STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP1759

NICOLE MCDANIEL, DAVID SMITH, and MATTHEW DAVIS,

Plaintiffs-Respondents-Petitioners,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

Attorneys for Defendant-Appellant
Wisconsin Department of
Corrections

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 264-6365 (KZK)
(608) 266-8549 (CPK)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us
keckhaverkz@doj.state.wi.us
kawskicp@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

INTRODUCTION

Petitioners, Wisconsin Department of Corrections (DOC) correctional officers, claim they are entitled to class action certification for their Wis. Stat. chapter 109 wage claim action, which relates to when officers' workdays begin and end. DOC treats an officer's compensable workday as beginning when they are ready at their prison posts and the time for their scheduled shifts begins, and ending when their shift ends. Petitioners contend that their compensable workday is much longer. While their asserted begin and end points have changed through the case, they currently assert (1) the day begins when officers arrive at the entrance of the prison, regardless of when their shift starts, and go through the security screening applicable to all employees and visitors of the prisons; and (2) the workday ends only once they have completed the walk from their post back to the prison exit.

Neither the U.S. Supreme Court, other federal courts, and Wisconsin courts recognize security screening and walking to and from a post as compensable points that begin and end the workday. The U.S. Supreme Court has held that being subjected to security screenings upon exiting is not a principal activity compensable under the Fair Labor Standards Act. Other federal courts have properly applied that holding to prison guards entering prisons. And the law is clear that passing through security screenings and merely walking within a workplace are not compensable activities that are "integral" and "indispensable" to the guards' principal activities.

As the court of appeals recognized, because Petitioners' legal theories for compensation are squarely barred, they cannot form the basis of the commonality and typicality factors for class certification. Wis. Stat. § 803.08(1)(b)–(c). The court of appeals correctly held that the class should not have been certified.

Petitioners offer no reason for this Court's consideration that meet the criteria for review. They argue that the court of appeals erred, but that is not a sufficient reason for granting the petition. Their claim that the court of appeals' decision is "contrary to settled law" ignores on-point case law. And they complain that the court of appeals improperly reached the merits of the case, but case law holds that the merits sometimes overlap with the factors in considering whether to certify a class, and this is one of those times.

In addition, as DOC explained in the court of appeals, Petitioners failed to meet other factors of class certification, especially the predominancy and superiority requirements of a class action. The court of appeals did not need to reach those issues, but they would be other reasons why the court of appeals decision was correct.

This Court should deny the petition for review.

STATEMENT OF THE CASE

I. Only principal activities are compensable under wage laws.

Wisconsin Admin. Code DWD § 272.12 limits compensable work to the time employees spend during the workday undertaking "principal" activities, including those tasks that are an "integral part of a principal activity." Wis. Admin. Code DWD § 272.12(1), (2)(e). "Among the activities included as an integral part of the principal activity are those closely related activities which are indispensable to its performance." DWD § 272.12(2)(e)1.c.

Activities that are "preliminary" and "postliminary" to the workday are not ordinarily principal activities: "[A]ctivities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." DWD § 272.12(2)(e)1.c.

In construing the state regulation, courts look to federal regulations under the Fair Labor Standards Act (FLSA). That is because state law is "substantively similar to federal regulations addressing the phrase 'principal activity or activities'" under the FLSA, as amended by the Portal-to-Portal Act. *See United Food & Com. Workers Union, Loc. 1473 v. Hormel Foods Corp.*, 2016 WI 13, ¶ 43 n.13, 367 Wis. 2d 131, 876 N.W.2d 99. Because the Wisconsin regulations mimic the "principal activities" under the FLSA, federal case law can "provide helpful insights" even though it is not binding. *See Kieninger v. Crown Equip. Corp.*, 2019 WI 27, ¶ 27, 386 Wis. 2d 1, 924 N.W.2d 172. Under federal law, "principal activities" means that preliminary and postliminary activities are only compensable if they are "integral and indispensable . . . to the productive work that the employee is employed to perform." *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 36 (2014). The U.S. Supreme Court has made clear that compensable preliminary and postliminary activities must "themselves" be "principal activities." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 33 (2005).

The FLSA treats as non-compensable activities that "are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which he ceases, such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(2).

II. Statement of relevant facts and procedural history.

A. DOC correctional officers work at various institutions, with differing security, post locations, and shift times, and arrive as early before a shift as they choose.

The putative class consists of approximately 5,000 DOC correctional officers and sergeants who work in 37 institutions located across the state, with different security levels and protocols. (R. 83:3–5.)

Guards arrive at the entryway of each prison before their scheduled shift at the time of their choosing. (R. 125:5, 7; 131:7–8; 184:3–4.) Like non-security personnel and visitors, they make themselves subject to a security screening, passing any personal belongings through an x-ray machine. (R. 125 ¶ 12; 85:12.)

By their shift start-time, guards must arrive at their designated post and be ready to assume their duties. (R. 87:31.) Posts are spread throughout each prison and range in distance from next to the entrance to the far side of the prison. (R. 131 ¶¶ 12–15; 125 ¶¶ 11–13.) Guards generally walk to their post location, and they are not compensated by DOC for this travel time. (R. 85:33–34.)

