SC98252

IN THE SUPREME COURT OF MISSOURI

THOMAS HOOTSELLE, JR., *et al.*,

Respondents,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce

APPELLANT'S SUBSTITUTE BRIEF

ERIC S. SCHMITT
Attorney General

D. John Sauer, Mo. Bar No. 58721
Solicitor General
Julie Marie Blake, Mo. Bar No. 69643
Peter T. Reed, Mo. Bar No. 70756
Deputy Solicitors General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
Phone: 573-751-8870
John.Sauer@ago.mo.gov
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

This case is a wage-and-hour class action brought by Plaintiffs-Respondents Thomas Hootselle, *et al.* ("Plaintiffs") against the Missouri Department of Corrections ("MDOC" or "State"). The Circuit Court of Cole County entered its final Amended Judgment on September 14, 2018, D535, and denied the State's authorized post-trial motions on October 19, 2018, D543. The State filed a timely notice of appeal to the Court of Appeals for the Western District on October 28, 2018. D544. The Court of Appeals issued its opinion on October 8, 2019. *See* Slip Opinion in No. WD82229 (Oct. 8, 2019) ("Slip Op."). The State filed a timely motion for rehearing or transfer in the Court of Appeals on October 22, 2019, which was denied on November 26, 2019. The State filed a timely motion for transfer in this Court on December 10, 2019, and this Court granted transfer on February 4, 2020. This Court has jurisdiction under Article V, § 10 of the Missouri Constitution.

INTRODUCTION

This case involves a judgment imposing enormous liability on Missouri's taxpayers without legal justification. Representing a class of corrections officers in Missouri prisons, Plaintiffs obtained a judgment of $113 million plus post-judgment interest against the Missouri Department of Corrections. Plaintiffs alleged that MDOC failed to pay compensation under the Fair Labor Standards Act ("FLSA") for pre-shift and post-shift activities such as checking into the facility, passing through security, collecting equipment, walking to job posts, receiving assignments, and waiting in line to do so. This judgment should be reversed for several reasons.

First, Plaintiffs' pre-shift and post-shift activities are quintessential "preliminary" and "postliminary" activities that are excluded from FLSA coverage by the Portal-to-Portal Act, 29 U.S.C. § 254(a)(2). The Act's whole purpose was to clarify that such ingress and egress activities are not compensable. Many cases reject Plaintiffs' argument that requiring security officers to respond to occasional emergencies transforms their non-compensable time into compensable time.

Second, Plaintiffs had no private cause of action against a state agency arising under the FLSA. *Alden v. Maine*, 527 U.S. 706, 712 (1999). To evade this barrier, they re-cast their FLSA claims as breach-of-contract claims, based on contractual provisions reciting that MDOC would comply with the FLSA. Because Plaintiffs lacked a cause of action under the FLSA, they could not assert identical claims under

a breach-of-contract theory. Many cases have rejected similar attempts to manufacture a cause of action by re-casting statutory claims as contract claims.

Third, the trial court abused its discretion and committed prejudicial error by excluding the State's well-qualified rebuttal experts from testifying to refute the damages analysis of Plaintiffs' dubiously qualified expert, Dr. Rogers. The State's experts, Dr. Hanvey and Ms. Arnold, had extensive experience in empirical analysis for wage-and-hour cases, while Dr. Rogers had none. Dr. Hanvey's offer of proof at trial demonstrated eleven critical deficiencies in Rogers' methodology that devastated Rogers' analysis. Yet the trial court permitted only Rogers to testify at trial, unrebutted by the State's experts, and the jury accepted Rogers' "massively overestimated" damages calculation of $113 million.

Fourth, the trial court erred by refusing to de-certify the plaintiff class after the close of discovery. Individual issues predominated because different officials at different facilities performed different pre-shift and post-shift activities for different amounts of time each day over different periods. The circuit court held that common questions of questions of liability predominated over individualized damages issues, but it then granted summary judgment on liability and held a damages-only trial.

This Court should reverse the judgment against MDOC.

STATEMENT OF FACTS

A. The Pre-Shift and Post-Shift Activities.

The principal duties of MDOC's corrections officers ("CO-1s" and "CO-2s") are "supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." D433, at 1, ¶ 2. These duties are performed during the officer's job shift, which usually lasts eight hours. The "job shift of a C.O.-1 and of a C.O.-2 generally begins at the time that the officer arrives at his or her assigned job post within the correctional center and generally ends when the officer is relieved from duty and departs from that job post." D448, at 4, ¶ 11.

Corrections officers frequently—though not always—engage in pre-shift and post-shift activities at the facility before and after their job shift. These activities vary widely from facility to facility and vary widely among jobs within particular facilities. In its Amended Judgment, the circuit court provided a general characterization of the pre-shift and post-shift activities that it deemed compensable under the Fair Labor Standards Act: (1) electronically or manually logging the officers' arrival at and departure from the facility; (2) reporting to a Central Observation Post to receive assignments; (3) passing through security gates, including a metal detector upon arrival and an airlock when entering and leaving; (4) presenting themselves to a supervisor and obtaining a daily post or duty assignment; (5) "picking up or returning equipment such as keys and radios"; (6)

"walking to and from the entry/egress points to duty post and possibly waiting in line if one has formed for any of the above activities"; (7) "in the case of vehicle patrol officers, inventorying the vehicle patrol's issued weapons, ammunition, and equipment," and (8) "[p]assing pertinent information from one shift to another." Appellant's Substitute Appendix ("Sub. App.") A17-A18; D535, at 5-6.

"The MDOC generally does not pay C.O.-1s or C.O.-2s for time that occurs before a shift begins or after a shift ends." D448, at 4, ¶ 16. Typically, "[d]uring no portion of such Pre-Shift Time are C.O.-1s or C.O.-2s required to supervise, guard, or escort any inmates," *id.*, at 5, ¶ 18, so they are not engaged in their principal activities of "supervising, guarding, escorting and disciplining offenders." D433, at 1, ¶ 2. Rather, pre-shift and post-shift activities "create for [MDOC] a safe and secure facility where we properly identif[y] staff and we properly equip them." D435, at 11 (158:8-23). These activities are "not part and parcel or directly related to offender supervision or reform or rehabilitation." *Id.* In fact, these activities "are pretty far removed from the actual responsibilities of a corrections officer . . . . For instance, we don't employ these corrections officers to pick up keys or carry radios or go through our security gate." *Id.* at 12 (159:8-18). The pre-shift time "primarily benefits the corrections officers themselves, insofar as this time is expended to help ensure that officers and other staff safely arrive at and are able to perform the job duties for which they have been hired." D433, at 2, ¶ 10.

MDOC recognizes a limited exception to this policy for emergency situations. Corrections officers are expected to respond to emergencies such as inmate fights or assaults on staff if they arise during pre-shift and post-shift time. "In some instances, before arriving for the start of his or her shift at an assigned post or after ending his or her shift at that post, [an officer] may respond to an incident involving a disturbance or altercation between inmates." D448, at 5, ¶ 19. Understandably, officers are expected to remain alert and respond to such emergencies if they occur, even during pre-shift and post-shift time. *See* D397, at 17 (103:17-104:7) (officers must answer a "duress call" or "respond to [an] emergency" such as "a fight or some type of duress activity" if one arises during pre-shift time); D405, at 5-6 (78:16-23) (officers "would be expected to respond" to assist an injured guard or inmate if that occurred during pre-shift time); D398, at 11 (52:5-53:19) (officers are "expected to respond" to "incidents and attacks" if they arise on pre-shift time). "In such instances, the [officer] who so responded is entitled upon application to be paid overtime compensation for the pre-shift time spent in responding to such incident." D448, at 5, ¶ 19. Such emergency situations are "unusual," however. D435, at 7 (105:2-14); D397, at 17 (103:17-104:2). During the "typical" shift, no emergency arises during pre-shift or post-shift activities. D435, at 7 (105:2-14).

B. MDOC's Labor Agreements and Procedure Manual.

In 2007 and 2014, MDOC executed two Labor Agreements with the Missouri Corrections Officers' Association ("MOCOA"). Both Labor Agreements contained generic recitals that MDOC would comply with the Fair Labor Standards Act and § 105.935, RSMo, regarding the accrual and payment of overtime. *See* D426, at 18 (2014 Labor Agreement, § 12.2) ("The Employer will comply with the Fair Labor Standards Act (FLSA), RSMo 105.935 and 1 CSR 20-5[1] regarding the accrual and payment of overtime."); D427, at 16 (2007 Labor Agreement, § 11.2) (same). Other than the agreement to comply with the FLSA, there is no specific language in the Labor Agreements addressing compensation for pre-shift or post-shift activities.

When both Labor Agreements were negotiated, MOCOA was fully aware of MDOC's policy on payment for pre-shift and post-shift activities. MOCOA had been on notice of MDOC's policy regarding payment for pre-shift and post-shift activities since 2005. D429, at 2 (16:7-11) (Gary Gross, head of MOCOA, testifying that he had been aware of this policy since "[p]robably around 2005").

[1] Section 105.935 and related regulations govern some overtime-related issues, such as state holidays and compensatory leave. *See* § 105.935, RSMo; 1 CSR 20-5.010. But these provisions do not address overtime compensation for pre-shift and post-shift activities, so the FLSA is the only legal provision cited in the Labor Agreements that applies those activities.

MDOC has also promulgated a Procedure Manual, which contains a similar generic recital that MDOC will comply with FLSA. D428, at 1, § I (stating that "the purpose of this procedure [manual] is to ensure departmental compliance with federal Fair Labor Standards Act rules and state merits guidelines"); *id.* at 5, § III.A.12.a (stating that MDOC will pay overtime compensation for "hours physically worked"). As with the Labor Agreements, there is no specific language in the Procedure Manual addressing pre-shift of post-shift activities other than the statement that MDOC will comply with the FLSA. *Id.* Under both the Labor Agreements and the Procedure Manual, when it comes to pre-shift and post-shift activities, FLSA standards provide the sole guidance for what constitutes compensable overtime or "hours physically worked." *Id.*

C. The Trial Court Granted Partial Summary Judgment on Plaintiffs' Breach-of-Contract Claims and Refused to De-Certify the Class.

Plaintiffs filed suit against MDOC, alleging that MDOC failed to pay overtime compensation for corrections officers' pre-shift and post-shift activities, and seeking class treatment. *See* D208 (Second Amended Petition). Count II of the Second Amended Petition alleged claims arising directly under the FLSA. D208, at 16-18. Counts III and VI of the Second Amended Petition alleged breach of contract. D208, at 18-20, 22-24. Count III claimed that MDOC had breached an agreement reflected in MDOC's manuals to "compl[y] with all applicable provisions of the Fair

Labor Standards Act (FLSA)" and to pay overtime for "hours physically worked." D208, at 18. Plaintiffs alleged that "DOC breached this contact by failing to pay for pre- and post-shift activities performed by Plaintiffs." D208, at 19. Count VI alleged that the same conduct had breached the 2007 and 2014 Labor Agreements negotiated by MOCOA on Plaintiffs' behalf. D208, at 22-24. Count VI alleged that MDOC had breached the recital in both Labor Agreements that "[t]he employer will comply with the Fair Labor Standards Act (FLSA) . . . regarding the accrual and payment of overtime." D208, at 23.

On February 9, 2018, at the conclusion of discovery, MDOC moved to de-certify the plaintiff class of corrections officers that the trial court had certified in 2015. D220, at 1. The trial court held a hearing on the motion for class decertification on March 14, 2018, and denied the motion on May 4, 2018. Sub. App. A6-A9, D549; D325. In its order denying class decertification, the trial court held that common issues would predominate over individualized issues at trial, but the trial court identified only liability-related common issues and identified no damages-related common issues in its order. D325, at 2-3.

The trial court then granted partial summary judgment to Plaintiffs on liability issues shortly before trial, limiting the trial to damages issues only. On June 15, 2018, Plaintiffs moved for partial summary judgment on the question of liability on their only remaining claims, the breach-of-contract claims. D393, D419, D420.

MDOC opposed the motion for summary judgment, arguing *inter alia* that Plaintiffs' pre-shift and post-shift activities are not compensable under the Portal-to-Portal Act, and that Plaintiffs lacked a private cause of action to pursue breach-of-contract claims against MDOC. D424, D452. The trial court granted partial summary judgment for Plaintiffs on the question of liability under Plaintiffs' breach-of-contract claims, holding that the pre-shift and post-shift activities are compensable as a matter of law. Sub. App. A12; D493, at 2. The court's summary-judgment order held: "The pre-shift and post-shift activities performed by Class Plaintiffs are compensable work under the contract requiring compensation for time class members 'physically work,' and compliance with the Fair Labor Standards Act …." Sub. App. A12; D493, at 2.

D. The Trial Court Excluded Testimony from MDOC's Damages Experts.

On December 19, 2017, Plaintiffs produced the final report of their damages expert, Dr. William Rogers. D295. Rogers was qualified in economic calculations, but he had never served as an expert in a wage-and-hour case or a class-action case, and he had no specific expertise in wage-and-hour disputes. D297, at 3-5 (13:21-15:7). To estimate class damages, Rogers performed an aggregate analysis that assumed that the entire time between an officer's moment of entry into the "security envelope," to the moment of departure from the facility, constituted compensable

work. *See* D295, at 3, n.3, 5-7. Rogers then added five minutes of compensable time to each shift, to account for anecdotal reports that some officers performed pre-shift and post-shift activities outside the security envelope not reflected in the entry and exit logs. *Id.* at 7-8.

Rogers did not conduct any empirical investigation of his own. *See id.* at 3, 5; Tr. 687, 831-32, 892. He never talked to any class member or visited any MDOC facility. *Id.* Instead, he relied exclusively on "testimonial and security evidence collected by class counsel from various sources, including Department of Corrections documents, the testimony of Department of Corrections witnesses, the testimony of class members and reports from federal labor investigations." D295, at 3. MDOC requires everyone to sign in and sign out as soon as they arrive at or leave the facility as a critical safety measure. *See id.* at 3 n.3. These entry and exit logs of "time in the security envelope" provided the basis for Rogers' calculation of unpaid hours worked in his assessment of the class's damages. *Id.* at 5, 6.

After receiving Dr. Rogers' final report in December 2017, the State disclosed Dr. Chester Hanvey and Ms. Elizabeth Arnold as rebuttal experts. Tr. 80, 97. Unlike Rogers, both Hanvey and Arnold have specific expertise in wage-and-hour disputes. Hanvey has served as a consulting expert on about 100 occasions, and a testifying expert on about 10 occasions, addressing wage-and-hour and employment discrimination issues. D285, at 1; Tr. 77. Arnold has over 16 years' experience as

an expert in wage-and-hour compliance and has conducted over 150 job analyses on employment law compliance. D284, at 1.

Like Rogers, Hanvey and Arnold reviewed certain case documents—such as "deposition testimony," "standard operating procedures," and "job descriptions"—to prepare their analysis. Tr. 83. But unlike Rogers, Hanvey and Arnold also conducted an empirical analysis to test the reliability of Rogers' assumptions and methodology. Hanvey and Arnold visited ten of MDOC's 21 facilities. D286, at 7-8. At each facility, they conducted a three-pronged inquiry: (1) "structured interviews with subject matter experts" at each facility, Tr. 80; (2) "time-and-motion observations" of pre- and post-shift activities, Tr. 81; and (3) distance measurements of the physical layouts of the facilities, *id.*

All three methodologies are well-established in the field of wage-and-hour analysis. Structured interviews are "an extremely common practice for collecting organizational data." Tr. 82. Time-and-motion observations and distance measurements are "based on a time and motion methodology that's been used for over a hundred years." Tr. 82; *see also* D293, at 11 (68:10-21); D278, at 3-5, ¶¶ 7-10; D286, at 4-6, ¶¶ 8-12. Hanvey and Arnold have extensive experience using these methods. D278, at 8, ¶ 15.

Hanvey and Arnold concluded that "the underlying data upon which the conclusions in [Rogers'] report are based are not a valid measure of compensable

time," and "there's a substantial degree of variability between class members." Tr. 80. Among other things, their analysis discovered significant variation in pre-shift and post-shift activities both among facilities and within facilities—variability that Rogers' analysis disregarded. D278, at 11-16, ¶¶ 20-27. Their study also revealed significant amounts of pre-shift and post-shift time spent on non-compensable personal activities, such as "congregating near the airlock" for significant periods, talking to co-workers, "working out in the gym or using computers for personal purposes," and "arriv[ing] 30 minutes early for their shift with a pizza." *Id.* at 13-19, ¶¶ 22, 32. "[S]everal facilities have weight rooms for employees" inside the security envelope, and "[m]ost facilities also have an assembly room that COs can use for a variety of personal activities such as eating, relaxing or talking with co-workers." *Id.* at 18-19, ¶ 32. They also found that moving from the entry to the post ranged from zero to almost eight minutes of walking time. *Id.* at 16-18, ¶¶ 28-31. Their study undermined Rogers' methodology and his assumption that "*all* time spent by *all* employees within the security envelope is compensable." *Id.* at 19, ¶ 33.

Plaintiffs moved to strike the testimony of Hanvey and Arnold on the ground that their testimony supposedly failed to satisfy the requirements of § 490.065.2, RSMo. D271; Tr. 76-90. The circuit court granted Plaintiffs' motion to strike in a one-line order. Sub. App. A10; D329.

E. The Trial Court Entered Judgment in Favor of Plaintiffs After a One-Sided Jury Trial at Which Only Plaintiffs Were Permitted to Present Expert Evidence.

