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

SUBSTITUTE REPLY BRIEF

ERIC S. SCHMITT
Attorney General

D. John Sauer, Mo. Bar No. 58721
Solicitor General
Julie Marie Blake, Mo. Bar No. 69643
Mary L. Reitz, Mo. Bar No. 37372
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

INTRODUCTION

Respondents' Substitute Brief ("Resp.Br.") fails to provide a convincing defense of the judgment below. On the question of compensability, Plaintiffs disregard binding authority from the U.S. Supreme Court and rely heavily on an unpersuasive decision of the Tenth Circuit that contradicts a strong consensus of authority. Regarding their non-existent cause of action, Plaintiffs miss the point of the State's argument by contending that the FLSA does not preempt state-law causes of action; and they fail to distinguish numerous cases holding that, where no statutory cause of action exists, a plaintiff cannot manufacture one by asserting a contract claim to enforce the same statutory requirements. Plaintiffs' defense of the trial court's extraordinary decision to strike the State's well-qualified experts mischaracterizes the record and disregards settled legal doctrine. And Plaintiffs provide no convincing justification for the continued maintenance of a class action where individual issues on damages overwhelmed common questions of liability. This Court should reverse the judgment of the trial court.

ARGUMENT

I. Plaintiffs' Pre-Shift and Post-Shift Activities Are Not Compensable (Supports Appellant's Points I and II).

Plaintiffs' pre-shift and post-shift activities are quintessential "preliminary" and "postliminary" activities under 29 U.S.C. § 254(a)(2). App.Br. 36-41.

A. The activities are not "integral and indispensable," and are de miminis.

Plaintiffs' pre-shift and post-shift activities are neither "principal activities" nor "integral and indispensable" to principal activities, and they are *de minimis*.

1. The activities are not "principal activities."

Plaintiffs urge that "principal activities" are those that the worker is "employed to perform." Resp.Br. 14 (quoting 29 CFR § 790.8(a)). But as MDOC testified, "we don't employ these corrections officers to pick up keys or carry radios or go through our security gate." D435, at 12 (159:8-18); *see also Integrity Staffing Solutions v. Busk*, 135 S. Ct. 513, 518 (2014) ("Integrity Staffing did not employ its workers to undergo security screenings."). While going through ordinary ingress and egress procedures, the officers do not (1) "supervis[e] the movement of offenders," (2) "conduct[] periodic counts of offenders," (3) "search offenders and their living quarters for contraband," (4) "escort[] and/or transport offenders," (5) "supervis[e] offenders in housing units," (6) "conduct[] inspections of housing units for health and safety hazards," (7) "prepar[e] and submit[] reports on offender

violations," or (8) "promot[e] offender rehabilitation by attempting to modify offender's social attitudes." Resp.Br. 4 (quoting D424, ¶ 57). None of these "principal activities" occurs while the officers are checking in, getting assignments, passing through security, picking up ordinary equipment, walking to posts, and waiting in line. Rather, those actions are "preparatory" to principal activities. WEBSTER'S THIRD NEW INT'L DICTIONARY 1789 (2002).

2. Not all "necessary" activities are "integral and indispensable."

Plaintiffs argue that their activities must be "integral and indispensable" because they are "necessary" and "essential" to principal activities. Resp.Br. 24-25. The U.S. Supreme Court has rejected this argument twice. "[T]he fact that certain preshift activities are *necessary* for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005) (emphasis added); *see also Busk*, 135 S. Ct. at 516 (reversing the holding that security screenings were "integral and indispensable" because they were "necessary to the principal work").

3. Passing through security is not "integral and indispensable."

Plaintiffs only argue that two activities are "integral and indispensable"—passing through security and collecting/returning keys and radios. Resp.Br. 26-35. Plaintiffs offer no argument that at least six other activities are "integral and indispensable": (1) logging in and out of the facility, (2) receiving assignments from

a Central Observation Post, (3) obtaining a post/duty assignment from a supervisor, (4) walking to and from one's post, (5) waiting in line, and (6) passing pertinent information between shifts. App. A17-A18; D535, at 5-6. Plaintiffs have thus waived any claim that these six are integral and indispensable.

On pre-shift security screenings, Plaintiffs attempt to distinguish *Busk* on the ground that MDOC's security screenings are "directly tied" to their work as security officers. Resp.Br. 27. But MDOC's security screenings serve exactly the same purposes as the screenings at the rocket-powder plant discussed in *Busk* and the nuclear facility in *Gorman—i.e.*, to promote the safety and security of the facility. *Busk*, 135 S. Ct. at 518-19; *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 591-93 (2d Cir. 2007). Two pages earlier, Plaintiffs block-quote MDOC testimony emphasizing that security screenings "create for us a safe and secure facility," "help[] for safety and security," and uphold "standards about safety and security." Resp.Br. 25. As in *Busk*, safety-related screenings are "not an intrinsic element" of the officers' principal activities. 135 S. Ct. at 518.

