at 98a-99a. The court also concluded under Rule 23(b)(3) that questions common to the class predominated over questions affecting only individual

members, noting that "common evidence that [petitioner's] compensation system cannot account for even the basic or standard [equipment] employees need to don, doff, and clean would establish a prima facie case for the class." *Id.* at 109a. A total of 444 employees joined the collective action; the parallel class had 3344 members. J.A. 117.

b. The case proceeded to trial before a jury. The parties stipulated that employees were entitled to be paid for donning and doffing certain equipment worn to protect from knife cuts. J.A. 120. But it was for the jury to determine whether donning and doffing other protective and sanitary equipment was compensable, whether petitioner was required to pay for donning and doffing during meal breaks, and the total amount of time spent on work not compensated under petitioner's gang-time system. J.A. 473-481.

To establish the time employees spent on the activities at issue, respondents presented employee testimony, video recordings of donning and doffing at the plant, and a study performed by an industrial-engineering expert. Pet. App. 5a, 13a. Based on 744 videotaped observations, the expert estimated that donning, doffing, and related activities required 21.25 minutes per day for positions on the plant's slaughter floor and 18 minutes per day for positions on the processing floor. J.A. 123-124. A second expert combined those estimates with petitioner's available wage-and-hour records to calculate the amount of uncompensated overtime worked by each class and collective action member. J.A. 139. Based on those calculations, plaintiffs sought approximately $6.7 million in unpaid overtime. J.A. 139, 465-466.

The jury returned a special verdict finding that the disputed pre- and post-shift activities were compensable, but that donning and doffing during meal breaks was not. J.A. 486-487. It awarded roughly $2.9 million. J.A. 488.

3. The court of appeals affirmed. Pet. App. 1a-24a.

a. The court first rejected petitioner's contention that differences in the equipment worn by employees rendered the certification of the class and collective actions inappropriate, explaining that the employees "used similar equipment" and were paid under the same system. Pet. App. 7a-8a. The court recognized that determining the amount of unrecorded time worked by class members "require[d] inference" based on respondents' representative proof, but it held that "this inference is allowable under [*Mt. Clemens*]." *Id.* at 8a. The court rejected petitioner's challenge to the sufficiency of the evidence for similar reasons, holding that the jury could draw "a 'reasonable inference' of classwide liability." *Id.* at 12a-13a (quoting *Mt. Clemens*, 328 U.S. at 687).

The court also rejected petitioner's contention "that the class should be decertified because evidence at trial showed that some class members did not work overtime" and therefore were not entitled to recover. Pet. App. 8a. The court reasoned that a class may be certified even if some members' claims ultimately fail on the merits. *Id.* at 9a & n.5. It also observed that the jury instructions ensured that the presence of those class members did not increase the size of the verdict. *Id.* at 10a.

b. Judge Beam dissented, concluding that differences among employees should have precluded certification of the Rule 23 class. Pet. App. 14a-24a.

4. The court of appeals denied rehearing and rehearing en banc. Pet. App. 114a-131a.

SUMMARY OF ARGUMENT

I. Respondents' suit was properly maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) and a collective action under the Fair Labor Standards Act.

A. Respondents' Iowa-law claim satisfied Rule 23(b)(3)'s requirement that questions common to the class predominate over those affecting only individual members. That standard requires a court to assess the extent to which the plaintiffs' claim will be capable of class-wide proof. Here, the trial record and jury verdict demonstrate that respondents *did* prove their case on a class-wide basis. There is no dispute that respondents relied on common evidence to prove that all class members' pre- and post-shift activities were compensable under the FLSA. And because petitioner failed to record the time spent on those activities, respondents properly invoked the burden-shifting framework under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), to establish the extent of that unrecorded work using representative evidence.

Petitioner asserts that respondents' class-wide proof was inadequate, pointing to some differences in the protective equipment worn by class members and variations in the amount of time spent donning and doffing. Under *Mt. Clemens*, however, employees are not required to prove the precise extent of the work their employer improperly failed to record, and may instead rely on inferences drawn from representative proof. After considering essentially the same factual contentions petitioner presents here, the jury determined that respondents' representative proof was

sufficient to carry their burden on a class-wide basis. Petitioner provides no sound reason to second-guess the jury's verdict. In particular, petitioner's insistence that employees who did comparable work in the same plant must make individualized showings of pre- and post-shift work time echoes the standard of proof this Court emphatically rejected in *Mt. Clemens*.

B. Respondents' parallel FLSA claim was properly brought as a collective action. The FLSA itself grants employees a right to proceed collectively if they are "similarly situated." 29 U.S.C. 216(b). Here, that standard was amply satisfied because the opt-in plaintiffs worked in the same plant, engaged in comparable unpaid activities, and were subject to the same unlawful compensation policy.

