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TYSON FOODS, INC. V. BOUAPHAKEO: THE USE OF STATISTICAL EVIDENCE IN CLASS ACTIONS

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INTRODUCTION

Statistical methods have always played an important role in litigation.[1] The importance of statistical analysis is particularly apparent in class-action lawsuits because the aggregation of individual claims allows more data collection and information gathering.[2] Crippling the use of statistical evidence in litigation could have wide implications in various legal contexts, including calculating damages in wrongful death cases, using DNA evidence in criminal prosecutions, and determining liability in pharmaceutical products, antitrust, and discrimination cases.[3] Nevertheless, the Supreme Court has largely foreclosed arguments for trial by statistics in *Wal-Mart Stores v. Dukes*.[4]

The Court's decision in *Dukes* does not, and should not, however, indicate the demise of statistical sampling in class-action lawsuits. Many courts have expressed their support for the use of statistics in class action cases post-*Dukes*.[5] In particular, most courts have refused

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1. Robert G. Bone, A Normative Evaluation of Actuarial Litigation, 18 CONN. INS. L.J. 227, 228 (2012); Brief of Economists and Other Social Scientists As Amici Curiae In Support of Respondents at 8, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Sept. 29, 2015).

2. *Id.* at 9–10.

3. Brief of Amici Curiae Civil Procedure Professors In Support of Respondents at 10–11, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Sept. 29, 2015).

4. 131 S. Ct. 2541 (2011) (rejecting plaintiffs' method of proving class-wide sex discrimination by relying on an extrapolation of results from a sample of the class).

5. *See, e.g.*, *In re* Urethane Antitrust Litig., 768 F.3d 1245, 1257 (10th Cir. 2014) (observing that *Dukes* "does not prohibit certification based on the use of extrapolation to calculate damages"); Balasanyan v. Nordstrom, Inc., 294 F.R.D. 550, 572 (S.D. Cal. 2013) (permitting the use of a survey to establish damages after *Dukes*); Alcantar v. Hobart Serv., No. ED CV 11-1600 PSG (SPx), 2013 WL 146323, at *4–5 (C.D. Cal. Jan. 14, 2013) (finding *Dukes*

to adopt much of the rationale of *Dukes* in cases under the Fair Labor Standards Act of 1938 (FLSA),[6] and wage-and-hour cases where company-wide compensation policies, rather than the subjective intent of managers, are scrutinized.[7] Importantly, in cases where the employer violates its timekeeping duty under the FLSA, the long-standing rule of *Anderson v. Mt. Clemens Pottery Co.*[8] preserves the employees' right to use inferential evidence based on relevant statistics to establish class-wide proof.

It follows that *Mt. Clemens*, rather than *Dukes*, should be the controlling precedent for *Tyson Foods, Inc. v. Bouaphakeo*.[9] In *Tyson Foods*, employees of one of Tyson's meat-processing facilities sued their employer for failure to pay overtime compensation required under both federal and state labor law. And like the employer in *Mt. Clemens*, Tyson violated (for purposes of class certification) the FLSA recordkeeping requirements, which mandate that the employer keep accurate records of the employees' working hours. The Supreme Court is asked to address the important issue of whether certification was proper where plaintiffs used representative evidence to prove the amount of work they did, in accordance with *Mt. Clemens*.[10]

This commentary first describes the factual and legal backgrounds of *Tyson Foods* in Parts I and II respectively, and then explains the Eighth Circuit Court of Appeals' holding in *Bouaphakeo v. Tyson*

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to be inapplicable when the calculation of wage-and-hour penalties did not require individualized determinations).

6. 29 U.S.C. §§ 201–219 (2012).

