No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

—v.—

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,

Respondents.

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

BRIEF OF AARP, INTERFAITH WORKER JUSTICE, NATIONAL EMPLOYMENT LAW PROJECT AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CATHERINE RUCKELSHAUS
NATIONAL EMPLOYMENT LAW PROJECT
75 Maiden Lane, Suite 601
New York, New York 10038
(212) 285-3025
cruckelshaus@nelp.org
Counsel for Amicus Curiae National Employment Law Project

SETH R. LESSER
Counsel of Record
FRAN L. RUDICH
KLAFTER OLSEN & LESSER LLP
Two International Drive, Suite 350
Rye Brook, New York 10573
(914) 934-9200
seth@klafterolsen.com
Counsel for Amici Curiae

(*Counsel continued on inside cover*)

September 29, 2015

Dan Kohrman
Laurie A. McCann
Dara S. Smith
AARP Foundation Litigation
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060
dkohrman@aarp.org

Counsel for Amicus Curiae AARP

Julian Medrano
Interfaith Worker Justice
1020 West Bryn Mawr Avenue
Chicago, Illinois 60660
(773) 728-8400
jmedrano@iwj.org

Counsel for Amicus Curiae
Interfaith Worker Justice

Roberta L. Steele
National Employment
Lawyers Association
417 Montgomery Street
San Francisco, California 94104
(415) 296-7629
rsteele@nelahq.org

Counsel for Amicus Curiae
National Employment
Lawyers Association

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

PAGE(S)

PAGE(S)

Statutes, Rules and Regulations

PAGE(S)

Other Authorities

PAGE(S)

PAGE(S)

PAGE(S)

BRIEF OF AARP, INTERFAITH WORKER JUSTICE, THE NATIONAL EMPLOYMENT LAW PROJECT AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[1]

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to addressing the needs and interests of older workers and strives through legal and legislative advocacy to preserve the means to enforce their rights. This case concerns the continuing vitality of collective actions under the Fair Labor Standards Act, which uses the same procedural enforcement mechanisms and remedies as the Age Discrimination in Employment Act. AARP has a strong interest in preserving the ability of similarly-situated workers to proceed collectively and to cooperate in meeting

---

[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to Court Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

their burden of proof, both in wage and hour cases and in federal age discrimination cases.

Interfaith Worker Justice (IWJ) is a national organization with 60 affiliate groups and 29 workers' centers that call upon its members' religious values to educate, organize, and mobilize the religious community and low-wage workers on issues and campaigns that will improve wages, benefits, and working conditions for workers across the United States. IWJ workers' centers collectively have more than one thousand members, including meat processing workers in multiple states as well as members in the hospitality, manufacturing, construction, poultry processing, day labor, janitorial, and retail and other service industries where wage theft is prevalent.

IWJ and its workers' centers seek to ensure that IWJ members are able to act collectively to recoup unpaid wages in the face of employers that do not keep accurate time records, the fear of retaliation, and the fact of relatively low individual recoveries.

The National Employment Law Project (NELP) is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP's areas of expertise include the workplace rights of low-wage workers under federal employment and labor laws, with a special emphasis on wage and hour rights. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act and related state fair pay laws. NELP's national three-city survey, *Broken Laws, Unprotected Workers,* shows the dire conditions of jobs in low-wage sectors. NELP works to ensure that all workers receive the basic workplace protections guaranteed in our

nation's labor and employment laws; this work has given us the opportunity to learn up close about job conditions around the country in the low-wage jobs where basic fair pay violations persist. These non-payments create hardships for workers and their families, and these workers face severe barriers to enforcing their rights to fair and lawfully required pay, making collective and class action mechanisms vital to upholding the wage floor.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

INTRODUCTION

Sixty-nine years ago, this Court decided *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), which has since then governed wage and hour litigation across the country. While both Petitioner and its *amici* attempt to portray *Mt. Clemens* as consistent with their position, they ignore its core con-

siderations and rulings, and urge the Court to diminish or effectively vitiate collective enforcement of the Fair Labor Standards Act by requiring individual-by-individual proof. The "collective action" mechanism enacted by Congress in Section 16(b) (29 U.S.C. § 216(b)) of the Fair Labor Standards Act (the "FLSA") allows "similarly situated" employees to join together to prosecute their claims, which furthers the FLSA's "broad remedial goal" and provides plaintiffs with "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffmann-La Roche, Inc., v. Sperling*, 493 U.S. 165, 170-71 (1989).

Amici here address three primary points. First, the core holding in *Mt. Clemens* is its recognition that often employees will not have the ability to prove through direct evidence that they were underpaid due to their employer's failure to keep records of hours worked, and for that reason they may prove their case through not perfectly precise evidence that raises a "just and reasonable inference" of the violation. "The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA]." *Mt. Clemens,* 328 U.S. at 688. To not permit cases to proceed absent exact evidence of damages would reward "an employer's failure to keep proper records in conformity with his statutory duty." *Id.*

Second, *amici* set out how, following *Mt. Clemens*, FLSA collective actions have been litigated on a "representative" basis, whereby the employees present the testimony of a representative sample of employees as part of their proof of the prima facie case, and from that testimony and other available evidence prove all employees' claims as a matter of just and

reasonable inference. This seven decades-long approach is grounded in *Mt. Clemens* itself, where the Court found liability based upon the testimony of eight employees out of 300. The courts have established procedures for these cases, including requiring an upfront finding that the employees are "similarly situated" under Section 216(b), and using discovery and case management techniques to insure the fairness of the process. Missing from Petitioner and its *amici* is any real suggestion that the use of representative testimony and of just and reasonable inferences to determine damages has not worked well. Without these procedural efficiencies, there would be floods of individual wage and hour cases in the district courts or some cases would never be brought, permitting companies that evade the law to be rewarded. A multiplicity of often duplicative cases and trials is what occurs when FLSA collective actions are decertified prior to trial, and cases are too far along to be consolidated.

Third, the need for efficient collective wage and hour actions becomes even more important in the face of the overwhelming and persistent wage theft that continues to plague worksites around the country. In too many low-wage workplaces (like the meat processing plant in this case) employees work off the clock, their employers are rewarded for a failure to keep time records, and the workers fear proceeding individually to seek their proper pay.

