#NELA16
National Employment Lawyers Association
2016 Annual Convention
June 22-25, 2016
Westin Bonaventure Hotel & Suites, Los Angeles, California

PLANNING FOR A WAGE & HOUR TRIAL—STARTING WITH DISCOVERY

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Class/Collective Action Trials

Because of the large number of witnesses, documents, and issues involved, trials of class action cases can present challenges not presented by trial of an individual's claims.[1] Before certifying a class under Federal Rule of Civil Procedure 23(b)(3), a trial court must consider the "difficulties in managing a class action," including whether trial of the case is practicable.[2] In considering whether trial of a class action is practicable, trial courts often consider procedural devices, such as bifurcation of trial issues under Fed. R. Civ. P 42, or certification of specific

[1] The authors thank Paloma Nikolic for assistance with this article.
[2] *See, e.g.*, *Duran v. U.S. Bank*, 59 Cal. 4th 1, 29 (2014).

issues under Fed. R. Civ. P. 23(c)(4). If a court bifurcates issues for trial, it must ensure that the trial plan does not violate the Seventh Amendment's re-examination clause.[3] Although it is fairly well established that differences in individual class members' damages do not preclude class certification,[4] and that bifurcation of liability and damages issues does not run afoul of the Seventh Amendment, since those sets of issues are usually distinct and separable,[5] the trial court must be careful to ensure that a defendant has an opportunity to present individual defenses.[6]

The trial of a class action will often involve the presentation of statistical proof.[7] Frequently, it will also involve anecdotal evidence[8] or representative testimony.[9]

Trial of liability issues will often include testimony from defendant company witnesses and defendant company documents.[10] It will frequently involve competing expert testimony.[11]

How the trial is structured may vary depending on the legal subject matter and the specific factual issues in dispute, and what evidence is available regarding those issues. In

[3] *See Gasoline Prods. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931).
[4] *See, e.g. Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. __, 136 S. Ct. 1036 (March 22, 2016); *Butler v. Sear*s, 727 F.3d 796 (7th Cir. 2013); *In re Whirlpool Corp. Front Loading Washer Prod. Liability Litig.*, 722 F.3d 838 (6th Cir. 2013); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).
[5] *See, e.g., Butler*, 727 F.3d at 811 (7th Cir. 2013); *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 169 (2d Cir. 2001), *abrogated on other grounds by Wal-Mart v. Dukes*, 564 U.S. 338 (2011).
[6] *See, e.g., Wal-Mart v. Dukes*, 564 U.S. 338, 366 (2011); *Duran v. U.S. Bank*, 59 Cal. 4th 1 (2014).
[7] *See, e.g., Teamsters v. United States*, 431 U.S. 324 (1977); *Bell v. Farmers Ins. Ex.*, 87 Cal. App. 4th 805 (2001); *see also, Kaye v. Freedman, Reference Guide on Statistics* in *Reference Manual on Scientific Evidence* (3d Ed., 2011); Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. 97, 117, 151 (2009).
[8] *See, e.g., Teamsters*, 431 U.S. at 338.
[9] *See, e.g., Tyson, supra* at __; *Teamsters v. United States*, 431 U.S. 324 (1977); *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946); *Morgan v. Family Dollar*, 554 F.3d 1233 (11th Cir. 2008);
[10] *Morgan v. Family Dollar*, 551 F.3d 1233, 1247-58 (11th Cir. 2008).
[11] *See, e.g., Bell v. Farmers Ins. Ex.*, 87 Cal. App. 4th 805 (2001); *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992).

general, if common issues can be tried with common evidence, a trial of the common issues through presentation of the common evidence in one trial phase makes sense and is practicable.

Class Certification and Trial Plans

In 2003, Fed. R. Civ. P. 23(c) was amended so that the requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" was replaced with language requiring that determination "at an early practicable time." The Advisory Committee notes explained that "[t]ime may be needed to gather information necessary to make the certification decision." The Advisory Committee notes then emphasized the relationship between class certification and manageability of trial:

> A critical need is to determine how the case will be tried. An increase number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.

In the section on Mass Torts, the *Manual for Complex Litigation*, Fourth (Fed. Judicial Center 2004), notes that "[t]rial plans can assist in determining whether common issues justify aggregating related cases for trial and the extent and nature of the appropriate aggregating."[12] In the section on class actions, the *Manual for Complex Litigation,* Fourth, states that "If the parties have submitted a trial plan to aid the judge in determining whether certification standards are met, the certification hearing provides an opportunity to examine the plan and its feasibility." *Id.* at §21.21.

Some state courts encourage trial courts to review trial plans when making class certification determinations.[13] Similarly, the Eleventh Circuit has recommend that lower courts

[12] Manual for Complex Litigation, Fourth §22.318, Trial Plans (Fed. Judicial Center 2004).
[13] *See, e.g., Duran*, 51 Cal. 4th at 31-32.

direct plaintiffs to present trial plans as early as practicable when seeking class certification.[14] As noted by the Court in *Vega v. T-Mobile USA, Inc.*:

> [T]he proposal of a workable trial plan will often go a long way toward demonstrating that manageability concerns do not excessively undermine the superiority of the class action vehicle. Moreover, there is a direct correlation between the importance of a realistic, clear, detailed, and specific trial plan and the magnitude of the manageability problems a putative class action presents.

564 F.3d at 1279 n.20 (11th Cir. 2009).

As a strategic matter, class counsel should view a trial plan as an opportunity, not a burden. Thinking through the trial plan early on in the case forces class counsel to determine what evidence class counsel will present on each element of the case. It will ensure class counsel develop a plan to obtain that evidence in discovery and investigation. A thorough trial plan shows class counsel the roadmap for an effective trial presentation – the road map to victory.[15]

Proportionality and Discovery of Electronically Stored Information (ESI)

Before a trial plan can be thoroughly developed and presented to the court, the evidence upon which a claim will be proven at trial must be considered and obtained through the discovery process. Accordingly, class counsel must identify early in litigation what evidence will be required to prosecute a claim, the method and/or manner by which the evidence can be presented, and how to acquire the necessary evidence in the discovery process.

Fed. R. Civ. P. 26 provides that discovery must be relevant to a claim or defense "and *proportional* to the needs of the case," which requires courts to consider, *inter alia*: the importance of the issues, the parties' relative access to the information, the parties' resources, the

[14] *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1279 n.20 (11th Cir. 2009)
[15] For additional discussion on circuit court considerations of trial management plans, compare *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013) with *Monroe v. FTS USA, LLC*, 815 F.3d 1000 (6th Cir. 2016).

importance of the discovery, and whether the burden or expense outweighs the discovery's likely benefit. Today, the prevalence of Electronically Stored Information (ESI) can be useful in identifying and managing large amounts of information in an efficient manner for use at trial. However, before counsel can request appropriate ESI in discovery, counsel must first have a thorough understanding of the universe of information that is maintained by the employer.

The process by which employers organize and manage electronic information is commonly referred to as "information governance." As attorneys are often required to negotiate the scope of discovery, it behooves plaintiffs' counsel to develop some foundational knowledge of the defendant's system of information governance to understand how information is stored and where potentially relevant ESI resides. As discovery in employment litigation is often asymmetric, the initial limitations of counsel's knowledge can be overcome by taking a 30(b)(6) deposition early in discovery, which may include any of the following topics:

- The employer's computer systems and types or forms of ESI during the relevant period;
- The software and operating systems used to collect, store, access, or retrieve ESI;
- The location, amount, and accessibility of ESI;
- The custodians who use, store, or maintain ESI, including the permissions and access granted to each;
- The issuance of any preservation notice, document retention policy, or "litigation hold";
- The employer's methods of communicating with any of its employees;
- Mechanisms, practices, or programs that the employer uses to track time spent working, employee movement, or other actions during the relevant period;
- The method and manner by which employees are compensated; and
- Methods for tracking employees' compensation.

Once the universe of ESI has been established, counsel can draft discovery requests specifically tailored to the claims and consistent with the proportionality standards under Fed. R. Civ. P. 26. Conversely, if focusing on e-discovery proves cost prohibitive or otherwise unproductive given the amount (or lack) of electronically stored information, more traditional methods of discovery can and should be utilized. Regardless, it is a worthwhile endeavor to determine early in the discovery process the potential utility of ESI in managing complex class and/or collective actions.

Bifurcation

Rule 42 provides that "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counter claims, or third-party claims." The tests for determining whether bifurcation is appropriate balance economy and possible prejudice.[16]

District courts have broad discretion in determining whether or not to bifurcate.[17] One constraint on that discretion is that the bifurcation plan must not run afoul of the Seventh Amendment's prohibition on a second jury re-examining issues decided by a first jury.[18]

The most common form of trial bifurcation in class actions is the separation of liability issues and damages issues, with liability issues resolved first.[19] The first phase of trial addresses the defendant's liability to the class using collective evidence. The specifics will vary by the type

[16] *See* 9A Wright & Miller, *Federal Practice and Procedure*, Civil 3d, §2388 (2008).
[17] *See* 4 Newberg on Class Actions, (5th ed. 2014) §11:5 at p. 18, n.10 and cases cited therein.
[18] Compare *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 170 (2d Cir. 2001) (finding no Seventh Amendment violation with bifurcation of employment discrimination class action into liability and remedy phases) with *In Re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1303 (7th Cir. 1995) (finding that trial plan under which one jury would first determine the common issues of negligence and subsequent juries would determine comparative negligence and proximate cause violated the Seventh Amendment's Reexamination clause).
[19] 4 *Newberg on Class Actions* §11:8 at 27 (5th ed. 2014); 4 *Newberg on Class Actions* §11:6 (5th ed.)

of case. Securities fraud, antitrust, product defect, employment discrimination, and wage/hour cases have all been bifurcated into liability and damages phases.[20]

If the class representatives fail in establishing liability, there is no need for a damages phase. If they succeed, the parties might settle. If they do not settle, the trial court will have to decide the most appropriate way of resolving damages issues. Resolution of damages issues can be either through an aggregate approach or an individualized approach.[21]

In *Tyson Foods v. Bouaphakeo*, 577 U.S. __, 136 S. Ct. 1036, 1050 (March 2, 2016), the U.S. Supreme Court suggested that bifurcation of liability and damages issues might be appropriate in some class action cases.

In cases where damages flow from a liability determination, bifurcation of trial might not be necessary or appropriate. For example, in a securities fraud case involving a stock traded on an efficient market, the efficient-capital-market presumption from *Basic v. Levinson*, 485 U.S. 224 (1988), would permit a single trial of both liability and damages.

As a strategic matter, counsel for plaintiffs might not want to bifurcate liability and damages. Doing so will not be necessary if damages can be proven through company records or expert testimony. Bifurcation of liability and damages only makes sense when one needs testimony from individual class members regarding damages, such as testimony about the amount of time spent working off the clock.

[20] *See, e.g., In re Farmers Ins. Ex. Claims Representations Overtime Litig.*, 336 F. Supp. 2d 1077 (D. Or. 2004), *rev'd on other grounds*, 481 F. 3d 1119 (9th Cir. 2006) (wage/hour); *Butler v. Sears* 727 F.3d 796 (7th Cir. 2013) (product defect); *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 522 F.3d 6, 28 (1st Cir. 2008) (antitrust); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985) (securities fraud); *Stender v. Lucky Stores*, 803 F. Supp. 259, (N.D. Cal 1992) (gender discrimination).

[21] Compare *Bell v. Farmers Ins. Ex.*, 87 Cal. App. 4th 805 (2001) (aggregate approach) with *In re Farmers Ins. Ex. Claims Representations Overtime Litig.*, 336 F. Supp. 2d 1077, (D. Or. 2004) (individual approach), *rev'd on other grounds*, 481 F. 3d 1119 (9th Cir. 2006).

Effect of *Comcast*

A recent U.S. Supreme Court decision – *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), caused some to question whether differences in class member damages would preclude class certification or modify the practice or bifurcating class action of trials into and liability and damages phases. Several circuit decisions have addressed those issues and concluded that differences in class member damages do not preclude class certification and that bifurcation of a trial into liability and damages issues continues to be an appropriate method of resolving common liability issues in a single trial using common evidence, while finding ways to address the individual issues raised by differences in damages.

The *Comcast* case was a federal antitrust action involving cable companies. The district court certified a liability and a damages class under Federal Rules of Civil Procedure 23(a) and (b)(3). The class was composed of more than two million Comcast subscribers. The district court found that only one of the plaintiffs' four theories of antitrust impact could be pursued in a common manner: that "Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia Designated Market Area." 133 S. Ct. at 1430-31 & n.3. The plaintiffs' expert calculated damages for the entire class using a model that failed to isolate the damages resulting from the one theory the district court approved. The district court nonetheless certified the class, and the Third Circuit affirmed.

The Supreme Court reversed, holding that the model serving as evidence of damages must measure only those damage attributable to that theory. Concluding that the model had failed to do that, the Court held that the predominance requirement of Rule 23(b)(3) was not satisfied.

The Supreme Court vacated class certification decisions in *Glazer v. Whirlpool* and *Butler v. Sears* and directed the Sixth and Seventh Circuits to reconsider their decisions in light of *Comcast*. Both circuits did so and concluded that their prior decisions certifying classes were correctly decided. Consistent with years of federal court jurisprudence, *see e.g., Blackie v. Barrack,* 524 F.2d 891, 905 (9th Cir. 1975), the Sixth and Seventh Circuits reaffirmed that differences in damages do not preclude class certification. *See also Comcast,* 133 S. Ct. at 1437 ("the predominance standard is generally satisfied even if damages are not provable in the aggregate") (Ginsberg J., dissenting).

In *In re Whirlpool*, a case involving allegations that mold and mildew grow in frontloading washing machines, Judge Stranch emphasized that the district court had certified only a liability class and reserved all issues concerning damages for individual determinations. 722 F.3d at 860. The Sixth Circuit held that certification of liability issues under Rule 23(c)(4) is appropriate post-*Comcast*.

Similarly, in *Leyva v. Medline Industries Inc*., 716 F.3d 510-514 (9th Cir. 2013), the Ninth Circuit held that certification is appropriate after *Comcast* if the class can show that damages stemmed from the defendant's actions that created the legal liability. *See also Pulaski & Middleman, LLC v. Google, Inc.,* 802 F.3d 979 (9th Cir. Sept. 21, 2015) (individual damages determinations cannot defeat class certification; *Comcast* stands for the proposition that plaintiffs must be able to show that their damages flow from defendant's actions that created the legal liability.).

In *Butler v. Sears*, 727 F.3d 796 (7th Cir. 2013), Judge Posner again explained why class certification was appropriate. *Butler v. Sears*, like *Whirlpool*, involved alleged defects in washing machines. The Seventh Circuit held that *Comcast* did not change its analysis because "there is no

possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit." The court expressly re-affirmed that the proof of individual damages does not defeat class certification.

When liability issues are certified, courts post-*Comcast* now sometimes expressly refer to Rule 23(c)(4). *See, e.g.*, *In re Whirlpool* at 860.

The Supreme Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. __, 136 S. Ct. 1036 (2016), confirmed that differences in class member damages does not preclude class certification.

Issue Certification Under Rule 23(c)(4)

Rule 23(c)(4) of the Federal Rules of Civil Procedure "recognizes that an action may be maintained as a class action as to particular issues only." It has been used in a variety of types of cases, including employment cases, and "fraud or similar case[s] [where] the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."[22] Rule 23(c)(4) may be appropriately used to decide class-wide issues before resolving individual issues.[23]

[22] Fed. R. Civ. P. 23 Advisory Committee Notes (1966); *see also Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 29–30 (E.D.N.Y. 2001) ("The framers of Rule 23(c)(4)(A) considered class actions brought under Rule 23(b)(3)—characteristically disputes that involve numerous individual proofs of causation and injury—particularly well suited for certification of fewer than all issues. Their conclusion follows from the fact that Rule 23(c)(4)(A) assists in satisfying Rule 23(b)(3)'s additional class certification requirements of predominance and superiority.").
[23] *See Chiang v. Veneman*, 385 F.3d 256, 267 (3d Cir. 2004) ("[C]ourts commonly use Rule 23(c)(4) to certify some elements of liability for class determination, while leaving other elements to individual adjudication—or, perhaps more realistically, settlement.").

Particularly in the wake of *Wal-Mart*'s holding that cases in which both money damages and injunctive relief are sought can no longer be certified under Fed. R. Civ. P. 23(b)(2), commentators and practitioners alike have embraced Rule 23(c)(4) as a way to resolve common issues using common evidence in a single proceeding before turning to the thornier issues of relief.[24] Courts recognized the utility of 23(c)(4) for trying class-wide liability issues even where questions of damages require individual proceedings. In his oft-cited[25] opinion in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[26] Judge Posner noted that while "hundreds of separate trials may be necessary to determine which class members were actually adversely affected by . . . the [allegedly discriminatory] practices and if so what loss each class member sustained," Rule 23(c)(4) provided a means of determining, on a class-wide basis, "whether the challenged practices were unlawful."[27] He further observed that if the litigation were to proceed as separate, individual suits, the suits would be "more complex if . . . the question whether [the defendant] ha[d] violated the antidiscrimination statutes must be determined anew in each case."[28] Because "[t]he practices challenged in [*McReynolds*] present[ed] a pair of issues that c[ould] most efficiently be determined on a class-wide basis," [29] he reversed the lower court's denial of class certification "under Rules 23(b)(2) and (c)(4)."[30]

[24] *See, e.g.*, Rebecca S. Bjork, *Recent Developments in Issue Certification Under Rule 23(c)(4) Require Courts to Focus on Manageability of Complex Class Actions*, BLOOMBERG BNA (2013); Patricia Bronte, George Robot, & Darin M. Williams, *"Carving at the Joint": The Precise Function of Rule 23(c)(4)*, 62 DEPAUL L. REV. 745 (2013).
[25] *See, e.g.*, Bjork, *supra* note 24, at text accompanying notes 20–25 (discussing *McReynolds*); Bronte et al., *supra* note 24, at 754–57 (same); Michael C. Harper, *Class Based Adjudication of Title VII Class in the Age of the Roberts Court*, 95 B.U.L. Rev. 1099 (2015); Smith, *supra* note 3, at 1207–10 (same).
[26] 672 F.3d 482 (7th Cir. 2012).
[27] *See id.* at 491.
[28] *See id.* at 492.
[29] *See id.* at 491.
[30] *See id.* at 492.

The Second Circuit has encouraged courts to "take full advantage of [Rule 23(c)(4)] to certify separate issues in order to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies." *Robinson v. Metro–North Commuter R.R. Co.*, 267 F.3d 147, 167 (2d Cir. 2001) (internal alterations and citation omitted).[31] Specifically, in *Robinson*, the court held that the district court abused its discretion in declining to certify the liability stage of a Title VII pattern-or-practice disparate treatment case:

> [L]itigating the pattern-or-practice liability phase for the class as a whole would both reduce the range of issues in dispute and promote judicial economy. For example, if the class should succeed and, even assuming that the remedial stage is ultimately resolved on a non-class basis, the issues and evidence relevant to these individual adjudications would be substantially narrowed . . . If, on the other hand, Metro-North succeeds at the liability stage, the question of whether it engaged in a pattern or practice of intentional discrimination that injured its African-American employees would be completely and finally determined, thereby eliminating entirely the need for a remedial stage inquiry on behalf of each class member.

Id. at 168. Post *Dukes*, several courts within the Second Circuit have recognized the continuing vitality of this holding of *Robinson*, and have held that *Robinson* applies with equal force to disparate impact cases as well. *See, e.g., Jacob v. Duane Reade, Inc.*, 602 F. App'x 3, 2015 WL 525697 at *3 (2d Cir. 2015) (affirming, in a wage-and-hour case, Rule 23(b)(3) predominance was satisfied with respect to issue of liability alone); *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116, 136, 142 (S.D.N.Y. 2014) (ordering issue certification where liability could be determined with common proof, but there was no method to calculate

[31] *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 809 (2013) (noting Second Circuit's historical support of issue certification).

classwide damages); *Easterling v. State of Conn. Dept. of Correction*, 278 F.R.D. 41, 46 (D. Conn. 2011); *The Vulcan Society, Inc. v. City of New York*, 276 F.R.D. 22, 34 (E.D.N.Y. 2011).[32]

More recently, the court in *Houser v. Pritzker* reached the same conclusion and certified a liability and injunctive relief class under Rule 23(c)(4) in a Title VII disparate impact case. *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014). The plaintiffs in *Houser* brought a case against the U.S. Census on behalf of over 250,000 minority applicants, alleging that the Census's applicant-screening process is racially discriminatory. Plaintiffs sought both injunctive relief and monetary damages. The Court found that the requirements for injunctive relief under 23(b)(2) were met, and certified a liability and injunctive relief class pursuant to 23(c)(4), which would "materially advance the litigation and make the proceedings more manageable." *Id*. at 254. After resolution of the liability issues, the Court can determine the best way to handle relief issues:

> If and when the litigation reaches that stage, the Court will have a number of management tools at its disposal to help resolve these issues. For example, the Court could appoint a special master to preside over individual damages proceedings, or could decertify the class after the liability phase and provide notice to plaintiffs as to how to proceed to prove damages. [citation] There is no need to decide at this time which avenue to pursue. What is important is that the Court has the tools to handle any management difficulties that may arise at the remedial phase of this litigation.