The trial court then held a one-sided jury trial on the question of damages alone, at which only Plaintiffs were allowed to present expert testimony. During trial, outside the jury's presence, the State presented an offer of proof from its expert, Dr. Hanvey, that identified eleven critical deficiencies in the damages calculations of Plaintiffs' expert, Dr. Rogers. Tr. 1802-80. At the conclusion of the offer of proof, the trial court renewed its ruling excluding Dr. Hanvey from testifying. Tr. 1880. At the conclusion of the jury trial on damages, the circuit court entered an Amended Judgment in favor of Plaintiffs, awarding damages in the amount of $113,714,632.00, plus post-judgment interest at 9 percent. Sub. App. A14; D535, at 2. The amount of damages awarded by the jury was the amount calculated by Plaintiffs' expert, Dr. Rogers, who was the sole expert witness to testify at trial. Tr. 821. The judgment also ordered MDOC, for the indefinite future, to pay overtime compensation for pre-shift and post-shift activities. Sub. App. A17-A18, D535, at 5-6. The judgment ordered MDOC to implement a new department-wide time-keeping system to track pre-shift and post-shift activities. Sub. App. A18, D535, at 6.

POINTS RELIED ON

I. The trial court erred in granting summary judgment in favor of Plaintiffs on their breach-of-contract claims, because the class members' pre-shift and post-shift activities are not compensable under the federal Fair Labor Standards Act as amended by the Portal-to-Portal Act or under state laws or contracts that incorporate FLSA standards, in that these activities constitute "preliminary" and "postliminary" activities, and the time spent on them is *de minimis*.

- 29 U.S.C. § 254(a)
- *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014)
- *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007)
- *Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015)

II. The trial court erred in denying Defendant's motion for summary judgment on Plaintiffs' breach-of-contract claims, because the pre-shift and post-shift activities are not compensable, in that they constitute "preliminary" and "postliminary" activities under the Portal-to-Portal Act, and the time spent on them is *de minimis*.

- 29 U.S.C § 254(a)

III. The trial court erred in granting summary judgment to Plaintiffs and denying summary judgment to the State on Plaintiffs' breach-of-

contract claims, because those claims were based on statutes and regulations that do not create a private cause of action enforceable in contract, in that a private plaintiff cannot pursue a statutory or regulatory claim against the State under the guise of a breach-of-contract claim when neither the statutes nor the regulations create a private cause of action against the State.

- *Astra USA, Inc. v. Santa Clara County, California*, 563 U.S. 110 (2011)
- *Alden v. Maine*, 527 U.S. 706, 712 (1999)
- *Allen v. Fauver*, 768 A.2d 1055 (N.J. 2001)
- *Norris v. Missouri Dep't of Corr.*, No. 4:13-CV-392-JAR, 2014 WL 1056906 (E.D. Mo. Mar. 19, 2014)

IV. The trial court erred and abused its discretion in excluding the testimony of the State's rebuttal experts on damages, because their testimony satisfied the requirements for admissibility of expert evidence under § 490.065, RSMo, in that they were qualified to offer expert testimony, their testimony was based on sufficient facts and data, their opinions were supported by reliable principles and methods that were reliably applied to the facts of the case, their

testimony was helpful to the trier of fact, and the exclusion of their testimony unfairly prejudiced the State.

- § 490.065.2, RSMo
- *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299 (Mo. banc 2011)

V. The trial court erred and abused its discretion under Rule 52.08 in refusing to de-certify the class, because individual questions predominated over common questions and a class action was not the superior method of adjudication, in that different officers at different facilities performed different pre-shift and post-shift activities for different amounts of time each day and for different lengths of employment, and the class members' issues of liability and damages were not susceptible to common proof or defenses.

- Mo. Sup. Ct. R. 52.08(b)(3)
- *Ogg v. Mediacom, LLC*, 382 S.W.3d 108 (Mo. App. W.D. 2012)
- *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)

VI. The trial court erred in entering a declaratory judgment on Count VII, because there was no legal basis for a declaratory judgment, in that MDOC has no duty to track non-compensable time, the damages verdict provided an adequate remedy, the relief went beyond the

enforceability and requirements of a contract, the declaratory judgment is based on a contract that is no longer valid, and the declaratory judgment orders the expenditure of funds without an appropriation.

- *Cincinnati Cas. Co. v. GFS Balloons*, 168 S.W.3d 523 (Mo. App. E.D. 2005)

ARGUMENT

I. The trial court erred in granting summary judgment in favor of Plaintiffs on their breach-of-contract claims, because the class members' pre-shift and post-shift activities are not compensable under the federal Fair Labor Standards Act as amended by the Portal-to-Portal Act or under state laws or contracts that incorporate FLSA standards, in that these activities constitute "preliminary" and "postliminary" activities, and the time spent on them is *de minimis*.

Standard of Review. The trial court's decision granting partial summary judgment to Plaintiffs is subject to *de novo* review. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered." *Id.* (citations omitted). To prevail, the movant must establish "that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law." *Id.* at 377. "[A] claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law."

Preservation. MDOC opposed Plaintiffs' motion for summary judgment on this basis. D452, at 23-38.

A. Plaintiffs' Pre-Shift and Post-Shift Activities Are "Preliminary" and "Postliminary" Under the Portal-to-Portal Act.

"Enacted in 1938, the FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek." *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014). "But the FLSA did not define 'work' or 'workweek,'" and at first, the U.S. Supreme Court "interpreted those terms broadly." *Id.* "These decisions provoked a flood of litigation" seeking "nearly $6 billion in back pay." *Id.* at 31-32. "Congress responded swiftly" to this "emergency" by enacting the Portal-to-Portal Act in 1947 to overrule the Supreme Court's overbroad interpretations of the FLSA. *Id.* at 32.

The Portal-to-Portal Act provides that a worker's time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not compensable under the FLSA. 29 U.S.C. § 254(a)(1); Sub. App. A21. In addition, any "activities which are ***preliminary*** to or ***postliminary*** to said principal activity or activities" are not compensable. 29 U.S.C. § 254(a)(2); Sub. App. A21 (emphases added).

The Supreme Court "has consistently interpreted the term 'principal activity or activities' to embrace all activities which are an 'integral and indispensable part of the principal activities.'" *Busk*, 574 U.S. at 33 (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29-30 (2005) (alterations omitted)). "An activity is ... integral and

indispensable to the principal activities that an employee is employed to perform if it is [1] an intrinsic element of those activities and [2] one with which the employee cannot dispense if he is to perform his principal activities." *Id.*

Here, Plaintiffs' principal activities consist of "supervising, guarding, escorting and disciplining the offenders incarcerated in our State prisons." D433, at 1, ¶ 2. Their pre-shift and post-shift activities amount to an ordinary ingress and egress process that may include some or many of the following, depending on the officer, shift, and facility: (1) electronically or manually logging officers' arrival at and departure from the facility; (2) reporting to a Central Observation Post to receive assignments or presenting themselves to a supervisor to obtain assignments; (3) passing through security gates, including a metal detector and an airlock; (4) picking up or returning ordinary equipment such as keys and radios; (5) "walking to and from the entry/egress points to duty post and possibly waiting in line if one has formed for any of the above activities"; (6) in the case of vehicle patrol officers, inventorying patrol vehicles; and (7) "[p]assing of pertinent information from one shift to another." Sub. App. A17-A18; D535, at 5-6.

Here, at least seven principles of statutory interpretation confirm that Plaintiffs' pre-shift and post-shift activities constitute "preliminary" and "postliminary" activities under the Portal-to-Portal Act. 29 U.S.C. § 254(a)(2).

First, Plaintiffs' activities are "preliminary" and "postliminary" under the plain meaning of the statute. The plain and ordinary meaning of "preliminary" is "something that precedes a main discourse, work, design, or business: something introductory or preparatory." WEBSTER'S THIRD NEW INT'L DICTIONARY 1789 (1986); *see also* Preliminary, DICTIONARY.COM, *at* https://www.dictionary.com/browse/preliminary (visited Feb. 14, 2020) (defining "preliminary" as "preceding and leading up to the main part, matter, or business; introductory; preparatory"). Plaintiffs' pre-shift activities "precede[]" the officer's "main . . . work" of supervising, guarding, and disciplining inmates, and they are "introductory or preparatory" to those activities. WEBSTER'S THIRD, at 1789. By the same token, Plaintiffs' post-shift activities—which closely resemble the pre-shift activities, performed in reverse—constitute "postliminary" activities under the Portal-to-Portal Act.[2]

Second, the U.S. Supreme Court's definitive interpretation of the Act confirms that Plaintiffs' pre-shift and post-shift activities are not compensable. As noted above, the U.S. Supreme Court has "interpreted the term 'principal activity or activities' to embrace all activities which are an 'integral and indispensable part of the principal activities.'" *Busk*, 574 U.S. at 33 (quoting *Alvarez*, 546 U.S. at 29-30)

[2] "Postliminary" is not found in the dictionary, but Congress evidently coined the term to reflect symmetrical meaning with "preliminary."

(alterations omitted). "The word 'integral' means 'belonging to or making up an integral whole; constituent, component; specifically necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage.'" *Id.* (quoting 5 OXFORD ENGLISH DICTIONARY 366 (1933)). "And, when used to describe a duty, 'indispensable' means a duty 'that cannot be dispensed with, remitted, set aside, disregarded, or neglected.'" *Id.* (quoting 5 OXFORD ENGLISH DICTIONARY 219). "An activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is [1] an *intrinsic element* of those activities and [2] one with which the employee cannot dispense if he is to perform his principal activities." *Id.* (emphasis added). Here, Plaintiffs pre-shift and post-shift activities—such as checking into the facility, obtaining work assignments, waiting in line, passing through security, and walking to and from their posts—are not "intrinsic element[s]" of their main activities of guarding, supervising, escorting, and disciplining offenders. *See id.* Rather, those pre-shift and post-shift activities constitute an ordinary process of ingress and egress—preparatory for the point where those "intrinsic" activities occur. *Id.*

Third, the Portal-to-Portal Act's statutory history and manifest purpose support this conclusion as well. As noted above, Congress enacted the Portal-to-Portal Act for the express purpose of overturning Supreme Court decisions that had imposed liability on employers for activities indistinguishable from those at issue

here. After the FLSA was enacted in 1938, the U.S. Supreme Court interpreted it to require compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Busk*, 574 U.S. at 31 (quoting *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680, 690-91 (1946)). "Applying these expansive definitions, the Court found compensable the time spent traveling between mine portals and underground work areas, and the time spent walking from timeclocks to work benches." *Id.* (citations omitted).

When these decisions threatened to impose $6 billion in retroactive liability on employers nationwide—a staggering figure in 1947 dollars—Congress enacted the Portal-to-Portal Act to overrule these prior decisions and "distinguish[] between activities that are essentially part of the ingress and egress process, on the one hand, and activities that constitute the actual 'work of consequence performed for an employer,' on the other hand." *Busk*, 574 U.S. at 38 (Sotomayor, J., concurring) (quoting 29 CFR § 790.8(a)). All Plaintiffs' activities fall squarely within this description of "the ingress and egress process," as opposed to the "work of consequence performed for an employer." *Id.*

Fourth, there is strong contemporaneous evidence of the meaning of "preliminary" from the Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), to which the Portal-to-Portal Act directly responded. "The year after [the Supreme Court's] decision in *Anderson*, Congress

passed the Portal-to-Portal Act, amending certain provisions of the FLSA," and repudiating the Supreme Court's "judicial interpretations" of the FLSA. *Alvarez*, 546 U.S. at 26. *Anderson* had held that the "preliminary duties" of workers in a pottery plant were compensable under the FLSA. 328 U.S. at 691. These activities included clocking into the plant, walking from the plant entrance to the place of work, "putting on aprons and overalls, removing shirts, taping or greasing their 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 683. *Anderson* had thus held two classes of activities compensable—(1) the ordinary ingress process to the pottery plant; and (2) the ordinary preparatory activities performed before commencing one's main work, which were closely connected to the main work. *Id.* *Anderson* repeatedly described these activities as "preliminary." *Id.* at 683, 685, 690, 692, 693, 694. This usage provides powerful contemporaneous evidence that the word "preliminary" in the Portal-to-Portal Act refers to ordinary ingress and preparatory activities, just like those here.

Fifth, the Portal-to-Portal Act was also designed to respect the longstanding customs and practices between employers and employees. In the Act, Congress explicitly found that the FLSA had been erroneously interpreted "in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and

retroactive in operation, upon employers." 29 U.S.C. § 251(a). This language is applicable here. Before this class-action lawsuit was filed, there was a "long-established custom" and "practice" of treating Plaintiffs' pre-shift and post-shift activities as non-compensable. *See id.*; *see also* 29 U.S.C. § 203(o). Plaintiffs were aware of MDOC's longstanding custom and practice since at least 2005, D429, at 2, and thus they negotiated and re-negotiated the 2007 and 2014 Labor Agreements at issue here against the backdrop of this understanding. *See Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567, 582 (8th Cir. 2018). This lawsuit thus improperly seeks to impose on Missouri's taxpayers "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. § 251(a).

Sixth, the Department of Labor's regulations promulgated at the time of the Portal-to-Portal Act—which provide powerful contemporaneous evidence of the Act's original meaning—also support this conclusion. Federal regulations explain that activities ordinarily performed during an ingress and egress process are "preliminary" and "postliminary" activities: "Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks." 29 CFR § 790.7(g). Again,

these examples of "preliminary" and "postliminary" activities are all part of an ordinary ingress and egress process and preparatory activities.

Seventh, the exclusion of such ingress and egress activities from "principal activities" is also consistent with a subsequent regulatory interpretation of the Portal-to-Portal Act relied on by the U.S. Supreme Court. Notably, "an opinion letter that the Department [of Labor] issued in 1951" found that "a preshift security search of employees in a rocket-powder plant 'for matches, spark producing devices such as cigarette lighters, and other items which have a direct bearing on the safety of the employees'" constituted a non-compensable preliminary activity. *Busk*, 574 U.S. at 35 (quoting Op. Letter from Dept. of Labor, Wage & Hour Div., to Dept. of Army, Office of Chief of Ordnance, at 1-2 (April 18, 1951)). Similarly, the same 1951 Opinion Letter concluded that "a postshift security search of the employees 'done for the purpose of preventing theft'" constituted a non-compensable postliminary activity. *Id.* "The Department drew no distinction between the searches conducted for the safety of the employees and those conducted for the purpose of preventing theft—neither were compensable under the Portal-to-Portal Act." *Id.* So also here.

B. Extensive Authority Holds that Each Category of Pre-Shift and Post-Shift Activities at Issue Here Is Not Compensable.

An extensive body of case law interprets the Portal-to-Portal Act. For each of category of pre-shift and post-shift activities identified in the Amended Judgment, the decisive weight of authority holds that such activities are not compensable.

1. Checking into and out of the facility is not compensable.

First, the judgment held that time spent "electronically logging their arrival or departure from the facility . . . and/or manually signing or initial[ling] a paper entry/exit record" is compensable. Sub. App. A17; D535, at 5. This is incorrect.

As discussed above, Congress enacted the Portal-to-Portal Act for the explicit purpose of overruling the Supreme Court's decision in *Anderson*, 328 U.S. 680. *See Busk*, 574 U.S. at 32; *see also Alvarez*, 546 U.S. at 26; 29 U.S.C. § 251(a)(1). In *Anderson*, "[t]he employer required [employees] to punch in, walk to their work benches and perform preliminary duties during the 14-minute periods preceding productive work," 328 U.S. at 690, and the Court held that this process was compensable. *Id.* at 692. By repudiating *Anderson*, the Portal-to-Portal Act provided that such ingress procedures as checking into work and walking to one's workstation are not compensable. 29 U.S.C. §§ 251(a)(1), 254(a)(1)-(2). Likewise, federal regulations explicitly provide that "*checking in and out* and waiting in line

to do so" constitute non-compensable "preliminary" and "postliminary" activities. 29 CFR § 790.7(g) (emphasis added).

Consistent with this guidance, courts have uniformly concluded that checking into and out of the workplace is not compensable. For example, the Wisconsin Court of Appeals held that a correctional facility's "check-in procedure" that "requires officers to report for check-in prior to arriving at the officer's post so that the supervisor can verify that the officer is present, in uniform, and not impaired" was a non-compensable "preliminary" activity. *Mertz v. Wis. Dep't of Workforce Dev.*, 365 Wis.2d 607, 2015 WL 6181046, ¶¶ 6-7, 10 (Wis. App. Oct. 22, 2015). Many other cases are in accord. *See, e.g.*, *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007) (holding that a check-in process at a nuclear power station involving "[b]adge inspection at the entrance" was not compensable); *Haight v. The Wackenhut Corp*., 692 F. Supp. 2d 339, 344 (S.D.N.Y. 2010) (holding that security officers "cannot be compensated for time taken to badge into the protected area" because that activity is "not integral to their principal activities").