II. The inclusion of some employees who were ultimately shown at trial to have no right to recover neither precluded certification of the class and collective actions at the outset nor required decertification following the jury verdict. Petitioner has rightly abandoned its contention that the possible presence of such individuals precluded certification altogether. And although petitioner is correct that parties who have been shown to have no right to recover should not be granted relief, petitioner forfeited that objection in this case by failing to seek to exclude such individuals from the action and by *opposing* a proposal to structure the trial to prevent them from sharing in any award. In any event, the jury instructions ensured that individuals who were not entitled to recover did not increase the size of the verdict.

ARGUMENT

I. RESPONDENTS' SUIT WAS PROPERLY MAINTAINED AS A CLASS ACTION UNDER RULE 23(b)(3) AND A COLLECTIVE ACTION UNDER THE FAIR LABOR STANDARDS ACT

A. Respondents' Suit Was Properly Maintained As A Class Action

Although petitioner frames the question before the Court as one about the rigor of Rule 23(b)(3)'s predominance standard, at bottom the parties' dispute turns on a question governed by the underlying substantive law: Where, as here, an employer violates the FLSA by failing to record its employees' working time, what proof is required to establish the extent of the unrecorded work?

This Court answered that question in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that such employees are not required to prove the "precise extent" of the work their employer improperly failed to record. *Id.* at 687. Since *Mt. Clemens*, it has been established that employees need not offer individualized proof of unrecorded working time, and may instead rely on inferences based on representative evidence about other employees who performed comparable work. In this case, no individualized inquiries were required at trial because respondents relied on the *Mt. Clemens* framework to prove their case on a class-wide basis. Petitioner's predominance argument thus reduces to the factbound contention that individualized inquiries *should have* been required because differences among class members

meant that respondents' common proof was insufficient to satisfy their burden under *Mt. Clemens*.[3]

That question—whether respondents' claim could be "proved on a classwide basis"—was certainly relevant to initial class certification. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2555 (2011) (*Wal-Mart*). But it was also a *merits* question, and it has now been resolved by a jury. After hearing nine days of evidence and considering essentially the same factual arguments about differences among class members that petitioner presents here, the jury determined that respondents' evidence was sufficient to carry their burden under *Mt. Clemens* on a class-wide basis. Petitioner identifies no sound basis for second-guessing that conclusion.

1. The predominance inquiry is shaped by the governing substantive law

Under Rule 23(b)(3), a class may be certified if the district court finds, *inter alia*, that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011). The district court must identify the relevant factual and legal issues and "compare the issues subject to com-

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[3] Although the Rule 23 class action involves a claim under an Iowa statute, the parties have litigated the case on the understanding that the FLSA and *Mt. Clemens* establish the governing substantive law. J.A. 479; see p. 9, *supra*.

mon proof against the issues subject solely to individualized proof." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:50, at 197 (5th ed. 2012). The predominance inquiry thus "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted).

As this Court's decisions addressing securities-fraud class actions illustrate, the burdens borne by the parties under the governing substantive law play a critical role in determining whether issues are "capable of resolution on a common, classwide basis." *Halliburton*, 131 S. Ct. at 2184. If securities-fraud plaintiffs were required to prove direct reliance on a defendant's misrepresentations, the reliance element "would ordinarily preclude certification of a class action [under Rule 23(b)(3)] because individual reliance issues would overwhelm questions common to the class." *Amgen Inc.* v. *Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1193 (2013). But if the plaintiffs are able to invoke the fraud-on-the-market presumption recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), "the problem dissipates." *Wal-Mart*, 131 S. Ct. at 2552 n.6. The *Basic* presumption "is a substantive doctrine of federal securities-fraud law that can be invoked by any . plaintiff." *Amgen*, 133 S. Ct. at 1193. But that substantive doctrine also "facilitates class certification" because it allows the use of common proof to establish a "rebuttable presumption of classwide reliance" without individualized inquiries. *Ibid.*

2. Mt. Clemens *sets forth a substantive rule of law that allows employees to establish the extent of their unrecorded work with common proof*

Like the *Basic* presumption, the *Mt. Clemens* framework is a substantive doctrine that allows a group of employees to establish an element of their claim using common evidence. Employees need not offer individualized proof of the extent of their unrecorded work in order to carry their burden. Instead, evidence of the work performed by "a representative sample of employees" can be used to establish the extent of the work performed by the entire group. *Reich* v. *Southern New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) (*SNET*).

Mt. Clemens itself involved representative testimony from eight employees concerning work done by 300 collective-action plaintiffs. See pp. 5-6, *supra*. And decades of decisions confirm that *Mt. Clemens* allows the use of "representative employees to prove violations [of the FLSA] with respect to all employees" in a case. *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994). Indeed, "[c]ourts have frequently granted back wages under the FLSA to nontestifying employees based upon the representative testimony of a small percentage of the employees." *Donovan* v. *Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985); see *Morgan* v. *Family Dollar Stores, Inc.*, 551 F.3d 1233, 1278-1279 (11th Cir. 2008) (collecting cases), cert. denied, 558 U.S. 816 (2009); *Wages and Hours* § 9.03[2], at 9-32 (same).

