No. 14-1146

IN THE

# Supreme Court of the United States

TYSON FOODS, INC.,

*Petitioner,*

v.

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

*Respondents.*

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

## BRIEF OF PETITIONER


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## QUESTIONS PRESENTED

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

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

## PARTIES TO THE PROCEEDING

The petitioner is Tyson Foods, Inc. ("Tyson"), and respondents are Peg Bouaphakeo, Mario Martinez, Javier Frayre, Heribento Renteria, Jesus A. Montes, and Jose A. Garcia, who filed suit on behalf of themselves and other similarly situated individuals at Tyson's pork-processing plant in Storm Lake, Iowa.

## RULE 26.9 STATEMENT

Tyson has no parent company, and no publicly held corporation owns more than 10% of petitioner's stock.

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## OPINIONS BELOW

The court of appeals' opinion is reported at 765 F.3d 791 and reproduced at Pet.App. 1a–24a. That court's unpublished order denying rehearing is reproduced at Pet.App. 114a–131a. The district court's unpublished orders denying Tyson's motion to decertify the class and Tyson's post-trial motion are reproduced at Pet.App. 25a–30a and 31a–38a. The district court's opinion granting conditional collective and class certification is reported at 564 F. Supp. 2d 870 and is reproduced at Pet.App. 41a–113a.

## JURISDICTION

The court of appeals entered judgment on August 25, 2014, Pet.App. 1a, and denied rehearing on November 19, 2014, Pet.App. 114a. On January 29, 2015, Justice Alito extended the time for filing a petition for certiorari to and including March 19, 2015. Tyson filed its petition for certiorari on March 19, 2015. This Court granted the petition on June 8, 2015. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTES AND RULES

This case involves Federal Rule of Civil Procedure 23(b)(3) and the Fair Labor Standards Act ("FLSA") provisions that authorize a private cause of action for damages for unpaid overtime compensation, 29 U.S.C. §§207(a), 216(b), which are reproduced at Pet.App. 132a–136a.

## INTRODUCTION

The decision in this case is the product of a judicial mindset concerning class actions (and collective actions) that persists despite this Court's recent and

repeated insistence on the need for greater judicial discipline in class certification decisions. This Court has explained that a class should not be certified until the court concludes, "'after a rigorous analysis,'" that the four prerequisites of Rule 23(a)—numerosity, typicality, commonality, and adequacy of representation—are met. *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S.Ct. 2541, 2551 (2011). For cases brought under Rule 23(b)(3), the inquiry into whether common questions will predominate over individualized issues "is even more demanding." *Comcast Corp.* v. *Behrend*, 133 S.Ct. 1426, 1432 (2013). The predominance inquiry must begin "with the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011), and focus on whether the requirements to prove the claim reveal "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair," *Amgen, Inc.* v. *Conn. Ret. Plans & Trust*, 133 S.Ct. 1184, 1197 (2013).

Faithful adherence to these requirements would have precluded certification in this case. Plaintiffs are hourly workers at a pork-processing facility who sought overtime compensation and liquidated damages under the FLSA and Iowa law on the theory that Tyson's "gang time" compensation system failed to compensate them fully for time spent "donning," "doffing," and rinsing personal protective equipment and walking to and from their work stations. There were significant differences, however, in the types of personal protective equipment individual workers wore, with corresponding differences in the amount of time each spent on these activities. There were also differences in the amount of time Tyson compensated individual workers for donning and doffing-related

activities, and differences in the total number of hours individual workers spent on other work activities in any given week. As a result, questions of whether individual workers were deprived of any overtime compensation—and if so, how much—overwhelmed any common legal questions concerning whether those activities were compensable "work."

The district court nevertheless certified a class of over 3,000 employees, concluding that the legality of the compensation system was a common question that predominated over individualized questions of injury or damages. The district court then allowed plaintiffs to airbrush these individualized issues out of the case. It permitted plaintiffs to "prove" classwide liability and damages with purportedly "common" statistical evidence that erroneously presumed that *all* class members were identical to a fictional "average" employee.

On appeal, the majority saw its task as distinguishing, rather than enforcing, this Court's recent holdings. "Unlike *Dukes*," the majority stated, "Tyson had a specific company policy [gang time] that applied to all class members." Pet.App. 8a. "Unlike *Dukes*, class members worked at the same plant and used similar equipment." *Id.* And "[u]sing statistics or samples in litigation is not necessarily trial by formula," as condemned in *Wal-Mart* v. *Dukes*. *Id.* at 10a–11a. Far from reflecting a rigorous predominance analysis, these observations simply ignored the many individualized issues inherent in plaintiffs' claims. As a result, Tyson was found liable based on an "undifferentiated presentation[] of evidence," and the jury announced a "single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id*. 24a (Beam, J. dissenting).

The majority's affirmance of this unjust result should be reversed. Rule 23(b)(3) does not authorize an award of damages to individuals who were not harmed simply because their claims are aggregated with others who were. And this Court's decisions do not permit courts to ignore the factual differences among class members that require individualized inquiry or to use statistics to eliminate the legal significance of such differences solely to allow Rule 23(b)(3)'s predominance standard to be met. The lower courts' lax approach to class certification effectively deprived Tyson of its due process right to raise every available defense, and impermissibly altered substantive rights in violation of the Rules Enabling Act, 28 U.S.C. §2072.

## STATEMENT OF THE CASE

1. Plaintiffs are current and former hourly employees at Tyson's Storm Lake, Iowa, pork-processing plant. J.A.117–118. These line employees worked in two areas: on the Slaughter (or "Kill") floor and on the Processing (or "Fabrication") floor. *Id*.

The Storm Lake facility employs approximately 1,300 employees, doing more than 420 distinct jobs over two shifts. J.A.117–118; J.A.74–85. Each position requires the job-holder to perform certain duties and to wear different sanitary items and personal protective equipment ("PPE"). J.A.118–119; J.A.126–138.

All employees wear a hard hat, hairnet, and ear protection while on the production floor, J.A.119, but the similarities end there. Processing employees wear a frock, like a butcher's smock, while Slaughter employees wear a company-issued white shirt-and-pants uniform, *id.*, or their own comparable clothing, J.A.199, 438.

Additional items worn by employees depend on the employee's job, J.A.61, 119, and personal preference, J.A.167, 237, 241, 246. Knife-wielding employees in both areas don and doff, in varying combination, plastic belly guards, mesh sleeves, plexiglass arm guards, Polar gloves, Polar sleeves, scabbards (or sheaths) for their knives, and steels with which to maintain them.[1] J.A.118. Some non-knife users, in contrast, choose to wear rubber gloves, cotton gloves, or plastic aprons. J.A.119, 167–68, 201–204, 273–74, 293, 295–296. Further, employees in both departments regularly elect to wear other Tyson-provided items as a matter of personal preference. See J.A.167–168, 189, 196, 274, 293, 295–296. Thus, even employees working precisely the same job may be attired quite differently. J.A.195–96, 201–204, 206–207, 328–330.

Depending on their attire and equipment, employees have different clean-up responsibilities with respect to their personal protective equipment. For instance, knife-wielding employees must rinse their knives, scabbards, belly guards, and other "hard equipment" when their shifts end. J.A.156, 179, 222. Other equipment, such as the rubber apron, gloves, or sleeves, need only be placed in a laundry bag. J.A.179–180, 227, 264. Those items are then washed by Tyson before the employees' next shift. J.A.180, 300.

2. This case is brought by employees paid on Tyson's "gang-time" system, which compensates them from the time the first piece of product passes their work stations until the last piece of product passes. J.A.171. Tyson also pays a fixed amount of extra time

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[1] Approximately 70 percent of the class were knife-wielding employees. J.A.210.

each day called "K-Code time" (because it is given to employees in departments using knives), Pet.App. 2a, that compensates employees for donning/doffing-related activities.

From the beginning of the limitations periods until February 2007, Tyson paid four minutes of K-Code time per day to each employee who worked in a department in which a knife was used.[2] J.A.121. From February 2007 to June 28, 2010, Tyson paid only knife-wielding employees K-Code time of four to eight minutes (depending on their specific job for the shift). *Id*.

In addition, some class members were compensated for these donning, doffing, rinsing, and walking activities above and beyond K-Code payments. Specifically, employees who were assigned to come in early to setup or stay late to teardown after gang time were paid for the additional time, J.A.249, 433, and were able to don/doff and clean their gear and walk to/from the work station during that period of time, J.A.433–434; J.A.60; J.A.68, 70; J.A.90.

3. Plaintiffs filed this action in 2007 for themselves and other "similarly situated individuals," alleging that Tyson failed to compensate its employees for overtime work, in violation of the FLSA, 29 U.S.C. §207, and the Iowa Wage Payment Collection Law, Iowa Code §91A.1, *et seq*., which provides a state-law basis to recover for FLSA claims. J.A.28, 39–40. Plaintiffs did not challenge the gang-time system *per se*, nor did they argue that Tyson failed to pay the

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[2] The Slaughter and Processing floors were mainly comprised of such departments; thus, most class members who worked during this time period would have received four minutes per day they were on the job, regardless of whether they actually worked a knife job. J.A.121.

federal minimum wage. They claimed, however, that the K-Code times were too low and, thus, that they were entitled to overtime compensation for unpaid time spent on donning/doffing, washing, and walking when those activities were undertaken by an employee who worked more than 40 hours in a workweek. J.A.35–39.

