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 AMICI CURIAE PROFESSORS ALEXANDRA D. LAHAV & SACHIN S. PANDYA IN SUPPORT OF RESPONDENTS

SACHIN S. PANDYA
Counsel of Record
ALEXANDRA D. LAHAV
University of Connecticut
School Of Law
65 Elizabeth Street
Hartford, CT 06105
(860) 570-5169
sachin.pandya@uconn.edu

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INTEREST OF AMICI CURIAE[1]

The *amici* are law professors who teach and write about federal civil procedure or employment law, including Rule 23 class actions and the Fair Labor Standards Act, respectively. Alexandra D. Lahav is the Joel Barlow Professor of Law at the University of Connecticut. Sachin S. Pandya is Professor of Law at the University of Connecticut. We submit this brief to help this Court answer the second question presented in this case.

SUMMARY OF ARGUMENT

On the second question presented, Article III does not require the class representative in a Rule 23 class action to prove at the class certification stage that every class member will prevail on the merits of their legal claims. To argue otherwise, Tyson implicitly redefines the Article III "injury" here as a failure to receive wages *owed*, so that the presence of an Article III "injury" depends on claim merit. Article III jurisdiction, however, does not depend on whether the asserted legal claims have merit.

In class actions, because Rule 23 requires that the class representative's claims be typical of the absent class members' claims, so long as the class representative himself has Article III standing, the

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties' letters of consent to the filing of this brief are on file with the Clerk.

federal court has enough to be assured, at the time of class certification, that the absent class members also have a genuine case or controversy. Tyson's reading of Article III, by contrast, would transform class actions into a form of permissive joinder, despite Rule 23's own requirement that the class must be so numerous that joinder is impracticable. Such a view would undo the efficiency, fairness, and preclusive effect of Rule 23 class actions. Article III does not require these results.

Tyson also conflates Rule 23 class actions with Fair Labor Standards Act (FLSA) collective actions. Deciding whether an opt-in plaintiff can join a FLSA collective action resembles a less-stringent form of Rule 20(a) permissive joinder; there is no predominance requirement. Even if an opt-in FLSA plaintiff is ultimately unable to prove that the defendant owes her damages, she may still be "similarly situated" to an original plaintiff in that action.

ARGUMENT

I. Article III Does Not Require a Plaintiff to Prove the Merits of Every Rule 23 Class Member's Claim at the Class Certification Stage.

Tyson and its amici argue that to represent a Rule 23(b)(3) class, the named plaintiffs must prove, at the class certification stage, not only their own Article III standing, but also the Article III standing of every absent class member, as if each absent class member had filed his or her own separate lawsuit. Pet. Br. 21. In the alternative, Tyson argues that, before

class certification, the named plaintiffs must at least provide a "mechanism" to identify and exclude "the uninjured class members" before final judgment. *Id.* To argue that "constitutional and statutory standing" so require, *id.*, Tyson conflates Article III with claim merit by implicitly defining a class member's Article III "injury-in-fact" to *depend* on the merit of his claim that he was owed wages under the Iowa Wage Payment Collection Law (IWPCL).

In general, Article III jurisdiction does not depend on proving claim merit. For class actions, Rule 23 itself does not require independently proving each class member's Article III standing or claim merit as a condition of class certification. Article III standing doctrine does not require reading Rule 23 otherwise.

A. Article III judicial power over a lawsuit does not turn on claim merit.

Article III "judicial Power" over "Cases" or "Controversies," U.S. Const. art. III, § 2, does not depend on claim merit, because whether a lawsuit presents "a valid . . . cause of action does not implicate subject-matter jurisdiction, *i.e.,* the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998); *accord Lexmark Int'l v. Static Control Components*, 134 S. Ct. 1377, 1391 n. 6 (2014).

Indeed, individual private lawsuits claiming a defendant's failure to pay money owed have always been understood to be "Cases" or "Controversies," U.S. Const. art. III, § 2, "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co.*, 523

U.S. at 102, regardless of whether the plaintiff ultimately prevails. *See*, *e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242-44 (1937) (insurer's declaratory judgment action based on insured's failure to pay premiums owed under disability insurance policy); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (inventor suit against patent licensee for failure to pay royalties owed under patent licensing agreement).