Accordingly, the *Mt. Clemens* framework has "particular significance" under Rule 23(b)(3), *Amgen*, 133 S. Ct. at 1193, because it allows a group of employees to use common evidence to establish the extent of

their unrecorded work on a class-wide basis even though such proof "would ordinarily be individualized." *O'Brien* v. *Ed Donnelly Enters., Inc.*, 575 F.3d 567, 585 (6th Cir. 2009).

3. The trial record demonstrates that individual questions did not predominate because respondents properly invoked* Mt. Clemens *to prove their case on a class-wide basis

When predominance questions are presented at the class-certification stage, the district court necessarily must rely on predictions about "how the case will be tried." Fed. R. Civ. P. 23(c)(1) advisory committee's note (2003). The court may also be required to determine whether the elements of the plaintiffs' claim will be "susceptible of class-wide proof," even though that question overlaps with the merits. *Ibid.*; see *Comcast*, 133 S. Ct. at 1432. Here, however, there is "no need to make a prediction" about how respondents' claim will be tried because this Court "ha[s] the benefit of seeing what ultimately took place at trial." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1259 (10th Cir. 2014), petition for cert. pending, No. 14-1091 (filed Mar. 9, 2015); cf. *Ortiz* v. *Jordan*, 562 U.S. 180, 184 (2011) ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of [a] summary judgment motion."). Furthermore, to the extent the propriety of class certification turns on whether respondents' claims were capable of class-wide proof, the Court should not disturb the jury's finding—*i.e.*, that respondents *did* prove their

case on a class-wide basis—absent some error in the trial or a legal insufficiency of the evidence.[4]

The jury's special verdict resolved four common questions that determined the compensability of the disputed activities performed by all class members. The jury found that: (1) donning and doffing protective and sanitary equipment was "work" under the FLSA; (2) donning and doffing that equipment was "'integral and indispensable' to the employees' gang-time work" and therefore marked the start and end of the compensable workday; (3) donning and doffing during meal breaks was not compensable; and (4) the compensable activities were not de minimis. J.A. 486-487. Petitioner does not dispute (Br. 28-29) that those findings applied equally to all class members. The class-action procedure thus made it possible to resolve "in one stroke" issues that were "central to the validity of each one of the [class members'] claims." *Wal-Mart*, 131 S. Ct. at 2551.

The common conclusion that employees' pre- and post-shift work was compensable did not, of course, fully resolve the case. To establish that employees were entitled to additional overtime, respondents also had to show that they worked more than 40 hours per week and that the K-code time paid by petitioner did not fully compensate for pre- and post-shift work. But with a single exception, respondents relied on peti-

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[4] In other contexts, it is "well settled" that "'all findings necessarily made by the jury in awarding the verdict . are binding on the parties as well as on the trial court.'" *Dybczak* v. *Tuskegee Inst.*, 737 F.2d 1524, 1526-1527 (11th Cir. 1984) (citation omitted), cert. denied, 469 U.S. 1211 (1985); see 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4418 & n.24, at 472 (2d ed. 2002).

tioner's own records to establish all of the facts relevant to that showing. Using "time sheets" and "[p]ay data" obtained "directly from [petitioner]," respondents' expert provided individualized calculations for each class member (and aggregate calculations for the class) reflecting each worker's shift work (gang time) for each week, any additional K-code time paid, and the worker's rate of pay. Pet. App. 13a. There was no dispute over the expert's calculations, and petitioner does not appear to contend that those essentially mechanical determinations caused individual questions to predominate.

Petitioner's predominance argument depends, instead, on the one fact not discernible from its records: the time each employee spent on pre- and post-shift work. Had petitioner complied with its obligation to keep records of that time, the amount of additional compensable time would have been equally subject to mechanical proof. But petitioner asserts that, given the absence of such records, the only way for respondents to establish the time spent on pre- and post-shift work was through laborious individualized inquiries into the donning, doffing, and walking routines of each class member.

Petitioner's argument ignores the legal consequences of its recordkeeping violation. Petitioner assumes (Br. 19, 34) that each class member was required to prove the "actual" amount of time he spent on pre- and post-shift activities. Under *Mt. Clemens*, however, petitioner's recordkeeping violation relieved respondents of the need "to prove the precise extent of [their] uncompensated work." 328 U.S. at 687. Instead, respondents could carry their burden by using representative evidence to establish the extent

of employees' uncompensated work as a matter of "just and reasonable inference"—a standard that necessarily allows "approximat[ion]." *Id.* at 687-688.