Id. at 254 (citing *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 231 (2d Cir. 2006)).

Outside the employment context, appellate courts have applied the same reasoning in awarding or upholding Rule 23(c)(4) certification. *See In re Deepwater Horizon*, 739 F.3d 790, 816 (5th Cir. 2014) (certification can be "accomplished by means of multi-phase trials under

[32] Scholarly authority supports issue certification, as well. *See, e.g.*, American Law Institute, *Principles of the Law of Aggregate Litigation* § 2.02(a)(1) (2010) (advocating issue certification where it would "materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives"); Manual for Complex Litigation, Fourth § 21.24 (2010) ("issues-class approach contemplates a bifurcated trial where the common issues are tried first, followed by individual trials on questions such as proximate causation and damages").

Rule 23(c)(4), which permits district courts to limit class treatment to 'particular issues' and reserve other issues for individual determination"); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) ("[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine-if liability is established-the damages of individual class members, or homogenous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed."); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013) ("Where determinations on liability and damages have been bifurcated, *see* Fed. R. Civ. P. 23(c)(4), the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis-has limited application.").

The *Teamsters* Model and the Use of Statistical Evidence to Prove Liability

Bifurcation under 23(c)(4) is also consistent with the phasing of different stages of a pattern-or-practice suit pursuant to the framework established in *Int'l Bhd. of Teamsters v. United States*.[33] As is typical in Title VII pattern-or-practice suits, the question of individual relief does not arise until the plaintiffs first demonstrate classwide liability, *i.e.*, that the employer has followed an employment policy of unlawful discrimination[34]—which is essentially the same sort of bifurcation that occurs under Rule 23(c)(4). *See, e.g., United States v. City of New York*, 07-2067, 2013 U.S. Dist. LEXIS 166616, *7-8 (E.D.N.Y. Oct. 28, 2013) (describing procedure for special masters to determine class members' eligibility for damages).

[33] 431 U.S. 324, 360–62 (1977).
[34] *See id.* at 361.

Courts have commonly bifurcated *Teamsters* pattern-or-practice cases under Rule 42(b).[35] At least one court, however, has tied the *Teamsters* bifurcation procedure to Rule 23(c)(4)[36]. In *Robinson v. Metro-N. Commuter R.R. Co.*,[37] the Second Circuit held that the lower court erred in failing to bifurcate the pattern-or-practice claim and to certify the liability stage of the claim under 23(b)(2).[38] In so doing, the court relied upon Rule 23(c)(4)(A),[39] noting that "[d]istrict courts should take full advantage of th[is] provision to certify separate issues in order . . . to reduce the range of disputed issues in complex litigation and achieve judicial efficiencies."[40] Whether applied in conjunction with Rule 42(b) or Rule 23(c)(4), *Teamsters* provides an accepted process for bifurcation in pattern-or-practice cases. In *Wal-Mart*, the Supreme Court expressly reaffirmed continuing validity of the *Teamsters* procedure. *Wal-Mart* 131 S. Ct. at 2552, 2555.

In *Teamsters*, the government used statistical evidence to establish a pattern and practice of discrimination. 431 U.S. at 337-40. The defendant had an opportunity to rebut the government's statistics. *Id.* The government also bolstered its statistical evidence with the testimony of over forty specific instances of discrimination that "brought the cold numbers convincingly to life." *Id.* at 330. In *Tyson*, the Supreme Court re-affirmed that statistics can, when appropriate, be used to prove liability. 136 S. Ct. at 1046.

[35] *See, e.g., Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 616 (11th Cir. 1983).
[36] *Robinson v. Metro-N Commuter R.R. Co*, 267 F.3d 147 (2d Cir. 2001), *abrogated on other grounds* by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
[37] *Id.*
[38] *See id.* at 167.
[39] In 2007, Rule 23 was amended to make "stylistic" changes, and what had been 23(c)(4)(A) and (B) were respectively changed to 23(c)(4), addressing issue classes, and 23(c)(5), addressing sub-classes. *See* Committee Notes to Fed. R. Civ. P. 23 (2007).
[40] *Id.* (internal quotation marks omitted).

Under the *Teamsters*' procedure, if the plaintiffs succeed in the liability phase in establishing that discrimination was the company's standard operating procedure, then there is rebuttable presumption that all class members were victims of the discriminatory policy and practice. The defendant has the opportunity in the relief stage to rebut that inference and establish that a particular individual was treated as he or she was for legitimate, non-discriminatory reasons. 431 U.S. at 361.

Representative Testimony

In *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687-88 (1946), the United States Supreme Court recognized the appropriateness of representative testimony from a few collective action members in the trial of a collective action. In *Morgan v. Family Dollar*, the Eleventh Circuit re-affirmed the continuing validity of that holding, emphasizing the "general rule" that "not all employees have to testify to prove overtime violations." 551 F.3d 1233, 1279 (11th Cir. 2008). In *Morgan*, seven of the 1,424 collective action members testified. In addition to representative testimony, plaintiffs presented testimony from company managers and evidence from company documents, including payroll records. *Id.*at 1247-58. Similar to the anecdotal testimony in *Teamsters*, the representative testimony in *Morgan v. Family Dollar* was only a portion of the evidence plaintiffs used to prove liability and entitlement to damages.

In *Tyson Foods, Inc. v. Bouaphakeo,* the U.S. Supreme Court re-affirmed that statistical evidence and representative testimony can be used to establish both liability and damages in class and collective actions. The Court noted that the specific use of statistical evidence and representative testimony will depend on the evidence being introduced and the issue for which it is being introduced: "Whether and when statistical evidence can be used to establish class wide

liability will depend on the purpose for which the evidence is being introduced and on the 'elements of the underlying cause of action.'" 136 S. Ct. at 1046.

How many class members the plaintiffs call as witnesses in a class action trial is subject to a number of strategic considerations. If the class member testimony is simply anecdotal, and meant to bring other evidence to life, then there is no set number that needs to be called. The witnesses who are called should be articulate and sympathetic. The jury should sympathize with them and believe that they suffered a real harm.

If the class member testimony is part of a statistical sample, mathematical concepts will play a role. The sample must then be randomly selected. The size of the sample must be large enough that a statistician can extrapolate from the sample to the whole within a reasonable margin of error. In most class action cases, the testimony of class members will only be anecdotal, and not part of a precise statistical sample but the issue of a scientifically-reliable sample did arise in the *Duran* case.

Whether the absent class members who testify at trial are deposed before they testify is an issue that should be clarified at a pretrial conference. If trial witness lists are exchanged after the close of discovery, it might be that the defendant does not get to depose the absent class member trial witness. In the *Farmers Ins. MDL*, 336 F. Supp. 2d 1077 (D. Or. 2004); *Pryor v. KBR*, JAMS Ref. No. 1100052926, (N.D. Cal. JAMS Nov. 2013); and *Keller v. CSU*, CGC 490977 (S.F. Super. Ct. April 2015) class action trials, class counsel called absent class member witnesses at trial whom defendants had not deposed. Some judges, however, might insist on the exchange of preliminary witness lists before the close of discovery, or might allow the deposition of trial witnesses not deposed after the close of discovery.

Mass Torts – Bellwether Trials

Although some mass tort cases have been tried on a class basis,[41] because those cases often present individualized causation issues, multidistrict litigation involving many mass tort cases that have been consolidated for pre-trial purposes frequently emphasize bellwether trials.[42] Under this procedure, the court holds trials of a few cases, in the hopes that the results from those exemplars will facilitate settlement of the remaining cases. Bellwether trials have been used in product liability, pharmaceutical, environmental, toxic tort, and medical device cases.[43]

In these cases, certification and trial of certain specific liability issues might be appropriate under Fed. R. Civ. P. 23(c)(4).

Conclusion

Like most civil cases, most class-action cases settle before trial. There have been enough class-action trials, in cases involving a variety of subject areas, however, to know that trial of class actions is manageable in many cases.[44]

Perhaps most important, in every case, in order to know whether or not the case should be certified, to know what discovery is important, and to understand the true value of the case, one needs to understand how the case will be tried.

[41] See, e.g. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986)
[42] See *generally*, 4 Newberg on Class Actions §11:11 (5th ed. 2014).
[43] *Id.* at §11:12 and cases cited therein.
[44] See, e.g., *In re Farmers Ins. Ex. Claims Representations Overtime Litigation*, 336 F. Supp. 2d 1077 (D. Or. 2004), *rev'd on other grounds*, 481 F. 3d 1119 (9th Cir. 2006) (wage/hour); *see also In re: TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. 2012) (antitrust); *Gutierrez v. Wells Fargo*, 1730 F. Supp. 2d 1080 (N.D. Cal. 2010) (consumer protection); *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992) (discrimination); *In re FPI/Agretech Securities Litig.*, MDL No. 763 (D. Haw. 1990) (securities fraud).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TYSON FOODS, INC. *v.* BOUAPHAKEO ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

No. 14–1146. Argued November 10, 2015—Decided March 22, 2016

Respondents, employees of petitioner Tyson Foods, work in the kill, cut, and retrim departments of a pork processing plant in Iowa. Respondents' work requires them to wear protective gear, but the exact composition of the gear depends on the tasks a worker performs on a given day. Petitioner compensated some, but not all, employees for this donning and doffing, and did not record the time each employee spent on those activities. Respondents filed suit, alleging that the donning and doffing were integral and indispensable to their hazardous work and that petitioner's policy not to pay for those activities denied them overtime compensation required by the Fair Labor Standards Act of 1938 (FLSA). Respondents also raised a claim under an Iowa wage law. They sought certification of their state claims as a class action under Federal Rule of Civil Procedure 23 and certification of their FLSA claims as a "collective action." See 29 U. S. C. §216. Petitioner objected to certification of both classes, arguing that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The District Court concluded that common questions, such as whether donning and doffing protective gear was compensable under the FLSA, were susceptible to classwide resolution even if not all of the workers wore the same gear. To recover for a violation of the FLSA's overtime provision, the employees had to show that they each worked more than 40 hours a week, inclusive of the time spent donning and doffing. Because petitioner failed to keep records of this time, the employees primarily relied on a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mer-

icle conducted videotaped observations analyzing how long various donning and doffing activities took, and then averaged the time taken to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department. These estimates were then added to the timesheets of each employee to ascertain which class members worked more than 40 hours a week and the value of classwide recovery. Petitioner argued that the varying amounts of time it took employees to don and doff different protective gear made reliance on Mericle's sample improper, and that its use would lead to recovery for individuals who, in fact, had not worked the requisite 40 hours. The jury awarded the class about $2.9 million in unpaid wages. The award has not yet been disbursed to individual employees. The Eighth Circuit affirmed the judgment and the award.

Held: The District Court did not err in certifying and maintaining the class. Pp. 8–17.

(a) Before certifying a class under Rule 23(b)(3), a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The parties agree that the most significant question common to the class is whether donning and doffing protective gear is compensable under the FLSA. Petitioner claims, however, that individual inquiries into the time each worker spent donning and doffing predominate over this common question. Respondents argue that individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample.

Whether and when statistical evidence such as Mericle's sample can be used to establish classwide liability depends on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U.S. 804, 809. Because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of a class. Respondents can show that Mericle's sample is a permissible means of establishing hours worked in a class action by showing that each class member could have relied on that sample to establish liability had each brought an individual action.

Anderson v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, shows why Mericle's sample was permissible in the circumstances of this case. There, where an employer violated its statutory duty to keep proper records, the Court concluded the employees could meet their burden by proving that they in fact "performed work for which [they were] improperly compensated and . . . produc[ing] sufficient evidence to

show the amount and extent of that work as a matter of just and reasonable inference." *Id.,* at 687. Here, similarly, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. Had the employees proceeded with individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. The representative evidence was a permissible means of showing individual hours worked.

This holding is in accord with *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, where the underlying question was, as here, whether the sample at issue could have been used to establish liability in an individual action. There, the employees were not similarly situated, so none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. In contrast, the employees here, who worked in the same facility, did similar work, and were paid under the same policy, could have introduced Mericle's study in a series of individual suits.

This case presents no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions. Rather, the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens*, *supra,* at 687. Pp. 8–15.

(b) Petitioner contends that respondents are required to demonstrate that uninjured class members will not recover damages here. That question is not yet fairly presented by this case, because the damages award has not yet been disbursed and the record does not indicate how it will be disbursed. Petitioner may raise a challenge to the allocation method when the case returns to the District Court for disbursal of the award. Pp. 15–17.

765 F. 3d 791, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a concurring opinion, in which ALITO, J., joined as to Part II. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 14–1146

TYSON FOODS, INC., PETITIONER *v.* PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

[March 22, 2016]

JUSTICE KENNEDY delivered the opinion of the Court.

Following a jury trial, a class of employees recovered $2.9 million in compensatory damages from their employer for a violation of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. §201 *et seq*. The employees' primary grievance was that they did not receive statutorily mandated overtime pay for time spent donning and doffing protective equipment.

The employer seeks to reverse the judgment. It makes two arguments. Both relate to whether it was proper to permit the employees to pursue their claims as a class. First, the employer argues the class should not have been certified because the primary method of proving injury assumed each employee spent the same time donning and doffing protective gear, even though differences in the composition of that gear may have meant that, in fact, employees took different amounts of time to don and doff. Second, the employer argues certification was improper because the damages awarded to the class may be distributed to some persons who did not work any uncompen-

sated overtime.

The Court of Appeals for the Eighth Circuit concluded there was no error in the District Court's decision to certify and maintain the class. This Court granted certiorari. 576 U. S. ___ (2015).

I

Respondents are employees at petitioner Tyson Foods' pork processing plant in Storm Lake, Iowa. They work in the plant's kill, cut, and retrim departments, where hogs are slaughtered, trimmed, and prepared for shipment. Grueling and dangerous, the work requires employees to wear certain protective gear. The exact composition of the gear depends on the tasks a worker performs on a given day.

Until 1998, employees at the plant were paid under a system called "gang-time." This compensated them only for time spent at their workstations, not for the time required to put on and take off their protective gear. In response to a federal-court injunction, and a Department of Labor suit to enforce that injunction, Tyson in 1998 began to pay all its employees for an additional four minutes a day for what it called "K-code time." The 4-minute period was the amount of time Tyson estimated employees needed to don and doff their gear. In 2007, Tyson stopped paying K-code time uniformly to all employees. Instead, it compensated some employees for between four and eight minutes but paid others nothing beyond their gang-time wages. At no point did Tyson record the time each employee spent donning and doffing.

Unsatisfied by these changes, respondents filed suit in the United States District Court for the Northern District of Iowa, alleging violations of the FLSA. The FLSA requires that a covered employee who works more than 40 hours a week receive compensation for excess time worked "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). In 1947, nine years after the FLSA was first enacted, Congress passed the Portal-to-Portal Act, which clarified that compensable work does not include time spent walking to and from the employee's workstation or other "preliminary or postliminary activities." §254(d). The FLSA, however, still requires employers to pay employees for activities "integral and indispensable" to their regular work, even if those activities do not occur at the employee's workstation. *Steiner* v. *Mitchell*, 350 U. S. 247, 249, 255 (1956). The FLSA also requires an employer to "make, keep, and preserve . . . records of the persons employed by him and of the wages, hours, and other conditions and practices of employment." §211(c).

In their complaint, respondents alleged that donning and doffing protective gear were integral and indispensable to their hazardous work and that petitioner's policy not to pay for those activities denied them overtime compensation required by the FLSA. Respondents also raised a claim under the Iowa Wage Payment Collection Law. This statute provides for recovery under state law when an employer fails to pay its employees "all wages due," which includes FLSA-mandated overtime. Iowa Code §91A.3 (2013); cf. *Anthony* v. *State*, 632 N. W. 2d 897, 901–902 (Iowa 2001).

Respondents sought certification of their Iowa law claims as a class action under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 permits one or more individuals to sue as "representative parties on behalf of all members" of a class if certain preconditions are met. Fed. Rule Civ. Proc. 23(a). Respondents also sought certification of their federal claims as a "collective action" under 29 U. S. C. §216. Section 216 is a provision of the FLSA that permits employees to sue on behalf of "themselves and other employees similarly situated." §216(b).

Tyson objected to the certification of both classes on the

same ground. It contended that, because of the variance in protective gear each employee wore, the employees' claims were not sufficiently similar to be resolved on a classwide basis. The District Court rejected that position. It concluded there were common questions susceptible to classwide resolution, such as "whether the donning and doffing of [protective gear] is considered work under the FLSA, whether such work is integral and [in]dispensable, and whether any compensable work is *de minim[i]s*." 564 F. Supp. 2d 870, 899 (ND Iowa 2008). The District Court acknowledged that the workers did not all wear the same protective gear, but found that "when the putative plaintiffs are limited to those that are paid via a gang time system, there are far more factual similarities than dissimilarities." *Id.*, at 899–900. As a result, the District Court certified the following classes:

> "All current and former employees of Tyson's Storm Lake, Iowa, processing facility who have been employed at any time from February 7, 2004 [in the case of the FLSA collective action and February 7, 2005, in the case of the state-law class action], to the present, and who are or were paid under a 'gang time' compensation system in the Kill, Cut, or Retrim departments." *Id.*, at 901.

The only difference in definition between the classes was the date at which the class period began. The size of the class certified under Rule 23, however, was larger than that certified under §216. This is because, while a class under Rule 23 includes all unnamed members who fall within the class definition, the "sole consequence of conditional certification [under §216] is the sending of court-approved written notice to employees . . . who in turn become parties to a collective action only by filing written consent with the court." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. ___, ___ (2013) (slip op., at 8). A

total of 444 employees joined the collective action, while the Rule 23 class contained 3,344 members.

The case proceeded to trial before a jury. The parties stipulated that the employees were entitled to be paid for donning and doffing of certain equipment worn to protect from knife cuts. The jury was left to determine whether the time spent donning and doffing other protective equipment was compensable; whether Tyson was required to pay for donning and doffing during meal breaks; and the total amount of time spent on work that was not compensated under Tyson's gang-time system.

Since the employees' claims relate only to overtime, each employee had to show he or she worked more than 40 hours a week, inclusive of time spent donning and doffing, in order to recover. As a result of Tyson's failure to keep records of donning and doffing time, however, the employees were forced to rely on what the parties describe as "representative evidence." This evidence included employee testimony, video recordings of donning and doffing at the plant, and, most important, a study performed by an industrial relations expert, Dr. Kenneth Mericle. Mericle conducted 744 videotaped observations and analyzed how long various donning and doffing activities took. He then averaged the time taken in the observations to produce an estimate of 18 minutes a day for the cut and retrim departments and 21.25 minutes for the kill department.

Although it had not kept records for time spent donning and doffing, Tyson had information regarding each employee's gang-time and K-code time. Using this data, the employees' other expert, Dr. Liesl Fox, was able to estimate the amount of uncompensated work each employee did by adding Mericle's estimated average donning and doffing time to the gang-time each employee worked and then subtracting any K-code time. For example, if an employee in the kill department had worked 39.125 hours of gang-time in a 6-day workweek and had been paid an

hour of K-code time, the estimated number of compensable hours the employee worked would be: 39.125 (individual number of gang-time hours worked)+2.125 (the average donning and doffing hours for a 6-day week, based on Mericle's estimated average of 21.25 minutes a day) – 1 (K-code hours)=40.25. That would mean the employee was being undercompensated by a quarter of an hour of overtime a week, in violation of the FLSA. On the other hand, if the employee's records showed only 38 hours of gang-time and an hour of K-code time, the calculation would be: 38+2.125–1=39.125. Having worked less than 40 hours, that employee would not be entitled to overtime pay and would not have proved an FLSA violation.

Using this methodology, Fox stated that 212 employees did not meet the 40-hour threshold and could not recover. The remaining class members, Fox maintained, had potentially been undercompensated to some degree.