Plaintiffs rely heavily on *Aguilar v. Management & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020). Resp.Br. 11-14. *Aguilar* is unpersuasive and contradicts both *Busk* and a strong consensus of contrary authority. App.Br. 44-48. *Aguilar* held that pre-shift screenings were compensable because "keeping weapons and other contraband out of the prison is necessarily 'tied to' the officers' work of providing

prison security," because they "share the same goal" of promoting a safe, secure facility. *Aguilar*, 948 F.3d at 1279. But MDOC employs officers to provide security against *inmates* and search *inmates* for contraband, not to provide security against *themselves* and search *themselves* for contraband. As *Gorman* noted, all other visitors to the facility are subjected to the same security screenings that officers undergo—but such visitors are not engaged in "principal activities." *Gorman*, 488 F.3d at 594; *see also Whalen v. United States*, 93 Fed. Cl. 579, 600 (2010) (security screenings for workers entering an Air Force base were not compensable because they "apply to everyone who enters and exits," including visitors).

4. Returning keys and radios is not "integral and indispensable."

Aguilar reasoned that the processes for returning equipment "help ensure that inmates do not obtain possession of keys or equipment and thus are necessary to maintain the security of the facility," and thus are "closely aligned" to principal activities. *Aguilar*, 948 F.3d at 1280, 1282. Again, this reasoning cannot be squared with *Busk*. The mere fact that a pre-shift activity promotes the facility's security does not entail that it is "integral" to principal activities. *Busk*, 135 S. Ct. at 518-19. And because virtually all equipment used at the worksite is "closely aligned" to one's principal activities—otherwise it would not be used—*Aguilar* fails to distinguish numerous cases holding that picking up and returning ordinary equipment are not compensable. App.Br. 50-52.

Plaintiffs cite *Perez v. City of New York*, 832 F.3d 120, 125-26 (2d Cir. 2016), which held that park rangers' donning and doffing specialized protective equipment, including bulletproof vests, could be compensable. *Id.* at 122. But *Perez* did not revise *Gorman*'s holding that retrieving "generic" equipment is not typically compensable. *Id.* at 125 (citing *Gorman*, 488 F.3d at 592-94). Here, Plaintiffs do not don and doff specialized gear like bulletproof vests or metal-mesh suits. Rather, keys and radios are akin to "ordinary hand tools," and retrieving them is thus a "preliminary" activity. 29 C.F.R. § 790.7(d). Moreover, even if collecting keys and radios were "integral and indispensable," it would plainly be *de minimis*—an issue that *Perez* did not address. 832 F.3d at 127.

Plaintiffs cite several other cases, Resp.Br. 32, but those cases did not involve collecting or returning ordinary equipment like keys and radios.

5. The continuous-workday rule does not support Plaintiffs.

For the first time in their Substitute Brief, Plaintiffs contend that passing through security and picking up and returning equipment are the first and last activity of each day, Resp.Br. 26, and they rely on the continuous-workday rule to try to sweep in the rest of the activities. Resp.Br. 35. This argument fails for three reasons.

First, passing through security and collecting/returning equipment are not "integral and indispensable," so they cannot start the continuous workday.

Second, even if those two activities were integral and indispensable, they would still be *de minimis*, and "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) (Sotomayor, J.) (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); *Chambers v. Sears Roebuck & Co.*, 428 F. App'x 400, 422 (5th Cir. 2011). Here, officers spend less than 10-15 minutes preforming each activity, and the "practical administrative difficulties of recording additional time" spent passing through security and collecting/returning equipment would be significant. *Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567, 584 (8th Cir. 2018). For these reasons, courts have held that virtually identical activities are *de minimis*. *See id.* (holding that time spent checking in and checking out tools was *de minimis*); *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 *de minimis*).

Plaintiffs submitted no evidence to establish that passing through security and collecting/returning equipment are not *de minimis*, so they were not entitled to summary judgment on this issue. Plaintiffs contend that "MDOC offered no evidence supporting a *de minimis* defense," Resp.Br. 39, but as the party moving for summary judgment, *Plaintiffs* had the burden of demonstrating that their activities were not *de minimis*. *City of Aurora v. Spectra Communications Group, LLC*, 592

S.W.3d 764, 781 (Mo. banc 2019); *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. banc 1993).

Plaintiffs contend that the *de miminis* doctrine applies to their activities in the aggregate, but that argument puts the cart before the horse by assuming that those activities are compensable in the first place. Because a *de minimis* principal activity does not start the continuous workday, their argument that all other pre-shift and post-shift activities are part of the continuous workday also fails.

