No. _____

In the
Supreme Court of the United States

FIVE STAR AUTOMATIC FIRE PROTECTION, L.L.C.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
MARTIN J. WALSH, SECRETARY OF LABOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In *Wal-Mart v. Dukes*, this Court rejected "Trial by Formula" in disapproving the use of representative testimony for certification of Rule 23 class actions under Title VII of the 1964 Civil Rights Act. In *Tyson Foods v. Bouaphakeo*, a "doffing and donning" wage and hour case, this Court **carved out an apparently limited exception to** *Wal-Mart v. Dukes* where the representative testimony was augmented by broadly applicable statistics, such that the experiences of a subset of employees were probative of the experiences of all of them. In this FLSA action, the Court of Appeals held an employer liable for overtime pay and liquidated damages to 53 employees based solely on the live testimony of only six, plus written DOL statements from two others, which collectively were not proven to be representative of the other 45. In light of *Dukes* and *Tyson Foods*, is this an important decision of a federal question in a way that conflicts with relevant decisions of this Court?

2. In the 1946 case of *Anderson v. Mt. Clemens Pottery*, when fixed work sites and punch-in time clocks facilitated precise timekeeping, this Court imposed on employers without precise records a harsh burden-shifting rule, effectively requiring them to pay triple time based on employees' self-serving estimates of unpaid overtime work hours. The modern workforce of shifting disparate work sites and schedules driven by variable work activities bears little resemblance to the mid-1940s. Should this Court abrogate or modify its 75-year-old

evidentiary rule for modern workplaces where time clocks may be impossible or infeasible?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

Five Star Automatic Fire Protection, LLC is a small, family-owned business. It has no parent company, nor is there any publicly held company which holds any of its stock.

STATEMENT OF RELATED PROCEEDINGS

1. *R. Alexander Acosta, Secretary of Labor, United States Department Labor v. Five Star Automatic Fire Protection, LLC*, No. EP-16-cv-00282-LS, U.S. District Court for the Western District of Texas. Final Judgment entered September 30, 2019.

2. *United States Department of Labor v. Five Star Automatic Fire Protection, LLC*, no. 19-51119, U.S. Court of Appeals for the Fifth Circuit. Opinion filed February 9, 2021.

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2. *United States Department of Labor v. Five Star Automatic Fire Protection, LLC*, no. 19-51119, U.S. Court of Appeals for the Fifth Circuit. Opinion filed February 9, 2021.

3. Timely motion for rehearing denied June 2, 2021.

BASIS FOR JURISDICTION

1. Date of the judgment sought to be reviewed: February 9, 2021.

2. Date of any order respecting rehearing: June 2, 2021.

3. Statutory basis of certiorari jurisdiction: 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

1. 29 U.S.C. § 207(a)(1):

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce

or in the production of goods for commerce, for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed."

2. 29 U.S.C. § 216(c) [excerpts]:

"The Secretary is authorized to supervise the payment of unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under Section 206 or Section 207 of this Title.

* * *

"The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation in an equal amount as liquidated damages.

* * *

"Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid on order of the Secretary of Labor directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts."

3. 29 C.F.R. § 516.2 [excerpts]:

"**Employees subject to minimum wage or minimum wage and overtime provisions pursuant to section 6 or sections 6 and 7(a) of the Act.**

> (a) *Items required.* Every employer shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom section 6 or both sections 6 and 7(a) of the Act apply:
>
> * * *
>
> (7) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of 7 consecutive workdays),
>
> (8) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation,
>
> (9) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under paragraph (a)(8) of this section,"

STATEMENT OF THE CASE

I. Facts material to consideration of the questions presented.

A. Five Star's Business Operations.

The Fifth Circuit's opinion is mostly correct about this subject:

