

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TYSON FOODS, INC., :

4 Petitioner : No. 14-1146

5 v. :

6 PEG BOUAPHAKEO, ET AL., :

7 INDIVIDUALLY AND ON :

8 BEHALF OF ALL OTHERS :

9 SIMILARLY SITUATED. :

10 - - - - - x

11 Washington, D.C.

12 Tuesday, November 10, 2015

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 a.m.

17 APPEARANCES:

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19 of Petitioner.

20 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
21 Respondents.

22 ELIZABETH B. PRELOGAR, ESQ., Assistant to the Solicitor
23 General, Department of Justice, Washington, D.C.; for
24 United States, as amicus curiae, supporting
25 Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 14-1146, Tyson Foods v.
5 Bouaphakeo.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER C. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 This Court has made clear that class actions
12 are only appropriate when the plaintiff's proof is
13 tailored to their specific theory of liability in a way
14 that allows class-wide injury to be determined in one
15 stroke, and that the lower courts must engage in a
16 rigorous analysis in order to demonstrate that fact.

17 In this Federal Fair Labor Standards Act,
18 the plaintiffs were allowed to pursue a class of more
19 than 3300 employees who occupied job -- more than 400
20 jobs which required widely differing amounts of time to
21 perform their donning, doffing, and washing tasks.

22 JUSTICE GINSBURG: Well, is that so?
23 Because as far as I understand this, there was some
24 donning and doffing that was common, that is, there was
25 some sanitation and some protective gear that they all

1 had to wear. And then there was a difference between
2 the night -- knife wielders and the others, but they
3 weren't all that different. So in one case, one wore
4 mesh aprons, and in the other case, rubber aprons. It
5 didn't seem to be that wide disparity.

6 MR. PHILLIPS: Well, there -- there are a
7 number of answers to that, Justice Ginsburg.

8 First of all, if you -- if you just look at
9 the activities that Dr. Mericle specifically testified
10 about, for certain activities, he found some employees
11 who take 30 seconds to get dressed and others who took
12 more than 10 minutes to get dressed --

13 JUSTICE KENNEDY: Well, but you didn't --

14 MR. PHILLIPS: -- in certain circumstances
15 in --

16 JUSTICE KENNEDY: -- the statistical
17 mechanism of your own, you didn't have a Daubert
18 objection to the testimony, and you suggest in your
19 brief that uninjured plaintiffs are included in
20 aggregate damages, but you were the one that objected to
21 the bifurcated trial. And so far as uninjured
22 plaintiffs recovering, that has to be determined on
23 remand anyway. I -- I just don't understand your
24 arguments.

25 MR. PHILLIPS: There are a number of

1 questions embedded in there, Justice Kennedy.

2 The -- the first one is -- and we objected
3 all along to having this class certified on the basis
4 that there were a wide range of --

5 JUSTICE KENNEDY: Yeah, but once you lose
6 that, you have also other defenses: Your own expert, a
7 Daubert objection, et cetera.

8 MR. PHILLIPS: But Justice Kennedy, we don't
9 have to bring forward an expert. What we did in this
10 case is we -- we cross-examined both their -- the named
11 plaintiffs, the four named plaintiffs who testified, and
12 demonstrated two things about that.

13 One, that in general, they way overestimated
14 their own time; and two, none of their times were
15 remotely the same as Dr. Mericle's time. So we proved
16 that.

17 Second, we cross-examined Dr. Mericle about
18 his testimony and demonstrated again that his methods
19 were completely haphazard and scattered, and therefore
20 couldn't demonstrate.

21 And this notion that you patch over the
22 entirety of these problems simply by averaging all of
23 the times of all of these employees is simply the kind
24 of shortcut this Court has -- has rejected in the past
25 in both Comcast and Wal-Mart.

1 I'm sorry, Justice.

2 JUSTICE SOTOMAYOR: Mr. Phillips, I'm
3 completely at a loss as to what you're complaining
4 about. That's exactly what you did.

5 And what this expert did -- I mean, as far
6 as I could tell, between your expert that you used to
7 calculate "gang time" and "K-time" did exactly the same
8 thing this expert did. You came out with a lower
9 number, but you used fewer people. At least their
10 expert used hundreds of people instead of the few that
11 you did. I'm -- I'm just completely at a loss.

12 Would you suggest that if one plaintiff came
13 into court, that he could not use the -- this expert to
14 prove his case circumstantially to show that in fact,
15 the average is this, and he doesn't really know how much
16 time he took? When he does it now, it may be 12 minutes
17 instead of 10?

18 MR. PHILLIPS: Justice Sotomayor, I would --
19 I would -- yes. I would categorically reject that,
20 because that's no more different than Employee A coming
21 into court and saying I don't know what I worked, but
22 Employee B, who does vastly different activities --

23 JUSTICE SOTOMAYOR: Oh, no, no. But they
24 know what they worked. They know that people were
25 working over 40 hours because there were time records

1 with respect to that.

2 What you're basically saying is that Mt.
3 Clemens is completely wrong. You can't estimate your
4 time when the employer doesn't keep records.

5 MR. PHILLIPS: We -- we don't have any
6 quarrel with Mt. Clemens the way it was written. The
7 Mt. Clemens made -- makes a very clear divide between
8 what needs to be proven, what the plaintiff's burden is
9 to demonstrate that he or she has worked beyond the
10 40-hour work week, and then what happens if
11 that's proof --

12 JUSTICE SOTOMAYOR: There were time records
13 to that effect here.

14 MR. PHILLIPS: Right. But there were a lot
15 of people who didn't work beyond the 40 hours.

16 JUSTICE SOTOMAYOR: No. There were
17 200-and-something-odd people that their expert showed
18 didn't work above 40 hours. The jury knew about those.

19 MR. PHILLIPS: And -- and the jury rejected
20 Dr. Mericle's averaging of -- of 18 -- 18 and 20 -- 18
21 and a half and 21 minutes, and we don't know what the
22 impact of that is.

23 What we do know is that Fox calculated that
24 a mere three minutes' departure from Mericle's numbers
25 dropped the damages award by \$1.41 million, and dropped

1 the number of plaintiffs out by close to 125.

2 So Justice Kennedy, the small differences
3 make a big difference in -- in this particular case.

4 JUSTICE GINSBURG: Can we go back to
5 Justice Sotomayor's basic question, that is, when the
6 government sued Tyson or Tyson's predecessor and got an
7 injunction --

8 MR. PHILLIPS: Right.

9 JUSTICE GINSBURG: -- what Tyson's did, it
10 had its own industrial engineer observe the workers as
11 they were donning and doffing their gear, and that
12 expert averaged the times that they spent. And it seems
13 to me that the plaintiff's expert here is doing exactly
14 the same thing that Tyson's expert did when the
15 government was bringing --

16 MR. PHILLIPS: And in some ways,
17 Justice Ginsburg, that explains why we didn't bring the
18 Daubert motion that Justice Kennedy asked about because
19 the methodology isn't inherently flawed. The problem
20 with the methodology is it's applied to the theory of
21 liability in this case.

22 It's one thing for an employer to say, look,
23 we're entitled under the Department of Labor regulations
24 to average, as a mechanism for trying to avoid the kind
25 of picayune details and discrepancies that the Court

1 identified in Mt. Clemens and said those can be
2 disregarded as mere trifles, we're allowed to do that.
3 And the effect of what we, in fact, did hear was to
4 round up in order to provide more time to people than
5 they might otherwise have gotten.

6 And indeed, if you go to the pre-2007 period
7 when you're talking about the people who just put on the
8 normal sanitary clothing, they were -- they were all
9 given four minutes of K-time when they -- it took them
10 all of about 30 seconds to do that.

11 So the idea that we could overcompensate
12 somebody using those kinds of data is one thing, but
13 that's a vast difference from saying that in order to --
14 to maintain as -- under a rigorous analysis the idea
15 that this can proceed as a class when all you've got is
16 averaging across the widest imaginable range of -- of
17 employees performing different tasks with different
18 requirements, and indeed, although I don't think --

19 JUSTICE KAGAN: Mr. Phillips, you say the
20 question is whether it can proceed as a class. But it
21 seems as though that's really not the question in this
22 case because of Mt. Clemens; that what Mt. Clemens does
23 is to suggest that certain kinds of statistical evidence
24 are completely appropriate in FLSA cases generally, even
25 if they're brought by the government, or even if they're

1 brought by a single person.