2. Receiving work assignments is not compensable.

Second, the judgment held that both "report[ing] to the Central Observation Post to receive assignments" and "presenting themselves before a custody supervisor who communicated to the COI or COII's their daily post/duty assignment" were compensable activities. Sub. App. A18; D535, at 6. But courts have repeatedly held

that such activities are non-compensable "preliminary" activities. *Carter v. Panama Canal Co.*, 314 F. Supp. 386, 391-92 (D.D.C. 1970) (holding that receiving one's work assignment from an assignment board was not compensable); *Butler v. DirectSAT USA, LLC*, 55 F. Supp. 3d 793, 806-08 (D. Md. 2014) (holding that a technician's time spent "read[ing] emails listing his work assignments for the day and, from those assignments, map[ping] out that day's route," was not compensable); *Colella v. City of New York*, 986 F. Supp. 2d 320, 343 (S.D.N.Y. 2013) (noting that "receiv[ing] assignments or instructions to transmit advice on work progress or completion," even while commuting, was not compensable); *Haight*, 692 F. Supp. 2d at 346 (holding that "[c]hecking … shift schedules, and notices while in the [employer's] building" are "generic activities that are not essentially linked to the principal activity of providing security to the power plant").

3. Passing through security is not compensable.

The judgment also held that time spent "passing through security gates/entry-egress points" is compensable. Sub. App. A18; D535, at 6. To the contrary, the U.S. Supreme Court in *Busk* unanimously held that time spent by warehouse workers passing through post-shift security for anti-theft purposes was not compensable. *Busk*, 574 U.S. at 35. As noted above, *Busk* relied on the federal Department of Labor's 1951 Opinion Letter addressing security procedures at a "rocket-powder plant" that had "a direct bearing on the safety of the employees." *Id.* The same

Opinion Letter also addressed "a postshift security search of the employees done for the purpose of preventing theft." *Id.* *Busk* relied on the fact that the "Department drew no distinction between the searches conducted for the safety of employees and those conducted for the purpose of preventing theft—neither were compensable under the Portal-to-Portal Act." *Id.* at 36.

Here, the security screening that Plaintiffs undergo at MDOC's facilities is directly analogous to the security screenings that were held non-compensable in *Busk*. The security screenings here serve the same two purposes. First, they protect the employees themselves by providing a critical safety measure against the introduction of weapons and other dangerous items into the facility, as MDOC's evidence in the summary-judgment record emphasized. D435, at 11 (158:3-23); D433, at 2, ¶ 10. Second, they guard against misbehavior by both visitors and employees by preventing them from (whether inadvertently or purposefully) introducing weapons or contraband to the facility. *See* D435, at 11 (158:3-23) (noting that the pre-shift activities "mak[e] sure unauthorized items aren't carried in" to the facilities). Just as in *Busk*, these screenings are quintessential "preliminary" and "postliminary" activities.

In addition to *Busk*, there is a widespread consensus that such pre-shift and post-shift security screenings are not compensable. This consensus extends to both security procedures designed to ensure the safety of employees, and security

procedures designed to guard against misbehavior by employees. For example, in *Gorman*, the Second Circuit held employees at a nuclear power station who "spen[t] between ten and thirty minutes a day passing through multiple layers of security" were engaged in non-compensable "preliminary" activities. *Gorman*, 488 F.3d at 591, 593. The security procedures in *Gorman* included waiting in traffic outside the plan entrance; submitting to visual inspections and sometimes random searches of vehicles; "waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector"; "[w]aiting in line to swipe an ID badge and to palm a sensor"; and "at the end of the shift, doing many of these things in reverse." *Id.* at 592. These procedures protected both the employees themselves and also protected the employer by preventing the employees from introducing inappropriate substances into the nuclear facility. *See id.*

Gorman held these preliminary security screenings were not "integral" to principal activities. *Id.* at 594. The court held that "this is easily demonstrated because the security measures at the entry are required (to one degree or another) for everyone entering the plant—regardless of what an employee does (servicing fuel rods or making canteen sandwiches)—and including visitors." *Id.* at 594. The same reasoning applies here—MDOC's security measures at the entry are required (to one degree or another) for everyone entering each correctional facility, regardless of

what an employee or visitor does—whether they guard prisoners, provide volunteer chaplaincy services, or work in the kitchen. *See* D435, at 11.

Many other cases have come to the same conclusion regarding pre-shift and post-shift security screenings. *See, e.g., Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1341, 1344-45 (11th Cir. 2007) (holding that "pass[ing] through a single security checkpoint to the tarmac" of an airport was not compensable); *In re Amazon.com, Inc., Fulfillment Ctr. FLSA & Wage & Hour Litig.*, No. 3:14-cv-204-DJH, 2018 WL 4148856, at *3 (W.D. Ky. Aug. 30, 2018) (holding that "time spent undergoing or waiting to undergo security screenings is not compensable"); *Jones v. Best Buy Co.*, No. CV 12-95 (PAM/FLN), 2012 WL 13054831, at *2 (D. Minn. Apr. 12, 2012) ("Indeed, there is ample caselaw in support of the … position that security screening time is not compensable under FLSA as a matter of law."); *Haight*, 692 F. Supp. 2d at 344 (S.D.N.Y. 2010) (holding that the "ingress/egress security procedures" for security officers at a nuclear facility were "not integral to their principal activities"); *Anderson v. Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (holding that "[t]he law is clear that Plaintiffs are not entitled to compensation for this time" spent passing through a security checkpoint where employees' belongings were subject to search); *Sleiman v. DHL Express*, Civ. No. 09-0414, 2009 WL 1152187, at *4 (E.D. Pa. Apr. 27, 2009) (holding that security screening of employees at a mail-sorting facility was not compensable).

Indeed, until quite recently, "every court which has addressed this issue has found that time spent participating in security screening is not compensable under the FLSA." *Sleiman*, 2009 WL 1152187, at *4. Uniformly, "courts have agreed that security screening procedures do not constitute work, and are not integral and indispensable to principal activities." *Id.* at *5. And in 2014, the U.S. Supreme Court endorsed this consensus view by holding that post-shift security screening procedures were not compensable under *Busk*. 574 U.S. at 35.

Despite this strong consensus, a panel of the Tenth Circuit recently held that a correctional facility's pre-shift security screening was "integral and indispensable" to corrections officers' principal activities. *Aguilar v. Management & Training Corp.*, 948 F.3d 1270 (10th Cir. Feb. 4, 2020).[3] But *Aguilar* is not binding or persuasive here. *Aguilar* reasoned that, because the corrections officers' job includes preventing inmates from obtaining weapons and contraband in the facility, the security screening for weapons and contraband was "'tied to' the productive work that [the employer] employs the officers to perform" and thus compensable. *Aguilar*, 948 F.3d at 1278 (quoting *Busk*, 574 U.S. at 36).

[3]A petition for en banc consideration was filed in this case on February 18, 2020. The Tenth Circuit called for a response to the en banc petition the very next day, and the response is due on March 2, 2020.

Aguilar's reasoning is not convincing because it misapprehends the nature of corrections officers' principal activities. MDOC employs officers to *provide* security within the prisons; it does not employ its officers to be *subjected* to prison security. D435, at 12 (159:3-18) ("[W]e don't employ these corrections officers to pick up keys or carry radios or go through our security gate."). "This is easily demonstrated because the security measures at the entry are required (to one degree or another) for *everyone* entering" a prison, including guards, kitchen workers, volunteers, visitors. *Gorman*, 488 F.3d at 594; *compare* D435, at 11 (noting that the security process is "necessary to operate and maintain a safe facility, and you can only do so by knowing the identity of the people within [and] making sure unauthorized items aren't carried in and that people are properly equipped to protect themselves"). This Court should disregard *Aguilar*, and instead follow *Busk*, *Gorman*, *Bonilla*, *Amazon*, *Best Buy*, *Haight*, *Anderson*, and *Sleiman*, to conclude that the officers' pre-shift security screenings are not compensable.

Moreover, even if this Court were to conclude that MDOC's security screenings are "integral and indispensable" to officers' principal activities, they would nevertheless be non-compensable because they are *de minimis*, and Plaintiffs failed to submit any evidence to the contrary. *See infra*, Part I.D.

4. Retrieving radios and keys is not compensable.

The Amended Judgment held that time spent "picking up or returning equipment such as keys or radios" is compensable. Sub. App. A18; D535, at 6. Again, this holding contradicts a strong consensus of authority.

Picking up and returning ordinary equipment like keys and radios are quintessential "preliminary" and "postliminary" activities. As noted above, the Portal-to-Portal Act was enacted to overrule the Supreme Court's decision in *Anderson*, which had held that time spent retrieving ordinary equipment—"such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, [and] preparing the equipment for productive work"—constituted compensable activities. 328 U.S. at 692-93. *Anderson* explicitly described these as "preliminary activities." *Id.* at 392. The next year, Congress passed the Portal-to-Portal Act directing that such "preliminary" activities are not compensable. 29 U.S.C. § 254(a)(2). DOL's regulations promptly provided that similar activities such as "changing clothes" and "washing up or showering" constitute "preliminary" and "postliminary" activities. 29 CFR § 790.7(g).

Following these authorities, many cases have held that time spent retrieving ordinary equipment like keys and radios is "preliminary" and not compensable. For example, in *Gorman*, the Second Circuit held that obtaining and donning "generic protective gear," including "a helmet, safety glasses, and steel-toed boots," were

closely akin to "changing clothes" and were thus not compensable. *Gorman*, 488 F.3d at 594 (quoting 29 CFR § 790.7(g)). "The donning and doffing of generic protective gear is not rendered integral by being required by the employer or by government regulation." *Id.* Similarly, in *Haight*, the court held that time spent by security officers in "obtaining radios and batteries before shift" was not compensable because "[r]adios and batteries are not specialized gear or equipment that are integral to the [security officers'] work." 692 F. Supp. 2d at 346 (citation omitted).

Other cases are in accord. *See, e.g., Bamonte v. City of Mesa*, 598 F.3d 1217, 1219-20 (9th Cir. 2010) (holding that police officers' times spent donning ordinary police equipment on the employer's premises, including "a duty belt, a service weapon, a holster, handcuffs, chemical spray, a baton, and a portable radio," was not compensable, especially because officers had the option of performing those activities at home); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125-26 (10th Cir. 1994) (holding that meatpackers' obtaining "standard safety equipment," including "a pair of safety glasses, a pair of earplugs and a hard hat," was not compensable under FLSA, even though they were "essential to the job, and required by the employer"); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001), *aff'd*, 44 F. App'x 652 (5th Cir. 2002) (holding that "the donning and doffing of the sanitary and safety equipment qualifies as a preliminary and postliminary activity within the meaning of the Portal-to-Portal Act").

Again, the Tenth Circuit's recent decision in *Aguilar* departed from this consensus view, but *Aguilar* is neither binding nor persuasive here. *Aguilar* held that corrections officers' process of "returning keys and equipment" at the end of their shift was "intrinsic to the officers' principal activities" because it was "closely aligned with their principal activities of maintaining custody and discipline of inmates and providing security." *Aguilar*, 948 F.3d at 1282. By this logic, however, the exception would swallow the rule. Virtually every kind of equipment worn or used at work is "closely aligned" to the performance of principal activities, or else it would not be used. Most notably, activities "such as putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, [and] preparing the equipment for productive work" were closely aligned to the work of professional potters in *Anderson*, 328 U.S. at 692-93—yet the main purpose of the Portal-to-Portal Act was to overrule *Anderson* and render such activities not compensable. Similarly, hard hats and steel-toed boots are "closely aligned" to the principal activities of workers at a nuclear facility. *See Gorman*, 488 F.3d at 594. Consistent with *Gorman*, *Haight*, *Bamonte*, *Reich*, and *Anderson*, this Court should disregard *Aguilar* and hold that retrieving and returning ordinary equipment like keys and radios is not compensable.

Moreover, even if *Aguilar* were correct in concluding that retrieving and returning keys and radios were "integral and indispensable," the activity would still

not be compensable because time spent on it is *de minimis*. *See infra*, Part I.D; *see also Albrecht v. Wackenhut Corp.*, 379 F. App'x 65, 67 (2d Cir. 2010) (holding that time spent by security officers in retrieving and returning their firearms and radios was not compensable because it was *de minimis*).

5. Walking to one's post and waiting in line is not compensable.

The Amended Judgment held that time spent "walking to and from the entry/egress points to duty post and possibly waiting in line if one has formed for any of the above activities" is compensable. Sub. App. A18; D535, at 6. But the Portal-to-Portal Act provides that "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not compensable. 29 U.S.C. § 254(a)(1), Sup. App. A21. Both the Act itself and its implementing regulations make clear that such on-premises walking time is not compensable. *See* 29 U.S.C. § 245(a)(1); 29 C.F.R. § 790.7(c), Sub. App. A23; 29 C.F.R. § 790.7(f), Sub. App. A24. The Portal-to-Portal Act was adopted to overrule *Anderson*, which held that walking from an entry point to the workstation was compensable. 328 U.S. at 690-91. Numerous cases hold that such on-premises walking time is not compensable. *See, e.g.*, *Bonilla*, 487 F.3d at 1341, 1342-43 ("rid[ing] on authorized buses or vans to their particular work site" within the airport was not compensable); *Carter*, 314 F. Supp. at 391-92 (walking for 15 minutes to the location of the principal activity was not compensable); *Mertz*, 365

Wis.2d at ¶¶ 9-10 (holding that a corrections officer's time spent walking to his post was not compensable).

Likewise, time spent waiting in line before one's principal activities begin is not compensable. In *Alvarez*, the U.S. Supreme Court unanimously held that time spent waiting to perform the first principal activity of the day "always comfortably qualif[ies] as a 'preliminary' activity." 546 U.S. at 40. The Court held that such waiting time was not "integral and indispensable" because it was "two steps removed from" principal activities. *Id.* Likewise, federal regulations explicitly provide that "checking in and out and *waiting in line to do so*" typically constitute "preliminary" and "postliminary" activities. 29 CFR § 790.7(g) (emphasis added).

Many cases hold that such waiting time is not compensable. *See, e.g., Bridges v. Empire Scaffold, LLC*, 875 F.3d 222, 226 (5th Cir. 2017) (holding that pre-shift waiting time before erecting and dismantling scaffolding was non-compensable "preliminary" activity); *Gorman*, 488 F.3d at 592, 594 (holding that time spent "waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector" and "[w]aiting in line to swipe an ID badge and to palm a sensor" was not compensable).

6. Passing information between shifts is not compensable.

The judgment held that time spent "passing . . . pertinent information from one shift to another" is compensable. Sub. App. A18; D535, at 6. But

"[c]ommunication between the employee and employer to receive assignments or instructions to transmit advice on work progress or completion" while traveling is not compensable. *Colella*, 986 F. Supp. 2d at 343; *see also Butler*, 55 F. Supp. 3d at 806-08 (obtaining work assignments and planning the next days' work activities was not compensable); *Carter*, 314 F. Supp. at 392 (holding that receiving one's work assignment was not compensable); *Haight*, 692 F. Supp. 2d at 346 (holding that "[c]hecking … shift schedules, and notices while in the [employer's] building" were not compensable).

7. Inventorying vehicle equipment is not compensable.

The judgment held that, "in the case of vehicle patrol officers," time spent "inventorying the vehicle patrol's issued weapons, ammunition, and equipment prior to and at the end of each shift" is compensable. Sub. App. A18; D535, at 6. Once again, these are quintessential "preliminary" and "postliminary" activities. 29 U.S.C. § 254(a)(2). Many cases hold that such activities are not compensable. *See, e.g., Chambers v. Sears Roebuck & Co.*, 428 F. App'x 400, 420 n.55 (5th Cir. 2011) (citations omitted) (holding that in-home service technicians' "refueling the service van, performing vehicle safety inspections, and tidying up the van" was not compensable); *Butler*, 55 F. Supp. 3d at 810-11 (holding that "loading and unloading equipment from his company vehicle" was not compensable); *Colella*, 986 F. Supp. 2d at 342-43 ("time spent transporting tools and equipment in their vehicles,

inspecting vehicles, [and] stopping to secure items that shifted during their commutes" was not compensable).

C. Responding to Occasional Emergencies Does Not Render Pre-Shift and Post-Shift Time Compensable.

Plaintiffs contend that, because officers are expected to remain alert and respond to occasional emergencies if they arise during pre-shift and post-shift time, *all* such time constitutes compensable "principal activities." In its pre-transfer opinion, the Court of Appeals ruled on this basis. Slip Op. 5-6. This argument is incorrect.

As discussed above, MDOC pays overtime for the "unusual" cases where corrections officers must abandon ordinary pre-shift activities to respond to an emergency, such as an inmate fight, an assault on staff, or an escape attempt. D397, at 17. "In some instances, before arriving for the start of his or her shift at an assigned post or after ending his or her shift at that post, [an officer] may respond to an incident involving a disturbance or altercation by or between inmates." D448, at 5, ¶ 19. Officers are expected to remain alert and respond to such emergencies if they occur, even during pre-shift and post-shift time. *See* D397, at 17; D405, at 5-6; D398, at 11. Such emergency situations are "unusual," however. D397, at 17. During the "typical" shift, no emergency arises during pre-shift or post-shift activities. D435, at 7. And if an officer does respond to an emergency during pre-

shift or post-shift time, he or she is paid overtime for that unanticipated work. D448, at 5, ¶ 19.

MDOC's practice is extremely common. Employees in security-related fields are routinely required to remain alert and respond to emergencies when on their employers' premises, even when on breaks or performing non-compensable tasks. Yet state and federal courts have repeatedly held that the mere fact that such employees are required to remain alert and respond to emergencies does not transform non-compensable time into compensable time.