Post locations at or near a prison's entrance take a matter of seconds or a minute to reach. (*See* R. 131 ¶ 14; 125 ¶ 13; 152:16.) Posts at the far end of a prison may take up to 15 minutes or more to reach. (R. 152:16.)

Plaintiff Davis works as a transportation officer in the Wisconsin Resource Center, a unique facility run by the Department of Health Services. (R. 152:4.) He has a "very fluid position" with "no specific spot" to report to. (R. 152:4.) The only task he must do before getting into pay status is retrieve a key from a key watcher box in the lobby, which

takes a matter of seconds. (R. 152:5, 10.) By contrast, Plaintiff McDaniel worked at a DOC maximum-security facility; she claimed it took approximately 30 minutes for her to get from the entrance to her post, in large part to the many secured doors that she had to travel through.[1] (R. 124:2.)

Guards are not always assigned to the same post. (R. 151:14, 17.) Walking time also depends on which shift a guard works. (R. 151:14.)

Once they are on post, guards do work including "actively supervising the inmates in [their assigned] area," ensuring inmates are fed and cared for, and maintaining security through cell and inmate searches. (R. 85:25; 125 ¶¶ 9–10; 131 ¶¶ 10–11.)

Many officers leave their posts before the end of the shift. (R. 131 ¶ 19; 125 ¶ 18.)

B. Petitioners' expert claims he can produce representative damage calculations; Defendant's expert disagrees.

Both parties disclosed experts during discovery on class certification.

Petitioners offered a report authored by Dr. William Rogers. (R. 176.) Rogers claimed he could produce representative damages calculations that could be used on a class wide basis. (R. 176:2.) To arrive at these calculations, Rogers reviewed security video showing the entryways of three prisons from 60 minutes before and 30 minutes after shift change on three randomly selected days in January 2021. (R. 176:8.) Rogers then noted the time guards passed the entryways when they entered and exited the prisons. (R. 176:8.)

---

[1] Plaintiff Smith does not request appointment as a class representative. (*See* R. 82:1 n.1.)

The videos showed no area of the prisons other than the entryways, and Rogers did not track individual guards' movement. (R. 176:8.) Rogers observed only "clusters" of unidentified employees upon entry and exit. (R. 191:5.)

Using the video, Rogers calculated the amount of time between a guard's arrival at security and the start of a shift (e.g., 6 a.m., 2 p.m., and 10 p.m.) and between the end of a shift (e.g., 2 p.m., 10 p.m., and 6 a.m.) and exit. He assumed that these times equaled a guard's amount of pre- and post-shift activity, including walk time. (R. 176:8–10.) From this, he said he could calculate an average number of minutes spent on pre- and post-shift activities that would be extrapolated to each class member. (R. 176:8, 18.)

DOC offered a report authored by Dr. Ananth Seshadri, an economics professor at the University of Wisconsin-Madison. (R. 184.) Seshadri explained that Rogers overstated compensable time because his methodology in calculating time was flawed.

First, according to Seshadri, Rogers assumed that the guards' arrival at security starts their compensable workday, even though those arrival times are entirely dictated by the guards themselves. (R. 184:3–4.) Thus, there is no direct correlation between the amount of time from a guard's arrival at the front door to the start of a shift and the amount of time actually spent on pre-shift activities, like walking to post. (R. 184:3–4.)

Second, Seshadri opined that Rogers's calculated average was not reliable. Rogers made no attempt to explain why pre-shift time was much greater than post-shift time. (R. 184:4–5.)

Finally, Seshadri opined that assigning an average pre- and post-shift activity time to all officers working on a given shift in a given prison was arbitrary and did not result in a calculation for true compensable time for each officer.

(R. 184:5–6.) This assignment of time discounted that, within each prison, some posts are geographically close to the entrance and others are far from the entrance. (R. 184:6.) Seshadri concluded that the method Rogers used to calculate the time spent class-wide was too highly unreliable to be of any use. (R. 184:6.)

C. Petitioners obtained class certification on the theories that being subjected to a security screening and walking through the prison are compensable activities.

In summer 2021, Petitioners moved for class certification after filing a second amended complaint. (R. 78, 81–82.) Their legal theory regarding common questions of law was that walking from entrance to post and back again was compensable. (R. 82:22–24; 105:3–4.)

In summer 2022, Petitioners filed an amended brief in support of their motion for class certification that included references to their expert's report on damages. (R. 179.) Petitioners' only legal theory was that guards engage in a compensable activity by vigilantly walking to and from the entrance of the prison and posts. (R. 179:6, 13, 15, 21, 25.)

After a DOC response (R. 182), on August 1, 2022, Petitioners filed a reply brief in which, for the first time, they raised the additional theory that going through a pre-shift security screening triggered the compensable workday. (R. 191:4.)

After oral argument, during which DOC asserted that Petitioners were too late to raise the security screening theory and DOC had been unable to address it in briefing (R. 195:23–24), the circuit court certified the class requested by Petitioners:

> All current and former non-exempt, hourly-paid [Department] employees who worked as security personnel in a correctional institution (including but not limited to Correctional Officers and Correctional Sergeants) in the State of Wisconsin at any time during the period starting two years before this action commenced through the date of judgment ("the Class Period").