7. *See, e.g.*, Morris v. Affinity Health Plan, Inc., 859 F. Supp. 2d 611, 615 (S.D.N.Y. 2012); Smith v. Pizza Hut, Inc., No. 09-cv-01632-CMA-BNB, 2012 U.S. Dist. LEXIS 56987, at *15 (D. Colo. Apr. 21, 2012); Robinson v. Ryla Teleserv., Inc., No. CA 11-131-KD-C, 2011 WL 6667338, at *3–4 (S.D. Ala., Dec. 21, 2011); Gilmer v. Alameda-Contra Costa Dist., No. C 08-05186, 2011 WL 5242977 at *7 (N.D. Cal. Nov. 2, 2011); Ware v. TMobile USA, No. 3:11-cv-411, 2011 WL 5244396, at *6 (N.D. Cal. Nov. 2, 2011); Troy v. Kehe Food Distrib., Inc., No. C09-0785JLR, 2011 WL 4480172, *14 (W.D. Wash. Sept. 26, 2011); Faust v. Comcast Cable Commc'ns Mgmt., No. WMN-10-2336, 2011 WL 5244421, at *1 n.1. (D. Md. Nov. 1, 2011); Sliger v. Prospect Mort., No. Civ. S-11-465 LKK/EFB, 2011 WL 3747947, at *2 n.25 (E.D. Cal. Aug. 24, 2011). *But see* Duran v. U.S. Bank Nat'l Ass'n., Nos. A125557 & A126827, 2012 Cal. App. LEXIS 107 (Cal. App. Feb. 6, 2012), *modified and reh'g denied,* Duran v. U.S. Bank Nat'l Ass'n, 2012 Cal. App. LEXIS 265 (Cal. App. 1st Dist. Mar. 6, 2012).

8. 328 U.S. 680 (1946).

9. No. 14-1146 (U.S. Nov. 10, 2015).

10. *See* Brief of Petitioner at i, Tyson Foods, Inc. v. Bouaphakeo No. 14-1146 (U.S. Aug. 7, 2015) [hereinafter Brief of Petitioner]. The Court has also been asked to address a second issue: whether certification was proper when some class members may not have been injured. *See id.* This Commentary, however, focuses only on the issue of the use of representative evidence.

Foods, Inc.[11] in Part III. Part IV presents both parties' arguments. Finally, Part V examines the validity of the plaintiffs' use of statistical evidence to estimate class-wide liability and damages, and argues that the Supreme Court should allow the plaintiffs to use this type of representative evidence to support class certification.

I. FACTUAL AND PROCEDURAL BACKGROUND

Tyson operates a pork-processing facility in Storm Lake, Iowa.[12] The facility requires all employees to wear certain items of personal protective equipment (PPE), which is stored in lockers at the facility.[13] Production employees are required to clean and put on the required PPE before they start working on the production line, and they generally do so in the locker rooms.[14] Tyson pays its production employees on a "gang time" system, which only records the time workers spend at the production line when the production line is moving.[15]

Besides "gang time," Tyson also pays some of its employees for a few additional minutes per day—known as "K-code" time—to compensate them for donning, doffing, and washing specialized protective equipment.[16] Prior to 2007, Tyson paid four minutes of K-code time to each employee in a department where knives were used.[17] From February 2007 to June 2010, Tyson limited K-code payment to only knife-wielding employees but raised the K-code time to between four and eight minutes per day, to account for both walking between the locker room and the production line, and donning and doffing.[18] Tyson never recorded the actual amount of time workers spent donning, doffing, rinsing, or walking.[19]

A group of current and former production employees at the Storm Lake facility filed suit against Tyson in 2007, alleging that the

11. Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015).
12. Joint Appendix at 28, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Aug. 7, 2015) [hereinafter Joint Appendix].
13. *Id.* at 36.
14. *Id.* at 37.
15. Brief for Respondents at 7, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Sept. 22, 2015) [hereinafter Brief for Respondents].
16. Joint Appendix, *supra* note 12, at 186.
17. *Id*. at 121–22.
18. *Id.*
19. *Id*. at 175.

company undercompensated them for their overtime donning and doffing work in violation of the FLSA and the Iowa Wage Payment Collection Law ("IWPCL").[20] The Northern District of Iowa certified a class action and conditionally certified a collective action based on Rule 23 and 29 U.S.C. § 216(b), respectively.[21] In doing so, the court found that there were "far more factual similarities than dissimilarities" among the class and collective action members and that questions common to the class predominated over individualized questions.[22] A total of 444 employees joined the collective action; the parallel class action had 3,344 plaintiffs.[23]