2 And so the question that you really are
3 putting before us is not a Rule 23 question, it's a
4 question of whether this sort of evidence complies with
5 the Mt. Clemens standard; isn't that right?

6 MR. PHILLIPS: No. I would go -- I would
7 actually go at it the other way. I would say that the
8 first question is: Can you use this kind of averaging
9 in a -- in a run mine-case period under Rule 23? And it
10 seems to me the answer to that has to be no, that
11 this -- this simply papers over the problems of the
12 class.

13 JUSTICE KAGAN: But the Rule 23 inquiry,
14 Mr. Phillips, is always dependent on what the
15 substantive law is.

16 MR. PHILLIPS: Right. And then the question
17 is --

18 JUSTICE KAGAN: That was true in Halliburton
19 where we said, look, if we didn't have the basic
20 presumption, we would think of this as very
21 individualized.

22 MR. PHILLIPS: Right.

23 JUSTICE KAGAN: But we have the basic
24 presumption, so the proof is not individualized.

25 And the same thing, it seems to me, is true

1 here because of the Mt. Clemens inquiry.

2 MR. PHILLIPS: Right.

3 JUSTICE KAGAN: Where it says if the
4 employer hasn't kept the appropriate records, even a
5 single plaintiff can prove the amount of work done
6 through the use of statistical --

7 MR. PHILLIPS: That's not what Mt. Clemens
8 says, Justice Kagan. Mt. Clemens says that it's the
9 burden on the employee to demonstrate that he or she
10 worked the requisite hours in order to get past 40.
11 Once you got past 40 in determining exactly what the
12 damages would be, at that point it was reasonable
13 because we hadn't -- because -- because Mt. Clemens
14 hadn't maintained records to go ahead and give the
15 plaintiff a pass. It's the same -- it's the Story
16 parchments test all over again.

17 JUSTICE KAGAN: I can't see how that account
18 of Mt. Clemens would make most -- much sense. You're
19 suggesting that a person past 40 can produce the
20 statistical evidence, but if I worked 39 1/2 hours and
21 all of this overtime is going to push me over 40, the
22 Mt. Clemens presumption wouldn't be available to me?

23 MR. PHILLIPS: I think that's exactly the
24 line the Court drew in Mt. Clemens. It's the line that
25 the Court has consistently drawn in antitrust cases,

1 from parchment.

2 JUSTICE KENNEDY: But you've changed your
3 theory. Question 2, as you presented in the petition
4 for certiorari, whether the class may be certified if
5 members were not injured. Then you changed that.
6 Page 49 of your brief, you say that the plaintiff must
7 demonstrate a mechanism to show that. So now you're
8 talking about -- about the mechanism.

9 So the -- so the case has been argued on
10 different theories at -- at many points, and it seems to
11 me Justice Kagan is precisely right. You said, well, I
12 want to start first with class action.

13 She said, no, no. The point is we start
14 with Mt. Clemens. That's the substantive law for FSLA.

15 MR. PHILLIPS: To be sure. I mean, you can
16 go at it either way. But at the end of the day,
17 obviously, what -- as I started -- as I started my
18 remarks, is -- is that the Court -- is that the
19 plaintiffs are obliged to demonstrate that a class works
20 on the basis of the substantive liability that they have
21 to -- burden that they have to --

22 JUSTICE BREYER: Right. So Mt. Clemens says
23 exactly this. I'll read it. I think it's correct.
24 "Where" -- "Where an employee's records of time worked
25 are inaccurate or inadequate" -- that's your case,

1 right? -- "then the employee attempting to bring a claim
2 can show time worked by producing sufficient evidence to
3 show the amount and extent of that work as a matter of
4 just and reasonable inference."

5 That's what it says to do.

6 MR. PHILLIPS: Right.

7 JUSTICE BREYER: And then it says the
8 employer can't complain that the damages lack the
9 exactness and precision of measurement that would be
10 possible had he kept records. But he didn't. So they
11 used some statistics to show it. What's wrong with
12 that?

13 MR. PHILLIPS: There are two answers to
14 that. The premise -- the first part of that sentence
15 is, if he proves that he has, in fact, performed work
16 for which he was improperly compensated.

17 JUSTICE BREYER: Yeah.

18 MR. PHILLIPS: None of these employee -- a
19 huge number of these employees have not made that
20 showing.

21 JUSTICE BREYER: Well, they did through
22 statistics. I mean --

23 MR. PHILLIPS: No. They --

24 JUSTICE BREYER: I mean, you say an
25 antitrust case. Okay. Let's imagine an antitrust case.

1 There's an agreement among sneaker manufacturers to use
2 shoddy material. And large customers, distributors buy
3 these shoddy materials. They're hurt. How much are
4 they hurt? It depends on how many sneakers their
5 employees used and when and so forth.

6 There is no way people don't keep sneaker
7 records, so what we do is we hire a statistician to use
8 sampling. And if he's a good statistician and uses
9 sampling correctly, we have probably a better measure
10 than if we asked the employees to go back and remember
11 how many sneakers they wore and what days and what hours
12 50 years ago.

13 MR. PHILLIPS: But Justice Breyer, your --
14 your entire hypothetical is premised on the fact that
15 they had already shown that they were injured in the
16 first --

17 JUSTICE BREYER: Well, some of them, it
18 might turn out, actually did not wear sneakers during
19 the period of time that the conspiracy has been shown to
20 exist. But we didn't know that at the beginning because
21 we thought we could prove a conspiracy from January to
22 December, but we only ended up proving it from January
23 until June. Now, there we have it. We put them in the
24 class to begin with because we thought we could prove
25 injury. As it turns out, we can't.

1 Now, I -- I've never heard that you had to
2 be able to know exactly how you're going to win your
3 case when you form the class action because you don't
4 know quite what the proof will be. I mean, isn't that
5 how class actions work?

6 MR. PHILLIPS: No, because --

7 JUSTICE BREYER: Why not?

8 MR. PHILLIPS: -- because there's a -- I
9 mean, the class certification decision is still open
10 until the final -- until a judgment is rendered by the
11 district court. So the district court has a continuing
12 responsibility in the face of challenges to the class
13 certification to consider decertifying the class. And
14 we raised -- and we raised that issue right after
15 Wal-Mart.

16 JUSTICE BREYER: But why decertify the
17 class? If we've shown or we do show the conspiracy
18 lasted from January until June, not through December?
19 Some people will recover; other people will not recover.
20 Can't we wait until the evidence is presented before we
21 tell the people who didn't --

22 MR. PHILLIPS: But see, the problem --

23 JUSTICE BREYER: -- buy the sneakers, then
24 you don't recover?

25 MR. PHILLIPS: The -- the problem with

1 this -- and this would raise exactly the same Comcast
2 problem -- is my guess is your expert testified about
3 the conspiracy that lasted through the entire period.
4 And for whatever reason the jury rejected it, just as it
5 rejected Mericle in this case. And now you're stuck in
6 a situation where you've got this huge judgment where we
7 knew there were 200 and some people who -- but now we
8 know there are more than a thousand plaintiffs.

9 And -- and Justice Kennedy, we didn't shift
10 the -- the answer. Our answer was this is invalid
11 because there are so many defendant -- plaintiffs -- who
12 are --

13 JUSTICE SOTOMAYOR: I'm sorry. I'm having
14 difficulty understanding your point. There are records,
15 aren't there, of how many hours they worked without
16 donning and doffing the equipment at issue, correct?

17 MR. PHILLIPS: Yes, there are.

18 JUSTICE SOTOMAYOR: All right. So I thought
19 that Dr. Mericle's using those actual records figured
20 out how many people worked over 40 hours.

21 MR. PHILLIPS: But -- but only because --
22 she didn't do that to say who's over 40. I mean, she
23 obviously identified some who weren't. But she took
24 Mericle's average numbers, 18 1/2 and 21 and -- and
25 slotted them in when nobody worked 18 1/2 and 21

1 minutes.

2 JUSTICE SOTOMAYOR: Well, you didn't have an
3 expert to say that?

4 MR. PHILLIPS: We didn't need an expert to
5 say that. We had our industrial engineer who said --
6 and the -- and the Federal government's industrial
7 engineer said the same thing for four minutes.

8 JUSTICE SOTOMAYOR: Is there any -- there
9 any -- reject --

10 JUSTICE ALITO: Is there any way at this
11 point to determine which employees were actually injured
12 and which ones were not? Because I -- I gathered
13 because the jury rejected the full verdict that was
14 requested by the plaintiffs, they did not accept
15 Dr. Mericle's testimony regarding the amount of time
16 needed to don and doff for employees in various
17 categories. And without knowing that, I don't see how
18 you can at this point -- I'll -- I'll ask Mr. Frederick
19 the same question -- how you can separate the employees
20 who were injured from the employees who were not
21 injured.