Respondents followed that approach here, presenting representative testimony from employees, video recordings of donning and doffing, and a study calculating averages of pre- and post-shift working time for slaughter and processing positions based on 744 videotaped observations. Pet. App. 5a, 13a; J.A. 123-124. Such proof is permissible as a *substantive* matter under *Mt. Clemens*. Petitioner therefore errs in suggesting (Br. 36) that the class-action procedure lowered respondents' burden of proof or altered its substantive rights: The same standard would have applied in an enforcement action by the Secretary or an individual action by an employee, and either the Secretary or the employee could have relied on the same type of evidence to carry his burden at the first stage of the *Mt. Clemens* framework.

Petitioner could have sought to rebut the reasonable inferences drawn from respondents' proof. *Mt. Clemens*, 328 U.S. at 687. If, for example, petitioner believed that respondents' expert overlooked salient differences between jobs in the plant by dividing them into only two categories (slaughter and processing), petitioner could have presented a study using a different methodology—for example, dividing jobs between those that involved knives and those that did not, or relying on more granular categories. But petitioner made no effort to offer competing estimates of the time spent on pre- and post-shift work.

Instead, petitioner sought to present the jury with an all-or-nothing choice, arguing that it should deny recovery to the class because "there has been a total

lack of proof of representative evidence." Tr. 1751-1752. Indeed, a central theme of petitioner's closing argument was that respondents' representative proof could not support a class-wide award because the jobs in the plant required "different combinations of sanitary and protective items" that took different amounts of time to don and doff. Tr. 1753-1754; see Tr. 1751-1760, 1782-1783, 1786-1787. Petitioner thus presented the jury with essentially the same factual arguments it now seeks to have this Court accept as a basis for decertification.

The jury rejected those arguments and found respondents' evidence sufficient under the *Mt. Clemens* standard. Using language proposed by petitioner, the district court instructed the jury that respondents could prove their case using "representative evidence" from employees who performed "substantially similar" work, and it specifically instructed the jury to consider whether the class members "wore similar sanitary and protective items" and engaged in "similar" donning and doffing activities. J.A. 472; see J.A. 93. Again using language proposed by petitioner, the court further instructed that if the jury found the activities at issue compensable, it should apply the *Mt. Clemens* framework in determining the amount the class was entitled to recover. J.A. 480-481; see J.A. 100-101. In returning a verdict for the class, therefore, the jury necessarily concluded that the differences among class members were not so substantial as to prevent a reasonable inference of the amount of uncompensated work they performed.

The trial record and jury verdict thus demonstrate that respondents' suit satisfied Rule 23(b)(3)'s predominance requirement because respondents proved

their case on a class-wide basis. Individual issues did not "overwhelm questions common to the class," *Amgen*, 133 S. Ct. at 1193; to the contrary, aside from matters established mechanically with petitioner's own records, individualized inquiries were not required at all.

4. Petitioner's challenges to the lower courts' application of Mt. Clemens *lack merit*

Petitioner's challenge to the decision below thus at bottom must be based not on the stringency of the standard imposed by Rule 23(b)(3), but rather on the contention (Br. 40-44) that respondents' class-wide evidence failed to satisfy the *Mt. Clemens* standard. But petitioner has abandoned its direct sufficiency-of-the-evidence challenge, and its indirect attacks on the adequacy of respondents' proof lack merit.

a. Petitioner principally repeats its factbound argument (Br. 29-35, 42-44) that variations in the donning and doffing routines of individual class members rendered respondents' evidence insufficient for the jury to draw a reasonable inference of the extent of class members' uncompensated work. But petitioner provides no sound basis for disturbing the jury's determination. In particular, it is well-settled that employees relying on representative evidence need not establish that they performed *identical* work. All that is required is that the proof be "fairly representative"—a standard that necessarily allows for some variation. *Morgan*, 551 F.3d at 1279-1280 (citation omitted); see, *e.g.*, *DOL* v. *Cole Enters., Inc.*, 62 F.3d 775, 781 (6th Cir. 1995); *Martin* v. *Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir.), cert. denied, 505 U.S. 1204 (1992); *McLaughlin* v. *Ho Fat*

Seto, 850 F.2d 586, 589 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989).

Petitioner insists (Br. 42) that *Mt. Clemens* cannot allow an employee to establish the extent of his uncompensated work based on the amount of time that "a *different employee*" spent performing "*different activities*" or support an award of damages based on "averages." But those arguments echo the stringent standard of proof rejected in *Mt. Clemens* itself. Like petitioner, the court of appeals in that case had emphasized that the uncompensated activities at issue "varied from department to department, and from job to job within the department," and like petitioner the court of appeals had insisted that such variation required individualized proof rather than reliance on an "estimated average of overtime worked." *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F.2d 461, 462-465 (6th Cir. 1945). But this Court emphatically disapproved that "improper standard of proof," explaining that it would thwart enforcement of the FLSA and impermissibly penalize employees for their employers' recordkeeping violations. *Mt. Clemens*, 328 U.S. at 686-687.