In the ensuing jury trial, the plaintiffs presented employee testimony, video recordings of donning and doffing at the facility, and an expert-run study based on 744 videotaped observations.[24] In the study, the expert estimated that donning, doffing, and related activities required 21.25 minutes per day for employees in the slaughter department and 18 minutes per day for employees in the processing department.[25] From these estimates, another expert calculated the amount of uncompensated overtime for each individual plaintiff and tallied a total of approximately $6.7 million in unpaid overtime for the entire class.[26] At Tyson's request, the jury instructions stated, "any employee who has already received full compensation for all activities you may find to be compensable is not entitled to recover any damages."[27] The court also heeded Tyson's proposed verdict form calling for the jury to provide a single total damages award.[28]

The jury found that the time the employees spent donning and doffing their PPE was compensable work "integral and indispensible" to the employees' gang-time work and not "de minimis," but that donning and doffing during meal breaks was not compensable.[29] It

20. *Id*. at 28, 39–40.
21. *Id*. at 117.
22. Brief for the United States as Amicus Curiae Supporting Respondents at 25, Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S. Sept. 29, 2015) [hereinafter Brief for the United States].
23. Joint Appendix, *supra* note 12, at 117.
24. Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 796 (8th Cir. 2014), *cert. granted*, 135 S. Ct. 2806 (2015).
25. Joint Appendix, *supra* note 12, at 123–24.
26. *Id*. at 139, 465–66.
27. *Id.* at 101.
28. Brief for Respondents, *supra* note 15, at 20.
29. Joint Appendix, *supra* note 12, at 486–87.

awarded roughly $2.9 million in damages to the plaintiffs.[30] Tyson appealed and the Eighth Circuit Court of Appeals affirmed.[31]

II. LEGAL BACKGROUND

Rule 23(b) of the Federal Rules of Civil Procedure provides that a damages class action which satisfies Rule 23(a)'s requirements may be certified if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[32]

The FLSA establishes both a minimum wage requirement and an overtime compensation requirement at a rate of one and one-half times an employee's regular wage for work exceeding forty hours in a workweek.[33] It allows "any one or more employees" to bring a "collective action" to recover unpaid wages "for and on behalf of himself or themselves and other employees similarly situated."[34]

For FLSA collective action certifications, most jurisdictions have adopted a two-step approach in determining whether plaintiffs are "similarly situated."[35] For conditional certification at the initial "notice stage," the "similarly situated" requirement is met when there are "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan."[36] If conditional certification is granted, prospective class members can then opt into the lawsuit.[37] At the second step of certification, courts review the "similarly situated" question again using a stricter standard.[38] Factors courts consider include "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; [and] (3)

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30. *Id*. at 488.
31. Brief for Respondents, *supra* note 15, at 22.
32. FED. R. CIV. P. 23(b).
33. 29 U.S.C. § 216(b) (2012).
34. *Id.*
35. Daniel C. Lopez, *Collective Confusion: FLSA Collective Actions, Rule 23 Class Actions, and the Rules Enabling Act*, 61 HASTINGS L.J. 275, 288 (2009); *see* Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001).
36. *Thiessen*, 267 F.3d at 1102 (quoting Vaszlavik v. Storage Tech. Corp., 175 F.R.D. 672, 678 (D. Colo. 1997)).
37. *Id.*
38. *Id.* at 1103.

fairness and procedural considerations."[39] Once the collective action proceeds to trial, the opt-in class members enjoy the same rights, privileges, and benefits as the original plaintiff.[40]

FLSA collective actions are "fundamentally different" from class actions under Rule 23(b).[41] First, the majority of the United States appellate courts believe that the FLSA "similarly situated" requirement is less stringent than Rule 23(b)(3)'s predominance requirement.[42] Second, unlike Rule 23(b)(3), which requires class members to opt out if they do not wish to be included in a class, 29 U.S.C. § 216(b) of the FLSA requires employees to opt into the lawsuit by filing written consent to become "party plaintiff[s]."[43] The purpose of § 216(b) is to allow employees with common issues of law and fact arising from the same violation to sue collectively, so as to reduce individual costs and boost efficiency in the judicial system.[44]

Congress passed the Portal-to-Portal Act of 1947[45] to exclude some of the activities that constitute work under the FLSA, such as travelling to and from the location of the employee's principal activity, and activities that are "preliminary to or postliminary to said principal activity."[46] The exceptions to such exclusions only apply to those activities that are considered an "integral and indispensable part of the principal activities" and are performed before the commencement of an employee's principal activities on any particular workday.[47] Such activities are compensable even when they are performed "before or after the regular work shift, on or off the production line."[48]