22 MR. PHILLIPS: It -- it's impossible to do
23 that. And -- and Fox, who was their expert who
24 testified on the damages, was very clear about that
25 because it's not linear. So that if -- if it turns out

1 that some period of time drops, the number of employees
2 who fall below the 40-hour threshold plus the -- plus
3 the K-code time will drop.

4 JUSTICE KENNEDY: But the briefs are like
5 two ships passing in the night on this point. The
6 Respondent is going to say this is for remand, or am I
7 wrong about that?

8 MR. PHILLIPS: I would be shocked if he's
9 prepared to accept a remand. I mean, I'm delighted if
10 he wants that.

11 JUSTICE KENNEDY: Aren't there further
12 proceedings?

13 MR. PHILLIPS: I don't --

14 JUSTICE KENNEDY: Aren't there further
15 proceedings in this case?

16 JUSTICE GINSBURG: It -- it was a lump sum.

17 MR. PHILLIPS: It was a lump sum judgment,
18 Your Honor.

19 JUSTICE KAGAN: And now that has to be
20 distributed. So there are going to be further
21 proceedings to distribute that lump sum judgment.

22 MR. PHILLIPS: It is far from clear how it's
23 going to be -- how it's going to be dealt with at this
24 point other than on a pro rata basis. That's what
25 Judge --

1 JUSTICE KENNEDY: But that has to be
2 determined in the trial court.

3 MR. PHILLIPS: I'm sorry?

4 JUSTICE KENNEDY: But that has to be
5 determined in the trial court.

6 MR. PHILLIPS: It's far from clear what the
7 trial court --

8 JUSTICE KAGAN: Mr. Phillips --

9 MR. PHILLIPS: -- if the trial court has any
10 intention to do anything with this other than to accept
11 the check.

12 JUSTICE SCALIA: I don't understand. You --
13 you can get a class certified, some of whom have not
14 been injured at all, and wait until the conclusion of
15 the trial for the trial court to determine who has not
16 been injured?

17 MR. PHILLIPS: Well, you can't do that. And
18 the truth -- I mean, no. I mean, the answer to that is
19 no; and second, you couldn't do it anyway.

20 JUSTICE SCALIA: -- class to begin with.

21 MR. PHILLIPS: But you can't -- you can't
22 unscramble this egg at this point. It's impossible.
23 You've got to --

24 JUSTICE GINSBURG: You have conceded that
25 the initial certification was okay because at that time,

1 we didn't know which ones --

2 MR. PHILLIPS: Well, I wouldn't say we
3 conceded that. Obviously, we -- we filed an opposition
4 to their motion to certify, and we brought forth dozens
5 of supervisors who testified about the -- the myriad
6 jobs and the -- and the wide range of donning and
7 doffing requirements for them, and said that under the
8 circumstances, this is not an appropriate case to
9 proceed as a class.

10 JUSTICE GINSBURG: But didn't you say that
11 in general, a class could be certified going in, even
12 though at that point, we don't know?

13 MR. PHILLIPS: No. No. We -- I mean, we --
14 in general, we say classes can be certified. I mean, I
15 think you could have certified a walking time class in
16 this case.

17 JUSTICE BREYER: I'm still having the same
18 problem. When I heard Justice Scalia's question, I
19 thought the answer is of course you can put in your
20 class people whom, it will turn out, are not hurt. I
21 have a class of people who were hurt by a price-fixing
22 conspiracy that lasted from January to December. That's
23 what I said. I have good reason to think it. But I
24 prove it only lasted until June. That's a failure of
25 proof. Half of them were not hurt, okay? So we don't

1 pay them.

2 MR. PHILLIPS: But the --

3 JUSTICE BREYER: I thought that's the most
4 common thing in the world. Am I wrong?

5 MR. PHILLIPS: But the problem is -- yes,
6 you are, Justice Breyer, because the problem there is
7 the expert who testified to the conspiracy would have
8 assumed that the conspiracy covered the entire time
9 of --

10 JUSTICE BREYER: That's right.

11 MR. PHILLIPS: -- proof. And, therefore,
12 the damages number that that expert will put forward
13 will be a vastly larger number than what the jury comes
14 back in based on the -- on the finding that there was a
15 shorter conspiracy.

16 JUSTICE BREYER: Yes.

17 MR. PHILLIPS: And there's no way to know
18 who was injured in that context and who was not injured
19 in that context.

20 JUSTICE KAGAN: But there --

21 MR. PHILLIPS: You can't identify the people
22 to pay.

23 JUSTICE KAGAN: But, Mr. Phillips, there is
24 a way.

25 CHIEF JUSTICE ROBERTS: Justice Sotomayor.

1 JUSTICE SOTOMAYOR: Why do you have
2 standing? I mean --

3 MR. PHILLIPS: Because --

4 JUSTICE SOTOMAYOR: -- the jury, obviously,
5 rejected something. It obviously was told to exclude
6 people who were not entitled, and it did it. You didn't
7 object to a -- the failure to have -- you objected to
8 proposing interrogatories. So this has invited errors;
9 it sounds like invited error.

10 But, finally, how do you have standing --

11 MR. PHILLIPS: Respondent didn't raise that.

12 JUSTICE SOTOMAYOR: -- to argue that the
13 issue of who gets part of that money?

14 MR. PHILLIPS: Phillips Petroleum says we
15 clearly have standing to do that because --

16 JUSTICE SOTOMAYOR: Why?

17 MR. PHILLIPS: Because our concern is that
18 we -- that -- that the class be bound by whatever
19 judgment comes out of this. And if it turns out that
20 this class has been improperly treated so that there are
21 a substantial number of --

22 JUSTICE SOTOMAYOR: You tell me, except for
23 those people --

24 MR. PHILLIPS: Plaintiffs.

25 JUSTICE SOTOMAYOR: -- who opted out, there

1 are people who opted in?

2 MR. PHILLIPS: The Fair Labor Standards Act
3 people opted in, yes, Your Honor.

4 JUSTICE SOTOMAYOR: Opted in.

5 So you know all of the people who are bound,
6 all the people who've opt -- who were -- who opted in.

7 MR. PHILLIPS: No, no.

8 JUSTICE SOTOMAYOR: So why do you have to
9 know whether -- there can't be more.

10 MR. PHILLIPS: No, no, no, no, no. It's --
11 it's quite possible that there are people who have
12 been -- who have been undercompensated because of this
13 particular scheme, and who could claim that because they
14 weren't allowed to participate, their due process rights
15 were violated --

16 JUSTICE SOTOMAYOR: They were allowed to
17 participate; they just didn't opt in.

18 MR. PHILLIPS: Well others -- but others
19 didn't -- that's -- that's true, but the -- but the
20 bottom line here remains the same, which is, they are
21 absent class members whose interests were -- may -- may
22 have not been fully protected, and the only question
23 there is do we have standing to raise this issue,
24 which --

25 JUSTICE SOTOMAYOR: I've never heard of a

1 case where absent class members are somehow bound by a
2 judgment in this case, when they didn't opt in. I hope
3 that -- I thought that was the whole purpose of not
4 opting in, so you're not bound by this judgment.

5 MR. PHILLIPS: If it's a class judgment and
6 you -- and you didn't opt out -- I mean, there are two
7 different classes here, right? There is a 23(b)(3)
8 class, and there's the FSLA collective action, which
9 have now been merged in on the judgment. So there's no
10 reason to look at this as anything other than a 23(b)(3)
11 class of individuals. And, you know -- and their -- so
12 that means there are literally thousands of absent class
13 members whose -- who are -- who are either entitled to
14 or not entitled to damages without any ability to know
15 whether they were or were not injured. And therefore,
16 under those circumstances, what this Court said in
17 Phillips Petroleum is that the defendant has a right to
18 be sure that the mechanism by which the judgment
19 ultimately is entered across the entire class is such
20 that it -- that it protects us as a collateral
21 estoppel --

22 CHIEF JUSTICE ROBERTS: Mr. Phillips, do
23 you have -- do you have a theory as to why the jury
24 awarded less than half of the damages that were
25 requested? Did they -- I take it they didn't identify

1 particular workers.

