No. 16-_____

In the United States Court of Appeals for the Ninth Circuit

JAMES COLE,
Plaintiff-Petitioner,

v.

CRST VAN EXPEDITED, INC., an Iowa corporation, FKA CRST, INC.,
Defendant-Respondent.

On Petition for Permission to Appeal in *Cole v. CRST Van Expedited, Inc.*, No. 5:08-cv-01570-VAP(SPx) (C.D. Cal.) (The Honorable Virginia A. Phillips)

PETITION FOR PERMISSION TO APPEAL UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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INTRODUCTION

Three weeks ago, the U.S. Supreme Court rejected an employer's argument that a class action alleging wage-and-hour violations should be decertified based on "person-specific inquiries into individual work time." *Tyson Foods v. Bouaphakeo*, 577 U.S. __, slip. op. 9 (Mar. 22, 2016). The Court emphasized that, in deciding whether to certify a class under Federal Rule of Civil Procedure 23, courts must look to the underlying substantive rule of law—there, a rule permitting representative evidence to establish liability when the employer fails to keep time records.

In this case, where employees allege that their employer violated California law by failing to provide meal and rest breaks, the substantive rule is supplied by the California Supreme Court's decision in *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513 (Cal. 2012). Under *Brinker*, proof that the employer had a "uniform policy" of failing to give employees a reasonable opportunity to take breaks—like an "informal anti-meal-break policy," or a "common scheduling policy that made taking breaks extremely difficult"—is enough to "show [a] violation." *Id.* at 532, 536.

The district court in this case defied both *Tyson Foods* and *Brinker*. It decertified a class of truck drivers alleging that their employer, CRST, had a uniform compensation policy that systematically impeded them from taking breaks—precisely the kind of showing that establishes liability under *Brinker*. Without citing *Tyson Foods*, the court concluded that "individualized inquiries predominate"—even if CRST had a uniform "defective policy"—because *some* drivers have taken *some* breaks. Decert.

Order 8 (Dkt. 184). On that logic, any employer could defeat certification (and effectively evade liability) for even a facially illegal policy: All it has to do is produce a few employees who, on a few occasions, dared to violate the policy.

The district court's holding deepens a divide among federal courts in California and cries out for immediate review. *Brinker* leaves no doubt that a defective policy by itself establishes liability. By erecting a higher standard of proof for class actions, the district court disregarded *Tyson Foods*, undermined state wage-and-hour law, and contravened "the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods*, slip op. at 11 (quoting 28 U.S.C. § 2072(b)).

Compounding its errors, the district court also overlooked a separate basis for classwide liability: CRST's acknowledged failure to keep time records, which creates a "presumption" that it violated California law with respect to meal breaks, *Brinker*, 273 P.3d at 545 (Werdegar, J., concurring). If left standing, the decision would give employers "an incentive to avoid [their] recording duty and a potential windfall from the failure to record," *id.* at 545 n.1, while "punishing the employee by denying him any recovery on the ground that he is unable to prove the precise extent of [his damages]," *Tyson Foods*, slip op. at 11–12—the very harms that *Brinker* and *Tyson Foods* aim to avoid.

If this Court declines to set things right, the district court's approach will encourage blatant forum shopping. Since *Brinker*, the state courts have uniformly held

that certification is appropriate in cases like this, because "the employer's liability arises by adopting a uniform policy." *Faulkinbury v. Boyd & Assocs.,* 216 Cal. App. 4th 220, 235 (2013). "Whether or not the employee was able to take the required break goes to damages," and so "does not require denial of the class certification motion." *Id.* This accords with *Tyson Foods'* recognition that Rule 23 certification is appropriate even when "other important matters will have to be tried separately, such as damages or some affirmative defenses." Slip. op. at 9. But the district court's contrary approach invites removal solely to take advantage of the heightened burden of proof.

Only this Court can rectify this intolerable state of affairs and provide much needed guidance to the district courts and employers. All three relevant Rule 23(f) factors are satisfied: the decision will sound the "death knell" of the litigation absent an appeal; it raises unsettled, fundamental legal issues; and it is manifestly erroneous. This case, in short, presents an ideal opportunity, in the wake of *Tyson Foods*, to clear up the confusion in the courts of this Circuit and bring them back into harmony with the U.S. Supreme Court on Rule 23 and the California Supreme Court on wage-and-hour law.

BACKGROUND

1. California's wage-and-hour law. "For the better part of a century, California law has guaranteed to employees wage and hour protection, including meal and rest periods intended to ameliorate the consequences of long hours." *Brinker*, 273 P.3d at 520. To that end, "[s]tate law obligates employers to afford their nonexempt

employees meal periods and rest periods during the workday." *Id.* at 521. Employers who fail to provide the breaks must "pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided." Cal. Labor Code § 226.7(c); *see id.* § 512.

Specifically, employers like CRST must permit employees "to take an uninterrupted 30–minute [meal] break" "no later than the end of an employee's fifth hour of work, and a second meal period no later than the end of an employee's 10th hour of work." *Brinker*, 273 P.3d at 536–537; *see* IWC Wage Order 9-2001, 8 C.C.R. § 11090(11)(A). The employer is also required to record all meal breaks taken by employees. *Id.* § 11090(7)(A)(3). Employers must likewise "authorize and permit all employees to take rest periods." 8 C.C.R. §11090(12)(A). "A compliant policy . . . prescribe[s] two ten-minute breaks for shifts longer than six hours and up to ten hours long." *Pena v. Taylor Farms Pac., Inc.*, 305 F.R.D. 197, 217 (E.D. Cal. 2015).