The FLSA also requires employers to keep "records of the persons employed . . . and of the wages, hours, and other conditions and practices of employment" according to regulations the Secretary

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39. *Id.*
40. *Id.*
41. Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013).
42. 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1807 (3d ed. Supp. 2015); *see, e.g.*, O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 585–86 (6th Cir. 2009); Grayson v. K Mart Corp., 79 F.3d 1086, 1096 n.12 (11th Cir. 1996). *But see* Espenscheid v. DirectSat USA, 705 F.3d 770, 772 (7th Cir. 2013).
43. 29 U.S.C. § 216(b) (2012).
44. *See* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989).
45. 29 U.S.C. § 254(a) (2012).
46. IBP, Inc. v. Alvarez, 546 U.S. 21, 26–28 (2005).
47. 29 U.S.C. § 254(a).
48. *Alvarez*, 546 U.S. at 29–30 (quoting Steiner v. Mitchell, 350 U.S. 247, 256 (1956)).

of Labor issued,[49] including "[h]ours worked each workday[,] . . . total hours worked each workweek," and regular and overtime pay.[50]

The Iowa Wage Payment Collection Law (IWPCL)[51] is a complementary wage-and-hour law paralleling the FLSA. It requires employers to pay for all hours worked and to compensate for overtime work.[52] Like the FLSA, the IWPCL requires recordkeeping[53] and creates a private cause of action.[54]

In *Anderson v. Mt. Clemens Pottery Co.*, the Supreme Court addressed the problem that arises when "the employer's records are inaccurate or inadequate."[55] In that case, seven employees and their labor union, on behalf of themselves and others similarly situated, brought a FLSA collective-action suit alleging that the employer's method of computing the total working time did not accurately reflect the time they actually worked and that they were deprived of the proper amount of overtime compensation.[56] The Court rejected the Sixth Circuit's stringent standard of proof and held that the employer's "failure to keep proper records in conformity with [its] statutory duty" calls for a burden-shifting framework that prevents the employer from benefiting from its own mistake.[57]

Under this framework, an employee first has to show that "he has in fact performed work for which he was improperly compensated" and that he has "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference."[58] Then, the burden shifts to the employer to provide evidence of the exact amount of work performed or evidence to undermine the employee's evidence.[59] Because the employer has received the benefits of the employee's work, even if the lack of accurate records was a bona fide mistake, the employer still has to pay for the work "on the most accurate basis possible under the circumstances."[60]

49. 29 U.S.C. § 211(c) (2012).
50. 29 C.F.R. § 516.2(a)(6)–(9) (2015).
51. IOWA CODE § 91A.1–A.14 (2015).
52. *Id.*
53. IOWA ADMIN. CODE r. 875-216.2(1)(g) (2015).
54. IOWA CODE § 91A.8.
55. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).
56. *Id.* at 684.
57. *Id.*
58. *Id.*
59. *Id.* at 687–88.
60. *Id.*

In *Wal-Mart v. Dukes*, approximately 1.5 million current and former female Wal-Mart employees filed a class-action lawsuit against their employer, alleging systematic sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[61] The Supreme Court ruled that Rule 23(a)(2)'s requirement of commonality was not satisfied and reversed class certification.[62] The Court refused to allow the plaintiffs to prove sex discrimination and the amount of backpay owed by the method they proposed.[63] This method involves first determining the number of valid claims for a sample of the class, then applying the percentage of valid claims to the entire class, and finally multiplying that number "by the average backpay award in the sample set to arrive at the entire class recovery."[64] This kind of "[t]rial by [f]ormula," the Court unanimously held, would violate the Rules Enabling Act[65] by depriving Wal-Mart of the right to litigate its statutory defense to individual claims.[66]

III. HOLDING

In *Bouaphakeo v. Tyson Foods, Inc.*, the Eighth Circuit Court of Appeals affirmed the district court's decision to certify the class.[67] Like the district court, the court of appeals found that the differences in the equipment worn by employees were inconsequential.[68] The court observed that because Tyson violated its statutory recordkeeping obligations, *Anderson v. Mt. Clemens Pottery Co.* allowed the plaintiffs to use representative proof to determine the amount of individual unrecorded overtime.[69] Moreover, the court factually distinguished *Wal-Mart v. Dukes* and observed that the present case did not present a "trial by formula" as suggested by Tyson because the plaintiffs "prove[d] liability for the class as a whole, using employee time records to establish individual damages."[70] The court also reasoned that a class might be certified even if some class members' claims failed on the merits and therefore they could not