> "Five Star Automatic Fire Protection, LLC is a fire sprinkler installation and service company based in El Paso. Luis Palacios and his wife, Veronica, run the company as President and Vice President, respectively. Five Star has five separate departments – this lawsuit implicates only the construction department. During the relevant timeframe, Five Star had 53 construction employees. Construction employees typically work in two-man crews with one foreman (sprinkler fitter) and one helper (laborer).
>
> "Most of the time, the crews work at client jobsites, not at Five Star's facility where pipe is cut and welded (the "shop"). But occasionally, the construction employees work in the shop or at Palacio's personal ranch. Most of the jobsites are close to Five Star's shop, but others are up to an hour away. Several jobsites are out of state and require crews to stay out of town during the workweek.
>
> "During typical day shifts at job sites, construction employees work from 7:30 am to 3:30 pm. The crews must first report to the shop

> and load the materials needed for the workday.[1] The crews then drive a company truck to the jobsite. When the day's work is completed, the crew drives back to the shop to drop off the company vehicle. The foreman usually drives the truck to and from the jobsite.
>
> "Five Star pays its construction employees by the hour. Employees must record their own time, by handwriting on the company timesheets how many hours they worked each day. Employees only include the total number of hours worked at a jobsite, the shop, or the ranch. So when an employee has worked at two or more locations in one day, he does not record his start and stop time for each location nor does he indicate the order in which he worked at those places."

App.2-3.[2]

B. "Representative Testimony" of Six Employees.

(1) Seth Palacio testified that he and everyone else scheduled to work had to arrive at 6:30 a.m., ROA.2680, and would be considered late if they arrived at 6:50 a.m. *Id*. The requirements were applicable to all employees, ROA.2681, six of whom he remembered by

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[1] DOL investigator Sandra Alba's declaration, ROA.2611-2614, plus attachments, says loading and unloading took place "on occasion." ROA.2612-2613.

[2] Near the end of the opinion, the Court noted the testifying employees said they "spent anywhere from 2.5% to 30% of their time on the night shift," and that night shift, shop, and ranch assignments would not have required getting to the shop early or leaving late. App.15.

name. ROA.2681-2682. He testified arrival time back at Five Star was between 3:45 and 4:00 p.m. ROA.2690. He did not testify about the return trips of any other employees.

(2) Dagoberto Gonzalez testified that he arrived at work between 6:30 and 6:45 a.m. ROA.2741. He named two employees who had been sent home after arriving several times between 6:45 and 6:50 a.m. ROA.2743. He testified he never got paid for the time spent driving back after 3:30 p.m., ROA.2750, but his only testimony was that "the closest place he worked was 10 minutes away." ROA.2752-2753. He did not testify about anyone's arrival time back at Five Star other than his own. His only specific testimony about required return time was "they would get mad at me if I arrived at 3:35 or 3:40." ROA.2783.

(3) Fernando Elias testified that his work schedule was from "6:40 to 4:15 depending on the area where we were in El Paso." ROA.2830. He and the other foremen told the helpers they had the same requirement. ROA.2835. Return time back to the Five Star shop was between 4:00 and 4:15 p.m. ROA.2840. He did not testify about anyone else's hours.

(4) Lorenzo Elias testified that he was told that his work day would begin at 6:30 a.m. and that he would leave the job site at 3:30 p.m. ROA.2882. He typically arrived at Five Star at 6:30 or a little earlier. *Id*. He arrived back at Five Star at about 4:00 p.m. ROA.2886-2887. He did not testify about anyone's hours other than his own.

(5) Jonathan Hernandez testified he "would go in at 6:30 and . . . leave after 4:00," ROA.2920, as required by supervisor Jorge Cobian. ROA.2921. He did not testify about anyone's hours other than his own.

(6) Jorge Hernandez testified that his workday began at 6:30 a.m., as ordered by Mr. Cobian. ROA.2957-2958. Arrival time back at Five Star was "after 3:30." ROA.2960. Then he testified that he left the project site at 3:30, *Id*., and arrived back at the shop about 4:00 p.m., give or take. ROA.2961. He did not testify about anyone's hours other than his own.

