# No. 25-1520

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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THOMAS E. OVERBY, JR., Individually and on behalf of all others similarly situated; ABBY GEARHART, Individually and on behalf of all others similarly situated

*Plaintiffs-Appellees*,

v.

ANHEUSER-BUSCH, LLC,

*Defendant-Appellant*.

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On appeal from an order granting class certification
by the United States District Court for the
Eastern District of Virginia, No. 4:21-cv-00141-AWA-DEM

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**BRIEF OF *AMICI CURIAE***
**NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEE**

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Dated: December 22, 2025

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amici curiae* the National Employment Lawyers Association and the Metropolitan Washington Employment Lawyers Association certify that they have no parent corporation and that no publicly held corporation owns 10% or more of their stock.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases:**



**Statutes & Other Authorities:**

## THE INTEREST OF *AMICI*[1]

The Metropolitan Washington Employment Lawyers Association (MWELA) is a local affiliate of the National Employment Lawyers Association. MWELA has over 400 members who represent and protect the interests of employees under state and federal law. The purpose of MWELA is to bring into close association employee advocates and attorneys to promote the efficiency of the legal system and fair and equal treatment under the law. MWELA has frequently participated as *amicus curiae* in cases of interest to its members, including in cases involving Virginia wage and hour issues. MWELA has an interest in ensuring that Virginia's wage laws are interpreted consistently with the General Assembly's remedial purpose to protect workers from wage theft and other workplace abuses.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country focused on empowering workers' rights attorneys. NELA is comprised of lawyers who represent workers in labor, employment, and civil rights disputes. NELA advances workers' rights and serves lawyers who advocate for equality and justice in the American workplace, including for workers hoping to vindicate their rights under federal and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel has authored this brief, either in whole or in part, and no party, party's counsel, or other person has contributed money that was intended to fund the preparation or submission of this brief.

state wage and hour protections. NELA regularly appears as *amicus* in cases of import to workers and comments on proposed rules, advocating for increased worker protections. NELA members routinely litigate wage and hour cases in Virginia and have an interest in ensuring that Virginia's wage laws are interpreted in a manner which protects the original intent of the General Assembly, namely, protecting workers from wage theft and other workplace abuses.

## SUMMARY

In *Stafford v. Bojangles*, 123 F.4th 671 (4th Cir. 2024), this Court sought to "ensure that the class-action train stays on the tracks" by requiring close adherence to Rule 23's requirements. In doing so, the Court gave careful attention to the competing policy concerns that arise in aggregate litigation, observing:

> State and federal laws are both sensitive to the plight of hourly-wage employees in America and to the value of each dollar to their households. Workers deserve every penny earned for the honest work they provide their employers, and aggregate litigation may often provide the best means through which to seek relief.

*Id.* at 683. This case again presents this Court with the "seemingly endless tug of pros and cons" surrounding Rule 23, *id*. at 678, requiring it to reinforce the boundaries of the class-action device and thereby avoid running the class-action train off the tracks.

Anheuser-Busch insists here that workers can only satisfy commonality by showing, in effect, that their employers had a formally-adopted *policy* to break the

law – surely a rare occurrence – which would introduce a *de facto* intent requirement that does not exist in either state or federal wage protections. That procedurally-engrafted standard would violate the Rules Enabling Act because it would "abridge . . . [a] substantive right." 28 U.S.C. § 2072. And while the record in this case *does* reflect relevant policies and practices that satisfy commonality and predominance, Anheuser-Busch tries to distract from them by insisting that the district court should have considered facts about the Plaintiffs' *non*-work time – without regard to how they bear on the issues in the case. Ultimately, the Plaintiffs' contentions here can be tested through well-established modes of proof that would allow the factfinder to draw inferences from the evidence presented. That approach has been endorsed by the Supreme Court and would be legally sufficient for any other litigant. Anheuser-Busch cannot deny Plaintiffs the right to prove their case at trial simply because they are proceeding through a class action.

The Court should resist Anheuser-Busch's call to push Rule 23 out of line with existing precedent, and instead keep the class action train on the tracks by affirming the District Court's certification order.

