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:

18 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf

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 a bifurcated trial. And so far as uninjured plaintiffs
22 recovering, that has to be determined on remand anyway.
23 I -- I just don't understand your arguments.
24 MR. PHILLIPS: There are a number of
25 questions embedded in there, Justice Kennedy.

1 The -- the first one is -- and we objected
2 all along to having this class certified on the basis
3 that there were a wide range of --
4 JUSTICE KENNEDY: Yeah, but once you lose
5 that, you have also other defenses: Your own expert, a
6 Daubert objection, et cetera.
7 MR. PHILLIPS: But Justice Kennedy, we don't
8 have to bring forward an expert. What we did in this
9 case is we -- we cross-examined both their -- the named
10 plaintiffs, the four named plaintiffs who testified, and
11 demonstrated two things about that.
12 One, that in general, they way overestimated
13 their own time; and two, none of their times were
14 remotely the same as Dr. Mericle's time. So we proved
15 that.
16 Second, we cross-examined Dr. Mericle about
17 his testimony and demonstrated again that his methods
18 were completely haphazard and scattered, and therefore
19 couldn't demonstrate.
20 And this notion that you patch over the
21 entirety of these problems simply by averaging all of
22 the times of all of these employees is simply the kind
23 of shortcut this Court has -- has rejected in the past
24 in both Comcast and Wal-Mart.
25 I'm sorry, Justice.

1 JUSTICE SOTOMAYOR: Mr. Phillips, I'm
2 completely at a loss as to what you're complaining
3 about. That's exactly what you did.
4 And what this expert did -- I mean, as far
5 as I could tell, between your expert that you used to
6 calculate "gang time" and "K-time" did exactly the same
7 thing this expert did. You came out with a lower
8 number, but you used fewer people. At least their
9 expert used hundreds of people instead of the few that
10 you did. I'm -- I'm just completely at a loss.
11 Would you suggest that if one plaintiff came
12 into court, that he could not use the -- this expert to
13 prove his case circumstantially to show that in fact,
14 the average is this, and he doesn't really know how much
15 time he took? When he does it now, it may be 12 minutes
16 instead of 10?
17 MR. PHILLIPS: Justice Sotomayor, I would --
18 I would -- yes. I would categorically reject that,
19 because that's no more different than Employee A coming
20 into court and saying I don't know what I worked, but
21 Employee B, who does vastly different activities --
22 JUSTICE SOTOMAYOR: Oh, no, no. But they
23 know what they worked. They know that people were
24 working over 40 hours because there were time records
25 with respect to that.

1 What you're basically saying is that Mt.
2 Clemens is completely wrong. You can't estimate your
3 time when the employer doesn't keep records.
4 MR. PHILLIPS: We -- we don't have any
5 quarrel with Mt. Clemens the way it was written. The
6 Mt. Clemens made -- makes a very clear divide between
7 what needs to be proven, what the plaintiff's burden is
8 to demonstrate that he or she has worked beyond the
9 40-hour work week, and then what happens if
10 that's proof --
11 JUSTICE SOTOMAYOR: There were time records
12 to that effect here.
13 MR. PHILLIPS: Right. But there were a lot
14 of people who didn't work beyond the 40 hours.
15 JUSTICE SOTOMAYOR: No. There were
16 200-and-something-odd people that their expert showed
17 didn't work above 40 hours. The jury knew about those.
18 MR. PHILLIPS: And -- and the jury rejected
19 Dr. Mericle's averaging of -- of 18 -- 18 and 20 -- 18
20 and a half and 21 minutes, and we don't know what the
21 impact of that is.
22 What we do know is that Fox calculated that
23 a mere three minutes' departure from Mericle's numbers
24 dropped the damages award by $1.41 million, and dropped
25 the number of plaintiffs out by close to 125.

1 So Justice Kennedy, the small differences
2 make a big difference in -- in this particular case.
3 JUSTICE GINSBURG: Can we go back to
4 Justice Sotomayor's basic question, that is, when the
5 government sued Tyson or Tyson's predecessor and got an
6 injunction --
7 MR. PHILLIPS: Right.
8 JUSTICE GINSBURG: -- what Tyson's did, it
9 had its own industrial engineer observe the workers as
10 they were donning and doffing their gear, and that
11 expert averaged the times that they spent. And it seems
12 to me that the plaintiff's expert here is doing exactly
13 the same thing that Tyson's expert did when the
14 government was bringing --
15 MR. PHILLIPS: And in some ways,
16 Justice Ginsburg, that explains why we didn't bring the
17 Daubert motion that Justice Kennedy asked about because
18 the methodology isn't inherently flawed. The problem
19 with the methodology is it's applied to the theory of
20 liability in this case.
21 It's one thing for an employer to say, look,
22 we're entitled under the Department of Labor regulations
23 to average, as a mechanism for trying to avoid the kind
24 of picayune details and discrepancies that the Court
25 identified in Mt. Clemens and said those can be

1 disregarded as mere trifles, we're allowed to do that.
2 And the effect of what we, in fact, did hear was to
3 round up in order to provide more time to people than
4 they might otherwise have gotten.
5 And indeed, if you go to the pre-2007 period
6 when you're talking about the people who just put on the
7 normal sanitary clothing, they were -- they were all
8 given four minutes of K-time when they -- it took them
9 all of about 30 seconds to do that.
10 So the idea that we could overcompensate
11 somebody using those kinds of data is one thing, but
12 that's a vast difference from saying that in order to --
13 to maintain as -- under a rigorous analysis the idea
14 that this can proceed as a class when all you've got is
15 averaging across the widest imaginable range of -- of
16 employees performing different tasks with different
17 requirements, and indeed, although I don't think --
18 JUSTICE KAGAN: Mr. Phillips, you say the
19 question is whether it can proceed as a class. But it
20 seems as though that's really not the question in this
21 case because of Mt. Clemens; and what Mt. Clemens does
22 is to suggest that certain kinds of statistical evidence
23 are completely appropriate in FLSA cases generally, even
24 if they're brought by the government, or even if they're
25 brought by a single person.

1 And so the question that you really are
2 putting before us is not a Rule 23 question, it's a
3 question of whether this sort of evidence complies with
4 the Mt. Clemens standard; isn't that right?
5 MR. PHILLIPS: No. I would go -- I would
6 actually go at it the other way. I would say that the
7 first question is: Can you use this kind of averaging
8 in a -- in a run mine-case period under Rule 23? And it
9 seems to me the answer to that has to be no, that
10 this -- this simply papers over the problems of the
11 class.
12 JUSTICE KAGAN: But the Rule 23 inquiry,
13 Mr. Phillips, is always dependent on what the
14 substantive law is.
15 MR. PHILLIPS: Right. And then the question
16 is --
17 JUSTICE KAGAN: That was true in Halliburton
18 where we said, look, if we didn't have the basic
19 presumption, we would think of this as very
20 individualized.
21 MR. PHILLIPS: Right.
22 JUSTICE KAGAN: But we have the basic
23 presumption, so the proof is not individualized.
24 And the same thing, it seems to me, is true
25 here because of the Mt. Clemens inquiry.

1 MR. PHILLIPS: Right.
2 JUSTICE KAGAN: Where it says if the
3 employer hasn't kept the appropriate records, even a
4 single plaintiff can prove the amount of work done
5 through the use of statistical --
6 MR. PHILLIPS: That's not what Mt. Clemens
7 says, Justice Kagan. Mt. Clemens says that it's the
8 burden on the employee to demonstrate that he or she
9 worked the requisite hours in order to get past 40.
10 Once you got past 40 in determining exactly what the
11 damages would be, at that point it was reasonable
12 because we hadn't -- because -- because Mt. Clemens
13 hadn't maintained records to go ahead and give the
14 plaintiff a pass. It's the same -- it's the Story
15 parchments test all over again.
16 JUSTICE KAGAN: I can't see how that account
17 of Mt. Clemens would make most -- much sense. You're
18 suggesting that a person past 40 can produce the
19 statistical evidence, but if I worked 39 1/2 hours and
20 all of this overtime is going to push me over 40, the
21 Mt. Clemens presumption wouldn't be available to me?
22 MR. PHILLIPS: I think that's exactly the
23 line the Court drew in Mt. Clemens. It's the line that
24 the Court has consistently drawn in antitrust cases,
25 from parchment.