ARGUMENT

I. *MT. CLEMENS* AND ITS PROGENY PERMIT REPRESENTATIVE PROOF WHEN THE EMPLOYER FAILS TO KEEP RECORDS.

A. *Mt. Clemens'* Two Rulings

While some wage and hour cases present the issue of whether the overtime that was paid was appropriately determined, the vast majority of wage and hour litigation presents situations where the employer did not keep records of the overtime allegedly worked.[2] In Section 11(c) of the Act Congress mandated that employers "shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him…." 29 U.S.C. § 211(c); *accord* 29 C.F.R. § 516.2. *Anderson v. Mt. Clemens Pottery* addresses the failure of an employer to comply with that provision, and the manner in which the Court handled it has governed wage and hour litigation since.

The issue the Court set out in *Mt Clemens* was how to address the fact that:

---

[2] The vast majority of wage and hour claims brought as collective actions under 29 U.S.C. § 216(b) fall into two categories: (1) claims for off-the-clock work (the claims at issue in the present case), and (2) claims where employees allege they were misclassified as overtime-exempt (and were not paid overtime at all). In both, the number of hours worked and what was done during those hours are the critical issues. The third category of FLSA claims asserts that the overtime paid was improperly determined (*e.g.*, when an employer improperly docks vacation pay). *See generally* 2 *The Fair Labor Standards Act* § 19.IV.D, pp. 19-55 – 19-72 (Ellen C. Kearns ed., 2d ed. 2010).

> Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

328 U.S. at 687.

The Court recognized that the solution cannot be "to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work" because "[s]uch a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act." *Id.*[3]

To prevent workers from being penalized by the employer's failure to keep records of hours worked, the Court provided that plaintiffs could meet their burden of proof so long as they "prove[] that [they have] in fact performed work for which [they were] improperly compensated" and "produce[] sufficient evidence to show the amount and extent of that

---

[3] These words appear particularly apposite in the context of this case, inasmuch as the reason plaintiffs had to use representative proof below was because of Tyson's failure to keep proper time records. Petitioner is a sophisticated employer that should have been keeping such records, especially due to the years of lawsuits against it that have alleged wage and hour violations and resulted in an injunction to comply. *See* Resp. Br. 7-8. To allow it to escape liability for its own failure to abide by the law – indeed, an injunction against it – would reward its own contemptuous view of the law and create the very injustice that *Mt. Clemens* presciently anticipated.

work as a matter of just and reasonable inference." *Id.* at 687. Accordingly, while the court of appeals in *Mt. Clemens* had reversed a judgment in favor of the employees because an employee cannot "base his right to recovery on a mere estimated average of overtime worked," *Mt. Clemens Pottery Co. v. Anderson*, 149 F.2d 465 (6th Cir. 1945), this Court reversed. Since *Mt. Clemens*, federal courts have time and again affirmed the importance of the just and reasonable inference standard. *See, e.g.*, *S. New England Telecomm. Corp.*, 121 F.3d 58, 69 (2d Cir 1997) (a "rule preventing employees from recovering for uncompensated work because they are unable to determine precisely the amount due would result in rewarding employers for violating federal law"); *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) ("*Mt. Clemens Pottery* leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records as required by the FLSA".)

The second half of the *Mt. Clemens*' decision addressed the issue of liability. The Court concluded that the employees had proven liability through what is now termed representative testimony – having a subset of the group of affected employees testify at trial. When this Court wrote that "we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute" and "the damage is therefore certain," 328 U.S. at 688, it was referring to the fact that liability was established based on the testimony of 8 out of 300 employees and the company's proffered testimony of its supervisors. *Mt. Clemens*, 149 F.2d at 461-62. The Court concluded, as to liability, both that "the employees did prove, however, that it

was necessary for them [*i.e.*, all the employees] to be on the premises for some time prior and subsequent to the scheduled working hours," 328 U.S. at 690, and that "[t]he employees proved, in addition, that they pursued certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-93.

The use of what is now called representative testimony has been relied upon as an integral part of overtime litigation since *Mt. Clemens*. *See generally* Kearns, *supra*, at 19-185 & n.638 (citing numerous decisions). Representative actions have been upheld by all the appellate courts to have addressed the issue, where they have interpreted *Mt. Clemens* to mean that it "authorize[d] some employees to testify about the number of hours they worked and how much they were paid so that other non-testifying plaintiffs could show the same thing by inference." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1278-79 (11th Cir. 2008) (citing *Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 951 (4th Cir. 1995) ("Under *Mt. Clemens*, the Secretary can present testimony from representative employees as part of his proof of the prima facie case."[4]); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792 (1st Cir. 1991) (interpreting *Mt. Clemens* burden-shifting and noting that the plaintiff "can rely on testimony and evidence from representative employees to meet the initial burden of proof requirement"); *McLaughlin v. Ho Fat Seto,* 850 F.2d

[4] The *prima facie* case that is that an employee was not paid in accordance with the requirements of the law.

586, 589 (9th Cir. 1988) ("We hold that the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees.").[5] *See also Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300, 1307 (10th Cir. 2014) ("[T]he jury could reasonably rely on representative evidence to determine class-wide liability because Tyson failed to record the time actually spent by its employees on pre- and post-shift activities.") (citing *Mt. Clemens*); *Reich v. S. New England Telecom. Corp.*, 121 F.3d 58, 66 (2d Cir. 1997) ("In meeting the burden under *Mt. Clemens*, the Secretary need not present testimony from each underpaid employee; rather, it is well-established that the Secretary may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA."); *see also, e.g., U. S. Dept. of Labor v. Cole Enters.*, 62 F.3d 775, 781 (6th Cir. 1995); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994); *Martin v. Tony & Susan Alamo Found.*, 952 F.2d 1050, 1052 (8th Cir. 1992); *Martin v. Selker Bros.*, 949 F.2d 1286, 1298 (3d Cir. 1991); *Donovan v. Burger King Corp.*, 672 F.2d 221, 224 (1st Cir. 1982);

---

[5] The term "representative action" has had two meanings in the FLSA's history. Originally, the FLSA permitted actions to be brought not just by employees on behalf of themselves and other similarly situated but also by "agents" or "representatives" who were not employees (such as labor unions or even unaffiliated third parties). With the Portal-to-Portal Act of 1947, Congress limited FLSA cases to cases brought by employees and the Secretary of Labor. *See Fair Labor Standards Act*, *supra* at 1-21. In modern parlance, "representative actions" refer to the use of use of representative testimony from a subset of the individuals who have individually joined a FLSA collective action. *See, e.g., Morgan*, 551 F.3d at 1278-79.

Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 829 (5th Cir. 1973).

In addition, from a practical standpoint, the very nature of overtime claims often does not permit drawing a line between "liability" and "damages", because proof that an employee worked overtime (liability) usually means proof of the amount of overtime (damages) through the same evidentiary method. Proving liability can be inextricably intertwined with proving damages because the question of "did you work overtime and not get paid for it" is invariably linked to "how much overtime did you work?" In other words, proof as to the number of hours worked is, in most cases, going to be the same proof as to liability.[6]

In short, *Mt. Clemens* established a framework, relied upon by the courts in hundreds of cases since then that have found, as the Fourth Circuit 30 years ago, "[t]here is no requirement that to establish a *Mt. Clemens* pattern or practice [*i.e.*, liability], testimony must refer to all nontestifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens*." *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985), *overruled on other grounds*, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

Petitioner and its *amici* ignore these well-established principles and jurisprudence. A theme running through their briefing is, as stated by one

---

[6] In those situations where the evidence across a collective may materially vary, courts can apply bifurcation of liability and damages. *See* pages 19-20, *infra*.

amicus, "Tyson was entitled to an individual assessment of liability based on the different circumstances of each plaintiff." Pacific Legal Foundation Br. 3. Perhaps because such a statement is incompatible with *Mt. Clemens* and how FLSA representative actions work, that particular *amicus* ignores *Mt. Clemens* and asserts the proposition solely as a matter of the Rule 23 class in this case – but the principle is no different vis-à-vis FLSA representative actions because in them the trier of fact also extrapolates liability and damages from a subset of the whole.

Petitioner and those of its *amici* that cite *Mt. Clemens* (many ignore it) attempt to cabin it by having it – in the words of one *amicus* – "stand[] only for the modest principle that, when liability has been shown and the employer's records are inadequate, identically situated employees may prove damages on a class-wide basis". Cato Institute Br. 14.[7] This statement is hyperbolic inasmuch as "identicality" is a concept foreign to the *Mt. Clemens* opinion, and wars with the application of any "just and reasonable

---

[7] Petitioner itself writes that "[N]othing in [*Mt Clemens*] allows an employee to prove that she was not properly compensated based on the amount of time that a *different employee*—much less a fictional "average" employee—spent performing *different activities* that admittedly took *different amounts of time* to perform." Pet. Br. 42 (emphasis in original). This statement, however, says little (because, of course, this Court did not permit mass adjudication where the individual claimants are materially differently situated) and, more fundamentally, assumes that the differences at issue were material. The point of any similarly-situated analysis is to determine how material the differences are vis-à-vis the application of the law at issue. What Petitioner ignores with its negative statement of what *Mt Clemens* did not permit is that *Mt Clemens* did permit representative testimony to determine liability and imperfect approximations of time for damages.

inference." "Identicality" cannot be squared with the way in which the Court found liability in the laundry list of "preliminary activities" in *Mt. Clemens,* which differed from employee to employee. Petitioner and its *amici* essentially contend that only where individual liability has been proven does *Mt. Clemens* then permit damage assessment on a non-individualized basis. *See* Pet. Br. 41-42; Association Of American Railroads Br. 17; Atlantic Legal Foundation Br. 24-25; Chamber of Commerce Br. 14; DRI—The Voice Of The Defense Bar Br. 9-10.

In sum, at the same time these *amici* decry the use of aggregate litigation to extrapolate from the experiences of a subset to the whole as an improper "trial by formula", *see, e.g.*, Chamber of Commerce Br. 17, that is in fact what occurred in *Mt. Clemens* and has been the routine methodology in representative action trials for decades of wage and hour litigation following it.

B. Decades of Section 216(b) Representative Actions And Trials Have Worked Successfully.

Missing from Petitioner and its *amici* is any real suggestion that the use of representative testimony and of just and reasonable inferences to determine damages has not worked well.[8] Nor do they,

---

[8] Petitioner and its *amici* do not assert that the system is broken. Indeed, their briefing is bereft of examples of supposedly erroneous outcomes. The only wage and hour case (beyond this case) that is decried as wrongfully decided is Wal-Mart's complaint of a case that it lost at trial and on appeal. *See* Wal-Mart Br. 5.

with the exception of the present case, try to point to supposedly unjust lower court decisions.[9]

Courts have been vigilant in ensuring the process in wage and hour aggregate litigation works fairly. The results have benefitted both sides, with collective action verdicts that have been rendered in favor of both employees and employers. For example, in the last ten years there have been five FLSA collective trial decisions addressing claims of alleged employee misclassification – two were won by plaintiffs and three were won by defendants. *Compare Morgan*, *supra* (collective action plaintiffs' verdict); *Stillman v. Staples, Inc.*, 2009 U.S. Dist. LEXIS 42247 (D.N.J. May 11, 2009) (same); *with Perkins v. Southern New England Telephone Co Inc.* No. 3:07-00967, Dkt. 578 (D. Conn. Oct. 24, 2011) (collective action defendant's verdict); *Henry v. Quicken Loans, Inc.,* Case No. 2:04-cv-40346-SJM-MJH (E.D. Mich. 17, 2011) (same); *Bell v. Citizens Fin. Group, Inc.*, 2:10-cv-00320 (W.D. Pa.) (Apr. 21, 2013) (same).