## ARGUMENT

### I. Rule 23 Cannot Be Used to Abridge the Scienter Element in Wage & Hour Laws.

In trying to analogize this case to *Bojangles*, Anheuser-Busch asks the Court to transmute the facts of that case into a new standard. As addressed in Part II

below, that is a misguided exercise because the facts of this case are distinguishable from *Bojangles* – but more importantly, Anheuser-Busch's position would distort wage & hour protections by inserting a *de facto* scienter element that is inconsistent with established law.

### A. *Bojangles* Did Not Impose a Formal-Policy Requirement.

In *Bojangles*, this Court found that an order certifying a class lacked the necessary specificity tying the common employer policies to the broad class that the court below had certified. The *Bojangles* plaintiffs had alleged several kinds of off-the-clock work – pre-shift work, post-shift work, and time shaving by managers – all of which they characterized as part of an overarching "policy," although the record disclosed more of a *pattern* than any kind of formal decision by upper management. 123 F.4th at 679-80. The only formal policy the court below had cited was an "Opening Checklist" of pre-shift tasks, which only 80% of the putative class was subject to. *Id.* The Court put it simply: "whether or not the Opening Checklist mandates off-the-clock pre-shift work does not 'resolve' the time-shaving claims or claims of unpaid off-the-clock wages at any other time." *Id.* at 679. The Court did not rule out the possibility that a class *could* be certified – or that a smaller class might be – but remanded the case for a more careful consideration of the fit between the common policies the court identified and the claims that it certified. Homing in on the plaintiffs' attempt to broaden the class,

the Court rejected their characterization of the employer's various methods of wage theft as part of a single overarching "policy" – calling this allegation "circular" insofar as it posited that the existence of diverse kinds of wage theft proved the existence of a policy to commit it. *Id*. at 680. A "more specific thread" was needed for those allegations to warrant class treatment. *Id.* (cleaned up).

Anheuser-Busch misreads this holding, and argues that *Bojangles* requires a wage-and-hour plaintiff to show that an employer had a formal policy that violates the law. Opening Br. 23-27. That is wrong; if the Court in *Bojangles* had intended to require that showing, it could have simply held that there was no basis to support claims for time shaving or post-shift work because no formal policy related to those claims appeared in the record; instead, it remanded to the district court to further consider whether there was a sufficient thread tying those claims together. It did not specify what that thread should be.

### B. Formal Policies Are Not Required to Show Liability or Commonality.

The Virginia Overtime Wage Act (VOWA) follows the FLSA in adopting a lenient scienter element. An employer is liable for unpaid wages when it "knew or should have known that [an employee] worked overtime but failed to compensate him for it." *Menjivar v. Nova Shortcrete & Concrete, Inc.*, No. 24 Civ. 107, 2025 WL 2490536, at *4 (E.D. Va. Aug. 12, 2025), *report and recommendation adopted sub nom.*, 2025 WL 2487334 (E.D. Va. Aug. 27, 2025) (cleaned up); *see also*

Opening Br. 22. Whether an employer *should have* known about unpaid work is a classic mixed question of law and fact for a jury – one in which the factfinder's ability to draw inferences may be central, as discussed in Part 3 below.

This reflects both the reality of how workplaces operate, and a balancing of policy considerations. The constructive-knowledge requirement places an affirmative obligation on employers to comply with wage and hour law, and reinforces the law's recognition of "the value of each dollar to [hourly workers'] households." *Stafford*, 123 F.4th at 683. Under the FLSA, even an employer who operates in good faith may be held liable for back pay. *See* 29 U.S.C. § 260 (additional showing of good faith is a defense to liquidated damages, but not liability). The standard contemplates that there may be unintended consequences of an employer's policies or practices – but if those consequences are foreseeable, the fact that they were unintended will not foreclose a worker's ability to reclaim "every penny earned for the honest work they provide their employers." *Stafford*, 123 F.4th at 683.