Plaintiffs moved to certify a Rule 23(b)(3) class and an FLSA collective action. Tyson objected, arguing that liability and damages could be determined only on an individual basis. The district court agreed that "there [we]re some very big factual differences among hourly employees at Tyson"; it recognized that "the kinds of PPE worn, the types of tools used, and the compensation system within the departments are often different." Pet.App. 87a. In particular, the court noted the declarations of 14 Tyson supervisors, who described the required personal protective equipment worn by their workers in different sub-departments, *id.* at 86a–87a, equipment that ranged from the standard hard hat, hairnet, and ear protection to the full body armor (belly guard, mesh glove, polar sleeves, and a plastic arm guard) within even a single sub-department, see J.A.53; J.A.61; J.A.74–85. Those affidavits also explained how Tyson requires different employees to remove different articles of equipment before entering the cafeteria during their breaks, J.A.71, and how there are different requirements for cleaning equipment at the end of the shift, J.A.64; J.A.87; J.A.90.

Nevertheless, the court viewed the unchallenged "gang time compensation system" as a "'tie that binds'" the class together under a single, common question of law. Pet.App.87a. Because all class members, in the court's view, "need[ed] to prove that they [were] not paid for all the work they perform

under Tyson's gang time compensation system," Pet.App. 109a, it certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members, all of whom are also members of the Rule 23 class, Pet. App. 110–111a; J.A.117.

4. After this Court decided *Wal-Mart Stores, Inc.* v. *Dukes*, Tyson filed a motion to decertify the Rule 23 class. J.A.10 (Dkt. 212). Tyson asserted that decertification was necessary because plaintiffs had failed to show that questions of liability or damages were "capable of classwide resolution … in one stroke." Dkt. 212-1, at 5 (quoting *Wal-Mart*, 131 S.Ct at 2551).

Plaintiffs opposed decertification, asserting, first, that they could prove Tyson undercompensated the class members with a time study by Dr. Kenneth Mericle that purported to show the "average" amount of time Tyson employees spent on donning/doffing-related activities. Dkt. 223-1, at 22. Specifically, Mericle identified eight donning/doffing-related "activities" on the Processing side and six on the Slaughter side, such as donning equipment in the locker room before the shift and washing knife-related equipment after the shift. J.A.142–43. He and his videographers stationed themselves at various points in the plant and then recorded the employees who performed those activities in their view without differentiating by position or articles of personal protective equipment. J.A.336–37, 359–60. Mericle measured how much time each employee in the videos took for each of these activities, *e.g.*, donning *all* equipment, rather than how much time it took an employee to don each separate piece of equipment, *e.g.*, a belly guard. J.A.377. He then purported to compute the average time for each of the

donning/doffing-related activities he identified, added an estimated walking time, and summed them for an "all-in" average of 18 minutes on the Processing floor and 21.25 minutes on the Slaughter floor. J.A.123–124.

Second, plaintiffs said they would calculate entitlement to overtime compensation and damages with a report by Dr. Liesl Fox. Fox assumed that *all* class members spent Mericle's average amount of time donning, doffing, and rinsing their equipment and walking to their work stations—*i.e.*, that everyone on the Processing floor spent 18 minutes and everyone on the Slaughter floor spent 21.25 minutes on these activities. Then, using a computer program and Tyson's pay records, she determined how much overtime compensation an employee would be due, if any, if he or she were credited for Mericle's average donning/doffing time each workday during the class period. J.A.404–408. Finally, Fox totaled those numbers to arrive at an aggregate damages award for each class. J.A.139.

Tyson objected that this purported proof would result in a "trial by formula" expressly prohibited by a unanimous Court in *Wal-Mart*. Dkt. 212-1, at 10–12. Whether an employee was entitled to overtime pay, Tyson argued, could be determined only on an individualized basis because the employees worked different jobs that required them to don, doff, and rinse different equipment in a different order over different amounts of time. Dkt. 237, at 11. To determine Tyson's liability and damages based on the amount of time a hypothetical "average" employee engaged in donning/doffing-related activities vitiated the company's right to demonstrate that *individual* class members were not entitled to overtime. *Id.* at 5.

The district court denied Tyson's motion, finding that whether "donning and doffing and/or sanitizing of the PPE … constitutes 'work'" was a common question susceptible to common proof. Pet.App. 37a. The court observed, without elaboration, that there were "numerous factual similarities among the employees paid on a 'gang time' basis." *Id*.

5. At trial, however, the few class members who testified admitted that Tyson required employees to wear different personal protective equipment, depending on their job, and that employees chose to wear different items, depending on their personal preferences. J.A.276–277 (Lovan); J.A.283–284 (Balderas); J.A.315 (Brown). In fact, each testifying class member indicated that he was personally required to wear different equipment and that each chose to wear additional items. J.A.256–257 (Lovan); J.A.293–295 (Balderas); J.A.315 (Brown); see also J.A.125–138 (chart listing the required personal protective equipment for each job in the plant).

Additionally, these employees testified that they don and doff these pieces of equipment in a different order, in different places, and that each piece requires a distinct amount of time. J.A.272, 297–302, 308–309, 318–319. As a result, it took them a different amount of time to perform each of Dr. Mericle's "activities," and none of them matched Mericle's "averages." For example, Mr. Lovan testified that it took him eight to nine minutes to don his protective equipment and walk to his work station, J.A.260; it took Mr. Balderas ten to twelve, J.A.288, and Mr. Brown approximately five minutes, J.A.309. Notably, when each of the employees broke down each element of his pre-shift routine on cross-examination, he revised his estimates further

downwards. J.A.270–272 (Lovan); J.A.297, 301–302 (Balderas); J.A.316–319 (Brown).

Nevertheless, plaintiffs purported to prove class members' entitlement to overtime compensation with Mericle's testimony regarding his average time study. Mericle conceded that his time measurements necessarily included employees who performed different jobs and donned and doffed different equipment. J.A.349–350, 351, 383. This resulted in "a lot of variation." J.A.387. For instance, when Mericle measured the pre-shift donning of equipment by Processing floor employees in the locker room, his observed times ranged from approximately 30 seconds to ten minutes. J.A.142. On the Slaughter side, he similarly observed employees take from 0.2 to 5.7 minutes to doff and clean equipment after their shift. J.A.143.

Mericle conceded that this wide disparity—which repeated itself with each "activity" measured—was because "some of [the workers] put on more equipment than others." J.A.385–386. On the Processing floor, for example, Tyson required the employee in one position to wear one belly guard, one scabbard, one steel, one mesh glove, two Polar sleeves, and one Plexiglass arm guard. J.A.241. In contrast, the employee in another position (also on the same Processing floor) needed to don none of these pieces, J.A.242. On the Slaughter floor, the variations are just as stark. For instance, the "Stickers" must "wear one mesh glove, a face shield, a mesh apron, plastic gloves, and an arm guard," while "[t]he Stunners are not required to wear anything." J.A.61.

Even beyond those problems, Mericle made no attempt to ensure that his time study was based on a statistically representative sample of class members.

J.A.359 (Mericle agreeing that he did not analyze a "random sample"). By his own admission, Mericle did not pre-select workers from a variety of jobs. J.A.378–381. Instead, he and his team observed whichever employees were performing a certain activity at a given time, allowing the employees to "self-select" into his study. J.A.359. Thus, for example, he made no effort to control for all the different combinations of equipment worn by individual workers, differences that resulted both from variations in the equipment required for different jobs and variation in optional equipment individual workers chose to wear. *Id.* And he did not limit his study to employees who donned and doffed their equipment in a deliberate manner without stopping to chat with co-workers. J.A.358, 385.

Mericle also measured employees continuing to don equipment once they were on the disassembly line (and, thus, already on paid gang-time), yet he included them in his computations. J.A.369. He did not account for the fact that employees were compensated for any donning/doffing-related activities when they had setup or teardown responsibilities. J.A.433. And he included in his average times 1.30 minutes and 2.37 minutes for cleaning knife-related equipment at the end of the shift in the Processing Floor and Slaughter Floor, respectively, see J.A.123–124, even though not all employees had to rinse their equipment at the end of their shift. Compare J.A.222 (listing items of hard equipment needed for knife-wielding jobs that employees have to rinse after their shifts), with J.A.226–227 (listing items that employees do not have to rinse but simply place in a laundry bag for the plant to wash).

Plaintiffs used Mericle's flawed averages to prove liability and to calculate damages. Their damages expert, Dr. Fox, testified that classwide damages were $6,686,082.36 for the Rule 23 class and $1,611,702.44 for the FLSA collective if one assumed that every class member worked Mericle's "average" times. J.A.410, 417–418; J.A.139. She conceded, however, that the figures would be different if one assumed that employees spent different amounts of time on donning, doffing, washing, and walking. J.A.419. For instance, at the direction of plaintiffs' counsel, Fox calculated damages assuming that these activities took each employee 15 minutes. J.A.411–412. This small subtraction from Mericle's average time dropped the Rule 23 class's damages by approximately $1.8 million. Compare J.A.139 with J.A.415.