2 MR. PHILLIPS: They did not identify
3 particular workers.

4 CHIEF JUSTICE ROBERTS: Did they -- did they
5 disagree with the 18 minutes, 21 minutes?

6 MR. PHILLIPS: They had to have disagreed
7 with it, and there was good reason to do that because if
8 you -- if you take the testimony of the four named
9 plaintiffs, they -- they were significantly different
10 than the -- than the 18 and 21 minute times. And so
11 the -- the best evidence was, is that Mericle, by this
12 method of sort of -- of nonrandom observations of
13 self-selected employees, came up with widely -- wildly
14 extravagant numbers, and the jury rejected them. And it
15 was the plaintiffs' decision to go for the -- for the
16 entirety of the claim rather than take a more narrow
17 approach of maybe seeking walking time where the conduct
18 of the individual plaintiffs is much more homogenous.

19 The problem with this is that it's very --
20 it's a vast -- I'm sorry.

21 JUSTICE KAGAN: If I could go back to
22 Justice Kennedy's question at the start, because it
23 really was your decision not to have a bifurcated
24 proceeding, where it would have been clear -- it would
25 have been proved separately in a highly ministerial way

1 which employees worked over 40 hours.

2 And having made that decision, you're in a
3 position now where you're saying, oh, there's one sum --
4 there's one lump judgment; we don't know what to do with
5 it. But, in -- in essence, what's going to happen is
6 that it's going to go back in remand, and the judge is
7 going to do something that looks an awful like -- lot
8 like the bifurcation that you rejected, which is, the
9 Court will say, now we figure out in this highly
10 ministerial way who worked more than 40 hours, and so
11 who is entitled to share in the judgment.

12 MR. PHILLIPS: The -- the bifurcation that
13 the plaintiffs proposed, two things to say about that.

14 First of all, they took it off the table
15 themselves, not us. We did object, but that wasn't --
16 it wasn't rejected because we -- we objected to it.
17 They -- they pulled bifurcation off the table. So I
18 don't think you can put the burden on us.

19 But, second of all, the -- the bifurcation
20 they proposed was that first you were going to decide
21 whether Mericle is right or not, and that means whether
22 18 and a half and 21 can be averaged across your class.
23 And then the second part was going to be Fox testifying
24 about how to slot that in.

25 Well, that's not -- that's not going to --

1 it may help with respect to the -- to the uninjured --
2 to the injured class members, but it would not have
3 remotely helped with the more fundamental question of
4 the inadequacy of this as a class action device where
5 you patch over the problems of this -- of this class by
6 simply averaging everything together.

7 JUSTICE KAGAN: But it -- it absolutely
8 helps with the question, your second question presented,
9 which is this point that you are making that there might
10 be some people who didn't work 40 hours, who would
11 nonetheless get money. And it absolutely helps for
12 that. It takes care of the entire problem.

13 That leaves you with only your first
14 question presented --

15 MR. PHILLIPS: Right.

16 JUSTICE KAGAN: -- which is this question
17 about was the class too varied. And on that, I have to
18 go back to this -- to this issue of, it's not a class
19 issue. It's an FLSA issue under Mt. Clemens as to
20 whether this kind of statistical evidence could have
21 been presented.

22 MR. PHILLIPS: And -- and my answer to the
23 Mt. Clemens one, which, obviously, I'm not persuading
24 you on, is that if -- the way I read Mt. Clemens, it
25 says, you don't go to fair and reasonable inference

1 on -- on the liability phase. You only do that on the
2 damages phase. And I would still argue here that even
3 if you use Mt. -- the fair and reasonable inference
4 standard, it won't be satisfied by what Mericle did
5 here, because it's one thing to -- to do some kind of
6 sampling. It's another thing to say, I'm going to take
7 wildly different, 30 seconds versus 10 minutes and
8 average everybody across the plant without any effort to
9 be more tailored in our approach than that, Your Honors.

10 I would like to reserve the balance of my
11 time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Frederick.

14 ORAL ARGUMENT OF DAVID C. FREDERICK

15 ON BEHALF OF THE RESPONDENTS

16 MR. FREDERICK: Thank you, Mr. Chief
17 Justice, and may it please the Court:

18 Let me start with your question, Justice
19 Kennedy, because there absolutely will be remand
20 proceedings on the presumption that you affirm the
21 judgment of the Eighth Circuit so that the money can be
22 allocated, and we know the names of every single person
23 who would be entitled to an award based on a very long
24 spreadsheet that Dr. Fox compiled in conjunction with
25 Dr. Mericle's analysis.

1 And so you're right, Justice Kagan, that
2 there is a pot of money based on the jury verdict that
3 will be allocated, assuming that the Court affirms the
4 class certification judgment.

5 JUSTICE ALITO: Well, there is no question
6 the money can be divided up. The question is whether it
7 can be divided up between those who were actually
8 injured and those who were not actually injured.

9 So suppose you have -- if you have three
10 employees, one worked -- one was -- one was given credit
11 for working 39 hours a week, one was given credit for
12 working 38 hours a week, one was given credit for
13 working 37 hours a week. Without knowing how much
14 additional time the -- each employee is entitled to, you
15 can't tell which one of those, which, if any, of them
16 was injured, and you can't tell how much additional time
17 the employees were entitled to without knowing what the
18 jury did with Dr. Mericle's statistics.

19 So that's why I -- I don't see how this can
20 be done in other than a very slap-dash fashion.

21 MR. FREDERICK: Well, there are two ways,
22 and I would submit that they -- neither is slap-dash.
23 Ordinarily, we would defer to jury verdicts, and we
24 would say that if the jury evaluated the evidence within
25 the realm of what was presented at trial, that is going

1 to get special deference in our legal system.

2 So when those monies get allocated,
3 ordinarily a district judge is going to do so on a basis
4 either of pro rata for all of those -- all of those
5 plaintiffs who were found to be injured, and the 212 who
6 were identified by name, by Dr. Fox, Tyson knew about
7 them before trial, did not move for summary judgment as
8 to those 212, could have easily severed them right out
9 before this case went to the jury.

10 The second way is that Dr. Fox did an
11 analysis using Mericle's averages and then added them to
12 the number of minutes worked by the particular employee,
13 and so based on that, a vast number got above the
14 40-hour threshold.

15 Now, the evidence at trial that it came in
16 by Tyson's own witnesses was that the average worker
17 worked 48 hours per week before you even got to any of
18 the counting of the donning and doffing, and that the
19 plant ran on Saturdays 60 percent of the time, which
20 would be a 6-day work week.

21 And so the evidence as the jury considered
22 it found the vast majority of the class members were
23 already going to be in overtime status, and that's why
24 the fulcrum of the case came down to whether putting on
25 this gear, which was standard sanitary gear for every

1 single worker in the class, was compensable or not.

2 CHIEF JUSTICE ROBERTS: Counsel, we don't
3 know why the jury reduced the requested damages by --
4 gave less than half. I mean, it could have been because
5 they thought the evidence on the ones who just put on
6 smocks or whatever as opposed to the ones who had the
7 mesh Armour -- you see, I don't believe what you said
8 about the ones who don't put on the mesh Armour, so
9 we're going to give zero dollars on that.

10 But I believe the -- the validity of your --
11 the experts' testimony on the ones who put on the mesh
12 Armour, so we're going to award that. Or maybe they
13 thought, you know, they would just discount the whole
14 thing, or -- you know, we don't know why.

15 So because they used average statistics over
16 varying jobs with -- even your expert admitted varying
17 times, depending upon the classes, there's no way to
18 tell whether everybody who's going to get money was
19 injured or not.

20 MR. FREDERICK: Well, and Tyson had an
21 opportunity to ask for more specific instructions. In
22 fact, their instructions were the ones that ended up
23 governing the trial. So to the extent that they had a
24 complaint --

25 CHIEF JUSTICE ROBERTS: Well, if you have --

1 you have -- I understand that, but you have a
2 substantive answer because it's one thing for us to
3 write an opinion saying this is a horrible problem, but
4 they didn't ask for instructions, so don't worry about
5 it.

6 MR. FREDERICK: Well, I don't --

7 CHIEF JUSTICE ROBERTS: That's another
8 thing. We need to know whether we should address the --
9 the mechanism by which this was presented to the jury,
10 and then we can deal separately with the waiver issue.

11 MR. FREDERICK: Yeah. Well, on the
12 substantive part, Mr. Chief Justice, let me say this.
13 That in all these instances where there is a challenge
14 between an aggregation or something where you could ask
15 the jury for a more particularized decision, there's
16 always a tactical and a strategic decision that the
17 counsel on both sides were making and the parties on
18 both sides.