"[I]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection." *IWC v. Superior Court*, 613 P.2d 579, 585 (Cal. 1980). And the "state's public policy supports the use of class actions to enforce [such] laws for the benefit of workers." *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 987 (2013).

In *Brinker*, the California Supreme Court clarified employers' substantive obligations under these laws. An employer must "relieve[] its employees of all duty, relinquish[] control over their activities and permit[] them a reasonable opportunity to take an uninterrupted [meal or rest] break," and should "not impede or discourage them from doing so." 273 P.3d at 536–537. And employers "violat[e]" the law not only by enforcing an express "uniform policy," *id.* at 531; an employer "exerting coercion against the taking of, creating incentives to forgo, or otherwise encouraging the skipping of legally protected breaks," the Court held, would also be liable, *id.* at 536. As an example, the Court explained that "proof of [a] common scheduling policy that made taking breaks extremely difficult would show [a] violation." *Id.*

Justice Werdegar, the author of the primary opinion, elaborated in a concurrence joined by Justice Liu that, "[i]f an employer's records show no meal period for a given shift . . . a rebuttable presumption arises that the employee was not relieved of duty and no meal period was provided." *Id.* at 545. Accordingly, "[a]n employer's assertion that . . . [an] employee waived the opportunity to have a work-free break is not an element that a plaintiff must disprove as a part of [its] case-in-chief," but "an affirmative defense" for which the employer has "the burden." *Id.* "To place the burden elsewhere," Justice Werdegar observed, "would offer an employer an incentive to avoid its recording duty and a potential windfall." *Id.* at 545 n.1.

2. The facts. CRST is a national trucking company that, during the relevant class period, employed about 4,200 California drivers to transport freight from its

terminal in Fontana, California. Decert. Order 1–2. CRST uses a uniform piece-rate compensation system, under which it calculates a driver's pay after a trip is completed based on the miles driven. "Drivers are instructed and expected to calculate trips according to the average trip speed standard of 50 miles per hour." PSJ Order 5 (Dkt. 171). The pay is based not on the "actual miles driven, but rather 'dispatched miles,' which are calculated according to the industry-standard . . . mileage calculation software." Cert. Order 2 (Dkt. 86). "[T]o ensure that they are paid for the loads they have driven in a given time period, drivers are required to submit trip sheets" documenting their trips. PSJ Order 5–6.

CRST "does not require its drivers to take rest or meal breaks, does not track rest or meal breaks on its payroll statements, and has never paid a premium for missed rest or meal breaks." *Id.* at 6 (citations omitted). And "[u]nless a rest or meal break would affect a driver's scheduled arrival time, drivers are not required or expected to notify dispatch about rest or meal breaks." *Id.* The system by which drivers communicate with CRST "tracks mileage, but not rest or meal breaks"; likewise, the trip sheets do not direct the drivers to document meal or rest breaks. *Id.*

3. This litigation. James Cole, a CRST truck driver, filed this class action in state court in October 2008. As relevant here, Cole alleged that, under CRST's uniform compensation system, drivers "were regularly required" to work without meal and rest periods, or premium wages in compensation. Compl. 4–8 (Dkt. 56). CRST promptly removed to federal court. *See* Dkt. 1.

In 2010, the district court granted Cole's motion for class certification, concluding that the "focus" of the "rest and meal break claims" was defendant's "compensation system as it applies to all potential class members." Cert. Order 13. "All employees in the proposed class" worked as drivers under the defendant's "standardized employment policies"—which formed "the basis" for the claims—and all the plaintiffs were, as a result of those "common practices and policies," allegedly deprived of the opportunity to take their statutorily-required breaks. *Id.* at 16.

Six years later, after this Court reversed the district court's earlier holding that federal law preempted Cole's claims, *see Cole v. CRST Van Expedited*, 599 F. App'x 755 (9th Cir. 2015), the district court reversed course. Focusing on two intervening decisions—*Brinker* and *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)—the court decertified the class. First, the court concluded that Cole could not show that CRST had an affirmative "policy of preventing its drivers from taking meal and rest breaks," because "a number of drivers . . . acknowledge that they took [] breaks when needed." Decert. Order 6. Then, canvassing "post-*Brinker* district court cases," the court explained that "employers' liability does not arise solely from a defective policy, but from proof that employees were actually denied . . . break[s]." *Id.* at 7–8. It thus determined that the CRST's decision to "not keep records of when drivers took rest breaks" made proving that employees were actually denied breaks dependent on "individualized inquiries as to each driver." *Id.* The class, in the district court's view, thus could not "satisfy the predominance requirement of Rule 23." *Id.* at 8. And,

although the plaintiffs had filed a brief just one week earlier arguing that class certification was proper under *Tyson Foods*, *see* Dkt. 182, the district court did not mention that decision in its order decertifying the class.

REASONS FOR GRANTING THE PETITION

This case checks all the boxes for immediate review. Under this Court's test, review under Rule 23(f) is "most appropriate" when one or more of three factors is satisfied: (1) a ruling with respect to class certification is "manifestly erroneous," (2) the ruling raises "unsettled and fundamental issue[s] of law," or (3) the ruling is likely dispositive of the litigation—the "death-knell situation" for the plaintiff. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). These three categories, of course, are "merely guidelines," not "a rigid test," and the Court has "broad discretion" to permit a "worthy" appeal even if "the petition does not fit" any of the above situations. *Id.* at 960. But this is the rare case in which *all three* factors are satisfied: the decision contravenes the U.S. Supreme Court's most recent pronouncement on the relevant procedural law and the California Supreme Court's most recent pronouncement on the relevant substantive law; it implicates a clear split among the district courts on an important issue that requires resolution by this Court; and it will indisputably signal the death knell of the litigation if an appeal is not permitted.