1 JUSTICE KENNEDY: But you've changed your
2 theory. Question 2, as you presented in the petition
3 for certiorari, whether the class may be certified if it
4 had members who were not injured. Then you changed
5 that. Page 49 of your brief, you say that the plaintiff
6 must demonstrate a mechanism to show that. So now
7 you're talking about -- about the mechanism.
8 So the -- so the case has been argued on
9 different theories at -- at many points, and it seems to
10 me Justice Kagan is precisely right. You said, well, I
11 want to start first with class action.
12 She said, no, no. The point is we start
13 with Mt. Clemens. That's the substantive law for FSLA.
14 MR. PHILLIPS: To be sure. I mean, you can
15 go at it either way. But at the end of the day,
16 obviously, what -- as I started -- as I started my
17 remarks, is -- is that the Court -- is that the
18 plaintiffs are obliged to demonstrate that a class works
19 on the basis of the substantive liability that they have
20 to -- burden that they have to assume --
21 JUSTICE BREYER: Right. So Mt. Clemens says
22 exactly this. I'll read it. I think it's correct.
23 "Where" -- "Where an employee's records of time worked
24 are," quote, "'inaccurate or inadequate'" -- that's your
25 case, right? -- "then the employee attempting to bring a

1 claim can show time worked by producing sufficient
2 evidence to show the amount and extent of that work as a
3 matter of just and reasonable inference."
4 That's what it says to do.
5 MR. PHILLIPS: Right.
6 JUSTICE BREYER: And then it says the
7 employer can't complain that the damages lack the
8 exactness and precision of measurement that would be
9 possible had he kept records. But he didn't. So they
10 used some statistics to show it. What's wrong with
11 that?
12 MR. PHILLIPS: There are two answers to
13 there. The premise -- the first part of that sentence
14 is, if he proves that he has, in fact, performed work
15 for which he was improperly compensated.
16 JUSTICE BREYER: Yeah.
17 MR. PHILLIPS: None of these employee -- a
18 huge number of these employees have not made that
19 showing.
20 JUSTICE BREYER: Well, they did through
21 statistics. I mean --
22 MR. PHILLIPS: No. They --
23 JUSTICE BREYER: I mean, you say an
24 antitrust case. Okay. Let's imagine an antitrust case.
25 There's an agreement among sneaker manufacturers to use

1 shoddy material. And large customers, distributors buy
2 these shoddy materials. They're hurt. How much are
3 they hurt? It depends on how many sneakers their
4 employees used and when and so forth.
5 There is no way people don't keep sneaker
6 records, so what we do is we hire a statistician to use
7 sampling. And if he's a good statistician and uses
8 sampling correctly, we have probably a better measure
9 than if we asked the employees to go back and remember
10 how many sneakers they wore and what days and what hours
11 50 years ago.
12 MR. PHILLIPS: But Justice Breyer, your --
13 your entire hypothetical is premised on the fact that
14 they had already shown that they were injured in the
15 first --
16 JUSTICE BREYER: Well, some of them, it
17 might turn out, actually did not wear sneakers during
18 the period of time that the conspiracy has been shown to
19 exist. But we didn't know that at the beginning because
20 we thought we could prove a conspiracy from January to
21 December, but we only ended up proving it from January
22 until June. Now, there we have it. We put them in the
23 class to begin with because we thought we could prove
24 injury. As it turns out, we can't.
25 Now, I -- I've never heard that you had to

1 be able to know exactly how you're going to win your
2 case when you form the class action because you don't
3 know quite what the proof will be. I mean, isn't that
4 how class actions work?
5 MR. PHILLIPS: No, because --
6 JUSTICE BREYER: Why not?
7 MR. PHILLIPS: -- because there's a -- I
8 mean, the class certification decision is still open
9 until the final -- until a final judgment is rendered by
10 the district court. So the district court has a
11 continuing responsibility in the face of challenges to
12 the class certification to consider decertifying the
13 class. And we raised -- and we raised that issue right
14 after Wal-Mart.
15 JUSTICE BREYER: But why decertify the
16 class? If we've shown or we do show the conspiracy
17 lasted from January until June, not through December?
18 Some people will recover; other people will not recover.
19 Can't we wait until the evidence is presented before we
20 tell the people who didn't --
21 MR. PHILLIPS: But see, the problem --
22 JUSTICE BREYER: -- buy the sneakers, then
23 you don't recover?
24 MR. PHILLIPS: The -- the problem with
25 this -- and this would raise exactly the same Comcast

1 problem -- is my guess is your expert testified about
2 the conspiracy that lasted through the entire period.
3 And for whatever reason the jury rejected it, just as it
4 rejected Mericle in this case. And now you're stuck in
5 a situation where you've got this huge judgment where we
6 knew there were 200 and some people who -- but now we
7 know there are more than a thousand plaintiffs.
8 And -- and Justice Kennedy, we didn't shift
9 the -- the answer. Our answer was this is invalid
10 because there are so many defendant -- plaintiffs -- who
11 are --
12 JUSTICE SOTOMAYOR: I'm sorry. I'm having
13 difficulty understanding your point. There are records,
14 aren't there, of how many hours they worked without
15 donning and doffing the equipment at issue, correct?
16 MR. PHILLIPS: Yes, there are.
17 JUSTICE SOTOMAYOR: All right. So I thought
18 that Dr. Mericle's using those actual records figured
19 out how many people worked over 40 hours.
20 MR. PHILLIPS: But -- but only because --
21 she didn't do that to say who's over 40. I mean, she
22 obviously identified some who weren't. But she took
23 Mericle's average numbers, 18 1/2 and 21 and -- and
24 slotted them in when nobody worked 18 1/2 and 21
25 minutes.

1 JUSTICE SOTOMAYOR: Well, you didn't have an
2 expert to say that?
3 MR. PHILLIPS: We didn't need an expert to
4 say that. We had our industrial engineer who said --
5 and the -- and the Federal government's industrial
6 engineer said the same thing for four minutes.
7 JUSTICE SOTOMAYOR: Jury rejected --
8 JUSTICE ALITO: Is there any way at this
9 point to determine which employees were actually injured
10 and which ones were not? Because I -- I gathered
11 because the jury rejected the full verdict that was
12 requested by the plaintiffs, they did not accept
13 Dr. Mericle's testimony regarding the amount of time
14 needed to don and doff for employees in various
15 categories. And without knowing that, I don't see how
16 you can at this point -- I'll -- I'll ask Mr. Frederick
17 the same question -- how you can separate the employees
18 who were injured from the employees who were not
19 injured.
20 MR. PHILLIPS: It -- it's impossible to do
21 that. And -- and Fox, who was their expert who
22 testified on the damages, was very clear about that
23 because it's not linear. So that if -- if it turns out
24 that some period of time drops, the number of employees
25 who fall below the 40-hour threshold plus the -- plus

1 the K-code time will drop.

2 JUSTICE KENNEDY: But the briefs are like

3 two ships passing in the night on this point. The

4 Respondent is going to say this is for remand, or am I

5 wrong about that?

6 MR. PHILLIPS: I would be shocked if he's

7 prepared to accept a remand. I mean, I'm delighted if

8 he wants that.

9 JUSTICE KENNEDY: Aren't there further

10 proceedings?

11 MR. PHILLIPS: I don't --

12 JUSTICE KENNEDY: Aren't there further

13 proceedings in this case?

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

15 MR. PHILLIPS: It was a lump sum judgment,

16 Your Honor.

17 JUSTICE KAGAN: And now that has to be

18 distributed. So there are going to be further

19 proceedings to distribute that lump sum judgment.

20 MR. PHILLIPS: It is far from clear how it's

21 going to be -- how it's going to be dealt with at this

22 point other than on a pro rata basis. That's what

23 Judge --

24 JUSTICE KENNEDY: But that has to be

25 determined in the trial court.

