No. 13-1239

IN THE

Supreme Court of the United States

U.S. SECURITY ASSOCIATES, INC.,
Petitioner,

v.

MUHAMMED ABDULLAH, as an individual and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the district court abuse its discretion in certifying a class action for violations of state law regarding mandatory employee meal breaks, where the record shows that the defendant has a uniform policy of denying meal breaks for a uniform reason for all its employees and where state substantive law provides that such a policy can give rise to liability?

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INTRODUCTION

Petitioner U.S. Security Associates (USSA) seeks review of a decision affirming the certification of a class of USSA employees to pursue their claim that they were denied meal breaks in violation of California labor law. The record shows that USSA has a uniform policy of denying all its employees meal breaks based on a uniform staffing decision. The court of appeals concluded that, under state substantive law, the legality of this policy poses a common question, resolvable on a classwide basis. The court of appeals also held that the district court did not abuse its discretion in finding that common issues would predominate.

USSA's claim that it was denied an opportunity to present defenses depends on USSA's position that the propriety of denying meal breaks must be resolved on an individualized basis. This position is wrong as a matter of California law. In any event, reviewing and reversing the Ninth Circuit's application of state law would be necessary for the question presented by USSA even to arise, and this Court does not grant certiorari to review disputes of state law. Certiorari is also inappropriate because of the fact-bound nature of the decision below, which relies heavily on admissions made in deposition testimony.

USSA's claim that the court of appeals shifted the burden to USSA to disprove the requirements of Rule 23 misreads the decision below, which did nothing of the sort. The court of appeals merely held that the district court did not abuse its discretion in crediting the admissions of USSA's own corporate deponent over USSA's hourly employee declarations.

Finally, USSA's suggestion of a circuit split regarding commonality is doubly wrong, both because the Second Circuit decision USSA cites addresses predominance, not commonality, and because the decision below affirmatively agrees with the Second Circuit.

The Court should deny the petition.

STATEMENT OF THE CASE

Petitioner USSA is a private security guard company that provides guards for various businesses in California. Pet. App. 3. A "large majority" of USSA guards work at single-guard posts. *Id.* at 3 & n.2. USSA requires all of its employees to sign "on-duty meal period agreements" under which the employees waive their right under California law to an off-duty meal period. *Id.* at 3-4. If a prospective employee refuses to sign, USSA will not hire her. *Id.* at 5.

California law forbids an employer from requiring that an employee work during a meal period mandated by the Industrial Welfare Commission (IWC) unless the employer pays the employee an extra hour of wages. Cal. Labor Code §§ 226.7(b) & (c).[1] The IWC, in turn, guarantees most types of employees (including guards) a 30-minute meal break for every five hours of work. 8 Cal. Code Regs. § 11040(11)(A); *see id.* § 11040(1) & (2)(O) (stating that the regulation applies to employees "in professional, technical, clerical, mechanical, and similar occupations," a category that includes

[1] The court of appeals cited Cal. Labor Code §§ 226.7(a) & (b). An October 2013 amendment to the law resulted in redesignation of the relevant subdivisions.

"guards"); *see also* Cal. Labor Code § 512(a) (imposing same requirements as regulatory scheme). The IWC regulation provides a narrow exception:

> An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

8 Cal. Code Regs. § 11040(11)(A).

Non-binding guidance from California's Division of Labor Standards Enforcement (DLSE) suggests that the "nature of the work" depends on a multi-factor, job-specific analysis. *See* Pet. App. 12-15 & n.12. However, the California courts have held that, even where an employer relies on the "nature of the work" exception, an employer's uniform policy of denying meal breaks without regard to individual circumstances can violate California labor law. *See Faulkinbury v. Boyd & Assocs., Inc.*, 156 Cal. Rptr. 3d 632, 642-43 (Cal. Ct. App. 2013), *review denied* (July 24, 2013) (applying *Brinker Restaurant Corp. v. Superior Court*, 273 P.3d 513, 531-32 (Cal. 2012)); *see also* Pet. App. 18-21 (discussing California law).