(R. 197:1.)

The court granted the motion "because the core legal theory is sufficiently plausible for granting a motion for class certification motion." (R. 197:6.) The court addressed Petitioners' merits theory held that "[a]t this stage McDaniel has made a plausible argument that the tasks in question were integral and indispensable." (R. 197:8.) The court also accepted Rogers's averaging methodology and said that "[c]ourts have allowed representative evidence to be employed in order to fill evidentiary gaps." (R. 197:10.)

In October 2022, DOC timely filed a notice of appeal. (R. 201.)

D. The court of appeals reverses the circuit court order granting class certification.

The court of appeals issued a decision on May 15, 2024, reversing the circuit court's order. *McDaniel v. DOC*, 2022AP1759 (June 14, 2024) (per curiam) ("Slip Op."). The court held that Petitioners did not fulfill the commonality and typicality requirements of Wisconsin's class-action statute, Wis. Stat. § 803.08(1)(b)–(c).

Petitioners petitioned to this Court.

REASONS TO DENY THE PETITION

This Court should deny the petition because it does not meet the criteria for supreme court review. Wis. Stat. § (Rule) 809.62(1r).

First, Petitioners argue that the court of appeals "erred." However, that is not a proper reason for this Court to grant the petition since this Court is not an error-correcting court.

Second, Petitioners argue that the court of appeals improperly resolved disputed factual issues by reaching the merits of the case. Not so. The facts related to security screening and walking to and from post are not disputed. Petitioners' references to guards' other pre- and post-shift activities are a red herring.

Third, Petitioners complain that DOC and the court of appeals touched on the merits of their claims. But when the merits overlap with class certification, the merits are not off limits. This is especially true here given that Petitioners' expert report is based on their walking theory and Petitioners did not raise their security screening theory until a reply brief filed one year after the class certification motion. The court properly concluded, based on case law, that Petitioners' case could not go forward as a class action. Neither being subjected to a common, pre-shift security screening or walking within the workplace is a compensable principal activity and, thus, Petitioners could not represent a class with those claims.

Lastly, DOC also argued that Petitioners did not meet the predominancy and superiority requirements of the class action statute, and the court of appeals' decision can be affirmed on these alternative grounds.

I. Petitioners have not put forth a proper criterion for granting the petition.

"Supreme court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). While not controlling, this Court considers multiple criteria set forth in Wis. Stat. § (Rule) 809.62(1r) when reviewing the petition.

The petition's main focus is arguing that the court of appeals' decision was erroneous. Petitioners' two issues both contend that the court of appeals "erred" and the petition argues that the court of appeals' decision was wrong. (E.g., Pet. *v–vii*.) This is not a criterion under Wis. Stat. § (Rule) 809.62(1r) warranting this Court's review. In contrast to the court of appeals, which is "an error-correcting court," the supreme court is a "is a law-making court." *State v. Schumacher*, 144 Wis. 2d 388, 398, 424 N.W.2d 672 (1988).

Petitioners also argue that the court of appeals' decision raises legal issues "of the type that [are] likely to recur unless resolved by the supreme court." (Pet. *viii*.) But this is not a criterion for review either. Under Wis. Stat. § (Rule) 809.62(1r)(c), this Court may grant a petition when a "decision by the supreme court will help develop, clarify or harmonize the law, *and* . . . [t]he question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court." Here, Petitioners completely fail to develop an argument that a decision by this Court will help "develop, clarify, or harmonize the law." That is not surprising, since Petitioners do not cite section 809.62(1r)(c) in their petition at all.

Petitioners further contend that their petition should be granted because the court of appeals' decision "contravenes settled law." (Pet. *viii*.) Although they cite Wis. Stat. § (Rule) 809.62(1r)(d), (*see* Pet. viii, 16), their argument does not support that criterion.

Wisconsin Stat. § (Rule) 809.62(1r)(d) states in full: "The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions." Here, Petitioners do not assert that the court of appeals' decision conflicts with any decisions of this Court or any other court of appeals' decision. Instead, they point to the U.S. Supreme Court's decision,

Integrity Staffing, 547 U.S. at 27. (Pet. 18–19.) But the court of appeals' decision does not conflict with *Integrity Staffing*.

In addition, Petitioners argue that the "Court of Appeals' decision is important not only with respect to cases involving corrections officers but with respect to donning and doffing cases writ large." (Pet. 25.) They also claim that the court of appeals "risks widespread confusion on all future class action cases in Wisconsin." (Pet. viii.) And Petitioners contend that the decision "regarding the nature of 'work' will reverberate across all so-called donning and doffing cases in the State." (Pet. viii.) Notwithstanding that this is not a "donning and doffing case," Petitioners give too much influence and weight to the court of appeals' decision. It is a per curiam opinion and, therefore, cannot be cited by litigants in future cases—even as persuasive authority. *See* Wis. Stat. § (Rule) 809.23(3)(a)–(b). So, the court of appeals' decision cannot be as important to future cases in the state as Petitioners contend. The decision applies to them and no one else.