I. The decision below is manifestly erroneous because it conflicts with *Tyson Foods* and misunderstands California substantive law.

The decision below is manifestly erroneous in three ways: First, it holds that, in a California wage-and-hour class action, "an employer's liability does not arise solely from a defective policy," Decert. Order 8—in square conflict with the California Supreme Court's decision in *Brinker* and the U.S. Supreme Court's recent decision in *Tyson Foods*. Second, it conflates class certification with the merits by holding that the plaintiffs have not established that CRST had an illegal policy because *some* drivers managed to take *some* breaks. And third, the decision below overlooks (and thus rewards) CRST's failure to keep records, even though California law requires that meal periods be recorded, and an employer's failure to do so creates a "rebuttable presumption" that it did not provide breaks. *Brinker*, 273 P.3d at 545 (Werdegar, J., concurring). This Court should remedy these mistakes.

A. The district court's insistence that the plaintiffs show more than a uniform "defective policy" to establish liability and satisfy Rule 23 contravenes *Tyson Foods* and is wrong as a matter of California law.

Tyson Foods involved a class of workers at an Iowa slaughterhouse who alleged that their employer failed to properly compensate them for the time that they spent donning and doffing protective gear and walking to and from the processing line, in violation of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1), and its state-law analogue. Because the employer failed to keep time records for those activities, in violation of the FLSA, the workers sought to establish liability and damages using

inferential proof: representative evidence that calculated the average times that a sample of workers spent on the activities. The question before the Court was whether this use of representative proof was permissible in light of *Wal–Mart* where the Court decertified a class of 1.5 million employees who had "proposed to use representative evidence as a means of overcoming [an] absence of a common policy." *Tyson Foods*, slip. op. at 13.

The Court held that it was, and thus rejected the employer's argument that "person-specific inquiries into individual work time" precluded certification. *Id.* at 9. The Court did so for a simple reason: because the underlying substantive rule of law, set forth in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), expressly permitted the use of representative evidence to establish liability when the employer has not kept records. Because that rule governs individual actions, *Tyson Foods* held that it must also apply in class actions. To hold otherwise, the Court explained, "would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right." Slip. op. at 11 (quoting 28 U.S.C. § 2072(b)). And "[w]hile the experiences of the employees in *Wal–Mart* bore little relationship to one another," the Court added, "in this case each employee worked in the same facility, did similar work, and was paid under the same policy." *Id.* at 14.

So it is here. The plaintiffs are truck drivers based at a single facility in California, who claim that CRST had a uniform compensation system that had the practical effect of preventing them from being properly compensated for meal and

rest breaks by making it difficult for them to take the breaks. And each plaintiff was paid under this common policy. The substantive rule of law that governs these claims, set forth in *Brinker*, makes clear that a policy like the one alleged here—even if informal—is sufficient to establish liability. Under *Brinker*, if the plaintiffs can show that the employer had a "common scheduling policy that made taking breaks extremely difficult," or some other "informal anti-meal-break policy" that "impede[d] or discourage[d]" workers from taking breaks, that alone is enough to "show [a] violation." 273 P.3d at 536–37. If an employer "adopts a uniform policy" that fails to authorize and permit the required meal and rest breaks, "it has violated the wage order and is liable" to the employees that work under that policy. *Id.* at 532.

Notwithstanding *Brinker*, and without so much as citing *Tyson Foods*, the court below followed two unpublished, pre-*Tyson Foods* district court cases holding that, in class actions, "an employer's liability does not arise solely from a defective policy, but from proof that employees were actually denied a rest break." Decert. Order 8. But "*Brinker* teaches" that courts "must focus on the policy itself" because the policy itself establishes liability. *Faulkinbury*, 216 Cal. App. 4th at 232. Once an employee shows an illegal policy, the defendant can raise the affirmative defense that the employee in fact took meal and rest breaks. But "that operates not to extinguish the defendant's liability but only to diminish the amount of a given plaintiff's recovery." *Brinker*, 273 P.3d at 546 (Werdegar, J., concurring); *see Faulkinbury*, 216 Cal. App. 4th at 235

("Whether or not the employee was able to take the required break goes to damages."). After *Tyson Foods*, this substantive rule must apply in class and non-class cases alike.

Under that rule, the district court clearly erred by denying certification. This Court has held that a district court abuses its discretion when it denies certification based on individualized damages in a wage-and-hour class action governed by *Brinker*. *Levya v. Medline Indus. Inc.*, 716 F.3d 510, 513–14 (9th Cir. 2013). In such circumstances, "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Id.* at 514. Instead, as *Tyson Foods* demonstrates, certification is appropriate because common proof can be used to make a "prima facie showing" of liability—"even though other important matters will have to be tried separately, such as damages or some affirmative defenses." Slip. op. at 9 (quotation marks omitted).[1]

By holding otherwise, the district court has erected a rule that would effectively "foreclose use of the class action device for a broad subset of claims, a rule inconsistent with the efficiency aims of rule 23." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 421 (5th Cir. 2004). It should be set straight.

[1] State courts throughout California, including the California Supreme Court, have uniformly reached the same conclusion. *Brinker*, 273 P.3d at 546 ("[I]ndividual damages questions will rarely if ever stand as a bar to certification."); *Faulkinbury*, 216 Cal. App. 4th at 235 ("The fact that individual [employees] may have different damages does not require denial of the class certification motion."); *Jones v. Farmers Ins. Exch.*, 221 Cal. App. 4th 986, 997 (2013) (same); *Bluford v. Safeway Stores, Inc.*, 216 Cal. App. 4th 864, 871 (2013) (same).

B. The district court's conclusion that the plaintiffs have not shown an illegal policy is not only wrong but conflates class certification with the merits.