Four former employees of USSA, including respondent Abdullah, filed a putative class action in state court against USSA for violations of California labor law, including USSA's policy requiring all employees to waive their right to a meal break. Pet. App. 3 & n.1, 5 & n.3. After USSA removed the case to federal court pursuant to the Class Action Fairness Act, the district court certified a class that included subclasses for some of plaintiffs' claims but not others. *See, e.g., id.* at 57-63 (certifying subclass

for claim regarding meal breaks but denying certification of subclass for claim regarding rest breaks); *id.* at 67-71 (certifying subclass for unpaid vacation wages claim); *id.* at 71-72 (denying certification of subclass for claim regarding off-the-clock work).

At issue here is the district court's certification of only one of those subclasses, a "meal break subclass" of USSA employees from July 2007 forward who worked more than six hours and were not provided an off-duty meal break and not compensated for an on-duty meal break pursuant to California Labor Code § 226.7. *Id.* at 5-6, 57-63. The court's certification ruling rested largely on the testimony of USSA's designated "Person Most Knowledgeable" (the California analogue to a federal Rule 30(b)(6) deponent) Leo Flury.[2] According to Flury — whose testimony the petition does not mention — 99.9% (subsequently revised to "a large majority") of his employees worked at single-guard posts. *Id.* at 58-59 & n.4. USSA argued that the "nature of the work" exception defeated certification. But the district court found that the record evidence did not show "how *any* of [USSA's] job descriptions would qualify for the nature of the work exception" because there was no evidence "that certain worksites presented such unique considerations that employees were unable to take an off-duty meal break." *Id.* at 60-61. Therefore, the district court reasoned, "given the admission that a large majority of Defendant's employees work at single guard posts," the case presents the common

[2] The California terminology was used because the deposition occurred prior to the removal to federal court.

legal question "whether the nature of the work exception applies to Defendant's single guard post staffing model." *Id.* at 61.

USSA filed a motion for reconsideration, which the district court denied. *Id.* at 6, 50. Again, the ruling was highly fact-specific. The court reasoned that "[i]n his deposition, Leo Flury gave no indication that on-duty meal periods were required for reasons *other than* the single post staffing model," *id.* at 47, and Flury "explained the rationale for [USSA's] on-duty meal break policy in undifferentiated, unparticularized, and generalized terms," *id.* at 50.

The court of appeals granted permission under Rule 23(f) to appeal the certification of the meal break subclass and affirmed the district court. *Id.* at 2, 33. The Ninth Circuit's analysis focused on the record before the district court and on the California courts' construction of California substantive law. The Ninth Circuit did not apply California courts' procedural decisions about when class treatment is appropriate, *see id.* at 21, but it looked to California jurisprudence on California labor law to assess whether the legal question posed by the plaintiffs was a common question apt to produce a common answer. *Id.* at 18-21. Because the California Court of Appeal had held that employers can be liable for a uniform policy of denying meal breaks to "'*all* security guard employees, regardless of the working conditions at a particular location,'" *id.* at 21 (quoting *Faulkinbury*, 156 Cal. Rptr. 3d at 642), and because the record showed that "USSA's sole explanation for why it requires on-duty meal periods is that its guards are staffed at single-guard locations," *id.* at 22, the Ninth Circuit held that the merits of the case would turn on the common answer to the common

question "whether USSA is permitted to adopt a single-guard staffing model that does not allow for off-duty meal periods." *Id.* at 24.

The Ninth Circuit's predominance analysis similarly hewed closely to the facts and to California law. Having already identified the common issue based on California law, the Ninth Circuit held that the district court had not abused its discretion in concluding that the common issue would predominate based on the record:

> Flury testified to three critical facts. First, he initially testified that 99.9% of employees work at single guard posts (he later changed his answer to say that "a large majority" of employees work at such posts). Second, Flury testified that no single guard post allowed for a lunch break. . . . Third, Flury made clear that such "on-duty" meal periods are required as a matter of policy — not necessity[.]

Id. at 30 (footnote omitted). To the extent that USSA relied on declarations that contradicted Flury's admissions on USSA's behalf, the court of appeals held that the district court's weighing of the evidence was not an abuse of discretion. *Id.* at 31. Finally, because damages could be easily determined based on USSA's own records, the court of appeals held it was not an abuse of discretion to conclude that the calculation of damages would not cause individual issues to predominate. *Id.* at 31-32.