Respondents proposed to bifurcate proceedings. They requested that, first, a trial be conducted on the questions whether time spent in donning and doffing was compensable work under the FLSA and how long those activities took to perform on average; and, second, that Fox's methodology be used to determine which employees suffered an FLSA violation and how much each was entitled to recover. Petitioner insisted upon a single proceeding in which damages would be calculated in the aggregate and by the jury. The District Court submitted both issues of liability and damages to the jury.

Petitioner did not move for a hearing regarding the statistical validity of respondents' studies under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), nor did it attempt to discredit the evidence with testimony from a rebuttal expert. Instead, as it had done in its opposition to class certification, petitioner argued to the jury that the varying amounts of time it took employees to don and doff different protective equipment made

the lawsuit too speculative for classwide recovery. Petitioner also argued that Mericle's study overstated the average donning and doffing time. The jury was instructed that nontestifying members of the class could only recover if the evidence established they "suffered the same harm as a result of the same unlawful decision or policy." App. 471–472.

Fox's calculations supported an aggregate award of approximately $6.7 million in unpaid wages. The jury returned a special verdict finding that time spent in donning and doffing protective gear at the beginning and end of the day was compensable work but that time during meal breaks was not. The jury more than halved the damages recommended by Fox. It awarded the class about $2.9 million in unpaid wages. That damages award has not yet been disbursed to the individual employees.

Tyson moved to set aside the jury verdict, arguing, among other things, that, in light of the variation in donning and doffing time, the classes should not have been certified. The District Court denied Tyson's motion, and the Court of Appeals for the Eighth Circuit affirmed the judgment and the award.

The Court of Appeals recognized that a verdict for the employees "require[d] inference" from their representative proof, but it held that "this inference is allowable under *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 686–688 (1946)." 765 F. 3d 791, 797 (2014). The Court of Appeals rejected petitioner's challenge to the sufficiency of the evidence for similar reasons, holding that, under the facts of this case, the jury could have drawn "a 'reasonable inference' of class-wide liability." *Id.*, at 799 (quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 687 (1946)). Judge Beam dissented, stating that, in his view, the class should not have been certified.

For the reasons that follow, this Court now affirms.

II

Petitioner challenges the class certification of the state-law claims and the certification of the FLSA collective action. The parties do not dispute that the standard for certifying a collective action under the FLSA is no more stringent than the standard for certifying a class under the Federal Rules of Civil Procedure. This opinion assumes, without deciding, that this is correct. For purposes of this case then, if certification of respondents' class action under the Federal Rules was proper, certification of the collective action was proper as well.

Furthermore, as noted above, Iowa's Wage Payment Collection Law was used in this litigation as a state-law mechanism for recovery of FLSA-mandated overtime pay. The parties do not dispute that, in order to prove a violation of the Iowa statute, the employees had to do no more than demonstrate a violation of the FLSA. In this opinion, then, no distinction is made between the requirements for the class action raising the state-law claims and the collective action raising the federal claims.

A

Federal Rule of Civil Procedure 23(b)(3) requires that, before a class is certified under that subsection, a district court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members." The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 623 (1997). This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a

prima facie showing [or] the issue is susceptible to generalized, class-wide proof." 2 W. Rubenstein, Newberg on Class Actions §4:50, pp. 196–197 (5th ed. 2012) (internal quotation marks omitted). The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.,* §4:49, at 195–196. When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123–124 (3d ed. 2005) (footnotes omitted).

Here, the parties do not dispute that there are important questions common to all class members, the most significant of which is whether time spent donning and doffing the required protective gear is compensable work under the FLSA. Cf. *IBP, Inc.* v. *Alvarez*, 546 U. S. 21 (2005) (holding that time spent walking between the locker room and the production area after donning protective gear is compensable work under the FLSA). To be entitled to recovery, however, each employee must prove that the amount of time spent donning and doffing, when added to his or her regular hours, amounted to more than 40 hours in a given week. Petitioner argues that these necessarily person-specific inquiries into individual work time predominate over the common questions raised by respondents' claims, making class certification improper.

Respondents counter that these individual inquiries are unnecessary because it can be assumed each employee donned and doffed for the same average time observed in Mericle's sample. Whether this inference is permissible becomes the central dispute in this case. Petitioner con-

tends that Mericle's study manufactures predominance by assuming away the very differences that make the case inappropriate for classwide resolution. Reliance on a representative sample, petitioner argues, absolves each employee of the responsibility to prove personal injury, and thus deprives petitioner of any ability to litigate its defenses to individual claims.

Calling this unfair, petitioner and various of its *amici* maintain that the Court should announce a broad rule against the use in class actions of what the parties call representative evidence. A categorical exclusion of that sort, however, would make little sense. A representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes—be it a class or individual action—but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. See Fed. Rules Evid. 401, 403, and 702.

It follows that the Court would reach too far were it to establish general rules governing the use of statistical evidence, or so-called representative evidence, in all class-action cases. Evidence of this type is used in various substantive realms of the law. Brief for Complex Litigation Law Professors as *Amici Curiae* 5–9; Brief for Economists et al. as *Amici Curiae* 8–10. Whether and when statistical evidence can be used to establish classwide liability will depend on the purpose for which the evidence is being introduced and on "the elements of the underlying cause of action," *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 809 (2011).

In many cases, a representative sample is "the only practicable means to collect and present relevant data" establishing a defendant's liability. Manual of Complex Litigation §11.493, p. 102 (4th ed. 2004). In a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed im-

proper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot "abridge . . . any substantive right." 28 U. S. C. §2072(b).

One way for respondents to show, then, that the sample relied upon here is a permissible method of proving class-wide liability is by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action. If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.

This Court's decision in *Anderson* v. *Mt. Clemens* explains why Mericle's sample was permissible in the circumstances of this case. In *Mt. Clemens*, 7 employees and their union, seeking to represent over 300 others, brought a collective action against their employer for failing to compensate them for time spent walking to and from their workstations. The variance in walking time among workers was alleged to be upwards of 10 minutes a day, which is roughly consistent with the variances in donning and doffing times here. 328 U. S., at 685.

The Court in *Mt. Clemens* held that when employers violate their statutory duty to keep proper records, and employees thereby have no way to establish the time spent doing uncompensated work, the "remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making" the burden of proving uncompensated work "an impossible hurdle for the employee." *Id.*, at 687; see also *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 173 (1989) ("The broad remedial goal of the statute should be enforced to the full extent of its terms"). Instead of punishing "the employee by denying him any recovery on the ground that he is unable to prove the

precise extent of uncompensated work," the Court held "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." 328 U. S., at 687. Under these circumstances, "[t]he 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 687–688.

In this suit, as in *Mt. Clemens*, respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. If the employees had proceeded with 3,344 individual lawsuits, each employee likely would have had to introduce Mericle's study to prove the hours he or she worked. Rather than absolving the employees from proving individual injury, the representative evidence here was a permissible means of making that very showing.

Reliance on Mericle's study did not deprive petitioner of its ability to litigate individual defenses. Since there were no alternative means for the employees to establish their hours worked, petitioner's primary defense was to show that Mericle's study was unrepresentative or inaccurate. That defense is itself common to the claims made by all class members. Respondents' "failure of proof on th[is] common question" likely would have ended "the litigation and thus [would not have] cause[d] individual questions . . . to overwhelm questions common to the class." *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U. S. ___, ___ (2013) (slip op., at 11). When, as here, "the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a

matter of summary judgment, not class certification." Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 107 (2009).

Petitioner's reliance on *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011), is misplaced. *Wal-Mart* does not stand for the broad proposition that a representative sample is an impermissible means of establishing class-wide liability.

Wal-Mart involved a nationwide Title VII class of over 1½ million employees. In reversing class certification, this Court did not reach Rule 23(b)(3)'s predominance prong, holding instead that the class failed to meet even Rule 23(a)'s more basic requirement that class members share a common question of fact or law. The plaintiffs in *Wal-Mart* did not provide significant proof of a common policy of discrimination to which each employee was subject. "The only corporate policy that the plaintiffs' evidence convincingly establishe[d was] Wal-Mart's 'policy' of allowing discretion by local supervisors over employment matters"; and even then, the plaintiffs could not identify "a common mode of exercising discretion that pervade[d] the entire company." *Id.,* at 355–356 (emphasis deleted).

The plaintiffs in *Wal-Mart* proposed to use representative evidence as a means of overcoming this absence of a common policy. Under their proposed methodology, a "sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master." *Id.,* at 367. The aggregate damages award was to be derived by taking the "percentage of claims determined to be valid" from this sample and applying it to the rest of the class, and then multiplying the "number of (presumptively) valid claims" by "the average backpay award in the sample set." *Ibid.* The Court held that this "Trial By Formula" was contrary to the Rules Enabling Act because it "'enlarge[d]'" the class members'

"'substantive right[s]'" and deprived defendants of their right to litigate statutory defenses to individual claims. *Ibid.*

The Court's holding in the instant case is in accord with *Wal-Mart*. The underlying question in *Wal-Mart*, as here, was whether the sample at issue could have been used to establish liability in an individual action. Since the Court held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers. By extension, if the employees had brought 1½ million individual suits, there would be little or no role for representative evidence. Permitting the use of that sample in a class action, therefore, would have violated the Rules Enabling Act by giving plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.

In contrast, the study here could have been sufficient to sustain a jury finding as to hours worked if it were introduced in each employee's individual action. While the experiences of the employees in *Wal-Mart* bore little relationship to one another, in this case each employee worked in the same facility, did similar work, and was paid under the same policy. As *Mt. Clemens* confirms, under these circumstances the experiences of a subset of employees can be probative as to the experiences of all of them.

This is not to say that all inferences drawn from representative evidence in an FLSA case are "just and reasonable." *Mt. Clemens*, 328 U. S., at 687. Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was

legal error to admit that evidence.

Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time Mericle calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equal time donning and doffing. Cf. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250–252 (1986). The District Court made no such finding, and the record here provides no basis for this Court to second-guess that conclusion.

The Court reiterates that, while petitioner, respondents, or their respective *amici* may urge adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions, this case provides no occasion to do so. Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens*, *supra*, at 687; see also Fed. Rules Evid. 402 and 702. The fairness and utility of statistical methods in contexts other than those presented here will depend on facts and circumstances particular to those cases.

B

In its petition for certiorari petitioner framed its second question presented as whether a class may be certified if it contains "members who were not injured and have no legal right to any damages." Pet. for Cert. i. In its merits brief, however, petitioner reframes its argument. It now

concedes that "[t]he 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." Brief for Petitioner 49. In light of petitioner's abandonment of its argument from the petition, the Court need not, and does not, address it.

Petitioner's new argument is that, "where class plaintiffs cannot offer" proof that all class members are injured, "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." *Ibid.* Petitioner contends that respondents have not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here.

Petitioner's new argument is predicated on the assumption that the damages award cannot be apportioned so that only those class members who suffered an FLSA violation recover. According to petitioner, because Fox's mechanism for determining who had worked over 40 hours depended on Mericle's estimate of donning and doffing time, and because the jury must have rejected Mericle's estimate when it reduced the damages award by more than half, it will not be possible to know which workers are entitled to share in the award.

As petitioner and its *amici* stress, the question whether uninjured class members may recover is one of great importance. See, *e.g.,* Brief for Consumer Data Industry Association as *Amicus Curiae.* It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.

Respondents allege there remain ways of distributing the award to only those individuals who worked more than

40 hours. For example, by working backwards from the damages award, and assuming each employee donned and doffed for an identical amount of time (an assumption that follows from the jury's finding that the employees suffered equivalent harm under the policy), it may be possible to calculate the average donning and doffing time the jury necessarily must have found, and then apply this figure to each employee's known gang-time hours to determine which employees worked more than 40 hours.

Whether that or some other methodology will be successful in identifying uninjured class members is a question that, on this record, is premature. Petitioner may raise a challenge to the proposed method of allocation when the case returns to the District Court for disbursal of the award.

Finally, it bears emphasis that this problem appears to be one of petitioner's own making. Respondents proposed bifurcating between the liability and damages phases of this proceeding for the precise reason that it may be difficult to remove uninjured individuals from the class after an award is rendered. It was petitioner who argued against that option and now seeks to profit from the difficulty it caused. Whether, in light of the foregoing, any error should be deemed invited, is a question for the District Court to address in the first instance.

* * *

The judgment of the Court of Appeals for the Eighth Circuit is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 14–1146

TYSON FOODS, INC., PETITIONER *v.* PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

[March 22, 2016]

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins as to Part II, concurring.

Petitioner Tyson Foods presents two primary arguments. First, it claims that class certification was improper because each individual plaintiff spent different amounts of time donning and doffing protective gear. Therefore, according to Tyson, whether and to what extent it owed damages to each individual employee for uncompensated overtime was not a question capable of resolution on a class-wide basis. Second, Tyson argues that the verdict cannot stand because, while no one disputes that the class as certified contains hundreds of uninjured employees, the plaintiffs have not come up with any way to ensure that those employees do not recover damages from the jury's lump-sum award.

The Court rejects the first argument and leaves the second for initial resolution by the lower courts. I join the Court's opinion in full. I write separately to explain my understanding of the Court's resolution of the case and to express my concern that the District Court may not be able to fashion a method for awarding damages only to those class members who suffered an actual injury.

I

A class may be certified under Federal Rule of Civil Procedure 23(b)(3) only if "questions of law or fact common to class members predominate over any questions affecting only individual members." A common question is one in which "the issue is susceptible to generalized, class-wide proof." *Ante*, at 9 (quoting 2 W. Rubenstein, Newberg on Class Actions §4:50, pp. 196–197 (5th ed. 2012)) (internal quotation marks omitted).

To prove liability and damages, respondents had to establish the amount of compensable (but uncompensated) donning and doffing time for each individual plaintiff. The Court properly concludes that despite the differences in donning and doffing time for individual class members, respondents could adequately prove the amount of time for each individual through generalized, class-wide proof. That proof was Dr. Mericle's representative study. As the Court observes, "each class-member could have relied on that [study] to establish liability if he or she had brought an individual action." *Ante,* at 11. And when representative evidence would suffice to prove a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought as part of a class action. See *ante,* at 10–11.

I agree with JUSTICE THOMAS that our decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), does not provide a "special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases." *Post,* at 7 (dissenting opinion). But I do not read the Court's opinion to be inconsistent with that conclusion. Rather, I take the Court to conclude that Dr. Mericle's study constituted sufficient proof from which the jury could find "the amount and extent of [each individual respondent's] work as a matter of just and reasonable inference"—the same standard of proof that would apply in any case. *Ante,* at 12 (internal quotation marks

omitted). It is with that understanding that I join the opinion of the Court.

II

As for Tyson's second argument, it is undisputed that hundreds of class members suffered no injury in this case. See Brief for Respondents 52–53; Tr. of Oral Arg. 30. The question is: which ones? The only way to know is to figure out how much donning and doffing time the jury found Tyson owed the workers in each department. But the jury returned a lump-sum verdict of $2.9 million on a class-wide basis, without specifying any particular amount of donning and doffing time used to calculate that number. If we knew that the jury had accepted the plaintiffs' proposed average donning and doffing times in calculating the verdict, we could easily overcome this problem. But we know the jury did no such thing. And with no way to reverse engineer the verdict to determine how much donning and doffing time the jury found Tyson owed workers in each department, we do not know which plaintiffs the jury found to be injured (or not).

Tyson contends that unless the District Court can fashion a means of identifying those class members not entitled to damages, it must throw out the jury's verdict and decertify the class. I agree with the Court's decision to leave that issue to be addressed in the first instance by the District Court. But I am not convinced that the District Court will be able to devise a means of distributing the aggregate award only to injured class members.

As the Court explains, each plaintiff in this case suffered actual harm only if he: (1) was not compensated for at least some compensable donning and doffing time; *and* (2) worked more than 40 hours in a workweek, including any compensable donning and doffing time. See *ante*, at 16–17. In other words, it is not enough that a plaintiff was uncompensated for compensable donning and doffing

time; unless that plaintiff also worked more than 40 hours in a week (including compensable donning and doffing time), he is owed no overtime pay and therefore suffered no injury.

If the jury credited Dr. Mericle's averages—18 minutes per day of donning and doffing time for employees in the fabrication (cut and retrim) departments, 21.25 for employees in the kill department—the District Court could have assumed that the jury found that each plaintiff from those departments donned and doffed the average amounts of time and used those averages to determine which plaintiffs had worked more than 40 hours (and awarded damages on that understanding).

The problem is that the jury obviously did not credit Dr. Mericle's averages. According to Dr. Fox, another of the plaintiffs' experts, those averages would have resulted in a $6.7 million verdict across the 3,344 member class. *Ante*, at 7. The jury, however, awarded the plaintiffs only $2.9 million.

How, then, did the jury arrive at that $2.9 million figure? The jury might have determined that Dr. Mericle's average was correct for the kill department, but overstated for the fabrication departments. Or vice versa. Or the jury might have found that Dr. Mericle's averages overstated the donning and doffing time in all departments, by varying degrees. Any of those conclusions would have been permissible on these facts, and any of those options would have reduced the jury verdict from the $6.7 million proposed by Dr. Fox. But in arriving at the $2.9 million verdict, we have no way of knowing how much donning and doffing time the jury actually found to have occurred in the kill and fabrication departments, respectively.

And there's the rub. We know that the jury must have found at least one of Dr. Mericle's two averages to be too high. And we know, as Dr. Fox testified, that if Dr. Mericle's averages were even slightly too high, hundreds of

class members would fall short of the 40-hour workweek threshold that would entitle them to damages. See *post*, at 5–6. But because we do not know how much donning and doffing time the jury found to have occurred in each department, we have no way of knowing which plaintiffs failed to cross that 40-hour threshold.

To illustrate: Take a fabrication employee and a kill employee, each of whom worked a 39-hour workweek before counting any compensable donning and doffing time. If the jury credited Dr. Mericle's kill department average but discounted his fabrication average to below one hour per week, the jury would have found that the kill employee was injured, while the fabrication employee was not. But the jury also might have done the exact opposite. We just don't know—and so we have no way to determine which plaintiffs the jury concluded were injured.

The plaintiffs believe they can surmount this obstacle. As the Court explains, they propose to work backward from the damages award by assuming that each employee donned and doffed for an identical amount of time. *Ante*, at 16–17. That won't work, however, because there is no indication that the jury made the same assumption. Indeed, the most reasonable guess is that the jury did *not* find that employees in different departments donned and doffed for identical amounts of time. After all, the plaintiffs' own expert indicated that employees in different departments donned and doffed for *different* amounts of time.

Given this difficulty, it remains to be seen whether the jury verdict can stand. The Court observes in dicta that the problem of distributing the damages award "appears to be one of petitioner's own making." *Ante*, at 17. Perhaps. But Tyson's insistence on a lump-sum jury award cannot overcome the limitations placed on the federal courts by the Constitution. Article III does not give federal courts the power to order relief to any uninjured plain-

tiff, class action or not. The Judiciary's role is limited "to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis* v. *Casey*, 518 U. S. 343, 349 (1996). Therefore, if there is no way to ensure that the jury's damages award goes only to injured class members, that award cannot stand. This issue should be considered by the District Court in the first instance. As the Court properly concludes, the problem is not presently ripe for our review.

SUPREME COURT OF THE UNITED STATES

No. 14–1146

TYSON FOODS, INC., PETITIONER *v.* PEG BOUAPHAKEO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

[March 22, 2016]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

Our precedents generally prohibit plaintiffs from maintaining a class action when an important element of liability depends on facts that vary among individual class members. This case concerns whether and when class-action plaintiffs can overcome that general rule by using representative evidence as common proof of an otherwise individualized issue. Our precedents resolve that question: Before class-action plaintiffs can use representative evidence in this way, district courts must undertake a rigorous analysis to ensure that such evidence is sufficiently probative of the individual issue to make it susceptible to classwide proof. The District Court did not satisfy that obligation here, and its failure to do so prejudiced defendant Tyson Foods at trial. The majority reaches a contrary conclusion by redefining class-action requirements and devising an unsound special evidentiary rule for cases under the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq*. I respectfully dissent.

I

"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 Corp.* v. *Behrend*, 569 U. S. ___, ___ (2013) (slip op., at 5) (internal quotation marks omitted). Plaintiffs thus "must affirmatively demonstrate [their] compliance" with Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350 (2011). Where, as here, a putative class seeks money damages, plaintiffs also must satisfy the "demanding" standard of predominance, *Comcast*, *supra,* at ___ (slip op., at 6), by proving that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. Rule Civ. Proc. 23(b)(3).