For example, in *Akpeneye v. United States*, 138 Fed. Cl. 512 (2018), the Court of Federal Claims held that security officers at the Pentagon were not entitled to compensation for time spent on breaks even though they were required to remain vigilant and respond to emergencies if they arose. *Id.* at 529. The court noted that Pentagon "officers have duties while they are on break," *id.* at 521; that "[o]fficers must remain vigilant and be in a state of readiness prepared to address any contingencies or emergencies that arise," *id.*; and that "officers may be asked to respond during their breaks to situations such as a traffic stop or medical emergency," which "occur frequently at the Pentagon reservation," *id.* (citations omitted). "Related to the requirements to remain vigilant and in a state of readiness, officers must constantly monitor their radios while on break . . . ." *Id.* The court held that these requirements of remaining constantly vigilant, monitoring radios, and

responding to emergencies while on break "do not transform a noncompensable . . . period into compensable time." *Id.* at 529.

Similarly, in *Babcock v. Butler County*, 806 F.3d 153 (3d Cir. 2015), corrections officers were required to remain on premises during breaks and had to "remain in uniform, in close proximity to emergency response equipment, and on call to respond to emergencies," and "if an emergency or unexpected situation arises, the officer must respond immediately in person, in uniform, and with appropriate response equipment." *Id.* at 155. The Third Circuit held that these requirements did not transform non-compensable time into compensable time. *Id.* at 158.

Likewise, in *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1134-37 (5th Cir. 1984), security guards at a petroleum refinery were required to remain on premises 24 hours a day during a strike and were required to respond to emergencies when they arose. *Id.* at 1134. The Fifth Circuit held that this requirement of being on call to respond to emergencies did not transform their off-duty time into compensable time. *Id.* at 1137.

Many other cases agree. These cases uniformly hold that merely requiring an employee in a security-related position to be alert and on call to respond to emergencies does not transform non-compensable time into compensable time. *See, e.g., Roy v. County of Lexington*, 141 F.3d 533, 546 (4th Cir. 1998) (EMS personnel's break time was not compensable even though they were required to

respond to emergencies and their breaks were interrupted by emergency calls 27 percent of the time); *Barefield v. Village of Winnetka*, 81 F.3d 704, 710 (7th Cir. 1996) (police employees "had to remain . . . in radio contact with the building in case of an emergency," but their time was not compensable); *Henson v. Pulaski Cty. Sheriff Dep't*, 6 F.3d 531, 536 (8th Cir. 1993) (police officers' meal breaks were not compensable even though officers would "monitor[] . . . their radios for emergency calls to return to service"); *Agner v. United States*, 8 Cl. Ct. 635, 638 (Cl. Ct. 1985) (security officers at the Library of Congress were required to respond to "emergency call[s]" during non-compensable time spent on their employer's premises); *Baylor v. United States*, 198 Ct. Cl. 331, 364 (1972) (employees were "required to eat lunch on the employer's premises and to be on a duty status, subject to emergency call during such period," but their time was not compensable); *Joiner v. Bd. of Trustees of Flavius J. Witham Mem'l Hosp.*, No. 1:13-CV-555-WTL-DKL, 2014 WL 3543481, at *6 (S.D. Ind. July 17, 2014) (hospital maintenance specialists "were expected . . . to respond to emergencies" but their time was not compensable); *Haviland v. Catholic Health Initiatives-Iowa, Corp.*, 729 F. Supp. 2d 1038, 1059-60 (S.D. Iowa 2010) (hospital employees "were required to keep their radios on and respond to [emergency] situations that may arise," but their time was not compensable); *Harris v. City of Boston*, 253 F. Supp. 2d 136, 145 (D. Mass. 2003)

(a police detective had to "remain on call" during lunch and "terminate his lunch period altogether if an emergency arises," his the time was not compensable).

Here, Plaintiffs presented exactly the same argument that was rejected in each of these cases. In each of these cases, employees in security-related positions (such as corrections officers, Pentagon security officers, hospital employees, police detectives, and EMS personnel) were required to remain alert and respond to emergencies during otherwise non-compensable time spent on the employer's premises. In each case, the employees argued that they should be compensated because they had to remain alert and respond to emergencies if they arose during non-compensable time, as Plaintiffs claim here. In each case, the court concluded that the time was *not* rendered compensable merely because the employees were required to remain alert and respond to emergencies.

In the Court of Appeals, Plaintiffs emphasized testimony in which MDOC officials described corrections officers' as "on duty" during pre-shift time. But the phrase "on duty" is not a talisman. The same argument was made in *Akpeneye*, and the Court of Federal Claims stated in this identical context: "[T]he semantics debate regarding the specific term used to define the 'duty' status is immaterial." *Akpeneye*, 138 Fed. Cl. at 531. The court should instead "[f]ocus[] on the responsibilities rather than terms used to summarize those responsibilities." *Id.* In fact, the Portal-to-Portal Act overruled *Anderson*'s holding that "the statutory workweek includes all time

during which an employee is necessarily required to be on the employer's premises, *on duty* or at a prescribed workplace." 328 U.S. at 690-91 (emphasis added). Here, unless and until an actual emergency arises and the officer is required to respond, his or her pre-shift and post-shift time is not compensable.

Plaintiffs emphasize that MDOC does pay overtime in the rare instances when an officer actually responds to an emergency during pre-shift or post-shift time. But MDOC's practice of compensating actual work when it occurs is fully consistent with treating ordinary pre-shift and post-shift activities as non-compensable. Multiple other courts have upheld the same policy. For example, in *Babcock*, the employer provided "mandatory overtime pay" if the non-compensable break "is interrupted by work," and the Third Circuit held that "the FLSA requires no more." *Babcock*, 806 F.3d at 157 (quotation omitted). Likewise, in *Atlantic Richfield*, the security guards "were paid for their on-duty shifts and for any actual work required during the normal off-duty twelve-hour period. Otherwise the guards were not paid for off-duty time when they were required to remain inside the refinery." 724 F.2d at 1133. The Fifth Circuit upheld this practice under the FLSA. *Id.* at 1137.

At bottom, Plaintiffs' argument here is based on a mischaracterization of Plaintiffs' pre-shift and post-shift activities. In essence, Plaintiffs contend that, during pre-shift and post-shift time, they are principally engaged in guarding and supervising offenders, while only incidentally engaged in ordinary ingress and

egress procedures. This characterization contradicts both common sense and MDOC's undisputed evidence in the summary-judgment record. *See, e.g.*, D435, at 11-12; D433, at 2 ¶ 10; D448, at 5, ¶ 18. MDOC does not "employ these corrections officers to pick up keys or carry radios or go through our security gate." D435, at 12. The pre-shift and post-shift time "is expended to help ensure that officers and other staff safely arrive at and are able to perform the job duties for which they have been hired." D433, at 2, ¶ 10. Remaining alert to respond to emergencies is incidental to these preliminary and postliminary tasks.

D. Time Spent on Each Activity Was *De Minimis* and Not Compensable.

Even if an activity would otherwise constitute a principal activity, it is not compensable if the time spent on it is *de minimis*. 29 C.F.R. § 785.47 (providing that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes," are not compensable); *see also Carter v. Panama Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970); *Anderson*, 328 U.S. at 692. Courts have frequently applied this doctrine to conclude that activities similar to those at issue here are not compensable because they are *de minimis*. *See, e.g., Albrecht v. Wackenhut Corp.*, 379 F. App'x 65, 67 (2d Cir. 2010) (holding that time spent retrieving and returning an officer's firearm and radio was not compensable because it was *de minimis*); *Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567, 584 (8th Cir. 2018)

(holding that time spent checking in and checking out tools was *de minimis*); *Carter*, 314 F. Supp. at 392 (holding that pre-shift walking time of 2 to 15 minutes, with an average of 8 minutes, was *de minimis*). "Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." *Lyons*, 899 F.3d at 584 (alteration and citation omitted); *see also Carter*, 314 F. Supp. at 392 (citing cases holding that five minutes, 10-11 minutes, and 10 minutes were all *de minimis*).

Whether pre-shift and post-shift activities is *de minimis* depends on multiple factors. "Courts consider the following factors when determining whether the work performed by the employee is *de minimis*: [1] the amount of time spent on the extra work, [2] the practical administrative difficulties of recording additional time, [3] the regularity with which the additional work is performed, and [4] the aggregate amount of compensable time." *Lyons*, 899 F.3d at 584 (citation omitted).

In moving for summary judgment, Plaintiffs submitted no evidence to establish these factors as to any of the disputed activities, and it is clear that the factors are not satisfied. For example, "the amount of time spent" is undoubtedly less than 10 minutes for each activity, and there would be obvious "practical administrative difficulties of recording additional time," *id.*, for each of the eight pre-shift and post-shift activities identified in the Amended Judgment. Sub. App. A17-A18; D535, at 5-6. Even if there were a dispute about whether any particular

activity was *de minimis*, Plaintiffs failed to submit any evidence to demonstrate that these factors were satisfied for any particular class of pre-shift and post-shift activities, so they were not entitled to summary judgment on the compensability of any class of activity.

In moving for summary judgment, Plaintiffs argued only that the time spent on *all* the pre-shift and post-shift activities, considered in the aggregate, was not *de minimis* because it supposedly amounted to about 30 minutes per day and could be tracked using entry and exit logs. D420, at 31-33. But time spent on pre-shift activities may be considered in the aggregate only if each of those activities is "integral and indispensable" to principal activities. *See Lyons*, 899 F.3d at 584 (noting that "the aggregate amount of *compensable* time" is a factor for determining whether pre-shift activities are *de minimis*) (emphasis added); *id.* (holding that the *de minimis* doctrine applies to activities that are "otherwise compensable").

Plaintiffs' argument aggregating their pre-shift and post-shift time thus assumes that each of the seven categories of pre-shift and post-shift activities in the Amended Judgment is "integral and indispensable" to their principal activities. For the reasons discussed above, this is not correct; none are "integral and indispensable." *Supra* Part I.B-C. But if this Court were to conclude that some activities but not others are "integral and indispensable," the order granting summary judgment would have to be reversed, because Plaintiffs presented no evidence to

quantify how much time is typically spent on any particular activity. For example, if the Court were to conclude that checking into the facility and obtaining post assignments were not "integral and indispensable" but that passing through security was "integral and indispensable," the time spent passing through security would still be non-compensable if it is *de minimis*. Plaintiffs submitted no evidence to demonstrate that passing through security is not *de minimis*, and the same is true for every other category of pre-shift and post-shift activities. Thus, their failure to submit particular evidence defeats summary judgment, unless the Court were to agree with them that *every* category of pre-shift and post-shift activities is "integral and indispensable" to principal activities.

Moreover, Plaintiffs' failure to establish that any particular activity was not *de minimis* undermines their ability to invoke the continuous-workday rule. The Portal-to-Portal Act exempts only those preliminary and postliminary activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, [his] principal activity or activities." 29 U.S.C. § 254(a)(2). Thus, an employee's time is compensable from the first "integral and indispensable" activity through the last such activity on each day. *Id.*; *see also Alvarez*, 546 U.S. at 29. But, even if an activity is "integral and indispensable," it does not commence the continuous workday if it is *de minimis*. As then-Judge Sotomayor wrote for the

Second Circuit, "a *de minimis* principal activity does not trigger the continuous workday rule." *Singh v. City of New York*, 524 F.3d 361, 371 n.8 (2d Cir. 2008) (citing *Reich v. New York City Transit Authority*, 45 F.3d 646, 652 (2d Cir. 1995)); *see also Rutti v. Lojack Corp.*, 596 F.3d 1046, 1060 (9th Cir. 2010) (holding that activities that "are either not principal activities or are *de minimis*" do not trigger the start of the continuous workday); *Chambers v. Sears Roebuck & Co.*, 428 F. App'x 400, 422 (5th Cir. 2011) (holding that *de minimis* activities do not start the continuous workday). Thus, to establish that any particular pre-shift (or post-shift) triggered the start (or end) of the continuous workday, Plaintiffs would have had to establish *both* that the activity was "integral and indispensable" to principal activities *and* that time spent on it was not *de minimis*. They cannot do so, because they submitted no evidence on the latter question for any category of activities.

For the reasons stated, the circuit court's order granting partial summary judgment to Plaintiffs on the question of liability should be reversed.

II. The trial court erred in denying Defendant's motion for summary judgment on Plaintiffs' breach-of-contract claims, because the pre-shift and post-shift activities are not compensable, in that they constitute "preliminary" and "postliminary" activities under the Portal-to-Portal Act, and the time spent on them is *de minimis*.

Standard of Review. An order denying summary judgment is "reviewable when . . . the merits of the motion for summary judgment are 'intertwined with the propriety of an appealable order granting summary judgment to another party.'" *Columbia Mutual Ins. Co. v. Heriford*, 518 S.W.3d 234, 238 n.2 (Mo. App S.D. 2017) (quotation omitted). On appeal, the Court applies *de novo* review. *ITT Commercial*, 854 S.W.2d at 376.

In addition to opposing Plaintiffs' motion for summary judgment, MDOC moved for summary judgment on the ground that Plaintiffs' pre-shift and post-shift activities constitute "preliminary" and "postliminary" activities under the Portal-to-Portal Act, and the time spent on them is *de minimis*. D118, at 16-22; D119, at 3-5, ¶¶ 5-15; D190, at 9-11. The circuit court denied this motion for summary judgment by docket entry. Sub. App. A3; D206. For the reasons discussed above, *supra* Point I, the circuit court's ruling was in error. The pre-shift and post-shift activities are not compensable under the Portal-to-Portal Act as a matter of law, and MDOC was entitled to summary judgment on Plaintiffs' breach-of-contract claims.

III. The trial court erred in granting summary judgment to Plaintiffs and denying summary judgment to the State on Plaintiffs' breach-of-contract claims, because those claims were based on statutes and regulations that do not create a private cause of action enforceable in contract, in that a private plaintiff cannot pursue a statutory or regulatory claim against the State under the guise of a breach-of-contract claim when neither the statutes nor the regulations create a private cause of action against the State.

Standard of Review. The trial court's decision to grant summary judgment is subject to de novo review. *ITT Commercial*, 854 S.W.2d at 376.

Preservation. MDOC opposed Plaintiffs' motion for summary judgment on this basis. D452, at 17-19. MDOC also moved for summary judgment on this ground, D118, at 14-16; D190, at 1, 8-9, which the circuit court denied, Sub. App. A3; D206.

A. Plaintiffs Have No Private Cause of Action Against the State.

A statute or regulation provides no private right of action unless there is a "clear indication of legislative intent to establish a private cause of action." *Johnson v. Kraft Gen. Foods*, 885 S.W.2d 334, 336 (Mo. banc 1994); *see also Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Nothing in the FLSA or any other provision

cited by Plaintiffs purports to create a private right of action enforceable through a breach-of-contract claim.

Quite the contrary—it is indisputable that Plaintiffs have ***no*** cause of action against MDOC arising directly under the FLSA. In *Alden v. Maine*, the U.S. Supreme Court invalidated "the provisions of the FLSA purporting to authorize private actions against States in their own courts," because "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." *Alden v. Maine*, 527 U.S. 706, 712 (1999). In other words, the FLSA does not confer any cause of action on Plaintiffs to sue MDOC because the provisions purporting to authorize such a cause of action are unconstitutional. *Id.*

For this reason, a federal district court in Missouri recently rejected a purported FLSA class action against MDOC—just like Plaintiffs' proposed class action here—and held: "The Supreme Court's decisions in *Seminole Tribe of Florida v. Florida* and *Alden v. Maine* effectively invalidate the FLSA's private right of action as applied against state agencies." *Norris v. Missouri Dep't of Corr.*, No. 4:13-CV-392-JAR, 2014 WL 1056906, at *2 n.3 (E.D. Mo. Mar. 19, 2014) (citations omitted). "Read together, *Seminole Tribe* and *Alden* mean that state employees no longer have any 'court of competent jurisdiction' in which to sue their employers for FLSA violations." *Id.* (citation omitted).

In the face of this undisputed authority, Plaintiffs sought to re-cast their FLSA claims as breach-of-contract claims, purporting to assert their wage-and-hour claims against MDOC arising under the Labor Agreements and Procedure Manual. *See* D208, at 18-20, 22-24. Critically, however, Plaintiffs' breach-of-contract claim merely rehashes their FLSA claims. The operative language of the Labor Agreements simply recites that MDOC will comply with the FLSA when it calculates wage-and-hour claims. *See* D426, at 18 (2014 Labor Agreement, § 12.2) ("The Employer will comply with the Fair Labor Standards Act (FLSA) . . . regarding the accrual and payment of overtime."); D427, at 16 (2007 Labor Agreement, § 11.2) (same). Plaintiffs also rely on language in MDOC's Procedure Manual that states that Plaintiffs will be paid overtime compensation for "hours physically worked." D428, at 5, § III.A.12.a. But the Procedure Manual makes clear that the FLSA determines what constitutes "hours physically worked" when it comes to pre-shift and post-shift activities. D428, at 1, § I (stating that "the purpose of this procedure [manual] is to ensure departmental compliance with federal Fair Labor Standards Act rules and state merits guidelines"). And Plaintiffs have never contended that any standards other than FLSA standards determine whether pre-shift and post-shift activities constitute "hours physically worked." In other words, Plaintiffs rely on FLSA standards alone—and no other standards—to argue that

MDOC's failure to compensate them for pre-shift and post-shift activities constitutes a breach of contract.