Fox also acknowledged that, even if one assumed that every employee worked the average time from Mericle's study, the class included over 212 members who suffered no injury at all; even adding the estimated time did not result in those employees working any unpaid overtime. J.A.415. She further explained that, as Mericle's average donning/doffing times are reduced, the number of uninjured workers would increase as more employees' work hours fell below 40 for a given week or they were fully compensated by the K-Code time they received. J.A.424–425. For example, when Fox recalculated damages for the Rule 23 class using a time of 15 minutes, the number of employees allegedly owed compensation dropped by another 110. Compare J.A.139 with J.A.141. Moreover, she testified that this drop-off happens in a non-linear fashion, J.A.424–425, so her calculations were "all or nothing," meaning that "if the jury concludes the activities take

[a different number of minutes than Mericle calculated], you have no idea what kind of back wage calculations would result" without re-running the program, J.A.425.

At the close of plaintiffs' case, Tyson asked the court to decertify the class or grant judgment as a matter of law because plaintiffs had not proved all class members were injured. J.A.14 (Dkt. 270). The district court summarily denied the motion, trial continued, and the case was submitted to the jury.

6. The jury found that the class members were "'entitled to additional compensation for … the donning and doffing activities at issue in this case," and awarded damages in the amount of $2,892,378.70, substantially less than Fox had calculated for the Rule 23 class. J.A.467.

After the verdict, Tyson requested judgment as a matter of law and renewed its motion for decertification of the class. The undisputed trial testimony showed that the class contained employees from numerous departments, "all of which were comprised of many different positions, all requiring different combinations of required and optional safety or sanitary items." Dkt. 304-1, at 9. These individual differences and Mericle's failure to account for them in his study, Tyson contended, meant that Mericle's average times did not establish whether any given employee was actually undercompensated. *Id*. at 10. Moreover, Fox's testimony established that there are at least 212 class members who had zero uncompensated overtime, and the actual number of uninjured employees was much higher. Because the jury awarded a damages figure less than Fox calculated, it necessarily found that Mericle's average times were overstated and, as Fox conceded at trial, the number of uninjured class members rises if one

assumes that the amount of time spent on donning/doffing, cleaning, and walking activities is less than Mericle calculated. *Id*. at 13 (citing J.A.415). Nonetheless, these uninjured plaintiffs were included in the aggregate damages award, now making it impossible to award damages accurately after the jury rejected Fox's "all or nothing" damages total. *Id*. at 13–14.

The district court denied Tyson's motion, saying that "there [was] not a complete absence of probative facts to support the [jury's] conclusion, nor did a miscarriage of justice occur." Pet.App. at 30a.

7. On appeal, a divided panel of the Eighth Circuit affirmed. The majority recognized that "individual plaintiffs varied in their donning and doffing routines," Pet.App. 8a, and that plaintiffs "rel[ied] on inference from average donning, doffing, and walking times" to calculate the amount of uncompensated "work" time, *id*. at 11a. The majority reasoned, however, that because "Tyson had a specific company policy" and the "class members worked at the same plant and used similar equipment," "this inference [was] allowable under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 … (1946)." *Id*. at 8a. In the majority's view, plaintiffs' application of Mericle's averaged donning/doffing times to individual "employee time records to establish individual damages" meant that "[t]hey [had] prove[d] liability for the class as a whole." *Id*. at 10a.

The majority also rejected Tyson's argument that decertification was necessary "because evidence at trial showed that some class members did not work overtime and would receive no FLSA damages even if Tyson under-compensated their donning, doffing, and walking." Pet.App. 8a. The majority said "Tyson exaggerate[d] the [legal] authority for its contention,"

*id*. at 9a, but provided no further elaboration of this "exaggeration."

Judge Beam dissented. He emphasized the myriad differences between the class members, "differences in [their] donning and doffing times, K-Code payments, abbreviated gang time shifts, absenteeism, sickness, vacation [and] other relevant factors." Pet.App. 23a (Beam, J., dissenting). "While … all class members were subject to a common policy—gang-time payment," there could be "no 'common answer[]' arising from the evidence concerning the individual overtime pay questions at issue in this case" because Tyson, by issuing K-Code time, had already paid for donning and doffing in many instances and because the amount of time individual employees spent donning and doffing varied. *Id.* Thus, the common evidence could not "resolve[] [the case] in 'one stroke,'" *id*. (quoting *Wal-Mart*, 131 S.Ct. at 2551), and the class "should have been decertified," *id*.

In addition, Judge Beam found that class certification was inappropriate because it was undisputed that the class included hundreds of uninjured employees. Pet.App. 22a. As he noted, "the jury in returning only a single gross amount of damages verdict, as instructed, discounted plaintiffs' evidence by more than half, likely indicating that more than half of the putative class suffered either no damages or only a de minimis injury." *Id*. Consequently, by certifying a class with hundreds of uninjured employees, the district court would force Tyson to pay employees whom it had fully compensated, a result that would be unfair to Tyson and any class members who actually were injured. *Id*.

8. Tyson's petition for rehearing or rehearing *en banc* was denied by a vote of 6 to 5. In an opinion

respecting the denial of rehearing, Judge Benton stated his view that "*Mt. Clemens* permits the use of a reasonable inference to determine liability and damages in this context" and that plaintiffs implicitly satisfied this standard by proffering expert testimony of classwide average donning/doffing times. Pet.App. 127a–128a & n.5 (Benton, J., respecting the denial of rehr'g *en banc*). He also concluded that "Tyson has no interest in how the fund is allocated among class members," so it is not relevant to the appeal that hundreds of uninjured employees were included in the class. *Id*. at 131a.

Again, Judge Beam dissented, decrying the court's affirmance of "a professionally assembled class action lurching out of control." Pet.App. 115a (Beam, J., dissenting from denial of rehr'g). First, the dissent faulted the majority for misreading *Mt. Clemens*, which allows the use of a "just and reasonable inference" in determining damages, but *only after* plaintiffs carry the "individual burden of [proving] by a preponderance of the evidence" that "each putative class member" "performed work for which he was not properly compensated." *Id*. at 120a (internal quotation marks omitted). Applying that inference at the liability stage by using an average donning/doffing time, the dissent argued, relieved plaintiffs of their burden and resulted in awarding damages to hundreds of uninjured plaintiffs. *Id*. at 120a–121a.

Second, the dissent emphasized that the inclusion of these uninjured employees in the class—when paired with the jury's reduced aggregate damages award—underscored the inappropriateness of certifying the class in the first instance. By awarding substantially less than plaintiffs' experts advocated, the jury necessarily found Mericle's time estimates

inflated. As a result, "well more than one-half the certified class of 3,344 persons have no damages whatsoever and the balance have markedly lower damages that are now virtually impossible to accurately calculate." Pet.App. 125a. By upholding the district court's class certification, the entire class—including the hundreds of members with "no provable damages"—were made "joint beneficiaries" of the "lump sum district court judgment" but without a means to limit distributions for only proven damages. *Id*.

## SUMMARY OF ARGUMENT

I. The district court certified the class and collective action, and the panel majority affirmed, without conducting the rigorous analysis necessary to ensure that the employees were "similarly situated," 29 U.S.C. §216(b), and that questions of law or fact common to the class predominated over individual questions, Fed. R. Civ. P. 23(b)(3). Although the lower courts acknowledged that there were significant differences in the personal protective equipment worn by individual class members, the courts thought common questions predominated because all were paid under Tyson's "gang time" compensation system that allegedly failed to compensate them for all time spent on donning/doffing-related activities. That predominance analysis was fundamentally flawed because it ignored the elements of the FLSA cause of action that plaintiffs would have to prove at trial, and had no way to deal with the individual differences that are critical to a proper determination of each class member's proof of liability and entitlement to damages. See *infra* §I.A.

To prove liability and damages under the FLSA, plaintiffs must do more than show that the

challenged donning and doffing-related activities are "work" that must be included in the computation of the 40-hour "workweek." 29 U.S.C. §207(a)(1). Plaintiffs also must show that they worked more than 40 hours without receiving overtime compensation of at least "one and one-half times the regular rate" of pay. *Id.* The latter showing cannot be made with common evidence because individual class members wear different combinations of personal protective equipment that take varying amounts of time to don, doff, and rinse. See *infra* §I.B.

Having failed to recognize that individual questions play a critical role in the determination of liability and damages, the lower courts then compounded their error by allowing plaintiffs to "prove" injury and damages on a classwide basis with statistical sampling that masked these individual differences. No court would allow an individual employee to prove that *he* worked unpaid overtime by submitting evidence of the amount of time worked by *other* employees who did different activities that took a different amount of time to perform. Yet plaintiffs were allowed to "prove" classwide liability and damages by applying Mericle's average donning/doffing times to all class members even though those averages do not reflect the actual time worked by any class member. *Wal-Mart* makes clear that such a "Trial by Formula" violated Tyson's due process right to raise every available defense, and lowered plaintiffs' burden of proof in violation of the Rules Enabling Act, 28 U.S.C. §2072(b). See *infra* §I.C.