1 MR. PHILLIPS: I'm sorry?
2 JUSTICE KENNEDY: But that has to be
3 determined in the trial court.
4 MR. PHILLIPS: It's far from clear what the
5 trial court --
6 JUSTICE KAGAN: Mr. Phillips --
7 MR. PHILLIPS: -- if the trial court has any
8 intention to do anything with this other than to accept
9 the check.
10 JUSTICE SCALIA: I don't understand. You --
11 you can get a class certified, some of whom have not
12 been injured at all, and wait until the conclusion of
13 the trial for the trial court to determine who has not
14 been injured?
15 MR. PHILLIPS: Well, you can't do that. And
16 the truth -- I mean, no. The answer to that is no; and
17 second, you couldn't do it anyway.
18 JUSTICE SCALIA: -- class to begin with.
19 MR. PHILLIPS: But you can't -- you can't
20 unscramble this egg at this point. It's impossible.
21 You've got to --
22 JUSTICE GINSBURG: You have conceded that
23 the initial certification was okay because at that time,
24 we didn't know which ones --
25 MR. PHILLIPS: Well, I wouldn't say we

1 conceded that. Obviously, we -- we filed an opposition
2 to their motion to certify, and we brought forth dozens
3 of supervisors who testified about the -- the myriad
4 jobs and the -- and the wide range of donning and
5 doffing requirements for them, and said that under the
6 circumstances, this is not an appropriate case to
7 proceed as a class.
8 JUSTICE GINSBURG: But didn't you say that
9 in general, a class could be certified going in, even
10 though at that point, we don't know?
11 MR. PHILLIPS: No. No. We -- I mean, we --
12 in general, we say classes can be certified. I mean, I
13 think you could have certified a walking time class in
14 this case.
15 JUSTICE BREYER: I'm still having the same
16 problem. When I heard Justice Scalia's question, I
17 thought the answer is of course you can put in your
18 class people whom, it will turn out, are not hurt. I
19 have a class of people who were hurt by a price-fixing
20 conspiracy that lasted from January to December. That's
21 what I said. I have good reason to think it. But I
22 prove it only lasted until June. That's a failure of
23 proof. Half of them were not hurt, okay? So we don't
24 pay them.
25 MR. PHILLIPS: But the --

1 JUSTICE BREYER: I thought that's the most
2 common thing in the world. Am I wrong? Is it not?
3 MR. PHILLIPS: But the problem is -- yes,
4 you are, Justice Breyer, because the problem there is
5 the expert who testified to the conspiracy would have
6 assumed that the conspiracy covered the entire time
7 of --
8 JUSTICE BREYER: That's right.
9 MR. PHILLIPS: -- proof. And, therefore,
10 the damages number that that expert will put forward
11 will be a vastly larger number than what the jury comes
12 back in based on the -- on the finding that there was a
13 shorter conspiracy.
14 JUSTICE BREYER: Yes.
15 MR. PHILLIPS: And there's no way to know
16 who was injured in that context and who was not injured
17 in that context.
18 JUSTICE KAGAN: But there --
19 MR. PHILLIPS: You can't identify the people
20 to pay.
21 JUSTICE KAGAN: But, Mr. Phillips, there is
22 a way.
23 CHIEF JUSTICE ROBERTS: Justice Sotomayor.
24 JUSTICE SOTOMAYOR: Why do you have
25 standing? I mean --

1 MR. PHILLIPS: Because --
2 JUSTICE SOTOMAYOR: -- the jury, obviously,
3 rejected something. It obviously was told to exclude
4 people who were not entitled, and it did it. You didn't
5 object to a -- the failure to have -- you objected to
6 proposing interrogatories. So this has invited errors;
7 it sounds like invited error.
8 But, finally, how do you have standing --
9 MR. PHILLIPS: Respondent didn't raise that.
10 JUSTICE SOTOMAYOR: -- to argue that the
11 issue of who gets part of that money?
12 MR. PHILLIPS: Phillips Petroleum says we
13 clearly have standing to do that because --
14 JUSTICE SOTOMAYOR: Why?
15 MR. PHILLIPS: Because our concern is that
16 we -- that -- that the class be bound by whatever
17 judgment comes out of this. And if it turns out that
18 this class has been improperly treated so that there are
19 a substantial number of --
20 JUSTICE SOTOMAYOR: You tell me, except for
21 those people --
22 MR. PHILLIPS: Plaintiffs.
23 JUSTICE SOTOMAYOR: -- who opted out, there
24 are people who opted in?
25 MR. PHILLIPS: The Fair Labor Standards Act

1 people opted in, yes, Your Honor.

2 JUSTICE SOTOMAYOR: Opted in.

3 So you know all of the people who are bound,

4 all the people who've opt -- who were -- who opted in.

5 MR. PHILLIPS: No, no.

6 JUSTICE SOTOMAYOR: So why do you have to

7 know whether -- there can't be more.

8 MR. PHILLIPS: No, no, no, no, no. It's --

9 it's quite possible that there are people who have

10 been -- who have been undercompensated because of this

11 particular scheme, and who could claim that because they

12 weren't allowed to participate, their due process rights

13 were violated --

14 JUSTICE SOTOMAYOR: They were allowed to

15 participate; they just didn't opt in.

16 MR. PHILLIPS: Well others -- but others

17 didn't -- that's -- that's true, but the -- but the

18 bottom line here remains the same, which is, they are

19 absent class members whose interests were -- may -- may

20 have not been fully protected, and the only question

21 there is do we have standing to raise this issue,

22 which --

23 JUSTICE SOTOMAYOR: I've never heard of a

24 case where absent class members are somehow bound by a

25 judgment in this case, when they didn't opt in. I hope

1 that -- I thought that was the whole purpose of not
2 opting in, so you're not bound by this judgment.
3 MR. PHILLIPS: If it's a class judgment and
4 you -- and you didn't opt out -- I mean, there are two
5 different classes here, right? There is a 23(b)(3)
6 class, and there's the FSLA collective action, which
7 have now been merged in on the judgment. So there's no
8 reason to look at this as anything other than a 23(b)(3)
9 class of individuals. And, you know -- and their -- so
10 that means there are literally thousands of absent class
11 members whose -- who are -- who are either entitled to
12 or not entitled to damages without any ability to know
13 whether they were or were not injured. And therefore,
14 under those circumstances, what this Court said in
15 Phillips Petroleum is that the defendant has a right to
16 be sure that the mechanism by which the judgment
17 ultimately is entered across the entire class is such
18 that it -- that it protects us as a collateral
19 estoppel --
20 CHIEF JUSTICE ROBERTS: Mr. Phillips, do
21 you have -- do you have a theory as to why the jury
22 awarded less than half of the damages that were
23 requested? Did they -- I take it they didn't identify
24 particular workers.
25 MR. PHILLIPS: They did not identify

1 particular workers.

2 CHIEF JUSTICE ROBERTS: Did they -- did they

3 disagree with the 18 minutes, 21 minutes?

4 MR. PHILLIPS: They had to have disagreed

5 with it, and there was good reason to do that because if

6 you -- if you take the testimony of the four named

7 plaintiffs, they -- they were significantly different

8 than the -- than the 18 and 21 minute times. And so

9 the -- the best evidence was, is that Mericle, by this

10 method of sort of -- of nonrandom observations of

11 self-selected employees, came up with widely -- wildly

12 extravagant numbers, and the jury rejected them. And it

13 was the plaintiffs' decision to go for the -- for the

14 entirety of the claim rather than take a more narrow

15 approach of maybe seeking walking time where the conduct

16 of the individual plaintiffs is much more homogenous.

17 The problem with this is that it's very --

18 it's a vast -- I'm sorry.

19 JUSTICE KAGAN: If I could go back to

20 Justice Kennedy's question at the start, because it

21 really was your decision not to have a bifurcated

22 proceeding, where it would have been clear -- it would

23 have been proved separately in a highly ministerial way

24 which employees worked over 40 hours.