Few cases are alike in this area of law because there is wide variation in the claims that can be pre-

---

[9] In its *Mt. Clemens* discussion, petitioner cites only to a single lower court FLSA case, *Espenscheid v. DirectSat USA*, LLC, 705 F.3d 770, 774-75 (7th Cir. 2013). *Espenscheid* had both a district and Circuit court exhibiting diligence in refusing to permit a collective action to proceed to trial on an improper basis. There, the Seventh Circuit affirmed the trial court's decertification where the plaintiffs had presented no basis to determine whether the plaintiff employees who would testify at a trial were in any way "representative" of the other members of the FLSA collective. This contrasts to the mechanisms routinely used to allow the representative discovery process address this issue (such as through the methods by which the representative discovery opt-ins are chosen once a collective exists, *see* pages 17-18, *infra*).

sented – from claims arising out of employees at a single location, to job classifications applied nationwide, or from claims that involve a specific and single job title to those that involve multiple job titles. Courts have used a wide range of procedures and case management tools to ensure fairness and due process, as briefly described below.

(a) Requiring a showing that employees are similarly-situated.

Courts of appeals that have addressed the matter have all agreed that before a FLSA collective action can proceed to trial the plaintiff employees bear the burden of showing that "a so-called 'collective action' may go forward by [proving that] the plaintiffs who have opted in are in fact 'similarly situated' to the named plaintiffs." *Myers v Hertz*, 624 F.3d 537, 555 (2d Cir. 2010); *accord also Zavala v. Wal-Mart Stores, Inc.,* 691 F.3d 527, 537 (3d Cir. 2012) ("we conclude that the burden is on the plaintiffs to establish that they satisfy the similarly situated requirement"); *O'Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 584 (6th Cir. 2009) (same); *Morgan*, 551 F.3d 1261-62 ("the plaintiff bears a heavier burden"); *accord also, e.g., Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001).[10] There are a number of relevant factors that can go into this analysis. These:

---

[10] The determination that a collective action can proceed to trial is what is referred to as the "second stage" certification determination. It generally follows a "first stage" determination that provides for notice to be sent to potential opt-ins who then can join the case. This two-stage process has been adopted by all federal circuits that have considered the matter as an effective way to balance the rights of employees and employers. *See, e.g, Myers*, 624 F.3d at 555; *Morgan*, 551 F.3d at 1261; *Thiessen,* 267 F.3d at 1102-03.

> include (but are not limited to): whether the plaintiffs are employed in the same corporate department, division, and location; whether they advance similar claims; whether they seek substantially the same form of relief; and whether they have similar salaries and circumstances of employment. Plaintiffs may also be found dissimilar based on the existence of individualized defenses. *See Ruehl*, 500 F.3d at 388 n.17. This list is not exhaustive, and many relevant factors have been identified. *See* 45C Am. Jur. 2d Job Discrimination *§ 2184* (listing 14 factors to be considered in determining whether proposed collective action plaintiffs are "similarly situated" under the ADEA).

Zavala, 691 F.3d at 536-37.

In overtime cases, the parties dispute just how similar employees are; they disagree as to whether individual differences are material; and they fight over whether there are individualized inquiries or defenses that may be presented. "[U]ltimately," however, "whether a collective action is appropriate depends largely on the factual question of whether the plaintiff employees are similarly situated to one another." *Morgan*, 551 F.3d at 1262; *see also* pages 21-22, *infra* (addressing the scope of evidence in the case that supported the collective action verdict). And notwithstanding the varying situations, courts have often avoided judgments or trials in situations where non-similarly situated employees were presented. *See, e.g., Reich*, 43 F.3d at 951 (where only 1.6% of the employees testified and the case involved

differing positions, case was remanded "for a new trial with testimony from a larger representative employee population, reflecting the complexity of this case, and the different positions, departments, shifts, pay periods, and time periods involved."); *DeSisto*, 929 F.2d at 793 ("Where the employees fall into several job categories, it seems to us that, at a minimum, the testimony of a representative employee from, or a person with first-hand knowledge of, each of the categories is essential to support a back pay award."); *Donovan v. New Floridian Hotel*, 676 F.2d 468, 472, 476 (11th Cir. 1982) (while recognizing "it is clear that each employee need not testify", affirms determination that evidence was insufficient to support back wage award to 56 of 263 employees who had performed job duties that were distinct from those of testifying employees); *see generally* 2 *Fair Labor Standards Act*, *supra,* at 19-172 – 19-177 (citing additional cases).

(b) Discovery methods.

Courts also commonly use discovery mechanisms to ensure fairness, including requiring random selection, allowing each side to choose opt-ins for discovery, and permitting defendants to choose some (often a great many) of the opt-in plaintiffs for full discovery. These discovery methods are common. *See, e.g.*, *Lusardi v. Xerox Corp.,* 855 F. 2d 1062, 1066 (3rd Cir. 1988) (random sample group); *Barrus v. Dick's Sporting Goods, Inc.*, 465 F. Supp. 2d 224, 231-32 (W.D.N.Y. 2006) (same); *Smith v. Lowe's Home Centers, Inc.,* 236 F.R.D. 354, 356-58 (S.D. Ohio 2006) (same); *Goodman v. Burlington Coat Factory Warehouse Corp.*, 292 F.R.D. 230, 233 (D.N.J. 2013) (allowing the employer to choose all opt-ins subject to representative discovery, and noting that "although

discovery in the case will be 'extensive,' it is not limitless. Not only would limitless discovery endlessly delay the case, but it would abrogate the Court's role to 'secure the just, speedy, and inexpensive determination' of the case. *Fed. R. Civ. P. 1*. There comes a point where the marginal returns on discovery do not outweigh the concomitant burden, expense, and bother"); *see generally* 2 *Fair Labor Standards Act, supra*, § 19.VIII.A at 19-117 – 19-123 (addressing approaches to discovery of opt-ins; citing numerous decisions).