District courts must also ensure continued compliance with Rule 23 throughout the case. When a district court erroneously certifies a class, then holds a trial, reversal is required when the record shows that improper certification prejudiced the defendant. And an incorrect class certification decision almost inevitably prejudices the defendant. When a district court allows class plaintiffs to prove an individualized issue with classwide evidence, the court relieves them of their burden to prove each element of their claim for each class member and impedes the defendant's efforts to mount an effective defense.

Here, the District Court misconstrued the elements of the plaintiffs' claims. And it failed to recognize that one critical element of those claims raised an individual issue that would predominate over any common issues. The court therefore did not ask whether that individual issue was susceptible to common proof. That error, at the class certification stage, then prejudiced Tyson at trial. It was only at trial that the plaintiffs introduced the critical evidence at issue in this case. They introduced, as representative of the class, a study by the plaintiffs' expert, Dr. Kenneth Mericle. The District Court still declined to consider whether this evidence was appropriate common proof — even though the study showed wide variations

among class members on an important individual issue. These errors prejudiced Tyson and warrant reversal.

A

The District Court erred at the class certification stage by holding that the plaintiffs satisfied Rule 23's predominance requirement. The plaintiffs alleged that Tyson failed to adequately pay workers overtime for donning and doffing protective gear, in violation of the Iowa Wage Payment Collection Law, Iowa Code §91A.3 (2013). This Iowa law mirrors the FLSA.[1] An employer violates these laws if it employs someone "for a workweek longer than forty hours" and fails to adequately compensate him for the overtime. 29 U. S. C. §207(a)(1). Here, the plaintiffs could establish Tyson's liability to all class members only if: (1) the donning and doffing at issue is compensable work; (2) all employees worked over 40 hours, including donning and doffing time; and (3) Tyson failed to compensate each employee for all overtime.

The District Court should have begun its predominance inquiry by determining which elements of the plaintiffs' claims present common or individual issues, and assessed whether individual issues would overwhelm common ones. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. ___, ___ (2014) (slip op., at 14–15); *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 563 U. S. 804, 809 (2011). The plaintiffs' claims here had one element that was clearly individualized: whether each employee worked over 40 hours without receiving full overtime pay. The amount of time that employees spent on donning and doffing varied by person because individuals take different amounts of time to don and doff the same gear, and their gear varied.

[1] The plaintiffs also brought a collective action under the FLSA. Because the jury verdict combined the two actions, deficiencies in the class action require reversal of the entire judgment.

This issue was critical to determining Tyson's liability because some employees would not have worked over 40 hours per week without counting time spent on donning and doffing. The critical issue for class certification thus was whether the individualized nature of employees' donning and doffing times defeated predominance.

The District Court, however, certified a 3,344–member class without acknowledging the significance of this individual issue, let alone addressing whether it was susceptible to common proof. The court acknowledged that "[i]ndividual questions may exist" and that Tyson was objecting to being "forced to defend against *un* common evidence" because the plaintiffs had no common evidence establishing what gear all employees wore "or how long [they] spend donning and doffing their [gear]." 564 F. Supp. 2d 870, 900, 909 (ND Iowa 2008). But, in the District Court's view, common issues predominated because the plaintiffs could establish classwide liability just by showing that Tyson was not paying any employee for the time it took to don or doff basic gear. *Id.,* at 909; see *id.,* at 900, 904, 905 (similar).

The District Court thus did not give proper consideration to the significance of variable donning and doffing times. Establishing an FLSA violation across the entire class was impossible without evidence that *each* employee would have worked over 40 hours per week if donning and doffing time were included. But the District Court did not fully appreciate that this was a critical individual issue that defined Tyson's liability, and it did not analyze, in any way, whether this issue was susceptible to common proof. As a result, the District Court erred when it certified the class.

B

It was only later at trial that the plaintiffs introduced the critical evidence that they claimed could establish all

employees' donning and doffing times on a classwide basis. This evidence came from the plaintiffs' expert, Dr. Mericle, who studied how long certain Tyson employees took to don and doff various gear. This was the "most important" evidence at trial. *Ante,* at 5. Without it, the plaintiffs almost certainly could not have obtained a classwide verdict. But rather than showing that employees' donning and doffing times were susceptible to classwide proof, Mericle's evidence showed that employees' donning and doffing times varied materially. Mericle's evidence thus confirmed the inappropriateness of class treatment.

Mericle used about 53 employees per donning- or doffing-related activity to extrapolate averages for the 3,344–person class. By averaging the times that sample employees spent per activity, Mericle estimated that all cut or retrim department employees spent 18 minutes per day on uncompensated activities (including donning and doffing), while kill department employees averaged 21.25 minutes.

Mericle's data, however, revealed material variances in the amount of time that individual employees spent on the same activities. Cut and retrim employees took between 0.583 minutes and over 10 minutes to don preshift equipment at their lockers. Postshift doffing took one employee less than two minutes, and another over nine minutes. Kill department employees had similar variances. No two employees performed the same activity in the same amount of time, and Mericle observed "a lot of variation within the activity." App. 387.

The plaintiffs' trial evidence also showed that variances in the amount of time that employees spent on donning and doffing activities significantly affected the number of class members who could assert overtime claims. The plaintiffs' other expert, Dr. Liesl Fox, added Mericle's average times to individual employees' timesheets to determine which class members had overtime claims. She discovered that 212 of the 3,344 class members had no

claims at all because they had not worked over 40 hours per week. If Mericle's averages even slightly overestimated average donning and doffing times, another 282 class members would have no overtime claims. If average donning or doffing times dropped from 18–21 minutes to 15 minutes, Fox stated, another 110 employees had no overtime claims. According to Fox, incremental changes to donning and doffing times mattered so much that her estimated damages figure ($6.6 million) would be meaningless if the jury discounted Mericle's data at all. Yet the jury ultimately rejected that damages figure—seemingly disagreeing that Mericle's average times reflected the amount of time that every class member spent donning and doffing.

Because the District Court did not evaluate Mericle's and Fox's evidence in its initial class certification decision, it should have revisited certification when faced with this evidence at trial. It declined to do so even after Tyson objected to using this evidence to establish the amount of time all class members spent donning and doffing. See 2011 WL 3793962 (ND Iowa, Aug. 25, 2011) (rejecting decertification motion); 2012 WL 4471119 (ND Iowa, Sept. 26, 2012) (summarily denying post-trial decertification). The court thus never made findings or analyzed whether, under Rule 23(b)(3), Mericle's study could be used as common proof of an individual issue that would otherwise preclude class treatment.

The District Court's jury instructions did not cure this deficiency. No instruction could remedy a court's failure to address why an individual issue was susceptible to common proof. In any event, the court instructed the jury that "expert testimony"—like Mericle's—should get "as much weight as you think it deserves." App. 471. The court also let the jury rely on representative evidence to establish each class member's claim even if the jury believed that employees' donning and doffing times varied considerably.

See *ibid.*

In sum, the plaintiffs at no time had to justify whether the variability among class members here was too much for representative evidence to fill the gap with common proof. Nor did the District Court address whether Mericle's study—which showed significant variability in how much time employees spent on donning and doffing—was permissible common proof. These errors created an unacceptable risk that Tyson would be held liable to a large class without adequate proof that each individual class member was owed overtime. Before defendants can be forced to defend against a class action, courts must be sure that Rule 23's criteria are met. The District Court's failure to do so warrants reversal.

II

The majority reaches a contrary result by erring in three significant ways. First, the majority alters the predominance inquiry so that important individual issues are less likely to defeat class certification. Next, the majority creates a special, relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases by misreading *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946). Finally, the majority points to Tyson's litigation strategy and purported differences from prior Rule 23 precedents. None of these justifications withstands scrutiny.

A

The majority begins by redefining the predominance standard. According to the majority, if some "'central issues'" present common questions, "'the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Ante*, at 9 (quoting, 7AA C.

Wright, A. Miller, & M. Kane, Federal Practice & Procedure §1778, pp. 123–124 (3d ed. 2005; footnotes omitted)).

We recently—and correctly—held the opposite. In *Comcast,* we deemed the lack of a common methodology for proving damages fatal to predominance because "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." 569 U. S., at ___ (slip op., at 7).[2] If, as the majority states, this case presents "no occasion" to announce "broad and categorical rules governing the use of representative and statistical evidence in class actions," *ante,* at 15, it should most certainly not present an occasion to transform basic aspects of the predominance inquiry.

B

The majority further errs in concluding that the representative evidence here showed that class members' claims were susceptible to common proof. See *ante,* at 8–15. As the majority observes, representative evidence can be used to prove an individual issue on a classwide basis if each class member, in an individual action, could rely on that evidence to prove his individual claim. *Ante,* at 11. But that premise should doom the plaintiffs' case. Even testifying class members would seem unable to use Mericle's averages. For instance, Mericle's study estimated that kill department employees took an average 6.4 minutes to don equipment at their lockers before their

[2] The majority relies on the same treatise citations that the *Comcast* dissent invoked to argue that individualized damages calculations should never defeat predominance. 569 U. S., at ___–___ (slip op., at 3–4) (opinion of BREYER, J.). Since then, these treatises have acknowledged the tension between their views of predominance and *Comcast.* See 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure, §1778, p. 37 (3d ed. Supp. 2015); 2 W. Rubenstein, Newberg on Class Actions §4:54, p. 21 (5th ed. Supp. June 2015).

shift—but employee Donald Brown testified that this activity took him around 2 minutes. Others also testified to donning and doffing times that diverged markedly from Mericle's estimates. So Mericle's study could not sustain a jury verdict in favor of these plaintiffs, had they brought individual suits.

According to the majority, this disparity between average times and individual times poses no problem because *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, allows plaintiffs to use such representative evidence as common proof. See *ante,* at 11–14. In the majority's view, *Mt. Clemens* established that (1) if the employer did not record the time that employees spent on compensable work, employees can use representative evidence to establish the employer's liability, *ante,* at 11–12; and (2) employees can use "the experiences of a subset of employees" to establish "the experiences of all of them" if "each employee worked in the same facility, did similar work[,] and was paid under the same policy," *ante,* at 14.

The majority's reliance on *Mt. Clemens* is questionable given that decision's shaky foundations. Seventy years ago, *Mt. Clemens* construed the FLSA broadly to vindicate the Court's understanding of the FLSA's "remedial" purposes. 328 U. S., at 687. Within a year, Congress rejected that interpretation. Citing the "emergency" this Court had created by spurring "excessive and needless litigation," Congress repudiated this Court's understanding of what the FLSA meant by "work" and the "workweek" and limited employees' ability to sue collectively. 29 U. S. C. §§251(a)–(b); see *Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U. S. ___, ___ (2014) (slip op., at 3–5) (noting repudiation in the Portal-to-Portal Act of 1947); *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 173 (1989) (noting repudiation of representative actions). Since then, this

Court has decided many FLSA cases, but has never relied on *Mt. Clemens* to do so.[3]

Putting these concerns aside, the majority today goes beyond what *Mt. Clemens* held. First, *Mt. Clemens* does not hold that employees can use representative evidence in FLSA cases to prove an otherwise uncertain element of liability. *Mt. Clemens* involved an employer's alleged failure to pay employees for time they spent walking to and from their work spaces and on preshift preparatory activities. See 328 U. S., at 684–685. The Court held that the FLSA required employers to compensate employees for those activities. *Id.,* at 690–692 (overruled by 29 U. S. C. §§252, 254). The employer was thus presumptively liable to all employees because they all claimed to work 40 hours per week. See Record in *Mt. Clemens*, O.T. 1945, No. 342 (Record), pp. 10–11 (complaint). All additional uncompensated work was necessarily unpaid overtime. That explains why the Court "assum[ed] that the employee has proved that he has performed work and has not been paid in accordance with the statute." 328 U. S., at 688.

Mt. Clemens also rejected the notion that employees who had *already* established the employer's liability had to prove damages using precise, employee-specific records. *Id.*, at 687. Rather, if the employer failed to keep records but its liability was certain, employees could use evidence that "show[s] the amount and extent of that work as a

[3] THE CHIEF JUSTICE believes that the majority does not actually depend upon *Mt. Clemens* as a special evidentiary rule, and instead applies "the same standard of proof that would apply in any case." *Ante*, at 2. That interpretation is difficult to credit given that the majority never explains why Dr. Mericle's representative evidence could have sustained a jury finding in favor of any individual employee in an individual case, and instead devotes several paragraphs to the proposition that "[t]his Court's decision in [*Mt. Clemens*] explains why Dr. Mericle's sample was permissible in the circumstances of this case." *Ante,* at 11; see *id.,* at 11-12.

matter of just and reasonable inference." *Ibid.* The Court, however, limited this holding to instances where the employer's FLSA violation was "certain," as in *Mt. Clemens* itself. *Id.,* at 688; see *ibid.* (inference permissible "as to the extent of the damages"). *Mt. Clemens* does not justify the use of representative evidence in this case, where Tyson's liability to many class members was uncertain.

Second, the majority misreads *Mt. Clemens* as "confirm[ing]" that when employees "worked in the same facility, did similar work and w[ere] paid under the same policy," representative evidence can prove all of their claims. *Ante*, at 14. *Mt. Clemens* said nothing about whether or why the employees there shared sufficient similarities for their claims to be susceptible to common proof. The *Mt. Clemens* plaintiffs were the local union and seven employees. See 328 U. S., at 684. They brought a representative action, a type of collective action that allowed employees to designate a union to pursue their claims for them. See §16(b), 52 Stat. 1069; Record 7 (complaint). Some 300 employees did so. See *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F. 2d, 461 (CA6 1945); Record 33–41. The District Court did not make findings about what made these employees similar, instead reasoning that the FLSA's broad objectives supported a liberal approach to allowing class suits. Record 29–32 (June 13, 1941, order). This Court also said nothing about whether the employees suffered the same harm in the same manner; that issue was not before it. In *Mt. Clemens*' aftermath, however, Congress eliminated representative actions, like the one in *Mt. Clemens*, that required too few similarities among plaintiffs and allowed plaintiffs "not themselves possessing claims" to sue. *Hoffman-La Roche*, *supra*, at 173. *Mt. Clemens* thus offers no guidance about what degree of similarity among employees suffices for representative evidence to establish all employees' experiences.

In any event, *Mt. Clemens* did not accept that the representative evidence there would be probative even were the employees sufficiently similar. All *Mt. Clemens* decided was that the lack of precise data about the amount of time each employee worked was not fatal to their case. 328 U. S., at 686–687. The Court then remanded the case, leaving the lower courts to "draw whatever reasonable inferences can be drawn from the employees' evidence," if any. *Id.*, at 693–694.[4] *Mt. Clemens* therefore does not support the majority's conclusion that representative evidence can prove thousands of employees' FLSA claims if they share a facility, job functions, and pay policies. See *ante,* at 14.

By focusing on similarities irrelevant to whether employees spend variable times on the task for which they are allegedly undercompensated, the majority would allow representative evidence to establish classwide liability even where much of the class might not have overtime claims at all. Whether employees work in one plant or many, have similar job functions, or are paid at the same rate has nothing to do with how fast they walk, don, or doff—the key variables here for FLSA liability.

The majority suggests that *Mt. Clemens*' evidentiary rule is limited to cases where the employer breaches its obligation to keep records of employees' compensable work. See *ante,* at 11–12. But that limitation is illusory. FLSA cases often involve allegations that a particular activity is uncompensated work. Just last Term, we re-

[4] If anything, *Mt. Clemens* suggests that the representative evidence here is impermissible. The Court affirmed that the District Court's proposed "formula of compensation," calculated based on estimated average times it derived from employees' representative testimony, was impermissible. 328 U. S., at 689; see 149 F. 2d, at 465 ("It does not suffice for the employee to base his right to recover on a mere estimated average of overtime worked.").

jected class-action plaintiffs' theory that waiting in an antitheft security screening line constitutes work. See *Integrity Staffing Solutions, Inc.*, 574 U. S. at ___ (slip op., at 1). The majority thus puts employers to an untenable choice. They must either track any time that might be the subject of an innovative lawsuit, or they must defend class actions against representative evidence that unfairly homogenizes an individual issue. Either way, the majority's misinterpretation of *Mt. Clemens* will profoundly affect future FLSA-based class actions—which have already increased dramatically in recent years. Erichson, CAFA's Impact On Class Action Lawyers, 156 U. Pa. L. Rev. 1593, 1617 (2008).

C

The majority makes several other arguments why Mericle's study was adequate common proof of all class members' experiences. None has merit.

First, the majority contends that, because Tyson's trial defense—that Mericle's study was unrepresentative or inaccurate—was "itself common," Tyson was "not deprive[d] . . . of its ability to litigate individual defenses." *Ante,* at 12. But looking to what defenses remained available is an unsound way to gauge whether the class-action device prevented the defendant from mounting individualized defenses. That Tyson was able to mount only a *common* defense confirms its disadvantage. Testifying class members attested to spending less time on donning and doffing than Mericle's averages would suggest. Had Tyson been able to cross-examine more than four of them, it may have incurred far less liability. See *supra*, at 9–10.

Second, the majority argues that Tyson's failure to challenge Mericle's testimony under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), left to the jury any remaining questions about the value of this evidence. *Ante,* at 14–15. But *Comcast* rejected this

argument. Failing to challenge evidence under *Daubert* precludes defendants from "argu[ing] that [the] testimony was not admissible," but it does not preclude defendants from "argu[ing] that the evidence failed to show that the case is susceptible to awarding damages on a class-wide basis." *Comcast,* 569 U. S., at ___, n. 4 (slip op., at 5, n. 4) (internal quotation marks omitted).

Finally, the majority's attempts to distinguish this case from *Wal-Mart* are unavailing. See *ante,* at 13–14. *Wal-Mart* involved a nationwide Title VII class action alleging that Wal-Mart's policy of delegating employment decisions to individual store managers let managers exercise their discretion in a discriminatory manner. See 564 U. S., at 342. We held that discretionary decisionmaking could not be a common policy uniting all class members' claims because managers presumptively exercise their discretion in an individualized manner. See *id.*, at 355–356. Some may rely on performance-based criteria; others may use tests; yet others might intentionally discriminate. *Ibid.* Because of this variability, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's." *Ibid.*

Moreover, the *Wal-Mart* plaintiffs' representative evidence—120 employee anecdotes—did not make this individualized issue susceptible to common proof. *Id.,* at 358. Using 120 anecdotes to represent the experiences of 1.5 million class members was too far below the 1:8 ratio of anecdotes to class members that our prior cases accepted. *Ibid.* Thus, this representative evidence was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory." *Ibid.*

The plaintiffs' reliance on Mericle's study fails for the same reasons. Just as individual managers inherently make discretionary decisions differently, so too do individual employees inherently spend different amounts of time donning and doffing. And, just as 120 employee anecdotes

could not establish that all 1.5 million class members faced discrimination, neither can Mericle's study establish that all 3,344 class members spent the same amount of time donning and doffing. Like the 120 Wal-Mart anecdotes, Mericle's study—which used about 57 employees per activity to extrapolate times for 3,344—falls short of the 1:8 ratio this Court deems "significant" to the probative value of representative evidence. See *id.,* at 358.

III

I agree with the majority's conclusion in Part II–B that we should not address whether a class action can be maintained if a class contains uninjured members. Given that conclusion, however, I am perplexed by the majority's readiness to suggest, in dicta, that Tyson's opposition to bifurcating the proceedings might be invited error. *Ante*, at 17. I see no reason to opine on this issue.

* * *

I respectfully dissent.

2016 WL 814329
Only the Westlaw citation is currently available.
United States Court of Appeals,
Sixth Circuit.

Edward MONROE, Fabian Moore, and Timothy Williams, on behalf of themselves and all others similarly situated, Plaintiffs–Appellees,
v.
FTS USA, LLC; UniTek USA, LLC, Defendants–Appellants.

No. 14–6063.
|
Argued: Oct. 6, 2015.
|
Decided and Filed: March 2, 2016.

Synopsis

Background: Employees brought action against employer under Fair Labor Standards Act (FLSA), alleging that employer implemented a company-wide policy of requiring employees to systematically underreport overtime hours. The United States District Court for the Western District of Tennessee, John T. Fowlkes, Jr., J., 257 F.R.D. 634, entered an order certifying case as a collective action, and subsequently denied employer's motion for judgment as a matter of law after a jury returned a verdict for employees. Employer appealed.

Holdings: The Court of Appeals, Stranch, Circuit Judge, held that:

[1] employees were similarly situated;

[2] employer's claimed right to present individualized defenses did not warrant decertification;

[3] representative testimony was appropriate in proving liability for nontestifying employees;

[4] estimated-average approach was appropriate in calculating damages; and

[5] district court improperly used a 1.5 multiplier to calculate damages.