61. Wal-Mart Stores v. Dukes, 131 S. Ct. 2541, 2544 (2011).
62. *Dukes*, 131 S. Ct. at 2544–46.
63. *Id.* at 2561.
64. *Id.*
65. 28 U.S.C. § 2072(b) (2012).
66. *Dukes*, 131 S. Ct. at 2561.
67. *See* Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 800 (8th Cir. 2014).
68. *See id.* at 797.
69. *Id.*
70. *Id.* at 797–98.

actually recover.[71] The court pointed out that the jury instructions ensured that the presence of such class members did not affect the size of the verdict.[72]

IV. ARGUMENTS

A. *Tyson's Arguments*

Tyson argues that the employees composing the putative class were not "similarly situated" and that questions of law or fact common to the class did not predominate over individual questions.[73] Because the class members wear different combinations of personal protective equipment that take varying amounts of time to don, doff, and rinse, Tyson argues that it is impossible for plaintiffs to show, with common evidence, that they have collectively worked more than forty hours without receiving overtime compensation.[74] Not only do individual questions predominate, according to Tyson, the lower courts also erred in allowing statistical sampling to demonstrate plaintiffs' class-wide liability and damages.[75] Tyson vigorously attacks plaintiffs' use of the average donning/doffing times, emphasizing that "[n]o court would allow an individual employee to prove that *he* worked unpaid overtime by submitting evidence of the amount of time worked by *other* employees who did different activities that took a different amount of time to perform."[76]

Tyson interprets the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.* to hold "only that an employee carried his burden of proving entitlement to damages under the FLSA 'if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'"[77] In other words, Tyson argues that *Mt. Clemens* is relevant only after an employee has demonstrated by individualized evidence that he performed uncompensated overtime work. Therefore, the case should not be read to allow plaintiffs' use of

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71. *Id.*
72. *Id*.
73. Brief of Petitioner, *supra* note 10, at 18.
74. *Id.* at 19.
75. *Id.*
76. *Id.*
77. Brief of Petitioner, *supra* note 10, at 19–20 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687).

statistical evidence to estimate the amount of injury the class collectively suffered.

Tyson raises the inclusion of hundreds of uninjured class members in the class as another independent ground for reversing the decision below because such inclusion deprives the class of Article III standing.[78] Tyson introduces a new test to determine if plaintiffs have constitutional and statutory standing: plaintiffs must show "(1) that they can prove with common evidence that *all* class members were injured, or (2) that there is a mechanism for identifying the uninjured class members and ensuring that they do not contribute to the size of the damages award and cannot recover damages."[79] If plaintiffs fail to meet either requirement prior to certification, Tyson argues, common issues cannot predominate and the class cannot be certified.[80] Even after the class is certified, Tyson suggests, the court may reconsider the certification decision "if it later appears that plaintiffs' proof is insufficient to establish classwide injury or the culling mechanism is unworkable or inadequate."[81]

B. Bouaphakeo's Arguments

Bouaphakeo and the rest of the class rely heavily on the Supreme Court's *Mt. Clemens* ruling to support a conclusion that common questions predominate.[82] First, the class identifies four common contentions about whether their work was compensable under federal and state wage-and-hour laws and argues that Tyson conceded that those issues would "dominate" the litigation.[83] Second, four of the five questions on the verdict form were compensability issues that are common to the class.[84] Thus, the workers argue that the district court did not abuse its discretion in finding that issues regarding the compensability of their work predominated.[85] They argue that the only issue that is individualized—the actual number of hours the class members spent on compensable activities—would have been easy to

78. *See id*. at 20.
79. *Id.* at 21.
80. *See id.*
81. *Id.*
82. *See* Brief for Respondents, *supra* note 14, at 22.
83. *Id.* at 23.
84. *Id.*
85. *See id.*

resolve had Tyson kept proper records of those hours as required by both the FLSA and Iowa law.[86]