19 CHIEF JUSTICE ROBERTS: That sounds like the
20 same answer you gave before.

21 MR. FREDERICK: No, but -- but --

22 CHIEF JUSTICE ROBERTS: Is there a
23 substantive? Yes. We could say, okay, the problem is
24 they didn't ask for a special verdict. They didn't
25 divide it between the people who were engaged in

1 different functions than the killers, stunners.

2 MR. FREDERICK: Substantively, the way this
3 is handled typically is that you would do a pro rata
4 distribution of the jury proceeds to the members who are
5 found to have been injured. That's the substantive
6 answer. We have it the way --

7 JUSTICE BREYER: But I'm actually puzzled by
8 the same thing. So put yourself in my puzzlement.
9 The -- there is a green room, a yellow room, and a blue
10 room, all right? Now, we discover with our statistical
11 experts that in the green room, doffing and donning,
12 those people on average -- some more, some less -- but
13 the sampling shows it's half an hour. In the blue room,
14 it's 20 minutes. In the yellow room, it's 10 minutes.
15 So, we add those three numbers on to green room, yellow
16 room, and blue room people. And we get a number.

17 Now, that number in individual cases will be
18 wrong, but that's what averaging is about. And if there
19 is no other proof in the case, well, is that good
20 enough?

21 MR. FREDERICK: Well, let me -- let me
22 address that question in this way because I do want
23 to --

24 JUSTICE BREYER: Is that the substantive
25 issue?

1 MR. FREDERICK: I -- I think it is not.

2 JUSTICE BREYER: Okay.

3 MR. FREDERICK: Because we --

4 JUSTICE BREYER: Then skip it.

5 (Laughter.)

6 MR. FREDERICK: Because we had additional
7 information testimony.

8 And Mr. Chief Justice, on the variations, I
9 think it's important to take into account what actually
10 is going on with these Dr. Mericle observations about
11 the 30 seconds versus the 10 minutes. What Dr. Mericle
12 observed using the videotape in the men's locker room
13 was that some of the men put their gear on in the locker
14 room, and then they went down to the line. That might
15 take them 10 minutes to do.

16 Some of the men put on part of the
17 equipment, and then they carried the rest. And they put
18 it on while they were walking to the production line or
19 while they were on the production line itself. And they
20 were not counted.

21 CHIEF JUSTICE ROBERTS: And I suppose some
22 of them like to chat while they're putting on the
23 equipment, and others are more down to, you know, let's
24 get this on as quickly as possible. And -- and some of
25 them have different sorts of jobs that require different

1 sorts of equipment.

2 MR. FREDERICK: And that's what the district
3 court rejected. The district court said there was not
4 evidence to support that, that the --

5 CHIEF JUSTICE ROBERTS: Well, there was not
6 evidence to support that they'd have different equipment
7 that they put on?

8 MR. FREDERICK: It was minimal. What the
9 district court and what the court of appeals found was
10 that the differences in equipment were -- were minimal,
11 and that they would not drive the difference. And what
12 Dr. Mericle testified -- and this is at 340- -- 346 to
13 350 of the Joint Appendix -- he explained that the
14 donning and doffing was occurring in different places
15 and that what they argued about this
16 30-second-to-10-minute difference was, in fact, not an
17 accurate depiction of the actual time that it took.
18 Because the time clustered around the average; that was
19 his testimony. And that if you took into account the
20 fact that they might be doing it in different places,
21 you then see why averaging works.

22 And the reason averaging works is because
23 the workers were rotating among different assignments.
24 Some of them might start the day in a non-knife
25 capacity, and so putting on all the protective gear

1 before they started their shift didn't make sense. They
2 would carry it to the production line. They would be
3 pulled off the production line, told you're going to be
4 in a knife capacity, get your gear on. They would put
5 their gear on at that time.

6 So when Dr. Mericle is observing in the
7 locker room how long it takes for people to put their
8 gear on and take it off, he's not counting, he's not --
9 he's not counting -- he's not taking into account the
10 variations in the work style mandated by the company.

11 CHIEF JUSTICE ROBERTS: So -- so your --
12 your submission is that, in fact -- well, what -- what
13 about 18 and 21? You must have thought there was some
14 difference.

15 MR. FREDERICK: Well, they were walking to a
16 different part, and they were divided into -- they did
17 have additional equipment in that one. But we divided
18 them by departments, and we can identify the employees
19 in the two different departments.

20 CHIEF JUSTICE ROBERTS: So -- so the
21 variation that is -- at least troubled some of us, 30
22 seconds, 10 minutes, you're saying it's not because the
23 30-second person is actually going to spend 9 1/2
24 minutes at the end of the walk, and the 10-minute person
25 spent all the time at the beginning of the walk, and

1 there's no difference between the people who clean up
2 and the people who actually slaughter the hogs because
3 the clean-up people are going to slaughter the hogs at
4 four hours at the end of the shift. And the --

5 MR. FREDERICK: There was rotation among --
6 and their own witness testified to that effect. That's
7 at JA 236. He said they rotated quite frequently. And
8 what he was explaining was that you might start on a
9 particular assignment -- and -- and Dr. Mericle is
10 taking a two-day snapshot, right? He's looking at
11 video. And the -- the workers themselves were
12 testifying that the actual donning and doffing basically
13 clustered around the average. That's what Dr. Mericle
14 observed.

15 CHIEF JUSTICE ROBERTS: So -- so we
16 should -- again, there's a -- a basic issue that's
17 presented, but you're saying in addition to avoiding it
18 because of the objection is their lack of objections at
19 all, we should not be reaching the substantive issue
20 because, in fact, there was no variation in the time?

21 MR. FREDERICK: That's what the -- both
22 courts below found. And -- and so when you are based
23 with a factual record here that comes up here with both
24 courts below, the ordinary presumption, particularly in
25 a jury context, is you're going to interpret the facts

1 in the light most supportive --

2 JUSTICE KENNEDY: Is it an argument that if
3 the employer wants to be quite conscientious about
4 complying with FLSA, the employer has to take some
5 averages. It has to say, we're going to give X minutes
6 for donning and doffing on this line, X minutes -- and
7 the second part of that question is, how much of this
8 case turns on the fact that the employer did not keep
9 adequate records?

10 MR. FREDERICK: Well, had this -- had the
11 employer kept records, this would be a completely easy
12 case for class certification purposes because every
13 single issue would be done by common proof.

14 JUSTICE KENNEDY: Can the employer be
15 charged with not keeping adequate records by not
16 following every single person every part of that
17 person's day? You spend four hours on this line, four
18 hours on that line. You have to -- you have to put on a
19 certain kind of doffing.

20 Can the employer really keep records for
21 every single employee?

22 MR. FREDERICK: It's actually simpler than
23 that, Justice Kennedy. It's where you place the time
24 clock. Had they put the punch clock right outside the
25 locker room so that the workers, as soon as they went in

1 the locker room, punched in, this problem would have
2 been eliminated. Because at that point, when they were
3 putting on the protective gear, the sanitary gear, and
4 then they are walking -- and the walking is uniform for
5 all class members. The sanitary gear is all uniform for
6 all class workers.

7 So when they're putting on their equipment
8 in the locker room, if they punched in, the company has
9 satisfied the FLSA and this problem goes away. And then
10 the question is, is the walking and donning and doffing
11 work? And that's what the trial was all about.

12 JUSTICE SCALIA: Many workers put on gear
13 other than sanitary gear. What you say is true: The
14 sanitary gear is the same for all workers. But some of
15 them wear, what, chain mail to protect them from the
16 knives, right? And -- and some of them wear other
17 protective gear. And that's what is claimed to create
18 the discrepancy.

19 MR. FREDERICK: Right. But if you take the
20 sanitary -- I'm just saying, if you -- for the question
21 of commonality and predominance, which I'm trying to
22 address the first question -- the sanitary gear is all
23 the same for everybody. The walking is all the same for
24 everybody.

25 And then the question is, can you use

1 averaging because of the peculiarities of the fact that
2 the doffing of this -- basically, the same gear was
3 occurring in three different places: in the locker
4 room, walking down to the production line, and on the
5 production line itself.

6 JUSTICE SCALIA: I don't -- I don't think
7 your -- your friend will agree that it's basically the
8 same gear.

9 MR. FREDERICK: Well, I wouldn't expect
10 that.

11 JUSTICE SCALIA: I think that's his -- his
12 point, that it's quite different gear.

13 MR. FREDERICK: But the -- what the district
14 court found, and they didn't show -- look, we're talking
15 about a difference between a Kevlar belly guard and a
16 Plexiglas belly guard or a mesh, metal mesh belly guard.
17 We're talking about the same basic kinds of gear. We're
18 talking about different kinds of gloves.