If Article III judicial power over such lawsuits *did* depend on whether the plaintiff prevailed on the merits, then in the many federal lawsuits in which a plaintiff claimed but could not prove that a defendant illegally failed to pay him money owed for goods or services rendered, the federal court would have had to dismiss for lack of subject-matter jurisdiction, see *Steel Co.*, 523 U.S. at 94-95, and such dismissals may have no res judicata effect under existing law, see *Hughes v. United States*, 71 U.S. 232, 237 (1866); 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4436 (2d ed. 2002).[2] In fact, however, in such garden-variety private lawsuits, federal judges ordinarily enter an adverse judgment.

Here, Tyson tries to circumvent the rule that Article III jurisdiction does not depend on claim merit by defining the Article III "injury-in-fact" — the actual and concrete "invasion of a legally protected interest," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) — to depend on claim merit. To see how,

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[2] Issue preclusion may prevent plaintiffs from re-litigating Article III jurisdiction in a subsequent proceeding. *See* 18A Wright et al., *Federal Practice & Procedure* § 4436 (2d ed. 2002 & Supp. 2015).

consider an ordinary individual private lawsuit, filed in federal court, in which a plaintiff claims that a defendant illegally failed to pay him or her some amount of money owed—for example, wages for services rendered or payment for goods exchanged. If the defendant in fact failed to pay plaintiff that money, the suit plainly qualifies as an Article III case or controversy. If the plaintiff ultimately cannot show that the defendant owed him by law the amount that he failed to pay, the defendant might *colloquially* say that he had not "injured" the plaintiff at all. To say this, however, one has to redefine the "injury" from not receiving money to not receiving money *owed* by law, which is to redefine the "injury" to depend on the merits of the legal claim.[3]

Here, Tyson implicitly redefines the Article III "injury-in-fact" as not receiving wages *owed* under the IWPCL. This Court need not and should not erode the distinction between Article III jurisdiction and claim merits by requiring that plaintiffs who claim they were owed wages prove the merits of their claim as a condition of Article III standing. That would "confuse[ ] weakness on the merits with absence of Article III standing." *Davis v. United States*, 131 S. Ct. 2419, 2434, n. 10 (2011); *accord Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015); *see Warth v. Seldin*, 422 U.S. 490, 500

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[3] This is easy to see in a case of simple battery. Punch someone in the face, and the "injury" ("his bloody nose") can be defined separately from claim merit—the elements of battery—or defined to depend on claim merit (e.g., "his bloody nose if you punched him under circumstances that satisfy the elements of battery").

(1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

B. Article III does not require Rule 23 class certification to turn on the merits of the absent class members' claims.

Article III also does not require Rule 23 class certification to depend on the merits of class members' claims. Tyson's argument to the contrary ignores the purpose of Article III standing doctrine and the structure of Rule 23. Article III standing doctrine—including the requisite "injury-in-fact"—assures that parties have an actual, not "professed, stake in the outcome," and that judges will resolve the legal issues presented "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Massachusetts v E.P.A.*, 549 U.S. 497, 517 (2007) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and concurring in the judgment)).

Rule 23 provides a mechanism for achieving these goals. The Rule 23 class representative must himself have Article III standing, *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and must have claims that are "typical of the claims . . . of the class" as defined, Fed. R. Civ. P. 23(a)(3). If these requirements are met, a court has enough information to be assured at the class certification stage that the absent class members also have a similarly genuine controversy. *See Neale v. Volvo Cars of N. Am.*, 794 F.3d 353, 368 (3d Cir. 2015) ("a properly formulated Rule 23 class should not

raise standing issues," because Rule 23 "test[s]" whether class representative shares the interests or injuries of the class members).

If plaintiffs had to independently identify and prove each and every absent class member's Article III standing at the class certification stage, Rule 23 class certification would differ from Rule 20 permissive joinder in name only, even though class certification requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). In effect, the burden at the class certification stage would become the necessarily impractical burden of joining each class member. Imposing that impractical burden goes well beyond what is needed to assure that Rule 23 class-actions involve parties with real stakes in the outcome and to "confine[ ] the Judicial Branch to its proper, limited role," *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part and in the judgment).