The Fifth Circuit summarized the testimony of the six employees as follows:

> "DOL called six former employees to testify. App.4.
>
> * * *
>
> "DOL acknowledges that employees perform work at different jobsites, but argues that all employees 'typically started and ended their work day at Five Star's premises and witnessed one another performing uncompensated work.
>
> * * *
>
> "For example, one former employee testified that no one instructed him to write down his time before 7 am, although he never asked about it.[3] Another stated that he just thought he would only be paid for 7 am to 3:30 pm. Others claimed

[3] The company's pre-employment Handbook specifically requires that "All Time Must be Recorded." ROA.3746.

> that Cobian specifically told them that they would only be paid for eight hours per day. Despite these slight variations, all of this testimony supports the inference that the employees believed they could not, or should not, record their pre- and post-shift time, and that the company failed to compensate for this time.
>
> * * *
>
> "But the employees who testified stated that they personally saw other employees completing similar pre- and **post**-shift work."[4]

App.9-10 (emphasis supplied).

C. Omitted Testimony About Employer's Instructions.

The most significant testimony about this vital subject is completely missing from the opinions of the courts below. In response to a question from the DOL attorney, former employee Jorge Hernandez testified that if he returned back to the yard after 4:00 p.m., Cobian's instruction was "If you recognize that you work that time then write it down." ROA.2963-2964. The DOL attorney then asked whether Cobian had told him "not to write the time down in the morning between 6:30 and 7:00 on [his] time sheet." He answered, "No, sir." ROA.2964. To clarify some earlier confusing testimony about the drive back in the afternoon, the Magistrate Judge asked, "Did you testify

4 The Fifth Circuit's opinion does not identify the source of this information. Counsel for Petitioner has been unable to find it anywhere in the record.

that Mr. Cobian told you that, if you wanted to, you could put the time down for your drive back from the work site to the shop? Did you testify that he said you could do that?" The witness answered, "Yes sir." ROA.2993.

In discussing the testimony of this important witness, both the Magistrate Judge and the Court of Appeals gave very brief summaries of testimony from DOL's six live witnesses, including testimony about their interactions with Mr. Cobian, but with no mention that at least one of them requested and received permission from Mr. Cobian to include return travel time in his time sheet. Cf. App.39-40 and App.8-9.

D. DOL's Key Witness: Its Own Investigator.

The witness upon whom the Court of Appeals relied most heavily was not anyone with first hand knowledge. It was the DOL investigator, Sandra Alba. The Court of Appeals led off with Alba's accusation against Five Star of withholding time sheets, App.13, a finding not made by the Magistrate Judge, but heavily emphasized by Ms. Alba in her trial testimony. ROA.3130-3131, 3133, 3139. She was undermined on cross examination by her lack of documentary evidence of ever having requested the records, ROA.3273-3274, and by Ms. Veronica Palacios' testimony Ms. Alba was shown the location of the documents but never requested access to them. ROA.3287-3288. The Secretary nevertheless included it in his brief to the

Fifth Circuit as if it were uncontested,[5] and the Court of Appeals accepted it.

Ms. Alba's testimony, almost all of it about calculations, takes up 185 pages of the record. ROA.3092-3276. Mr. Palacios' testimony about calculation of time covers 125 pages in the record. ROA.3362-3486. Post-trial, Ms. Alba and Mr. Palacios helpfully boiled their 310 pages of testimony and numerous exhibits down to 35 pages of affidavits and attachments. ROA.2611-2614 (Alba) and ROA.2552-2582 (Palacios). The Court of Appeals summarized the 35 pages of post-trial submissions in a single page of the Federal Reporter. 987 F.3d at 445, App.13-15.

E. Omitted Testimony About Calculation.

Alba's testimony was predicated on nine interviews with employees out of the 53-worker group. ROA.3183. She used the interviews to arrive at a global, general estimate of the time she believes was not paid to the crews. ROA.2612.