This constructive-knowledge requirement does *not* demand "evidence of a generalized company policy" to violate the law – what Anheuser-Busch derisively refers to as an alleged "secret policy." Opening Br. 26, 28 (cleaned up). To be sure, some consistency in the *practices* giving rise to a pattern of overtime violations is needed – and Plaintiffs have shown that here, as discussed in Part II

below. But demanding that a worker show that the employer reduced its intention to break the law to writing would change the substantive law. An employer presumably has *actual* knowledge of its formal written policies, so requiring proof of such a policy to satisfy commonality and predominance would effectively foreclose an entire category of claims based on an employer's *constructive* knowledge. The Rules Enabling Act does not allow such an amendment.

Granted, it may be more difficult to show that a set of *de facto* practices is consistent. But that is a matter of proof. And as discussed below, Plaintiffs here can point to clear proof that Anheuser-Busch had consistent practices that required off-the-clock work here.

First, although only in place for a portion of the class period, Anheuser-Busch's COVID screenings were required for all workers and took place outside of the brewery before workers clocked in. JA848, JA23-24. These facts are sufficient to show a common practice that affected all members of the putative class. As for the donning and doffing activities, the record shows that the categories of workers here are employed in either the brewing area or on the packaging floor, JA1637, and are required to wear PPE before entering those areas. JA395-396 (workers must don PPE before they enter the packaging floor); JA499, JA1637 (same for production area). And workers are required to be in their work area – i.e. on the brewing area or the packaging floor – at the start of their shift, or

they are considered tardy. JA320. Although nobody at Anheuser-Busch thought to formally say in writing, "you must don PPE before the start of your shift and doff PPE after your shift ends," that is the effect of this practice; PPE must be worn in work areas, and workers must be in work areas at the start of their shift, which is when their paid hours begin. These are common practices that lead to consistent kinds of off-the-clock work for all class members.

Although all of these practices and their logical effects are presumably known to Anheuser-Busch, in a different kind of case where the effects of *de facto* practices are less obvious, requiring Plaintiffs show a more deliberately expressed intent to violate the law would ratchet up the constructive-knowledge requirement, converting it into an actual-knowledge requirement. That would distort the law, violate the intent of the legislature, and revise the policy choices reflected in the fact that the law places an affirmative responsibility on employers to ensure that their workplace practices do not underpay workers. What matters for class certification is *consistent* application of workplace practices; not the explicit conversion of them to a written policy.

## II. Predominance, Like Commonality, Must Focus on *Issues* – Not Facts Plucked at Random from the Record.

*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) sharpened the focus of Rule 23 commonality, holding that it requires not just any common question or set of facts, but rather "a common contention . . . . capable of classwide

resolution . . . . [that is] apt to drive the resolution of the litigation." *Id.* (cleaned up). The same logic is at work for predominance. Individualized facts and questions only matter to the extent that they are more "prevalent or important than" the common issues in resolving the disputed questions of law and fact. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016). Just as common questions can be raised "in droves" without satisfying commonality, *Walmart* at 350, superficial differences among class members – even in droves – cannot defeat predominance unless they bear on the issues and contentions in the case.

Anheuser-Busch distracts from the contentions that matter in this case by focusing on the minutiae of all the *non*-work activities brewery workers engaged in after clocking in. Opening Br. 10-11. But this case is about how much *work* time brewery workers were not paid for. So long as Plaintiffs have a common way to quantify their unpaid hours, it is irrelevant what they did the rest of the time. Here, there are two discrete kinds of work that Plaintiffs claim time for: (1) COVID screening protocols that took place outside the brewery before workers clocked in, and (2) donning, doffing, and related tasks that had to be completed *before* workers entered the brewery floor to start their shift.