Affirmed in part, reversed in part, and remanded.

Sutton, Circuit Judge, filed an opinion concurring in part and dissenting in part.

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 2:08–cv–02100 —John Thomas Fowlkes, Jr., District Judge.

Attorneys and Law Firms

ARGUED: Miguel A. Estrada, Gibson, Dunn & Crutcher LLP, Washington, D.C., for Appellants. Adam W. Hansen, Nichols Kaster, PLLP, Minneapolis, Minnesota, for Appellees. **ON BRIEF:**Miguel A. Estrada, Gibson, Dunn & CRUTCHER LLP, Washington, D.C., Colin D. Dougherty, Jonathan D. Christman, Fox Rothschild LLP, Blue Bell, Pennsylvania, for Appellants. Adam W. Hansen, Rachhana T. Srey, Anna P. Prakash, Nichols Kaster, PLLP, Minneapolis, Minnesota, William B. Ryan, Bryce W. Ashby, Donati Law Firm, LLP, Memphis, Tennessee, for Appellees. William C. Jhaveri–Weeks, Goldstein, Borgen, Dardarian & HO, Oakland, California, for Amicus Curiae.

Before BOGGS, SUTTON, and STRANCH, Circuit Judges.

STRANCH, J., delivered the opinion of the court in which BOGGS, J., joined. SUTTON, J. (pp. 31–42), delivered a separate opinion concurring in part and dissenting in part.

OPINION

STRANCH, Circuit Judge.

***1** Edward Monroe, Fabian Moore, and Timothy Williams brought this Fair Labor Standards Act (FLSA) claim, on behalf of themselves and others similarly situated, against their employers, FTS USA, LLC and its parent company, UniTek USA, LLC. FTS is a cable-television business for which the plaintiffs work or worked as cable technicians. The district court certified the case as an FLSA collective action, allowing 293 other technicians (collectively, the FTS Technicians) to opt in. FTS Technicians allege that FTS implemented a company-wide time-shaving policy that required its employees to systematically underreport their overtime hours. A jury returned verdicts in favor of the class, which the district court upheld before calculating

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and awarding damages. We AFFIRM the district court's certification of the case as a collective action and its finding that sufficient evidence supports the jury's verdicts. We REVERSE the district court's calculation of damages and REMAND the case for recalculation of damages consistent with this opinion.

I. BACKGROUND

A. Facts

FTS contracts with various cable companies, such as Comcast and Time Warner, to provide cable installation and support, primarily in Tennessee, Alabama, Mississippi, Florida, and Arkansas. To offer these services, FTS employs technicians at local field offices, called "profit centers." FTS's company hierarchy includes a company CEO and president, regional directors, project managers at each profit center, and a group of supervisors. FTS Technicians report to the supervisors and project managers. FTS's parent company, UniTek, is in the business of wireless, telecommunication, cable, and satellite services, and provides human resources and payroll functions to FTS.

All FTS Technicians share substantially similar job duties and are subject to the same compensation plan and company-wide timekeeping system. FTS Technicians report to a profit center at the beginning of each workday, where FTS provides job assignments to individual technicians and specifies two-hour blocks in which to complete certain jobs. Regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." Time is recorded by hand, and FTS project managers transmit technicians' weekly timesheets to UniTek's director of payroll. FTS Technicians are paid pursuant to a piece-rate compensation plan, meaning each assigned job is worth a set amount of pay, regardless of the amount of time it takes to complete the job. The record shows that FTS Technicians are paid by applying a .5 multiplier to their regular rate for overtime hours.

FTS Technicians presented evidence that FTS implemented a company-wide time-shaving policy that required technicians to systematically underreport their overtime hours. Managers told or encouraged technicians to underreport time or even falsified timesheets themselves. To underreport overtime hours in compliance with FTS policy, technicians either began working before their recorded start times, recorded lunch breaks they did not take, or continued working after their recorded end time.

***2** FTS Technicians also presented documentary evidence and testimony from technicians, managers, and an executive showing that FTS's time-shaving policy originated with FTS's corporate office. Technicians testified that the time-shaving policy was company-wide, applying generally to all technicians, though not in an identical manner. At meetings, managers instructed groups of technicians to underreport their hours, and managers testified that corporate ordered them to do so. One former manager, Anthony Louden, offered testimony regarding high-level executive meetings. Louden identified overtime and fuel costs as the two leading items that an FTS executive felt it "should be able to manage and cut in order to make a bigger profit." Louden also stated that FTS executives circulated and reviewed technicians' timesheets, "go[ing] into detail on which technician had overtime, and, you know, go[ing] over why this guy had too much overtime and why he didn't have overtime." Technicians testified that they often complained about being obligated to underreport, and FTS's human resources director testified that she received such complaints. No evidence was presented that managers or technicians were disciplined for underreporting time.

B. Procedural History

A magistrate judge recommended conditional certification as a FLSA collective action, which the district court adopted. The district court also authorized notice of the collective action to be sent to all potential opt-in plaintiffs. The notice defined eligible class members as any person employed by FTS as a technician at any location across the country in the past three years to the present who were paid by piece-rate and did not receive overtime compensation for all hours worked over 40 per week during that period. A total of 293 technicians ultimately opted in to the collective action. [1]

The parties originally agreed on a discovery and trial plan, which the trial court adopted by order. Under the parties' agreement, discovery would be limited "to a representative sample of fifty (50) opt-in Plaintiffs," with FTS Technicians choosing 40 and FTS and UniTek choosing 10. The parties also agreed to approach the district court after discovery regarding "a trial plan based on representative proof" that "will propose a certain number of Plaintiffs from the pool of fifty (50) representative sample Plaintiffs that may be called as trial witnesses."

Following the completion of discovery, the district court denied FTS and UniTek's motions to decertify the class and

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for summary judgment, finding that the class members were similarly situated at the second stage of certification. In light of the parties' agreement and the district court's resulting order—under which the litigation proceeded—the court held that it could not "accept Defendants' contention that the parties' stipulated agreement to limit discovery to fifty representative plaintiffs did not also manifest Defendants' acquiescence to a process by which the remaining members of the class would not have to produce evidence as a prerequisite to proceeding to trial on their claims." (R. 238, PageID 5419.) The district court also denied FTS and UniTek's pretrial motion to preclude representative proof at trial because "the class representatives identified by Plaintiff[s] sufficiently represent the class" and "[t]o deny the use of representative proof in this case would undermine the purpose of class wide relief, and would have the effect of decertifying the class." (R. 308, PageID 6822.)

***3** Accordingly, the collective action proceeded to trial on a representative basis. FTS Technicians identified by name 38 potential witnesses and called 24 witnesses, 17 of whom were class-member technicians. FTS and UniTek identified all 50 representative technicians as potential witnesses, but called only four witnesses—all FTS executives and no technicians.

The district court explained the representative nature of the collective action to the jury, both before the opening argument and during its instructions, noting that FTS Technicians seek "to recover overtime wages that they claim [FTS and UniTek] owe them and the other cable technicians who have joined the case." (R. 450, PageID 10646–47; R. 463, PageID 12253.) The jury instructions specified that the named plaintiffs brought their claim on behalf of and collectively with "approximately three hundred plaintiffs who have worked in more than a dozen different FTS field offices across the country." (R. 463, PageID 12264.) The court also set out how the case would be resolved, instructing that FLSA procedure "allows a small number of representative employees to file a lawsuit on behalf of themselves and others in the collective group"; that the technicians who "testified during this trial testified as representatives of the other plaintiffs who did not testify"; and that "[n]ot all affected employees need testify to prove their claims" because "non-testifying plaintiffs who performed substantially similar job duties are deemed to have shown the same thing." (*Id.* at 12264–65.) The district court then charged the jury to determine whether all FTS Technicians "have proven their claims" by considering whether "the evidence presented by the representative plaintiffs who testified establishes that they worked unpaid overtime hours and are therefore entitled to overtime compensation." (*Id.* at 12265.) If the jury answers in the affirmative, the court explained, "then those plaintiffs that you did not hear from are also deemed by inference to be entitled to overtime compensation." (*Id.* at 12265–66.)

The jury returned verdicts of liability in favor of the class, finding that FTS Technicians worked in excess of 40 hours weekly without being paid overtime compensation and that FTS and UniTek knew or should have known and willfully violated the law. The jury determined the average number of unrecorded hours worked per week by each testifying technician—all of whom were representative and were called on behalf of themselves and all similarly situated employees, as authorized by 29 U.S.C. § 216(b) and instructed by the district court. As indicated to the parties and the jury, the court used the jury's factual findings to calculate damages for all testifying and nontestifying technicians in the opt-in collective action. The trial court ruled that the formula for calculating uncompensated overtime should use a 1.5 multiplier, apparently based on the assumption that FTS and UniTek normally used that multiplier.

***4** The district court[2] held a post-trial status conference and suggested that a second jury could be convened to decide the issue of damages. FTS and UniTek opposed a second jury, arguing that plaintiffs had failed to prove damages and judgment should be entered, "either for the defense or liability for plaintiffs ... with zero damages." After the court rejected this proposal, FTS and Unitek filed motions for judgment as a matter of law, a new trial, and decertification, all of which were denied. Finding that FTS Technicians had met their burden on damages, the court adopted their proposed order, using an "estimated-average" approach to calculate damages and employing a multiplier of 1.5.

II. ANALYSIS

FTS and UniTek challenge the certification of the case as a collective action pursuant to 29 U.S.C. § 216(b), the sufficiency of the evidence as presented at trial, the jury instruction on commuting time, and the district court's calculation of damages. After a review of the legal framework for collective actions in our circuit, we turn to each of these arguments.

A. Legal Framework

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Under the FLSA, an employer generally must compensate an employee "at a rate not less than one and one-half times the regular rate at which he is employed" for work exceeding forty hours per week. 29 U.S.C. § 207(a)(1). Labor Department regulations clarify, however, that in a piece-rate system only "additional half-time pay" is required for overtime hours. 29 C.F.R. § 778.111(a).

[1] **[2]** "Congress passed the FLSA with broad remedial intent" to address "unfair method[s] of competition in commerce" that cause "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." *Keller v. Miri Microsystems LLC*, 781 F.3d 799, 806 (6th Cir.2015); 29 U.S.C. § 202(a). The provisions of the statute are "remedial and humanitarian in purpose," and "must not be interpreted or applied in a narrow, grudging manner." *Herman v. Fabri–Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir.2002) (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944), *superseded by statute on other grounds*, Portal–to–Portal Act of 1947, 29 U.S.C. §§ 251–262).

[3] **[4]** **[5]** **[6]** To effectuate Congress's remedial purpose, the FLSA authorizes collective actions "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). To participate in FLSA collective actions, "all plaintiffs must signal in writing their affirmative consent to participate in the action." *Comer v. Wal–Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir.2006). Only "similarly situated" persons may opt in to such actions. *Id.* Courts typically bifurcate certification of FLSA collective action cases. At the notice stage, conditional certification may be given along with judicial authorization to notify similarly situated employees of the action. *Id.* Once discovery has concluded, the district court—with more information on which to base its decision and thus under a more exacting standard—looks more closely at whether the members of the class are similarly situated. *Id.* at 547.

***5** In *O'Brien v. Ed Donnelly Enterprises, Inc.*, we clarified the contours of the FLSA standard for certification. There, employees alleged that their employer violated the FLSA by requiring employees to work "off the clock," doing so in several ways—requiring unreported hours before or after work or by electronically altering their timesheets. 575 F.3d 567, 572–73 (6th Cir.2009). The district court initially certified the *O'Brien* case as a collective action. *Id.* at 573. At the second stage of certification, the court determined that the claims required "an extensive individualized analysis to determine whether a FLSA violation had occurred" and that "the alleged violations were not based on a broadly applied, common scheme." *Id.* at 583. Applying a certification standard akin to that for class actions pursuant to Federal Rule of Civil Procedure 23, the district court decertified the collective action on the basis that individualized issues predominated. *Id.* at 584.

[7] On appeal, we determined that the district court engaged in an overly restrictive application of the FLSA's "similarly situated" standard. It "implicitly and improperly applied a Rule 23–type analysis when it reasoned that the plaintiffs were not similarly situated because individualized questions predominated," which "is a more stringent standard than is statutorily required." *Id.* at 584–85. We explained that "[w]hile Congress could have imported the more stringent criteria for class certification under Fed.R.Civ.P. 23, it has not done so in the FLSA," and applying a Rule 23–type predominance standard "undermines the remedial purpose of the collective action device." *Id.* at 584–86. Based on our precedent, then, the FLSA's "similarly situated" standard is less demanding than Rule 23's standard.

O'Brien applied the three non-exhaustive factors that many courts have found relevant to the FLSA's similarly situated analysis: (1) the "factual and employment settings of the individual[ ] plaintiffs"; (2) "the different defenses to which the plaintiffs may be subject on an individual basis"; and (3) "the degree of fairness and procedural impact of certifying the action as a collective action." *Id.* at 584 (quoting 7B Wright, Miller & Kane, Federal Practice and Procedure § 1807 at 487 n. 65 (3d ed.2005)); *see Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261–65 (11th Cir.2008) (applying factors); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir.2001) (applying factors); *Frye v. Baptist Mem'l Hosp., Inc.*, 495 Fed.Appx. 669, 672 (6th Cir.2012) (concluding that district court properly exercised its discretion in weighing the *O'Brien* factors and granting certification). Noting that "[s]howing a 'unified policy' of violations is not required," we held that employees who "suffer from a single, FLSA-violating policy" *or* whose "claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct," are similarly situated. *O'Brien*, 575 F.3d at 584–85; see 2 ABA Section of Labor & Employ't Law, The Fair Labor Standards Act 19–151, 19–156 (Ellen C. Kearns ed., 2d ed.2010) (compiling cases supporting use of the three factors and noting that "many

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courts consider whether plaintiffs have established a common employer policy, practice, or plan allegedly in violation of the FLSA," which may "assuage concerns about the plaintiffs' otherwise varied circumstances").

***6** Applying this standard, we found the *O'Brien* plaintiffs similarly situated. We determined that the district court erred because plaintiffs' claims were unified, as they "articulated two common means by which they were allegedly cheated: forcing employees to work off the clock and improperly editing time-sheets." *O'Brien*, 575 F.3d at 585. However, due to *O'Brien* 's peculiar procedural posture (the only viable plaintiff remaining did not allege that she experienced the unlawful practices), remand for recertification was not appropriate. *Id.* at 586. In sum, *O'Brien* explained the FLSA standard for certification, distinguishing it from a Rule 23–type predominance standard, and adopted the three-factor test employed by several of our sister circuits. *Id.* at 585.

Just as *O'Brien* clarifies the procedure and requirements for certification of a collective action, the Supreme Court's opinion in *Anderson v. Mt. Clemens Pottery Co.*—originally a Sixth Circuit case—explains the burden of proof at trial. Using a formula "applicable to all employees," the district court there awarded piece-rate employees recovery of some unpaid overtime compensation under the FLSA. 328 U.S. 680, 685–86, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), *superseded by statute on other grounds,* Portal–to–Portal Act of 1947. We reversed on appeal, determining that the district court improperly awarded damages and holding that it was the employees' burden "to prove by a preponderance of the evidence that they did not receive the wages to which they were entitled ... and to show by evidence rather than conjecture the extent of overtime worked, it being insufficient for them merely to offer an estimated average of overtime worked." *Id.* at 686, 66 S.Ct. 1187.

[8] On certiorari, the Supreme Court held that we had imposed an improper standard of proof that "has the practical effect of impairing many of the benefits" of the FLSA. *Id.* It reminded us of the correct liability and damages standard, with a cautionary note: an employee bringing such a suit has the "burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies ... militate against making that burden an impossible hurdle for the employee." *Id.* at 686–87, 66 S.Ct. 1187. We have since acknowledged that instruction. *See Moran v. Al Basit LLC*, 788 F.3d 201, 205 (6th Cir.2015). The Supreme Court also explained how an employee can satisfy his burden to prove both uncompensated work and its amount: "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes ... 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." *Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187. The employee's burden of proof on damages can be relaxed, the Supreme Court explained, because employees rarely keep work records, which is the employer's duty under the Act. *Id.; see O'Brien*, 575 F.3d at 602; *see also* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2(a)(7). Once the employees satisfy their relaxed burden for establishing the extent of uncompensated work, "[t]he 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." *Mt. Clemens*, 328 U.S. at 687–88, 66 S.Ct. 1187.

***7** **[9]** We quoted and applied this standard in *Herman v. Palo Group Foster Home, Inc.*, concluding that the employees had met their burden on liability because "credible evidence" had been presented that they had performed work for which they were improperly compensated. 183 F.3d 468, 473 (6th Cir.1999). Also recognizing this shifting burden, we held that "Defendants did not keep the records required by the FLSA, so the district court properly shifted the burden to Defendants to show that they did not violate the Act." *Id.* The end result of this standard is that if an "employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Id.* at 472 (quoting *Mt. Clemens*, 328 U.S. at 688, 66 S.Ct. 1187). We now apply these standards to the case before us.

B. Certification as a Collective Action

[10] **[11]** FTS and UniTek appeal the denial of their motion to decertify the collective action. We review a district court's certification of a collective action under an "abuse of discretion" standard. *See O'Brien*, 575 F.3d at 584. "A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Auletta v. Ortino* (*In re Ferro Corp. Derivative Litig.*), 511 F.3d 611, 623 (6th Cir.2008).

The district court made its final certification determination post-trial. With the benefit of the entire trial record—

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including representative testimony from technicians covering the several regions in which FTS operates—the court found that FTS Technicians were similarly situated and a collective action was appropriate. FTS and UniTek challenge certification of the case as a collective action, arguing that differences among FTS Technicians (differences in location, supervisors, reasons for submitting false timesheets, and types and amount of uncompensated time) require an individualized analysis as to every plaintiff to determine whether a particular violation of the FLSA took place for each.

[12] Turning to review, we may not examine the certification issue using a Rule 23–type analysis; we must apply the "similarly situated" standard governed by the three-factor test set out in *O'Brien.* Two governing principles from our case law serve as guides: plaintiffs do not have to be "identically situated" to be similarly situated, and the FLSA is a remedial statute that should be broadly construed. 2 ABA Section of Labor & Employ't Law, *supra*, at 19–150, 19166 (compiling cases).

1. *Factual and Employment Settings*

[13] **[14]** The first factor, the factual and employment settings of the individual FTS Technicians, considers, "to the extent they are relevant to the case, the plaintiffs' job duties, geographic locations, employer supervision, and compensation." *Id.* at 19–155. On FTS Technicians' duties and locations, the record reveals that all FTS Technicians work in the same position, have the same job description, and perform the same job duties: regardless of location, "the great majority of techs do the same thing day in and day out which is install cable." FTS Technicians also are subject to the same timekeeping system (recording of time by hand) and compensation plan (piece rate).

***8** Key here, the record contains ample evidence of a company-wide policy of requiring technicians to underreport hours that originated with FTS executives. Managers told technicians that they received instructions to shave time from corporate, that underreporting is "company policy," and that they were "chewed out by corporate" for allowing too much time to be reported. Managers testified that FTS executives directed them to order technicians to underreport time. FTS executives reinforced their policy during meetings with managers and technicians at individual profit centers. FTS Technicians testified that they complained of being required to underreport, often in front of or to corporate representatives, who did nothing.

Evidence of market pressures suggests that FTS executives had a motive to institute a company-wide time-shaving policy. According to one manager's testimony, "[e]very profit center has ... a budget," and to meet that budget "you couldn't put all of your overtime." Both managers and technicians were under the impression that FTS's profitability depended on underreporting.

The underreporting policy applied to FTS Technicians regardless of profit center or supervisor, as technicians employed at multiple profit centers and under multiple managers reported consistent time-shaving practices across the centers and managers. Namely, FTS executives told managers that technicians' time before and after work or during lunch should be underreported. One manager told his technicians that "an hour lunch break will be deducted whether [they] take it or not," while technicians who reported full hours were told to "change that" and that "[t]his is not how we do it over here, ... you are just supposed to record your 40 hours a week, take out for your lunch, sign it and turn it in." If technicians failed to comply with the policy, managers would directly alter time sheets submitted by employees—one manager changed a seven to an eight and another used whiteout to change times. Regarding reporting lunch hours not taken, one manager said "that's the way it's got to be, you put it on there or I'll put it on there." Even technicians who never received direct orders from managers to underreport time knew that FTS required underreporting in order to continue receiving work assignments and to avoid reprimand or termination.