Alba's estimate cannot be harmonized with the real life variations in the workers' schedules and duties. For instance, Alba based her estimate on time spent each day loading materials, but the trial testimony was that the underground crew members who were part of the group of 53 workers represented by the Labor Department did no such loading in the morning. ROA.2883-2884. Another testifying witness, Seth Palacio, could not give a clear example of his pre-shift routine, as it sometimes took give minutes to load or no time at all. ROA.2687; ROA.2708.

[5] 5th Cir. Doc. 00515471132, p. 53, fn.15.

The trial testimony also established a variety in travel times by the crews. Seth Palacio testified he would sometimes skip reporting to the yard at the beginning of the day altogether. ROA.2857; ROA.2698. Employees who worked at the yard or the ranch did not have travel at the end of the day. ROA.2770-2771.

Alba conceded her estimate did not track the actual variable work hours and daily schedules of the employees. ROA.3217. The timesheets that were undisputed reflected that workers routinely worked less than a full workweek, yet Alba failed to give a credit due for those weeks. ROA.3211; ROA.3132. The timesheets of the testifying six employees showed they worked less than a full workweek 19.3 percent of the relevant work weeks, yet Alba made no adjustment for such weeks in her global estimate, which was accepted as the basis of the damage award by the Magistrate Judge. ROA.2562-2570.

It is an undeniable fact that the timesheets reflected credits or adjustments that establish less overtime was worked than Alba reported, and moreover, that Alba simply ignored these adjustments using a global *Mt. Clemens* style estimate. The timesheets showed some of the workers were on service assignments where they did not report to the yard in the morning or travel back at the end of the shift. ROA.2547. Alba did not adjust her estimate despite what Five Star's record said. The timesheets established that the workers could not have had overtime during the six weeks per year with holidays, yet Alba gave only a four-week adjustment for those weeks. ROA.3397. Alba failed to make adjustments for

similar undisputed entries on the timesheets, such as when employees worked four-day, ten-hour shifts, ROA.3329, ROA.3394, or night shifts when workers did not go to or from the yard. ROA.3200.

There was also no offset for occasions when employees exercised their option to report directly to the work site without going to the shop, despite uncontroverted testimony about the practice by Jorge Cobian, ROA.3332-3334, and Mr. Palacios, ROA.3382-3383. Neither Ms. Alba nor either of the lower courts acknowledged the testimony of Mr. Cobian about a "gang box"[6] for storing tools at the work sites, ROA.3313-3314, which rebutted the testimony of various employees about how they had to load tools every day. Alba also gave no discount for travel actually compensated by Five Star to distant locations such as Las Cruces (about 45 minutes each way) and Alamogordo (about 120 miles). ROA.3386-3387.

Alba's refusal to recognize the timesheets and instead rely on her *Mt. Clemens* global estimate resulted in a trial by mistaken approximation, and not fact. Jorge Hernandez' overtime calculation by Alba was for every week he worked, but he himself testified he spent 30 percent of his time on night shifts with none of the pre- and post-shift activities included in Alba's calculation. ROA.2562; ROA.2993. Similarly, Alba's calculation for Seth Palacio was for every week of work in the relevant period, yet his timesheets showed he worked night shifts frequently and had no pre- or post-shift uncompensated work on such shifts. ROA.2698. The same mistake was made for out-of-town

[6] Mistakenly called a "gain box" in the transcript.

assignments, where the workers had no yard to report to before or after a shift. ROA.3385. Attachment 3 of Mr. Palacios' affidavit on damages meticulously accounted for all of employee's work when they did not report in or return to the main office. These consisted of service days/weeks, night work, out-of-town work, sites within ten minutes of the office, and working at the shop or the ranch. ROA.2562-2570. Ms. Alba gave Five Star no credit for any of those days. ROA.2613-2614. The Magistrate Judge summarily rejected this evidence, saying only "Five Star's time sheets simply do not allow for the retrospective analysis its president proffers," App.35, and the Fifth Circuit did not mention it at all.