The estimates offered by respondents' expert necessarily reflected some imprecision. But the initial burden under *Mt. Clemens* "is a minimal one" and tolerates such uncertainty. *Secretary of Labor* v. *DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991). The obligation to come forward with more precise estimates then shifts to the employer, who "bear[s] the lion's share of the burden," *ibid.*, because the employer's recordkeeping violation created the uncertainty in the first place and because the employer is best positioned to offer evidence of the "amount of work performed."

Mt. Clemens, 328 U.S. at 687. Accordingly, courts have consistently held that *Mt. Clemens* permits employees to rely on inferences from average working times—including average times spent "donning and doffing" by large groups of workers at meat-processing plants. *Perez* v. *Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir. 2011), cert. denied, 132 S. Ct. 1634 (2012); see also, *e.g.*, *Garcia* v. *Tyson Foods, Inc.*, 770 F.3d 1300, 1306-1307 (10th Cir. 2014).

It is of course true that the employees invoking *Mt. Clemens* must have engaged in sufficiently comparable work to allow the factfinder to draw reasonable inferences based on their representative proof. But the jury permissibly concluded that such inferences were reasonable here. In arguing otherwise, petitioner exaggerates the differences among class members. For example, petitioner places great weight (Br. 30-31) on the variation suggested by the outlier donning and doffing times observed in the study performed by respondents' expert. But the expert explained that most of his observations were "clustered around the average[s]," and the jury had a list of all the expert's observations and was able to evaluate that claim for itself. J.A. 348; see Pl. Ex. 242. Similarly, petitioner emphasizes (Br. 29-31) that employees wore varying combinations of protective equipment. But the district court, in certifying the class, found that the variation was "limited" and that there were "far more factual similarities than dissimilarities." Pet. App. 89a, 101a. The jury evidently agreed, finding that class members were sufficiently similar to permit reasonable inferences based on respondents' class-wide proof. Indeed, trial evidence showed that employees frequently rotated between jobs requiring

different equipment, meaning that the variation among *employees* was smaller than the variation among *jobs*. J.A. 210, 224-225, 234.

Petitioner therefore is wrong to suggest (Br. 42-44) that this case is comparable to *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013). There, the plaintiffs proposed to use a "small, unrepresentative sample" of 42 hand-picked employees to establish the amount of work performed by more than 2000 employees who worked widely varying hours in different locations. *Id.* at 774-775. Petitioner's attempt to depict equally great differences among its employees is implausible—particularly because for much of the class period petitioner itself paid all class members exactly the same amount (four minutes per day) to cover pre- and post-shift activities. J.A. 121.

b. Petitioner also asserts (Br. 41) that the *Mt. Clemens* framework applies only to a determination of damages and not where, as in many overtime cases, proving the extent of unrecorded work is also a factor in determining liability. Petitioner therefore suggests that class members should have been required to establish liability—*i.e.*, the existence of some unpaid work in excess of 40 hours in at least one workweek—on an individualized basis.

It is well-settled, however, that *Mt. Clemens* permits employees to use representative evidence to establish the extent of their unrecorded work when that fact is relevant to liability as well as damages. This Court held that employees' initial burden is to establish that they "ha[ve] in fact performed work for which [they were] improperly compensated" and to provide "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable

inference." 328 U.S. at 687. But as *Mt. Clemens* itself illustrates, both of those showings can be made with representative proof. In that case, the Court found that 300 workers had carried their burden using representative testimony from eight employees. See pp. 5-6, *supra*. A rule requiring individualized evidence to establish an overtime violation with respect to each employee would contradict the central teaching of this Court's decision, which is that an employee's "burden of proving that he performed work for which he was not properly compensated" must be set with "[d]ue regard" to the fact that "it is the employer who has the duty under [29 U.S.C. 211(c)] to keep proper records." *Mt. Clemens*, 328 U.S. at 687.[5]

Lower courts have consistently held that the *Mt. Clemens* framework permits the use of inferences from representative proof to establish both liability and damages. See, *e.g.*, *Morgan*, 551 F.3d at 1278 (*Mt. Clemens* establishes a means to "prove an FLSA violation"); *SNET*, 121 F.3d at 66 (*Mt. Clemens* permits reasonable inferences related to "violations of the Act and the amount of an award") (quoting *Martin* v. *Selker Bros.*, 949 F.2d 1286, 1296-1297 (3d Cir. 1991)); *DeSisto*, 929 F.2d at 792 ("It is well established that not all employees need testify in order to prove [FLSA] violations."). Consistent with that precedent,

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[5] Petitioner relies (Br. 41) on this Court's statement that an approximate award of damages is permissible because liability is certain and "[t]he uncertainty lies only in the amount of damages." *Mt. Clemens*, 328 U.S. at 688. But that statement reflects the fact that if a court awards damages at the third step of the *Mt. Clemens* burden-shifting framework, the employees have by definition established a statutory violation at the first two steps. It does not foreclose the use of appropriate representative evidence to establish a violation in the first place. *SNET*, 121 F.3d at 69.

the jury in this case was instructed, without objection, that it was required to find by a preponderance of the evidence that the class members "ha[d] been underpaid," but that it could make that finding as to absent class members based on "inference" from "representative evidence." J.A. 471-472; see J.A. 464.