Third, both the summary-judgment record and Plaintiffs' own expert witness contradict Plaintiffs' contention that passing through security and collecting/returning equipment are the first and last activities of the workday. Plaintiffs cite only two sources of evidence: D424, ¶¶ 58, 66, 106 (*see* Resp.Br. 26-27), and D397, at 91:18-92:4, 93:5-6 (*see* Resp.Br. 35). But Plaintiffs themselves listed passing through security and collecting/returning equipment *third* and *fifth*, respectively, on their list of seven pre-shift activities—not first or last. D424, at 36-37, ¶ 58. And MDOC controverted the supposed "facts" Plaintiffs now cite—precisely because there is a wide variety of practices among prisons. D424, at 37-38, ¶ 58; *id.* at 42-43, ¶ 66. MDOC cited testimony that many officers do not collect keys and radios at all, and some do not pass through security, *see id.*—which undermines Plaintiffs' continuous-workday theory entirely. And the evidence that Plaintiffs cite to argue that those are the *last* two activities of the continuous workday

simply do not address the *order* of post-shift activities at all. *See* D424, at 63, ¶ 106; D397, at 14 (91:18-92:4, 93:5-6). Further, Plaintiffs' damages expert directly contradicted Plaintiffs' current contention by estimating that every officer spends five minutes per day performing pre-shift and post-shift activities *outside* the security envelope—which would obviously be impossible if passing through security or collecting/returning equipment were first and last. D295, at 7-8.

B. Responding to occasional emergencies does not transform pre-shift and post-shift time into compensable time.

The State cited eleven cases holding that merely requiring employees to remain alert and respond to emergencies does not transform non-compensable time spent on premises into compensable time. App.Br. 57-60. In the face of this consensus, Plaintiffs rely heavily on *Havrilla v. United States*, 125 Fed. Cl. 454, 459 (2016), Resp.Br. 20-21, but that case does not support them. *Havrilla* involved civilian employees of the Navy who were stationed in an equipment room all day. *Id.* at 459. The employees' principal activities were to guard that equipment room and issue equipment to Navy personnel upon request. *Id.* at 459. During their meal breaks, the employees were required to continue to guard the equipment room and issue equipment to Navy personnel upon request. *Id.* In other words, the employees continued performing all their principal activities during their supposed meal breaks. *Id.* at 459, 465. Notably, *Havrilla* acknowledged that "courts have declined to order

overtime pay to security guards who are required to remain on the employer's premises during their unpaid meal breaks and to carry a radio or be otherwise available for emergency calls." *Id.* at 464. And *Havrilla* reaffirmed that "the mere fact that an employee is required … to be on a duty status, subject to emergency call during such period, does not convert this [non-compensable] time into compensable time." *Id.* at 464-65 (quoting *Agner v. United States*, 8 Cl.Ct. 635, 638 (1985)).

Plaintiffs argue that cases involving meal breaks are distinguishable because their pre-shift and post-shift activities are "tightly controlled" and involve no time for personal activities. Resp.Br. 21-24. On the contrary, officers frequently engage in personal activities during pre-shift and post-shift time. App.Br. 27, 90-91. More importantly, the pre-shift and post-shift activities here are not compensable because they are "preliminary" and "postliminary" under the Portal-to-Portal Act—not because they allow freedom for personal activities. Virtually all preliminary and postliminary activities are "controlled" to some extent, Resp.Br. 21, but they are still not compensable. 29 U.S.C. § 254(a). The question here is whether the limited *additional* requirement of having to remain alert and respond to emergencies renders otherwise non-compensable activities compensable by transforming them into "principal" activities. As many courts have held, it does not. *See Babcock v. Butler Cty.*, 806 F.3d 153, 157-58 (3d Cir. 2015); App.Br. 57-60.

Plaintiffs argue officers are "on duty" while performing pre-shift and post-shift activities, and thus "by definition" their time is compensable. Resp.Br. 19. But *Havrilla* itself confirmed that "the mere fact that an employee is required … to be ***on a duty status***, subject to emergency call during such period, does not convert this [non-compensable] time into compensable time." *Havrilla*, 125 Fed. Cl. at 464-65 (emphasis added) (quoting *Agner*, 8 Cl.Ct. at 638). When it comes to the "on duty" label, the Court should "[f]ocus[] on the responsibilities rather than terms used to summarize those responsibilities." *Akpeneye v. United States*, 138 Fed. Cl. 512, 531 (2018). Here, MDOC's witnesses used the phrase "on duty" to describe the fact that officers are expected to remain alert and respond to emergencies. *See, e.g.*, D397, at 17 (103:17-104:7); D398, at 11 (51:17-53:16); D405, at 5-6 (78:16-79:10).

Plaintiffs assert that offenders "often" engage in disruptive behavior during shift changes. Resp.Br. 5; *see also* Resp.Br. 18, 24. But Plaintiffs submitted no evidence of the frequency of such interruptions. And, as Plaintiffs admit, the frequency of emergencies is "immaterial" to compensability. Resp.Br. 22. *See, e.g.*, *Akpeneye*, 138 Fed. Cl. at 521 (Pentagon security officers' time was not compensable even though emergencies occurred "frequently"); *Roy v. County of Lexington*, 141 F.3d 533, 546 (4th Cir. 1998) (EMS personnel's time was not compensable even though emergencies arose 27 percent of the time). MDOC compensates officers for time spent responding to emergencies that actually arise

during pre-shift and post-shift time. D448, at 5, ¶ 19. "The FLSA requires no more." *Babcock*, 806 F.3d at 157.