II. Basis for federal jurisdiction in federal court: 28 U.S.C. §§ 1331 (federal question) and 1445 (United States as plaintiff).

REASONS FOR GRANTING THE WRIT

First Issue: Inadequacy of Representative Testimony

Wal-Mart v. Dukes[7]

This was a nationwide Title VII sex discrimination action with about one and a half million plaintiffs. 564 U.S. at 342. Pay and promotions in Wal-Mart's 3,400 stores are mostly based on subjective managerial discretion with only limited corporate oversight. *Id.* 343. The three named plaintiffs and the class they wished to represent claimed that Wal-Mart knew its local managers were discriminating in favor of men but

[7] 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011).

failed to cabin their authority, resulting in disparate treatment. *Id*. 344-345.

Decentralization of pay and promotion discretionary authority was the only corporate policy the plaintiffs could identify. *Id*. 355. They could not identify a common mode of exercising discretion pervading the entire company. *Id*. 355-356. The Supreme Court held that representative testimony could not establish liability, *Id*. 359, or damages, *Id*. 367, because of the diversity of the class members' circumstances.

Tyson Foods, Inc. v. Bouaphakeo[8]

This was a "doffing and donning" FLSA case which arose at a single physical location in a pork processing plant. 136 S.Ct. at 1042. The workers prevailed with representative testimony supported by two scientific studies based on 744 videotaped observations of workers at the plant doffing and donning and afterwards averaging the time to estimate the amount due to each worker. 136 S.Ct. at 1043-1044.

In *Tyson Foods*, the Supreme Court majority went to considerable pains to distinguish *Wal-Mart v. Dukes*:

> "The underlying question of *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 upon depositions detailing the ways in which

[8] 577 U.S. 442, 136 S.Ct. 1036, 194 L.Ed.2d 124 (2016).

> other employees were discriminated against by their particular store managers.
>
> * * *
>
> "In contrast, the study here **could have been sufficient** to sustain a jury finding as to the hours worked it if 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 experience of a subset of employees **can** be probative of the experiences of all of them."

Tyson Foods, 136 S.Ct. at 1048 (emphasis supplied, citations and quotation marks omitted).

The five-justice majority opinion relied heavily on *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed.2d 1515 (1946):

> "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 variances 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.
>
> 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. 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 or just and reasonable inference. Under these circumstances, the 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."

136 S.Ct. at 1047 (citations and internal quotation marks omitted).

Justices Thomas and Alito dissented. They characterized the majority opinion as "devising an unsound special evidentiary rule for cases under the Fair Labor Standards Act." The dissenters went on to

criticize *Anderson v. Mt. Clemens Pottery Co.* for its "shaky foundations." 136 S.Ct. at 1057. They pointed to the almost complete legislative reversal of everything else in *Mt. Clemens* except burden shifting. *Id.*

They went on to point out that, from the beginning, burden shifting occurred only after proof of employer liability, which Tyson Foods hotly denied, *Id.* 1058, and which Five Star has also strenuously denied in this case. They continued:

> "The majority thus puts employers to an untenable choice. They must either track any time that might be the subject of an innovative lawsuit or they must defend class actions against representative evidence that unfairly homogenizes an individual issue. Either way, the majority's misinterpretation of *Mt. Clemens* will profoundly affect future FLSA-based class actions – which have already increased dramatically in recent years."

Id. 1059.

The Chief Justice wrote a guarded concurrence, emphasizing the importance of the expert opinion supporting the anecdotal evidence from a small minority of the class members. That said, he agreed with Justice Thomas that *Mt. Clemens Pottery* does not provide a "special relaxed rule authorizing plaintiffs to use otherwise inadequate representative evidence in FLSA-based cases."[9] He emphasized the rationale for

[9] Notwithstanding the misgivings of three Supreme Court Justices, the Court of Appeals characterized *Mt. Clemens* as "a lenient standard rooted in the view that an employer shouldn't benefit

his partial concurrence: "Dr. Mericle's study constituted sufficient proof from which the jury could find the amount and extent of [each individual respondent's] work as a matter of just and reasonable inference." *Id.* 1051. The Chief Justice was also troubled by the fact that the jury found the expert testimony not completely convincing, awarding the plaintiffs less than half of the expert's estimate. *Id.* 1052.