FTS Technicians identified the methods—the same methods found in *O'Brien*—by which FTS and UniTek enforced their time—shaving policy: (1) "requiring plaintiffs to work 'off the clock' " before or after scheduled hours or during lunch breaks and (2) "alter[ing] the times that had previously been entered." *O'Brien*, 575 F.3d at 572–73. As in *O'Brien*, such plaintiffs will be similarly situated where their claims are "unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct." *Id.* at 585.

***9** The dissent asserts that FTS Technicians allege "distinct" violations of the FLSA and "define the company—wide 'policy' at such a high level of generality that it encompasses *multiple* policies." (Dis. at ——.) The definition of similarly situated does not descend to such a level of granularity. The Supreme Court has warned against such a "narrow,

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grudging" interpretation of the FLSA and has instructed courts to remember its "remedial and humanitarian" purpose, as have our own cases. *See* *Tenn. Coal, Iron & R.R. Co.*, 321 U.S. at 597, 64 S.Ct. 698; *Keller*, 781 F.3d at 806; *Herman*, 308 F.3d at 585. Many FLSA cases do focus on a single action, such as the donning and doffing cases that the dissent's reasoning would suggest is the only situation where representative proof would work. But neither the statutory language nor the purposes of FLSA collective actions require a violating policy to be implemented by a singular method. The dissent cites no Sixth Circuit case that would compel employees to bring a separate collective action (or worse, separate individual actions) for unreported work required by an employer before clocking in, and another for work required after clocking out, and another for work required during lunch, and yet another for the employer's alteration of its employees' timesheets. Such a narrow interpretation snubs the purpose of FLSA collective actions.

The dissent concludes that FTS Technicians' claims do "not do the trick" because a "company-wide 'time-shaving' policy is lawyer talk for a company-wide policy of violating the FLSA." (Dis. at ——.) But FTS Technicians' claims do not depend on "lawyer talk"; they are based on abundant evidence in the record of employer mandated work off the clock. That an employer uses more than one method to implement a company-wide work "off-the-clock" policy does not prevent employees from being similarly situated for purposes of FLSA protection. This is not a new concept to our court or to other courts. In accordance with *O'Brien*, we have approved damages awards to FLSA classes alleging that employers used multiple means to undercompensate for overtime. *See, e.g.*, *U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 778 (6th Cir.1995) (approving damages award where employers required employees to work uncompensated time both before and after their scheduled shifts and to report only the scheduled shift hours on their timesheets). Other circuits and district courts have done so as well. *See* *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 588 (9th Cir.1988) (affirming damages award where employees gave varied testimony on the means employer used to underpay overtime); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 84 (10th Cir.1983) (affirming damages award where employer failed to compensate for overtime both before and after work, at different locations); *Wilks v. Pep Boys*, No. 3:02–0837, 2006 WL 2821700, at *5 (M.D.Tenn. Sept. 26, 2006) (denying motion to decertify class that alleged employer deprived employees of overtime compensation by requiring them to work off the clock and shaving hours from payroll records).

***10** Like the plaintiffs in *O'Brien*, FTS Technicians' claims are unified by common theories: that FTS executives implemented a single, company-wide time-shaving policy to force all technicians—either through direct orders or pressure and regardless of location or supervisor—to underreport overtime hours worked on their timesheets. *See* *O'Brien*, 575 F.3d at 584–85; *see also* *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir.1973) (affirming finding of uncompensated overtime where employees understated overtime because of pressure brought to bear by immediate supervisors, putting upper management on constructive notice of potential FLSA violations). Based on the record as to FTS Technicians' factual and employment settings, therefore, the district court did not abuse its discretion in finding FTS Technicians similarly situated.

2. *Individualized Defenses*

[15] **[16]** We now turn to the second factor-the different defenses to which the plaintiffs may be subject on an individual basis. FTS and UniTek argue that they must be allowed to raise separate defenses by examining each individual plaintiff on the number of unrecorded hours they worked, but that they were denied that right by the allowance of representative testimony and an estimated-average approach. Several circuits, including our own, hold that individualized defenses alone do not warrant decertification where sufficient common issues or job traits otherwise permit collective litigation. *O'Brien*, 575 F.3d at 584–85 (holding that employees are similarly situated if they have "claims ... unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct"); *Morgan*, 551 F.3d at 1263; *see* *Thiessen*, 267 F.3d at 1104–08.

As noted above, the record includes FTS Technicians' credible testimonial and documentary evidence that they performed work for which they were improperly compensated. In the absence of accurate employer records, both Supreme Court and Sixth Circuit precedent dictate that the burden then shifts to the employer to "negative the reasonableness of the inference to be drawn from the employee's evidence" and, if it fails to do so, the resulting damages award need not be perfectly exact or precise. *Mt. Clemens*, 328 U.S. at 687–88, 66 S.Ct. 1187 ("The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would

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be possible had he kept records in accordance with the requirements of [the FLSA]."); *see* Herman, 183 F.3d at 473.

Under this framework, and with the use of representative testimony and an estimated-average approach, defenses successfully asserted against representative testifying technicians were properly distributed across the claims of nontestifying technicians. For example, FTS and UniTek argue that testifying technicians did not work all of the overtime they claimed and underreported some of their overtime for reasons other than a company-wide policy requiring it. FTS and UniTek had every opportunity to submit witnesses and evidence supporting this claim. The jury's partial acceptance of these defenses, as evidenced by its finding that testifying technicians worked fewer hours than they claimed, resulted in a lower average for nontestifying technicians. Thus, FTS Technicians' representative evidence allowed appropriate consideration of the individual defenses raised here. The district court, moreover, offered to convene a second jury and submit the issue of damages to it, but FTS and UniTek declined. *See* Thiessen, 267 F.3d at 1104–08 (concluding that district court abused its discretion in decertifying the class because defendants' "highly individualized" defenses could be dealt with at the damages stage of trial). Under our precedent and the trial record, we cannot say that the district court committed a clear error of judgment in refusing to decertify the collective action on the basis of FTS and UniTek's claimed right to examine and raise defenses separately against each of the opt-in plaintiffs.

3. *Fairness and Procedural Impact*

***11** **[17]** The third factor, the degree of fairness and the procedural impact of certifying the case, also supports certification. This case satisfies the policy behind FLSA collective actions and Congress's remedial intent by consolidating many small, related claims of employees for which proceeding individually would be too costly to be practical. *See* Hoffmann–La Roche Inc. v. Sperling, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989) (noting that FLSA collective actions give plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources"); Espenscheid v. DirectSat USA, LLC, 705 F.3d 770, 776 (7th Cir.2013) ("[W]here it is class treatment or nothing, the district court must carefully explore the possible ways of overcoming problems in calculating individual damages."). Because all FTS Technicians allege a common, FLSA-violating policy, "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact." Hoffmann–La Roche, Inc., 493 U.S. at 170, 110 S.Ct. 482. In view of the entire record, neither this factor nor the other two suggest that the district court abused its discretion in finding FTS Technicians similarly situated and maintaining certification.

4. *The Seventh Circuit Decision in Espenscheid*

Lastly, FTS and UniTek argue that *Espenscheid*—a Seventh Circuit case affirming the decertification of a collective action seeking unpaid overtime—compels decertification here. 705 F.3d at 773. *Espenscheid*, however, is based on Seventh Circuit authority and specifically acknowledges that it is at odds with Sixth Circuit precedent. *Id.* at 772 (citing *O'Brien*, 575 F.3d at 584). Though recognizing the differences between Rule 23 class actions and FLSA collective actions—and admitting that Rule 23 procedures are absent from the statutory provisions of the FLSA-the Seventh Circuit determined that "there isn't a good reason to have different standards for the certification of the two different types of action." *Id.* This conflicts with our precedent. Explaining that Congress could have but did not import the Rule 23 predominance requirement into the FLSA and that doing so would undermine the remedial purpose of FLSA collective actions, we have refused to equate the FLSA certification standard for collective actions to the more stringent certification standard for class actions under Rule 23. *O'Brien*, 575 F.3d at 584, 585–86.

The difference between the Seventh Circuit's standard for collective actions and our own is the controlling distinction for the issues before us.[3] The facts and posture of *Espenscheid*, however, also distinguish it from this case. There, the district court decertified the collective action before trial, after which the parties settled their claims but appealed the decertification. Reviewing for abuse of discretion, the Seventh Circuit affirmed the district court. The circuit opinion noted that the plaintiffs had recognized the possible need for individualized findings of liability for a class of 2,341 members—nearly 10 times larger than the group here—but "truculently" refused to accept a specific plan for litigation or propose an alternative and failed to specify the other kinds of evidence that they intended to use to supplement the representative testimony. *Espenscheid*, 705 F.3d at 775–76; *see* Thompson v. Bruister & Assocs., Inc., 967 F.Supp.2d 1204, 1216 (M.D.Tenn.2013) (holding that *Espenscheid* cannot "conceivably be read as an overall indictment of utilizing a collective action as a vehicle to establish liability in piece-rate cases ... because the Seventh

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Circuit was presented with little choice but to hold as it did, given the lack of cooperation by plaintiffs' counsel in explaining how they intended to prove up their case"). The opinion additionally references no evidence similar to that supporting the time-shaving policy here. And the proposed, but not agreed-upon, representative sample in *Espenscheid* constituted only 1.8% of the collective action, and the method of selecting the sample was unexplained. *Espenscheid*, 705 F.3d at 774.

***12** Conversely, FTS and UniTek ask us to overturn a case tried to completion. They seek a determination that the district court *abused its discretion* in declining to decertify the 293–member collective action after both parties preliminarily agreed to a representative trial plan, completed discovery on that basis, and jointly selected the representative members. The jury here, moreover, heard representative testimony from 5.7% of the class members at trial, FTS and UniTek had abundant opportunity to provide contradictory testimony, and FTS Technicians also submitted testimony from managers and supervisors along with documentary proof. Upon completion of the case presentations by the parties, and following jury instructions regarding collective actions, the jury returned verdicts in favor of FTS Technicians. In light of these legal, factual, and procedural differences, *Espenscheid* is simply not controlling.

To conclude our similarly situated analysis, certification here is supported by our standard. The factual and employment settings of individual FTS Technicians and the degree of fairness and the procedural impact of certifying the case favor upholding certification. FTS and UniTek's alleged individual defenses do not require decertification because they can be, and were, adequately presented in a collective forum. On the record before us, the district court was within its wide discretion to try the claims as a collective action and formulated a trial plan that appropriately did so. Based on the record evidence of a common theory of violation—namely, an FLSA-violating time-shaving policy implemented by corporate—we affirm the district court's certification of this case as a collective action.

C. Sufficiency of the Evidence

At the close of FTS Technicians' case and after the jury verdicts, FTS and UniTek moved for judgment as a matter of law, challenging the sufficiency of the evidence, particularly the allowance of representative testimony at trial to prove liability and the use of an estimated-average approach to calculate damages. The district court denied the motion, which FTS and UniTek now appeal.

[18] **[19]** **[20]** **[21]** "Our review of the sufficiency of the evidence is by review of a trial judge's rulings on motions for directed verdict or [judgment as a matter of law]." *Young v. Langley*, 793 F.2d 792, 794 (6th Cir.1986). We review de novo a post-trial decision on a motion for judgment as a matter of law by applying the same standard used by the district court. *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 818 (6th Cir.2013). "Judgment as a matter of law may only be granted if ... there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor of the moving party." *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir.2005). The court must decide whether there was sufficient evidence to support the jury's verdict, without weighing the evidence, questioning the credibility of the witnesses, or substituting the court's judgment for that of the jury. *Waldo*, 726 F.3d at 818. We must view the evidence in the light most favorable to the party against whom the motion is made, giving that party the benefit of all reasonable inferences. *Id.*

***13** **[22]** Pursuant to *Mt. Clemens*, the evidence as a whole must be sufficient to find that FTS Technicians performed work for which they were improperly compensated (*i.e.*, liability) and sufficient to support a just and reasonable inference as to the amount and extent of that work (*i.e.*, damages). *Mt. Clemens*, 328 U.S. at 687, 66 S.Ct. 1187. "[T]he only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict." *Morgan*, 551 F.3d at 1280. Plaintiffs have the initial burden to make the liability and damages showing at trial; once made, the burden shifts to defendants to prove the precise amount of work performed or otherwise rebut the reasonably inferred damages amount. *Id.* at 687–88, 66 S.Ct. 1187. If defendants fail to carry this burden, the court may award the reasonably inferred, though perhaps approximate, damages. *Id.* at 688, 66 S.Ct. 1187.

1. *Liability*

[23] FTS and UniTek challenge the district court's allowance of representative testimony to prove liability for nontestifying technicians. We have recognized that "representative testimony from a subset of plaintiffs [can] be used to facilitate the presentation of proof of FLSA violations, when such proof would normally be individualized." *O'Brien*, 575 F.3d at 585. Preceding *O'Brien*, we affirmed an award

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of back wages for unpaid off-the-clock hours based on representative testimony in *Cole Enterprises, Inc.*, 62 F.3d at 781. There, the defendant objected to an award of back wages to nontestifying employees, which was based on representative testimony at trial, interview statements, and the employment records. *Id.* We endorsed the sufficiency of representative testimony, holding that "[t]he testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." *Id.*

In FLSA cases, the use of representative testimony to establish liability has long been accepted. In the 1980s, the Tenth Circuit approved the use of representative testimony in a situation comparable to this case. There, the employer did not pay overtime to employees working cash-register stations before or after scheduled shift hours in six service stations in two states. *Simmons Petroleum Corp.*, 725 F.2d at 84. Though only twelve employees testified, the Tenth Circuit held that representative testimony "was sufficient to establish a pattern of violations," explaining that the rule in favor of representative testimony is not limited "to situations where the employees leave a central location together at the beginning of a work day, work together during the day, and report back to the central location at the end of the day." *Id.* at 86 & n. 3.

In another comparable FLSA case, the Eleventh Circuit held that, "[i]f anything, the *Mt. Clemens* line of cases affirms the general rule that not all employees have to testify to prove overtime violations." *Morgan*, 551 F.3d at 1279. Although *Mt. Clemens* 's burden shifting framework did not apply because the employer kept "thorough payroll records," representative testimony could rebut on a collective basis the employer's allegedly individualized defenses to liability. *Id.* at 1276. To do so, seven plaintiffs testified on behalf of 1,424 plaintiffs, less than 1% of the total number. *Id.* The Eleventh Circuit found that the employer could not validly complain about the ratio of testifying plaintiffs where, as here, the trial record contained other "good old-fashioned direct evidence," *id.* at 1277, and the employer opposed the plaintiffs' introduction of additional testimony while choosing not to present its own, *id.* at 1277–78. As for the employer's argument that its defenses were so individualized that the testifying plaintiffs could not fairly represent those not testifying, the circuit court held that "[f]or the same reasons that the court did not err in determining that the Plaintiffs were similarly situated enough to maintain a collective action, it did not err in determining that the Plaintiffs were similarly situated enough to testify as representatives of one another." *Id.* at 1280. The same is true here.

***14** Our sister circuits overwhelmingly recognize the propriety of using representative testimony to establish a pattern of violations that include similarly situated employees who did not testify. *See, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir.2014) (quoting the Ninth Circuit's *Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977, 992 (9th Cir.2006), for the proposition that "[t]he class action mechanism would be impotent" without representative proof and the ability to draw class-wide conclusions based on it); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 67 (2d Cir.1997) ("[I]t is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA."); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir.1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."); *Brock v. Tony & Susan Alamo Found.*, 842 F.2d 1018, 1019–20 (8th Cir.1988) ("[T]o compensate only those associates who chose or where chosen to testify is inadequate in light of the finding that other employees were improperly compensated."); *Ho Fat Seto*, 850 F.2d at 589 (holding that, based on representative testimony, "[t]he twenty-three non-testifying employees established a prima facie case that they had worked unreported hours"); *Donovan v. Bel–Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir.1985) (holding that requirement that testimony establishing a pattern or practice must refer to all nontestifying employees "would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens* "); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224–25 (1st Cir.1982) (limiting testimony to six plaintiffs from six restaurant locations owned by defendant "in light of the basic similarities between the individual restaurants"); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that, based on testimony from sixteen representative employees and a report on six employees that found "employees in this type of job consistently failed to report all the overtime hours worked," "the trial court might well have concluded that plaintiff had established a prima facie case that all thirty-seven employees had worked unreported hours"). In the face of these consistent precedents, many with fact patterns similar to this case, FTS and UniTek point to no case categorically disapproving of representative testimony to prove employer liability to those in the collective action who do not testify.

FTS and UniTek next assert that, even if representative testimony is allowed generally, testifying technicians here

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were not representative of nontestifying technicians. The record suggests otherwise, as we explained above when determining that FTS Technicians were similarly situated. We found that testifying technicians were geographically spread among various FTS profit centers and were subject to the same job duties, timekeeping system, and compensation plan as nontestifying technicians. As *Morgan* highlights, the collective-action framework presumes that similarly situated employees are representative of each other and have the ability to proceed to trial collectively. *See* Morgan, 551 F.3d at 1280.

***15** The dissent also challenges the representative nature of the technicians' testimony, arguing for a blanket requirement of direct correlation because a plaintiff alleging "*the company* altered my timesheets" cannot testify on behalf of one alleging that "*I* underreported my time because my supervisor directed me to." (Dis. at ——.) Though the time-shaving policy may have been enforced as to individual technicians by several methods, we do not define "representativeness" so specifically—just as we do not take such a narrow view of "similarly situated." *See* O'Brien, 575 F.3d at 585; *see also* Cole Enters., Inc., 62 F.3d at 778. For the testifying technicians to be representative of the class as a whole, it is enough that technicians testified as to each means of enforcement of the common, FLSA-violating policy. *See* Simmons Petroleum Corp., 725 F.2d at 86 (deeming testimony from at least one employee in each category of plaintiffs sufficient to establish a pattern of violations and support an award of damages to all); *see also* Sec'y of Labor v. DeSisto, 929 F.2d 789, 793 (1st Cir.1991) ("Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award.").

Here, the jury heard testimony that managers told technicians to underreport hours before and after work and during lunch and that, in the absence of direct orders, FTS otherwise exerted pressure to underreport under threat of reprimand, loss of work assignments, or termination. Or managers just directly altered the timesheets. The dissent's conclusion that the proof was not "remotely representative" (Dis. at ——) neither acknowledges how representative testimony was presented here nor does it follow from the record evidence. There was ample evidence of managers implementing off-the-clock work requirements established and enforced through one corporate policy and ample evidence that the collective group of plaintiffs experienced the same policy enforced through three means. All FTS Technicians were properly represented by those testifying.

The collective procedure adopted by the district court, moreover, was based on FTS and UniTek's agreement, which was memorialized by court order, to limit discovery "to a representative sample of fifty (50) opt-in Plaintiffs" and to approach the district court after discovery regarding "a trial plan based on representative proof" that "will propose a certain number of Plaintiffs from the pool of fifty (50) representative sample Plaintiffs that may be called as trial witnesses." After discovery closed, FTS and UniTek did object to the use of representative proof at trial. But as we have explained, the district court's denial of that motion is not grounds for reversal at this stage.

FTS and UniTek's remaining arguments on liability are simply reiterations of the claims that FTS Technicians are not similarly situated and that the testifying technicians are not representative. FTS and UniTek first complain that the liability verdict form gave the jury an "all or nothing" choice. But the jury's choice was whether or not FTS applied a single, company-wide time-shaving policy to all FTS Technicians that encompassed each means used to enforce it. The jury found that it did. This accords with precedent recognizing that preventing similarly situated employees from proceeding collectively based on representative evidence would render impotent the collective-action framework. *See, e.g.*, Garcia, 770 F.3d at 1307.

***16** Next FTS and UniTek cite *Espenscheid* a second time. As to representative testimony, *Espenscheid* emphasized that the representative evidence before it could not be sufficient because it consisted entirely of testimony regarding "the experience of a small, unrepresentative sample of [workers]" (1.8% of the 2,341 members), which cannot "support an inference about the work time of thousands of workers." 705 F.3d at 775. These are not the facts before us. Testifying technicians here are representative, and the ratio of testifying technicians to nontestifying technicians—5.7%—is well above the range commonly accepted by courts as sufficient evidence, especially where other documentary and testimonial evidence is presented. *See, e.g.*, Morgan, 551 F.3d at 1277 (affirming award to 1,424 employees based on testimony from seven, or .49%, in addition to other evidence); S. New Eng., 121 F.3d at 67 (affirming award to nearly 1,500 employees based on testimony from 39, or 2.5%); Burger King Corp., 672 F.2d at 225 (affirming award of back wages to 246 employees based on testimony from six, or 2.4%); *see*

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also DeSisto, 929 F.2d at 793 (holding "there is no ratio or formula for determining the number of employee witnesses required" but testimony of a single employee is not enough). FTS and UniTek, moreover, had the opportunity to call other technicians but chose not to. *See* Morgan, 551 F.3d at 1278 ("Family Dollar cannot validly complain about the number of testifying plaintiffs when ... Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own district managers, [but] it chose not to.").