REASONS FOR DENYING THE WRIT

I. USSA's Claim That It Has Been Denied The Ability To Assert Defenses Relies On A Misunderstanding Of State Substantive Law.

Twice in the previous Term, this Court instructed that a court should examine the underlying merits as necessary to determine whether Rule 23's requirements are satisfied. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). Here, the court of appeals performed that analysis and concluded that state substantive law renders the question that the meal break subclass raises — whether an employer may have a policy of denying all its employees off-duty meal breaks because of the employer's own staffing decisions — a common question, resolvable on a classwide basis. Pet. App. 18-24. That reading of state law and the facts adduced in discovery supplied the basis of the decision below.

USSA's claim that it was denied the right to assert individualized defenses rests on its argument that because "the 'nature of the work' exception [to California law's meal break requirement] is a highly specific and individualized inquiry," Pet. 14, USSA's liability for having a policy of denying meal breaks to all of its workers is not a common question, *see id.* at 17. USSA's premise is faulty. The five-part balancing standard on which USSA relies is based on a non-binding opinion letter. *See* Pet. 14-15 (citing DLSE guidance); *Brinker Rest. Corp. v. Super. Ct.*, 273 P.3d 513, 529 n.11 (Cal. 2012) (noting that such letters are properly a source of "guidance" but are not

controlling). But the California Court of Appeal has held that, notwithstanding the "nature of the work" exception, an employer's uniform policy of denying meal breaks without regard to individual circumstances can violate California law. *See Faulkinbury v. Boyd & Assocs., Inc.*, 156 Cal. Rptr. 3d 632, 642-43 (Cal. Ct. App. 2013) (applying *Brinker*, 273 P.3d at 531-32).[3]

Based on Flury's testimony about USSA's policies and staffing patterns, the lower courts concluded that this case presents exactly the type of factual circumstance in which a uniform policy can subject the employer to liability. Like the employer in *Faulkinbury*, which "require[d] blanket off-duty meal break waivers in advance from *all* security guard employees, regardless of the working conditions at a particular station," 156 Cal. Rptr. 3d at 642, here "USSA's sole explanation for why it requires on-duty meal periods is that its guards are staffed at single-

[3] If there is any inaccuracy regarding California law in the decision below, it is the isolated statement that "the 'nature of the work' defense [is] relevant only to damages." Pet. App. 24. What the California Court of Appeal has deemed relevant only to damages is "[w]hether or not [a particular] employee was able to take the required break." *Faulkinbury*, 156 Cal. Rptr. 3d at 643. But the Ninth Circuit's statement on this point is dicta. The holding of the decision below is that the legality of a policy that treats all employees the same regardless of particular working conditions is susceptible to classwide resolution. Moreover, the opinion made clear in the very same paragraph that the "nature of the work" exception *is* relevant to liability: "the merits inquiry will turn on . . . whether [USSA] can invoke a 'nature of the work' defense on a classwide basis, where the need for on-duty meal periods results from its own staffing decisions." Pet. App. 24. In any case, this Court is not in the business of correcting misstatements of state law.

guard locations." Pet. App. 22. As the district court noted, the record was devoid of evidence "that certain worksites presented such unique considerations that employees were unable to take an off-duty meal break." *Id.* at 61. Given that USSA chose to assert the "nature of the work" defense in blanket fashion as to all its employees based on the fact that its employees work at single-guard posts, and given *Faulkinbury*'s holding that an employer could be liable for a uniform policy imposed for a uniform reason, state substantive law and the district court record dictated the result below.

Despite the centrality of *Faulkinbury* and Flury's testimony to the Ninth Circuit's affirmance of class certification, the petition fails to cite *Faulkinbury* or to mention Flury's testimony. USSA's misapprehension of California law and incomplete presentation of the record undermines its argument that it has lost its chance to present defenses. Because California law makes clear that an employer can be liable for its blanket policy where, as here, the company has chosen to treat all of its employees the same for the same reason, USSA has lost nothing to which the law entitles it. In particular, USSA has not lost its ability to assert that the "nature of the work" justifies its policy of denying meal breaks; USSA simply must litigate the defense "on a classwide basis," because it advanced just one reason for denying plaintiffs meal breaks and that reason applied equally to the entire class. Pet. App. 24.