In this case, there was no dispute in the courts below that the six testifying witnesses worked assignments with significant variables in their daily schedules and duties, and that the variations applied to all 53 employees. The group of 53 workers in this case were working at different job sites, doing different types of work, using different equipment and supplies, and working different schedules. Due to the variations in the experiences of the group as a whole, *Tyson Foods*' cautionary language predominates over a rote application of *Mt. Clemens* to Five Star's operation. The testimony of six employees simply cannot support a "norm" or "pattern" applicable to the larger group.

Second Issue: Reconsider *Mt. Clemens*

The Court of Appeals in this case simply did not discuss the law or the facts in the manner they deserved. It mentioned *Tyson Foods* only to the extent that it supposedly reaffirmed *Mt. Clemens*. App.7. The Court of Appeals did not mention the critical distinction between *Tyson Foods* and this case, the expert testimony and the hundreds of videotapes

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from his failure to keep required payroll records, thereby making the best evidence of damages unavailable." App.2.

supporting it, nor the misgivings expressed about *Mt. Clemens Pottery* by three of the justices. It did not mention *Wal-Mart v. Dukes* at all.

Concerning the inability of construction industry employers to keep track of employee hours working a number of different schedules at varying job sites without time clocks, or any guidance whatsoever from DOL, the Court of Appeals said "that misses the point." App.7. That is precisely the point. The construction industry is in an untenable position, facing the unavailability of adequate timekeeping, the low evidentiary bar in collective actions, and the need to prove their innocence in opportunistic litigation.

Indeed, Justice Thomas' warning about increased wage and hour litigation seems prophetic. It is fatuous for the Labor Department to assume that men doing hard labor can carry their weekly time sheet and a pencil in a convenient pocket, whip it out, unfold it, write down a time, do that at unscheduled intervals all day long, and keep track of it for the entire week before turning in the grimy worn-out remnant to the payroll clerk. Even technological solutions to recording time depend on the workers accurately recording what they do out in the field.

Mr. Palacios swore in his post-trial affidavit that his method of having employees keep track of their time was exactly the same at all six of the fire protection companies where he had been employed before establishing Five Star. ROA.2553-2555. The construction industry is low hanging fruit, and if this case is any indication, the Labor Department intends to do some picking.

Both of the courts below and the Supreme Court majority in *Tyson Foods* all quote the familiar language of *Mt. Clemens*. It is notable, however, that the Fifth Circuit itself has tacitly, but substantially, parted company with *Mt. Clemens* in its Pattern Jury Charges:

> "The law requires an employer to keep records of how many hours its employees work and the amount they are paid. In this case, Plaintiff [name] claims that Defendant [name] failed to keep and maintain adequate records of [his/her] hours and pay. Plaintiff [name] also claims that Defendant [name]'s failure to keep and maintain adequate records has made it difficult for Plaintiff [name] to prove the exact amount of [his/her] claim.
>
> If you find that Defendant [name] failed to keep adequate time and pay records for Plaintiff [name] and that Plaintiff [name] performed work for which [he/she] should have been paid, Plaintiff [name] may recover a reasonable estimation of the amount of [his/her] damages. But to recover this amount, Plaintiff [name] must prove by a preponderance of the evidence a reasonable estimate of the amount and extent of the work for which [he/she] seeks pay."

Fifth Circuit Pattern Jury Charges, 11.24, p. 283.