Finally, Plaintiffs cite FLRA opinions regarding the Federal Bureau of Prisons that stand outside the record. Even if they were properly cited, such opinions are not controlling. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-17 (2019). "As DOL itself has acknowledged . . . the ultimate decisions on interpretations of the [FLSA] are made by the courts." *Havrilla*, 125 Fed. Cl. at 464 (citing 29 C.F.R. § 785.2).

II. Plaintiffs Cannot Manufacture a Private Cause of Action by Re-Casting FLSA Claims as Breach-of-Contract Claims (Supports Appellant's Point III).

A. MDOC preserved these issues for appeal.

In Point III, MDOC contends 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." App.Br. 68. MDOC opposed summary judgment on this precise ground, arguing that "Plaintiffs cannot maintain a private cause of action under [FLSA and MMWL] based on the MDOC's alleged failure to" comply with them, and "Plaintiffs cannot receive summary judgment for a claim that they have no legal ability to pursue." D452, at 19. MDOC argued that Plaintiffs had impermissibly re-cast FLSA claims as contract claims to evade *Alden v. Maine*, 527 U.S. 706 (1999). *Id.* at 18. And MDOC had moved for summary judgment on this basis, so the trial court was already familiar with this argument. D118, at 14-16; D190, at 1, 8-9.

Plaintiffs concede that MDOC raised this issue in opposing summary judgment, Resp.Br. 47, but contend that MDOC was required to re-assert this ground in its motion for new trial. *Id.* This is incorrect. "[I]n cases tried without a jury . . . , neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review if the matter was previously

presented to the trial court." Mo. Sup. Ct. R. 78.07(b). Issues resolved by summary judgment are "tried without a jury" under Rule 78.07(b). *Bank of Am., N.A. v. Duff*, 422 S.W.3d 515, 518 n.3 (Mo. App. E.D. 2014). MDOC was not required to re-assert its summary-judgment arguments in its post-trial motions. *Id.* In any event, MDOC did briefly reassert these arguments. D494, at 4 n.4; D539, at 40.

Separately, Plaintiffs argue that MDOC cannot cite case law regarding pre-existing legal duties because it did not cite those cases in the trial court. Resp.Br. 46-47. But the pre-existing duty doctrine does not provide a separate basis for reversal; it merely expands upon the basis raised in opposing summary judgment below and in Appellant's Point III, by providing additional case law in support. To preserve an issue for appeal, a party is not required to cite every case to the trial court that it later cites to the appellate court. *See, e.g., Costello Family Trust Dated July 20, 2006 v. Dean Family Lotawana Trust Dated July 20, 2006*, 551 S.W.3d 561, 572 n.12 (Mo. App. W.D. 2018).

B. *Astra USA* and many other cases reject Plaintiffs' position.

Astra USA and many other cases hold that, where a plaintiff lacks a statutory cause of action, he or she cannot evade this barrier by suing to enforce putative contractual obligations that merely reiterate the statutory requirements. *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110, 118 (2011); App.Br. 71-76.

Plaintiffs argue that "none of these cases involved FLSA or wage and hour disputes." Resp.Br. 53. This distinction makes no difference. In these cases, (1) the plaintiff lacked a cause of action to enforce statutory requirements, and (2) the plaintiff sought to enforce the same requirements under the guise of a breach-of-contract claim. In each case, the court concluded that, because plaintiffs lacked a cause of action to enforce statutory requirements, they could not bring a breach-of-contract claim to enforce the same requirements. So also here.

Plaintiffs seek to distinguish *Astra USA* and similar cases by arguing that, in those cases, *Congress* had deprived the plaintiff of a statutory right of action, whereas here, the *Constitution* deprives Plaintiffs of a statutory cause of action. Resp.Br. 54. Again, this distinction makes no difference. *Alden*'s holding that there is no statutory cause of action is rooted in the Constitution, not just Congress's policy judgment, and thus it provides a *stronger* reason to prevent Plaintiffs from circumventing its restrictions by re-casting their FLSA claims as breach-of-contract claims. Instead of merely circumventing Congress's policy judgment, here they are circumventing the U.S. Constitution itself.

Plaintiffs also attempt to distinguish *Allen v. Fauver*, *Norris v. MDOC*, and *Nunez v. Indiana Department of Child Services* on the ground that those cases related to sovereign immunity and whether it had been waived, not whether a contractual cause of action exists to enforce FLSA requirements. Resp.Br. 50-51. But Plaintiffs

have no statutory or contractual cause of action precisely because *Alden* held that the FLSA's provisions conferring a cause of action against state entities unconstitutionally violated state sovereign immunity. *Alden*, 527 U.S. at 711; *Norris v. MDOC*, 2014 WL 1056906 (E.D. Mo. 2014), at *2 n.3.

Astra USA squarely applies here. Because it would be unconstitutional for Plaintiffs to sue under the statute, it would make "scant sense" to allow Plaintiffs to sue on a contract that "set[s] out terms identical to those contained in the statute." 563 U.S. at 114. Where the relevant contract provisions "simply incorporate statutory obligations," it follows that "[t]he statutory and contractual obligations … are one and the same." *Id.* at 118. "Their treatment, therefore, must be the same, no matter the clothing in which [Plaintiffs] dress their claims." *Id.* at 114. "Telling in this regard," Plaintiffs here "based [their] suit on allegations that" MDOC violated FLSA requirements, "not that [MDOC] violated any independent substantive obligation arising only from the [contracts]." *Id.* at 118-19.