More importantly, Article III certainly does not require reading Rule 23 to *also* demand merits adjudication of absent class members' claims at the class certification stage. To be sure, a party seeking class certification must show that it in fact satisfies Rule 23, and sometimes that requires deciding questions that are also relevant to the merits of the putative class's legal claims. *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). Rule 23, however, does not authorize "free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen, Inc. v. Connecticut*

Retirement Plans and Trust Funds, 133 S. Ct. 1184, 1195 (2013) (emphasis added). Article III's requirements are consistent with this procedure. No less than if a putative class member had filed suit individually, a court's Article III "*power* to adjudicate the case" does not turn on whether he or she has "a valid . . . cause of action." *Steel Co.*, 523 U.S. at 89.

The burden of proving the merit of each putative absent class member's claim at class certification is also impractical, because a judge must decide whether to certify a Rule 23 class at an "early practicable time." Fed. R. Civ. P. 23(c)(1)(A). That time usually occurs before traditional discovery and the crucible of trial produces a well-developed factual record. It is often impossible at that time to personally identify and determine the merits of each and every absent class member's claim.

Accordingly, such a burden of proof at the class certification stage would undo the efficiency and fairness gains of Rule 23(b)(3) class actions; "in effect the trial would precede the certification," *Kohen v. Pacific Investment Mgmt. Co.*, 571 F.3d 672, 676 (7th Cir. 2009), the exact reverse of the order required by the Federal Rules. To the contrary, Rule 23's operation depends on "judicial willingness to certify classes that have weak claims as well as strong ones." *Szabo v. Bridgeport Machines*, 249 F.3d 672, 677 (7th Cir. 2001) (Easterbrook, J).

Tyson's reading of Article III and Rule 23 would cause plaintiffs to be less likely to seek class certification for putative class members with meritorious claims, given the additional expense and

effort. Or, if plaintiffs pursue class certification all the same, district courts will expand the scope of so-called certification discovery to rival traditional discovery and the class-certification hearing will become, in substance if not in form, a bench trial on the merits. If so, plaintiffs seeking Rule 23 class certification would bear much of the costs but forego the procedural-fairness safeguards of a real bench or jury trial. Article III does not require these results.

Tyson's view of Article III and Rule 23 would also erode a key benefit of class actions: finality or global peace. In general, if a class is not certified, any putative absent class member may litigate his or her claim in a later lawsuit. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-80 (2011). Tyson's view implies that if some class members were later found not to be entitled to relief on the merits, or if plaintiffs lost on the merits, they would thereby lack Article III "injury-in-fact" (as Tyson has defined it). If so, the district court would be obliged to de-certify the class and dismiss the whole suit for lack of subject-matter jurisdiction, opening to the door to more suits. Only if a court found that all the class members were entitled to relief would the class action have preclusive effect.

What if some class members are not entitled to damages? That is not an Article III issue but one of trial management. *See generally* 3 William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 10:5 (5th ed. 2011 & Supp. 2015) (discussing trial plans). If a district court has certified a Rule 23 class, and *thereafter*, thanks to traditional discovery and trial practice, the parties discover evidence that warrants narrowing or refining the class, the district

court can "alter [ ] or amend[ ]" its certification order before final judgment. Fed. R. Civ. P. 23(c)(1)(C). *Cf. Kohen*, 571 F.3d at 679 (suggesting that defendant sample a random selection of class members to prove its claim that large numbers of them did not suffer from alleged violations of securities laws). If a defendant can show before final judgment that it actually does not owe any money to a subset of class members, then it may be more efficient for the court to craft a judgment order that specifies which class members have claims with merit, because that judgment then binds all class members.