25 And having made that decision, you're in a

1 position now where you're saying, oh, there's one sum --
2 there's one lump judgment; we don't know what to do with
3 it. But, in -- in essence, what's going to happen is
4 that it's going to go back in remand, and the judge is
5 going to do something that looks an awful like -- lot
6 like the bifurcation that you rejected, which is, the
7 Court will say, now we figure out in this highly
8 ministerial way who worked more than 40 hours, and so
9 who is entitled to share in the judgment.
10 MR. PHILLIPS: The -- the bifurcation that
11 the plaintiffs proposed, two things to say about that.
12 First of all, they took it off the table
13 themselves, not us. We did object, but that wasn't --
14 it wasn't rejected because we -- we objected to it.
15 They -- they pulled bifurcation off the table. So I
16 don't think you can put the burden on us.
17 But, second of all, the -- the bifurcation
18 they proposed was that first you were going to decide
19 whether Mericle is right or not, and that means whether
20 18 and a half and 21 can be averaged across your class.
21 And then the second part was going to be Fox testifying
22 about how to slot that in.
23 Well, that's not -- that's not going to --
24 it may help with respect to the -- to the uninjured --
25 to the injured class members, but it would not have

1 remotely helped with the more fundamental question of
2 the inadequacy of this as a class action device where
3 you patch over the problems of this -- of this class by
4 simply averaging everything together.
5 JUSTICE KAGAN: But it -- it absolutely
6 helps with the question, your second question presented,
7 which is this point that you are making that there might
8 be some people who didn't work 40 hours, who would
9 nonetheless get money. And it absolutely helps for
10 that. It takes care of the entire problem.
11 That leaves you with only your first
12 question presented --
13 MR. PHILLIPS: Right.
14 JUSTICE KAGAN: -- which is this question
15 about was the class too varied. And on that, I have to
16 go back to this -- to this issue of, it's not a class
17 issue. It's an FLSA issue under Mt. Clemens as to
18 whether this kind of statistical evidence could have
19 been presented.
20 MR. PHILLIPS: And -- and my answer to the
21 Mt. Clemens one, which, obviously, I'm not persuading
22 you on, is that if -- the way I read Mt. Clemens, it
23 says, you don't go to fair and reasonable inference
24 on -- on the liability phase. You only do that on the
25 damages phase. And I would still argue here that even

1 if you use Mt. -- the fair and reasonable inference
2 standard, it won't be satisfied by what Mericle did
3 here, because it's one thing to -- to do some kind of
4 sampling. It's another thing to say, I'm going to take
5 wildly different, 30 seconds versus 10 minutes and
6 average everybody across the plant without any effort to
7 be more tailored in our approach than that, Your Honors.
8 I would like to reserve the balance of my
9 time.
10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Frederick.
12 ORAL ARGUMENT OF DAVID C. FREDERICK
13 ON BEHALF OF THE RESPONDENTS
14 MR. FREDERICK: Thank you, Mr. Chief
15 Justice, and may it please the Court:
16 Let me start with your question, Justice
17 Kennedy, because there absolutely will be remand
18 proceedings on the presumption that you affirm the
19 judgment of the Eighth Circuit so that the money can be
20 allocated, and we know the names of every single person
21 who would be entitled to an award based on a very long
22 spreadsheet that Dr. Fox compiled in conjunction with
23 Dr. Mericle's analysis.
24 And so you're right, Justice Kagan, that
25 there is a pot of money based on the jury verdict that

1 will be allocated, assuming that the Court affirms the
2 class certification judgment.
3 JUSTICE ALITO: Well, there is no question
4 the money can be divided up. The question is whether it
5 can be divided up between those who were actually
6 injured and those who were not actually injured.
7 So suppose you have -- if you have three
8 employees, one worked -- one was -- one was given credit
9 for working 39 hours a week, one was given credit for
10 working 38 hours a week, one was given credit for
11 working 37 hours a week. Without knowing how much
12 additional time the -- each employee is entitled to, you
13 can't tell which one of those, which, if any, of them
14 was injured, and you can't tell how much additional time
15 the employees were entitled to without knowing what the
16 jury did with Dr. Mericle's statistics.
17 So that's why I -- I don't see how this can
18 be done in other than a very slap-dash fashion.
19 MR. FREDERICK: Well, there are two ways,
20 and I would submit that they -- neither is slap-dash.
21 Ordinarily, we would defer to jury verdicts, and we
22 would say that if the jury evaluated the evidence within
23 the realm of what was presented at trial, that is going
24 to get special deference in our legal system.
25 So when those monies get allocated,

1 ordinarily a district judge is going to do so on a basis
2 either of pro rata for all of those -- all of those
3 plaintiffs who were found to be injured, and the 212 who
4 were identified by name, by Dr. Fox, Tyson knew about
5 them before trial, did not move for summary judgment as
6 to those 212, could have easily severed them right out
7 before this case went to the jury.
8 The second way is that Dr. Fox did an
9 analysis using Mericle's averages and then added them to
10 the number of minutes worked by the particular employee,
11 and so based on that, a vast number got above the
12 40-hour threshold.
13 Now, the evidence at trial that it came in
14 by Tyson's own witnesses was that the average worker
15 worked 48 hours per week before you even got to any of
16 the counting of the donning and doffing, and that the
17 plant ran on Saturdays 60 percent of the time, which
18 would be a 6-day work week.
19 And so the evidence as the jury was
20 considering it found the vast majority of the class
21 members were already going to be in overtime status, and
22 that's why the fulcrum of the case came down to whether
23 putting on this gear, which was standard sanitary gear
24 for every single worker in the class, was compensable or
25 not. We're --

1 CHIEF JUSTICE ROBERTS: Counsel, we don't
2 know why the jury reduced the requested damages by --
3 gave less than half. I mean, it could have been because
4 they thought the evidence on the ones who just put on
5 smocks or whatever as opposed to the ones who had the
6 mesh Armour -- you see, I don't believe what you said
7 about the ones who don't put on the mesh Armour, so
8 we're going to give zero dollars on that.
9 But I believe the -- the validity of your --
10 the experts' testimony on the ones who put on the mesh
11 Armour, so we're going to award that. Or maybe they
12 thought, you know, they would just discount the whole
13 thing, or -- you know, we don't know why.
14 So because they used average statistics over
15 varying jobs with -- even your expert admitted varying
16 times, depending upon the classes, there's no way to
17 tell whether everybody who's going to get money was
18 injured or not.
19 MR. FREDERICK: Well, and Tyson had an
20 opportunity to ask for more specific instructions. In
21 fact, their instructions were the ones that ended up
22 governing the trial. So to the extent that they had a
23 complaint --
24 CHIEF JUSTICE ROBERTS: Well, if you have --
25 you have -- I understand that, but do you have a

1 substantive answer? Because it's one thing for us to
2 write an opinion saying this is a horrible problem, but
3 they didn't ask for instructions, so don't worry about
4 it.
5 MR. FREDERICK: Well, I don't --
6 CHIEF JUSTICE ROBERTS: It's another thing.
7 We need to know whether we should address the -- the
8 mechanism by which this was presented to the jury, and
9 then we can deal separately with a waiver issue.
10 MR. FREDERICK: Yeah. Well, on the
11 substantive part, Mr. Chief Justice, let me say this.
12 That in all these instances where there is a challenge
13 between an aggregation or something where you could ask
14 the jury for a more particularized decision, there's
15 always a tactical and a strategic decision that the
16 counsel on both sides are making and the parties on both
17 sides.
18 CHIEF JUSTICE ROBERTS: That sounds like the
19 same answer you gave before.
20 MR. FREDERICK: No, but -- but --
21 CHIEF JUSTICE ROBERTS: Is there a
22 substantive? Yes. We could say, okay, the problem is
23 they didn't ask for a special verdict. They didn't
24 divide it between the people who were engaged in
25 different functions than the killers, stunners.

1 MR. FREDERICK: Substantively, the way this
2 is handled typically is that you would do a pro rata
3 distribution of the jury proceeds to the members who are
4 found to have been injured. That's the substantive
5 answer. We have it the way --
6 JUSTICE BREYER: But I'm actually puzzled by
7 the same thing. So put yourself in my puzzlement.
8 The -- there is a green room, a yellow room, and a blue
9 room, all right? Now, we discover with our statistical
10 experts that in the green room, doffing and donning,
11 those people on average -- some more, some less -- but
12 the sampling shows it's half an hour. In the blue room,
13 it's 20 minutes. In the yellow room, it's 10 minutes.
14 So, we add those three numbers on to green room, yellow
15 room, and blue room people. And we get a number.
16 Now, that number in individual cases will be
17 wrong, but that's what averaging is about. And if there
18 is no other proof in the case, well, is that good
19 enough?
20 MR. FREDERICK: Well, let me -- let me
21 address that question in this way because I do want
22 to --
23 JUSTICE BREYER: Is that the substantive
24 issue?
25 MR. FREDERICK: I -- I think it is not.