The panel majority affirmed this unjust judgment because it thought this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, permitted this use of averaging in these circumstances. It does not. *Mt.*

*Clemens* held only that an employee carries his burden of proving entitlement to damages under the FLSA "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. 680, 687 (1946). But an employee does not prove that *he* performed overtime work for which he was not properly compensated with evidence of the amount of time worked by a *fictional "average" employee* derived from a sample of different employees who did activities that took different amounts of time to perform. As the Seventh Circuit has explained, that approach confers a "windfall" on some class members while "undercompensat[ing]" others. *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013). Class certification and the classwide judgment based on such averaging cannot stand. See *infra* §I.D.

II. The decision below is fatally flawed for another, independent reason. The class and collective action includes hundreds of uninjured class members who are beneficiaries of the nearly $6 million class judgment. The federal courts have no authority to provide damages to individuals with no injury. Article III only permits federal courts to provide redress for an "injury in fact" that is traceable to the conduct of the defendant. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The FLSA likewise assigns federal courts the role of providing damages to employees who were injured by working overtime without receiving extra compensation. 29 U.S.C. §216(b). The procedural device of a class action or collective action cannot expand the jurisdiction of the federal courts or authorize the award of damages to a person who is not injured. See *infra* §II.A.

Accordingly, constitutional and statutory standing requirements permit a court to certify a class only if plaintiffs show (1) that they can prove with common evidence that *all* class members were injured, or (2) that there is a mechanism for identifying the uninjured class members and ensuring that they do not contribute to the size of the damages award and cannot recover damages. In the absence of either showing, common issues cannot predominate—individualized showings will be necessary to determine whether a particular class member is entitled to relief. And proceeding with class litigation in the absence of such showings will result in a trial that alters substantive rights, provides damages to those who are not injured, and deprives the defendant of its due process right to raise every available defense. This rigorous scrutiny must occur *before* the class is certified, and the court must be willing to reconsider its certification decision if it later appears that plaintiffs' proof is insufficient to establish classwide injury or the culling mechanism is unworkable or inadequate. See *infra* §II.B.

No such culling mechanism was used here even though plaintiffs' own damages expert acknowledged that there are hundreds of class members who worked no unpaid overtime and, thus, were not entitled to additional compensation. As a result, class members who worked no unpaid overtime are now beneficiaries of the jury's lump-sum verdict that the district court reduced to a lump-sum judgment in favor of the class. That judgment exceeds the authority of the federal courts under Article III and the FLSA and must be reversed. See *infra* §II.C.

## ARGUMENT

### I. A RULE 23 CLASS ACTION OR FLSA COLLECTIVE ACTION MAY NOT BE CERTIFIED BASED ON STATISTICAL EVIDENCE THAT MASKS, RATHER THAN ACCOUNTS FOR, DIFFERENCES AMONG INDIVIDUAL CLASS MEMBERS.

The district court failed to conduct the rigorous analysis required by this Court before certifying the class and collective action, and the panel majority below committed the same error in affirming. A proper analysis would have foreclosed certification in this case. Instead, the lower courts compounded their certification error by permitting plaintiffs to use statistical evidence to mask the fatal dissimilarities among class members. These errors require reversal of the decision below.

#### A. Prior To Certification Of A Rule 23(b)(3) Class Or A FLSA Collective Action, The Court Must Conduct A Rigorous Analysis Based On The Relevant Cause Of Action.

1. As this Court has repeatedly noted, the "class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast*, 133 S.Ct. at 1432 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979)); *Wal-Mart*, 131 S.Ct. at 2550 (same). Accordingly, when plaintiffs invoke that exception, courts must conduct "'a rigorous analysis'" to ensure that plaintiffs can satisfy the requisites of Rule 23(a)—*i.e.*, that there "are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation. *Wal-Mart*, 131 S.Ct. at 2551–52 (emphasis in original).

And when plaintiffs seek certification of a damages action, the inquiry under Rule 23(b)(3) "is even more demanding." *Comcast*, 133 S.Ct. at 1432.

Subsection (b)(3) is the "'most adventuresome' innovation" of the 1966 amendments to Rule 23, "[f]ramed for situations in which 'class-action treatment is not as clearly called' for as it is in Rule 23(b)(1) and (b)(2)." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 613–15 (1997). It permits class certification where "the questions of law or fact common to the class predominate over any questions affecting only individual members," and "a class action is superior to other methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

The predominance requirement "'invites a close look at the case before it is accepted as a class action.'" *Amchem*, 521 U.S. at 615. The determination whether "'questions of law or fact common to class members predominate'" must begin "with the elements of the underlying cause of action." *Halliburton*, 131 S.Ct. at 2184. Focusing "on the legal or factual questions that qualify each class member's case as a genuine controversy," *Amchem*, 521 U.S. at 623, a court must ask whether "a proposed class is 'sufficiently cohesive to warrant adjudication by representation,'" *Amgen*, 133 S.Ct. at 1196–97 (quoting *Amchem*, 521 U.S. at 623). Such a finding cannot be made if the requirements to prove the underlying claim reveal "'some fatal dissimilarity' among class members that would make use of the class-action device inefficient or unfair." *Id.* at 1197.

It is therefore essential that any analysis of the predominance requirement go beyond identifying the similarities among class members and the common questions that exist. Common questions do not

predominate simply because there are many similarities among class members and one or more important common legal questions. "The problem with this 'predominance' approach is that the extent of *dissimilarity* among class members' circumstances turns out to be a much more important indicator of whether claims are suitable for class action treatment than the extent of any similarity." Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995, 1001–02 (2005) (emphasis added).

Thus, in addition to identifying the common questions, the predominance analysis also must acknowledge the dissimilarities and identify a way to resolve the individual questions they present in a manner that is fair to the defendant and all class members and consistent with the applicable substantive law. *Id.* at 1045. Unless the court has a mechanism available that will fairly and accurately resolve the individual questions, it cannot have any assurance that the common questions do, in fact, predominate.

Because a damages class action may be certified only if plaintiffs prove that "*in fact*" the "'questions of law or fact common to class members predominate over any questions affecting only individual members,'" *Comcast*, 133 S.Ct. at 1432 (quoting Fed. R. Civ. P. 23(b)(3)), the plan for resolving the individual questions as well as the common ones must exist *before* the class is certified. Certification of a large class puts pressure on the defendant to settle, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978), and certification of a class that cannot fairly be litigated "injects the unfairness of potential litigation into the terms of the settlement," Erbsen, *supra*, at 1022–23. See also *Amchem*, 521 U.S. at 621

(if a class is certified "despite the impossibility of litigation," counsel would be "disarmed" because they "could not use the threat of litigation to press for a better offer").

Finally, if the case does not settle, it is essential that a court remain willing to revisit the predominance question as the facts of the case develop. Interlocutory review of a certification decision is rare. See 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* §7.2 (10th ed. 2013). And courts of appeals are reluctant to overturn jury verdicts following full trials. But, as this case illustrates, *infra* §I.B.2, the lack of predominance often becomes clear (or clearer) after discovery or during trial. When that occurs, the class must be modified or decertified. See Fed. R. Civ. P. 23(c)(1)(C) (class certification order "may be altered or amended before final judgment"); *Boucher* v. *Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("courts are 'required to reassess their class rulings as the case develops'"); *Stastny* v. *S. Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980) (court must be prepared to decertify the class "if the course of trial on the merits reveals the impropriety of class action maintenance").

2. Although the Court has not addressed the issue, the standards governing certification of a collective action under the FLSA can be no less stringent. The FLSA authorizes one or more employees to bring an action "in behalf of himself or themselves and other employees similarly situated" to recover "their unpaid minimum wages, or their unpaid overtime compensation, as the case may be," and "an additional equal amount as liquidated damages." 29 U.S.C. §216(b). Unlike Rule 23(b)(3), which requires class members to opt out if they do not want to be

covered by the lawsuit, the FLSA collective action provision requires employees to opt into the lawsuit by filing written consent "to become such a party." *Id*. Notwithstanding this difference, a collective action is no less an exception to the usual rule of non-representative litigation than a class action is. And this exception has the same potential as a class action to be "inefficient or unfair." *Amgen*, 133 S.Ct. at 1197.