19 But those variations were presented to the
20 jury, found to be minor. And the district court
21 concluded that they were minor differences.

22 JUSTICE SCALIA: Well, the difference -- the
23 question is not whether they're -- whether one
24 protective gear is different from another, but it's
25 whether protective gear is different from sanitary gear.

1 That's the question.

2 MR. FREDERICK: Well, the question is --

3 JUSTICE GINSBURG: Wasn't there -- wasn't
4 there -- for all of the workers, there was certain basic
5 equipment. There was basic sanitary gear, but there was
6 also basic protective gear. So the only difference
7 comes up with the protective gear for the knife weld.

8 MR. FREDERICK: That's -- that's --

9 JUSTICE GINSBURG: The basic protective gear
10 was the same for everybody.

11 MR. FREDERICK: That's correct. And the
12 knife issue was solved --

13 JUSTICE SCALIA: What was that? What was
14 that basic protective gear that everybody --

15 JUSTICE GINSBURG: Hard hats, ear plugs or
16 ear muffs, and boots.

17 MR. FREDERICK: Thank you, Justice Ginsburg.

18 CHIEF JUSTICE ROBERTS: What was it?

19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: Let's see if you
21 remember what she said. What was it?

22 (Laughter.)

23 MR. FREDERICK: Hard hats, ear plugs, hair
24 nets, beard nets, and basic smocks.

25 CHIEF JUSTICE ROBERTS: And -- but the --

1 JUSTICE GINSBURG: And boots.

2 MR. FREDERICK: And boots. Sorry. I forgot
3 boots.

4 CHIEF JUSTICE ROBERTS: You left boots out.
5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: But -- but the knife
7 wielders had a lot more than that.

8 MR. FREDERICK: Right. But the point was,
9 Mr. Chief Justice, that if you were on knife duty at a
10 particular point in time, you were going to rotate
11 frequently during the course of a day or from one day to
12 the next, and so you were charged always to have your
13 gear ready to be put on if you were put in a
14 knife-wielding capacity.

15 JUSTICE KENNEDY: It seems -- it seems to me
16 that you might concede that if this were simply a class
17 action under 23, that these problems might be a barrier
18 to certification, but that under Mt. Clemens you have a
19 special rule; is that --

20 MR. FREDERICK: We certainly --

21 JUSTICE KENNEDY: Is that correct?

22 Do you -- do you concede that there is a
23 strong possibility you might not be -- have this class
24 certified under section -- under Rule 23, absent
25 Mt. Clemens?

1 MR. FREDERICK: Well, Justice Kennedy, I
2 think Mt. Clemens answers the question in this case. I
3 think that, given the way the evidence came in, the
4 averages here are reasonable ones. So even if there was
5 not a special Mt. Clemens rule where there's a
6 burden-shifting framework, the answer should be the
7 same.

8 JUSTICE BREYER: Okay. So that's exactly,
9 perhaps, what I -- I read the question, the first
10 question. I'm taking it literally. It said, "Whether
11 differences among individual class members may be
12 ignored, liability and damages will be determined with
13 statistical techniques that assume everyone is like the
14 average."

15 Now, I thought the answer to that question
16 is yes, and it depends, of course; you have to be
17 reasonable. I mean, that's why you use the four rooms.
18 We don't know everybody in the room. What we do is we
19 take an average in the room. If it's a good statistical
20 average, why not?

21 Now, I want -- I don't want you to agree
22 with that if that isn't the law, but I don't see why it
23 isn't.

24 MR. FREDERICK: Well, Justice Breyer, we do
25 agree with that position, but we also agree with

1 Justice Kennedy that, because of the Mt. Clemens
2 framework overlay for Fair Labor Standards Act, this is
3 an easier case than a case in which there was not that
4 substantive law difference. Because if you were to take
5 one individual and you were to use the same evidence, it
6 would be representative proof; you'd have the same
7 burden-shifting framework. That's why all these
8 arguments about Dr. Mericle really are merits questions,
9 they're not class-certifying questions.

10 JUSTICE SOTOMAYOR: Mr. Frederick, I -- I'm
11 not sure that you've answered the -- the two substantive
12 questions that I see my colleagues asking, okay?

13 With respect to whether you're a knife
14 wielder or not, if you are assigned to -- to bear a
15 knife during the day, you're going to be paid for that
16 time anyway because you're on the start-to-end day,
17 okay? So you're not going to get FSLA for that. So
18 it's only the people who start out the day being
19 required to don those outfits.

20 MR. FREDERICK: Well, actually,
21 Justice Sotomayor, that's where I would disagree with
22 you, because --

23 JUSTICE SOTOMAYOR: All right.

24 MR. FREDERICK: -- if -- if the worker,
25 through habit, convenience, is doffing while walking,

1 our study didn't double count. Our study only took into
2 account the walking time. So he's not going to get
3 credit for the fact that he's doing work by putting on
4 the gear while he happens to be walking.

5 If he is pulled off the line during
6 gang-time while the hogs are going along, he does not
7 get extra minutes because his supervisor says, we need
8 you with knife so go put your gear on. He's counted as
9 part of gang-time at that point. And so --

10 JUSTICE ALITO: Could I just ask you to
11 clarify something before your time runs out, because
12 it -- it's unclear to me from what you've said in your
13 argument.

14 Why did Dr. Mericle come up with one figure
15 for employees on the processing floor and another figure
16 for employees on the slaughter floor if, as I understand
17 you to have said this morning, all of the employees
18 basically do both of those tasks and spend an equal
19 amount of time on them, so they can all be considered
20 together?

21 MR. FREDERICK: I didn't say that, and if I
22 did, I was -- I misspoke.

23 JUSTICE ALITO: Well, that was the
24 impression I got from what you said.

25 MR. FREDERICK: Within the department, they

1 would perform different tasks, some of which would
2 require knife and some which didn't. And it was within
3 the department that the averages that were being
4 observed we believe are fair averages, in light of the
5 fact that we're looking back in time, and we're trying
6 to recreate what happened in a -- in a three-year period
7 that, you know, was -- where there are no records.

8 And so within the department, what the Court
9 found was that there was consistency, and that the
10 differences were minimal. The reason why there's a
11 three-minute difference is because one is longer. It's
12 a longer distance for walking to get to it, and there
13 is, you know, more to be done. But I want to make clear
14 that we -- we broke this down into the two different
15 departments because we could discern those. But I would
16 submit that the --

17 JUSTICE KENNEDY: Let me ask you this: If
18 the Court is writing an opinion of reaching the result
19 you want, what is the standard we put? Representative
20 evidence? Average evidence of injury is sufficient if?
21 What -- what do we write?

22 MR. FREDERICK: I think what you write,
23 Justice Kennedy, is that in this context, where there
24 was an expert who said that the averages -- they
25 clustered around the averages, and that based on

1 observations where the work activity, the donning and
2 doffing that is contested here is occurring in three
3 different places, it's fair to treat the employees
4 because the FLSA is a remedial statute that is designed
5 to protect workers who can't keep these kinds of
6 records. That's why --

7 JUSTICE KENNEDY: And that's -- that's a
8 little bit too specific for the broad standard that I'm
9 looking for. An average is possible if what, there's no
10 other way to do it? If it's an FLSA case and has a
11 special policy? Neither of those seem quite
12 satisfactory to me.

13 MR. FREDERICK: Well, I think every case is
14 going to be different, as we would all candidly
15 recognize, that an antitrust case is going to be
16 different from a labor case. And that will be different
17 from -- I think you do have to look at the substantive
18 context in which the averaging is going to occur so that
19 any deviations at least are explicable. Here --

20 JUSTICE SCALIA: Don't you also have to say
21 that the jury accepted the averaging? And that doesn't
22 seem to have happened here.

23 MR. FREDERICK: Well --

24 JUSTICE SCALIA: When the jury comes in
25 with -- with less than half of -- of what the averaging

1 would have produced, how can we say that there has been
2 averaging?

3 MR. FREDERICK: The averaging, I think you
4 should infer from the jury's award of damages to the
5 injured -- and it was instructed not to give damages to
6 the uninjured workers, and was faithfully charged with
7 that. The fact that it awards a lesser amount may be
8 based on its own doubts about the number of minutes or
9 the quantity.