The district court misapplied Rule 23 in another way: It reasoned that class certification is required because, in its view, the plaintiffs have failed to show that CRST "had a general policy of preventing its drivers from taking meal and rest breaks," in light of the fact that some employees took breaks. Decert. Order 6. That is of course wrong as a matter of California law because "the fact that some employees may have taken breaks is an issue that goes to damages"; it does not disprove the existence of an illegal policy. *Alberts v. Aurora Behavioral Health Care*, 241 Cal. App. 4th 388, 408 (2015).

But even if that were not so, whether CRST had such a policy is the common liability question in this case. CRST's argument that it did not have an illegal policy is its defense on the merits—a defense that "is itself common to the claims made by all class members." *Tyson Foods*, slip. op. at 12. When it comes to the plaintiffs' theory of liability, then, "the class is entirely cohesive: It will prevail or fail in unison." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).

Rule 23 requires no more. It does not demand that plaintiffs, to obtain certification, "first establish that [they] will win the fray." *Id.* That "put[s] the cart before the horse." *Id.* Any allegation of a "failure of proof as to an element of the plaintiffs' cause of action" is "properly addressed at trial" or at summary judgment. *Id.* at 1197. "The allegation should not be resolved in deciding whether to certify a

proposed class." *Id.* Because that is what the district court did, its decision is manifestly erroneous.

C. The district court's decision rewards CRST's failure to keep time records, which should have given rise to a presumption that CRST violated California law.

The district court was also wrong to rely (at 8) on the absence of time records as a basis for decertification—as *Brinker* itself makes clear. There, writing separately to provide "guidance," Justice Werdegar explained that the lack of records in fact cuts the other way: It creates "a rebuttable presumption" that employees were not "provided" the required breaks. 273 P.3d at 544–45. California law requires employers to record meal breaks. *Id.* If they fail to do so, it is only fair to place the burden on them to show that they provided breaks, not on the employee to prove the opposite. Any other rule "would offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods." *Id.* at 545 n.1.

Federal law follows the same approach. As *Tyson Foods* explains, when employees "have no way to establish the time spent" doing certain work, making the employee shoulder the "burden of [proof]" would impose "an impossible hurdle." Slip. op. at 11. Employees should not be "punish[ed]" for an "evidentiary gap created by the employer's failure to keep adequate records." *Id.* at 11–12.

The district court's decision does just that. It gives employers an incentive to shirk good record-keeping practices, knowing full well that the absence of records will immunize unlawful conduct.

II. The courts of this Circuit are divided over whether evidence that some employees took some breaks is enough to defeat class certification.

The district court's conclusion that no class may be certified where there is merely *some* evidence in the record of employees taking meal and rest breaks—despite plausible allegations of unlawful uniform policies—is the subject of a significant intra-circuit split. That alone justifies granting the petition. *See Chamberlan*, 402 F.3d at 960.

A. On one side, a minority of courts—like the district court here—have denied certification based on a view that, even in the face of a defective break policy, Rule 23 bars class certification when the defendant offers "testimony that[,] despite its written policy, putative class members were granted . . . breaks." *Ordonez v. Radio Shack, Inc.*, 2013 WL 210223, at *11 (C.D. Cal. 2013).

In *Ordonez*, the district court recognized that "RadioShack's rest break policy appears to be facially inconsistent with California law." *Id.* Yet it nevertheless refused to certify the class because, in its view, testimony that some class members "were granted rest breaks" would engulf the litigation with "individualized inquiries" into whether "putative class members were actually provided or deprived of the rest breaks owed to them." *Id.* The court accordingly held that the evidence that RadioShack "*may* have an illegal, written rest break policy" was "insufficient for this Court to find that common issues predominate." *Id.* (emphasis in original). And it reasoned that the fact that "rest breaks were not recorded in defendant's timekeeping system" meant that no "classwide method" could be used "for proving when class members were or were

not authorized and permitted to take a rest break." *Id.* at *12. At least one other court has applied similar reasoning to deny certification even when confronted with an "allegedly facially invalid policy." *In re Taco Bell Wage and Hour Actions*, 2012 WL 5932833, at *11 (E.D. Cal. 2012). That court held that, "[w]ithout reliable evidence in the [employees'] time cards" showing they were denied break opportunities, "an individual inquiry is the only way to determine whether" breaks were taken. *Id.*

These decisions, decided before *Tyson Foods*, cannot be reconciled with *Tyson*'s logic. Like the decision below, they give short shrift to California's substantive rule that employers' break *policies* establish liability. And, like the decision below, they improperly reward employers for failing to keep records.

B. On the other side stand a majority of federal district courts in California. These courts have held that "it would be error" for a court "to focus on whether some individuals were able to take breaks" when deciding "whether a [meal-and-rest-break] class is properly certified." *Brewer v. Gen'l Nutrition Corp.*, 2015 WL 9460198 at *2 (N.D. Cal. 2015).[2] *Brinker*, these courts properly understand, establishes that an "employer's liability arises by adopting a uniform policy that violates the wage and hour laws." *Id.* at *2. By contrast, these courts recognize that the questions "[w]hether

[2] *See, e.g.*, *Wang v. Chinese Daily News*, 2014 WL 1712180 at *8 (C.D. Cal. 2014) (holding that evidence that defendant "did not 'prevent' employees from taking . . . breaks" was insufficient to defeat certification); *Ortega v. J.B. Hunt Transp.,* 2012 WL 6708161, at *2–*3 (C.D. Cal. 2012) (same); *In re AutoZone, Inc., Wage & Hour Emp't Practices Litig.*, 289 F.R.D. 526, 533–34 (N.D. Cal. 2012) (rejecting defendants' proffer of "117 declarations from putative class members stating that they *were* authorized and permitted" to take breaks as insufficient to defeat class certification).

some individuals were able to take breaks, or voluntarily chose not to take a break that was offered," go not to class certification under Rule 23 but to the merits—they "are matters of individual damages." *Id.* (emphasis added). Where "meal and rest period claims" involve allegations that a "uniform policy" or "uniform lack of policy" violates operative law, in other words, "common issues predominate." *Ortega*, 2012 WL 6708161, at *2.