Accordingly, the requirement that the plaintiffs be "similarly situated" to the other employees they seek to represent necessarily requires an analysis similar to that under Rule 23(b)(3). See *Espenscheid*, 705 F.3d at 772 (although there are "some terminological differences," the "case law has largely merged the standards" for certification of a state wage and hour claim under Rule 23(b)(3) and certification of a collective action under the FSLA). To obtain damages for other employees in addition to themselves, plaintiffs must be able to prove injury and damages for all with common evidence, or, if some individualized inquiry is needed, to resolve the individual issues fairly and accurately, without altering any party's rights under the FLSA or the Constitution.[3] Only then can a collective action

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[3] At the outset of a collective action, conditional certification simply authorizes plaintiffs to provide notice of the action. *See Genesis Healthcare Corp.* v. *Symczyk*, 133 S.Ct. 1523, 1530 (2013). After other employees have opted into the action and discovery is complete, courts frequently reconsider whether the claims of all of the employees are in fact "similarly situated." In making that determination, many courts consider factors such as (1) whether there are "'disparate factual and employment settings'" among the individual plaintiffs; (2) whether there are "'defenses available to [the] defendant [that] appear to be individual to each plaintiff'"; and (3) "'fairness and procedural considerations.'" *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d

provide employees with the "the advantage of lower individual costs to vindicate rights by the pooling of resources," and the judicial system with the benefit of an "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity," as Congress intended. *Hoffman-LaRoche, Inc.* v. *Sperling*, 493 U.S. 165, 170 (1989).

3. In this case, the district court certified a Rule 23(b)(3) class (for litigation of the Iowa state law claims) and a collective action (for litigation of the FLSA claims), and both were tried together. See *supra* pp. 8–9. The jury was instructed that "the elements of the Iowa claim," and "what the plaintiffs must prove, are the same as the federal claim," but "the Iowa claim applies to a larger number of employees and a shorter period of time than the federal claim." J.A.479. Because the jury returned a single lump sum verdict, J.A.488, the judgment cannot stand if certification of either the Rule 23 class or the FLSA collective action was improper. As explained below, both were.

### B. The Lower Courts Failed To Conduct A Rigorous Certification Analysis In This Case.

The district court certified the class and conditionally certified the collective action because it thought the "gang time compensation system" was the "'tie that binds' most all putative plaintiffs." Pet.App. 87a. The question whether that compensation system "violates the law" was thus a common question that, in the court's view, predominated over individual questions that "may

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1095, 1103 (10th Cir. 2001); *see also, e.g.*, Pet.App. 6a–7a; 7B Wright & Miller, *Federal Practice and Procedure* §1807, at 497–98 (3d ed. 2005).

exist" due to differences in the personal protective equipment worn by individual class members. *Id*. at 98a, 99a, 109a. But the court made that determination without analyzing the requirements of the law that allegedly was violated. When analyzed under the requirements of the FLSA, it is evident that the answer to the question whether the gang-time compensation system "violated the law" is *not* the same for all class members, and instead varies with the individual circumstances of each class member.

**1. District courts must rigorously analyze the elements of plaintiffs' claim before certifying a class action or a collective action.**

With certain exceptions not relevant here, the FLSA prohibits an employer from employing an employee "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. §207(a)(1). Whether the gang-time compensation system resulted in a failure to pay overtime compensation thus depends on (1) whether the various donning/doffing-related activities are "work" that must be included in the computation of the employee's "workweek;" (2) if so, whether the amount of time the employee spent on those activities, when combined with the amount of time the employee spent on other "work," resulted in a "workweek" longer than 40 hours; and, if so, (3) whether Tyson paid the employee for that overtime at a rate of at least one and one-half times the employee's regular rate of pay.

The first of these questions, even if capable of common proof, is not, by itself, dispositive of the

question whether any employee was wrongly denied overtime compensation. To make that determination, it is necessary to decide: how much time the employee spent on those activities; whether the addition of that time to the employee's workweek resulted in the performance of overtime work; and whether Tyson's system for compensating for these activities failed to compensate the employee for all of the overtime he or she worked. See *Mt. Clemens*, 328 U.S. at 688 (the employee has the burden of proving "that he has performed work and has not been paid in accordance with the statute").

Thus, while individual variations in the personal protective equipment that a particular employee wore, and the amount of time it took to don and doff that equipment, have no bearing on whether that donning and doffing is "work," these variations bear directly on the other elements necessary to establish a claim for liability and damages under the FLSA.

**2. The lower courts failed to recognize the significance of the widespread variations in the individual circumstances of class members.**

The type of personal protective equipment each plaintiff wore, and the amount of time required to don, doff and wash it, were directly relevant to each plaintiff's ability to prove that donning and doffing activities resulted in (1) overtime work (2) for which Tyson failed to compensate them. The evidence demonstrated that there were widespread variations in the amount of time employees spent on these activities. The lower courts erred in failing to recognize the import of this "'fatal dissimilarity,'" *Amgen*, 133 S.Ct. at 1197, in the predominance determination under Rule 23(b)(3) and the "similarly situated" determination under the FLSA.

The district court itself acknowledged that there were "numerous factual differences regarding the clothing and equipment employees wear." Pet.App. 99a. Although there is a "general need for employees to wear PPE for their work, exactly what kind of PPE is required differs greatly among employees." *Id.* at 86a. The "'clothing and equipment that team members wear differs from department to department and position to position.'" *Id.* at 86a–87a. Even class members employed in the same position wear different equipment because certain equipment is optional, and some individuals choose to wear it while others do not. See J.A.196–204, 206–207 (discussing examples of employees choosing to wear different optional equipment); see also *supra* pp. 5–6.

Plaintiffs' own evidence shows that there was substantial variance in the amount of time individual class members spent in donning, doffing, and cleaning protective equipment each day. The three class members who provided "representative" testimony at trial provide a vivid illustration. Each testified that he wore different items and spent different amounts of time on donning/doffing-related activities. See J.A.317–319 (more than two minutes for Brown to don equipment pre-shift); J.A.266–267 (six to seven minutes for Lovan); J.A.287–288 (ten to 12 minutes for Balderas).

Mericle likewise conceded that, in his time study, there were "different [times] for every single person [his] team measured." J.A.387. Indeed, the time study revealed wide variations in the amount of time employees spent donning and doffing different combinations of equipment. On the Processing floor, for example, employees spent between 0.583 minutes and 10.333 minutes donning equipment in the locker room pre-shift, and between 1.783 minutes and 9.267

minutes doffing and storing equipment post-shift. See J.A.142. On the Slaughter floor, employees spent between 2.1 and 13.28 minutes donning equipment in the locker room pre-shift, and between 1.967 and 5.517 minutes doffing and storing equipment post-shift. See J.A.143.

But even this understates the individual variations. Class members who wear "hard equipment," like "belly guards, knives, scabbard," have to rinse that equipment off in a wash area in the department at the end of their shift. J.A.222 (Hacker); J.A.262 (Lovan); J.A.288–289 (Balderas). Other class members, who wear items that can be laundered, such as the frock, gloves, rubber apron, and Kevlar sleeves, are not required to do any washing. They simply place these items in a laundry bag at the end of the shift, and the plant launders them. J.A.226–227 (Hacker).

Additional variation stems from the fact some class members are paid to come in before or after gang time to set up or clean up the production line. When they do so, they may don and doff their personal protective equipment during the set-up or clean-up time for which they are paid. See *supra* p. 7. And the record shows that some class members had time to don some protective gear at their work station after the production line had commenced operation—and thus were paid for that activity under Tyson's gang-time system. J.A.366–369. Mericle acknowledged that he witnessed that during his time study. J.A.369.

These factual differences raised a host of individualized issues that clearly predominated over any common legal questions about whether the donning and doffing of certain personal protective equipment is "work" that should be counted in the calculation of the employees' "workweek." Cf.

*Haliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2416 (2014) (if each class member in a large securities fraud action "would have to prove reliance individually, … common issues would not 'predominate' over individual ones, as required by Rule 23(b)(3)"); *Comcast*, 133 S.Ct. at 1433 (without a common way to prove damages for all class members in a large antitrust class action, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class"). The existence of these individual issues should have precluded class certification and conditional certification or at least led the district court to decertify the class before, if not immediately after, the trial.

The lower courts, however, brushed aside these differences. In the initial class certification decision, the district court acknowledged that "[i]ndividual questions may exist," but stated, without any detailed analysis, that it did "not believe they predominate." Pet.App. 109a. Even when it became clear that plaintiffs were going to paper over these differences and "prove" classwide liability and damages by extrapolating the average times from Mericle's study to each class member regardless of individual circumstances, the district court refused to decertify the class because the "case involves a company wide compensation policy that is applied uniformly throughout defendant's entire Storm Lake facility." *Id.* at 37a. Similarly, the Eighth Circuit conceded that "individual plaintiffs varied in their donning and doffing routines," but it believed that their suit was "not 'dominated by individual issues'" because they all "worked at the same plant and used similar equipment." *Id.* at 8a.

This reasoning falls far short of the demanding analysis required by this Court and Rule 23 in a predominance inquiry. Nor does it satisfy the comparable requirements for certification of a collective action under the FLSA. In light of the requirements of the FLSA, the time variations at issue in this case are not mere "rounding errors." To the contrary, they are outcome determinative because they control whether or not a particular plaintiff worked any unpaid overtime at all. The lower courts thus plainly erred in concluding that a class action and collective action could be certified.

### C. The Courts Below Impermissibly Allowed Plaintiffs To "Prove" Injury And Damages By Using Averages That Masked Individualized Issues.

The lower courts compounded their failure to conduct a rigorous predominance inquiry by permitting plaintiffs to "prove" liability and damages for all class members using "average" times. This use of statistics improperly disguised the presence of numerous individualized issues. It also violated the Rules Enabling Act and Tyson's due process rights.