Per *Mt. Clemens*, the workers argue that Tyson's failure to fulfill its statutory recordkeeping duties permits them to "demonstrate the 'appropriate' time worked 'as a matter of just and reasonable inference.'"[87] The class rejects Tyson's argument that the *Mt. Clemens* rule is limited to determining the amount of damages.[88] Rather, "*Mt. Clemens*' core holding," according to the class, is that "where the defendant has deprived workers of accurate records . . . [w]orkers may satisfy their evidentiary burden through reasonable approximation under an objective, classwide standard."[89] Furthermore, the class points out that the *Mt. Clemens* evidentiary standard is a substantive rule and therefore the district court, by applying the rule to justify certification, did not violate the Rules Enabling Act and the Due Process Clause as Tyson claims.[90]

The class factually distinguishes this case from *Wal-Mart v. Dukes* and argues that the statistical approach employed here is not the "trial by formula" that the Supreme Court explicitly rejected in *Dukes*.[91] While *Dukes* involved a myriad of discretionary decisions for which proof by statistical methods was inappropriate, the plaintiffs here are "subjected to a common, plant-wide policy that systematically undercompensated them."[92]

Lastly, the class argues that Tyson lacks standing to appeal the district court's lump-sum damages award both because Tyson itself invited the error by insisting on an aggregated verdict and because the allocation of the verdict does not change Tyson's liability.[93] The jury instruction also ensured that uninjured class members would not receive any damages award.[94]

86. *See id.*
87. *Id.* at 24 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687–88 (1946)).
88. *Id.* at 24, 43–44.
89. *Id.* at 39.
90. *Id.* at 25.
91. *See id.* at 25, 50.
92. *Id.* at 50.
93. *Id.* at 26, 57–58.
94. *Id.* at 26, 59.

VI. ANALYSIS: *MT. CLEMENS* GOVERNS THE SUBSTANTIVE EVIDENTIARY STANDARD

Under Rule 23(b)(3) a class may be certified if common questions predominate over individual ones and a class action is superior to other methods of resolving a dispute.[95] Because predominance requires the plaintiffs to establish "classwide proof,"[96] whether this requirement is satisfied depends on the substantive law governing the plaintiffs' claims.[97] The FLSA collective action requirement is less stringent, as it only requires employees joining an action to be "similarly situated" and does not require common questions to predominate over individual ones.[98]

Anderson v. Mt. Clemens Pottery Co. allows employees to rely on inferences drawn from representative proof to "show the amount and extent" of their overtime work on a class-wide basis.[99] In *Tyson Foods, Inc. v. Bouaphakeo*, Tyson's violation of its recordkeeping duty under the FLSA triggers the evidentiary standard the Supreme Court established in *Mt. Clemens*.

Despite its recent rejection of "trial by formula" in *Wal-Mart v. Dukes*, the Court should allow the plaintiffs in *Tyson Foods* to use statistical evidence in light of *Mt. Clemens*. Because of *Mt. Clemens*' clear precedential authority in this case, the Court should decide this case narrowly, without addressing the stringency of class certification requirements in general.

This case requires the Court to decide between two conflicting interpretations of *Mt. Clemens*: whether it governs the determination of both liability and damages or whether it applies only when "damage is . . . certain" and the "uncertainty lies only in the amount of damages."[100] Because of the impracticality of proving liability and

95. FED. R. CIV. P. 23(b)(3).

96. Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1196 (2013).

97. *See* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 2179, 2184 (2011) ("Considering whether 'questions of law or fact common to class members predominate' begins . . . with the elements of the underlying cause of action."); Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) (stating that the predominance inquiry "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff 's cause of action") (citation omitted).

98. Scott A. Moss & Nantiya Ruan, *The Second-Class Class Action: How Courts Thwart Wage Rights by Misapplying Class Action Rules*, 61 AM. U. L. REV. 523, 536 (2012); Brian R. Gates, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) A Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1553 (2005).

99. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).

100. *Id.* at 688.

damages separately in this case, the Court should adopt the former reading of *Mt. Clemens*.

The question, therefore, is what prerequisites must be met for the *Mt. Clemens* rule to apply. Tyson wants the plaintiffs to prove that individual class member's work exceeds the forty-hour overtime threshold before representative evidence can be introduced to determine how much overtime the plaintiffs are owed.[101] As the plaintiffs point out, however, "where the 'liability' question is simply whether an employee suffered any damages," the distinction between liability and damages is "untenable."[102] Here, proving one will necessarily prove the other because the amount of uncompensated work the plaintiffs performed is the only fact governing both liability and damages.[103] Therefore, it is nonsensical to require the plaintiffs to establish liability before they can use "just and reasonable inference" to establish the amount of damages.