C. The Rule 23 class here was properly certified even if some class members are later found not to be owed wages.

Once we set aside Tyson's Article III makeweight, the Rule 23 analysis here is unexceptional. The class members share this common question: whether "the donning and doffing and/or sanitizing of the [personal protective equipment] at issue constitutes 'work' for which plaintiffs are entitled to compensation," given Tyson's "company-wide compensation policy that is applied uniformly throughout [its] entire Storm Lake facility." Pet. App. 37a (District Court Order Denying Mot. For Decertification of Rule 23 Class at 6). The jury found that these activities are compensable work and this finding applies to all the class members regardless of the number of hours worked. This answer "resolve[d] an issue that is central to the validity of each one of the[ir] claims in one stroke." *Dukes*, 131 S. Ct. at 2545. Had Tyson prevailed on this common question, the case would have been over.

Further, this "common" issue "predominate[s]" under Rule 23(b)(3). If Tyson had properly made and kept records of the hours each employee spent donning and doffing and/or sanitizing protective equipment, as FLSA requires, 29 U.S.C. § 211(c), a court could have more easily resolved the individual issue—whether the class member worked enough compensable hours to be owed some back wages for overtime. The "common" issue, however, *still* predominates, because other types of evidence, and permissible inferences from that evidence, can substitute for the lack of record keeping. It is still less efficient to hear 3,000 individual cases for back pay than to answer the common question to all of those employees in a single case. That is why a class action is a "superior method to other available methods" of resolving such a dispute. Fed. R. Civ. P. 23(b)(3). Accordingly, this is an unexceptional case for class certification, which is analytically distinct from whether the district court here properly admitted certain kinds of evidence in the trial itself.[4]

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[4] For example, if Tyson had intentionally destroyed otherwise admissible records of hours worked, the parties may disagree whether a spoliation inference is proper, but that issue would not matter to whether the common question here predominates under Rule 23(b)(3).

II. A FLSA Collective Action's Opt-In Plaintiffs Can Be "Similarly Situated" Even if Some of Them Are Later Found Not To Be Owed Wages.

In appealing the district court's refusal to "decertify" the FLSA collective action, Tyson conflates FLSA collective actions and Rule 23(b)(3) class actions. Pet. Br. 26. This Court should not import into FLSA its interpretation of Rule 23(b)(3) (predominance), because a FLSA collective action "fundamentally differ[s]" from a Rule 23 class action. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2012).

FLSA provides that one or more employees may sue any employer for themselves and "in behalf of . . . other employees similarly situated." 29 U.S.C. § 216(b).[5] A "similarly situated" employee can "be a party plaintiff" in (opt into) such a FLSA action by filing a written consent with the court, *id.*, which has the "requisite procedural authority to manage the process of joining multiple parties" into the action, *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

FLSA section 216(b), as amended, precedes the present-day Rule 23 by many decades and is "not intended to be affected by Rule 23, as amended." Fed. R. Civ. P. 23, Advisory Committee's Note, reprinted in

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[5] *See also* 29 U.S.C. § 626(b) (incorporating 29 U.S.C. § 216(b) by reference into Age Discrimination in Employment Act); 29 U.S.C. § 206(d) (Equal Pay Act, which is enforceable by section 216(b) collective action).

39 F.R.D. 69, 104 (1966). Instead, FLSA section 216(b)'s opt-in provision provides for a kind of permissive joinder of plaintiffs, see *Hoffman-La Roche*, 493 U.S. at 171 (describing court's "managerial responsibility" under section 216(b) as "oversee[ing] the joinder of additional parties to assure that the task is accomplished in an efficient and proper way"); *id.* at 181 (Scalia, J., dissenting) (analogizing § 216(b) to Rule 20(a)(1) permissive joinder of plaintiffs), that is "less stringent" in its prerequisites than those for joinder of plaintiffs under Federal Rule of Civil Procedure 20(a)(1), see *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996).

Tyson's key mistake is to assume that opt-in plaintiffs are "similarly situated" to an original party plaintiff under section 216(b) only if those plaintiffs share questions of fact or law that are *dispositive* of the merits of each plaintiff's own FLSA claim. This is error, as it makes joinder under section 216(b) *more* stringent than permissive joinder under Rule 20(a). Rule 20(a) joinder of plaintiffs requires, among other things, just one common question of law or fact—literally "any" one will do, Fed. R. Civ. P. 20(a)(1)(B), even if answering that common question does not resolve all the plaintiffs' claims on the merits. Similarly, ruling a potential opt-in employee to be "similarly situated" under section 216(b) does *not* require ruling that such employee has proven liability. *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 262 (S.D.N.Y. 1997) (Sotomayor, J.). Thus, opt-in plaintiffs may be "similarly situated" yet not prevail on their claims.