Petitioners do not demonstrate that they meet the criteria for granting review under Wis. Stat. § (Rule) 809.62(1r). The petition can be denied on this basis alone.

II. The court of appeals did not erroneously reach the merits and resolve a disputed factual issue, but conducted a class certification analysis that took the merits into account and correctly followed the law.

In Petitioners' first issue, they claim that the court of appeals applied an excessive pleading standard to a motion for class certification and resolved a disputed factual issue. (Pet. *v*, 11.) In their second issue, Petitioners contend that the court of appeals got the law wrong. But in analyzing class certification, the court of appeals did nothing more than engage in a rigorous analysis and correctly determine that

Petitioners did not meet the statutory requirements for class action certification under Wis. Stat. § 803.08(1).

A. Courts perform a rigorous analysis of class action certification motions, which may entail overlap with the merits.

Under Wis. Stat. § 803.08, a party may sue on behalf of a class "*only* if the court finds all of" the prerequisites under subsections (1)(a)–(d): "numerosity, commonality, and typicality." Wis. Stat. § 803.08(1)(a)–(d); *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 23, 388 Wis. 2d 546, 933 N.W.2d 654.

Wisconsin Stat. § 803.08(1)(b) requires that "[t]here are questions of law or fact common to the class." To make that affirmative finding, the court must engage in a "rigorous analysis" of the class prerequisites. Slip Op. ¶ 11 (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). "A circuit court erroneously exercises its discretion if it makes an error of law or neglects to base its decision upon facts in the record." *King v. King*, 224 Wis. 2d 235, 248, 590 N.W.2d 480 (1999).

The court of appeals explained that a "rigorous analysis will necessarily entail 'some overlap with the merits of the plaintiff's underlying claim." Slip Op. ¶ 11 (citing *Wal-Mart Stores*, 564 U.S. at 351, and *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) ("[A] district court must consider the merits if they overlap with the Rule 23(a) requirements."). This rigorous analysis may touch upon the merits because the elements of the claim are often central to determining whether the prerequisites are met. *Comcast Corp.*, 569 U.S. at 33–34. In federal courts, merits questions are considered to the extent they are relevant to determining whether the Rule 23 prerequisites for class certification are

satisfied. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013).[2]

Thus, courts considering class certification "cannot rely on a mere 'threshold showing' that a proposed class-wide method of proof is 'plausible in theory,'" as the circuit court did here.[3] *Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 304–05 (3d Cir. 2016) (citation omitted).

B. Upon conducting a rigorous analysis, the court of appeals properly concluded that Petitioners failed to establish the commonality and typicality requirements.

The court of appeals stated that deciding "whether the claims of the putative class representatives coincide with the claims of the proposed class members requires the circuit court to evaluate the nature of the claims asserted." Slip Op. ¶ 15. It explained that at "the threshold of a class certification analysis necessarily is a consideration of whether a compensable injury is at issue." *Id.* So, "consideration of the merits of this case cannot be separated from the preliminary procedural question concerning certification of the proposed class action." *Id.*

Petitioners seek a class of all current and former non-exempt, hourly-paid DOC employees who work as

---

[2] Petitioners cite *Stehberger v. Gannett Publishing Services, LLC*, 2023 WI App 16, Case No. 2021AP1403, but this is a per curiam opinion. Because parties are not allowed to cite per curiam opinions, *see* Wis. Stat. § (Rule) 809.23(3)(a)–(b), Petitioners' citation to *Stehberger* was improper and DOC therefore will not address it. *See Munger v. Seehafer*, 2016 WI App 89, ¶ 49 n.15, 372 Wis. 2d 749, 890 N.W.2d 22.

[3] The circuit court failed to apply that rigorous analysis standard, instead considering only whether Petitioners' claims were "plausible." (E.g., R. 197:6 ("McDaniel's motion is granted because the core legal theory is sufficiently plausible for granting a motion for class certification."), 8–9, 12, 14, 19).)

security as correctional institutions. Slip. Op. ¶ 7. Although the putative class members perform a variety of pre- and post-shift activities that they claim are compensable on an individual basis, Petitioners' two legal theories for a class are based entirely on "whether pre-shift security screening and walking to and from the assigned work post are compensable principal activities." *Id.* ¶ 16. And their expert report on damages was completely based on security screening triggering the compensable workday and walking out the door ending it. (R. 176.) Looking at those questions, the court of appeals correctly concluded that Petitioners could point to no "questions of law or fact . . . common to the class" regarding activities at the start and end of the compensable workday, nor can they identify viable "claims or defenses . . . typical of the claims or defenses of the class. *Id.* ¶ 17.

1. Walking to and from the prison door and post is not a compensable activity.

As to Petitioners' original theory that walking to and from the door of the prison and posts is compensable, the court of appeals did not improperly resolve a factual issue or get the law wrong when holding that Petitioners did not put forth a viable question of law common to the class and no viable claim typical of the claims of the class under section 803.08(1)(b) and (c).

Federal and state laws clearly treat walking as non-compensable. 29 U.S.C. § 254(a)(1) ("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" are "not compensable"); 29 C.F.R. § 785.34 ("Effect of section 4 of the Portal-to-Portal Act") ("Thus travel time at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench)

need not be counted as working time unless it is compensable by contract, custom or practice."); Wis. Admin. Code DWD § 272.12(2)(g)2. (certain "travel time" is not compensable).