Where "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 State's sovereign immunity. *Grochowski v. Phoenix Construction*, 318 F.3d 80, 86 (2d Cir. 2003).

C. MDOC does not argue preemption.

Plaintiffs argue that "MDOC conflates two distinct legal concepts (sovereign immunity and preemption)." Resp.Br. 48. On the contrary, that is Plaintiffs' error. As noted in MDOC's opening brief, "[i]n this Point, the State does not contend that the FLSA *preempts* state-law claims by providing the exclusive remedy for wage-and-hour disputes." App.Br. 76 n.4. Most of Plaintiffs' argument on this Point contends that the FLSA does not preempt state-law claims, and thus it addresses an argument that the State has not made.

To clarify: To argue that the FLSA *preempts* a state-law claim is to claim that the FLSA displaces an *independent* source of state law that would otherwise provide recovery for the same or similar conduct. Here, the State does not contend that the FLSA displaces claims based on independent sources of state law. Rather, the State argues that, because Plaintiffs' breach-of-contract claims rest entirely on the assertion that MDOC promised to comply with the FLSA, the contract claims are not independent of the FLSA claims at all. Plaintiffs' statutory claims and their contract claims "are in substance one and the same." *Astra USA*, 563 U.S. at 114.

Plaintiffs do not dispute this. They admit that they are only seeking to enforce *FLSA requirements* through their breach-of-contract claims, and so the only relevant contractual promise is MDOC's promise *to comply with the FLSA*. The Labor Agreements contains bare recitals that MDOC will comply with the FLSA. D426, at 18 (§ 12.2); D427, at 16 (§ 11.2). When it comes to the meaning of "time worked"

and "hours physically worked," Plaintiffs concede that "the Contract incorporates the FLSA," and that FLSA standards thus determine the meaning of those phrases. Resp.Br. 14. Plaintiffs do not dispute that "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 for 'hours physically worked.'" Resp.Br. 37 (quoting App.Br. 25). And Plaintiffs admit that "[b]ecause the Contract also provides that MDOC must comply with the FLSA, the parties looked there to interpret 'time worked' and 'hours physically worked.'" Resp.Br. 48.

All Plaintiffs' preemption cases are thus distinguishable. In those cases, the plaintiffs' claims arose from state-law obligations that were *independent* of the FLSA, even when they mirrored or incorporated FLSA's requirements. *Bowler v. AlliedBarton Security Services, LLC* considered whether the FLSA preempts state-law claims for unpaid overtime arising under RSMo § 290.505, breach of contract, and quantum meruit. 123 F. Supp. 3d 1152, 1156-57 (E.D. Mo. 2015). There was no allegation in *Bowler* that the contract claims merely recited that the employer would comply with the FLSA. Similarly, the Ninth Circuit's vacated opinion in *Wang v. Chinese Daily News, Inc.* held that the FLSA did not preempt claims arising under California's unfair trade practices statute—a source of recovery clearly distinct from the FLSA, though it incorporated FLSA requirements. 623 F.3d 743,

759-60 (9th Cir. 2010), *vacated*, 565 U.S. 801 (2011). Likewise, *Tinsley v. Covenant Care Services*, No. 14-cv-0026, 2016 WL 393577 (E.D. Mo. Feb. 2, 2016), held that claims arising under Missouri's Minimum Wage Laws, unjust enrichment, and quantum meruit were not preempted by the FLSA. And the district court in *Uwaeke v. Swope Community Enterprises, Inc.*, held that state-law claims were not preempted because they were "viable theories of liability *that do not depend on the FLSA*." No. 12-1415-CV-W-ODS, 2013 WL 12129948, at *3 (W.D. Mo. Oct. 25, 2013) (emphasis added).

For similar reasons, *Avery v. City of Talledaga*, 24 F.3d 1337, 1348 (11th Cir. 1994), is inapposite. In *Avery*, plaintiffs had a valid cause of action against their employer under the FLSA, and their breach-of-contract claim merely presented "an alternative legal theory to redress" FLSA claims. *Id.* at 1348. The rule announced in *Astra USA* thus had no application in *Avery*, and *Avery* did not consider it. *Id.* Far from seeking to "end-run" around a barrier to FLSA claims, the *Avery* plaintiffs *had* valid claims for FLSA violations—so there was nothing to "end-run" around. The opposite is true here.

D. The pre-existing duty doctrine applies here.

Plaintiffs argue that the pre-existing duty rule does not apply because it is "one of contract formation." Resp.Br. 54. To be sure, a contract whose sole consideration is the promise to comply with a pre-existing legal duty is entirely unenforceable.