This clear division among the district courts can only be fixed by this Court. Until it is, otherwise identically situated class actions will meet diametrically opposite outcomes, undermining predictability for employers and employees alike. That is exactly what Rule 23(f) is designed to avoid.

III. The decision below will effectively terminate this litigation, encourage improper forum shopping, and undermine state substantive law.

A. Absent an appeal, the decision below will sound the "death knell" of the litigation.

This is a classic "death knell" scenario. If this Court does not step in, the district court's order will effectively terminate this litigation because the plaintiffs' individual claims are too modest to be litigated independently, without the cost-sharing benefits of aggregate litigation. *See Chamberlan*, 402 F.3d at 959. The plaintiffs have already waited eight years to get to this point, with six years passing between the court's initial certification order and its recent reversal of that order. Even if some of the plaintiffs have the potential for significant damages, many others do not. They will thus be unable to pursue litigation in federal court—particularly in light of the risk of

losing and being assessed costs under Federal Rule of Civil Procedure 54(d) that could be greater than their potential recovery. This Court should correct the district court's error and allow the plaintiffs, at long last, an opportunity to prove their case at trial.

B. Left to stand, the decision below hands employers a federal blueprint for defeating state meal- and rest-break class actions.

Beyond this case, this appeal also has enormous practical consequences on the enforcement of California's worker protections more generally. California courts have repeatedly emphasized that class actions are necessary to prevent "random and fragmentary enforcement of the employer's legal obligation[s]." *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 745 (2004) (quotations omitted). If left in place, however, the decision below will allow defendants facing class actions to defeat certification (and thus effectively evade liability) by simply removing the case to federal court, and then producing declarations from a few employees saying that they took meal or rest breaks—just as CRST did here. That runs counter to the consensus of California state courts, and would undermine California's carefully calibrated system of worker protections.

Since *Brinker*, state courts have uniformly held that, "[a]t the certification stage, plaintiffs need only establish that the question of whether the [employer's] practices or procedures resulted in the denial of lawful breaks can be determined on a class-wide basis"; plaintiffs simply must "articulate[] a theory susceptible to common resolution." *Alberts*, 241 Cal. App. 4th at 407. And California courts have "agreed that, where the

theory of liability asserts the employer's uniform policy violates California's labor laws, factual distinctions concerning whether or how employees were or were not adversely impacted by the allegedly illegal policy do not preclude certification." *Hall v. Rite Aid Corp.*, 226 Cal. App. 4th 278, 289 (2014); *see Faulkinbury*, 216 Cal. App. 4th at 232–36; *Benton v. Telecom Network Specialists*, 220 Cal. App. 4th 701, 725–27 (2013); *Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129, 1150–53 (2012);.

That is in direct tension with the district court's logic. And that tension is not limited to this case; federal courts have recognized the stark divergence. As one court observed, the "line of California Court of Appeal cases" that "have interpreted *Brinker* as holding that an employer's liability flows simply from having a facially defective policy" "conflict[s]" with "post-*Brinker* district court cases that find that liability springs not simply from a facially defective policy, but from proof that a rest break was unlawfully denied." *Cummings v. Starbucks Corp.*, 2014 WL 1379119, at *18–*20 (C.D. Cal. 2014). That some federal courts have endorsed a restrictive approach that flouts the settled consensus of California courts—on a pure question of substantive state law no less—is unacceptable.

Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), of course, federal courts sitting in diversity must "apply state substantive law and federal procedural law," *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). In doing so, the U.S. Supreme Court has emphasized, diversity courts should interpret federal procedural law "with sensitivity to important state interests and regulatory policies," *Gasperini v. Ctr. for Humanities, Inc.*,

518 U.S. 415, 427 n.7 (1996), and consider whether an interpretation of federal procedural law will cause "the character and result of the federal litigation [to] stray from the course it would follow in state courts," *Hanna*, 380 U.S. at 473.

Absent this Court's review, more and more defendants will follow the path taken by CRST here, removing any state wage-and-hour class action to federal court secure in the knowledge that producing a couple declarations from outlier employees will preclude any liability under California's labor laws. This Court should grant review to prevent that distortion of both Rule 23 and substantive state law, and return federal litigation on these issues to "the course it would follow in state courts." *Id.*

CONCLUSION

The petition for permission to appeal should be granted.

Respectfully submitted,

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Counsel for Plaintiff-Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 5(c) and 32(c)(2)

I hereby certify that the foregoing petition for permission to appeal under Fed. R. Civ. P. 23(f) complies with Federal Rule of Appellate Procedure 5(c) and the general requirements of Rule 32(c)(2) because it does not exceed 20 pages, exclusive of the certificates of compliance and service and accompanying documents required by Rule 5(b)(1)(E), and is formatted with a proportionally spaced, 14-point font.

/s/ Deepak Gupta

Deepak Gupta

April 15, 2016

STATEMENT OF RELATED CASES

Petitioner is unaware of any related pending cases.

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2016, I filed the foregoing petition for permission to appeal under Fed. R. Civ. P. 23(f) with the Clerk of the U.S. Court of Appeals for the Ninth Circuit via the CM/ECF system. I further certify that on this same day, after receiving written consent from counsel, I served the petition by sending copies via electronic mail, in compliance with Fed. R. App. P. 25(c)(1)(d):

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/s/ Deepak Gupta

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EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

James Cole,

Plaintiff,

v.