Petitioners claim that walking is compensable because officers are "vigilant" regarding their surroundings and prepared to respond to emergencies in their immediate vicinity. (Pet. 14; R. 179:6, 25.) They cite *Hootselle v. Missouri Department of Corrections*, 624 S.W. 3d 123, 142 (Mo. 2021), for support. (Pet. 3; R. 179:21–22.) This decision is easily distinguishable.

The *Hootselle* court found that Missouri correctional employees engaged in compensable work because they were "supervising, guarding, and disciplining offenders" during their walk to and from post. The court explained that in its view, the officers did "the same work expected . . . during their shift," with "[t]he only difference" being "where within the facility they do the work, at or away from their posts." *Id.* The same does not hold true in Wisconsin.

Here, as DOC's director of security explained, and Petitioners did not dispute, officers merely travel to and from a post: "when a person, a staff member, is walking to a post they are *not* assigned to supervise inmates," and "[t]hey're *not* assigned to supervise certain areas." (R. 85:36 (emphasis added).) Different, paid staff are doing those tasks: "[T]he staff who are currently on duty are performing those specific functions at that time." (R. 85:34.) Indeed, DOC has made it clear that "[u]nless instructed otherwise by the responding Security Supervisor or the Control Center Sergeant, ONLY the designated staff will respond to an emergency call." (R. 91:5 Ex. 26); *see also, e.g.*, R. 91:11 Ex. 27).) Petitioners even testified that they were not required to respond to emergencies before or after their shift. (R. 152:21; 151:19.) And, importantly, if guards respond to such an emergency before or after a shift, they are entitled to wages. (*See, e.g.*, R. 125 ¶¶ 16–17; 131 ¶ 18; 84:17; 85:30.)

Federal decisions also reject Petitioners' vigilance theory. For example, in *Llorca v. Sheriff, Collier County*, 893 F.3d 1319, 1328 (11th Cir. 2018), the Eleventh Circuit held that sheriff deputies' commute times—in which they were required to monitor the radio and observe and enforce traffic violations—were not indispensable tasks because the requirement to monitor "could be dispensed with without affecting at all the deputies' performance of their law enforcement duties during their shifts." And in *Chagoya v. City of Chicago*, the Seventh Circuit rejected an argument that "the continued emphasis on maintaining a state of readiness" made time spent by SWAT officers transporting, loading, and unloading SWAT gear to and from their employer-provided vehicles, and securing it inside their homes, compensable. 992 F.3d 607, 622 (7th Cir. 2021).

2. Being subjected to a security screening is not a compensable activity.

As to Petitioners' belated security screening theory, the court of appeals looked to federal case law, in particular a U.S. Supreme Court decision, on the question of whether it is a compensable activity. In *Integrity Staffing*, warehouse workers who "retrieved products from the shelves and packaged those products for delivery to Amazon customers" were required "to undergo a security screening before leaving the warehouse at the end of each day." 574 U.S. at 29–30. During this screening, employees removed items such as wallets, keys, and belts and passed through metal detectors. *Id*. The Court held that the security screenings were non-compensable postliminary activities under the FLSA, concluding that they "were not 'integral and indispensable' to the employees' duties as warehouse workers." *Id.* at 29, 35. The employer "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id.*

Notably, the Court also pointed to a 1951 Department of Labor opinion finding that *pre-shift* safety-based security searches in a rocket-powder plant for "items which have a direct bearing on the safety of the employees," and post-shift security searches "for the purpose of preventing theft," *id.* at 35–36 (quoting Opinion Letter from Dept. of Labor, Wage and Hour Div., to Dept. of Army, Office of Chief of Ordnance (Apr. 18, 1951), pp. 1–2 (available in Clerk of Court's case file), were similarly non-compensable. The Court noted that the Department of Labor "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.* at 36.

As the court of appeals took into account, *Integrity Staffing* explained that "activities including 'checking in and out and waiting in line to do so . . . are 'preliminary' or 'postliminary' activities." Slip Op. ¶ 16. The court of appeals noted that other federal courts have followed the *Integrity Staffing* holding and dismissed FLSA claims by prison employees for time spent in pre-shift security screenings. *Id.* (citing *Aitken v. United States*, 162 Fed. Cl. 356, 365 (2022); *Alkire v. United States*, 158 Fed. Cl. 380, 391 (2022); *Medrano v. United States*, 159 Fed. Cl. 537, 545 (2022)). And the court cited a Wisconsin court of appeals decision holding that the "time an employee takes to accomplish the mechanical steps of entering and exiting the workplace is not compensable, even if that involves waiting in line." Slip Op. ¶ 16 (quoting *Weissman v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, ¶ 26, 350 Wis. 2d 380, 838 N.W.2d 502).