But that is because the underlying promise to perform a pre-existing legal duty is void and unenforceable in contract, even if the contract's other provisions are supported by valid consideration. "[T[he fact that the [promise to comply with a pre-existing duty] *is included as part of an agreement that is otherwise enforceable, does not alter its gratuitous character*. 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) (citation omitted) (emphasis added). "[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) (emphasis added). Even if the contract contains other enforceable provisions, "[a] promise by a government employee to comply with the law does not transform statutory or regulatory obligations to contractual ones." *Pressman v. United States*, 33 Fed. Cl. 438, 444 (1995).

III. The Trial Court Committed Prejudicial Error by Striking the State's Rebuttal Experts (Supports Appellant's Point IV).

A. Hanvey's refutation of Rogers' methodology was admissible.

Plaintiffs argue that MDOC was not allowed to criticize Rogers' methodology once the trial court permitted Rogers to testify to the jury. Resp.Br. 60-61. This is incorrect. The mere fact that the trial court permits an expert to testify does not mean that the trial court endorses that witness's opinions or methods, or that the jury is bound to accept them. Once the trial court makes the threshold determination of admissibility, it is for *the jury* to decide whether and to what extent to credit the expert's analysis and opinions. *Kivland v. Columbia Orthopaedic Grp.*, LLP, 331 S.W.3d 299, 311 (Mo. 2011) ("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."); *id.* ("The jury will decide whether to accept the expert's analysis of the facts and the data."); *Elliott v. State*, 215 S.W.3d 88, 95 (Mo. 2007); *Murrell v. State*, 215 S.W.3d 96, 111 (Mo. 2007).

The sole case that Plaintiffs cite in support of this novel argument, *Childress v. Ozark Delivery of Missouri LLC*, No. 09-cv-03133, 2014 WL 7181038 (W.D. Mo. Dec. 16, 2014), does not support them. *Childress* held that, because the court could not conclude that the expert "miscalculated damages as a matter of law," the expert would *not* be excluded. *Id.* at *5. *Childress* did not hold that, once the court had

denied the motion to exclude, the jury would not be allowed to draw its own conclusions about the expert's analysis and opinions. *Id.*

B. MDOC timely disclosed Hanvey and Arnold as rebuttal witnesses.

Plaintiffs argue that MDOC's experts should have been excluded because the disclosure was supposedly untimely. Resp.Br. 64-67. Plaintiffs never moved for exclusion on this basis in the trial court, the trial court never ruled on that basis, they never made this argument in the Court of Appeals, and in fact they conceded at oral argument in the Court of Appeals that this was *not* the basis for the trial court's decision. As discussed in MDOC's opening brief, (1) Hanvey and Arnold were *rebuttal* experts who were disclosed promptly after Rogers disclosed his final report, and thus the disclosure was plainly timely; (2) Plaintiffs had the opportunity to re-depose Hanvey and Arnold regarding the inadvertent late disclosure of immaterial documents, but they declined to do so; and (3) the expert affidavit in support of *class decertification* was appropriately filed at the conclusion of discovery, and the trial court refused to consider it in any event. App.Br. 100-102.

C. Plaintiffs' criticisms of Hanvey's qualifications are meritless.

Plaintiffs argue that Hanvey and Arnold's opinions were unreliable because their empirical survey was preliminary and they did not attempt to extrapolate to their own class-wide damages calculation. Resp.Br. 70-73. But Plaintiffs admit that "Hanvey was not obligated to provide his own damages calculation." Resp.Br. 70.

Hanvey and Arnold analyzed the data on which Rogers based his calculation, and conducted an empirical review to evaluate and assess Rogers' factual assumptions. App.Br. 83-85. These techniques easily sufficed to form an opinion about the reliability of Rogers' calculation. *Id.*

Plaintiffs criticize Hanvey and Arnold because they visited 10 of 21 facilities and "talked to less than 30 people." Resp.Br. 71. By comparison, Rogers visited zero facilities and talked to zero people (other than Plaintiffs' counsel). App.Br. 25; Tr. 687:6-688:4, 831:17-832:9, 892:20-25. And Hanvey testified without contradiction that their visits and interviews were sufficiently thorough to undermine Rogers' factual assumptions. Tr. 80; D278, at 19, ¶ 33.

Plaintiffs argue that Hanvey and Arnold did not review all the discovery in the case, Resp.Br. 72, but they testified without contradiction that reviewing every piece of discovery would not be a useful or reliable method of calculating damages. App.Br. 85-87.

Plaintiffs argue that Hanvey and Arnold's observation of wide variability in pre-shift and post-shift activities contradicted MDOC's interrogatory responses, which supposedly stated that officers "perform nearly identical activities." Resp.Br. 82 (citing D412, at 4-71); *see also* Resp.Br. 72 (citing D424 ¶¶ 44, 58-63, 71-80). But Plaintiffs plainly mischaracterize the record. MDOC's interrogatory responses repeatedly emphasized that such variability existed across officers and facilities.