CRST, Inc. et al.,

Defendants.

EDCV 08-1570-VAP (SPx)

ORDER DECERTIFYING THE MEAL AND REST BREAK PERIOD CLASSES (DOC. NO. 166) AND DENYING MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT (DOC. NO. 173)

On December 4, 2015, Defendant CRST Van Expedited, Inc. ("CRST" or "Defendant") filed a Motion for Decertification. (Doc. No. 166.) On January 11, 2016, Plaintiff James Cole ("Plaintiff") filed an opposition (Doc. No. 172), and on February 29, 2016, CRST filed its reply. (Doc. No. 179.) After considering all papers filed in support of and in opposition to the Motion, as well as the arguments advanced at the hearing, the Court GRANTS the Motion.

I. BACKGROUND

This action arises out of the compensation system of CRST, a motor carrier that transports freight to customers in the United States, Canada, and Mexico. CRST employs truck drivers to transport freight in vehicles owned by Defendant. CRST is based in Cedar Rapids, Iowa, and operates terminals across the United States, including in Fontana, California. Plaintiff alleges that Defendant uses a

uniform compensation system to pay Plaintiff and a putative class of nearly 4,200 current and former California-based truck drivers.

On October 6, 2008, Plaintiff filed a putative class action in California Superior Court for the County of San Bernardino. On November 5, 2008, Defendant removed the action to this Court. (Doc. No. 1.) On January 20, 2010, Plaintiff filed a Second Amended Complaint ("SAC") alleging Defendant failed to provide rest and meal breaks, compensation, and timely wages, among other things. (Doc. No. 56.) On August 5, 2010, the Court granted Plaintiff's motion to certify the class. In the Certification Order, the Court certified five subclasses. (Doc. No. 86.)

On December 2, 2010, the Court stayed the case pending a decision in Brinker Rest. Corp. v. Superior Ct., 165 Cal. App. 4th 25 (2008), rev. granted, 196 P.3d 216. (Doc. No. 98.) On April 12, 2012, the California Supreme Court announced its decision in Brinker. Pursuant to the stay order, the stay in this case was lifted on that same day.

On September 27, 2012, the Court issued a minute order (1) granting Defendant's motion for judgment on the pleadings, in part; (2) granting Defendant's motion for decertification, in part; and (3) denying Plaintiff's motion for order to mail class notice. (See Decertification Order (Doc. No. 125) at 1-2.)

The Ninth Circuit reversed this Court's order entering judgment against Plaintiff's rest and meal break claims on the basis that they were preempted by the FAAA in a memorandum issued on April 14, 2015, and remanded the action for

further proceedings. (Doc. No. 149.) The mandate of the Ninth Circuit took effect on May 8, 2015. (Doc. No. 153.) On December 15, 2015, the Court denied Plaintiff's motion for partial summary judgment as to his meal and rest break claims. (Doc. No. 171.)

II. LEGAL STANDARD

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on an individual basis." Haley v. Medtronic, Inc., 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing Crown, Cork & Seal Co. v. Parking, 462 U.S. 345 (1983)). Federal Rule of Civil Procedure 23 governs class actions. A class action "may be certified if the trial court is satisfied after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161 (1982).

To certify a class under Rule 23(a), a plaintiff must demonstrate (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S.Ct. 2541, 2548 (2011); Dunleavy v. Nadler (In re Mego Fir. Corp. Sec. Litig.), 213 F.3d 454, 462 (9th Cir. 2000). If the Court finds that the action meets the prerequisites of Rule 23(a), the Court must then consider whether the class is maintainable under Rule 23(b). Wal-Mart, 131 S.Ct. at 2548.

In considering a motion to decertify, "a court must reevaluate whether the class continues to meet the requirements of Rule 23." Bruno v. Eckhart Corp., 280 F.R.D. 540, 544 (C.D. Cal. 2012). The Court has a continuing duty to ensure

compliance with class action requirements pursuant to Rule 23, and therefore may decertify a class at any time. Falcon, 457 U.S. at 160 ("Even after a certification order is entered, the judge remains free to modify it in light of subsequent developments in the litigation."). It is within the Court's discretion to decertify a class. Marlo v. United Parcel Serv., Inc., 639 F.3d 942, 944 (9th Cir. 2011). The party seeking decertification bears the burden of demonstrating that the elements of Rule 23 have not been established. Weigele v. FedEx Ground Package Sys., 267 F.R.D. 614, 617 (S.D. Cal. 2010).

III. DISCUSSION

Defendant moves to decertify the Meal and Rest Break Period Classes.

A. Meal and Rest Break Policies Post-Brinker

Plaintiff contends that Defendant violates California Labor Code § 226.7 by not authorizing or permitting its employees to take meal and rest breaks. In Brinker Rest. Corp. v. Superior Court, 53 Cal. 4th 1004 (2012), the California Supreme Court articulated employers' obligations with respect to meal and breaks. Under the Brinker analysis, an employer satisfies its obligation when it "relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." Id. at 1040. According to Brinker, an employer is not obligated to police employees to ensure that meal breaks are taken; rather, the employer must not prevent employees from taking meal breaks. Id. Moreover, the Brinker Court made clear that employers could satisfy this obligation in different ways and that the court did not need to delineate every instance of compliance. Id.

Plaintiff misstates the appropriate standard when he says that Defendant violates California's meal break rules by failing to adopt a break policy consistent with California law. Defendant's only affirmative obligation is to notify its drivers of California's meal and rest break rules. See Cal. Labor Code § 1183(d). Defendant fulfilled this obligation by posting the relevant rules at its terminals. (Taylor Decl., Ex. A-1, Kopecky Dep 52:17-22, 99:4-101:13.)