The contrast between *Mt. Clemens* and what the Fifth Circuit requires judges to tell juries is striking, because it evens the scales which *Mt. Clemens* tilted against employers. No matter what time records an employer has, even a time clock, any employee can say

the employer suffered or permitted him to work off the clock. That automatically triggers the mechanical operation of *Mt. Clemens*, which does not provide any guidance about which party has the burden of proof and whose overall rhetorical tone strongly suggests it is the employer.

The opinion of the Fifth Circuit has numerous examples of this mindset:

(1) "It's a lenient standard rooted in the view that an employer shouldn't benefit from its failure to keep required payment records thereby making the best evidence of damages unavailable." App.2.[10]

(2) "Five Star's only rebuttal evidence [to DOL's version of the facts] was a summary charge based on the president's memory." *Id*.

(3) "But the employees who testified stated they personally saw other employees completed similar pre- and post-shift work." App.10. See discussion at pages 4-8 of this petition.

(4) "Finally, Five Star offers a string of arguments concerning the general efforts to correct time sheet errors and its openness to addressing employee concerns. But these general efforts do not undermine the specific testimony that employees worked per company instruction before and after their recorded hours." App.10-11.

[10] Cf. page 16, this petition.

(5) "Five Star didn't provide [Ms. Alba] with any time sheets until almost two years into the investigation." App.13. See discussion at pages 9-10 of this petition.

(6) The Court of Appeals reduced the testimony of six employee witnesses to a series of bullet points, without mentioning that one of them testified that Mr. Cobian practically invited him to write down his start and stop times on his time sheet. See discussion at pages 8-9 of this petition.

The Fifth Circuit's humane and reasonable pattern jury charge is like *McDonnell Douglas/Burdine* burden-shifting.[11] The employee makes his estimate, the employer rebuts it, the employee gets the last word and has the burden of proof. As applied by the courts below, however, *Mt. Clemens* is explicitly "a lenient standard" to prevent rewarding an employer for his misconduct.

The repeated instances where the lower courts fail to account for the employer's evidence certainly suggest both a "special relaxed rule" and "a lenient standard." Neither of the courts below even considered it necessary to account for testimony that the only time anyone questioned Mr. Cobian about the alleged overtime, he said to go ahead and put it down.

In similar fashion, the courts below dismissed Mr. Palacios' computation of damages, in which he had to

[11] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1980).

assume the correctness of the Magistrate Judge's liability finding in favor of the Secretary. After the court's initial order finding that Five Star had violated FLSA and allowing the parties to submit information concerning damages, Mr. Palacios painstakingly reconstructed his employees' hours from what additional records he had, ROA.2546-2582, at a time when he had no reason to believe that his records were inadequate. The Magistrate Judge and the Fifth Circuit rejected his entire work product, the Magistrate Judge because it relied "exclusively on his personal review of the handwritten time sheets." App.34.

To any neutral observer, Five Star and its founder/president Luis Palacios would seem to be unlikely targets of DOL attention. It is undisputed that, during the two-year period covered by this lawsuit, Mr. Palacios paid his employees a total of $497,864.14 in overtime compensation at the rate of time-and-a-half. *Cf.* ROA.2559 (Mr. Palacios' declaration) and ROA.2619 (USMJ award of damages).

By the simple expedient of computing overtime using the fluctuating workweek, he could have reduced that amount by two-thirds, $331,909.42. *See*, *e.g.*, *Black v. SettlePou, P.C.*, 732 F.3d 492, 496 (5th Cir. 2013). Neither the magistrate judge nor the Court of Appeals acknowledged Mr. Palacios' compelling reason for his voluntary generosity to his workers:

> "As a young man, after finishing my time with the United States Marine Corps, I was employed at Crown Leasing. At the time, without any real skills and only high school education, the employment available was labor intensive. My

> duties consisted of driving a delivery vehicle and delivering furniture. Although I was happy to have employment, it became apparent that through company policies and my dictated work schedule, I was being taken advantage of. The company had its entire workforce on a salary basis and computed overtime by the FWW method. They would in turn have us work so many hours that in my case my hourly rate was diminished to below $3.00 an hour.
>
> "Being naive and inexperienced about work rules, I didn't pursue any action. I did know that another employee had filed a complaint with DOL. I was contacted one day at work and was asked a few questions in a telephone interview. Once it was completed, I was asked to leave. I had been fired."