See, e.g., D412, at 3, 5-6, 10, 19, 22, 29, 32, 36, 39, 42, 46, 49, 53, 56, 59, 63, 66, 70 (stating that, "in responding to this interrogatory, Defendants do not concede that every COI or COII engages in the activities listed below, only that *certain categories* of officers *may* complete the following activities") (emphasis added); *see also id.* at 4, 8, 17, 20, 23, 33, 36-37, 39-40, 43-44, 46-47, 50, 53-54, 56-57, 60, 63-64, 66-67, 70-71 (stating only that many officers "*may* engage" in the various identified pre-shift and post-shift activities). And MDOC repeatedly *denied* Plaintiffs' asserted "fact" that officers perform "nearly identical" activities, citing evidence establishing variability among class members. D424, at 37-44, ¶¶ 58, 60, 61, 62, 66, 69.

Plaintiffs argue that Hanvey and Arnold's methodology was unreliable because their many structured interviews included six wardens who later testified (supposedly unreliably) at trial. Resp.Br. 74-75. This argument rests entirely on trial testimony that occurred months *after* Hanvey interviewed those wardens and *after* Hanvey was excluded. *See id.* In any event, Hanvey and Arnold's structured interviews were based on reliable, well-established methods in the field of wage-and-hour analysis. Tr. 82; D278, at 3-4, ¶ 7. Any criticism of their interviewees' credibility goes to weight, not admissibility.

Plaintiffs argue that Hanvey's identification of extensive personal activities performed inside the security envelope—such as weightlifting, sending personal emails, congregating around the airlock, and eating pizza—was not "legally

relevant" because such activities are supposedly compensable under the continuous-workday rule. Resp.Br. 77-79, 80-81. But, under that rule, Plaintiffs "must demonstrate that the amount of overtime hours they worked were *reasonably related* to their principal activity." *Albanese v. Bergen County*, 991 F. Supp. 410, 423-24 (D.N.J. 1997); App.Br. 91-92 (citing similar cases). Such personal activities were not "reasonably related" to principal activities. *Id.*

D. The exclusion of Hanvey's testimony prejudiced the State.

Plaintiffs contend that Hanvey's testimony was not prejudicial because it was supposedly "cumulative of the challenges that others made to Rogers at trial." Resp.Br. 79. But Plaintiffs identify only a small minority of the numerous errors in Rogers' analysis that were supposedly aired at trial. Resp.Br. 80. In his offer of proof, Hanvey identified at least eleven critical deficiencies. App.Br. 89-98; Tr. 1802-1845. The jury never heard the vast majority of this devastating critique. Even on the other issues, cross-examination was no substitute for expert testimony because Hanvey had the unique expertise to attest to Rogers' lack of qualifications and flawed methods. D285, at 1; Tr. 77-78; *see also United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004) ("talismanic significance" of expert testimony).

One of Rogers' most glaring errors was to calculate damages based on an eight-hour workday, not a 40-hour workweek, which vastly inflated his damages calculation. App.Br. 81-82; *see also* 29 U.S.C. § 207(a)(1). Plaintiffs contend that

Rogers "account[ed] for the 40-hour workweek" by "convert[ing] the FTEs to weeks *and shifts*," Resp.Br. 86 (emphasis added); but the table on the very next page of Plaintiffs' brief indicates that damages were based on overtime *per shift*, not *per week*. Resp.Br. 87. And Rogers repeatedly admitted at trial that his damages calculation was *not* based on a 40-hour workweek. Tr. 761:4-5, 14-15 ("Q: Did you consider using a 40-hour workweek? A: Yes, I did. … Q: Okay. And did you end up using that method? A: I did not use that method in my reports, no."); Tr. 862:15-17 ("Q: You did not calculate damages based on time over a 40-hour workweek, correct? A: Right. I focused on individual days or shifts.").

Hanvey testified without contradiction that Rogers could easily have used a 40-hour workweek, because Rogers wrote an R-script to do so, which would have reduced his damages calculation by 76 percent. Tr. 1824:5-21; Tr. 1826:5-7 (noting that this error made Rogers' damages "massively overestimated"); Tr. 1826:15-19 (stating that Rogers "wrote an R script code and that code would have allowed him to run a weekly analysis"); Tr. 1827:2-12 (explaining that, based on the data Rogers had, "there's no reason why a weekly calculation wouldn't be appropriate"); Tr. 1828:2-22 (noting that Rogers "could just as easily calculate it according to the way the FLSA suggests you do it"); Tr. 1845:18 (testifying that Rogers' R-script would have resulted in a damages calculation of $24 million, not $100 million).

IV. The Trial Court Should Have De-Certified the Class (Supports Appellant's Point V).

Even if every class member were entitled to be paid continuously for all disputed activity, Rule 52.08(b)(3) requires reliable common proof of class damages, showing the fact and amount of each worker's uncompensated time with reasonable certainty—and without speculation. App.Br. 107.

But each class member did not have the same damages. App.Br. 103-21. Almost 14,000 officers at 21 different facilities performed different pre-shift and post-shift activities, for different times each day, and for different lengths of employment, over a decade. App.Br. 108-15. Far from providing statistically sound evidence of each member's damages through comprehensive sampling of these different workers—or even providing a single representative plaintiff for each prison and position—Plaintiffs offered ad hoc examples of certain workers from some prisons and positions, and ignored the rest. App.Br. 76-100, 108-10, 112-18.