1 JUSTICE BREYER: Okay.
2 MR. FREDERICK: Because we --
3 JUSTICE BREYER: Then skip it.
4 (Laughter.)
5 MR. FREDERICK: Because we had additional
6 information testimony.
7 And Mr. Chief Justice, on the variations, I
8 think it's important to take into account what actually
9 is going on with these Dr. Mericle observations about
10 the 30 seconds versus the 10 minutes. What Dr. Mericle
11 observed using the videotape in the men's locker room
12 was that some of the men put their gear on in the locker
13 room, and then they went down to the line. That might
14 take them 10 minutes to do.
15 Some of the men put on part of the
16 equipment, and then they carried the rest. And they put
17 it on while they were walking to the production line or
18 while they were on the production line itself. And they
19 were not counted.
20 CHIEF JUSTICE ROBERTS: And I suppose some
21 of them like to chat while they're putting on the
22 equipment, and others are more down to, you know, let's
23 get this on as quickly as possible. And -- and some of
24 them have different sorts of jobs that require different
25 sorts of equipment.

1 MR. FREDERICK: And that's what the district
2 court rejected. The district court said there was not
3 evidence to support that, that the --
4 CHIEF JUSTICE ROBERTS: Well, there was not
5 evidence to support that they'd have different equipment
6 that they put on?
7 MR. FREDERICK: It was minimal. What the
8 district court and what the court of appeals found was
9 that the differences in equipment were -- were minimal,
10 and that they would not drive the difference. And what
11 Dr. Mericle testified -- and this is at 340- -- 346 to
12 350 of the Joint Appendix -- he explained that the
13 donning and doffing was occurring in different places
14 and that what they argued about this
15 30-second-to-10-minute difference was, in fact, not an
16 accurate depiction of the actual time that it took.
17 Because the time clustered around the average; that was
18 his testimony. And that if you took into account the
19 fact that they might be doing it in different places,
20 you then see why averaging works.
21 And the reason averaging works is because
22 the workers were rotating among different assignments.
23 Some of them might start the day in a non-knife
24 capacity, and so putting on all the protective gear
25 before they started their shift didn't make sense. They

1 would carry it to the production line. They would be
2 pulled off the production line, told you're going to be
3 in a knife capacity, get your gear on. They would put
4 their gear on at that time.
5 So when Dr. Mericle is observing in the
6 locker room how long it takes for people to put their
7 gear on and take it off, he's not counting, he's not --
8 he's not counting -- he's not taking into account the
9 variations in the work style mandated by the company.
10 CHIEF JUSTICE ROBERTS: So -- so your --
11 your submission is that, in fact -- well, what -- what
12 about 18 and 21? You must have thought there was some
13 difference.
14 MR. FREDERICK: Well, they were walking to a
15 different part, and they were divided into -- they did
16 have additional equipment in that one. But we divided
17 them by departments, and we can identify the employees
18 in the two different departments.
19 CHIEF JUSTICE ROBERTS: So -- so the
20 variation that is -- at least troubled some of us, 30
21 seconds, 10 minutes, you're saying it's not because the
22 30-second person is actually going to spend 9 1/2
23 minutes at the end of the walk, and the 10-minute person
24 spent all the time at the beginning of the walk, and
25 there's no difference between the people who clean up

1 and the people who actually slaughter the hogs because
2 the clean-up people are going to slaughter the hogs at
3 four hours at the end of the shift. And the --
4 MR. FREDERICK: There was rotation among --
5 and their own witness testified to that effect. That's
6 at JA 236. He said they rotated quite frequently. And
7 what he was explaining was that you might start on a
8 particular assignment -- and -- and Dr. Mericle is
9 taking a two-day snapshot, right? He's looking at
10 video. And the -- the workers themselves were
11 testifying that the actual donning and doffing basically
12 clustered around the average. That's what Dr. Mericle
13 observed.
14 CHIEF JUSTICE ROBERTS: So -- so we
15 should -- again, there's a -- a basic issue that's
16 presented, but you're saying in addition to avoiding it
17 because of the objection is their lack of objections at
18 all, we should not be reaching the substantive issue
19 because, in fact, there was no variation in the time?
20 MR. FREDERICK: That's what the -- both
21 courts below found. And -- and so when you are based
22 with a factual record here that comes up here with both
23 courts below, the ordinary presumption, particularly in
24 a jury context, is you're going to interpret the facts
25 in the light most supportive --

1 JUSTICE KENNEDY: Is it an argument that if
2 the employer wants to be quite conscientious about
3 complying with FLSA, the employer has to take some
4 averages. It has to say, we're going to give X minutes
5 for donning and doffing on this line, X minutes -- and
6 the second part of that question is, how much of this
7 case turns on the fact that the employer did not keep
8 adequate records?
9 MR. FREDERICK: Well, had this -- had the
10 employer kept records, this would be a completely easy
11 case for class certification purposes because every
12 single issue would be done by common proof.
13 JUSTICE KENNEDY: Can the employer be
14 charged with not keeping adequate records by not
15 following every single person every part of that
16 person's day? You spend four hours on this line, four
17 hours on that line. You have to -- you have to put on a
18 certain kind of doffing.
19 Can the employer really keep records for
20 every single employee?
21 MR. FREDERICK: It's actually simpler than
22 that, Justice Kennedy. It's where you place the time
23 clock. Had they put the punch clock right outside the
24 locker room so that the workers, as soon as they went in
25 the locker room, punched in, this problem would have

1 been eliminated. Because at that point, when they were
2 putting on the protective gear, the sanitary gear, and
3 then they are walking -- and the walking is uniform for
4 all class members. The sanitary gear is all uniform for
5 all class workers.
6 So when they're putting on their equipment
7 in the locker room, if they punched in, the company has
8 satisfied the FLSA and this problem goes away. And then
9 the question is, is the walking and donning and doffing
10 work? And that's what the trial was all about.
11 JUSTICE SCALIA: Many workers put on gear
12 other than sanitary gear. What you say is true: The
13 sanitary gear is the same for all workers. But some of
14 them wear, what, chain mail to protect them from the
15 knives, right? And -- and some of them wear other
16 protective gear. And that's what is claimed to create
17 the discrepancy.
18 MR. FREDERICK: Right. But if you take the
19 sanitary -- I'm just saying, if you -- for the question
20 of commonality and predominance, which I'm trying to
21 address the first question -- the sanitary gear is all
22 the same for everybody. The walking is all the same for
23 everybody.
24 And then the question is, can you use
25 averaging because of the peculiarities of the fact that

1 the doffing of this -- basically, the same gear was
2 occurring in three different places: in the locker
3 room, walking down to the production line, and on the
4 production line itself.
5 JUSTICE SCALIA: I don't -- I don't think
6 your -- your friend will agree that it's basically the
7 same gear.
8 MR. FREDERICK: Well, I wouldn't expect
9 that.
10 JUSTICE SCALIA: I think that's his -- his
11 point, that it's quite different gear.
12 MR. FREDERICK: But the -- what the district
13 court found, and they didn't show -- look, we're talking
14 about a difference between a Kevlar belly guard and a
15 Plexiglas belly guard or a mesh, metal mesh belly guard.
16 We're talking about the same basic kinds of gear. We're
17 talking about different kinds of gloves.
18 But those variations were presented to the
19 jury, found to be minor. And the district court
20 concluded that they were minor differences.
21 JUSTICE SCALIA: Well, the difference -- the
22 question is not whether they're -- whether one
23 protective gear is different from another, but it's
24 whether protective gear is different from sanitary gear.
25 That's the question.