This is why, in cases where some opt-in plaintiffs are later found not to be "similarly situated," a district court must not dismiss the entire collective action. *Cf.* Fed. R. Civ. P. 21 (misjoinder is not a ground for dismissal of the action). Rather, as with any erroneous joinder, the district court can sever the non-"similarly situated" plaintiffs' FLSA claims. Each severed claim would then receive its own docket number and proceed as if it had been filed separately. *Lee v. Cook County*, 635 F.3d 969, 971 (7th Cir. 2011). Or the court could sever the claims of "subgroups" of similarly situated plaintiffs to proceed separately as multiple FLSA collective actions. *Realite v. Ark Restaurants Corp.*, 7 F. Supp. 2d 303, 308 (S.D.N.Y. 1998) (Sotomayor, J.).

Tyson also errs by applying Rule 23(b)(3)'s predominance requirement to FLSA collective actions. Just as a common question for Rule 20 joinder need not predominate, see *Lee*, 635 F.3d at 971, most lower courts do not read Rule 23(b)(3)'s predominance requirement into FLSA section 216(b). Instead, they decide, provisionally at first and then finally, whether those who want to opt into the action, and have filed the requisite written consent, are "similarly situated" employees. *See*, *e.g.*, *Myers v. Hertz Corp.*, 624 F.3d 537, 554-555 (2d Cir. 2010); *Zavala v. Wal Mart Stores*, 691 F.3d 527, 536-38 (3d Cir. 2012); *O'Brien v. Ed Donnelly Enterprises*, 575 F.3d 567, 584-86 (6th Cir. 2009); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001); *Morgan v. Family Dollar Stores*, 551 F.3d 1233, 1260-62 (11th Cir. 2008). Although some courts use the phrase "conditional certification" when they provisionally decide this issue, this "is not tantamount to class

certification under Rule 23." *Symczyk*, 133 S. Ct. at 1529.[6]

Here, the plaintiffs were "similarly situated" with respect to "whether donning and doffing hard hats, work boots, hair nets, frocks, aprons, gloves, whites, and ear plugs are 'work' within the meaning of the FLSA." J.A. 475 (Jury Instruction No. 5). FLSA does not require this issue to "predominate" over all the other issues in each opt-in plaintiff's FLSA claim, let alone be dispositive of their claims, for a FLSA collective action to proceed.

Finally, just as the issue of whether plaintiffs were properly joined under Rule 20(a) precedes the question of how a court should address the individual issues in the joined cases, whether opt-in plaintiffs are indeed "similarly situated" employees precedes, and should not be confused with, the question of how the court should thereafter resolve, for those "similarly situated" opt-in plaintiffs, the individual issues that remain, if any, for their FLSA claims, see, e.g., *Wright v. U.S. Rubber Co.*, 69 F. Supp. 621, 623 (S.D. Iowa 1946) (ordering separate trials on remaining individual issues).

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[6] *But see Espenscheid v. DirectSat USA*, 705 F.3d 770 (7th Cir. 2013). The court there just ignored *Symczyk*, 133 S. Ct. at 1529. Instead, it treated a FLSA collective action and a set of Rule 23(b)(3) classes "as if it were a single class action," largely because "there isn't a good reason" for Congress' different standards for certifying Rule 23(b)(3) (opt-out) class actions and (opt-in) FLSA collective actions; "[s]implification is desirable in law"; and Rule 23 promotes efficiency, which makes it "relevant" for collective actions too. *Espenscheid*, 705 F.3d at 772.

CONCLUSION

This Court should conclude that the district court properly applied Rule 23 and FLSA section 216(b) in this case.

Respectfully submitted,

SACHIN S. PANDYA
Counsel of Record
ALEXANDRA D. LAHAV
University of Connecticut
School Of Law
65 Elizabeth Street
Hartford, CT 06105
(860) 570-5169
sachin.pandya@uconn.edu

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