To further ensure trial fairness, courts will allow employers to seek leave to obtain additional discovery, after discovery of an initial subset of opt-ins, to demonstrate that the collective action members are dissimilar. *See, e.g., Craig v. Rite Aid Corp.*, 2011 U.S. Dist. LEXIS 13843, at *22-23 (M.D. Pa. Feb. 7, 2011) (to avoid the time and expense of discovery of all opt-ins, court initially limited discovery in 1,000 employee case to 50 opt-ins, writing "[i]n reaching this conclusion, we emphasize that after the parties have engaged in this representative discovery, the parties may return to the Court if they believe that additional discovery is warranted after examining what has been learned through this initial representative process."); *Spellman v. Am. Eagle Express*, 2011 U.S. Dist. LEXIS 149919, at *1 (E.D. Pa. Nov. 30, 2011) (after limiting depositions in number and length, providing that defendant could request additional depositions upon a showing of good cause); *see also Burlington*, 292 F.R.D. at 233 (allowing defendant leave to depose any plaintiff who will testify at trial, even after the close of fact discovery). In this case, Petitioner did not avail itself of such available procedures. *See* Respondent Br. 13-14, 19-20, 45-47.

For it to now claim it was denied due process is thus absurd: the process it was denied was what it failed to seek.

When there are a material number of atypical collective action plaintiffs that would make trying the claims of all the members in a single trial unfair, courts have permitted employers to demonstrate the materiality of differences between the plaintiffs. Such demonstrations can come at nearly any point in the litigation. Indeed, cases have been decertified at the close of discovery, *see, e.g., Steavens v HMS Host, Corp.*, 10-cv-03571, 2014 U.S. Dist. LEXIS 119653, *22 (E.D.N.Y. Aug. 26, 2014); on the eve of trial, *e.g., Espenscheid v. Direct Sat USA, LLC,* 09-cv-625, 2011 U.S. Dist. LEXIS 56062 at **12-13 (W.D. Wis. May 23, 2011), *aff'd*, 705 F.3d 770 (7th Cir. 2013), and even during trial. *See, e.g.*, *Morganelli v. Chemed Corp.*, 275 F.R.D. 99, 121 (E.D.N.Y. 2011); *Johnson v. Big Lots Stores, Inc.* 561 F. Supp. 567, 568, 588 (E.D. La. 2008).

(c) Trial management tools – bifurcation and subclasses.

Courts have also employed trial management mechanisms to address potential differences within groups of employees, such as bifurcation of liability and damages determinations,[11] or subclassification of

---

[11] *See, e.g., Wilks v. Pep Boys*, 02 Civ. 0837, 2006 LEXIS 69537 at *7 (M.D. Tenn. Sept. 26, 2006) (denying motion to decertify and stating that, to allow defendant's individualized defenses, the court "will consider bifurcation of the case into a liability stage, where the parties could address the alleged existence of an impermissible policy or practice, and a damages one, where they could, if necessary, debate the impact of the policy or practice on individual plaintiffs"); *Crawford v. Lexington-Fayette Urban County Gov't*, 06 Civ. 299, 2008 LEXIS 56089, at *11 (E.D. Ky. July 22, 2008) (stating that, while denying mo-

the collective. *See, e.g., Iglesias-Mendoza v. La Belle Farm, Inc.,* 239 F.R.D. 363, 369 (S.D.N.Y. 2007) (noting that subclassification and decertification are options for district courts); *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 813 (M.D. Tenn. 2008) (finding it appropriate to have two subclasses of meat processing employees depending as a result of differences between their work); *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 308 (S.D.N.Y. 1998) ("should discovery [following notice certification] reveal that plaintiffs in fact are not similarly situated, or that only plaintiffs who worked in the same Ark restaurant or who held the same job type are similarly situated, I may later decertify the class, or divide the class into subgroups, if appropriate") (Sotomayor, *J.*); *see generally* 2 *Fair Labor Standards Act*, *supra*, § 19.XI.D at 19-168 – 19-169 (addressing cases). The Petitioner in this case, notwithstanding having been the defendant in the *Jordan* case, failed to seek to take advantage of any such mechanisms (such as subclassification between departments or knife-welding or non-knife welding positions) – and it should not be rewarded for this failure. Indeed, Respondents here who sought bifurcation of liability and damages (at which stage of the proceedings Petitioner could have shown whether any individuals had failed to suffer damages) and it was Petitioner who opposed bifurcation. *See* Resp. Br. 13-14.

---

tion to decertify, bifurcation can allow individualized determination of damages and "should not preclude collective adjudication of the central issue of whether there was a[n] [unlawful] policy"); *Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1025 (D. Minn. 2007) (denying motion to decertify while recommending bifurcation to promote manageability of the collective action because the individualized defenses that defendant asserted chiefly related to issues of damages).

(d) The scope of information and evidence available to both sides also ensures fairness.

Finally, and no less consistent with *Mt. Clemens'* recognition that employers can present "evidence to negative the reasonableness of the inference drawn from the employees' evidence," 328 U.S. at 687-88, defendants like Petitioner have a wealth of information at their disposal to show differences across the collective or class. That information includes personnel files; the testimony and recollections of other employees and supervisors; modern electronic data that contain time-relevant information such as telephone calls, computer log-ins, or video records. *Morgan v. Family Dollar Stores*, a leading court of appeals decision, is illustrative. In *Morgan*, in affirming a collective action FLSA verdict, the Eleventh Circuit described the breadth and depth of the testimony and evidence that had been presented, including, among other things:

> hundreds of Family Dollar's records detailing its policies and procedures. These records included Family Dollar's Store Policy Manual, subsequent manual revisions, four volumes of the Professional Development Training Reference Book, the Personnel Training Manual, various Frequently Asked Question documents, 'Weekly Work Schedules,' and emails by district managers to store managers. The parties also introduced a large volume of payroll records showing (1) the number of hours worked by each Plaintiff store manager each week, (2) each store manager's salary and rate of

> pay, and (3) the number of hours every employee worked each week. Both parties submitted multiple exhibits summarizing payroll data in easy-to-digest charts"; other evidence included payroll budgets, staff schedulers, directives, corporate FAQs, and numerous corporate policies, all in addition to individual and corporate designee witnesses.