1 MR. FREDERICK: Well, the question is --
2 JUSTICE GINSBURG: Wasn't there -- wasn't
3 there -- for all of the workers, there was certain basic
4 equipment. There was basic sanitary gear, but there was
5 also basic protective gear. So the only difference
6 comes up with the protective gear for the knife weld.
7 MR. FREDERICK: That's -- that's --
8 JUSTICE GINSBURG: The basic protective gear
9 was the same for everybody.
10 MR. FREDERICK: That's correct. And the
11 knife issue was solved --
12 JUSTICE SCALIA: What was that? What was
13 that basic protective gear that everybody --
14 JUSTICE GINSBURG: Hard hats, ear plugs or
15 ear muffs, and boots.
16 MR. FREDERICK: Thank you, Justice Ginsburg.
17 CHIEF JUSTICE ROBERTS: What was it?
18 (Laughter.)
19 CHIEF JUSTICE ROBERTS: Let's see if you
20 remember what she said. What was it?
21 (Laughter.)
22 MR. FREDERICK: Hard hats, ear plugs, hair
23 nets, beard nets, and basic smocks.
24 CHIEF JUSTICE ROBERTS: And -- but the --
25 JUSTICE GINSBURG: And boots.

1 MR. FREDERICK: And boots. Sorry. I forgot
2 boots.
3 CHIEF JUSTICE ROBERTS: You left boots out.
4 (Laughter.)
5 CHIEF JUSTICE ROBERTS: But -- but the knife
6 wielders had a lot more than that.
7 MR. FREDERICK: Right. But the point was,
8 Mr. Chief Justice, that if you were on knife duty at a
9 particular point in time, you were going to rotate
10 frequently during the course of a day or from one day to
11 the next, and so you were charged always to have your
12 gear ready to be put on if you were put in a
13 knife-wielding capacity.
14 JUSTICE KENNEDY: It seems -- it seems to me
15 that you might concede that if this were simply a class
16 action under 23, that these problems might be a barrier
17 to certification, but that under Mt. Clemens you have a
18 special rule; is that --
19 MR. FREDERICK: We certainly --
20 JUSTICE KENNEDY: Is that correct?
21 Do you -- do you concede that there is a
22 strong possibility you might not be -- have this class
23 certified under section -- under Rule 23, absent
24 Mt. Clemens?
25 MR. FREDERICK: Well, Justice Kennedy, I

1 think Mt. Clemens answers the question in this case. I
2 think that, given the way the evidence came in, the
3 averages here are reasonable ones. So even if there was
4 not a special Mt. Clemens rule where there's a
5 burden-shifting framework, the answer should be the
6 same.
7 JUSTICE BREYER: Okay. So that's exactly,
8 perhaps, what I -- I read the question, the first
9 question. I'm taking it literally. It said, "Whether
10 differences among individual class members may be
11 ignored, liability and damages will be determined with
12 statistical techniques that assume everyone is like the
13 average."
14 Now, I thought the answer to that question
15 is yes, and it depends, of course; you have to be
16 reasonable. I mean, that's why you use the four rooms.
17 We don't know everybody in the room. What we do is we
18 take an average in the room. If it's a good statistical
19 average, why not?
20 Now, I want -- I don't want you to agree
21 with that if that isn't the law, but I don't see why it
22 isn't.
23 MR. FREDERICK: Well, Justice Breyer, we do
24 agree with that position, but we also agree with
25 Justice Kennedy that, because of the Mt. Clemens

1 framework overlay for Fair Labor Standards Act, this is
2 an easier case than a case in which there was not that
3 substantive law difference. Because if you were to take
4 one individual and you were to use the same evidence, it
5 would be representative proof; you'd have the same
6 burden-shifting framework. That's why all these
7 arguments about Dr. Mericle really are merits questions,
8 they're not class-certifying questions.
9 JUSTICE SOTOMAYOR: Mr. Frederick, I -- I'm
10 not sure that you've answered the -- the two substantive
11 questions that I see my colleagues asking, okay?
12 With respect to whether you're a knife
13 wielder or not, if you are assigned to -- to bear a
14 knife during the day, you're going to be paid for that
15 time anyway because you're on the start-to-end day,
16 okay? So you're not going to get FSLA for that. So
17 it's only the people who start out the day being
18 required to don those outfits.
19 MR. FREDERICK: Well, actually,
20 Justice Sotomayor, that's where I would disagree with
21 you, because --
22 JUSTICE SOTOMAYOR: All right.
23 MR. FREDERICK: -- if -- if the worker,
24 through habit, convenience, is doffing while walking,
25 our study didn't double count. Our study only took into

1 account the walking time. So he's not going to get
2 credit for the fact that he's doing work by putting on
3 the gear while he happens to be walking.
4 If he is pulled off the line during
5 gang-time while the hogs are going along, he does not
6 get extra minutes because his supervisor says, we need
7 you with knife so go put your gear on. He's counted as
8 part of gang-time at that point. And so --
9 JUSTICE ALITO: Could I just ask you to
10 clarify something before your time runs out, because
11 it -- it's unclear to me from what you've said in your
12 argument.
13 Why did Dr. Mericle come up with one figure
14 for employees on the processing floor and another figure
15 for employees on the slaughter floor if, as I understand
16 you to have said this morning, all of the employees
17 basically do both of those tasks and spend an equal
18 amount of time on them, so they can all be considered
19 together?
20 MR. FREDERICK: I didn't say that, and if I
21 did, I was -- I misspoke.
22 JUSTICE ALITO: Well, that was the
23 impression I got from what you said.
24 MR. FREDERICK: Within the department, they
25 would perform different tasks, some of which would

1 require knife and some which didn't. And it was within
2 the department that the averages that were being
3 observed we believe are fair averages, in light of the
4 fact that we're looking back in time, and we're trying
5 to recreate what happened in a -- in a three-year period
6 that, you know, was -- where there are no records.
7 And so within the department, what the Court
8 found was that there was consistency, and that the
9 differences were minimal. The reason why there's a
10 three-minute difference is because one is longer. It's
11 a longer distance for walking to get to it, and there
12 is, you know, more to be done. But I want to make clear
13 that we -- we broke this down into the two different
14 departments because we could discern those. But I would
15 submit that the --
16 JUSTICE KENNEDY: Let me ask you this: If
17 the Court is writing an opinion of reaching the result
18 you want, what is the standard we put? Representative
19 evidence? Average evidence of injury is sufficient if?
20 What -- what do we write?
21 MR. FREDERICK: I think what you write,
22 Justice Kennedy, is that in this context, where there
23 was an expert who said that the averages -- they
24 clustered around the averages, and that based on
25 observations where the work activity, the donning and

1 doffing that is contested here is occurring in three
2 different places, it's fair to treat the employees
3 because the FLSA is a remedial statute that is designed
4 to protect workers who can't keep these kinds of
5 records. That's why --
6 JUSTICE KENNEDY: That's -- that's a little
7 bit too specific for the broad standard that I'm looking
8 for. An average is possible if what, there's no other
9 way to do it? If it's an FSLA case and has a special
10 policy? Neither of those seem quite satisfactory to me.
11 MR. FREDERICK: Well, I think every case is
12 going to be different, as we would all candidly
13 recognize, and an antitrust case is going to be
14 different from a labor case. And that will be different
15 from -- I think you do have to look at the substantive
16 context in which the averaging is going to occur so that
17 any deviations at least are explicable. Here --
18 JUSTICE SCALIA: Don't you also have to say
19 that the jury accepted the averaging? And that doesn't
20 seem to have happened here.
21 MR. FREDERICK: Well --
22 JUSTICE SCALIA: When the jury comes in
23 with -- with less than half of -- of what the averaging
24 would have produced, how can we say that there has been
25 averaging?