Plaintiffs make four arguments in response, but nothing shows that they met Rule 52.08(b)(3)'s predominance and superiority requirements.

First, Plaintiffs claim that a higher standard applies to decertification than to certification. Resp.Br. 89-93. But Plaintiffs' argument cannot be squared with the rules. Rule 52.08 requires a court to monitor class certification "in light of the evidentiary developments." *Smith v. Am. Family Mut. Ins. Co.*, 289 S.W.3d 675,

688–89 (Mo. App. W.D. 2009). This ongoing duty is an exception to the law-of-the-case doctrine: "courts *must* decertify the class" if the certification requirements are no longer met. *Ogg v. Mediacom*, LLC, 382 S.W.3d 108, 116 (Mo. App. W.D. 2012).

Countless cases hold that the burden to meet the certification requirements "rests entirely with the plaintiff," *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 877–78 (Mo. 2008), throughout the case, including at decertification. *Ogg*, 382 S.W.3d at 116; *see, e.g.*, *Mazzei v. Money Store*, 829 F.3d 260, 270 (2d Cir. 2016); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011); *Ezell v. Mobile Hous. Bd.*, 709 F.2d 1376, 1380 (11th Cir. 1983). Nor does the Eighth Circuit place this burden elsewhere. It has decided a different "narrow issue" in one circumstance: that a defendant has the burden of proof to exclude certain class members from a certified class. *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 832 (8th Cir. 2016). But no appellate court reverses the burden of proof or imposes a heightened substantive requirement to decertify a class.

Second, Plaintiffs contend that a single common liability issue satisfies Rule 52.08(b)(3). Resp.Br. 95, 104-07. But this contention elides Plaintiffs' burden to meet the certification requirements at each stage—on liability *and* damages. App.Br. 104-08. A common liability question, no matter how important, is not enough for a class damages trial. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35–36

(2013). Under the far more demanding predominance and superiority requirements, common proof must establish each class member's damages with reasonable certainty. *Affiliated Acceptance Corp. v. Boggs*, 917 S.W.2d 652, 657 (Mo. App. W.D. 1996). A court thus must conduct "rigorous analysis" and account for "any individual circumstances or issues." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 488-89 (Mo. 2003); App.Br. 106-07. Otherwise, the class receives a windfall of more damages than it could prove individually. App.Br. 104-07, 111-12. Dispensing with classwide proof makes the certification requirements a "nullity." *Comcast Corp.*, 569 U.S. at 35–36.

Third, Plaintiffs assert that they offered reasonably certain representative evidence of the fact and amount of each class member's uncompensated time. Resp.Br. 96-102, 107. But the few individual estimates that Plaintiffs provided were overwhelmingly different: their hours were not similar enough to support extrapolation. App.Br. 76-100, 108-15. Plaintiffs' own witnesses testified that, even if guards had similar job descriptions, they all walked different distances before clocking into a post, had different security procedures, earned different wages, worked different hours each week, and worked different pre-shift and post-shift activities. App.Br. 108-15. And Plaintiffs offered no witnesses at all for most prisons and positions. App.Br. 110-15. An individual officer could not have relied on this evidence to win an individual action. App.Br. 106-11.

To account for this lack of similarity among class members, Plaintiffs needed some other kind of detailed representative proof, such as a randomized, statistically sound survey taken comprehensively across all prisons and cross-checked against known historical data. App.Br. 76-100, 108-15. Plaintiffs instead used exit and entry logs as a shortcut. Resp.Br. 102-03. 107. But even they admitted that these logs incorrectly assumed that class members worked whenever they were in the building. App.Br. 115-18. Plaintiffs' computer model rested not on statistically representative evidence but on a few self-selected testimonies and their expert's sheer guesswork. App.Br. 76-100, 110-18.

Plaintiffs claim that the variation in the "computation" or "apportionment" of damages is "irrelevant" and minor—so the trial court could just *assume* that individual actions would use "identical" evidence. Resp.Br. 98. 100, 104-05. But nothing shows that the class's uncompensated time was uniform for a decade across prisons, positions, and officers. Instead, there is a mountain of evidence to the contrary, including hopelessly contradictory testimony from Plaintiffs' own witnesses. App.Br. 108-15.

Fourth, Plaintiffs claim that the FLSA provides MDOC no affirmative defenses. Resp.Br. 109-11. This assertion gets the FLSA's *de minimis* provision wrong. App.Br. 119-20. And MDOC still had the right to offset damages by how much it rounded up hours and to challenge whether Plaintiffs had proven their case.

App.Br. 119. Because the trial court dispensed with individual proof, MDOC could not challenge how much *each* of the thousands of class members worked without compensation. App.Br. 111-20. And even if MDOC had lacked any defenses, the class's common legal theory would not have provided the necessary reliable common proof of damages.

CONCLUSION

This Court should reverse the judgment of the trial court.

Dated: April 15, 2020

ERIC S. SCHMITT
Attorney General

/s/ D. John Sauer
D. John Sauer, #58721
Solicitor General
Julie Marie Blake, #69643
Deputy Solicitor General
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 April 15, 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 7,707 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

/s/ D. John Sauer