This breach-of-contract theory fails as a matter of law. Many cases have held that, where a statutory cause of action does not exist, plaintiffs cannot simply create one by re-casting their barred statutory claims as contract claims. For example, the U.S. Supreme Court unanimously rejected an identical argument in *Astra USA, Inc. v. Santa Clara County, California*, 563 U.S. 110 (2011). In *Astra USA*, the plaintiff sought to enforce federal statutory obligations, but the plaintiff "ha[d] no right of action under" the federal statute. *Id.* at 117. The plaintiff sought to avoid this barrier by re-casting its statutory claims as breach-of-contract claims, based on agreements that "simply incorporate statutory obligations and record [defendants'] agreement to abide by them." *Id.* at 118. The Supreme Court held that this gambit failed because a "suit to enforce" those agreements "is in essence a suit to enforce the statute itself." *Id.* "The absence of a private right to enforce statutory . . . obligations would be rendered meaningless if [plaintiffs] could overcome that obstacle by suing to enforce the contract's . . . obligations instead. The statutory and contractual obligations, in short, are one and the same." *Id.*

So also here. Plaintiffs lack a cause of action under the FLSA, and they seek to evade this hurdle by asserting their FLSA claim under the guise of a breach-of-contract claim, by contending that the contract incorporates FLSA standards.

"Though labeled differently, suits to enforce [the FLSA] and suits to enforce [the Labor Agreements] are in substance one and the same. Their treatment, therefore, must be the same, no matter the clothing in which [Plaintiffs] dress their claims." *Id.* at 114 (alterations and quotation omitted). "Telling in this regard," Plaintiffs "based [their contract] suit on allegations that" MDOC violated FLSA standards, "not that they violated an independent substantive obligation arising from the" contracts. *Id.* at 118-19.

In a case cited by *Astra USA*, the Second Circuit held that plaintiffs may not manufacture a statutory cause of action by re-casting federal statutory claims as state-law contract claims. *Grochowski v. Phoenix Const.*, 318 F.3d 80, 86 (2d Cir. 2003). In *Grochowski*, the plaintiffs were employees who were subject to contracts that recited that their employers would comply with a federal statute (the Davis-Bacon Act) in payment of wages and benefits. *Id.* at 83, 85. After concluding that the relevant federal statute did not confer a private cause of action, *id.* at 85, the Second Circuit held that plaintiffs could not evade this barrier by re-casting their statutory claims as common-law contract claims: "At bottom, the plaintiffs' state-law claims are indirect attempts at privately enforcing the prevailing wage schedules contained in the [Davis-Bacon Act]." *Id.* at 86. "To allow a third-party private contract action aimed at enforcing those wage schedules would be 'inconsistent with the underlying purpose of the legislative scheme . . . to the same extent as would a

cause of action directly under the statute.'" *Id.* (quoting *Davis v. United Air Lines*, 575 F. Supp. 677, 680 (E.D.N.Y. 1983)). "Since . . . no private right of action exists under the relevant statute, the plaintiffs' efforts to bring their claims as state common-law claims are clearly an impermissible 'end run' around the [statute]." *Id.* at 86 (quoting *Davis*, 575 F. Supp. at 680). So also here, Plaintiffs' "efforts to bring their [FLSA] claims as state common-law claims are clearly an impermissible 'end run' around" *Alden v. Maine*. *Id.*

Many other cases agree. *See, e.g., MM&S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 912 (8th Cir. 2004) ("Any attempt by MM&S to bypass the Exchange Act by asserting a private breach of contract claim for violations of section 78s(g)(1) is fruitless."); *Anderson v. Soap Lake Sch. Dist.*, 423 P.3d 197, 215 (Wash. 2018) ("To bring a claim for breach of contract, a party must point to a separate duty contained in the contract that is different from the duties already imposed by law."); *NASDAQ OMX PHLX, Inc. v. PennMont Sec.*, 52 A.3d 296, 313 (Pa. Super. Ct. 2012) ("Thus, if Congress failed to authorize a private right of action to enforce a statute, then a party cannot sidestep legislative intent by suing to enforce a contract imposing the same obligations as those set forth in that statute and, by extension, [the] rule or regulation."); *Dixon v. Wells Fargo Bank, N.A.*, No. 12–10174, 2012 WL 4450502, at *8, (E.D. Mich. Sept. 25, 2012) ("This Court is not inclined to permit Plaintiffs to merely restate or redress their claim based on a

violation of HUD regulations, which otherwise is clearly foreclosed, as a breach of contract claim.").

Notably, several cases have applied this principle in this very context—holding that plaintiffs could not end-run around *Alden v. Maine* by trying to re-cast their FLSA claims against state agencies as breach-of-contract claims. For example, after *Alden v. Maine* was decided, a group of New Jersey state corrections officer "sought to recharacterize" their FLSA claims against the state as "contract" claims. *Allen v. Fauver*, 768 A.2d 1055, 1059 (N.J. 2001). In support, they cited a provision of the collective bargaining agreement that incorporated the FLSA's overtime provisions—just as Plaintiffs do here. *Id.* The New Jersey Supreme Court correctly rejected this attempt to "recharacterize" FLSA claims as breach-of-contract claims: "In fact, plaintiffs' claim is not contractual; it is statutory." *Id.* "[R]echaracterization of the claim cannot change the essential nature of the claim." *Id.*

The Seventh Circuit rejected a similar attempt to recast FLSA claims against a state agency as breach-of-contract claims. *Nunez v. Indiana Dep't of Child Servs.*, 817 F.3d 1042, 1045 (7th Cir. 2016). In *Nunez*, state employees sued an Indiana state agency, alleging FLSA violations similar to those asserted here. *Id.* at 1043. Attempting to evade *Alden v. Maine*, the employees sought to recharacterize their FLSA claims as breach-of-contract claims, arguing that "the FLSA's requirements are embedded in all employment relationships and thus in [their employment]

contracts." *Id*. The Seventh Circuit rejected this argument: "This path around the Eleventh Amendment amounts to a creative argument" that "is not sufficient." *Id.* at 1045. "The fact that a state incorporates the standards of the federal FLSA into employment contracts 'does not transform state into federal law, any more than by copying the Federal Rules of Civil Procedure a state turns its procedural code into federal law.'" *Id.* at 1046 (quoting *Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1998)).

Likewise, in *Norris*, the U.S. District Court for the Eastern District of Missouri rejected a similar argument in a case involving a putative FLSA class action brought by a corrections officer against MDOC. *Norris*, 2014 WL 1056906, at *1. Just as Plaintiffs do here, the plaintiff in *Norris* sought to evade the bar of *Alden v. Maine* by invoking the collective bargaining agreement between MDOC and its corrections officers—the very same agreement that Plaintiffs rely on here. *Id*. at *2. The *Norris* plaintiff argued that "by entering into a collective bargaining agreement incorporating the provisions of the FLSA, MDOC has constructively waived its Eleventh Amendment immunity and consented to suit." *Id.* at *2. The federal district court rejected this attempt to evade *Alden v. Maine* by re-casting FLSA claims as claims arising under MDOC's collective bargaining agreement: "[C]ontrary to Plaintiff's argument, the Supreme Court has expressly rejected the

theory that a state may impliedly or constructively waive sovereign immunity" in this way. *Id.* at *3.[4]

B. A Promise to Comply With a Pre-Existing Legal Duty Does Not Create a Separate Breach-of-Contract Claim.

These cases, moreover, provide a specific application of a more general principle that is universally recognized, including in Missouri law. A promise to comply with a preexisting legal duty does not support a claim for breach of contract. "Under the preexisting duty rule, a promise to do that which the promisor is already legally obligated to do is unenforceable." *Johnson v. Seacor Marine Corp.*, 404 F.3d 871, 875 (5th Cir. 2005). "It is a well-settled principle that an enforceable contract cannot be based upon a duty which one is already legally obligated to perform." *Seidel v. Lee*, 1996 WL 903947, at *7 (D. Del. 1996). "That which one is under a legal duty to do, cannot be the basis for a contractual promise." *Floyd v. United States*, 26 Cl. Ct. 889, 891 (1992) (citing RESTATEMENT (SECOND) OF CONTRACTS,

[4] In its pre-transfer opinion, the Court of Appeals rejected this argument on the ground that the FLSA does not preempt state-law breach of contract claims. *See* Slip Op. 9 (quoting *Bowler v. AlliedBarton Sec. Servs. LLC*, 123 F. Supp. 3d 1152, 1156-57 (E.D. Mo. 2015)). This holding misapprehended the State's argument. In this Point, the State does not contend that the FLSA *preempts* state-law claims by providing the exclusive remedy for wage-and-hour disputes—a question about which there is a division of authority in federal courts. *See Bowler*, 123 F. Supp. 3d at 1157 n.5. The State argues that a plaintiff cannot manufacture a non-existent cause of action against a state agency under the FLSA by re-casting its FLSA claims as breach-of-contract claims, especially where the contractual provision merely "reiterat[es] its obligation to comply with FLSA." Slip Op. 9.

§ 80 (1979)), *aff'd,* 996 F.2d 1237 (Fed. Cir. 1993). Missouri accepts this universal principle: "[A] preexisting duty cannot furnish consideration for a contract." *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. 2008).

This principle has particular force when the government is a contracting party. "***A promise by a government employee to comply with the law does not transform statutory or regulatory obligations to contractual ones.*** The violation of the statute or regulation will not be enforceable through a contract remedy." *Pressman v. United States*, 33 Fed. Cl. 438, 444 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) (emphasis added). Here, the Labor Agreement's recital that "[t]he Employer will comply with the Fair Labor Standards Act . . . regarding the accrual and payment of overtime," D426, at 18, constitutes a "promise by a government employee to comply with the law" that "does not transform statutory . . . obligations into contractual ones." *Pressman*, 33 Fed. Cl. at 444. The alleged "violation of the statute . . . will not be enforceable through a contract remedy." *Id.* Rather, Plaintiffs must pursue statutory remedies, which are not available here. *Alden*, 527 U.S. at 712.

Because Plaintiffs have no cause of action against MDOC under the FLSA, they cannot assert a breach-of-contract claim based solely on supposed FSLA violations. Moreover, the generic promise to comply with a preexisting legal obligation—such as the obligation to comply with FLSA—is not enforceable in contract. Plaintiffs' contract claims are meritless as a matter of law.

IV. The trial court erred and abused its discretion in excluding the testimony of the State's rebuttal experts on damages, because their testimony satisfied the requirements for admissibility of expert evidence under § 490.065, RSMo, in that they were qualified to offer expert testimony, their testimony was based on sufficient facts and data, their opinions were supported by reliable principles and methods that were reliably applied to the facts of the case, their testimony was helpful to the trier of fact, and the exclusion of their testimony unfairly prejudiced the State.

Standard of Review. The trial court's decision admitting or excluding expert testimony is reviewed for abuse of discretion. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. banc 2011). "[A]n abuse of discretion occurs if the court erroneously finds that the requirements of the expert witness statute are not met." *Id.* at 311. If the statutory criteria for admissibility are met, "the trial court must admit [the expert's] testimony." *Id.* Also, an erroneous evidentiary ruling does not warrant reversal of the judgment unless "the error committed by the trial court against the appellant materially affected the merits of the action." *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 S.W.3d 107, 114 (Mo. banc 2015) (citation omitted).

Preservation. This issue is preserved. Tr. 75, 68-90; D238; D331; Tr. 1802-80, D539, at 40-42. The circuit court struck the State's experts by one-line order. Sub. App. A10; D329.

A. Dr. Hanvey and Ms. Arnold's Testimony Satisfied the Requirements for Admissibility Under § 490.065.2, RSMo.

The admissibility of expert testimony in Missouri civil cases is governed by section 490.065, RSMo. Section 490.065.2 provides that "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" if: (a) "The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;" (b) "The testimony is based on sufficient facts or data;" (c) "The testimony is the product of reliable principles and methods;" and (d) "The expert has reliably applied the principles and methods to the facts of the case." § 490.065.2(1)(a)-(d), RSMo, Sub. App. A28.

If these four factors are satisfied, the trial court *must* admit the expert's testimony. "In deciding whether to admit an expert's testimony, the circuit court is required to ensure that all of the statutory factors are met; however, the court is not required to consider the degree to which they are met. So long as the expert is qualified, any weakness in the expert's knowledge is for the jury to consider in determining what weight to give the expert." *Kivland*, 331 S.W.3d at 311.

Dr. Hanvey and Ms. Arnold satisfied all these requirements.[5] First, each was "qualified as an expert by knowledge, skill, experience, training, or education." § 490.065.2, RSMo, Sub. App. A28. Each had over ten years' experience serving as an expert in wage-and-hour disputes, and each had served as an expert in wage-and-hour disputes over 100 times. *See* D284, at 1; D285, at 1. Plaintiffs did not dispute their qualifications as experts in the field of wage-and-hour analysis. Tr. 79.

Second, Hanvey and Arnold's testimony would have "help[ed] the trier of fact to understand the evidence or to determine a fact in issue." § 490.065.2(1)(a), RSMo, Sub. App. A28. The damages model of Plaintiffs' expert, Dr. Rogers, was based on factual assumptions that were not derived using commonly accepted methods in the field of wage-and-hour analysis. Rather, it was based entirely on evidence and assumptions provided by *non*-experts—specifically, Plaintiffs' lawyers. *See* D295, at 3, 5; Tr. 669. This is not surprising, because Rogers had no expertise in wage-and-hour cases, and thus he was not an expert in the empirical methods for calculating aggregate uncompensated time in wage-and-hour disputes. D297, at 3-5 (13:21-15:7); Tr. 664, 829. Rogers had no training or experience in that area, and he had never before served as an expert in a wage-and-hour case, or

[5] Hanvey and Arnold worked together to prepare their analysis of Rogers' damages calculation, and Hanvey provided an offer of proof at trial that presented both their results. Tr. 1802-80. Thus, this brief refers to their joint analysis as "Hanvey and Arnold's" evidence, which Hanvey summarized at trial through his offer of proof.

even a class action. *Id.* As a result, Rogers' damages analysis suffered from at least eleven critical errors identified by Hanvey and Arnold, all discussed below. *See infra* Part IV.C. For the vast majority of these criticisms, Plaintiffs have never offered any argument to defend Rogers' methodology.

One example highlights both the helpfulness of Hanvey and Arnold's testimony and the prejudicial indefensibility of Rogers' analysis. It is indisputable that the FLSA requires the calculation of overtime based on a 40-hour work *week*, not on an eight-hour work *day*. *See* 29 U.S.C. § 207(a)(1) ("[N]o employer shall employ any of his employees who in any *workweek* is engaged in commerce . . . for a *workweek* longer than forty hours unless such employee receives [overtime] compensation") (emphases added). "In the FLSA's 'maximum hours' provision, 29 U.S.C. § 207(a)(1), the unit of time . . . within which to distinguish regular from overtime work is the week." *Abshire v. Redland Energy Servs., LLC*, 695 F.3d 792, 794 (8th Cir. 2012) (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 579 (1942)). Thus, the fact that an employee may work more than eight hours on a given *day* does not necessarily mean that that employee is entitled to overtime compensation. Instead, under the FLSA, the employee must work compensable time in excess of 40 hours over a given *week*. This "workweek" requirement is universally recognized, it is fundamental to FLSA calculations, and it has been written into the plain text of the FLSA since 1938. 29 U.S.C. § 207(a)(1).

Notwithstanding this clear authority, Rogers calculated Plaintiffs' damages based on an eight-hour workday, not a 40-hour "workweek" as required by 29 U.S.C. § 207(a)(1). Tr. 761, 862-65. In doing so, Rogers committed an elementary error that no qualified expert in the field of wage-and-hour analysis would have committed. Tr. 1824. This elementary error alone made Rogers' calculation "massively overestimated." Tr. 1826. In fact, this error and other errors effectively *quadrupled* Rogers' damages estimate, based an R script using the proper workweek that Rogers himself wrote but declined to employ. Tr. 1828, 1845. And this is only one example of the deficiencies in Rogers' analysis—many others are discussed below. *See infra* Part IV.C. By elucidating such critical deficiencies in Rogers' assumptions and methodologies, Hanvey and Arnold's testimony would have "help[ed] the trier of fact to understand the evidence [and] to determine a fact in issue." § 490.065.2(1)(a), RSMo.

Furthermore, Hanvey and Arnold's analysis was based on sufficient facts and data, and was based on reliable principles and methods that were reliably applied to the facts of the case. § 490.065.2(1)(b)-(d), Sub. App. A28. As discussed above in the Statement of Facts, the principles and methods they employed—such as structured interviews, time-and-motion studies, and distance measurements, Tr. 80-81—are reliable methods based on sufficient facts that are commonly used by experts in the field of wage-and-hour analysis, and these methods were reliably

applied to the facts. Tr. 82; *see also* D293, at 11 (68:10-21); D278, at 4-5, 8, ¶¶ 8-10, 15; D286, at 4-6, ¶¶ 8-12. Hanvey and Arnold's testimony on these points was uncontradicted—again, Plaintiffs could not have contradicted it, because they failed to produce an expert with expertise in the relevant field. Tr. 664, 829.

B. Plaintiffs' Arguments Against Admitting Hanvey and Arnold's Testimony Had No Merit.

The arguments Plaintiffs advanced in favor of striking Hanvey and Arnold's testimony were unconvincing. First, all Plaintiffs' objections went to the weight of their expert testimony, not its admissibility. "As a rule, questions regarding the sources and bases of expert witness testimony and opinions affect the weight, not the admissibility, of such evidence." *Mansil v. Midwest Emergency Med. Servs.*, 554 S.W.3d 471, 475 (Mo. App. W.D. 2018). "Only in cases where the sources relied on by the expert are so slight as to be fundamentally unsupported, should the opinion be excluded because testimony with that little weight would not assist the jury." *Id.* (quotation omitted). Plaintiffs' arguments were unconvincing on the merits as well.