1 MR. FREDERICK: The averaging, I think you
2 should infer from the jury's award of damages to the
3 injured -- and it was instructed not to give damages to
4 the uninjured workers, and was faithfully charged with
5 that. The fact that it awards a lesser amount may be
6 based on its own doubts about the number of minutes or
7 the quantity.
8 But those kinds of calculations, I submit,
9 Justice Scalia, we have always deferred to juries in the
10 way these kinds of damages are calculated.
11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Ms. Prelogar.
13 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
14 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING RESPONDENTS
16 MS. PRELOGAR: Mr. Chief Justice, and may it
17 please the Court:
18 Justice Kennedy, I'd like to begin with your
19 question about the proper standard to apply here. The
20 government thinks it's the standard that the jury was
21 instructed on, and this appears at JA 471 to 472.
22 The jury was told in this case that they
23 could only rely on representative evidence if all of the
24 employees performed substantially similar activities,
25 and that substantial similarity is what we think is the

1 proper standard to determine whether an inference here
2 would be just and reasonable.
3 CHIEF JUSTICE ROBERTS: Do you think -- how
4 do you know they relied on the representative evidence?
5 The number was -- was more than 50 percent of what was
6 asked. The expert was cross-examined. We don't know,
7 for example -- they rejected the 18 minutes but accepted
8 the 21 minutes. The fact that the jury did not give you
9 the damages sought seems to me to call into question the
10 significance of the statistics.
11 MS. PRELOGAR: Well, I think it calls into
12 question whether the jury agreed with the actual time
13 estimates, but I don't think it undermines the
14 conclusion that they found that there was proper
15 representative evidence here because they were
16 instructed that they couldn't award a recovery to the
17 class until all of the nontestifying employees, unless
18 they were convinced that they all performed
19 substantially similar activities.
20 So I think we have to infer that the jury
21 found that all of these activities were similar, that
22 there were not material differences of the kind that
23 Mr. Phillips has referred to today, because the jury was
24 instructed that that was the only way they could award
25 class-wide -- find a -- a finding here of class-wide

1 liability.

2 CHIEF JUSTICE ROBERTS: Well, but they --

3 they saw the evidence on which the calculations were

4 based, right?

5 MS. PRELOGAR: That's correct.

6 CHIEF JUSTICE ROBERTS: They saw the donning

7 and doffing of the sanitary gear and the protective

8 gear. Couldn't they have made judgments based on those

9 actual differences to reject some of the representative

10 statistics?

11 MS. PRELOGAR: I don't think they would have

12 had any basis to do so. And at the end of the jury

13 instruction on representative evidence, which was an

14 instruction that Tyson requested, the jury was told,

15 quote, "The representative evidence, as a whole, must

16 demonstrate that the class is entitled to recover. And

17 I think that there was an ample evidentiary basis here

18 for the jury to conclude that there weren't

19 substantial -- substantial dissimilarity among the tasks

20 that were being performed in these donning and doffing

21 activities.

22 It's useful, I think, to review that record

23 evidence. For example, Dr. Mericle testified that the

24 times clustered around the averages. He had 744

25 videotaped observations. As well, there was the

1 testimony that employees frequently rotated between
2 positions, including between those jobs that used a
3 knife and those that didn't. The employees who
4 testified at trial had times that came in very close to
5 Dr. Mericle's averages.
6 And I'll just refer you to Mr. Logan, who
7 testified at JA 260 and 265, 17 to 19 minutes. Mr.
8 Bulbaris said 18 to 22 minutes. Mr. Montes said around
9 20 minutes. As well, Tyson itself didn't think that
10 there were these material variations when it was
11 calculating the K-Code time using a study that was very
12 similar to the study that Dr. Mericle employed here and
13 used essentially the same methodology.
14 In that circumstance, Tyson thought that it
15 would be appropriate to treat all employees in a uniform
16 way.
17 So I think it's critical here that we have a
18 jury determination upon a proper instruction about
19 representative evidence that there weren't these kinds
20 of dissimilarities that would warrant --
21 CHIEF JUSTICE ROBERTS: And maybe you don't
22 know because you're the -- in an amicus posture, but was
23 the person who normally is, like, hosing down the floor
24 paid as much as the person who performs the most
25 intricate knifing operation?

1 MS. PRELOGAR: No. My understanding is that
2 there were differences in what you were paid depending
3 on your position.
4 CHIEF JUSTICE ROBERTS: And yet, your --
5 both you and your -- your friend are telling me that,
6 well, we shouldn't treat those jobs differently because
7 they often switched back and forth.
8 MS. PRELOGAR: Well, the jury concluded here
9 that those jobs didn't require materially different
10 gear. So I think that the pay rate, which was evident
11 from Tyson's own records here and could be calculated
12 through these kind of mechanical damages calculations,
13 doesn't signal that there was different gear. It might
14 signal that the work being performed on the job was
15 somewhat different and required different levels of
16 skill.
17 But I think it's clear, based on the jury
18 verdict in this case, the plaintiffs were able to prove
19 their claim with class-wide evidence. And at this
20 juncture, it's something of the reverse of what this
21 Court has confronted in other cases, where the Court has
22 recognized that sometimes the certification decision
23 overlaps with the merits of the claim, and you have to
24 consider at the outset whether the plaintiffs will be
25 able to prove their claim with class-wide proof.

1 JUSTICE KENNEDY: Do you concede that if
2 this were a Rule 23 action and the FSLA were not
3 involved that it would be a much closer, much more
4 difficult case?
5 MS. PRELOGAR: Yes. I think it would be
6 much closer. And -- and here, I think that this really
7 gets to the point that the dispute here doesn't turn on
8 a freestanding Rule 23 requirement. It stands on --
9 it -- it turns on the Mt. Clemens standard. And
10 Mt. Clemens does adopt a special rule tailored to the
11 fact that there is a recordkeeping violation in this
12 case that prevents the employees from being able to
13 prove their claims with more precise evidence. We
14 think --
15 CHIEF JUSTICE ROBERTS: You -- you agree it
16 would be an extension of Mt. Clemens to apply it at the
17 liability stage as opposed to the damages stage, right?
18 MS. PRELOGAR: I think there's a way to read
19 Mt. Clemens where the -- this -- where it would not be
20 an extension. But to the extent that you think it would
21 be, we think it's a perfectly logical one and one that's
22 consistent with the rationale in Mt. Clemens.
23 Mt. Clemens said that when the recordkeeping
24 violation prevents a determination of the amount of time
25 spent on these activities, then you should be able to

1 come forward with a just and reasonable inference and
2 not put the burden on the employees to prove that time
3 with precision.
4 And when that exact same fact is relevant
5 liability insofar as it's necessary to prove that the
6 employee is pushed over the 40-hour-per-week threshold,
7 then we think that all of the rationales that animated
8 Mt. Clemens would equally apply to the determination of
9 that particular fact in that context.
10 But we think the Mt. Clemens itself signaled
11 that this might be an appropriate determination at the
12 liability phase because it recognized at the outset that
13 the burden of proving that you have performed work for
14 which you were not properly compensated shouldn't be an
15 impossible burden. That was the language that was used
16 in the opinion. And so I think that whether or not
17 Mt. Clemens decided it, certainly it -- it's true that
18 it should be applied in this context to the particular
19 fact that was relevant there.
20 JUSTICE SOTOMAYOR: I'm -- I'm going to try
21 to phrase what I understand the question my colleagues
22 have been posing that I don't think either counsel has
23 sort of gotten at, or maybe it's so obvious that we're
24 missing it, okay?
25 Clearly, the expert here, Dr. Joy, said --

1 I'm using a hypothetical -- there's 10 minutes of
2 overtime. And the figure that comes out with 10 minutes
3 of overtime is a million dollars. Now the jury comes
4 back with half a million dollars.
5 How do you know that what they said is -- I
6 half the time -- five minutes, or the jury said, I think
7 it's eight minutes or -- for slaughterhouse and three
8 for production line people. So it averages out to five
9 now, okay?
10 How do we know what -- how the jury
11 calculated that half million?
12 MS. PRELOGAR: The answer is that we don't
13 know for sure, Justice Sotomayor.
14 JUSTICE SOTOMAYOR: That's what my
15 colleagues are saying. So the question is, your
16 adversary is claiming that there might be some people on
17 the three-minute side who are going to come and collect
18 a pro rata share who really weren't injured because they
19 had worked 39 hours and 57 -- 56 minutes, something like
20 that. So why is it that it's fair to distribute this --
21 this award pro rata?
22 MS. PRELOGAR: Well, I think that it's not
23 clear yet exactly how the award will be allocated, and
24 those will be left to the district court's discretion
25 when the case returns for allocation.