In light of the proper use of representative testimony to prove liability, we note the sufficiency of the evidence presented here. FTS Technicians offered testimony from 17 representative technicians and six managers and supervisors, as well as documentary evidence including timesheets and payroll records, to prove that FTS implemented a company-wide time-shaving scheme that required employees to systematically underreport their hours. *See id.* at 1277 ("The jury's verdict is well-supported not simply by 'representative testimony,' but rather by a volume of good old-fashioned direct evidence."); *Gen. Motors Acceptance Corp.*, 482 F.2d at 829 (holding that trial court could conclude violations as to nontestifying employees based on evidence that "employees in this type of job consistently failed to report all the overtime hours worked"). Witnesses attributed the time-shaving policy to corporate, and FTS executives told managers and technicians to underreport overtime. Technicians complained, but FTS took no remedial actions. *See Cole Enters., Inc.*, 62 F.3d at 779 ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed."). In response to this evidence and despite agreeing to and participating in the selection of 50 representative technicians and including all 50 on its witness list, FTS and UniTek called only four corporate executives and no technicians.

***17** Our standard of review dictates that we view the evidence in the light most favorable to FTS Technicians and give them the benefit of all reasonable inferences. Based on the trial record and governing precedent, we conclude that the evidence here is sufficient to support the jury's verdict that all FTS Technicians, both testifying and nontestifying, performed work for which they were not compensated.

2. *Damages*

[24] FTS and UniTek object to the use of an estimated-average approach to calculate damages for nontestifying technicians. They argue that an estimated-average approach does not allow a "just and reasonable inference"—the *Mt. Clemens* standard—on the number of hours worked by nontestifying technicians because it results in an inaccurate calculation, giving some FTS Technicians more than they are owed and some less.

[25] We addressed a version of the estimated-average approach in *Cole Enterprises, Inc.*, concluding that "[t]he information [pertaining to testifying witnesses] was also used to make *estimates and calculations* for similarly situated employees who did not testify. The testimony of fairly representative employees may be the basis for an award of back wages to nontestifying employees." 62 F.3d at 781 (emphasis added). Other circuits and district courts have explicitly approved of an estimated average. *See Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472–73, 472 n.7 (11th Cir.1982) (affirming district court's determination that "waitresses normally worked an eight and one-half hour day" based on "the testimony of the compliance officer and computations based on the payroll records"); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir.1981) (affirming as "accepted practice" and not "clearly erroneous" district court's finding that, "based on the testimony of employees, ... certain groups of employees averaged certain numbers of hours per week" and award of "back pay based on those admittedly approximate calculations" because reversing would penalize the employees for the employer's failure to keep adequate records); *Baden–Winterwood v. Life Time Fitness Inc.*, 729 F.Supp.2d 965, 997–1001 (S.D.Ohio 2010) (averaging hours per week worked by testifying plaintiffs and applying it to nontestifying plaintiffs); *Cowan v. Treetop Enters.*, 163 F.Supp.2d 930, 938–39 (M.D.Tenn.2001) ("From the testimony of the Plaintiffs' and the Defendants' employee records, the Court finds ... that Plaintiffs worked an average of 89.04 hours per week and applying *Mt. Clemens*, this finding is applied to the entire Plaintiff class to determine the amount of overtime backpay owed for the number of weeks of work stipulated by the parties.").

Mt. Clemens acknowledges the use of "an estimated average of overtime worked" to calculate damages for nontestifying employees. 328 U.S. at 686, 66 S.Ct. 1187. There, eight employees brought suit on behalf of approximately 300 others. A special master concluded that productive work did not regularly commence until the established starting time. *Id.* at 684, 66 S.Ct. 1187. Declining to adopt the special master's recommendation, the district court found that the employees were ready for work 5 to 7 minutes before starting time and

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presumed that they started immediately. *Id.* at 685, 66 S.Ct. 1187. To calculate damages, the district court fashioned a formula to derive an estimated average of overtime worked by all employees, testifying and nontestifying. *Id.* On direct appeal to the Sixth Circuit, we deemed the estimated average insufficient. *Id.* at 686, 66 S.Ct. 1187. Though the Supreme Court ultimately agreed with the special master, it reversed our disapproval of the estimated average, explaining that we had "imposed upon the employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act." *Id.* at 686, 689, 66 S.Ct. 1187.

***18** Disapproving of an estimated-average approach simply due to lack of complete accuracy would ignore the central tenant of *Mt. Clemens*—an inaccuracy in damages should not bar recovery for violations of the FLSA or penalize employees for an employer's failure to keep adequate records. *See id.* at 688, 66 S.Ct. 1187 ("The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.' " (quoting *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931)); *see also Hamm's Drive Inn*, 661 F.2d at 318 (upholding an estimated-average approach and noting that "[e]vidence used to calculate wages owed need not be perfectly accurate, since the employee should not be penalized when the inaccuracy is due to a defendant's failure to keep adequate records"). *Mt. Clemens* effectuates its principles through a burden-shifting framework in which employees are not punished but employers have the opportunity to make damages more exact and precise by rebutting the evidence presented by employees. *See Mt. Clemens*, 328 U.S. at 687–88, 66 S.Ct. 1187; see also *Herman*, 183 F.3d at 473. FTS and UniTek had the opportunity at trial to present additional evidence to rebut FTS Technicians' evidence but failed to do so.

Mt. Clemens's burden-shifting framework, in conjunction with the estimated-average approach, functioned here as envisioned. Seventeen technicians working at various locations testified and were cross-examined as to the number of unrecorded hours they worked, allowing the jury to infer reasonably the average weekly unpaid hours worked by each. Testifying technicians were similarly situated to and representative of nontestifying technicians, as specified by the district court's instructions to the jury, and thus the average of these weekly averages applied to nontestifying technicians. The jury found fewer unrecorded hours than testifying technicians claimed; FTS and UniTek thus partially refuted the inference sought by FTS Technicians and their defenses were distributed to make the damages more exact and precise, as the *Mt. Clemens* framework encourages.

Viewing the evidence in the light most favorable to FTS Technicians, we cannot conclude that reasonable minds would come to but one conclusion in favor of FTS and UniTek. Accordingly, the average number of unpaid hours worked by testifying and nontestifying technicians, based on the jury's findings and the estimated-average approach, resulted from a just and reasonable inference supported by sufficient evidence.

D. Jury Instruction on Commuting Time

In another challenge to the jury's determination of unrecorded hours worked, FTS and UniTek argue that the district court erred by instructing the jury on commuting time. FTS and UniTek do not dispute that the district court accurately instructed the jury on when commuting time requires compensation; they instead argue that, as a matter of law, the instruction should not have been given because a reasonable juror could not conclude that compensation for commuting time was required here.

***19** **[26]** **[27]** **[28]** "This [c]ourt reviews a district court's choice of jury instructions for abuse of discretion." *United States v. Ross*, 502 F.3d 521, 527 (6th Cir.2007). A district court does not abuse its discretion in crafting jury instructions unless the instruction "fails accurately to reflect the law" or "if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* We generally must assume that the jury followed the district court's instructions. *See United States v. Olano*, 507 U.S. 725, 740, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *see also United States v. Monus*, 128 F.3d 376, 390–91 (6th Cir.1997) ("[E]ven if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance."). Here, the verdict form does not specify whether the jury included commuting time in the average numbers of unrecorded hours, and we assume that the jury followed the district court's instructions by not including commuting time that does not require compensation.

E. Calculation of Damages

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FTS and UniTek lastly challenge the district court's calculation of damages. They argue that the district court (1) took the calculation of damages away from the jury in violation of the Seventh Amendment and (2) used an improper and inaccurate methodology by failing to recalculate each technician's hourly rate and by applying a 1.5 multiplier. These are questions of law or mixed questions of law and fact that we review de novo. *See* *Harries v. Bell*, 417 F.3d 631, 635 (6th Cir.2005).

[29] We begin with the Seventh Amendment arguments. The dissent claims that the Seventh Amendment was violated because the trial procedure resulted in "non-representative" proof (Dis. at ——) and posits a standard requiring a jury in any collective action to "determine the 'estimated average' that *each* plaintiff should receive" (*Id.* at —— (emphasis added)). Such an individual requirement for each member of a collective action does not comport with the principles of and precedent on representative proof, and would contradict certification of the case as a collective action in the first place.

[30] Here, moreover, the proof was representative and the jury rendered its findings for the testifying and nontestifying plaintiffs in accordance with the district court's charge. Finding that "the evidence presented by the representative plaintiffs who testified establishe[d] that they worked unpaid overtime hours," and applying that finding in accordance with the instruction that "those plaintiffs that you did not hear from [would] also [be] deemed by inference to be entitled to overtime compensation," the jury determined that all FTS Technicians had "proven their claims." The jury accordingly made the factual findings necessary for the court to complete the remaining arithmetic of the estimated-average approach. The Seventh Amendment does not require the jury, instead of the district court, to perform a formulaic or mathematical calculation of damages. *See* *Wallace v. FedEx Corp.*, 764 F.3d 571, 591 (6th Cir.2014) ("[A] court may render judgment as a matter of law as to some portion of a jury award [without implication of the Seventh Amendment] if it is compelled by a legal rule or if there can be no genuine issue as to the correct calculation of damages."); *see also* *Maliza v. 2001 MAR–OS Fashion, Inc.*, No. CV–07–463, 2010 WL 502955, at *1 (E.D.N.Y. Feb 10, 2010) (completing arithmetic on shortfalls, if any, in wages paid to plaintiff after jury calculated "month-by-month determinations of the hours worked by, and wages paid to, the plaintiff"). On this record, the Seventh Amendment is not implicated.

***20** At any rate, FTS and UniTek rejected the district court's offer to impanel a second jury to make additional findings and perform the damages calculation. They had cited their "constitutional rights to a jury" at the end of trial, but at the status conference on damages the court asked if FTS and UniTek wished to have "a panel come in, select another panel, and submit the issues of damages." (R. 444, PageID 10171–72.) Their counsel responded, "No, your honor. I don't think that's allowed ... for these claims." (*Id.* at 10172.) The court went on to ask, "You would be upset if we did have a jury trial to finish up the damages question?" (*Id.* at 10173.) Counsel responded, "Well, your Honor, again, it's our position that that's not appropriate." (*Id.*) Banking instead on their arguments that the estimated-average approach is inappropriate and that any calculation of damages would not be supported by sufficient evidence, counsel maintained that "the only thing, quite frankly, that's left and that is appropriate is an entry of judgment ... either for the defense or liability for plaintiffs and with zero damages." (*Id.*) After the court asked for a "more constructive approach from the defense," counsel agreed to a briefing schedule on the calculation of damages. (*Id.* at 10181.) Counsel subsequently qualified that FTS and UniTek were "not waiving ... or changing their position," but the positions referenced were those relied upon at the status conference—the estimated-average-approach disagreement and sufficiency-of-the-evidence argument. Based on this record, FTS and UniTek abandoned and waived any right to a jury trial on damages that they may have had.

[31] In regard to FTS and UniTek's challenge to the district court's methodology, FLSA actions for overtime are meant to be compensatory. *See, e.g.*, *Nw. Yeast Co. v. Broutin*, 133 F.2d 628, 630–31 (6th Cir.1943) (finding that the FLSA "is premised upon the existence of an employment contract" and that recovery authorized by 29 U.S.C. § 216(b) "does not constitute a penalty, but is considered compensation"); 29 U.S.C. § 216(b) ("Any employer who violates [the FLSA] shall be liable to the employee or employees affected in the amount of their ... unpaid overtime compensation...."). To achieve its purpose, the FLSA directs an overtime wage calculation to include (1) the regular rate, (2) a numerical multiplier of the regular rate, and (3) the number of overtime hours. *See* 29 U.S.C. § 207; 29 C.F.R. § 778.107. In a piece-rate system, "the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources" and then dividing "by the number of hours worked in the week for which such compensation was paid." 29 C.F.R. § 778.111(a). The numerical multiplier for overtime hours in a piece-rate system is .5 the regular

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rate of pay. *Id.* (A piece-rate worker is entitled to be paid "a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week.... Only additional halftime pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked.").

***21** As for the hourly rate, the amount of "straight time" paid in a piece rate system remains the same regardless of the number of hours required to complete the number of jobs. The fixed nature of piece rates shows that piece-rate compensation was paid for all hours worked by FTS Technicians, regardless of whether that time was recorded. It also creates an inverse relationship between the number of hours worked and the hourly rate: working more hours lowers a technician's hourly rate. By not recalculating hourly rates to reflect the actual increased number of hours FTS Technicians worked each week, the district court used a higher hourly rate than would have been used if no violation had occurred. This approach overcompensated FTS Technicians and required FTS and UniTek to pay more for unrecorded overtime hours than recorded overtime hours. For the damages calculation to be compensatory, therefore, hourly rates must be recalculated with the correct number of hours to ensure that FTS Technicians receive the pay they would have received had there been no violation.

[32] Regarding the correct multiplier, the FLSA entitles piece-rate workers to an overtime multiplier of .5, and the record shows that FTS and UniTek used this multiplier to calculate FTS Technicians' overtime pay for recorded hours. In explaining the piece-rate system to their technicians, FTS and UniTek provided an example where a technician receiving $1,000 in piece rates for 50 hours of work would receive $100 in overtime compensation. Reverse engineering this outcome gives us the following formula: regular rate of $20.00/hour multiplied by a .5 multiplier and 10 overtime hours. Plugging a multiplier of 1.5 into the formula would result in $300 of overtime pay, overcompensating this hypothetical technician, as it did FTS Technicians. We accordingly reverse the district court's use of a 1.5 multiplier.

[33] Reversal of the district court's calculation of damages does not necessitate a new trial on liability. We have "the authority to limit the issues upon remand to the [d]istrict [c]ourt for a new trial" and such action does "not violate the Seventh Amendment." *Thompson v. Camp*, 167 F.2d 733, 734 (6th Cir.1948) (per curiam). We remand to the district court to recalculate damages consistent with this opinion.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's certification of this case as a collective action, allowance of representative testimony at trial, and use of an estimated-average approach; REVERSE the district court's calculation of damages; and REMAND to the district court for recalculation of damages consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

SUTTON, Circuit Judge, concurring in part and dissenting in part.

Two questions loom over every multi-plaintiff action: Who is representing whom? And can they fairly represent them? Whether it be a class action under Civil Rule 23, a joined action under Civil Rule 20, or as here a collective action under § 216 of the Fair Labor Standards Act, 29 U.S.C. § 216(b), the only way in which representative proof of liability —evidence by some claimants to prove liability for all— makes any sense is if the theory of liability of the testifying plaintiffs mirrors (or is at least substantially similar to) the theory of liability of the non-testifying plaintiffs. The same imperative exists at the damages stage, where the trial court must match any representative evidence with a representative theory of liability and damages.

***22** The three trial judges who handled this case (collectively as it were) did not heed these requirements. Before trial, the district court mistakenly certified this case as one collective action as opposed to a collective action with two or three sub-classes, as the various and conflicting theories of liability required. At trial, the district court approved a method of assessing damages that violated the Seventh Amendment. After trial, the district court miscalculated damages by failing to adjust plaintiffs' hourly wages and using an incorrect multiplier. The majority goes part of the way to correcting these problems by reversing the district court's damages calculation. I would go all of the way and correct the first two errors as well.

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Collective-action certification. The Fair Labor Standards Act permits employees to bring lawsuits on behalf of "themselves and other employees similarly situated." 29 U.S.C. § 216(b). To determine whether plaintiffs are "similarly situated," we look to (1) "the factual and employment settings of the individual[ ] plaintiffs," (2) "the different defenses to which the plaintiffs may be subject," and (3) "the degree of fairness and procedural impact of certifying the action as a collective action," among other considerations. *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir.2009) (quotation omitted), *abrogated on other grounds by Campbell–Ewald Co. v. Gomez*, ––– U.S. ––––, 136 S.Ct. 663, ––– L.Ed.2d –––– (2016). Helpful as this checklist may be, it should not obscure the core inquiry: Are plaintiffs similarly situated *such that* their claims of liability and damages can be tried on a class-wide and representative basis? 7B Charles Alan Wright et al., Federal Practice and Procedure § 1807 (3d ed.2005).

That is where the plaintiffs come up short. They claim that the defendants violated the Fair Labor Standards Act in three distinct ways: (1) by falsifying employees' timesheets; (2) by instructing employees to underreport their hours; and (3) by creating incentives for employees to underreport by rewarding "productiv[ity]" and scheduling fewer shifts for those who worked too many hours. R. 200 at 8. The problem with the plaintiffs' approach is that a jury could accept some of their theories of liability while rejecting others, and yet the verdict form gave the jury only an all-or-nothing-at-all option. Assume that, as plaintiffs allege, supervisors at a certain subset of the defendants' offices directed employees to underreport (which violates the FLSA), while supervisors at a distinct subset of offices merely urged employees to be more efficient (which normally will not violate the FLSA). *See Davis v. Food Lion*, 792 F.2d 1274, 1275–78 (4th Cir.1986); *Brumbelow v. Quality Mills, Inc.*, 462 F.2d 1324, 1327 (5th Cir.1972). A jury could decide that statutory violations occurred at the first group of offices but not the second (perhaps because the calls for efficiency did not rise to the level of a statutory violation, perhaps because the plaintiffs did not present enough evidence to conclude that supervisors pressured their employees to underreport, or perhaps because the only pressure—to be efficient—was self-induced and not a violation at all). What, then, is the jury tasked with delivering a class-wide verdict to do? It must say either that the defendants are liable as to the entire class or that the defendants are liable as to no one—when the truth lies somewhere in the middle. Just as it would be unfair to impose class-wide liability for all 296 employees based on the "representative" testimony that *some* supervisors directed employees not to report their hours, so it would be unfair to deny class-wide liability based on the "representative" testimony that *some* supervisors merely urged employees to be more efficient.

***23** The evidence introduced at trial illustrates the problem. Start with Richard Hunt, who said he was instructed "to dock an hour for lunch whether [he] took it or not." R. 456 at 125. Compare him to Paul Crossan, who testified that he underreported his time "because [he] wanted more jobs for more money for [him]self," thinking he would not be scheduled for extra shifts if he recorded too many hours. R. 448 at 77. Then compare them both to Stephen Fischer, who said he was instructed to underreport his hours on some occasions, was told to *overreport* his hours on other occasions, and in still other cases underreported because he wanted to "be routed daily and not miss any work." R. 456 at 78. With so many variables in play—different employees offering different testimony about different types of violations—how could a jury fairly assess liability on a class-wide, one-size-fits-all basis? I for one do not see how it could be done.

The Seventh Circuit recently explained how all of this should work in its unanimous opinion in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (2013). The case not only arose in the same industry and not only concerned the same worker-incentive plans, but it also involved the *same defendant in this case*. *Id.* at 772–73. Now that is an apt use of the term similarly situated. In denying certification, Judge Posner explained the "complication presented by a worker who underreported his time, but did so ... not under pressure by [the defendant] but because he wanted to impress the company with his efficiency." *Id.* at 774. The problem, as in this case, was that some plaintiffs were instructed to underreport; others underreported to meet the company's efficiency goals; and still others alleged that, while they recorded their time correctly, the company miscalculated their wages. *Id.* at 773–74; *see Espenscheid v. DirectSat USA, LLC*, No. 09–cv–625–bbc, 2011 WL 2009967, at *2 (W.D.Wis. May 23, 2011), *amended by* 2011 WL 2132975 (W.D.Wis. May 27, 2011). Because the plaintiffs offered no way to "distinguish ... benign underreporting from unlawful conduct by [the defendant]"—and no other way to prove their multiple, conflicting theories of liability on an all-or-nothing class-wide basis—Seventh Circuit refused to let them proceed collectively. 705 F.3d at 774. The court also worried that, because each employee did not perform the same tasks, they were not sufficiently similar to permit

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a class-wide determination of liability or damages, *id.* at 773; that assessing damages would require a "separate evidentiary hearing[ ]" for each member of the class, *id.;* that the plaintiffs' plan to use "representative" proof with their hand-picked employees would not work because the various theories of liability made it impossible to have representative employees in a single class, *id.* at 774; and that "the experience of a small, unrepresentative sample" of testifying workers could not support "an inference about the work time of" the remaining plaintiffs, *id.* at 775. Although the district court had proposed to divide the employees into three sub-classes, "corresponding to the three types of violation[s]" alleged, plaintiffs' counsel opposed the court's plan and "refus[ed] to suggest a feasible alternative, including a feasible method of determining damages." *Id.* at 775–76. We could adopt the Seventh Circuit's opinion as our own in this case, since it highlights precisely the same problems that afflicted the plaintiffs' trial plan. Because the employees did not offer a "feasible method of determining" liability and damages, the district court should have decertified their case. *Id.* at 776.