#### 1. Plaintiffs' statistical evidence masked individual differences and thus did not "prove," but simply presumed, injury and damages.

Plaintiffs argued below, and the lower courts agreed, that the different amounts of time individual workers spent donning and doffing personal protective equipment did not foreclose class treatment, because plaintiffs could prove their case using the averages derived from Mericle's study. These averages, however, were not "common" evidence justifying class certification because they

were not probative of any individual plaintiff's actual injury or damages. Instead, they were "proof" only of the injury and damages suffered by a non-existent hypothetical plaintiff.

A few examples from the trial illustrate the point. One class member, Mr. Brown, testified that it took him just over two minutes to don his equipment. J.A.318–319. But plaintiffs asked the jury to determine liability and to award damages based on the assumption that Brown (and every other class member who worked on the Slaughter floor) spent 6.4 minutes donning equipment in the locker before the start of the shift, which was the average time observed in Mericle's study, J.A.123–124. Brown thus did not suffer the injury and damages that plaintiffs purportedly established using Mericle's averages.

Similarly, other class members, like FLSA opt-in plaintiff Leticia Montes, who worked on the Slaughter floor, did not use a knife and had *none* of the knife-related safety equipment that knife-wielding employees must don, doff, and rinse. J.A.167. Thus her donning and doffing time would be less than that of knife-wielding employees who donned, doffed and rinsed additional items. See, e.g., J.A.225–226, 118 (discussing the knife-related equipment that must be rinsed). Yet plaintiffs asked the jury to determine liability and award damages on the assumption that Montes spent the same 8.46 minutes donning equipment and 5.9 minutes doffing and washing knife-related equipment at the end of the shift that they used for class members who worked on the Slaughter floor and used a knife. J.A.123–124.

As other lower courts have recognized, the fact that it was necessary for plaintiffs to use averaging to prove their case should have been a "caution signal"

that class certification was improper. *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (reversing class certification and classwide judgment obtained with testimony of expert whose damages calculations were based "on abstract analysis of 'averages'"). It is improper to permit a class action to proceed when the supposedly "common" or "representative" evidence is a hypothetical "average" or composite plaintiff derived from a sample. Averages "are not probative of any individual's claims"; individual class members may be "well above or below the average." *Gates* v. *Rohm & Haas Co.*, 655 F.3d 255, 261, 266 (3d Cir. 2011) (denying class certification of tort claims arising from exposure to alleged carcinogen where plaintiffs' "common" proof was expert testimony based on "an average exposure, not the exposure of any actual class member"). That was plainly true here: plaintiffs' averages were used to mask differences among class members that are essential to determining whether they were denied overtime compensation and, if so, the amount of their damages.[4]

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[4] Mericle's averaging can manufacture injury as well as affect damages. Mericle's averaging increases "work" time for individuals who actually spent less time donning, doffing, and rinsing equipment than the average observed in Mericle's time study. Even modest increases in time can be dispositive as to liability. As Fox's mathematical calculations showed, *see supra* p. 14, a decrease of just a few minutes of time spent on donning/doffing-related activities resulted in 110 additional class members with no injury as well as a reduction of approximately $1.8 million in damages for the Rule 23 class.

### 2. Use of statistical averages in this case violated the Rules Enabling Act and the Due Process Clause.

Use of Mericle's averaged times not only masked important differences that should have precluded certification, but also impermissibly lessened plaintiffs' burden of proof and undermined Tyson's ability to defend itself. This violated Tyson's due process rights, see *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (due process ensures "'an opportunity to present every available defense'") (quoting *Am. Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)), and the Rules Enabling Act, which requires that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. §2072(b). See also *Wal-Mart*, 131 S.Ct. at 2561 *(*class certification cannot result in the alteration of the substantive rights of defendants or class members).

No court would allow an individual employee to meet his "burden of proving that *he* performed work for which he was not properly compensated," *Mount Clemens*, 328 U.S. at 687 (emphasis added), by submitting evidence of the amount of time worked by *other* employees who did different activities requiring a different amount of time to perform.[5] Yet that is exactly what happened here. Plaintiffs obtained an

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[5] *See*, *e.g.*, *Grochowski* v. *Phx. Constr.*, 318 F.3d 80, 88 (2d Cir. 2003) (employee's testimony that a co-worker generally worked with him, but did not always do so, insufficient to show that the co-worker worked unpaid overtime); *Callahan* v. *City of Chi.*, 2015 WL 394021, at *31 (N.D. Ill. Jan. 23, 2015) (studies showing that "'many'" taxi cab drivers earn less than minimum wage "cannot save Callahan's claims. Whether drivers other than Callahan earn or have earned the minimum wage … is irrelevant to whether Callahan herself earned that minimum"), *appeal docketed*, No. 15-1318 (7th Cir. Feb. 19, 2015).

aggregate classwide damages award by applying Mericle's average times to all class members without producing evidence that all class members actually worked overtime for which they were not compensated.

This lessening of plaintiffs' burden of proof also violated Tyson's right to due process. In individual trials, Tyson could respond to a plaintiff's claim for unpaid donning and doffing time by demonstrating, through cross-examination of the plaintiff or the testimony of other employees, that it took (or reasonably could have taken) much less time to don and doff the particular equipment that the plaintiff wore. Or Tyson could show that the plaintiff was compensated for time spent donning and doffing apart from any K-Code time, because the particular plaintiff donned equipment after "gang time" started or when the plaintiff was paid to setup or clean up the production area. See *supra* p. 7; see also J.A.90 (discussing example of an employee who did all of his post-shift washing of equipment on paid clean-up time). Indeed, one plaintiff, Mr. Balderas, testified on direct examination that it takes 30 seconds to don his hard hat, but on cross-examination conceded that he could actually do it in 2–3 seconds. J.A.297; see also J.A.266–270 (Mr. Lovan admitting on cross-examination that he can don his equipment in about two minutes less than he testified to on direct).

In this class action, however, Tyson could not raise such individualized defenses. It is not feasible to call hundreds or thousands of class members at trial, and doing so would be inconsistent with the reason the court certified the class. A defendant is not even permitted to "propound discovery on each class member's individualized issues, [as] such discovery would frustrate the rationale behind Rule 23's

representative approach to litigation." 3 William B. Rubenstein, *Newberg on Class Actions* §9:16 (5th ed. 2015). As a consequence, Tyson was forced to defend against a hypothetical or composite plaintiff derived from Mericle's averages. Rather than challenging whether individual class members suffered any injury or damages, Tyson could only attack plaintiffs' supposedly "representative" evidence as biased, unreliable, and not actually representative of anyone in the class. See, e.g., J.A.376–391.

Substituting the right to challenge an expert's study for the right to raise individualized defenses plainly "abridge[d]" and "modif[ied] [Tyson's] substantive right[s]," in violation of the Rules Enabling Act, 28 U.S.C. §2072(b). This is why several lower courts have properly recognized that class certification based on such averaging results in an impermissible "alteration of substantive" rights. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990). It creates "the requisite commonality for trial" only by "submerge[ing]" the "discrete components of the class members' claims and the [defendant's] defenses." *Id.* It likely results in a "damages figure that does not accurately reflect the number of plaintiffs actually injured" or "the amount of economic harm actually caused by defendants." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008). And it poses the "'danger of overcompensation'" in that some members of the class may benefit from the recovery even though they were not injured. *Id.* at 232; *id.* at 231 ("This kind of disconnect offends the Rules Enabling Act.").

*Wal-Mart* likewise makes clear that determining a defendant's liability to a class by extrapolation from the average of a sample is a flawed approach that cannot be used to avoid individual inquiries and

thereby allow thousands of different claims to be aggregated in a single class action. In *Wal-Mart*, this Court reversed class certification where liability and damages would be determined for a sample of class members, and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the same set to arrive at the entire class recovery—without further individualized proceedings." 131 S.Ct. at 2561. Such a "Trial by Formula," this Court unanimously held, would impermissibly abridge the defendant's rights under the Due Process Clause and the Rules Enabling Act. *Id*.

The Eighth Circuit tried to distinguish *Wal-Mart* on the grounds that "[h]ere, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet.App. 10a; see also *id*. at 13a. That is a distinction without a difference. Although plaintiffs' expert added the average donning/doffing times to the class members' actual time records, the average times were essential to plaintiffs' effort to prove whether any individual class member worked more than 40 hours without receiving overtime compensation and, if so, the amount of damages. Thus here, as in *Wal-Mart*, classwide liability was ultimately based purely on extrapolation and the erroneous assumption that each class member spent the same "average" amount of time donning, doffing, washing, and walking. And here, as in *Wal-Mart*, there was no individualized inquiry into whether individual class members were actually injured and,

if so, the amount of damages to which they were entitled.

### D. *Anderson* v. *Mt. Clemens Pottery Co.* Does Not Justify Use Of "Averages" To Mask Differences Among Individual Employees That Are Material To Damages Claims Under The Fair Labor Standards Act.

Ultimately, the panel majority below upheld plaintiffs' use of averages on the theory that drawing "inference[s]" from such evidence was "allowable" under this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.* Pet.App. 8a. That is incorrect.