1. The State had no burden to "extrapolate" to the entire population of corrections officers.

First, Plaintiffs argued that Hanvey and Arnold's analysis was not based on sufficient facts and data, because Hanvey and Arnold did not purport to provide a final estimate of damages for all class members. *See* D271, at 6-8. But Hanvey and

Arnold explained that their empirical study was "preliminary" and that they did not intend to "extrapolate this data to the larger population" of all corrections officers. D272, at 7-8 (123:16-140:25); *see also* D273, at 2 (70:10-25). The purpose of their study was not to "measure the entire population of the folks you're assessing." D272, at 8 (138:8-18). Rather, their study was designed to assess and evaluate *Rogers'* methodologies and assumptions, which was their task of rebuttal experts. D292, at 4, 10 (10:3-6, 79:15-23).

Rogers' analysis assumed that all officers across all 21 facilities spent similar amounts of time engaged in pre-shift and post-shift activities, and that all such activities were compensable. The empirical study conducted by the State's experts refuted Rogers' assumptions, because it showed "range and variability and differences in scenarios, differences in position, differences in facility, all the differences that we found when visiting these different locations." D272, at 8 (140:9-12). "You would need to follow a different protocol to extrapolate the results to the overall population," but their study did "present data actually collected in the field that shows the range and variability in terms of post distance procedures, etc." *Id.* (140:20-25). "[T]he goal of the study was simply to evaluate the assumptions" of Rogers' report, "and the observation data and the interviewing data that we were collecting was sufficient for that purpose." D293, at 11 (68:3-6).

Hanvey and Arnold also conducted an independent review of the data underlying Rogers' report. D272, at 7 (124:19-24) (testifying that, in addition to the empirical study, the State's experts "analyzed [Rogers'] data and looked at his code and looked at a variety of assumptions that he made in the analysis"); Tr. 80 (noting that their conclusions were "based on a fairly thorough review of the documents that were provided to us as support for the report by Dr. Rogers"). Both prongs of their analysis contributed to their conclusion that Rogers' study was based on unreliable assumptions and methods. *See* Tr. 80.

Hanvey and Arnold's role as rebuttal experts was to evaluate and assess the analysis conducted by Plaintiffs' expert, and their testimony was plainly admissible for that purpose. "A party is entitled to introduce evidence to rebut that of his adversary, and for this purpose any competent evidence to explain, repel, counteract, or disprove the adversary's proof is admissible." *Am. Family Ins. v. Coke*, 413 S.W.3d 362, 372 (Mo. App. E.D. 2013) (quotation omitted). The State's experts had no obligation to provide their own damages calculation, because it was Plaintiffs' burden, not the State's, to prove class-wide damages. Tr. 1804.

2. The State's experts were not required to review every legal document in the case before forming opinions.

Second, Plaintiffs faulted the State's experts because they had supposedly "not considered the vast amount of discovery that had been adduced in this case that

would have been relevant to their research," such as "entry and exit logs, testimony regarding pre and post shift activities from Plaintiff and Defendant witnesses, [and] handwritten logs." D271, at 8. This argument has no merit. The State's experts testified that they reviewed numerous relevant written materials in preparing their opinions, but that it was neither necessary nor useful to review every piece of discovery to form expert opinions. As Hanvey attested, "a comprehensive review of all legal materials is rarely, if ever, done by testifying experts in wage and hour cases." D278, at 6, ¶ 12. On the contrary, "[r]elying on a comprehensive review of secondary materials, such as legal filings, typically does not meet this standard [of expert reliability], is not a generally-accepted technique in this context, and is not common practice for professionals in [the] field." *Id.* This testimony was uncontradicted because Rogers had no expertise in the field, and therefore he had no basis to contradict it.

Furthermore, the State's experts testified, again without contradiction, that the three established methods they used to conduct an empirical analysis—structured interviews, time and motion observations, and distance measurements—are more reliable, not less reliable, than Rogers' armchair approach of simply reviewing documentary evidence provided by Plaintiffs' counsel. Structured interviews and time-and-motion studies are more reliable because the experts "have control over the data collection process and have control over the questions that are asked."

D293, at 13; *see also* D293, at 8 (49:5-7) (testifying that "we did collect our own data," because that "was going to give us the most reliable data"); D293, at 12 (76:19-23) (testifying that "generally the value of legal documents is to help design the methodology, to help understand what the issues are, to help understand what questions to ask, what sort of data to collect. It's not to reach conclusions based on what others have said."); D286, at 5-7. By contrast, exhaustively reviewing every piece of discovery—as Rogers did—was not a useful method of calculating time spent in pre-shift and post-shift activities. Tr. 85.

3. There was no evidence of bias by the State's experts.

Third, Plaintiffs accused the State's experts of being "hopelessly compromised" because they supposedly intended to "refute" Rogers' analysis from the outset, instead of starting from a neutral perspective. D271, at 11-13. This argument is meritless. It is based entirely on an internal AGO document requesting authority to retain Hanvey and Arnold, which stated that they would "review, analyze and refute" Dr. Rogers' analysis. D287. Neither Hanvey nor Arnold had ever seen this document before their depositions, and thus it had no bearing whatsoever on their putative bias. D288, at 4 (54:18-25); D289, at 5-6 (30:1-14). Both Hanvey and Arnold repeatedly testified, without contradiction, that they were retained to review and evaluate Rogers' report, that they conducted their analysis

from a neutral perspective, and that they did so in all cases in which they were retained as experts. *See* D272, at 2, 3, 4; D286, at 2-3; Tr. 84.

In any event, the argument that an expert witness is biased "goes to the weight that testimony should be given and not its admissibility." *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 246 (Mo. 2001). This argument provided no plausible basis for the trial court to exclude the State's experts from testifying.

4. The State's experts took appropriate precautions to avoid biased responses in structured interviews.

Fourth, Plaintiffs argued that the State's experts used unreliable methods because, when they observed corrections officers performing pre-shift and post-shift activities, they did not advise the officers that their performance was not being evaluated. This criticism is meritless, because it conflates two different social science techniques. When Hanvey and Arnold conducted *structured interviews* of knowledgeable staff members, it was appropriate to advise the interviewees that their performance was not being evaluated—and Hanvey and Arnold did so. D292, at 5 (11:17-21); D286, at 8, ¶ 16; D278, at 7, ¶ 14. By contrast, when they conducted unobtrusive *time and motion observations* of officers performing pre-shift and post-shift activities, it would have been inappropriate to advise the officers that they were being observed, because that might have introduced bias by rendering the officers self-conscious or inducing them to act in an atypical manner. As Hanvey testified,

"generally the goal in an observation study is to minimize the impact that the observer has on the people that they are observing." Tr. 88. Warnings were not given to observed officers because "[w]e were observing them as a group. It's possible that they may not have even been aware that they were observing them." Tr. 89. "[I]f we had addressed that person prior to doing the observation, it would have caused more bias in their behavior than those instructions are intended to prevent." *Id.*; *see also* D278, at 4-5, ¶ 9.

C. Excluding the State's Experts Was Extremely Prejudicial.

Excluding the States' experts was an extremely prejudicial error that "materially affected the merits of the action." *Cox*, 473 S.W.3d at 114. In a damages trial where the Plaintiffs' case hinged entirely on the testimony of a single, unqualified expert witness—Dr. Rogers—it is hard to imagine a more prejudicial error than striking the State's highly qualified rebuttal experts. This prejudice is manifest on the face of the record. Hanvey's offer of proof identified at least eleven critical errors in Rogers' analysis, which devastated Rogers' credibility and demonstrated his massive overestimation of damages. Tr. 1802-80.

First, Hanvey's testimony would have demonstrated to the jury that Rogers had expertise only in economic calculations, and had no expertise in wage-and-hour analysis or in empirical methods for ascertaining wage-and-hour losses. *See* Tr. 692, 694. At trial, Rogers admitted that he had never served as an expert in a wage-and-

hour case, that he had not conducted any empirical analysis of the time spent in pre-shift and post-shift activities, that he had not spoken to any class members or visited any facilities, and that he had relied entirely on secondhand information provided by Plaintiffs' counsel to conduct his damages calculation. Tr. 669, 687, 829, 831-32, 892, 928-29. Rogers admitted that he had no idea how to conduct an empirical analysis of time spent in pre-shift and post-shift activities: "If I go to a prison, I'm not sure what I'm looking for. I haven't been to a prison since I was in kindergarten." Tr. 687. In his offer of proof at trial, Hanvey explained that these shortcomings rendered Rogers' analysis inherently unreliable and methodologically unsound to experts in wage-and-hour analysis. To conduct a reliable analysis, it was "necessary . . . to actually go out to a variety of prisons and observe what goes on on the grounds." Tr. 1807. By contrast, Hanvey's opinions were "based on tried and true methods that have been used in organizational research for 100 years." Tr. 1808.

Second, "one of the critical assumptions within Dr. Rogers' analysis was that all activities that were performed inside of what he defined as the security envelope were compensable." Tr. 1811. Hanvey and Arnold's empirical survey decisively refuted this assumption. Their survey revealed that numerous non-compensable activities were performed inside the security envelope, including using a weight room, "people standing around, talking to each other, we saw people eating, we saw people showing photos to each other." Tr. 1813; *see also* D278, at 13-16, 19 (noting

that their study documented extensive non-compensable personal activities inside the security envelope such as "congregating near the airlock" for significant periods, talking to co-workers, "working out in the gym or using computers for personal purposes," and "arriv[ing] 30 minutes early for their shift with a pizza").

Plaintiffs argued below that time spent on such personal activities inside the security envelope, before one's shift commences, is compensable under the continuous-workday rule. This argument assumes that the continuous workday commences the moment officers arrive at the facility and enter the security envelope, which is erroneous for all the reasons discussed above. *See supra*, Part I. In any event, this argument would be misplaced even if Plaintiffs were correct about the commencement of the continuous workday (which they are not). Under the continuous-workday rule, "employees must show that the overtime hours they worked [are] *reasonable* in order for those hours to be compensable." *Albanese v. Bergen County, N.J.*, 991 F. Supp. 410, 423-24 (D.N.J. 1997) (emphasis added) (citing *Hellmers v. Town of Vestal, N.Y.*, 969 F. Supp. 837, 844-45 (N.D.N.Y. 1997); *Holzapfel v. Town of Newburgh, N.Y.*, 950 F. Supp. 1267, 1273 (S.D.N.Y. 1997); *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1324 (D. Kan. 1993); and *Amos v. United States*, 13 Cl. Ct. 442, 449 (1987)). Plaintiffs "must demonstrate that the amount of overtime hours they worked were reasonably related to their principal activity." *Id.* at 424. Arriving at work early to weightlift, send personal emails, and eat pizza is

not "reasonably related to" corrections officers' principal activity. *Id.* The continuous workday does not provide employees with a blank check to arrive at work early and obtain overtime compensation for performing personal activities before their shift starts. *Id.*

Third, more generally, Rogers' methods were unreliable because he failed to rely on first-hand observation, and relied instead exclusively on self-serving information provided by Plaintiffs' counsel. "In organizational science, the value of things like depositions or other secondhand information is to help you develop a methodology to go out and collect your firsthand data, help shape appropriate questions to ask when you're there." Tr. 1808-09. Rogers did none of that. For example, a time-and-motion study at each facility could have established how much time the pre-shift and post-shift activities take, and excluded non-compensable activities like weightlifting and eating pizza: "Certainly I think the most effective way to do that is through a time and motion methodology. It's more or less designed to capture that exact information where you can document the tasks being performed as well as the duration." Tr. 1815. The inclusion of a very substantial amount of non-compensable time rendered Rogers' analysis methodologically unsound. Tr. 1816. Rogers failed to exclude these activities because he relied solely on deposition testimony and self-serving affidavits from class members. Tr. 669. Relying solely on such documents is not a reliable or accepted method in the field of wage-and-

hour analysis: "I don't think I've ever seen anybody do that as an expert witness." Tr. 1808.

Fourth, Hanvey explained how Rogers' analysis overlooked wide variations in pre-shift and post-shift activities across MDOC's 21 facilities. Rogers assumed that all "time inside the security envelope" was compensable work, but he never visited a single facility or talked to a single class member. Tr. 831-32. As Hanvey explained, this approach did not comport with reliable methodologies used by experts in wage-and-hour analysis: "[T]he only way to really test that assumption is to go to the facilities and see what individuals are actually doing." Tr. 1838-39. Even the preliminary empirical study of 10 facilities revealed "a tremendous variation" in the pre- and post-shift activities that were actually performed. Tr. 1841. This variation was pervasive. There was tremendous variation among individual officers at each particular facility, and tremendous variation across the quite different facilities. "Generally speaking, . . . there weren't really any of [the pre-shift and post-shift activities] that are consistently performed by all CO's." Tr. 1839. Not all officers were "required to pick up radios and keys before going to their posts," Tr. 1839; "there were a variety of different walk times," both among and within the many facilities, Tr. 1840; not all officers received shift information from their supervisors, Tr. 1840; not all officers checked mailboxes before their shifts, Tr.

1840; and the locations for swiping in and swiping out varied widely from prison to prison, Tr. 1840-41.

Fifth, Hanvey attested to a whole series of methodological errors in Rogers' analysis, all of which tended to overestimate class-wide damages. For example, in constructing his damages calculation, Rogers simply discarded 10-hour and 12-hour shifts. Tr. 765-67. But Hanvey's analysis demonstrated that these shifts are often used at MDOC facilities. Tr. 1817. This error resulted in overestimation of damages. If 10-hour and 12-hour shifts were considered, "you would certainly get a much smaller number [of shifts worked] which would mean fewer days worked which would mean smaller damages." Tr. 1818.

Sixth, Hanvey pointed out that Rogers also discarded shifts less than 7 hours, which caused additional overestimation problems. Tr. 1819. "[B]y discarding the shorter shifts, you end up with higher percentages associated with the shifts that are 8 hours and 25 minutes, 8 hours and 30 minutes, 8 hours and 45 minutes," which also overestimated damages. Tr. 1819. In general, Hanvey testified, "there was a tremendous amount of data that was discarded" by Rogers without sufficient explanation, Tr. 1820—and all these omissions tended to inflate, rather than reduce, Rogers' estimate of damages.

Seventh, as discussed above, Rogers calculated overtime based on an eight-hour workday, instead of a 40-hour workweek, contrary to the FLSA's express

requirements. Tr. 761, 862-65; *see also* 29 U.S.C. § 207(a)(1). Rogers assumed that any time worked beyond eight hours on any given day constituted compensable overtime under the FLSA, even though the FLSA only requires payment of overtime if the worker works more than 40 hours in the workweek. *Id.* Thus, a worker who works four 8.5-hour shifts in a single week is owed no overtime, but Rogers' analysis would credit that worker with 2 full hours of overtime. *Id.* Evidence at trial demonstrated that many officers did not work 40 hours each week, or work five-day weeks with the same five days' worth of pre- and post-shift activity. *E.g.*, Tr. 552-61, 634, 1047-48, 1148, 1168, 1171, 1180-81, 1443-44 (plaintiff's witnesses); Tr. 1480-82, 1486, 1570, 1628, 1706-07, 1741, 1780 (defense witnesses).

Hanvey testified that, reviewing the data on which Rogers relied, "if you look at the data on a weekly basis, there was a tremendous number of weeks that were on the low end." Tr. 1820-21. No experts in the field of wage-and-hour analysis would use Rogers' approach, because it contradicted the plain language of the FLSA: "40 hours per workweek has always been used in every situation I've ever seen. . . . [I]t specifically says that in FLSA." Tr. 1824. This error "made the damages massively overestimated." Tr. 1826.

Eighth, Hanvey also testified that Rogers' explanation for not using the FLSA-mandated 40-hour workweek was unconvincing, and that it would have been no more difficult to do Rogers' calculations using the correct assumptions. Rogers

"testified that he wrote an R script code and that code would have allowed him to run a weekly analysis," but he "chose not to run that script." Tr. 1826. Based on the data available to him, Rogers could have "just as easily calculate[d]" damages based on the 40-hour workweek, "according to the way FLSA suggests you do it." Tr. 1828. In fact, using Rogers' own R script with appropriate assumptions would have resulted in a lost-overtime damages figure of $24 million, not $100 million, with a proportional reduction in the $13 million pension-related damages claimed by Plaintiffs. Tr. 1845. In other words, Rogers' own code for calculating damages based on correct information—which Rogers "chose not to run," Tr. 1826—would have resulted in a damages calculation *76 percent* lower than Rogers testified to at trial. *Id.* The jury was never advised of this devastating fact.

Ninth, Rogers also estimated that each class member, on average, works five minutes of pre-shift and post-shift time *outside* the security envelope, which increased his damages calculation by about $16 million. Tr. 721-22, 842-43, 845. This five-minute estimate was based entirely on 11 affidavits of class members collected by Plaintiffs' counsel. *Id.* Hanvey explained that this estimate was based on a deficient methodology that contradicted basic principles of sound social science. Tr. 1830. Studying how to "collect[] valid self-reports" is "one of the most widely studied areas of social science." Tr. 1830. Self-reports "tend to overestimate that amount" of time spent. Tr. 1831. Valid social science required the collection

of a representative sample that could "extrapolate to the entire class," which Rogers did not do. Tr. 1831. Rogers' sample of 11 self-reports was "extremely small," and it violated "well-accepted standards that must be met" for a statistician to "justify extrapolation from a sample to a population." Tr. 1832. This requires a "random selection procedure generally that's well documented, everything about it is controlled, structured." Tr. 1832. "That was clearly not done here, because they were collected in the form of declarations which are subject to a number of biases." Tr. 1832.