Morgan, 1247, 47-57. In response to the employer's contention that the use of representative testimony was improper because "not enough Plaintiffs testified" to ensure a "reliable" liability verdict, the court of appeals wrote:

> the jury's verdict [] was not based on the testimony of just seven Plaintiffs. Instead, the parties presented an abundance of trial evidence about the executive exemption issue, including (1) a vast array of corporate manuals; (2) testimony from 39 witnesses including Family Dollar executives, district managers who ran the operations of 134 stores, and store managers who worked at a total of 50 different stores; (3) detailed charts summarizing wages and hours; and (4) a wealth of exhibits including emails, internal Family Dollar correspondence, payroll budgets, and in-store schematics. If one factors in that [two testifying managers] oversaw thousands of stores, the witnesses go from representing hundreds of stores to thousands. In addition to the large quantity of testimonial evidence, the non-

> testimonial evidence was equally high in quality and largely comprised of Family Dollar's corporate records. The jury's verdict is well-supported not simply by "representative testimony," but rather by a volume of good old-fashioned direct evidence.

551 F.3d at 1277. *See also, e.g., Stillman*, 2009 U.S. Dist. LEXIS 42247 at **69-77 (detailing the scope of evidence supporting a representative action collective jury verdict on behalf of 342 assistant store managers in a misclassification case).

With so many forms and scope of evidence readily available, an employer can attack certification for trial much more easily than Plaintiffs can defend it, because employers have far more information at their disposal than do Plaintiffs, who, if not provided with records of their hours worked and pay received, often have little more than their recollections (which can be cross-examined) – a point seemingly lost in the brief of Petitioner and its *amici* who present the landscape as a one-sided employees-favoring endeavor to which rebuttal is impossible. But, as noted above, the problem is created at the beginning by employers who fail to comply with the law by simply keeping records.

* * *

Inasmuch as some employers like Petitioner will resist taking the steps necessary to comply with the law, without some possibility of collective litigation to pursue wage and hour claims, the district courts will be burdened by cases even where large numbers of workers' claims are materially similar. For example, in the *Morgan v. Family Dollar Stores* case discussed above, had there not been a collective action trial there would have been 1,424 individual

trials regarding substantially similar claims. *Morgan*, 551 F.3d at 1265.

Congress permits the collective adjudication of "similarly situated" individuals under Section 216(b), and courts have been vigilant in managing collective cases to avoid the docket-clogging alternative of individual adjudications. The alternative is shown by collective actions in which individuals have joined and then the matters are subsequently decertified. In one instance, after the court decertified a FLSA collective action following a week of trial, there were over 2,000 cases transferred across the country, while in another, after decertification of a collective action, 29 separate multi-plaintiff actions were filed in various federal courts. 2 *The Fair Labor Standards Act*, *supra*, § 19.XI.A at 19-154 (discussing these two cases and citing others).

II. THE NEED FOR AGGREGATE FORMS OF ADJUDICATION UNDER THE *MT. CLEMENS'* HOLDINGS IS UNDERSCORED BY THE ENDEMIC NATURE OF WAGE HOUR VIOLATIONS.

A. Wage Theft is Pervasive, Especially in Low-Wage Industries.

The need for workers to be able to proceed collectively and efficiently to seek legally mandated pay is made urgent by the fact that wage theft continues to be a persistent problem. Wage theft, or the failure to pay workers the wages owed to them, is a nationwide problem cutting across business sectors and geographies. Employers fail to pay the minimum wage, force employees to work off the clock, fail to pay overtime, misclassify employees as contractors or managers to exempt them from worker protections; steal

tips; deduct money from employees' pay; and even fail to pay at all in many industries.

While additional national data on wage theft is needed, national and state-level studies paint a dire picture. A seminal 2009 study of 4,307 low-wage workers found that: (1) more than two-thirds experienced at least one pay-related violation in their previous work week, including a quarter of workers who were paid less than minimum wage; (2) three quarters of those surveyed were not paid proper overtime; (3) 57% did not receive paystubs in violation of state laws requiring documentation of wages, rates of pay, and hours worked; and (4) workers in low-wage industries in the three cities of New York, Chicago and Los Angeles lose over $56 million per week in unpaid wages.[12]

This study's findings have been confirmed by dozens of other surveys and studies showing what can only be described as staggering rates of wage and hour violations. The United States Department of Labor (DOL) has found that 50% of restaurants in Pittsburgh, 74% of day care centers in Georgia, 50% of nursing homes in St. Louis, 38% of hotels and motels in Reno, and 42% of group homes in Seattle violated wage and hour laws.[13] A recent DOL survey of

---

[12] Annette Bernhardt, *et al., Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (New York: Center for Urban Economic Development at UIC, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009), available at *www.nelp.org/page/-brokenlaws/BrokenLawsReport2009pdf.*

[13] U.S. Department of Labor*, 1999-2000 Report on Low-Wage Initiatives,* (Washington, DC: Employment Standards Administration, Wage and Hour Division, 2001), available at, *http://nelp.3cdn.net/a5c00e8d7415a905dd_o4m6ikkkt.pdf.*

garment firms found violations in 89 percent of more than 1,600 cases in Southern California alone since 2009, leading to more than $15 million in recovered back wages for nearly 12,000 workers.[14] A survey of Current Population Survey data found that between 2005 and 2013, 16 percent of respondents were not paid properly in the last year, getting shorted about 26 percent of what they were owed.[15]

State wage theft studies in Iowa, North Carolina, Pennsylvania and New York are among myriad studies showing high rates in labor-intensive industries.[16] Sectors that are particularly prone to wage

---

[14] U.S. Department of Labor, Wage and Hour Division Press Release. 2014, "Workers Face Millions in Unpaid Wages in Southern California Garment Industry." Available at, http://www.dol.gov/whd/media/press/*whdpressVB3.asp?pressdoc=Western/20141106.xml.*

[15] Daniel Galvin, *Wage Theft, Public Policy, and the Politics of Workers' Rights,* Northwestern University Institute for Policy Research Working Paper (September 2015), available at: http://www.ipr.northwestern.edu/publications/papers/2015/ipr-wp-15-08.html.