***24** All of this does not mean that a collective action was not an option. It means only that plaintiffs should have accounted for their distinct theories by dividing themselves into subclasses, one corresponding to each theory of liability under the statute—and indeed under their own trial plan. That is a tried and true method of collective-action representation, and nothing prevented plaintiffs from using it here.

The plaintiffs offer two reasons for concluding that their trial plan worked, even without sub-classes. First, they argue that they were subject to a "unified" company-wide "time-shaving policy" and that their trial plan enabled them to prove this policy's existence on a class-wide basis. Appellees' Br. 41. But what was the relevant policy? Was it that supervisors should alter employees' timesheets? That they should instruct employees to underreport their hours? That they should subtly encourage employees to underreport by urging them to be efficient? The plaintiffs define the company-wide "policy" at such a high level of generality that it encompasses *multiple* policies, each one corresponding to a different type of statutory violation and some to no violation at all. The FLSA does not bar "benign underreporting" where workers try "to impress the company with [their] efficiency in the hope of obtaining a promotion or maybe a better job elsewhere—or just to avoid being laid off." *Espenscheid*, 705 F.3d at 774. Nor does it violate the FLSA to reduce an employee's amount of work to avoid increasing overtime costs. *See* 29 C.F.R. § 785.13; *see also U.S. Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 779–80 (6th Cir.1995); *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir.2011). Yet what purports to link the plaintiffs' claims (cognizable and non-cognizable alike) is merely the theory—at a dizzying level of generality—that the defendants violated the overtime provisions of the FLSA. A company-wide "time-shaving" policy is lawyer talk for a company-wide policy of violating the FLSA. That does not do the trick. And most assuredly it does not do the trick when one of the theories does not even violate the FLSA.

The majority worries that, by requiring sub-classes to litigate the relevant policies, my approach would limit liability to donning and doffing cases. But those are not the only types of cases in which a company-wide policy—in the singular—permits class-wide resolution of liability and damages. Imagine that FTS and UniTek, rather than employing different practices in different offices, told supervisors at every location to dock the pay of employees who worked at least fifty hours; or declined to pay employees for compensable commuting time; or stated that technicians in each office should not be paid for their lunch break, even if they worked through it; or used punch-in clocks that systematically under-recorded employees' time. The plaintiffs in each of these cases could prove liability and damages on a class-wide basis, which means they could use the collective-action device to litigate their claims. But if, as here, the company employs multiple policies, as FTS and UniTek allegedly did, the plaintiffs must bring separate actions or prove violations using sub-classes (or any other trial plan that permits class-wide adjudication). The majority warns that my approach "would compel employees to bring a separate collective action ... for unreported work required by an employer before clocking in, and another for work required after clocking out." *Supra* at ——. But of course that "level of granularity," *id.* at ——– – ——–, is not required, and crying wolf won't make it so. All that's required is an approach that allows plaintiffs to litigate their claims collectively only when they can *prove* their claims collectively.

***25** Second, the plaintiffs argue that the jury could assess class-wide liability by relying on "representative" proof. They note that, before trial, the parties agreed to take discovery on a "sample" of fifty employees—forty chosen by the plaintiffs, ten by the defendants. R. 249–1 at 2. The plaintiffs called seventeen of those employees to testify at trial. This representative testimony, say the plaintiffs, gave the jury enough information to reach a class-wide verdict, which means the employees were sufficiently similar to

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permit collective-action certification and collective-action resolution.

That representative proof works in some cases does not mean it works in all cases. The question—always—is *who* can fairly represent *whom.* If the proof shows systematic underreporting by the employer of, say, the time it takes to don and doff the same protective clothing—giving the same workers credit for three minutes when the proof shows it takes seven minutes—representative proof works just fine. In that setting, there is evidence about how long it takes workers to don and doff and proof that the same deficiency was applied to all plaintiffs. But I am skeptical, indeed hard pressed to believe, that plaintiffs who allege one theory of liability (*e.g., the company* altered my timesheets) can testify on behalf of those who allege another (*e.g., I* underreported my time because my supervisor directed me to) or still another (*e.g., I* altered my time because the company urged me to be efficient). Plaintiffs who were told to underreport, for example, tell us very little about plaintiffs at different offices, working under different supervisors, who underreported based on efforts to improve efficiency. That is why the majority goes astray when it suggests that "it is enough that technicians testified as to each means of enforcement of the common, FLSA-violating policy." *Supra* at ——. The question is not whether each "means of enforcement" was represented; it is whether each means of enforcement was represented *in proportion to* its actual employment by FTS and UniTek across the entire class—something that the plaintiffs did not even attempt to prove.

Does anyone doubt how this case would come out if the roles were reversed—if most of the testifying plaintiffs were subtly pressured to underreport while only a few were told to do so? We would hesitate, I suspect, to say that the testifying employees were "representative" of all their non-testifying peers, especially if the jury returned a verdict for the defendants. What is sauce for one, however, presumably should be sauce for the other, making the district court's certification order perilous for defendants *and* plaintiffs alike. No doubt, collective actions permit plaintiffs to rely on representative proof. But that proof must be *representative*—and here plaintiffs' own evidence demonstrates that it was not remotely representative. *See* *Espenscheid*, 705 F.3d at 774; *see also* *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 793–94 (1st Cir.1991); *Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir.1995).

***26** The plaintiffs claim that *Anderson v. Mt. Clemens Pottery Co.* permits this trial plan. 328 U.S. 680, 66 S.Ct. 1187 (1946). But by its own terms, that is a case about damages, not liability. *Mt. Clemens Pottery* holds that, *after* an employee has shown that he "performed work and has not been paid in accordance with the" FLSA, he may "show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687–88, 66 S.Ct. 1187. The "just and reasonable inference" rule, in other words, comes into play only when the "fact of damages" is "certain" but the "amount of damages" is unclear. *Id.* at 688, 66 S.Ct. 1187. As *O'Brien explains*, "*Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred." 575 F.3d at 602; *see also* *Shultz v. Tarheel Coals, Inc.*, 417 F.2d 583, 584 (6th Cir.1969) (per curiam); *Porter v. Leventhal*, 160 F.2d 52, 58 (2d Cir.1946); *Kemmerer v. ICI Ams. Inc.*, 70 F.3d 281, 290 (3d Cir.1995); *Brown v. Family Dollar Stores of Ind., LP*, 534 F.3d 593, 594–95 (7th Cir.2008); *Carmody v. Kansas City Bd. of Police Comm'rs*, 713 F.3d 401, 406 (8th Cir.2013); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 914–15 (9th Cir.2003). The case thus provides no support for the plaintiffs' claim that they can show liability under a "relaxed" standard of proof. Appellees' Br. 39.

The plaintiffs counter that the defendants agreed to representative discovery, claiming that this means they necessarily agreed to representative proof at trial. The one does not follow from the other. The only way to determine whether one group of plaintiffs is representative of another is to gather information about both groups, typically by conducting discovery. When the defendants, after taking depositions, learned that the selected employees were not representative of their peers, they objected to the plaintiffs' plan to use representative proof at trial. Then they objected to it three more times. We have no right to penalize them for failing to raise this objection *before* discovery when the targeted problem did not materialize until *after* discovery was complete. Put another way, there is a difference between *alleging* a uniform policy of underreporting and *proving* one. Once discovery showed there was no uniform policy, the defendants properly objected to representative proof.

The plaintiffs lean on *O'Brien v. Ed Donnelly Enterprises* to try to sidestep these problems but it cannot bear the weight. 575 F.3d 567 (6th Cir.2009). *O'Brien* in dicta said that plaintiffs are similarly situated when "their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably

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individualized and distinct." *Id.* at 585. But *O'Brien* 's point was that, *if* plaintiffs offer a trial plan that enables them to prove their case on a class-wide basis, the court should permit the suit to proceed as a collective action. Such a trial plan, in some cases, may involve "individualized" presentations of proof; in other cases, representative proof may suffice. *Id.* But in all cases, plaintiffs must offer *some* reasoned method for the jury to assess class-wide liability—and that is just what the plaintiffs failed to do here. As for *O'Brien* 's *holding*, it was that the opt—in plaintiff was *not* similarly situated to the other plaintiffs, "because she failed to allege that she suffered from" the "unlawful practice[s]" endured by those employees. *Id.* at 586. Just so here, where the plaintiffs failed to offer a means of proving that they suffered from "unlawful practice[s]" on a class-wide basis.

***27** Finally, the plaintiffs (and the majority) try to distinguish this case from the Seventh Circuit's decision in *Espenscheid*. It is true that the Seventh Circuit applies the Rule 23 class-action standard to assess whether plaintiffs are "similarly situated" and that our circuit has rejected Rule 23(b)(3)'s "predominance" inquiry as an element of the "similarly situated" analysis. *Compare Espenscheid*, 705 F.3d at 772, *with O'Brien*, 575 F.3d at 584–85. But that makes no difference here. Under both the Seventh Circuit's approach and our own, one way for plaintiffs to satisfy the "similarly situated" inquiry is to allege "common theories" of liability that can be proved on a class-wide basis. *See O'Brien*, 575 F.3d at 585. That is exactly what the Seventh Circuit found to be missing when it held that the *Espenscheid* plaintiffs failed to distinguish "benign underreporting from unlawful conduct." 705 F.3d at 774. And that is exactly what is missing here. The majority also notes that *Espenscheid* involved a larger group of plaintiffs than this case. But that had no bearing on the Seventh Circuit's analysis. Nor could it. Whether the collective action consisted of twenty employees or two thousand, the problem was that those employees could not prove class-wide liability—and the same reasoning applies to the class of two-hundred-plus plaintiffs today. An error does not become harmless because it affects "just" 200 people or "just" two companies.

Seventh Amendment. It should come as no surprise that a skewed liability determination leads to a skewed damages calculation. The majority to its credit corrects one problem with the damages calculation. I would correct the other. The plaintiffs provided no evidence from which the jury (or, alas, the court) could conclude that the testifying plaintiffs failed to record a comparable number of hours on their timesheets as their non-testifying peers. The district court nonetheless adopted a trial procedure that *assumed* that each of the testifying and non-testifying employees was similarly situated for purposes of calculating damages. That procedure not only ignored the non-representative nature of the proof but it also violated the Seventh Amendment.

Here's how the district court calculated damages: When the jury returned a verdict for the plaintiffs, it identified the average number of weekly hours that each of the seventeen testifying employees had worked but had not recorded on their timesheets. The court then averaged together the number of unrecorded hours for each testifying employee, assumed that this value was also the average number of unrecorded hours for each of the 279 *non*-testifying employees, and awarded damages to the class as a whole.

The Seventh Amendment bars this judge-run, average-of-averages approach. "In Suits at common law, where the value in controversy shall exceed twenty dollars," the Amendment reads, "the right of trial by jury shall be preserved, and 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." U.S. Const. amend. VII. That means a court may not "substitut[e] its own estimate of the amount of damages which the plaintiff ought to have recovered[ ] to enter an absolute judgment for any other sum than that assessed by the jury." *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 766 (6th Cir.2008) (quotation omitted). Yet that is just what the court did. The jury awarded damages to the seventeen testifying plaintiffs, but the court—on its own and without any jury findings—extrapolated that damages award to the remaining 279 plaintiffs.

***28** The plaintiffs defend this procedure by noting that a court may "render judgment as a matter of law as to some portion of a jury award if it is compelled by a legal rule or if there can be no genuine issue as to the correct calculation of damages." *Id.* But the district court did not award damages based on a legal conclusion; it did so based on its finding that the non-testifying plaintiffs failed to record the same number of hours, on average, as their testifying peers. That is a *factual finding* about the number of hours worked by each plaintiff. And the Seventh Amendment means that a jury, not a judge, must make that finding.

The majority portrays the district court's damages determination as a matter of "arithmetic," a "formulaic or mathematical calculation." *Supra* at ——. How could that be?

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There was no finding by the jury about the overtime hours worked by the non-testifying employees and thus no basis for the judge to do the math or apply a formula. Imagine that ten plaintiffs bring a lawsuit. The court gives the jury a verdict form, listing the names of five plaintiffs and asking the jury to write down the amount of damages those plaintiffs should receive. After the jury does so, the judge decides that the remaining five plaintiffs are similar to their peers and decides they should receive damages too, all in the absence of any finding by the jury about the similarity of the two classes of plaintiffs. It then doubles the jury's award and gives damages to all ten plaintiffs. I have little doubt we would find a Seventh Amendment violation, and the majority says nothing to suggest otherwise. *See* *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990); *Wallace v. FedEx Corp.*, 764 F.3d 571, 591–94 (6th Cir.2014). That conclusion should not change simply because this case arises in the collective-action context, where the "estimated average approach" is the accepted practice. The missing ingredient is that the jury, not the judge, must still determine the "estimated average" that each plaintiff should receive. And no court to my knowledge —either in the collective-action context or outside of it—has endorsed a procedure by which the jury awards damages to testifying plaintiffs while the judge awards damages to their non-testifying counterparts with no finding from the jury as to the latter group.

Nor did the district court cure the problem when it instructed the jury that non-testifying plaintiffs would be "deemed by inference to be entitled to overtime compensation." R. 463 at 28. This instruction told the jury only that, if it found liability with respect to the testifying plaintiffs, it also was finding liability with respect to the non-testifying plaintiffs. The court did not inform the jury that its damages calculations would be averaged together to make a class-wide finding. Nor did the court charge the jury with determining the estimated average that each plaintiff should receive. All the instructions did, in effect, was tell the jury that the judge would calculate damages. But it should go without saying that a court cannot *correct* a Seventh Amendment violation by *informing* the jury that a Seventh Amendment violation is about to occur.

***29** For the same reason, *Mt. Clemens Pottery* has nothing to do with this case. It is not a Seventh Amendment case. It did not permit a judge, rather than a jury, to decide whether the damages of the testifying and non-testifying employees were similar and thus could be assessed on an "estimated average approach." And it involved compensation for employees' preliminary work activities, which took roughly the same amount of time for each employee to perform. 328 U.S. at 690–93, 66 S.Ct. 1187. The jury in today's case, however, found that the number of unrecorded hours varied widely among the testifying technicians—from a low of eight hours per week to a high of twenty-four, with considerable variation in between. This range of evidence increased the risk of under-compensation for employees who worked the most hours (and over-compensation for those who worked the fewest) in a way that *Mt. Clemens Pottery* never needed to confront. And that risk of course heightens the importance of keeping the damages determination where it belongs—with the jury, which is best equipped to undertake the intricate fact-finding required when the employees' unrecorded hours span so broadly.

Herman v. Palo Group Foster Home, Inc., is of a piece. 183 F.3d 468 (6th Cir.1999). It stated that the *Mt. Clemens Pottery* framework enables juries to find damages "as a matter of just and reasonable inference" when employers do not keep adequate records of their employees' time. *Id.* at 472. Nowhere does *Herman* endorse the procedure used in this case, which permitted the court to *assume* (not even infer) that all employees failed to record the same number of hours on their timesheets.

The majority claims in the alternative that the defendants forfeited their claim to a jury trial on damages. Not true. The defendants opposed the district court's ruling that the court could calculate damages, and they reiterated their objections at a post-trial status conference. Consistent with these objections, the district judge did not decide that defendants forfeited the point. He instead explained he was "at a little bit of a loss" because he had not tried the case and only "now" "realize[d]" that a "residual issue" remained. R. 444 at 6. In response, the district court offered to call a second jury to calculate damages, and asked the defendants what steps would be "appropriate[.]" *Id.* at 6–7. Counsel responded, "[W]e think the only thing ... that's left and that is appropriate is an entry of judgment ... either for the defense or liability for plaintiffs ... with zero damages." *Id.* at 7. "[P]art of our position," counsel concluded, "is to be clear for any type of post-trial appellate record" that the defendants were "not waiving ... or changing their position." *Id.* at 19–20. Nowhere in this exchange do the defendants forfeit their Seventh Amendment argument; at times they indeed reaffirm it. Of course, even if the defendants *had* forfeited or for that matter waived their right to a jury trial (which they did not), the appropriate response would have been to conduct a *bench*

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trial on damages, not to impose damages as a matter of law with no finding by anyone—judge or jury—about the right amount. *Cf. Singer v. United States*, 380 U.S. 24, 26, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965).

* * *

***30** It is not difficult to imagine how this case could have gone differently. The plaintiffs could have organized themselves into sub-classes, one corresponding to each type of alleged statutory violation. *See, e.g., Fravel v. County of Lake*, No. 2:07 cv 253, 2008 WL 2704744, at *3–4 (N.D.Ind. July 7, 2008). Or they could have complained to the Department of Labor, which may seek damages on the employees' behalf. *See* 29 U.S.C. § 216(c); *Espenscheid*, 705 F.3d at 776. But the plaintiffs did not take either route. Because they did not do so—because they proposed a trial plan that violated both statutory and constitutional requirements—we should remand this case and allow them to propose a new procedure that permits reasoned and fair adjudication of their claims.

The majority seeing things differently, I respectfully dissent.

1 Named plaintiff Monroe was a technician during the class period. After the class period, he was promoted to a managerial position.

2 The Honorable Bernice Donald presided over all pretrial and trial issues before assuming her position on the Sixth Circuit. The Honorable Jon Phipps McCalla and John Fowlkes presided over all post-trial issues, including the calculation of damages.

3 The dissent suggests we must follow *Espenscheid* because it "involved the *same defendant in this case*." (Dis. at ——.) UniTek, the parent company that provided human resources and payroll functions, was involved in both cases, but at issue in each case was what the direct employer—here FTS, there DirectSat USA—required regarding the reporting of overtime.

All Citations

--- F.3d ----, 2016 WL 814329

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Planning for A Wage & Hour Trial—Starting With Discovery

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

2016 ANNUAL CONVENTION

JUNE 23, 2016

***Moderator*: Cornelia Dai**

***Speakers*: James M. Finberg, George A. Hanson, & Jason C. Marsili**

Tyson v. Bouaphakeo, 136 S. Ct. 1036 (Mar. 22, 2016)

Tyson v. Bouaphakeo (cont'd)

- ***Issue 1— Holding*:**
  - **"Class certification was appropriate under Fed. R. Civ. P. 23(b)(3) where the employees' reliance on an expert's study as to how long various donning and doffing activities took did not deprive the employer of its ability to litigate individual defenses to the FLSA action, and the study could have been sufficient to sustain a jury finding as to hours worked if introduced in each employee's action."**

- ***Issue 2— Unanswered.***

Tyson v. Bouaphakeo (cont'd)

- ***Query*: When may a representative sample be used to establish classwide liability?**
  - **"Whether and when statistical evidence can be used to establish class wide liability will depend on the purpose for which the evidence is being introduced and on the 'elements of the underlying cause of action.'"**

Tyson v. Bouaphakeo (cont'd)

- ***Main Takeaways*:**
  - **Statistical evidence and representative testimony can be used to establish both liability and damages in class and collective actions. [*Rejects Trial by Formula Walmart defense*]**
  - **Differences in class member damages does not preclude class certification. [*Rejects Common Damages Model at Certification Comcast defense*]**

Representative Proof

- **Class Certification**
- **Discovery**
- **Representative Sampling**
- **Models:**
  - ***Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008); and**
  - ***Duran v. U.S. Bank Nat'l Assn*., 59 Cal. 4th 1 (2014).**

Trial Plan

- **Preparing a trial plan**
- **Effective use of a trial plan**
- **Responding to defendant's challenges**

Use of Experts

- **Liability vs. Damages**
- **Class Certification**
- **Summary Adjudication/Judgment**
- **Settlement**

Bifurcation: Liability and Damages

- **Bifurcation (FRCP 42)**
- **Issue Certification (FRCP 23(c)(4))**
- **Damages Models**

Other Trial Considerations

- **Type of Action**
- **Trier of Fact**
- **Jury Selection**
- **Time Limits**