Both categories of work can be quantified using an expert time study, as Plaintiffs propose to do here. Resp. Br. at 44. That approach is on all fours with *Tyson Foods*. There, as here, workers sought to recover pay for time spent donning

and doffing protective gear before their shifts started, and as here, they retained an expert to perform a time study to quantify the average time spent on that work. 577 U.S. at 449-51. The Supreme Court accepted this approach, which "did not deprive [the employer] of its ability to litigate individual defenses." *Id*. at 457. Instead, it offered the employer a common defense: "to show that [the expert's] study was unrepresentative or inaccurate." *Id.* That kind of defense is not accomplished by describing everything else that occurred *outside* the time being studied by the expert – for example by showing that when workers were not donning protective gear, they were eating breakfast or visiting the gym. It is accomplished by attacking the expert's methodology or assumptions, or by introducing one's own expert testimony to rebut the plaintiffs' expert. Here, plaintiffs' expert has not yet completed the proposed study, so that rebuttal would be premature – but by the same token, it means Anheuser-Busch still has that defense available as the case proceeds, and has been deprived of no right.

The proposed use of an expert time study is what distinguishes this case from both *Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019) and *Babineau v. Federal Express Corp.*, 576 F.3d 1183 (11th Cir. 2009). In *Ferreras*, as in this case, the workers clocked in but sometimes engaged in personal activities; but unlike this case, and unlike in *Tyson*, the *work* activities at issue in the case were substantially varied. As the Third Circuit explained, in *Tyson*, the

disputed work "was the same for everyone – donning and doffing protective gear." But the American Airlines employees showed "substantial variability in what they were doing, *even if some of it could be called work.*" *Ferreras*, 946 F.3d at 186-87 (emphasis added). The focus was on the dispute about what was actually at issue – that is, work time, not non-work time.

Similarly, in *Babineau*, the disputed time consisted of "pre–and post-liminary tasks" that "vary according to the job function of the particular employee," 576 F.3d at 1187, in a class that included "couriers, courier/handlers, service agents, and any other non-exempt Employees." *Id*. at 1186. There was no consistent set of tasks that could be quantified through a time study, and no time study was proposed by the plaintiffs. Again, that is distinguishable from this case. The proposed use of an expert time study here makes this case more like *Tyson Foods* than *Babineau* or *Ferreras.*

Predominance cannot be defeated by simply pointing to variations among the class members. What matters are variations that are pertinent to the dispute – here, about the duration of COVID screenings and donning/doffing and other preliminary activities. And that dispute gives rise to a common mode of proof that predominates over any individualized issues *that are relevant to the case*.

## III. The Same Modes of Proof Must Be Available to Both Individual and Class Plaintiffs.

Just as the Rules Enabling Act does not allow courts to change substantive rules of law, it does not allow procedural rules to deny a mode of proof to a party in a class action that would be available in an individual action. *See Tyson Foods*, 577 U.S. at 455 ("evidence cannot be deemed improper merely because the claim is brought on behalf of a class. To so hold would ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge ... any substantive right'"). Resolving commonality and predominance will often require courts to examine how the plaintiffs propose to prove up the case. And in many cases, the role of inferences at trial are key.

Juries are commonly instructed about the role of circumstantial proof. Common jury instructions tell jurors, for example, that they may infer that a person entering a room with a wet umbrella just stepped in out of the rain. *See, e.g.*, Cmte. on Model Jury Instructions, 9th Cir., Manual of Model Civil Jury Instructions, § 1.12, "Direct and Circumstantial Evidence" (2025). Sometimes the evidence is less direct, but still sufficient for a jury to conclude that it is more likely than not that an element of a plaintiff's claim has been met. Anheuser-Busch argues here that there can be no classwide proof of knowledge. Opening Br. 34-36. There are two problems with this. First, Anheuser-Busch's argument relies on the mistaken premise that *actual* knowledge of off-the-clock work is required – when

in fact the standard is one of constructive knowledge, as discussed in Part I above. Second, whether an employer *should have known* about off-the-clock work is a matter that is readily susceptible to inference.