In addition, the jury's findings regarding compensable activities and the undisputed evidence regarding petitioner's pay practices indicate that all class members performed some unpaid work, even setting aside respondents' proof of the amount of time required for pre- and post-shift activities. At various points during the class period, petitioner paid certain employees K-code time to compensate for donning and doffing knife-specific protective gear, but before 2007 those payments did not include any allowance for compensable time walking to and from the locker rooms. J.A. 121-122. In addition, all class members were required to wear a basic set of sanitary and protective equipment. J.A. 119. The jury found that donning and doffing that equipment was compensable, but petitioner never included it in K-code time. J.A. 120-122, 486-487. Accordingly, so long as a class member otherwise worked at least 40 hours in a workweek, his entitlement to at least some unpaid overtime followed directly from the jury's findings on compensability. And the evidence further established that class members typically worked at least five (and often six) eight-hour shifts per workweek. J.A. 122, 326, 435.[6]

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[6] The evidence indicated that approximately 200 class members were not entitled to any overtime pay, and that other class members were owed only small amounts. J.A. 414-415. Respondents' expert explained that those individuals likely worked part time or

B. Respondents' Suit Was Properly Maintained As An FLSA Collective Action

Although petitioner principally challenges the certification of the Rule 23(b)(3) class, it also briefly contends (Br. 25) that the FLSA collective action should not have been allowed to proceed because the standards for a collective action "can be no less stringent" than those in Rule 23(b)(3). This Court need not decide that question because, as demonstrated above, Rule 23(b)(3) was satisfied here. But if the Court does address the issue, it should hold that a collective action need not conform to the reticulated requirements of Rule 23.

The FLSA confers on employees a "right" to bring a collective action. 29 U.S.C. 216(b). That "explicit statutory direction of a single [FLSA] action for multiple [FLSA] plaintiffs," *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 172 (1989), does not condition employees' right to proceed collectively on any showing beyond a demonstration that they are "similarly situated." To interpret Section 216(b) by incorporating the requirements of Rule 23, which was adopted decades later, "would effectively ignore Congress' directive" that a different standard applies. *Thiessen* v. *General Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001), cert. denied, 536 U.S. 934 (2002). It would also contravene the Advisory Committee's admonition that "[Section] 216(b) [was] not intended to be affected by Rule 23." Fed. R. Civ. P. 23 advisory committee's note (1966).

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were employed by petitioner for only a short period. J.A. 409-410, 429-430.

Rule 23(b)(3) embodies a different standard because "Rule 23 actions are fundamentally different from collective actions." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529 (2013). Section 216(b) is not a procedure for litigating the rights of absent class members, but rather a mechanism for allowing multiple employees to join an action as "party plaintiff[s]." 29 U.S.C. 216(b). And because Section 216(b) sets forth Congress's "policy that [FLSA] plaintiffs should have the opportunity to proceed collectively," this Court has emphasized that its "broad remedial goal . should be enforced to the full extent of its terms." *Hoffmann-La Roche*, 493 U.S. at 170, 173.

Consistent with that understanding, the great weight of authority holds that "the FLSA's 'similarly situated' requirement is less demanding than Rule 23." 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1807 (3d ed. Supp. 2015); see, *e.g.*, *O'Brien*, 575 F.3d at 585-586; *Grayson* v. *K Mart Corp.*, 79 F.3d 1086, 1096 & n.12 (11th Cir.), cert. denied, 519 U.S. 982, and 519 U.S. 987 (1996); but see *Espenscheid*, 705 F.3d at 772. Rather than importing Rule 23(b)(3)'s predominance requirement, courts hearing collective actions consider factors including the similarity of the "factual and employment settings of the individual plaintiffs," any defenses "individual to each plaintiff," and "fairness and procedural considerations." *Thiessen*, 267 F.3d at 1103 (citation omitted); *Wages and Hours* § 9.02[3][b][i], at 9-20.