ROA.2559.

Furthermore, by forcing its employees to sign collective action waivers, Five Star could effectively indemnify itself against high dollar private actions. *See*, *e.g.*, *LogistiCare Solutions Inc. v. National Labor Relations Board*, 866 F.3d 715, 721-722 (5th Cir. 2017). Its employment handbook is part of the record and contains no such provision. ROA.3744-3755.

Since the main element of DOL's recovery is the estimated 30 minutes of end-of-the-day travel time, it is appropriate to point out that Five Star pays its employees for travel to and from distant locations such as Las Cruces and Alamogordo, even though the so-called Portal to Portal Pay Act permits an employer to

require employees to "commute" back and forth for many hours each day on their own time. *See*, *e.g.*, *Smith v. Aztec Well Servicing Company* 462 F.3d 1274, 1287-1288 n. 3 (10th Cir. 2006) (daily 7-hour "commute" was not compensable).

To the Secretary of Labor, an employer who pays overtime at the traditional rate of time-and-a-half is fair game, because that generosity enables the DOL to triple its recovery. This Court should take judicial notice of how the Wage and Hour Division touts the amounts of back wages it has collected as proof of its effectiveness. See https://www.dol.gov/agencies/whd/data. If the judgment in this case stands, the Secretary will collect about a quarter million dollars from Five Star instead of about $83,000.

Petitioner understands that this Court has no fact-finding power, but submits these facts as exemplary of why *Mt. Clemens* should be abrogated, or at least limited. The language this Court used in 1946 was harsh, judgmental, and tinged with Depression-era politics. It held, when the employer has inaccurate or inadequate time records, it must "produce evidence of the precise amount of work performed or evidence negating the reasonableness of the inferences drawn from the employees' evidence." *Anderson*, 320 U.S. at 687-688. In quoting that language, the Magistrate Judge even italicized the word "*precise*," implying the near impossibility of the shifted burden. App.37.

First, if the employer's records are inaccurate or inadequate, then they cannot be precise. Second, the right to "negate" evidence offered by the employee or the Secretary is not much help. According to BLACK'S

LAW DICTIONARY (10th ed. 2014), it means "to deny" or "to nullify; to render ineffective." This case shows how completely dismissive lower federal courts have become of employers' evidence.

The burden not only shifts from the employee to the employer, but *Anderson v. Mt. Clemens* is effectively transformed from a rule of evidence to a rule of law. If the Secretary puts on a few employees to say they worked off the clock and an investigator to give her opinion of what she thinks her investigation showed, then the Secretary wins in a smack-down. Nothing the employer says in its defense carries any weight.

When all the evidence is considered, such as in a jury trial, the results can be very different from what happened here. In *Tyson Foods*, a jury heard all of the evidence, including the impressive study of the plaintiffs' expert witness, armed with two scientific studies based on 774 videotaped observations of actual workers performing the doffing and donning at issue in the case. 136 S.Ct. at 1043-1044. The jury reduced the expert's estimates by more than half. *Id*. 1052. *Mt. Clemens*' hair trigger activation, unsatisfiable requirements of precision or negation, and silence about burden of proof make it inappropriate outside the historical context in which it was decided.

CONCLUSION

Wherefore, premises considered, Petitioner respectfully prays that the Court grant the petition, vacate the judgments below, and remand this action to the United States Court of Appeals for the Fifth Circuit which instructions to further remand it to the District

Court for a new trial in which the Department of Labor will have the burden of proof without the benefit of representative testimony and applying, instead of *Anderson v. Mt. Clemens Pottery*, the evidentiary principles embodied in the Fifth Circuit's Pattern Jury Instructions.

Respectfully submitted,

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