For example, an employer may receive complaints that some employees are being underpaid for certain kinds of work; if other employees are engaged in similar work, under similar circumstances, the partial complaint can suffice to show the employer's constructive knowledge of other off-the-clock work. *See Perry v. City of N.Y.*, 78 F.4th 502, 522 (2d Cir. 2023) ("It was not necessary to demonstrate that the City knew that the particular slivers now at issue were going unpaid: knowledge that some compensable, extra-shift work was not being paid suffices to put the City on notice"). Similarly, one employee's testimony about a general practice can be sufficient for a jury to infer that the practice operated similarly as to other employees. As one district court recently observed:

> The Court uses the term "representative testimony" in this decision for ease of reference and to be consistent with the parties' briefing and case law. However, the Court does not view the testimony of one member of the collective as "representative" of the collective on the whole. Rather, when opt-ins testify as to their alleged injuries, the factfinder may use that information to make reasonable inferences about the alleged injuries of similarly situated non-testifying opt-ins.

*Wilson v. Jamaica Serv. Program for Older Adults, Inc.*, 708 F. Supp. 3d 213, 216 (E.D.N.Y. 2023). As the court went on to explain, there is "nothing novel" about allowing a factfinder to draw inferences from the available evidence in this way.

Even if Anheuser-Busch only knew that its practices caused *some* workers to work off the clock, that would be sufficient for the jury to infer that it should have known about the rest. Anheuser-Busch's argument that "[w]hether an employer suffered or permitted work by one employee" cannot prove knowledge about another employee's off-the-clock work, Opening Br. 35-36, must be rejected. That rule would require this Court to tell workers they cannot use circumstantial proof to put on their case – which the Rules Enabling Act does not allow.

But Anheuser-Busch's knowledge can be inferred even more readily than that. The question for the jury will be whether Anheuser-Busch should have known about work that occurred on its premises due to policies and practices that it created. Merely stating the problem in those terms makes clear how readily it may be proven. Anheuser-Busch knows workers often clock in before the start of their shift, and that they are only paid for their scheduled shift time (absent an exception). And it knows about the COVID screening protocols it required, and about the fact that workers are required to don protective gear before entering the brewery floor and doff it only after they leave. It also knows that workers are required to be on the brewery floor, ready to work, at the start of their shift. That is enough to hold, based on a constructive-knowledge standard, that it should have foreseen the consequence that some compensable time would not be captured.

*Amicus* Chamber of Commerce advocates a view that would effectively foreclose *all* wage & hour litigation, claiming to find a "consensus among sister circuits that these types of wage-and-hour disputes inevitably raise individualized questions that defeat predominance." Chamber Br. 12. There is no such "consensus." Wage and hour cases, including donning/doffing cases like this one, continue to be routinely certified, and properly so. *See, e.g., Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (use of "representative" evidence was proper in donning/doffing case); *Loy v. Rehab Synergies, L.L.C.*, 71 F.4th 329, 340 (5th Cir. 2023) (district court did not err in allowing off-the-clock case to proceed to trial as collective action); *Monroe v. FTS USA, LLC*, 860 F.3d 389, 394 (6th Cir. 2017) (case involving company-wide time-shaving practices was properly certified). To accept the Chamber's view of the law would bring this Circuit out of step with other courts, including the Supreme Court's decision in *Tyson Foods*.

## CONCLUSION

There is nothing new about employers demanding impossible burdens of proof when their workers claim unpaid wages. The Supreme Court faced a similar demand nearly 80 years ago in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946), when it wrote that "[t]he remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making that burden an impossible hurdle for the employee." Here, Anheuser-Busch tries to make such

proof impossible through a procedural route. That approach must be rejected as incompatible with the Rules Enabling Act. Accordingly, the district court's class certification order should be affirmed.

Dated: December 22, 2025

Respectfully,

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## CERTIFICATE OF COMPLIANCE

The undersigned, Michael J. Scimone, counsel for Amici Curiae, hereby certifies pursuant to Fed. R. App. P. 32 (g)(1) that the Brief of Amici Curiae complies with the type-volume limitations of F.R.A.P. 32(a)(7)(B). According to the word count of Microsoft Windows, the word-processing system used to prepare the brief, the brief contains 3,744 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

Dated: December 22, 2025

Respectfully,

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 22nd day of December, 2025, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all counsel of record as registered CM/ECF users.

/s/ *Michael J. Scimone*
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