The district court considered those factors here and correctly concluded that a collective action was appropriate. Pet. App. 69a-90a. The opt-in plaintiffs worked in the same plant, were paid under the same unlawful policy, and performed comparable unpaid

work. A suit brought by such employees has long been a paradigmatic example of a collective action—as *Mt. Clemens* itself illustrates. A rule that variations in working time preclude such employees from vindicating their rights in a single suit would drain the collective-action procedure of much of its function and disserve the "broad remedial goal" of Section 216(b). *Hoffmann-La Roche*, 493 U.S. at 173.

II. THE PRESENCE OF EMPLOYEES WHO WERE ULTIMATELY SHOWN TO HAVE NO RIGHT TO RECOVER DID NOT REQUIRE DECERTIFICATION OF THE CLASS AND COLLECTIVE ACTIONS

Although respondents' trial evidence established that all class members engaged in some unpaid work, it also indicated that approximately 200 of them had no right to recover overtime because they never worked more than 40 hours in a workweek. J.A. 414-415. Petitioner could have sought to amend the class to remove those individuals or to structure the trial in a manner that would have prevented them from sharing in any award. But it failed to do so, and it may not invoke the result of its own tactical decisions as a basis for decertification after an unfavorable verdict.

A. The Possibility That Some Class Members May Ultimately Be Found To Have No Right To Recover Does Not Preclude Certification Of A Rule 23 Class

1. In seeking certiorari, petitioner asserted (Pet. 26) that a Rule 23 class may not be certified if it "includes members who were not injured and thus have no claim for damages." Petitioner has now essentially abandoned that position, acknowledging (Br. 49) that a class may be certified even "in the absence of proof that all class members were injured."

The Court may therefore wish to dismiss the second question presented as improvidently granted. Cf. *City & County of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1772-1774 (2015).

2. Any consideration of that question in this case would require two important clarifications.

First, petitioner at times "confuses weakness on the merits with absence of Article III standing." *Davis* v. *United States*, 131 S. Ct. 2419, 2434 n.10 (2011); see Pet. Br. 20-21, 44-45. Class members who did not work more than 40 hours in a workweek failed to establish one of the elements of an FLSA overtime claim. 29 U.S.C. 207(a)(1). Ordinarily, however, "[t]he question whether [parties] are entitled to the relief that they seek goes to the merits, not to standing." *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 151 n.1 (2010). Article III does not require dismissal for lack of jurisdiction every time an FLSA plaintiff fails to prove his case.

Second, many of the decisions cited in the petition considered whether a court may certify a class if it is clear at the outset that the class definition includes individuals who have no injury or lack a colorable legal claim. See, *e.g.*, *Kohen* v. *Pacific Inv. Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009), cert. denied, 559 U.S. 962 (2010). Here, in contrast, petitioner relies (Br. 52) on the fact that the evidence ultimately introduced at *trial* established that some class members lacked a right to relief.

3. Petitioner was correct to abandon its contention that the possible presence of such individuals precludes class certification at the outset. Provided that the requirements of Rule 23 are otherwise satisfied, a class may be certified even if *none* of its members

ultimately recover because the defendant prevails on the merits. *Amgen*, 133 S. Ct. at 1197 & n.5. It may also be appropriate—again, assuming compliance with Rule 23—to certify a class even where some members' claims may ultimately fail for individual reasons. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014). Indeed, requiring that a class be defined to include only individuals with meritorious claims would violate the rule that courts may not certify a "fail-safe" class "defined in terms of success on the merits." *Mullins* v. *Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

B. The Presence Of Some Members Who Were Shown To Have No Right To Recover Did Not Require Decertification Of The Class And Collective Actions

Petitioner now advances the more modest argument (Br. 49) that a Rule 23(b)(3) class may be certified and maintained only if there is "some mechanism" to ensure that individuals who are shown to have no right to relief neither "contribute to the size of any damage award" nor "recover such damages." Petitioner is of course correct that a defendant should not be required to pay damages to individuals who are shown to have no right to recover, and a court considering whether to certify a Rule 23(b)(3) class should take into account the availability of mechanisms for identifying such individuals when assessing "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). In this case, however, such mechanisms were available, and they went unused only because of petitioner's own choices.

Here, the most sensible approach may have been to structure the trial so that the jury first made findings about the compensability of the activities at issue and

"the number of minutes it takes to perform [them]." J.A. 112-113. Calculating the "individual backpay amount for each class member" would then have been "ministerial." J.A. 113. Respondents proposed exactly that approach, *ibid.*, which would have ensured that only class members with meritorious claims received an award. But petitioner *opposed* that proposal, J.A. 115, and asked that the jury be permitted to make only a lump-sum award to the entire class, J.A. 104. Alternatively, when respondents' trial evidence revealed that some class members were not entitled to recover, petitioner could have moved to exclude those individuals from the class. Fed. R. Civ. P. 23(c)(1)(C). But petitioner did not do that either.