[16] For a summary of these and other surveys and research from across the country, see NELP's Summary of Research on Wage and Hour Violations in the United States, available at: http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf. *See also,* Susan Miloser, Picking Pockets for Profit: Wage Theft and the Fair Labor Standards Act, Washington & Lee School of Law (2011), available at: http://www2.wlu.edu/documents/shepherd/academics/cap_11_miloser.pdf; Ruth Milkman, Ana Luz Gonzàlez & Peter Ikeler, *Wage and hour violations in urban labor markets: a comparison of Los Angeles, New York and Chicago,* 43 Indus. Rel. J. 378 (2012); Kimberly Bobo, WAGE THEFT IN AMERICA: WHY MILLIONS OF AMERICANS ARE NOT GETTING PAID AND WHAT WE CAN DO ABOUT IT xi, 41 (Revised and Updated ed., 2011).

theft include, construction[17]; nursing homes,[18] agriculture, garment[19], nail salons,[20] restaurants, and janitorial.[21]

Detail of wage theft in the meat industry is particularly apt for this case. A DOL's investigation of the poultry industry found that *100%* of the 51 processors it had previously investigated continued not to pay for hours worked, and 65% of the plants had misclassified

---

[17] New research published by the University of Massachusetts Amherst Labor Center shows that the illegal theft of workers' wages has reached an "epidemic" level in the residential construction industry in Massachusetts. *The Epidemic of Wage Theft in Residential Construction in Massachusetts*," Tom Juravich, Essie Ablavsky and Jake Williams (2015).

[18] In 2000, the DOL's Wage and Hour Division ('WHD") found that 60% of nursing homes and other personal care facilities failed to comply with minimum wage, overtime, and child labor laws. U.S. Dept. of Labor Wage and Hour Division, *Nursing Home 2000 Compliance Survey Fact Sheet*, available at http://www.dol.gov/esa/healthcare/surveys/printpage_nursing2000.htm.

[19] A DOL study of the Los Angeles garment industry found two-thirds of garment employers violated minimum wage or overtime laws, or both, in 2000. U.S. Dept. of Labor Wage and Hour Division News Release, *Only One-Third Of Southern California Garment Shops In Compliance With Federal Labor Laws*, (2000), available at http://www.dol.gov/esa/media/press/whd/sfwh112.htm.

[20] New employees were often required to pay a $100 deposit in order to work, trained for weeks without pay, and then paid as little as $30 per day for 12-hour days, six or seven days a week. Workers did not complain for fear of deportation, job loss, or abuse. Nir, Sarah Maslin,"The Price of Nice Nails." *The New York Times*, May 7, 2015.

[21] National Employment Law Project, *Winning Wage Justice: A Summary of Research on Wage and Hour Violations in the United States*, July 2013, available at: http://www.nelp.org/content/uploads/2015/03/WinningWageJusticeSummaryofResearchonWageTheft.pdf.

workers as exempt from FLSA.[22] A common practice was (as is at issue on this appeal) not paying employees for "donning and doffing" protective gear.[23]

B. Neither Agency Enforcement Nor Individual Claims are Adequate to Enforce Existing Wage and Hour Protections.

1. Federal and state DOLs cannot handle the magnitude of the problem alone.

Some assume that regulators alone can rectify wage theft. For instance, in the *Espenscheid* decision to which Petitioner cites, Judge Richard Posner passingly suggested that class counsel should have considered complaining to the DOL which, in a recent year, had recovered $225 million in back wages. 705 F.3d at 776.

But while it is true that employees can seek enforcement from federal or state departments of labor where available, these agencies are notoriously underfunded, and often do not provide the necessary relief.[24] Indeed, a 2009 GAO report investigating the

---

[22] *Id.*; *see generally*, Rafael Jimenez, *Blood, Sweat and Fears: Worker's Rights in U.S. Meat and Poultry Plants*, HUMAN RIGHTS WATCH (2004) available at: http://www.hrw.org/en/reports/2005/01/24/blood-sweat-and-fear (last visited May 7, 2011); Tom Fritzsche, *Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers*, Southern Poverty Law Center and Alabama Appleseed (2013).

[23] U.S. Dept. of Labor, *Poultry Processing Compliance Survey Fact Sheet*, Jan. 1, 2001, available at http://www.ufcw.org/your_industry/meatpacking_and_poultry/industry_news/dol_poultry. U.S. Department of La bor, *Report on Initiatives*, 21, 25 (2005).

[24] *See* Zach Schiller & Sarah DeCarlo, Policy Matters Ohio, *Investigating Wage Theft: A Survey of the States* (2010); Weil, David, and Amanda Pyles. 2005. "Why Complain?: Complaints,

Wage & Hour Division's enforcement capacity and efficacy concluded, "the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn."[25] Further, between 1997 and 2007, the number of DOL inspectors fell by 20 percent – from 942 to 732 – as the number of covered workplaces rose.[26] Even with 250 additional wage and hour investigatory staff since added, the probability that any given employer would be investigated by Wage and Hour Division was still only 0.5 in 2012.[27]

Compliance, and the Problem of Enforcement in the U.S. Workplace." *Comp. Lab. L. & Pol'y. J.*27:59.

[25] U.S. Government Accountability Office, *Department of Labor: Wage and Hour Division's Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft* (2009); *GAO's Undercover Investigation: Wage Theft of America's Vulnerable Workers: Hearings before the Committee on Education and Labor*, 111th Cong., 1st sess. (2009); GAO, *Better Use of Resources and Consistent Reporting Could Improve Compliance,* July 2008, available at: http://www.gao.gov/*new.items/d08962t.pdf*.

[26] Jessica Scheider, *To Better Protect Workers, We Need More Wage Inspectors and Stronger Enforcement*, Center for Effective Government, 2015; available at: http://www.foreffectivegov.org/blog/better-protect-workers-we-need-more-wage-inspectors-and-stronger-enforcement; Weil,*supra*, note 24. "Why Complain?: Complaints, Compliance, and the Problem of Enforcement in the Us Workplace." *Comp. Lab. L. & Pol'y. J.*27:59.

[27] Scheider, *supra,* note 26. State departments of labor have even less capacity. State investigators with any connection to wage and hour enforcement number less than 1,000 nationwide, and most of those are responsible for more than one workplace law. Five states lack a state wage and hour division of any kind, meaning that workers in those states can only seek recourse at the federal DOL. *See* Zach Schiller & Sarah DeCarlo, Policy Matters Ohio, *Investigating Wage Theft: A Survey of the States* (2010).