1 At that point, Tyson can come in and it can
2 make these arguments if it thinks it's unfair. The
3 district court will be well-positioned to determine
4 whether Tyson waived the claims by actually asking for a
5 lump sum verdict here and whether Tyson even has a stake
6 in this issue given that its own liability won't
7 increase.
8 JUSTICE GINSBURG: Why would -- why would
9 Tyson's care? They have to pay the same amount of
10 dollars.
11 MS. PRELOGAR: Exactly, Justice Ginsburg,
12 and I think that that shows that Tyson might not have
13 the requisite stake here to be able to challenge the
14 allocation.
15 But I think the overarching point to keep in
16 mind is that the -- the issues with allocating this
17 award were not the inevitable result of the class action
18 mechanism. They don't reveal some defect in that
19 mechanism.
20 There were any number of ways to account for
21 this problem. The trial could have been bifurcated
22 between liability and damages, as Justice Kagan noted.
23 That would have solved this problem entirely, but Tyson
24 opposed it. Or Tyson could have sought judgment against
25 the 212 class members who had no right to recover under

1 the plaintiffs' evidence. It didn't do that.

2 Tyson could have asked for a special verdict

3 that would have allocated the damages by the jury; but

4 instead, it asked for a lump sum verdict. Or it could

5 have asked for the class definition to be altered in

6 this case to exclude those individuals who weren't

7 working the requisite number of times.

8 Ultimately, there are any number of

9 mechanisms that could account for this issue, and none

10 of them demonstrate that this class action was improper.

11 They went unutilized only because of Tyson's own

12 litigation strategy here.

13 JUSTICE GINSBURG: What happened to the --

14 the government's action? I mean, the government started

15 this against Tyson's or its predecessor and got an

16 injunction. And then the government said that the

17 solution that the -- the K -- whatever it was -- that

18 Tyson's came up with wasn't good enough. And then

19 nothing. What happened to the government's --

20 MS. PRELOGAR: Well, ultimately, the

21 government ended up settling the claims in that prior

22 enforcement action. But then the -- the government

23 issued an opinion letter to the industry, saying that it

24 was clear that you had to pay for actual time worked.

25 And, of course, the secretary has limited resources and

1 can't conduct enforcement actions for every violation of
2 the FLSA.
3 But it is the Department of Labor's position
4 here that Tyson was in violation of the FLSA, both by
5 not keeping the actual records and by not fully
6 compensating the employees for the time worked in this
7 case.
8 JUSTICE ALITO: What do you think an
9 employer --
10 CHIEF JUSTICE ROBERTS: No. Go ahead.
11 JUSTICE ALITO: What do you think an
12 employer should do about recordkeeping when the employer
13 believes that certain activities need not be counted
14 under the FLSA? So is the employer -- it may be that
15 the employer is stuck with the choice that it makes, the
16 legal judgment it makes.
17 But is it supposed to keep two sets of -- of
18 records so the amount of time that it thinks the
19 employee is entitled to compensation for, and then this
20 additional amount of time, that it might be argued that
21 the employee is entitled to compensation for?
22 MS. PRELOGAR: Well, Mt. Clemens does make
23 clear that the employer is stuck with its mistake
24 because it said even when the failure to keep records
25 grows out of a bona fide mistake about whether the time

1 should be compensable whether it was work, that still
2 the burden-shifting framework applies.
3 But I would also note here that I think
4 there was no legitimate argument here that this wasn't
5 work. These activities, I think -- it was clear with
6 the wake of Alvarez -- were required to be compensated.
7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Phillips, you have five minutes.
9 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
10 ON BEHALF OF THE PETITIONER
11 MR. PHILLIPS: Thank you, Mr. Chief Justice.
12 Let me answer Justice Alito's point and
13 the -- and the observation where -- I mean, the reality
14 is, is that in the Reich litigation, we were told that
15 the -- the ordinary sanitary equipment was not -- was
16 not within the donning and doffing requirements, and
17 never a problem. And so as a consequence of that,
18 frankly, we didn't monitor this.
19 That's not a complete defense, but it at
20 least explains the sort of the equities of the -- of the
21 situation.
22 Second, my good friend tells you that the
23 district court here found that all of these things are
24 very similar. The reality is, is that at Pet. App. 87A,
25 the first time this issue came up with the class

1 certification, the district court said there are some
2 very big factual differences among all these employees.
3 And the basic -- and the only reason the district court
4 didn't agree to certify it at that time was because he
5 thought that the gang-time was somehow the -- the tie
6 that binds this all together.
7 Well, the gang-time was nothing in this --
8 in this litigation, and the reality is he made a mistake
9 then, and every time we came back to decertify this
10 class, based on more and more information about the
11 inadequacies of Mericle's evidence as applied by Fox,
12 who was -- who was essentially just wiped away, saying,
13 well, this is distinguishable from the Supreme Court's
14 cases here, and it's distinguishable from the Supreme
15 Court's cases there.
16 Justice Kennedy, the answer to your
17 question --
18 JUSTICE SCALIA: Yeah, but you're -- you're
19 saying the district court made a finding that there were
20 great dissimilarities.
21 MR. PHILLIPS: Yes, Your Honor, it did.
22 JUSTICE GINSBURG: Where is that?
23 MR. PHILLIPS: That's on page 87A of the
24 appendix to the petition. Justice, that's in the first
25 certification decision.

1 Justice Kennedy, to answer your question
2 about how do you write an opinion, and when is it close
3 enough? Averaging is a permissible way of going about
4 it when the evidence is clear that the -- that the basic
5 activity is homogenous, and that would have been true
6 for walking time. There was -- there was literally no
7 difference --
8 JUSTICE KENNEDY: Basic activity is --
9 MR. PHILLIPS: Homogenous.
10 And here when you're talking about 30
11 seconds and 10 minutes, and we're talking about wildly
12 different activities, what you can't do is just simply
13 say, okay, we're just going to patch over all that and
14 average it.
15 JUSTICE SOTOMAYOR: Didn't they standardize
16 walking time? That's what I thought they used.
17 MR. PHILLIPS: Yes, and that's why --
18 JUSTICE SOTOMAYOR: There's a standardized
19 walking time because some people are faster than others,
20 correct?
21 MR. PHILLIPS: Right. But my point here is,
22 is that in general, everybody agrees that's a reasonable
23 way to proceed. That's my point. Here we're not
24 talking about homogenized because there are vast
25 differences, and the evidence is absolutely unsalable on

1 that.

2 And with respect to Mt. Clemens, in the

3 first place, I -- I don't think Mt. Clemens should be

4 extended to -- to make the fair and reasonable inference

5 standard of the presumption apply at the liability

6 phase, and I think the court was extremely clear in not

7 wanting to go down that path.

8 But second, even if you thought the

9 presumption should be applied here, I would argue that

10 the Mericle's evidence, as -- as, you know, through

11 cross-examination and examination of others,

12 demonstrates that this is not a fair and reasonable

13 inference. And on that score, it seems to me that there

14 are two quotations I would offer up.

15 One comes from this Court's decision in

16 Wal-Mart, "when an expert's testimony does nothing to

17 advance a party's case, the Court can safely disregard

18 what he says."

19 And then what Judge Posner said in a very

20 similar FLSA case, "What cannot support an inference

21 about the work time of thousands of employees is

22 evidence of a small, unrepresentative sample of them,"

23 and that is precisely what we have in this particular

24 case.

25 With respect to remand, we would be happy

1 for a remand to -- for allocation if that's permissible,
2 but as I read, the final judgment of the district court
3 is judgment of about $6 million to these named
4 plaintiffs, and that was affirmed. There is nothing in
5 there about how this is going to be allocated under
6 these circumstances. So if the Court believes there's
7 got to be a separate proceeding of allocation, the Court
8 hopefully would order that, although I think there is a
9 more fundamental decision the Court would have to reach.
10 And then finally, with respect to who has
11 the burden of dealing with this problem, it is the
12 plaintiffs' burden to sustain the justification for a
13 class all throughout the proceedings until a final
14 judgment is entered. And we came to the court four
15 times asking them not to certify this. So to come back
16 in at the end and say, well, since we were able to try
17 this without any ability to put forward any of our
18 individual defenses with respect to any of these
19 individual employees, except for the four who actually
20 testified, is exactly what this Court said in Wal-Mart
21 and Comcast is an impermissible way to define the class.
22 The Court should reverse in this case,
23 declare the class decertified.
24 If there are no further questions, Your
25 Honor, thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 The case is submitted.
3 (Whereupon, at 11:06 a.m., the case in the
4 above-entitled matter was submitted.)
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