Petitioner's contention that the inclusion of some class members who are not entitled to relief requires that the entire class be decertified is also unavailing because the jury instructions ensured that those individuals did not contribute to the size of the award. Pet. App. 10a. At petitioner's request, the district court instructed the jury that backpay was owed only for "hours worked in excess of 40 hours in each workweek" and that "[a]ny employee who has already received full compensation . is not entitled to recover any damages." J.A. 481; see J.A. 471. The presence of such employees thus had no effect on petitioner's liability to the class and is relevant only to allocation of the award among the class members—a step that has not yet occurred and in which petitioner has no stake. *Urethane*, 768 F.3d at 1269.

Finally, petitioner's suggestion (Br. 45, 51) that the presence of employees who lacked meritorious claims required "decertification" of the FLSA collective action is particularly unsound. A collective action

"does not produce a class with an independent legal status." *Genesis Healthcare*, 133 S. Ct. at 1530. Instead, it authorizes similarly situated employees to join an action as "party plaintiff[s]." 29 U.S.C. 216(b). A showing that some of those plaintiffs lack a right to relief would be grounds for dismissing them from the action or rejecting their claims on the merits, but provides no basis for preventing the remaining plaintiffs from going forward. *O'Brien*, 575 F.3d at 586.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 29 U.S.C. 206(a)(1) provides:

Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

2. 29 U.S.C. 207(a)(1) provides:

Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. 29 U.S.C. 211(c) provides:

Collection of data

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or

orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

4. 29 U.S.C. 216(b) provides:

Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such con-

sent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

5. 29 C.F.R. 516.2(a) provides:

Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.

(a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:

(1) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's

identifying symbol or number if such is used in place of name on any time, work, or payroll records,

(2) Home address, including zip code,

(3) Date of birth, if under 19,

(4) Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.) (Employee's sex identification is related to the equal pay provisions of the Act which are administered by the Equal Employment Opportunity Commission. Other equal pay recordkeeping requirements are contained in 29 CFR part 1620.)

(5) Time of day and day of week on which the employee's workweek begins (or for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period). If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice,

(6)(i) Regular hourly rate of pay for any workweek in which overtime compensation is due under section 7(a) of the Act, (ii) explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and (iii) the amount and nature of each payment which, pursuant to section 7(e) of the Act, is excluded from the "regular rate" (these records may be in the form of vouchers or other payment data),

(7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of **7** consecutive workdays),

(8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,

(9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,

(10) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions,

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

6. 29 C.F.R. 785.19(a) provides:

Meal.

(a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal

period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. *(Culkin* v. *Glenn L. Martin, Nebraska Co.,* 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson v. Stock & Sons, Inc.,* 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.,* 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.,* 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.,* 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.,* 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.,* 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

7. 29 C.F.R. 785.47 provides:

Where records show insubstantial or insignificant periods of time.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946)) This rule applies only where there are

uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See *Glenn L. Martin Nebraska Co.* v. *Culkin,* 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; *Addison* v. *Huron Stevedoring Corp.,* 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that "To disregard workweeks for which less than a dollar is due will produce capricious and unfair results." *Hawkins v. E. I. du Pont de Nemours & Co.,* 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

8. 29 C.F.R. 790.6 provides:

Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that

period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without

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[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are ... not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be com-pensable or not without regard to the provisions of this section."

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would

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[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

10. Fed. R. Civ. P. 23 provides in pertinent part:

Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

.....

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) ***Certification Order.***

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class*; *Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) ***Particular Issues.*** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) ***Subclasses.*** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

.....

11. Iowa Code 91A.3 provides in pertinent part:

Mode of payment

1. An employer shall pay all wages due its employees, less any lawful deductions specified in section 91A.5, at least in monthly, semimonthly, or biweekly installments on regular paydays which are at consistent intervals from each other and which are designated in advance by the employer. However, if any of these wages due its employees are determined on a commission basis, the employer may, upon agreement with the employee, pay only a credit against such wages. If such credit is paid, the employer shall, at regular intervals, pay any difference between a credit paid against wages determined on a commission basis and such wages actually earned on a commission basis. These regular intervals shall not be separated by more than twelve months. A regular payday shall not be more than twelve days, excluding Sundays and legal holidays, after the end of the period in which the wages were earned. An employer and employee may, upon written agreement which shall be maintained as a record, vary the provisions of the subsection.

.....

12. Iowa Code 91A.8 provides:

Damages recoverable by an employee

When it has been shown that an employer has intentionally failed to pay an employee wages or reimburse expenses pursuant to section 91A.3, whether as

the result of a wage dispute or otherwise, the employer shall be liable to the employee for any wages or expenses that are so intentionally failed to be paid or reimbursed, plus liquidated damages, court costs and any attorney's fees incurred in recovering the unpaid wages and determined to have been usual and necessary. In other instances the employer shall be liable only for unpaid wages or expenses, court costs and usual and necessary attorney's fees incurred in recovering the unpaid wages or expenses.