The court of appeals resolved no disputed factual issues. All guards must subject themselves to a security screening upon entering the prison. They pass any personal belongings that are permitted through an x-ray machine. (R. 125 ¶ 12; 85:12.) Some common activities that guards are required to perform include patrolling the particular area that the officer

is assigned to monitor; checking security measures like locks and doors in that area; performing inmate counts; responding to emergencies; and notifying inmates of medical appointments. (R. 85:25; 125 ¶ 9–10; 131 ¶¶ 10–11.) None of these facts are disputed.

In deciding class certification, the court of appeals applied the Supreme Court's "integral and indispensable" activities reasoning and state regulations (and the federal Portal-to-Portal Act) to the undisputed facts to conclude that Petitioners put forth no viable question of law common to the class regarding security screening and no viable claim typical of the claims of the class under section 803.08(1)(b) and (c). That is, being subjected to a security screening is not a basis for a wage claim because it is not a principal activity entitled to compensation.

The prevailing view is that pre-shift security screenings are not compensable. *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 594 (2d Cir. 2007) ("security measures that are rigorous and that lengthen the trip to the job site do not thereby become principal activities of the employment" that are compensable); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007) ("We therefore hold that the time appellants spent going through the mandatory security screening is not compensable under the FLSA because that screening is not 'integral and indispensable' to a principal activity" under federal law).

Other case law supports the application of *Integrity Staffing* in the prison context. For example, in *Henderson v. Cuyahoga Cnty.*, No. 1:20 CV 1351, 2020 WL 5706415, at *3 (N.D. Ohio Sept. 24, 2020), the district court addressed wage claims brought by a detention officer in a prison who was subject to a pre-shift security screening almost identical to the one here. The court concluded that *Integrity Staffing* controlled, and the officer was not entitled to compensation for two reasons. *Id.* First, although the screening was related to

part of the activity he performed during his shift, such as searching for contraband, he "could still perform his job effectively if the pre-shift screenings were eliminated." *Id.* Second, undergoing a security screening was not work of consequence he was hired to perform.

Also, in *Aitken v. United States*, 162 Fed. Cl. 356, 360, 365 (2022), guards were also subjected to a pre-shift security screening. The court held that these "security screenings are not the 'principal activity or activities which [the guards are] employed to perform.'" *Id.* (quoting 29 U.S.C. § 254(a)(1)). It compared the guards to the employees in *Integrity Staffing* because they had no evidence that they were "employ[ed] . . . to undergo security screenings," or that there was "anything 'productive' about the security screenings." *Id.* (quoting *Integrity Staffing*, 574 U.S. at 35, 36). The court pointed out that "[o]ne consequence of the Portal-to-Portal Act is to separate 'activities that are essentially part of the ingress and egress process' from 'activities that constitute the actual work of consequence performed for an employer[.]'" *Id.* (quoting *Integrity Staffing*, 574 U.S. at 38 (Sotomayor, J., concurring)). The court held that the guards' pre-shift security screenings, "like post-shift screenings for employee theft and other arrival and departure processes, 'fall on the "preliminary or postliminary" side of this line.'" *Id.* (quoting *Integrity Staffing*, 574 U.S. at 38 (Sotomayor, J., concurring)).

The same applies here. Being subjected to a security screening at the entrance of a Wisconsin prison is not an intrinsic element of guards' principal tasks of supervising inmates in their assigned areas, ensuring that they are fed, and searching the inmates and their cells. (R. 85:25; 125 ¶ 9–10; 131 ¶¶ 10–11.) "The integral and indispensable test is tied to the productive work that the employee is *employed to perform*." *Integrity Staffing*, 574 U.S. at 36 (emphasis added). Being subjected to a security screening is not tied to any principal activity that the prison guards are employed to

perform. Indeed, DOC can eliminate the security screening altogether without impairing guards' ability to do their jobs. While an entrance security screening may be important to the prison's operations, it is not a factor in determining whether being subjected to one is a principal activity for the purpose of wage a wage claim.

Petitioners cite non-binding, foreign case law to support their position that the court of appeals got the law wrong (Pet. 17), but none of these decisions correctly follow the reasoning of *Integrity Staffing*. For example, Petitioners cite *Aguilar v. Management & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020), but both the *Henderson* and *Aitken* courts rejected applying *Aguilar*. *Henderson*, 2020 WL 5706415, at *3; *Aitken*, 162 Fed. Cl. at 367. The *Aitken* court explained why *Aguilar*'s view that the screening was part of the prison guards' principal activities was wrong: "The question is not whether pre-shift activities align with the 'purpose' of employment. If it were, then virtually every pre- and post-shift activity required by an employer would be compensable. . . . *Integrity Staffing* rejects that approach." *Id.* The court concluded that *Aguilar* strayed from the directive of *Integrity Staffing*: "Far from merely directing lower courts to analyze in the abstract whether an activity is 'tied to' an employee's principal activities, the Court requires analyzing whether the activity is integral and indispensable—a more focused inquiry, rooted in the words of the Portal-to-Portal Act." *Id.* at 368.

C. Without Petitioners' unsupported legal theories, there were no other bases on which the court of appeals could find commonality and typicality.

Because Petitioners' legal theories for compensable time are not viable, the court properly held that they had no common or typical questions of law or fact under Wis. Stat. § 803.08(1)(b) and (c).