10 But those kinds of calculations, I submit,
11 Justice Scalia, we have always deferred to juries in the
12 way these kinds of damages are calculated.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Ms. Prelogar.

15 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR

16 FOR THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING RESPONDENTS

18 MS. PRELOGAR: Mr. Chief Justice, and may it
19 please the Court:

20 Justice Kennedy, I'd like to begin with your
21 question about the proper standard to apply here. The
22 government thinks it's the standard that the jury was
23 instructed on, and this appears at JA 471 to 472.

24 The jury was told in this case that they
25 could only rely on representative evidence if all of the

1 employees performed substantially similar activities,
2 and that substantial similarity is what we think is the
3 proper standard to determine whether an inference here
4 would be just and reasonable.

5 CHIEF JUSTICE ROBERTS: Do you think -- how
6 do you know they relied on the representative evidence?
7 The number was -- was more than 50 percent of what was
8 asked. The expert was cross-examined. We don't know,
9 for example -- they rejected the 18 minutes but accepted
10 the 21 minutes. The fact that the jury did not give you
11 the damages sought seems to me to call into question the
12 significance of the statistics.

13 MS. PRELOGAR: Well, I think it calls into
14 question whether the jury agreed with the actual time
15 estimates, but I don't think it undermines the
16 conclusion that they found that there was proper
17 representative evidence here because they were
18 instructed that they couldn't award a recovery to the
19 class until all of the nontestifying employees, unless
20 they were convinced that they all performed
21 substantially similar activities.

22 So I think we have to infer that the jury
23 found that all of these activities were similar, that
24 there were not material differences of the kind that
25 Mr. Phillips has referred to today, because the jury was

1 instructed that that was the only way they could award
2 class-wide -- find a -- a finding here of class-wide
3 liability.

4 CHIEF JUSTICE ROBERTS: Well, but they --
5 they saw the evidence on which the calculations were
6 based, right?

7 MS. PRELOGAR: That's correct.

8 CHIEF JUSTICE ROBERTS: They saw the donning
9 and doffing of the sanitary gear and the protective
10 gear. Couldn't they have made judgments based on those
11 actual differences to reject some of the representative
12 statistics?

13 MS. PRELOGAR: I don't think they would have
14 had any basis to do so. And at the end of the jury
15 instruction on representative evidence, which was an
16 instruction that Tyson requested, the jury was told,
17 quote, "The representative evidence, as a whole, must
18 demonstrate that the class is entitled to recover. And
19 I think that there was an ample evidentiary basis here
20 for the jury to conclude that there weren't
21 substantial -- substantial dissimilarity among the tasks
22 that were being performed in these donning and doffing
23 activities.

24 It's useful, I think, to review that record
25 evidence. For example, Dr. Mericle testified that the

1 times clustered around the averages. He had 744
2 videotaped observations. As well, there was the
3 testimony that employees frequently rotated between
4 positions, including between those jobs that used a
5 knife and those that didn't. The employees who
6 testified at trial had times that came in very close to
7 Dr. Mericle's averages.

8 And I'll just refer you to Mr. Logan, who
9 testified at JA 260 and 265, 17 to 19 minutes. Mr.
10 Bulbaris said 18 to 22 minutes. Mr. Montes said around
11 20 minutes. As well, Tyson itself didn't think that
12 there were these material variations when it was
13 calculating the K-Code time using a study that was very
14 similar to the study that Dr. Mericle employed here and
15 used essentially the same methodology.

16 In that circumstance, Tyson thought that it
17 would be appropriate to treat all employees in a uniform
18 way.

19 So I think it's critical here that we have a
20 jury determination upon a proper instruction about
21 representative evidence that there weren't these kinds
22 of dissimilarities that would warrant --

23 CHIEF JUSTICE ROBERTS: And maybe you don't
24 know because you're the -- in an amicus posture, but was
25 the person who normally is, like, hosing down the floor

1 paid as much as the person who performs the most
2 intricate knifing operation?

3 MS. PRELOGAR: No. My understanding is that
4 there were differences in what you were paid depending
5 on your position.

6 CHIEF JUSTICE ROBERTS: And yet, your --
7 both you and your -- your friend are telling me that,
8 well, we shouldn't treat those jobs differently because
9 they often switched back and forth.

10 MS. PRELOGAR: Well, the jury concluded here
11 that those jobs didn't require materially different
12 gear. So I think that the pay rate, which was evident
13 from Tyson's own records here and could be calculated
14 through these kind of mechanical damages calculations,
15 doesn't signal that there was different gear. It might
16 signal that the work being performed on the job was
17 somewhat different and required different levels of
18 skill.

19 But I think it's clear, based on the jury
20 verdict in this case, that the plaintiffs were able to
21 prove their claim with class-wide evidence. And at this
22 juncture, it's something of the reverse of what this
23 Court has confronted in other cases, where the Court has
24 recognized that sometimes the certification decision
25 overlaps with the merits of the claim, and you have to

1 consider at the outset whether the plaintiffs will be
2 able to prove their claim with class-wide proof.

3 JUSTICE KENNEDY: Do you concede that if
4 this were a Rule 23 action and the FSLA were not
5 involved that it would be a much closer, much more
6 difficult case?

7 MS. PRELOGAR: Yes. I think it would be
8 much closer. And -- and here, I think that this really
9 gets to the point that the dispute here doesn't turn on
10 a freestanding Rule 23 requirement. It stands on --
11 it -- it turns on the Mt. Clemens standard. And
12 Mt. Clemens does adopt a special rule tailored to the
13 fact that there is a recordkeeping violation in this
14 case that prevents the employees from being able to
15 prove their claims with more precise evidence. We
16 think --

17 CHIEF JUSTICE ROBERTS: You -- you agree it
18 would be an extension of Mt. Clemens to apply it at the
19 liability stage as opposed to the damages stage, right?

20 MS. PRELOGAR: I think there's a way to read
21 Mt. Clemens where the -- this -- where it would not be
22 an extension. But to the extent that you think it would
23 be, we think it's a perfectly logical one and one that's
24 consistent with the rationale in Mt. Clemens.

25 Mt. Clemens said that when the recordkeeping

1 violation prevents a determination of the amount of time
2 spent on these activities, then you should be able to
3 come forward with a just and reasonable inference and
4 not put the burden on the employees to prove that time
5 with precision.

6 And when that exact same fact is relevant
7 liability insofar as it's necessary to prove that the
8 employee is pushed over the 40-hour-per-week threshold,
9 then we think that all of the rationales that animated
10 Mt. Clemens would equally apply to the determination of
11 that particular fact in that context.

12 But we think the Mt. Clemens itself signaled
13 that this might be an appropriate determination at the
14 liability phase because it recognized at the outset that
15 the burden of proving that you have performed work for
16 which you were not properly compensated shouldn't be an
17 impossible burden. That was the language that was used
18 in the opinion. And so I think that whether or not
19 Mt. Clemens decided it, certainly it -- it's true that
20 it should be applied in this context to the particular
21 fact that was relevant there.

22 JUSTICE SOTOMAYOR: I'm -- I'm going to try
23 to phrase what I understand the question my colleagues
24 have been posing that I don't think either counsel has
25 sort of gotten at, or maybe it's so obvious that we're

1 missing it, okay?

2 Clearly, the expert here, Dr. Joy, said --
3 I'm using a hypothetical -- there's 10 minutes of
4 overtime. And the figure that comes out with 10 minutes
5 of overtime is a million dollars. Now the jury comes
6 back with half a million dollars.

7 How do you know that what they said is -- I
8 half the time -- five minutes, or the jury said, I think
9 it's eight minutes or -- for slaughterhouse and three
10 for production line people. So it averages out to five
11 now, okay?

12 How do we know what -- how the jury
13 calculated that half million?

14 MS. PRELOGAR: The answer is that we don't
15 know for sure, Justice Sotomayor.

16 JUSTICE SOTOMAYOR: That's what my
17 colleagues are saying. So the question is, your
18 adversary is claiming that there might be some people on
19 the three-minute side who are going to come and collect
20 a pro rata share who really weren't injured because they
21 had worked 39 hours and 57 -- 56 minutes, something like
22 that. So why is it that it's fair to distribute this --
23 this award pro rata?

24 MS. PRELOGAR: Well, I think that it's not
25 clear yet exactly how the award will be allocated, and

1 those will be left to the district court's discretion
2 when the case returns for allocation.