*Mt. Clemens* was a collective action brought by seven employees and their local union alleging that employees were deprived of proper overtime compensation. 328 U.S. at 684. Pottery employees were allowed to "punch in" up to 14 minutes before, and were required to "punch out" within 14 minutes after, the "established working periods," but were paid for only the established working period. *Id.* at 683–84. Plaintiffs claimed that "all the time between the hours punched on the time cards constituted compensable working time." *Id.* at 684.

This Court disagreed in part. The Court found that the "employees did not prove that they were engaged in work from the moment when they punched in at the time clocks to the moment when they punched out." *Id.* at 689. It held, however, that certain "preliminary activities" and the time necessarily spent walking from the time clock to the work bench were compensable work.[6] *Id.* at 692.

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[6] Congress overruled this aspect of *Mt. Clemens* with the enactment of the Portal-to-Portal Act of 1947. *See IPB, Inc.* v.

This Court therefore reversed the court of appeals, which had denied damages for the preliminary activities because it thought plaintiffs had failed to prove "by evidence rather than conjecture the extent of overtime worked." *Id.* at 686. The Court deemed this an "improper standard of proof." *Id.* Instead, an employee "has the burden of proving that he performed work for which he was not properly compensated." *Id.* at 686–87. But if he makes that showing, an "employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687. "The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 687–88.

The rule "that precludes the recovery of uncertain and speculative damages" applies "only to situations where the fact of damage is itself uncertain." *Id.* at 688. In *Mt. Clemens*, however, the Court was "assuming that the employee has *proved* that he has performed work and *has not been paid in accordance with the statute,*" so the "damage is therefore certain," and the "*uncertainty lies only in the amount of damages*." *Id.* (emphases added). The Court therefore remanded "for the determination of the amount of walking time involved and the amount of preliminary activities performed, giving due consideration to the *de minimis* doctrine and calculating the resulting damages." *Id.* at 694.

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*Alvarez*, 546 U.S. 21, 26–28 (2005) (discussing amendments codified at 29 U.S.C. §254(a)).

Nothing in that decision allows an employee to prove that she was not properly compensated based on the amount of time that a *different employee*—much less a fictional "average" employee—spent performing *different activities* that admittedly took *different amounts of time* to perform. Nowhere did the Court suggest that the district court on remand should calculate the average time spent on *all* of the different preliminary activities performed by the employees who testified in *Anderson* and use that average time to calculate damages for every plaintiff, regardless of whether that average was a reasonable approximation of the amount of the plaintiff's unpaid overtime.

On the contrary, it explained that a method may "be used as an appropriate measure of the hours worked" only if it "*accurately reflect*[*s*] the period worked." *Id.* at 690 (emphasis added) (rejecting use of time clock records because the evidence showed that they were not an accurate reflection of "the actual time worked by employees"). For the reasons discussed above, Mericle's averages do not "accurately reflect" the amount of time that class members actually spent donning, doffing, and, in some cases, cleaning their different equipment. Instead, it is a calculation of the average time spent by an unrepresentative sample of employees who worked a variety of different jobs and had different combinations of equipment that took varying amounts of time to don, doff, and clean. Accordingly, no reasonable inference may be drawn from those averages.

As the Seventh Circuit explained in *Espenscheid* v. *DirectSat USA, LLC*, 705 F.3d 770, extrapolation from a sample is an accurate measure of other class member's unpaid overtime only if everyone in the

class has the same duties that take essentially the same amount of time to perform—which, as Mericle's time study and the testimony of plaintiffs' own witnesses show, is decidedly *not* the case here. *Id.* at 775. Plaintiffs in *Espenscheid* were technicians who claimed they were required "to do work for which they were not compensated at all, and also to work more than 40 hours a week without being paid overtime for the additional hours" in violation of the FLSA and parallel provisions of state law. *Id.* at 773. The Seventh Circuit assumed that "plaintiffs could prove that [the employer's] policies violated the [law]." *Id.* But even so, the court held that no class action could be certified because the amount of damages actually owed, if any, depended on the job duties and personal circumstances of individual class members. *Id.* at 773, 776.

In so holding, the Seventh Circuit expressly rejected plaintiffs' proposal "to get around the problem of variance by presenting testimony at trial from 42 'representative' members of the class." *Id.* at 774. There, as in this case, no random sampling had been performed. *Id.*[7] But even if by "pure happenstance" the number of unpaid hours worked each week by the employees in the sample "was equal to the average number of hours of the entire class," the sampling "would not enable the damages of any members of the class other than the 42 to be calculated." *Id.* "To extrapolate from the experience of the 42 to that of the 2341" other class members, the court held

> would require that all 2341 have done roughly the same amount of work.… No one thinks there

[7] As explained above, *supra* at pp. 12–13, Mericle admitted that his study was not a "random sample," J.A.359.

> was such uniformity. And if for example the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) under-compensate him by half.

*Id.*

The same lack of uniformity and corresponding risks of windfall payments exist here. Nothing in *Mt. Clemens* justifies such a result. Nor does that decision excuse the violations of the Rules Enabling Act and Tyson's due process rights. The decision below should therefore be reversed.

## II. CLASS CERTIFICATION IS IMPROPER UNLESS PLAINTIFFS EITHER PROVE THAT ALL CLASS MEMBERS WERE INJURED OR ENSURE THAT UNINJURED CLASS MEMBERS DO NOT CONTRIBUTE TO THE DEFENDANT'S LIABILITY OR SHARE IN ANY CLASS RECOVERY.

The decision below should be reversed for a second reason. The Eighth Circuit majority upheld certification of a class and collective action that included hundreds of uninjured plaintiffs and would allow such individuals to collect damages. In doing so, it exceeded its authority.

### A. Federal Courts Have No Authority To Provide Compensation To Persons Who Cannot Establish A Cognizable Injury.

It is axiomatic that federal courts cannot order money to be paid to an uninjured plaintiff. Article III

limits the authority of federal courts to providing redress for actual injuries that are fairly traceable to a defendant. *Lujan*, 504 U.S. at 560; see also *Lewis* v. *Casey*, 518 U.S. 343, 349 (1996) (judiciary's role is "to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm"). These requirements ensure that courts do not "undertak[e] tasks assigned to the political branches," *id*. at 349, which possess the authority (subject to certain limits) to redistribute wealth to promote the general welfare.

The FLSA likewise assigns to the courts the role of providing redress for specific injuries by creating a cause of action for employees to recover "unpaid overtime compensation" from their employer. 29 U.S.C. §216(b). Thus, the statute requires that an employee establish that he suffered an injury (or, in the words of *Mt. Clemens*, "that damage is therefore certain," 328 U.S. at 688) in order to invoke the power of the federal courts. See *supra* pp. 29–30, 41–43.

The class action and collective action devices do not—and cannot—expand the limited role of the courts. Rather,

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.

*Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality); see also *Lewis*, 518 U.S. at 357–58 & 360 n.7 ("Courts have no power to presume and remediate harm that has not been

established," and "[t]his is no less true with respect to class actions than with respect to other suits.").

It follows from the foregoing straightforward and indisputable propositions that the class action and collective action devices do not authorize courts to award damages to individuals who cannot establish a cognizable injury. Yet many lower courts have allowed named plaintiffs to sue on behalf of a class that includes uninjured members. Some have observed that, "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied." *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676–77 (7th Cir. 2009); see also *Krell* v. *Prudential Ins. Co. of Am.* (*In re Prudential Ins. Co. of Am.*), 148 F.3d 283, 307 (3d Cir. 1998) (if named plaintiffs can show they are injured and have standing, "absentee class members are not required to make a similar showing"). These courts have thus interpreted Rule 23 as not requiring proof that all class members suffered "harm or threat of immediate harm," *DG ex rel. Stricklin* v. *Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010), and have even affirmed class certification and judgment for the class when it was clear that some class members "avoid[ed] injury altogether," *In re Urethane Antitrust Litig*, 768 F.3d 1245, 1254 (10th Cir. 2014), *petition for cert. filed sub nom.* No. 14–1091 (Mar. 9, 2015).

But the fact that a single, named class plaintiff has Article III standing—and that a court can therefore adjudicate a case or controversy between that plaintiff and the defendant—does not establish that the court has authority to award damages to class members who cannot prove injury. Nor do practical necessities justify such an assertion of authority. In essence, a number of lower courts have acted on the

theory that (1) when a defendant's actions affect a large number of individuals, class litigation is the appropriate way to determine the legality of those actions and provide redress for them; (2) it is unrealistic and unfair to expect courts to determine, at the class certification stage, whether a class seeking such redress includes uninjured class members; and (3) it is therefore appropriate to certify a class as long as it does not contain a "great many" uninjured persons. *Kohen*, 571 F.3d at 677; see also, *e.g.*, *Mims* v. *Stewart Title Guar. Co.*, 590 F.3d 298, 308 (5th Cir. 2009) (following *Kohen*). These purported justifications suffer from a number of flaws.