At the motion hearing, Plaintiff argued that the analysis in Brinker applies to meal breaks only. While Brinker directly addresses employers' obligations regarding meal breaks, it interprets language in IWC wage orders that apply to meal and rest breaks both. District courts have used this guidance to deny certification of rest period classes. See, e.g., Ordonez v. Radio Shack, Inc., No. CV 10-7060-CAS JCGx, 2013 WL 210223, at *11 (C.D. Cal. Jan. 17, 2013), Cummings v. Starbucks Corp., No. CV 12-06345-MWF FFMx, 2014 WL 1379119, at *23 (C.D. Cal. Mar. 24, 2014).

Moreover, while Defendant encourages its drivers to take at least one 15-minute break after five hours of work, Defendant does not limit the number or frequency of rest or meal breaks. (Ex. A-3, Long Dep. at 133:3-21; Ex. A-5, Dixon Dep. at 128:25–129:2; Ex. A-6, Cole Dep. at 206:19-24.)

B. Meal and Rest Period Classes

Defendant argues that the Meal and Rest Period Classes should be decertified because Plaintiff cannot show there was a policy against providing meal breaks. (Mot. at 5, 21.) Plaintiff argues that the "Court thoroughly addressed commonality… in its original Certification Order." (Opp. at 8.) While this is true, the Court has a continuing duty to ensure the class continues to meet the

requirements of Rule 23 given the Brinker and Wal-Mart decisions. Falcon, 457 U.S. at 160.

The Court premised its 2010 Certification Order on a pre-Brinker analysis of California labor law, which required employers to ensure that meal and rest break periods were being taken. Similarly, the Certification Order was premised on a pre-Wal-Mart analysis of Rule 23.

In Wal-Mart, the Supreme Court provided guidance on how a court must approach the issue of commonality for purposes of class certification. A plaintiff must show "significant proof that [an employer] operated under a general policy . . . ." Wal-Mart, 131 S. Ct. at 2553. Here, Plaintiff must show that Defendant had a general policy of preventing its drivers from taking meal and rest breaks. Plaintiff has not made this showing because a number of drivers, including Plaintiff, acknowledge that they took meal and rest breaks when needed, usually every four to five hours, without interference from Defendant. (Ex. A-2, Clemmons Dep. at 47:8-49:13, 102:10-23, 116:8-13; Ex. A-3, Long Dep. at 49:1- 50:22; Ex. A-5, Dixon Dep. at 44:5- 10, 46:14-25, 47:2-3, 60-62, 84:10-14; Ex. A-6, Cole Dep. at 207:9-25, 208:8-15, 216:6-9, 217:9-19, 238:16-18; Ex. A-7, Berger Dep. at 42:2-43:24, 57:22-58:8, 73:25-74:6, 92:22-95:7.)

Plaintiff's argument against decertification of the meal and rest period classes rests on the assumption that Defendant's failure to maintain an affirmative policy allowing for meal and rest breaks creates a rebuttable presumption that the breaks were not taken. This argument fails because no such presumption exists. Brinker unambiguously held that an employer is not obligated to police or ensure that

employees take meal breaks; rather, the employer must not prevent employees from taking meal breaks. Id. at 1040.

Similarly, there are post-Brinker district court cases that found that employers' liability springs not simply from a defective policy, but from proof that rest breaks were unlawfully denied.

For example, in Ordonez v. Radio Shack, Inc., No. CV 10–7060–CAS (JCGx), 2013 WL 210223 (C.D. Cal. Jan.17, 2013), the district court denied certification on a rest break subclass. The court applied Brinker to find that an employer's rest break policy, which was facially deficient when the defendant offered "testimony that despite its written policy, putative class members were granted rest breaks in accordance with California law-or at a minimum, in accordance with no uniform policy at all." Id. at *11. The district court found this evidence important, stating that "[u]nlike other cases where a defendant had a purportedly illegal rest or meal break policy and courts found that common issues predominated, there is substantial evidence in this case that defendant's actual practice was to provide rest breaks in accordance with California law." Id. Therefore, the "plaintiff's evidence that defendant may have an illegal, written rest break policy [wa]s insufficient for [the district court] to find that common issues predominate" under Rule 23(b)(3). Id.

Ordonez is not the only case to apply this reasoning post-Brinker. See, e.g., In re Taco Bell Wage & Hour Actions, No. CV F 07-1314-LJO (DLBx), 2013 WL 204661 (E.D. Cal. Jan. 17, 2013). In In re Taco Bell, the district court found that the plaintiff lacked any form of class-wide proof because the defendants had no records

showing whether employees took rest breaks. Id. The court held that "[w]ithout reliable evidence in the time cards, an individual inquiry is the only way to determine whether a second break was or was not taken." Id. Here, Defendant did not keep records of when drivers took rest breaks.

Both Ordonez and In re Taco Bell found that an employers' liability does not arise solely from a defective policy, but from proof that employees were actually denied a rest break.

As Plaintiff cannot show that Defendant had a policy of preventing drivers from taking meal and rest breaks, and because there is evidence in the record of drivers taking meal and rest breaks without interference from Defendant, individualized inquiries predominate. In order to determine why some drivers took meal and rest breaks while others did not requires individualized inquiries as to each driver. Hence, Plaintiff does not satisfy the predominance requirement of Rule 23(b).

Accordingly, the Court GRANTS the motion to decertify the Meal and Rest Period Classes.

C. Leave to Amend

On January 22, 2016, Plaintiff filed a Motion for Leave to File a Third Amended Complaint. (Doc. No. 173.) Defendant opposed the motion on February 1, 2016. (Doc. No. 176.)