Additionally, such a requirement would defeat the central purpose of the *Mt. Clemens* decision, which is to relieve the employees of an unreasonable evidentiary burden when the employer fails to meet its recordkeeping duty.[104] Hence, the reading of *Mt. Clemens* to both liability and damages most accurately captures the Court's intent at the time.

Because *Mt. Clemens* applies to this case, the plaintiffs' use of statistical evidence is proper. Tyson argues that the use of statistical averages to estimate the liability and damages of the class constitutes "trial by formula," which was explicitly rejected by the Court in *Dukes*.[105] Tyson is both misinterpreting the term and baselessly stretching the application of *Dukes*.

In *Dukes*, the Court used "trial by formula" to describe a process "where liability and damages would be determined for a sample of class members" and "[t]he percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the same set to arrive at the entire class recovery—without further individualized

101. Brief of Petitioner, *supra* note 10, at 39.
102. Brief for Respondents, *supra* note 15, at 43.
103. *Id.*
104. *Mt. Clemens*, 328 U.S. at 687.
105. Brief of Petitioner, *supra* note 10, at 39.

proceedings."[106] Unlike in *Dukes*, however, where the plaintiffs only proved liability for a sample set of class members, the plaintiffs in this case proved liability for every class member by calculating the amount of time each member worked "[u]sing 'time sheets' and '[p]ay data' obtained 'directly from [Tyson].'"[107]

Additionally, *Dukes* is factually dissimilar to this case, so it has little precedential value here.[108] Unlike *Dukes*, which involved many discretionary decisions, this case involves employees working at the same plant, using similar equipment, and who are subjected to the same company policy that "systematically undercompensated them for compensable work under the FLSA and state law."[109] Hence, Tyson's attempt to use the *Dukes* decision to undermine the *Mt. Clemens* rule here fails.

Similarly, Tyson's argument that variations in the time the plaintiffs spent donning and doffing the different equipment "rendered [their] evidence insufficient for the jury to draw a reasonable inference of the extent of class members' uncompensated work" also fails.[110] First, whether the differences among class members are so great as to warrant decertification is a factual inquiry for the jury to decide. Here, the jury returned a verdict for the class, which suggests that it found the class members to be sufficiently similar to permit reasonable inferences based on the plaintiffs' representative evidence. Tyson cannot ask the Court to overturn the jury's factual determination without providing the Court with sufficient justification to do so.

Second, because variations almost always exist among class members, adopting Tyson's standard would mean that virtually no class action could be certified. There is no limiting principle in Tyson's standard to prevent it from requiring "classwide evidence to capture every minuscule variation in workers' time."[111] In fact, the Court openly rejected a similarly stringent standard of proof that the Sixth

106. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011).
107. Brief for the United States, *supra* note 22, at 20.
108. *See* Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791, 797–98 (8th Cir. 2014) (noting the factual dissimilarity between the two cases).
109. Brief for Respondents, *supra* note 15, at 50; *see Bouaphakeo*, 765 F.3d at 798–799.
110. Brief for the United States, *supra* note 22, at 23.
111. Brief for Respondents, *supra* note 15, at 42.

Circuit Court of Appeals demanded in *Mt. Clemens*.[112] Therefore, at least in circumstances where an employer has clearly violated its statutory duty to keep proper records, the employees should be subject to a more lenient standard and be able to use statistical evidence to prove their injury.

CONCLUSION

Because of the clear evidentiary standard laid out in *Anderson v. Mt. Clemens Pottery Co.*, the Supreme Court should allow the use of statistical evidence as common proof satisfying class certification requirements, at least in cases where the employer has clearly violated its FLSA recordkeeping duty. Nevertheless, given its ruling in *Wal-Mart v. Dukes*, the Court may be less willing to allow such representative evidence to prove class-wide liability and damages under other circumstances. The future of class actions remains grim, but the plaintiffs in this case should prevail.

112. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87 (1946) (rejecting the Sixth Circuit's argument that it is insufficient for the employees to prove their case with an estimated average of overtime worked).