First, there is no presumption in favor of class actions whenever a defendant's actions affect a large group of people. The framers of the 1966 amendment that added Rule 23(b)(3) noted that it applied in situations where "class-action treatment is not as clearly called for," and that class treatment "may *or may not*" be appropriate, depending on the nature of the issues, including liability defenses. Fed. R. Civ. P. 23 advisory committee's 1966 note (subd. (b)(3)) (emphasis added). Ultimately, the framers stated that the device should be used only where it can "achieve economies of time, effort, and expense, and promote uniformity of decision … *without sacrificing procedural fairness or bringing about other undesirable results*." *Id.* (emphasis added); see also *Wal-Mart*, 131 S.Ct. at 2561 (class cannot be certified on the premise that the defendant "will not be entitled to litigate its statutory defenses to individual claims").

Second, and more fundamentally, requiring defendants to pay damages to persons who cannot establish injury is not merely unfair and

"undesirable," it is beyond the authority of federal courts. Thus, even if there were a principled and administrable standard for determining what number of uninjured plaintiffs is not a "great many," *Kohen*, 571 F.3d at 677—and no such standard exists[8]—courts cannot use such concepts to expand their authority. See *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (Rule 23's "'requirements must be interpreted in keeping with Article III constraints.'") (quoting *Amchem*, 521 U.S. at 612–13). Indeed, the theory that courts can use the class action device to award damages to uninjured persons as long as there are not a "great many" of them, is no different in kind than the now-discredited theory of "fluid class" recoveries, in which courts estimated damages in gross and allowed "unclaimed" amounts to be apportioned to *future* purchasers. See *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1974), *vacated*, 417 U.S. 156 (1974).

Accordingly, as the D.C. Circuit has correctly held, the predominance requirement of Rule 23(b)(3) "demands more than common evidence" that defendants violated some law. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013). It also requires that plaintiffs can prove, "through common evidence, that *all* class members

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[8] There is no neutral and consistent way for a court to decide what is a "great many." What may sound like a small number in one context (just 2.4% of the class) could be a large number of people. *Compare Messner* v. *Northshore Univ. HealthSystem*, 669 F.3d 802, 826 (7th Cir. 2012) (affirming class certification where 2.4 percent of the class might not be injured because that "is certainly not significant enough to justify denial of certification"), *with In re Nexium Antitrust Litig.*, 777 F.3d 9, 25 (1st Cir. 2015) (Kayatta, J., dissenting) (noting that if 2.4% of the class were uninjured, that "is likely to be at least 24,000 people" and "nobody knows who the 24,000 are").

were in fact injured" by that alleged violation. *Id.* (emphasis added). "Otherwise, individual trials are necessary" to determine whether a particular class member was injured and is entitled to any relief from the court. *Id.*

### B. A Class Or Collective Action Should Be Certified Only Where There Is Evidence Of Classwide Injury Or A Mechanism That Ensures That Uninjured Members Will Not Contribute To, Or Share In, Any Damages Award.

The fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured. But where class plaintiffs cannot offer such proof, they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages. Moreover, as the First Circuit recently recognized, the mechanism for culling uninjured class members must be "'administratively feasible,'" and "protective of defendants' Seventh Amendment and due process rights." *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

Although the First Circuit properly recognized the need to cull uninjured class members, the mechanism it approved is seriously flawed and does not provide adequate protections against the dangers the court identified. The errors in *In re Nexium* thus highlight the need for this Court to require that lower courts undertake a rigorous analysis of any supposedly fail-safe mechanism. Otherwise, certification in the absence of evidence that all class members were

actually injured will inevitably (and impermissibly) allow courts to exceed their constitutional power to remedy injuries.

The first error is that *In re Nexium affirmed* class certification even though the district court had *not* identified any mechanism for culling uninjured class members, because the First Circuit thought such a mechanism *could* be identified, and defendants had not proven otherwise. *Id.* at 21, 32. That is the wrong standard. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart*, 131 S.Ct. at 2551; see also *Comcast*, 133 S.Ct. at 1432. It is therefore *plaintiffs'* burden to show that there is an administratively feasible and constitutionally valid way for culling the uninjured class members. *In re Nexium*, 777 F.3d at 36 (Kayatta, J., dissenting). As with all requirements of Rule 23, plaintiffs must make that showing *before* the class is certified, and they continue to bear the burden through the class trial and judgment. See *supra* p. 26 (discussing duty of court to decertify class if requirements of Rule 23 are not met at any time before entry of final judgment).

The second error is that the method for culling uninjured class members proposed by the First Circuit—having each class member sign an affidavit swearing that he or she was injured—is not administratively feasible and will not protect defendants' constitutional rights. What will the court do if thousands of class members file affidavits? "How exactly will defendants exercise their acknowledged right to 'challenge individual damage claims at trial?'" *In re Nexium*, 777 F.3d at 35 (Kayatta, J., dissenting). Will defendants be denied the opportunity to depose these class members or take

other discovery? See Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order," parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense"); *id.* 56(d) (when nonmovant "cannot present facts essential to justify its opposition" to a motion for summary judgment, the court may deny the motion or delay consideration to allow time for discovery).

A court cannot certify a class (or collective) action with uninjured class members when the proposed culling mechanism poses these types of unanswered questions. If there is no accurate and fair way to cull uninjured class members, it cannot truly be said that the common questions of law or fact predominate over the individual questions of which class members were injured. Thus, any mechanism to cull uninjured class members must be given the same "rigorous analysis" that is applied to other methods by which plaintiffs seek to establish that common issues predominate over individual issues. See *Comcast* 133 S.Ct. at 1432–33. Just as a court must deny class certification where plaintiffs' proposed damages models employ flawed methodologies or produce "arbitrary" measurements, *id.* at 1433, so, too, must it deny class certification when their proposed mechanism for culling uninjured class members is arbitrary, unfair, or unworkable in practice. To ignore those defects and allow class certification simply because plaintiffs or the court can identify *some* mechanism, "no matter how arbitrary" or unfair it may be, would "reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

### C. The Judgment Entered In This Case Violates The Foregoing Requirements.

The class action and collective action certifications and judgment in this case cannot stand because

neither plaintiffs nor the district court made any effort to cull out the uninjured class members so that they do not share in the judgment. Plaintiffs' damages expert candidly admitted that the class contains at least 212 employees who were not injured because they did not work *any* unpaid overtime even if it is erroneously assumed that they worked the inflated average time in Mericle's flawed study. See *supra* p. 14–15. The jury verdict establishes that the actual number of uninjured class members is even larger.

As Judge Beam explained in dissent below, the fact that the jury awarded plaintiffs less than half the damages they requested indicates that the jury disagreed with plaintiffs' "over-generous time study conclusions." Pet.App. 125a. And plaintiffs' expert admitted that if "'employee[s] worked less than [the time study] numbers … it is possible that Tyson's K-code payments already have fully paid them for that time.'" *Id.* at 123a (Beam, J., dissenting) (omission in original). Accordingly, under plaintiff's own evidence, hundreds of class members "have no damages." *Id.* at 125a. Yet *all* class members are "included as beneficiaries of the single damages verdict" and, "damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 22a–24a (Beam, J., dissenting).

Neither the panel majority below nor plaintiffs have explained how that result is consistent with the FLSA, due process, the Rules Enabling Act, or Article III. The majority's only justification for including uninjured people in the class and judgment was to say that *Tyson* "invited" the error by requesting that the jury be instructed that it could not award damages for "[a]ny employee who has already received full compensation for all activities you find

to be compensable." Pet.App. 10a (quotations omitted). As explained in Tyson's petition for certiorari, Pet. 29–30, that reasoning is flawed and cannot insulate the district court's error from appellate review. Tyson did not invite the erroneous inclusion of uninjured class members; it "vigorously" opposed class certification "at every turn in this litigation." Pet.App. 20a (Beam, J., dissenting). But when its objections to class certification were rejected by the district court, Tyson reasonably and properly requested "that the plaintiffs be held to their evidentiary burdens of proof." *Id.* In all events, courts cannot rely on "invited error" as a basis for exceeding the constitutional limits of their authority to provide compensation.

Plaintiffs vaguely asserted that there is "no basis for concern about the use of Rule 23 to expand substantive rights by affording recoveries to uninjured class members." Opp. 19. But the only authority they cite is the same jury instruction cited by the court of appeals. The judgment, however, does not say uninjured class members will not share in the recovery; it says nothing about how the award will be distributed. Pet.App. 125a–126a (Beam, J., dissenting). Nor, tellingly, have Plaintiffs proposed any way that the judgment can be limited only to injured class members. In fact, there is no way to know which class members the jury found were injured. There is just "a single-sum class-wide verdict from which each purported class member, damaged or not, will receive a pro-rata portion of the jury's one-figure verdict." *Id.* at 24a (Beam, J., dissenting). Any attempt by the district court now to reopen the judgment and reallocate the damages would raise a host of due process concerns and violate the Seventh Amendment's command that "no fact tried by a jury,

shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." See *Gasoline Prods. Co.* v. *Champlin Ref. Co.*, 283 U.S. 494, 497 (1931) (At common law there was "no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all."); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) (Seventh Amendment confers a right "to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact," either "a judge" or "another jury").

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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