Tenth, when Plaintiffs' counsel collected information from class members about how much time they spent in pre-shift activities outside the security envelope, "there was no specific definition given to where the security envelope begins." Tr. 1835. Again, this lack of precision in collecting information from class members undermined Rogers' methods and conclusions. Hanvey testified that "these are very clear examples of what happens when you don't collect this data in a systematic manner. You get inconsistent understanding and essentially highly unreliable data." Tr. 1835.

Eleventh, Rogers relied on the number of full-time equivalents ("FTEs") to estimate the total number of shifts worked by class members. But in doing so, he did not account for the fact that many shifts go unfilled due to "chronic short-staffing" at MDOC. Tr. 1836. Hanvey explained that Rogers' analysis counted

unpaid overtime for numerous shifts that were never worked by anyone at all: "[W]hat that means is that there are shifts unworked that are still being credited in the analysis, so essentially the number of annual shifts and annual weeks is overestimated." Tr. 1837.

Based on these many deficiencies, Hanvey testified that Rogers' damages calculation was unreliable and "greatly overestimated." Tr. 1841. In fact, as noted above, Rogers' own R script, using more defensible assumptions, would have resulted in a damages estimate of $24 million of lost overtime, not $100 million, with a total damages award of $27.2 million, not $113 million. Tr. 1845. Even overlooking his other methodological errors, Rogers' miscalculations on this point alone *quadrupled* Plaintiffs' recovery.

At trial, Plaintiffs repeatedly attempted to vest Rogers' analysis with an aura of credibility by emphasizing that Rogers personally coded the computer algorithms used to process the data. But, as Hanvey attested, Rogers was selective in his use of computer programs—he declined to use his own R script that would have reduced his damages estimate by 76 percent. Tr. 1826-27, 1845. "Testimony that is based upon or bolstered by a computer simulation can have a powerful effect, but the proponent of such evidence runs a risk that . . . other evidence casting doubt on the factual premises can damage the credibility of the computer-assisted evidence. The computer-age adage, 'garbage in, garbage out,' applies." *Alcorn*, 50 S.W.3d at 246.

In short, Rogers' testimony was the centerpiece of Plaintiffs' case. Plaintiffs called numerous fact witnesses to provide anecdotal and background information, but Rogers was their only expert witness, and he provided the sole basis for their damages calculation. Rogers' testimony was the overwhelming focus of Plaintiffs' closing argument. *See* Tr. 1909-17. The exclusion of highly qualified rebuttal evidence that would have devastated Rogers' credibility was extremely prejudicial.

This prejudice was compounded because only Plaintiffs were allowed to present expert evidence of any kind to the jury. Many courts have commented that juries give expert testimony "talismanic significance" due to its aura of credibility. *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004). "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 595 (1993) (quotation omitted). "[T]here is often an inherent danger with expert testimony unduly biasing the jury because of its aura of special reliability and trust." *United States v. Anderson*, 851 F.2d 384, 393 (D.C. Cir. 1988). This "inherent danger" was greatly magnified in this case, because the trial court allowed Plaintiffs' expert to testify—despite his lack of relevant qualifications—while excluding the State's highly qualified experts.

D. Striking the State's Experts Was Not a Discovery Sanction.

In its pre-transfer opinion, the Court of Appeals did not address these issues. Instead, it held that the exclusion of the trial court's exclusion of the State's experts was not based on § 490.065.2 at all, but was rather a discovery sanction. Slip Op. 10-11. This holding lacked support in the record. Plaintiffs never filed any motion to strike MDOC's experts as a discovery sanction; instead, their motion to strike argued exclusively that the experts should be stricken because they supposedly failed to satisfy § 490.065.2, RSMo. D271, at 1-18. Neither party briefed or argued on appeal that the experts were stricken as a discovery sanction. *See* Brief of Appellants in No. WD82229, at 43-58; Respondent's Brief in No. WD82229, at 33-45; Reply Brief in No. WD82229, 17-21. And Plaintiffs' counsel explicitly conceded at oral argument in the Court of Appeals that the circuit court did *not* strike MDOC's experts as a discovery sanction.

The Court of Appeals' opinion stated that "DOC produced a twenty-page affidavit and over 1000 pages of supporting documentation from its rebuttal expert witness" after the close of discovery, which incorrectly implied that MDOC's expert disclosures were untimely. Slip Op. 11. This statement misapprehended the course of events in the circuit court. The "twenty-page affidavit" of Dr. Hanvey disclosed after the close of discovery was *not* Hanvey and Arnold's summary of opinions, which was disclosed before their depositions on February 8, 2018. *See* D271, at 2.

It was an affidavit filed in support of the State's motion for class de-certification, which was appropriately filed at the close of discovery. Tr. 75; D278 ("Affidavit of Dr. Chester Hanvey in Support of Defendants' Motion for Class Decertification," filed March 13, 2018). And though there was an inadvertent late disclosure of certain documents, which MDOC cured as soon as it became aware of the omission, Tr. 98-99, 100, Plaintiffs have never contended that they were prejudiced in any way by that inadvertent late disclosure. In fact, they never accepted MDOC's offer to re-depose Dr. Hanvey and Ms. Arnold regarding those documents. *See id.*

Moreover, any order striking Plaintiffs' experts as a discovery sanction would have been a clear abuse of discretion. Striking an expert witness's testimony is an extreme sanction. Dr. Hanvey and Ms. Arnold were retained as rebuttal experts to address Plaintiffs' expert, Dr. Rogers. But Rogers did not disclose his final report until December 19, 2017. D295, at 1. MDOC disclosed Hanvey and Arnold as rebuttal experts in January 2018. D271, at 2. Thus, MDOC's expert disclosure came promptly after MDOC received the final report from Plaintiffs' expert, before the close of discovery, and seven months before trial occurred. Tr. 97. Plaintiffs had plenty of time to depose both Hanvey and Arnold, and in fact they did depose them both on February 8, 2018. D272 (Arnold deposition); D273 (Hanvey deposition). As Plaintiffs' counsel conceded at oral argument in the Court of Appeals, the order

excluding MDOC's experts was not a discovery sanction. Plaintiffs never sought such a sanction, and there was no valid basis for one.

V. The trial court erred and abused its discretion under Rule 52.08 in refusing to de-certify the class, because individual questions predominated over common questions and a class action was not the superior method of adjudication, in that different officers at different facilities performed different pre-shift and post-shift activities for different amounts of time each day and for different lengths of employment, and the class members' issues of liability and damages were not susceptible to common proof or defenses.

Standard of Review. This court reviews a class certification order for an abuse of discretion. *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 880 (Mo. 2008). A court abuses its discretion "if the class certification is based on an erroneous application of the law or the evidence provides no rational basis for certifying the class." *State ex rel. McKeage v. Cordonnier*, 357 S.W.3d 597, 599–600 (Mo. 2012) (quotation omitted).

Preservation. MDOC repeatedly preserved its objections to proceeding as a class action and, after the close of discovery, moved to de-certify the class. D39; D84; D220; D277; D333; D501; D494; D507, p.1 (Aug. 13, 2018); D510, p.1; D498; D521; D531; D529; D534; D537; D538; D529. The circuit court refused to de-certify the class. Sub. App. A6-A9; D549.

Under Rule 52.08(a), a class action must satisfy four initial requirements—numerosity, commonality, typicality, and adequacy. Mo. Sup. Ct. R. 52.08(a)(1)-(4), Sub. App. A29. In addition, the class action must meet one of the requirements of Rule 52.08(b)—here, the predominance and superiority requirements of 52.08(b)(3). Mo. Sup. Ct. R. 52.08(b)(3), Sub. App. A29.

At all stages, the burden to show that a class action is or remains proper "rests entirely with the plaintiff." *Green*, 254 S.W.3d at 877–78. Plaintiffs bear the burden of establishing that all requirements for class certification have been satisfied. *Ogg v. Mediacom, LLC*, 382 S.W.3d 108, 116 (Mo. App. W.D. 2012). The burden in opposing a decertification motion likewise "rests entirely with the plaintiff." *Green*, 254 S.W.3d at 877–78; *see also Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011). When the class becomes "unmanageable" because individual issues predominate, the class should be decertified. *Ogg*, 382 S.W.3d at 116-17.

A class must not be certified if doing so improperly expands substantive rights—finding liability and awarding damages classwide when individual analysis would have shown no liability or fewer damages. Here, the circuit court erred by only weighing liability questions and not damages questions when considering whether class-wide questions predominated over individual questions. That was error. The court then compounded that error by going to trial *only on damages*—the

issue that was most individualized, and one that the court failed to weigh when granting class certification.

These compounded errors predictably resulted in a flawed damages model and a heavily inflated verdict. Almost 14,000 class members at 21 different facilities worked different pre-shift and post-shift activities, for different amounts of time each day, and for different lengths of employment over the 10-year class period. These differences defied class-wide resolution. Plaintiffs tried but failed to paper over these differences through individual representative testimony. But their cherry-picked "representatives" were in no way representative and actually showed significant differences among class members rather than the "common proof" required in a class action. Plaintiffs' expert then tried to rely on exit and entry data. But this shortcut assumed that class members were always working whenever they were in the building, an implausible assumption he conceded to be flawed (and that he attempted to correct with equally implausible assumptions). MDOC was also given no opportunity to present individual defenses. Without reliable common proof of both liability and damages, common issues did not predominate, and the class should not have been certified.

A. The Class Did Not Satisfy the Predominance Requirement of Rule 52.08(b)(3).

Class certification was improper under the predominance factor of Rule 52.08(b)(3). "An action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Mo. Sup. Ct. R. 52.08(b)(3), Sub. App. A29. This predominance requirement "'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Smith v. Mo. Highways & Transp. Comm'n*, 372 S.W.3d 90, 94 (Mo. App. S.D. 2012) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)).

Unlike commonality under Rule 52.08(a), the test for predominance "'is far more demanding.'" *Id*. A court must find more than common legal questions. *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. App. W.D. 2017). A court must "entertain arguments against . . . [the] damages model" advanced by the putative class when considering predominance because questions of individual damages can "overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (reversing class certification where court refused to consider whether damages model allowed for classwide resolution); *see also Espenscheid v. DirectSat USA*, 705 F.3d 770, 775 (7th Cir. 2013) (Posner, J.) (holding putative FLSA wage-and-overtime class should be

decertified under Rule 23(b)(3) because of the "variance" in time worked among class members).

Damages must be shown with reasonable certainty, "as to both existence and amount, and the evidence must not leave the matter to speculation." *Affiliated Acceptance Corp. v. Boggs*, 917 S.W.2d 652, 657 (Mo. App. W.D. 1996) (citation omitted). "The predominance requirement explicitly requires a comparison between common issues and individual issues in order to ascertain whether the common issues predominate, and thus requires the Court to identify the common issues and the individual issues presented by the case." *Smith*, 372 S.W.3d at 94 (citation omitted). "[W]hether a question is a common or an individual question" depends on "the evidence that will suffice to resolve the question." *Id.* (quoting *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 163 (Mo. App. W.D. 2006)). "If the evidence needed to prevail on the question 'varies from member to member, then [the question] is an individual question.'" *Id.* (quotation omitted).

The circuit court held that common questions of contract and statutory interpretation—all related to liability—meant that common issues predominated over any individual issues. Sub. App. A7-A8; D549, at 2-3. But "'[w]hat matters to class certification is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to

drive the resolution of the litigation.'" *Lucas Subway*, 524 S.W.3d at 130 (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)).

1. Different staff at different facilities performed different pre- and post-shift activities for different amounts of time each day and for different lengths of employment.

By the time the case went to trial on damages, discovery had made clear that the class certified three and a half years earlier no longer held together. Almost 14,000 class members at 21 different facilities worked different pre-shift and post-shift activities, for different amounts of time each day, and for different lengths of employment over the 10-year class period. *See, e.g.*, D238, at 2, 5 (7:16-22, 22:14-23). Their activities varied so much that it was impossible to find representative proof without resorting to speculation, a Plaintiffs' expert, Dr. Rogers, did. *Boggs*, 917 S.W.2d at 657.

Pre-shift and post- shift activities were "very different at each institution due to the age of the institutions." *See, e.g.*, D238 (Exh. R Rainwater Depo.), 7:16–22, 22:14–23. Not every facility required the same pre-shift or post-shift activities. D39, at 10-20; D41. "[B]ecause each employee did not perform the same tasks, they were not sufficiently similar to permit a class-wide determination of liability or damages." *Monroe v. FTS USA, LLC*, 860 F.3d 389, 418 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part). But even within a single facility, the nature of those activities and the time it took to complete them varied significantly. *See*

D238 at 3 (17:1-23). For each officer, there are day-to-day variances in the time it takes to complete pre-shift and post-shift activities, depending on individual discretionary decisions, individual duties, individual duty time of shift during the day, post locations, and individual equipment needs. *E.g.*, *id*. at 4 (18:5-24); D501, at 2. Because proof of class claims rested on "these other contributing circumstances" that varied by class member, *Smith*, 372 S.W.3d at 96, individual evidence was necessary to resolve the litigation, and common issues did not predominate.

Moreover, the evidence at trial confirmed the impropriety of class treatment for these individualized claims. The class's own witnesses testified that the class had differing damages because the officers work different posts, at different times of day and over different years, at 21 different facilities, with different distances to walk before clocking into a post, and with different security procedures to follow, with different wage rates, with differences in the number of hours worked each week, and different pre-shift and post-shift activities. In fact, Gary Gross, Director of the Missouri Corrections Officers Association, admitted these variances:

> Q: … the time it takes to perform these pre and post-shift activities that we've been talking about, does that vary from prison to prison?
>
> A: Yes. It varies somewhat from prison to prison.

Q: And does it also vary from shift to shift?

A: Yes.

D239, at 97:4–12. Testimony from trial witnesses repeatedly confirmed these variations. *See, e.g.*, Tr. 510, 543, 588-90, 593-95, 599-600, 632-34, 639-40, 654-55, 975-77, 1015-16, 1022-29, 1048-50, 1062-63, 1065-68, 1072-75, 1110-11, 1124, 1129-32, 1166-68, 1172-74, 1198-99, 1205-08, 1212-13, 1241-42, 1253-54, 1259, 1263, 1266-67, 1269-71, 1286, 1299, 1393, 1399, 1402, 1409, 1412, 1417-19, 1423, 1459, 1462 (plaintiff's witnesses); *see also* Tr. 1472-76, 1483-84, 1489, 1517-18, 1527-28, 1533, 1541-43, 1557-58, 1560-63, 1566-68, 1571-72, 1608-10, 1645-47, 1657-58, 1683, 1696, 1704, 1763-68, 1793, 1796-97 (defense witnesses). To take one clear example of this variance—although Plaintiffs' expert Dr. Rogers included five minutes of pre-swipe time for every class member, several witnesses testified that there was no pre-swipe time *at all* at their facility. Tr. 619, 1058, 1078-79, 1190, 1195, 1198, 1202, 1286-87, 1310-12.

Courts routinely refuse to let class actions proceed when this type of individual evidence is necessary. *See, e.g.*, *Comcast Corp.*, 569 U.S. at 34; *Espenscheid*, 705 F.3d at 775; *Collins v. ITT Educ. Servs. Inc.*, No. 12CV1395, 2013 WL 6925827, at **5-7 (S.D. Cal. July 30, 2013) (refusing to certify a class for off-the-clock work where evidence showed the practices at only 5 of 15 campuses); *Cornn v. United Parcel Serv., Inc.*, No. CO3-2001, 2005 WL 2072091, at *2 (N.D.

Cal. Aug. 26, 2005) (denying class certification where "individual questions predominate[d] over whether time spent on [the challenged] activities should be counted as hours worked, and if so, how much time, if any, was spent on these activities"); *Freeman v. Wal-Mart Stores, Inc.*, 256 F. Supp. 2d 941, 945 (W.D. Ark. 2003) (refusing to certify class for FLSA overtime where "there are material differences in the duties and responsibilities of the [7000 current and former] employees").

2. These significant differences could not be accounted for by any "reliable, common proof."

Where this kind of significant variation exists, the party seeking to certify a class must submit "reliable, common proof that might establish an off-the-clock violation for each member of the class." *In re Bank of America Wage & Hour Emp. Litig.*, 286 F.R.D. 572, 588 (D. Kan. 2012). Because of the factual differences, it was impossible to infer or prove the time officers spent on all activities without resorting to speculation and sweeping assumptions. *See Dukes*, 564 U.S. at 356; *supra* Part IV.C. While plaintiffs could use some form of representative evidence to try to overcome these differences, they were required to show that such common evidence was in fact representative of every class member.