Commonality requires that "each class member's claim could be determined in a single case and would involve common issues of proof." *Cruz v. All Saints Healthcare Sys., Inc.*, 2001 WI App 67, ¶ 16, 242 Wis. 2d 432, 625 N.W.2d 344. "What matters" is "the capacity . . . to generate common answers," and "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes*, 564 U.S. at 350 (citation omitted). For a finding of typicality, the court must find that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Wis. Stat. § 803.08(1)(c). "A claim is typical if it 'arises from the same event or practice or course of conduct that gives rise to the claims of other class members and . . . her claims are based on the same legal theory.'" *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)). Although typicality is a different prerequisite from commonality, these two "tend to merge." *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Stripped of their two unsupported legal theories, Petitioners' putative class action lacked both commonality and typicality. The class included approximately 5,000 guards who work in 37 prisons located across the state, with different security levels and protocols. (R. 83:3–5.) At each prison, posts are spread throughout, from near the entryway to the far side of the prison. (R. 131 ¶¶ 12–15; 125 ¶¶ 11–13.) Guards do different things, such as picking up keys, obtaining pepper spray or other equipment, or listening to daily orders. But not all do so pre- or post-shift, and those who do such activities do so at different times and places. (R. 125 ¶ 14; 131 ¶ 16.)

Non-common individual questions of fact predominate and produce non-common answers. What specific pre-shift and post-shift activities, if any, constitutes a compensable "principal activity" varies from person to person. A class action cannot answer which tasks might be compensable for

individuals who fulfill a variety of roles, and do a variety of tasks, at a variety of institutions.

Thus, lacking commonality and typicality, the court of appeals properly reversed the circuit court's order granting Petitioners' motion.

***

Petitioners seek to delay the inevitable by urging this Court to avoid addressing the non-viability of their common legal questions and claims. As their briefs below reveal, these merits issues directly relate to their class certification motion. And the court of appeals properly conducted a rigorous analysis of that motion and held that being subjected to a security screening and walking to and from posts are not principal activities subject to compensation under Wisconsin law. Slip Op. ¶ 17. A remand of this case to the circuit court for summary judgment was unnecessary and would not be efficient use of the courts' and litigants' time and resources.

III. Alternative grounds support the court of appeals' result.

Alternative grounds also support the court of appeals' decision. *See* Wis. Stat. § (Rule) 809.62(3)(d). DOC argued that Petitioners failed to meet the predominancy and superiority requirements of Wis. Stat. § 803.08(2)(c), but because the court of appeals held that they did not meet the typicality and commonality requirements of class certification, it did not address those arguments. Slip Op. ¶ 17 n.5.

If the prerequisites under Wis. Stat. § 803.08(1) are satisfied, a court must still find that one of three criteria is met under Wis. Stat. § 803.08(2). Petitioners sought class certification (R. 179:16–17), under subpar. (c): "The court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available

methods for fairly and efficiently adjudicating the controversy." Wis. Stat. § 803.08(2)(c). These findings are known as "the predominancy and superiority requirements." *Hammetter v. Vermisa Sys., Inc.*, 2021 WI 53, ¶ 8, 399 Wis. 2d 211, 963 N.W.2d 874.

DOC argued to the court of appeals that the circuit court erroneously exercised its discretion in finding that Petitioners established the predominancy and superiority requirements of Wis. Stat. § 803.08(2)(c). On these grounds the court of appeals' decision can be affirmed—and the petition denied.

A. DOC argued that the circuit court erred in finding that Petitioners met predominancy under Wis. Stat. § 803.08(2)(c).

The predominancy requirement "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case," to determine if the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 456, 453 (2016). As the U.S. Supreme Court explained in a case where predominance was not satisfied, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast Corp.*, 569 U.S. at 34.

DOC put forward three reasons why Petitioners did not establish that questions common to the class predominate over questions affecting individuals. First, the expert report relied on incomplete evidence and assumptions that did not match the undisputed facts. Second, manageability is part of predominancy, and Petitioners could not show the class would be manageable. Third, DOC would be prevented from raising the *de minimis* defense for thousands of individual guards.

1. Petitioners could not establish predominancy because of their flawed representative evidence.

Courts have allowed representative evidence as a "permissible means of establishing the employees' hours worked in a class action" if the evidence "could have sustained a reasonable jury finding as to hours worked in each employee's individual action." *Bouaphakeo*, 577 U.S. at 455. Here, Petitioners' expert relied on entryway video and calculated the amount of time between a guard's arrival at security and the start of a shift and between the end of a shift and the guard's exit. He assumed that these times equaled the guard's amount of pre-and post-shift activity, including walk time. (R. 176:8–10.) But entryway videos are not adequate substitutes for learning the actual time spent by individual employees.

Unlike the employees in *Bouaphakeo*, the guards here do not all engage in the same activity. And guards are not required to arrive at the prison at any specific time, and some guards choose to arrive long before their shift starts. (R. 125:5, 7.) Unsurprisingly, the expert's average showed large differences between pre- and post-shift activity time—with pre-shift time much greater than post-shift time. (R. 184:4–5.) That difference should not exist if guards traveled the same route to and from their posts and the bulk of time captured were spent walking. (R. 184:4–5.)

"Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours and employee has worked." *Bouaphakeo*, 577 U.S. at 459. Individual officers' questions would predominate here. Petitioners' evidence could not support the predominancy requirement.

2. Petitioners could not establish predominancy because the class would be unmanageable.

DOC also asserted that the circuit court erred by concluding that Petitioners' class is manageable. (R. 197:12.)

Manageability is a necessary and crucial inquiry in determining whether a class should be certified. *See* Wis. Stat. § 803.08(2)(c)4.; *Hermanson v. Wal Mart Stores, Inc.*, 2006 WI App 36, ¶ 3, 290 Wis. 2d 225, 711 N.W.2d 694. And the Wisconsin Constitution gives the parties to a class-action lawsuit "the right to have all 'juriable issues' decided by the same jury." *Id.* ¶ 6; Wis. Const. art. 1, § 5. Where the defendant's entitlement to a jury trial on damages requires separate mini-trials, it renders class litigation unmanageable, and class certification must be denied. *In re Wal Mart*, 290 Wis. 2d 225, ¶¶ 2, 4, 6.

In *In re Wal Mart*, the court of appeals held that a class should not be certified to determine wages where the data relied on the proposed class members' self-generated, after-the-fact data. *Id.* ¶ 2. To address factual gaps, the petitioners argued that they could "make their class-action case through statistical analysis of Wal–Mart data." *Id.* ¶ 5. The petitioners' expert proposed to obtain employees' recollections of additional unpaid work. *Id.*

The court rejected the premise that such evidence could substitute for the defendant's right to question individual class members and other witnesses. *Id.* ¶ 6. "Wal–Mart was entitled to question the plaintiff" "statistical conclusions and all the underlying data tested by discovery and examination at trial." *Id.* Such questioning "would require not only the examination of each and every member of the proposed class, but, also, their co-workers and supervisors, and, in some or many cases, their friends and family." *Id.* "To say that such a

trial would be unmanageable is somewhat akin to saying that the sun is warm or that the universe is large." *Id.*

Here, as in *In re Wal Mart*, Petitioners needed to rely on individuals' self-reported data given the guards' freedom to choose when to arrive at work. DOC contended that it would be entitled to question the individual guard class members about their arrival time to determine if that time had any direct correlation to the time it took to walk to post. DOC's constitutional right to try juriable issues before the same jury made this certified class unmanageable.

3. The putative class did not satisfy predominancy because DOC would be precluded from raising the *de minimis* defense for individual officers.

DOC further argued that circuit court's predominancy finding was erroneous because it precluded it from using a *de minimis* defense.

This Court has applied the *de minimis non curat lex* doctrine to Wisconsin state wage law claims, assuming but not deciding that the doctrine applies in this state. *Piper v. Jones Dairy Farm*, 2020 WI 28, ¶ 38, 390 Wis. 2d 762, 940 N.W.2d 701. Here, DOC argued that class should not have been certified because the use of an average walk time as applied to every class member would preclude its ability to raise the *de minimis* defense for guards such as Davis, who testified that it takes him about a minute to get to post from security. (R. 152:5, 10.) And proving the factual issues of whether the *de minimis* doctrine applied to individual employees would overwhelm any common issues. On this basis, DOC argued that Petitioners did not satisfy predominancy.

B. The circuit court erred in finding that a class action was superior to allowing individual guards to pursue their own claims.

For a class to be certified under Wis. Stat. § 803.08(2)(c), a court must find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." DOC argued that a class action was not superior to allowing individual guards take advantage of Wisconsin's chapter 109 wage claim process.

The averaging methodology proposed for the class meant that about half of the class members would have received *less* than their "actual" wages. That group would have had monetary "interests in individually controlling the prosecution . . . of separate actions." Wis. Stat. § 803.08(2)(c)1. And neither would a class action for this group have "fairly and efficiently adjudicat[ed] the controversy." Wis. Stat. § 803.08(2)(c). And on the flip side of the class coin, a class action would not have been a fair adjudication for DOC because of class members like Davis. These guards, whose walk-times are between 1–2 minutes and less, would have obtained a windfall based on the expert's averaging of damages. DOC asserted that this feature demonstrated not only that members have interests in individually controlling the prosecution under Wis. Stat. § 803.08(2)(c)1., but also the "undesirability of concentrating the litigation of the claims in th[is] particular forum." Wis. Stat. § 803.08(2)(c)3.

CONCLUSION

Defendant DOC respectfully asks this Court to deny the petition for review.

Dated this 26th day of July 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General
State Bar #1025452

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

CLAYTON P. KAWSKI
Assistant Attorney General
State Bar #1066228

Attorneys for Defendant-Appellant
Wisconsin Department of
Corrections

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1792 (SCK)
(608) 264-6365 (KZK)
(608) 266-8549 (CPK)
(608) 294-2907 (Fax)
kilpatricksc@doj.state.wi.us
keckhaverkz@doj.state.wi.us
kawskicp@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,882 words.

Dated this 26th day of July 2024.

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of July 2024.

Electronically signed by:

Steven C. Kilpatrick
STEVEN C. KILPATRICK
Assistant Attorney General