Federal Rule of Civil Procedure 15(a) provides that the Court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Although liberally granted, leave to amend is not automatic. Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The Ninth Circuit strongly favors allowing amendment and considers a motion for leave to amend under five factors: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether plaintiff has already amended the complaint. In re W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716, 738 (9th Cir. 2013) (quoting Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir.1990)). The most important of these factors is prejudice to the opposing party. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). The burden is on the party opposing amendment to show prejudice. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987). Absent a showing of prejudice or a strong showing of the remaining factors, a presumption exists in favor of granting leave to amend. Eminence Capital, LLC, 316 F.3d at 1052.

Plaintiff seeks to amend the Second Amended Complaint ("SAC") to "clarify" his unpaid rest break claim, i.e., his claim that Defendant failed to pay drivers for rest break time they did take. Plaintiff raised this claim for the first time in its summary judgment motion. As the Court noted in its denial of Plaintiff's summary judgment motion, this is a different claim than that alleged in the SAC. In the SAC, Plaintiff alleges that Defendant failed "to provide rest periods" and failed "to provide compensation for such *unprovided* rest periods" (emphasis added) (SAC ¶¶ 40), which is the only violation that would warrant premium pay, but in the summary judgment motion, Plaintiff sought summary judgment on the claim that Defendant

failed to pay for rest breaks taken. These are two different claims, the latter of which was not pled in the SAC.

Allowing Plaintiff to amend his complaint to include this unpaid wage claim would prejudice Defendants at this late stage of the litigation. This case was filed in 2008, so not only is this proposed amendment prejudicial, it is unduly delayed. There has been extensive discovery and motion practice, including a motion for class certification, motion for judgment on the pleadings, and multiple motions for leave to amend, summary judgment, and decertification. If Plaintiff were given leave to amend his complaint to include a new claim now, it would necessarily involve new discovery, repeated motion practice, and possibly development of new defense strategies.

Plaintiff argues that allowing his amendment would avoid prejudice to Defendant because, "absent this motion to amend, the alternative is for Plaintiff to file an entirely new pleading, which would then be cause for the litigation to be dual tracked, which is completely inefficient." (Mot. at 11.) This argument is not persuasive. A plaintiff must bring all related claims in a single action and cannot get around this requirement by filing a second lawsuit. See, e.g., United States v. Haitian Republic, 154 U.S. 118, 123-24 (1894); Adams v. California Dep't of Health Services, 487 F.3d 684, 688 (9th Cir. 2006).

Lastly, Plaintiff's amendment is futile. The Court noted previously in its order denying Plaintiff's summary judgment motion that Plaintiff's proposed claim is an unpaid wage claim, not a rest break claim, and that it is contradictory to the rest break theory that has been litigated since 2008. Plaintiff cannot seek simultaneously

to recover premium pay for unprovided rest breaks pursuant to a general policy against taking rest breaks while seeking unpaid wages for rest breaks that were provided. Adding Plaintiff's new theory to the case would be futile because it is fundamentally at odds with Plaintiff's existing theory. Plaintiff cannot reconcile these two inconsistent theories.

Accordingly, the Court DENIES Plaintiff's Motion for Leave to File a Third Amended Complaint.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS Defendant's Motion for Decertification of the Meal and Rest Period Claims and DENIES Plaintiff's Motion for Leave to File a Third Amended Complaint.

IT IS SO ORDERED.

Dated: 4/1/16

Virginia A. Phillips
United States District Judge

EXHIBIT B

SUPREME COURT OF THE UNITED STATES

No. 14–1146

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

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

[March 22, 2016]

JUSTICE KENNEDY delivered the opinion of the Court.

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

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

sated overtime.

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

I

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

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

Unsatisfied by these changes, respondents filed suit in the United States District Court for the Northern District of Iowa, alleging violations of the FLSA. The FLSA requires that a covered employee who works more than 40 hours a week receive compensation for excess time worked "at a rate not less than one and one-half times the regular

rate at which he is employed." 29 U. S. C. §207(a). In 1947, nine years after the FLSA was first enacted, Congress passed the Portal-to-Portal Act, which clarified that compensable work does not include time spent walking to and from the employee's workstation or other "preliminary or postliminary activities." §254(d). The FLSA, however, still requires employers to pay employees for activities "integral and indispensable" to their regular work, even if those activities do not occur at the employee's workstation. *Steiner* v. *Mitchell*, 350 U. S. 247, 249, 255 (1956). The FLSA also requires an employer to "make, keep, and preserve . . . records of the persons employed by him and of the wages, hours, and other conditions and practices of employment." §211(c).

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

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

Tyson objected to the certification of both classes on the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For the reasons that follow, this Court now affirms.

II

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

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

A

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

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

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

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

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

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

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

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

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

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

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

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

precise extent of uncompensated work," the Court held "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U. S., at 687. Under these circumstances, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*, at 687–688.

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

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

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

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

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

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

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

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

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

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

legal error to admit that evidence.

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

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

B

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

concedes that "[t]he fact that federal courts lack authority to compensate persons who cannot prove injury does not mean that a class action (or collective action) can never be certified in the absence of proof that all class members were injured." Brief for Petitioner 49. In light of petitioner's abandonment of its argument from the petition, the Court need not, and does not, address it.

Petitioner's new argument is that, "where class plaintiffs cannot offer" proof that all class members are injured, "they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) do not contribute to the size of any damage award and (2) cannot recover such damages." *Ibid.* Petitioner contends that respondents have not demonstrated any mechanism for ensuring that uninjured class members do not recover damages here.

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

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

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

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

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

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

* * *

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

It is so ordered.