And, the $225 million figure Judge Posner cited is a literally drop in the bucket compared to actual losses. To cite one of the studies summarized above, a three-city study of workers in low-wage industries found that in any given week, the average loss per worker over the course of a year was $2,634 (out of total earnings of $17,616). This meant that workers in low-wage industries in New York, Chicago, and Los Angeles alone lost nearly $3 billion a year.[28] The total cost of wage theft to our economy or to the government (in lost tax revenues) is enormous.

2. Individual worker actions are an inadequate means to enforce the wage and hour laws.

Relying on individual private lawsuits to address wage and hour violations is also insufficient in light of the barriers workers face to pursuing individual claims. Employers in low-wage jobs can deprive their employees of individually small but cumulatively substantial wages. *See, e.g., IBP, Inc. v. Alvarez,* 546 U.S. 21 (2005) (12-14 minutes spent changing clothes and showering and few minutes spent walking between locker rooms and production area are compensable under federal law); *see also, e.g., Chase v. AIMCO Properties, L.P.,* 374 F. Supp. 2d 196, 198 (D.D.C. 2005) ("individual wage and hour claims might be too small in dollar terms to support a litigation effort"); *Scholtisek v. The Eldre Corp.,* 229 F.R.D. 381, 394 (W.D.N.Y. 2005) (class members are not likely to file individual suits because of the small size of their claims).

Compounding the small individual recovery problem is that, without the protection of aggregate lit-

---

[28] Bernhardt, *supra*, note 12.

igation, individual workers are less likely to come forward to start or join a suit to complain of improper pay or hours due to fear of retaliation.[29] *See Shahriar v. Smith & Wollensky Rest. Group*, 659 F.3d 234, 244 (2d Cir. 2011) ("an employee fearful of retaliation or of being 'blackballed' in his or her industry may choose not to assert his or her FLSA rights"). If the workers are immigrants, the barriers are even more daunting inasmuch as employers may try to intimidate or scare immigrant plaintiffs by seeking information regarding the plaintiff's immigration status. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2003) (granting a protective order barring discovery into plaintiff's immigration status because it could "chill the plaintiffs' willingness and ability to bring civil rights claims.").[30]

C. Many Workers Are Not Getting Paid Due To Improper Employer Recordkeeping.

Another obstacle for workers experiencing wage theft is – consistent with the Courts' concern in *Mt. Clemens* – the unwillingness of some employers to keep records of hours and pay. Section 11 of the FLSA requires employers to keep records of the hours worked by each employee, the amount of pay that each worker received for regular hours and overtime hours, and the basis upon which a worker's reg-

---

[29] Weil, *supra,* note 24 (studies suggest that, "despite explicit retaliation protections under various labor laws, being fired is widely perceived to be a consequence of exercising certain workplace rights.").

[30] Preserving the collective action mechanism is equally important to preserving plaintiffs' ability to bring collective actions under the Age Discrimination in Employment Act, which incorporates section 216(b) of the FLSA. 29 U.S.C. § 626(b); *see also Hoffman-La Roche, Inc.*, 493 U.S. at 167-68 (1989) (discussing collective actions under ADEA).

ular and any overtime hours are compensated. 29 U.S.C. § 211; *see also* 29 CFR 516.2. Thirty years ago, a GAO report found that employer non-compliance with the record keeping and other provisions of FLSA was "a serious and continuing problem" and that "many employers willfully violated the act."[31] Employer lack of recordkeeping was singled out, as were "willful" violations, defined as those of repeat offenders, or by employers who had already been investigated as Tyson was here.[32] As the studies discussed above demonstrate, the problem has not improved in the decades since.

Employers of low-wage workers in particular are significantly less likely to provide their employees with information about their hours and pay, compounding proof problems if wage theft occurs. Of the workers surveyed in the *Broken Laws* three-city

---

[31] David Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Workers Rights?* 20 Berkeley J. Emp. & Lab. L. 74, 106 (1999).

[32] As one commentator notes, the report showed:

> An initial DOL investigation should have been sufficient to clear up misunderstandings about the law. In samples of local and regional office cases, between 21 and 37% of offending employers had at least one prior violation. Furthermore, high percentages (ranging from 80 to 98% in the two samples) of the repeat violations involved the same provisions of the act…the GAO found that "record keeping violations are extensive." Compliance officers reported that 49% of cases closed in June 1979 that had monetary findings contained record-keeping violations.

Walsh, *supra*, at 106-07.

study, 38 percent did not receive pay documentation in the last pay period.[33]

Without records, workers cannot track wages or document violations. Not holding repeat offenders that refuse to keep records like Petitioner accountable rewards head-in-the-sand violations of this Country's wage and hour laws and deprives workers of the pay for which they worked.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

SETH R. LESSER
Counsel of Record
FRAN L. RUDICH
KLAFTER OLSEN & LESSER LLP
Two International Drive
Suite 350
Rye Brook, New York 10573
(914) 934-9200
(seth@klafterolsen.com)
Counsel for Amici Curiae

CATHERINE RUCKELSHAUS
NATIONAL EMPLOYMENT LAW PROJECT
75 Maiden Lane, Suite 601
New York, New York 10038
(212) 285-3025
(cruckelshaus@nelp.org)
Counsel for Amicus Curiae
National Employment Law Project

---

[33] National Employment Law Project, *Immigration Status and Pay Documentation Fact Sheet* (2013), available at: http://nelp.3cdn.net/7fa4b3cbfa64242b14_sim6ib20q.pdf.

DAN KOHRMAN
LAURIE A. MCDANN
DARA S. SMITH
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060
(dkohrman@aarp.org)
Counsel for Amicus Curiae AARP

JULIAN MEDRANO
INTERFAITH WORKER JUSTICE
1020 West Bryn Mawr Avenue
Chicago, Illinois 60660
(773) 728-8400
(jmedrano@iwj.org)
Counsel for Amicus Curiae
Interfaith Worker Justice

ROBERTA L. STEEL
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street
San Francisco, California 94104
(415) 296-7629
(rsteele@nelahq.org)
Counsel for Amicus Curiae
National Employment Lawyers Association