3 At that point, Tyson can come in and it can
4 make these arguments if it thinks it's unfair. The
5 district court will be well-positioned to determine
6 whether Tyson waived the claims by actually asking for a
7 lump sum verdict here and whether Tyson even has a stake
8 in this issue given that its own liability won't
9 increase.

10 JUSTICE GINSBURG: Why would -- why would
11 Tyson's care? They have to pay the same amount of
12 dollars.

13 MS. PRELOGAR: Exactly, Justice Ginsburg,
14 and I think that that shows that Tyson might not have
15 the requisite stake here to be able to challenge the
16 allocation.

17 But I think the overarching point to keep in
18 mind is that the -- the issues with allocating this
19 award were not the inevitable result of the class action
20 mechanism. They don't reveal some defect in that
21 mechanism.

22 There were any number of ways to account for
23 this problem. The trial could have been bifurcated
24 between liability and damages, as Justice Kagan noted.
25 That would have solved this problem entirely, but Tyson

1 opposed it. Or Tyson could have sought judgment against
2 the 212 class members who had no right to recover under
3 the plaintiffs' evidence. It didn't do that.

4 Tyson could have asked for a special verdict
5 that would have allocated the damages by the jury; but
6 instead, it asked for a lump sum verdict. Or it could
7 have asked for the class definition to be altered in
8 this case to exclude those individuals who weren't
9 working the requisite number of times.

10 Ultimately, there are any number of
11 mechanisms that could account for this issue, and none
12 of them demonstrate that this class action was improper.
13 They went unutilized only because of Tyson's own
14 litigation strategy here.

15 JUSTICE GINSBURG: What happened to the --
16 the government's action? I mean, the government started
17 this against Tyson's or its predecessor and got an
18 injunction. And then the government said that the
19 solution that the -- the K -- whatever it was -- that
20 Tyson's came up with wasn't good enough. And then
21 nothing. What happened to the government's --

22 MS. PRELOGAR: Well, ultimately, the
23 government ended up settling the claims in that prior
24 enforcement action. But then the -- the government
25 issued an opinion letter to the industry, saying that it

1 was clear that you had to pay for actual time worked.
2 And, of course, the secretary has limited resources and
3 can't conduct enforcement actions for every violation of
4 the FLSA.

5 But it is the Department of Labor's position
6 here that Tyson was in violation of the FLSA, both by
7 not keeping the actual records and by not fully
8 compensating the employees for the time worked in this
9 case.

10 JUSTICE ALITO: What do you think an
11 employer --

12 CHIEF JUSTICE ROBERTS: No. Go ahead.

13 JUSTICE ALITO: What do you think an
14 employer should do about recordkeeping when the employer
15 believes that certain activities need not be counted
16 under the FLSA? So is the employer -- it may be that
17 the employer is stuck with the choice that it makes, the
18 legal judgment it makes.

19 But is it supposed to keep two sets of -- of
20 records so the amount of time that it thinks the
21 employee is entitled to compensation for, and then this
22 additional amount of time, that it might be argued that
23 the employee is entitled to compensation for?

24 MS. PRELOGAR: Well, Mt. Clemens does make
25 clear that the employer is stuck with its mistake

1 because it said even when the failure to keep records
2 grows out of a bona fide mistake about whether the time
3 should be compensable whether it was work, that still
4 the burden-shifting framework applies.

5 But I would also note here that I think
6 there was no legitimate argument here that this wasn't
7 work. These activities, I think -- it was clear with
8 the wake of Alvarez -- were required to be compensated.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Phillips, you have five minutes.

11 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

12 ON BEHALF OF THE PETITIONER

13 MR. PHILLIPS: Thank you, Mr. Chief Justice.

14 Let me answer Justice Alito's point and
15 the -- and the observation where -- I mean, the reality
16 is, is that in the Reich litigation, we were told that
17 the -- the ordinary sanitary equipment was not -- was
18 not within the donning and doffing requirements, and
19 never a problem. And so as a consequence of that,
20 frankly, we didn't monitor this.

21 That's not a complete defense, but it at
22 least explains the sort of the equities of the -- of the
23 situation.

24 Second, my good friend tells you that the
25 district court here found that all of these things are

1 very similar. The reality is, is that at Pet. App. 87A,
2 the first time this issue came up with the class
3 certification, the district court said there are some
4 very big factual differences among all these employees.
5 And the basic -- and the only reason the district court
6 didn't agree to certify it at that time was because he
7 thought that the gang-time was somehow the -- the tie
8 that binds this all together.

9 Well, the gang-time was nothing in this --
10 in this litigation, and the reality is he made a mistake
11 then, and every time we came back to decertify this
12 class, based on more and more information about the
13 inadequacies of Mericle's evidence as applied by Fox,
14 who was -- who was essentially just wiped away, saying,
15 well, this is distinguishable from the Supreme Court's
16 cases here, and it's distinguishable from the Supreme
17 Court's cases there.

18 Justice Kennedy, the answer to your
19 question --

20 JUSTICE SCALIA: Yeah, but you're -- you're
21 saying the district court made a finding that there were
22 great dissimilarities.

23 MR. PHILLIPS: Yes, Your Honor, it did.

24 JUSTICE GINSBURG: Where is that?

25 MR. PHILLIPS: That's on page 87A of the

1 appendix to the petition. Justice, that's in the first
2 certification decision.

3 Justice Kennedy, to answer your question
4 about how do you write an opinion, and when is it close
5 enough? Averaging is a permissible way of going about
6 it when the evidence is clear that the -- that the basic
7 activity is homogenous, and that would have been true
8 for walking time. There was -- there was literally no
9 difference --

10 JUSTICE KENNEDY: Basic activity is --

11 MR. PHILLIPS: Homogenous.

12 And here when you're talking about 30
13 seconds and 10 minutes, and we're talking about wildly
14 different activities, what you can't do is just simply
15 say, okay, we're just going to patch over all that and
16 average it.

17 JUSTICE SOTOMAYOR: Didn't they standardize
18 walking time? That's what I thought they used.

19 MR. PHILLIPS: Yes, and that's why --

20 JUSTICE SOTOMAYOR: There's a standardized
21 walking time because some people are faster than others,
22 correct?

23 MR. PHILLIPS: Right. But my point here is,
24 is that in general, everybody agrees that's a reasonable
25 way to proceed. That's my point. Here we're not

1 talking about homogenized because there are vast
2 differences, and the evidence is absolutely unsalable on
3 that.

4 And with respect to Mt. Clemens, in the
5 first place, I -- I don't think Mt. Clemens should be
6 extended to -- to make the fair and reasonable inference
7 standard of the presumption apply at the liability
8 phase, and I think the court was extremely clear in not
9 wanting to go down that path.

10 But second, even if you thought the
11 presumption should be applied here, I would argue that
12 Mericle's evidence, as -- as, you know, through
13 cross-examination and examination of others,
14 demonstrates that this is not a fair and reasonable
15 inference. And on that score, it seems to me there are
16 two quotations I would offer up.

17 One comes from this Court's decision in
18 Wal-Mart, "when an expert's testimony does nothing to
19 advance a party's case, the Court can safely disregard
20 what he says."

21 And then what Judge Posner said in a very
22 similar FLSA case, "What cannot support an inference
23 about the work time of thousands of employees is
24 evidence of a small, unrepresentative sample of them,"
25 and that is precisely what we have in this particular

1 case.

2 With respect to remand, we would be happy
3 for a remand to -- for allocation if that's permissible,
4 but as I read, the final judgment of the district court
5 is judgment of about \$6 million to these named
6 plaintiffs, and that was affirmed. There is nothing in
7 there about how this is going to be allocated under
8 these circumstances. So if the Court believes there's
9 got to be a separate proceeding of allocation, the Court
10 hopefully would order that, although I think there is a
11 more fundamental decision the Court would have to reach.

12 And then finally, with respect to who has
13 the burden of dealing with this problem, it is the
14 plaintiffs' burden to sustain the justification for a
15 class all throughout the proceedings until a final
16 judgment is entered. And we came to the court four
17 times asking them not to certify this. So to come back
18 in at the end and say, well, since we were able to try
19 this without any ability to put forward any of our
20 individual defenses with respect to any of these
21 individual employees, except for the four who actually
22 testified, is exactly what this Court said in Wal-Mart
23 and Comcast is an impermissible way to define the class.

24 The Court should reverse in this case,
25 declare the class decertified.

1 If there are no further questions, Your
2 Honor, thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 The case is submitted.

5 (Whereupon, at 11:06 a.m., the case in the
6 above-entitled matter was submitted.)

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