The U.S. Supreme Court has used a simple rule to measure whether allegedly class-wide proof is truly representative: If the evidence "could have sustained a

reasonable jury finding . . . in each employee's individual action," then it is a "permissible means of establishing the employees' hours worked in a class action." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016); *Monroe*, 860 F.3d at 416 (Sutton, J., concurring in part and dissenting in part) ("*Tyson Foods* . . . held that a jury may consider the persuasiveness of statistically adequate representative evidence *only* if each class member could have used that evidence in an individual action."). If the representative evidence would be *insufficient* to establish liability and damages in individual actions, then class certification is improper. *Id.* This makes sense: the class action vehicle must not be used to create liability or damages where there otherwise is none. If representative evidence is insufficient to establish liability and damages in individual actions, then allowing class certification improperly "enlarges" the class members' "substantive rights." *Dukes*, 564 U.S. at 367; *Tyson Foods*, 136 S. Ct. at 1048. That is exactly what happened here when the circuit court refused to decertify the class despite Plaintiffs' trial-by-formula theory of damages.

Here, Plaintiffs failed to show that liability and damages could be determined through representative evidence that could properly be extrapolated to all class members across all facilities. Plaintiffs tried to do this in two ways: (1) by putting on individual employees; and (2) through expert testimony based on entry and exit times. Both failed as common evidence. Testimony from individual employees

showed widely varying and individualized experiences, not commonality. The testimony was also inadequate as a categorical matter—each facility did not even have its own class representative, so there was no evidence at all in the trial record about many facilities. And even within each facility, a single representative's testimony was not a proper basis to infer the hours for other officers.

In contrast, MDOC presented many examples showing how no common evidence of time worked predominated among the different staff at different facilities who performed different pre- and post-shift activities for different amounts of time each day and for different lengths of employment. D220, at 4-11. For example, at the Boonville Correctional Center, one officer claimed to "always" arrive 20 minutes early for pre-shift activities. D221 (Moore Affidavit), at 1, ¶ 3. But then she testified in her deposition that pre-shift activities take 15–35 minutes. D222 (Moore Depo.), at 2-3 (19:5-20:4). Another officer at the same facility said all post-shift activities took only 10 minutes each day. D223 (McMillan Declaration), at 2, ¶ 8. But then that officer also said that pre-shift activities took at least 10–15 minutes, and post-shift activities took another 10 minutes. D224 (McMillan Depo.), at 2-5 (11:19-13:20, 22:6-22).

The same problems plagued time estimates by other officers at other facilities. One officer said that pre-shift activities took 17 minutes per day on average and post-shift activities took 5–18 minutes. D225 (Hootselle Affidavit), at 3-4, ¶ 9. Another

officer at the same facility said that pre- activities took 5–10 minutes per day, and that post-shift activities took another 5–10 minutes. D226 (Hubbard Declaration), at 1-3, ¶¶ 2, 10. Still another officer said that the pre- and post- shift activities took 14–19 minutes, while yet another officer said that these activities took 23–33 minutes per day. D227 (England Declaration), at 3, ¶ 8; D228 (Birch Declaration), at 2, ¶ 8. Another officer then offered several estimates of his own time from 5 minutes to 30 minutes, none of which agreed internally or with the other officers. D229 (Huff Declaration), at 3, ¶ 8; D230 (Huff Deposition), at 4-6 (27:10-20, 29:1-25, 34:3-21). Testimony varied significantly for the Northeast Correctional Center and Potosi Correctional Center too. *See, e.g.*, D231 (Ferguson Affidavit), ¶¶ 4–5; D232 (Crum Declaration), at 3, ¶¶ 8–9; D233 (Dicus Affidavit), at 1-2, ¶¶ 4–5; D234 (Jones Affidavit), at 1-2, ¶¶ 4–5; D235 (Jones Declaration), at 3, ¶¶ 8–9; D236 (Meister Affidavit), at 1-2, ¶¶ 4–5; D237 (Montgomery Affidavit), at 1-2, ¶¶ 3–5.

None of this testimony provided any reasonable basis for extrapolation to *all* class members. The class members' different and ever-changing accounts underscore the need for individualized analysis of each officer's work experiences, as well as the need for individualized cross-examination to test the veracity of sworn testimony. *Martin v. Citizens Fin. Group, Inc.*, No. 10-260, 2013 WL 1234081, at *7 (E.D. Pa. 2013). As one federal court stated in this situation, it was "concerned about the contradictions between Plaintiffs' affidavits and their deposition testimony

because they show 'the importance of cross-examination of each plaintiff and suggest the need for separate mini-trials to resolve each individual's claim.'" *Pacheco v. Boar's Head Provisions Co., Inc.*, 671 F. Supp. 2d 957, 964–65 (W.D. Mich. 2009) (citation omitted).

3. The entry and exit logs are no proxy for the individual experiences of class members.

To compensate for the lack of representative testimony from individual, the class certification motion asserted that entry and exit logs at the facilities can be used to calculate the time it takes officers to complete pre- and post- shift activities. D15, at 8–9; D255, at 16-18. These logs, too, were not a reasonable proxy for compensable work. A "model purporting to serve as evidence of damages in this class action must measure only those damages attributable to [plaintiffs'] theory" of harm. *Comcast Corp*., 569 U.S. at 35; *see also Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("plaintiffs must be able to show that their damages stemmed from the defendant's action that created the legal liability"). Plaintiffs' damages model improperly included time that was not in fact compensable, as discussed in detail above. *See supra* Part IV.

The logs show, at most, the approximate time when officers enter and exit the facilities. This log data is not "common proof" of the time spent working because class members do any number of things after entering the facility but before starting

their shift, or after finishing their shift but before leaving the facility. For instance, an officer can arrive at work early to pass through security, which will generate data on the entry log, and may then decide to socialize with friends, go to the break room to eat breakfast, stand around and drink coffee, exercise in the weight room, engage in other leisure activities, or engage in any number of other personal activities before reporting to his or her post to begin work. D278, at 18-19, ¶¶ 32-33; Tr. 1813-20. One officer even testified that he arrived at work early and entered the security envelope just to have his shoes polished before his shift. D238 (Rainwater Depo.), at 25:3–17.

The entry and exit logs show who is within the prisons' walls at any given time, not what those individuals were doing within the prison. Thus, any assumption that the entry and exit logs can be used as a proxy for compensable work is incorrect. But Dr. Rogers relied heavily on such entry and exit logs, as well as upon the unreliable declarations of a handful of class members. D240 (Rogers Depo.), at 135:5–15. This report is not an adequate proxy for the individual experiences of class members because its conclusions turn on the assumption that each class member's work invariably begins when the officer enters the facility and does not end until the officer leaves. *Id*. at 140:25-141:4. Contrary to this assumption, time spent within the secured perimeter of a correctional facility does not automatically equate to time spent engaged in compensable work. Rogers' expert testimony fails

as representative evidence because it is "based on implausible assumptions." *Tyson Foods*, 136 S. Ct. at 1048; *see supra* Part IV.C.

Contrary to Rogers' assumption, the entry and exit logs often show that an officer was in the facility for longer than the work shift. D240, at 138:10–12, 219:25, 220:1–3, 222:2–6. Given that officers would rarely, if ever, work such extensive hours, Plaintiff's proposed expert himself conceded that this data was not a valid measurement of unpaid work time. *Id*. at 138:7–14, 222:7–19. Even the Missouri Corrections Officers Association agreed that the electronic data is "not accurate." D239 (Director Gross's Depo.), at 72:23–25, 74:2–9. Because the electronic data is not accurate, the expert made up his own metric. He arbitrarily ignored all data that exceeded an officer's scheduled shift by 45 minutes. D240 (Rogers Depo.), at 138:7–14. Then, he assumed that the remaining data represented time spent working. *Id*. at 140:25-141:4. But, because an officer can do any number of personal activities within the prison before or after a shift, there is no way to know if and how long an officer worked just by reviewing this data. As several class witnesses conceded above, no average time applies to everyone. Rogers substituted one implausible assumption for another.

And as the department's experts observed during their site visits, "there are significant differences between facilities with respect to pre-shift and post- shift activities performed." D278 (Hanvey Affidavit), at 11, ¶ 20; *see also id*. at 11–18,

¶¶ 20-31. For instance, at Potosi Correctional Center, many corrections officers arrive and depart in street clothes, electing to change in the locker room after passing through the metal detector rather than arrive at work already wearing their uniforms like officers do at many other facilities. *Id.* Officers chose to do or not do a huge variety of personal activities before or after work. *Id*. at 18-19, ¶ 32. And within each facility, some officers did some pre or post shift activities, and others did not. *Id*. at 11, ¶ 20. So, too, differences in the physical layout of the facilities make some activities take more or less time, none of which Rogers factored into his report on which class certification and the trial proceeded. *Id.* ¶¶ 28-31.

Only an individualized analysis of the class members' work experiences could address these issues. A Missouri federal court, for example, refused to allow records showing when employees logged into or out of their computers to be used to show the time they spent working, because these records did not establish when each employee was working. D241, Order, *Nobles v. State Farm Mut. Auto. Ins. Co.*, Case No. 2:10-cv-04175-NKL, Dkt. #496, at 6–10 (W.D. Mo. July 8, 2013). Because each class member must be subject to individualized inquiry, common issues do not predominate.

4. Class certification prevented individualized defenses.

Class certification was also improper because it prevented MDOC from presenting individualized defenses.

Offset of Damages. Without individual evidence on damages, MDOC could not offset damages. Time worked was rounded to the nearest 15-minute interval. D240 (Rogers Depo.), at 2-3 (135:16-136:10). But when an officer's time is rounded up, the officer will be paid for several extra minutes. *Id*. This means that some time officers did not work, including time that may have been spent on pre-shift or post-shift activities, was already paid because their time was rounded up. Defendants may offset this overcompensation on an individual basis against any amount allegedly owed to a particular officer. *Schulze v. Erickson*, 17 S.W.3d 588, 591–92 (Mo. App. W.D. 2000) (holding that employee's award of backpay must be offset by such sums as the employee has earned or could have earned during the period in question); *Lewis v. Bellefontaine Habilitation Center*, 122 S.W.3d 105, 110 (Mo. App. W.D. 2003) (same). But with no individual testimony, MDOC could not present this defense and the jury's verdict yielded unfair overpayments.

De Minimis Activities. Employers are not liable to any employee who spends only a *de minimis* amount of time on pre-shift or post-shift activities, even if those activities are otherwise compensable (which they are not here). *Anderson*, 328 U.S. at 693. Here, some class members took more time than others to complete the same pre-shift and post-shift activities. MDOC should have been able to cross-examine each class member to determine how much time, if any, they spent on pre-shift and post-shift activities, and present an individualized *de minimis* defense for each class

member. Decertifying an FLSA class action is proper when "[t]he extent to which work was *de minimis* . . . will necessarily vary widely according to the particular situation of each individual plaintiff." *Zivali v. AT&T Mobility, LLC*, 784 F. Supp. 2d 456, 468 (S.D.N.Y. 2001). Because "whether a given security officer is subject to the *de minimis* defense depends entirely on her individual circumstances," other courts have refused to certify a class in these circumstances. *Hawkins v. Securitas Security Servs. USA, Inc.*, 280 F.R.D. 388, 400 (N.D. Ill. 2011) (refusing to certify a class of security officers under the Illinois Minimum Wage Law for pre-shift/post-shift claims).

B. The Superiority Requirement of Rule 52.08(b)(3) Was Not Satisfied.

Under Rule 52.08(b)(3), a class action cannot proceed unless it is also "superior to other available methods for the fair and efficient adjudication of the controversy." Mo. Sup. R. 52.08(b)(3), Sub. App. A29. But, for all the reasons just shown, the individualized analyses necessary for a fair trial outweighed any efficiency from a class action. The individual experiences of a small handful of officers could not provide common proof for every class member, and the class was thus "unmanageable." *Ogg*, 382 S.W.3d at 117. For this reason, Plaintiffs were forced to rely on an expert who engaged in a whole series of indefensible shortcuts to estimate class-wide damages. *Supra*, Point IV.C.

Under such circumstances, a class action is not the superior adjudication. *White v. 14051 Manchester Inc.*, 301 F.R.D. 368, 378 (E.D. Mo. 2014). "Defendants 'cannot be expected to come up with representative proof when the plaintiffs cannot reasonably be said to be representative of each other.'" *Id*. (citation omitted).

For all these reasons, the trial court erred in refusing to de-certify the class.

VI. The trial court erred in entering a declaratory judgment on Count VII, because there was no legal basis for a declaratory judgment, in that MDOC has no duty to track non-compensable time, the damages verdict provided an adequate remedy, the relief went beyond the enforceability and requirements of a contract, the declaratory judgment is based on a contract that is no longer valid, and the declaratory judgment orders the expenditure of funds without an appropriation.

Standard of Review. The propriety of entering the declaratory judgment turns on questions of law and is reviewed *de novo*. *Ramirez v. Mo. Dep't of Soc. Servs.*, 501 S.W.3d 473, 479 (Mo. App. W.D. 2016).

Preservation. MDOC fully preserved these issues. D494, at 31-33; D498, at 32-34; D531, at 14; D529, at 4, 17-20, 57; D538, at 14; D539, at 4, 17-20, 57.

A. MDOC Has No Duty to Track Non-Compensable Time.

The declaratory judgment required MDOC to track and compensate pre-shift and post-shift activities in the future, and to implement 21 new timekeeping systems to do so. Sub. App. A17-A18; D535, at 5-6, ¶ 7(a)-(c). Because MDOC has no duty to compensate pre-shift and post-shift activities, *see supra* Point I, it has no duty to impose record-keeping systems to track such non-compensable time. *See, e.g.*,

Colella, 986 F. Supp. 2d at 344 ("Defendants were not required to track Plaintiffs' non-compensable . . . time.").

B. The Declaratory Judgment Duplicated the Breach-of-Contract Award.

Count VII for declaratory judgment was duplicative of Count VI for breach of contract. A "requisite element to maintain an action for declaratory judgment is the absence of an adequate remedy at law." *Cincinnati Cas. Co. v. GFS Balloons*, 168 S.W.3d 523, 525 (Mo. App. E.D. 2005) (citation omitted). And a "petition seeking declaratory judgment that alleges breach of duties and obligations under the terms of a contract and asks the court to declare those terms breached is nothing more than a petition claiming breach of contract." *Id.* at 525.

Because Plaintiffs' breach-of-contract claim can only succeed if a contract covering their wages exists, such a claim would foreclose their declaratory judgment claim because an adequate remedy at law would exist if such a contract exists. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 104 (Mo. banc 2010); *Cincinnati Cas. Co.*, 168 S.W.3d at 525. Plaintiffs cannot bring both claims and obtain relief on both; they must elect which remedy to pursue. *Trimble v. Pracna*, 167 S.W.3d 706, 711 (Mo. banc. 2005). In fact, Plaintiffs recognized this reality by expressly pleading their claim for declaratory judgment (Count VII) in the *alternative* to their breach-of-contract claim (Count VI). *See* D208, at 24 (alleging

"Count VII -- Declaratory Judgment" as "pled in the alternative to Count VI"). Yet the Amended Judgment improperly granted Plaintiffs relief on *both* the breach-of-contract claim *and* the declaratory judgment claim. This was error.

C. The Declaratory Judgment Had No Basis in the Contract, Which Expired Before the Judgment Had Operative Effect.

The declaratory judgment also went beyond declaring the enforceability and requirements of a contract by ordering a new timekeeping system and prospective payment of overtime for pre-shift and post-shift activities, which went beyond the Labor Agreements and the relief requested in the Petition. Sub. App. A17-A18; D535, at 5-6, ¶ 7. No language in the Labor Agreements or any other putative contractual provision mandates the imposition of a new timekeeping system, or makes any reference to such a requirement. And expanding relief beyond what is requested in the Petition is improper without compliance with this Court's Rule 87.10, which did not occur in this case.

Moreover, the prospective declaratory judgment is unfounded because it rests entirely on MDOC's supposed contractual obligations, yet it imposes ongoing obligations beyond the contract's expiration date. The 2014 Labor Agreement expired on September 30, 2018, and become unenforceable by the time the declaratory judgment imposed any obligation on MDOC. D426, at 1. No ongoing obligation to satisfy the expired agreement should be in the judgment.

In addition, the legislature has not appropriated the significant costs of paying overtime prospectively for pre-shift and post-shift activities. It is unlawful to prospectively order the State to withdraw funds for a purpose that the legislature did not authorize. *State ex rel. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. 1975). Under Article IV, § 28 of the Constitution, "[n]o money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law, nor shall any obligation for that payment of money be incurred unless the commissioner of administration certifies it for payment and certifies that the expenditure is within the purpose as directed by the general assembly of the appropriation." MO. CONST. art. IV, § 28; *see also* § 33.040.1, RSMo. Here, neither an appropriation for the relevant purpose, nor a certification by the commissioner of administration, has occurred. That is why the proper remedy for an alleged breach of the State's contractual obligations is a judgment for money damages to remedy past injuries, not a declaratory judgment that constitutes a *de facto* order to engage in ongoing future appropriations.

CONCLUSION

The trial court's judgment should be reversed and the case remanded with instructions to enter judgment in favor of the State.

Dated: February 28, 2020

ERIC S. SCHMITT
Attorney General

/s/ D. John Sauer
D. John Sauer, #58721
Solicitor General
Julie Marie Blake, #69643
Peter T. Reed, #70756
Deputy Solicitors
Mary L. Reitz, #37372
Assistant Attorney General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102
Phone: 573-751-8870
John.Sauer@ago.mo.gov
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that a copy of the above was filed electronically and served by operation of the electronic filing system through Missouri CaseNet on February 28, 2020, on all counsel of record.

The undersigned also certifies that the foregoing brief complies with the limitations in Missouri Supreme Court Rule 84.06(b) and 84.06(c)(1)-(4), and that the brief contains 27,756 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

/s/ D. John Sauer