As the foregoing discussion makes clear, USSA's quarrel with the court of appeals is not really about Rule 23 but about the substantive requirements of state law. "A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'" *Riley v.*

Kennedy, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)) (alteration in *Riley*). If the California Supreme Court thinks *Faulkinbury*, on which the Ninth Circuit principally relied, misinterpreted *Brinker*, the California Supreme Court can overrule *Faulkinbury*. Regardless, an alleged misapplication of state law is not a reason for this Court to grant certiorari. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts.").

II. USSA's Argument That It Bore The Burden Of Disproving Rule 23's Requirements Mischaracterizes The Decision Below.

USSA's claim that the court of appeals improperly shifted to it the burden of disproving that Rule 23 is satisfied relies on out-of-context snippets of the decision below regarding what USSA had "failed" to do or to show. *See* Pet. 22. In fact, what USSA "failed" to do was not to carry a burden to defeat certification but to overcome the record evidence plaintiffs had marshalled demonstrating that certification was appropriate.

At the outset, the court of appeals correctly noted that *plaintiffs* have the burden of justifying certification. *See* Pet. App. 7 (specifying what "a party seeking class certification must always show"); *id.* at 8 ("We begin . . . by considering whether the plaintiffs have satisfied Rule 23(a)(2) . . . ."). The court then reviewed evidence relevant to the required showings under Rules 23(a)(2) and 23(b)(3) (the two aspects of the certification ruling at issue, *see id.* at 8

n.4) and determined that the district court had not abused its discretion in finding that plaintiffs met their burden.

Regarding Rule 23(a)(2), because "USSA's sole explanation for why it requires on-duty meal periods is that its guards are staffed at single-guard locations," *id.* at 22, the court concluded that the record placed the case into the category of cases in which California recognizes that employers can be liable for a uniform policy of denying meal breaks to "'*all* security guard employees, regardless of the working conditions at a particular location,'" *id.* at 21 (quoting *Faulkinbury*, 156 Cal. Rptr. 3d at 642). What *USSA* failed to do was offer evidence to justify analyzing the "nature of the work" on anything other than a classwide basis pursuant to California law. *See id.* at 22 ("[USSA] does not argue that any particular posts would qualify for the 'nature of the work' exception *absent* the single-guard staffing model. In fact, when asked if he could think of 'examples' where 'the nature of the work requires an on-duty meal break,' Flury testified that he could not.'" (footnote omitted)). In asking whether USSA provided a basis to disregard the record evidence favoring classwide treatment, the court of appeals did no more than consider and reject, as unsupported by its own evidence, USSA's counterargument regarding what the record showed.

Regarding Rule 23(b)(3), the court of appeals likewise held that the district court acted within its discretion in finding USSA's proffered declarations less persuasive than Flury's admissions. *See id.* at 30 (rejecting "arguments [that] directly contradict the statements that Flury made during his deposition"); *id.* at 31 ("[W]e defer to the district court's decision to

weigh his testimony over the employee declarations."). Crediting certain evidence over other evidence is the daily function of district courts; a court does not "shift the burden" to a party simply by ruling against that party on the evidence, and, in particular, holding it to the admissions of its chosen deponent rather than crediting self-serving declarations.

USSA's claim that the circuits are split regarding the allocation of the class-certification burden, Pet. 23-26, thus fails, because its premise — that the court of appeals improperly shifted the burden to the defendant — is incorrect. As the decision repeatedly stated, *see* Pet. App. 7, 8, it is the plaintiffs' burden to justify certification; there is no disagreement among the circuits on that point.

USSA's real complaint is not that it was forced to carry the burden on class certification, but that both the district court and court of appeals found its counterarguments to certification unpersuasive. That complaint is not a basis for certiorari.

III. The Decision Below And The Second Circuit Agree That A Uniform Policy Alone Does Not Dictate Predominance.

As a threshold matter, USSA's argument in Part III of the petition confuses commonality with predominance. USSA argues that the decision below conflicts with *Myers v. Hertz*, 624 F.3d 537 (2d Cir. 2010), "over how to evaluate commonality," Pet. 26; *see also* Pet. i (referring to commonality in its third Question Presented), but *Myers* did not address commonality. Instead, *Myers* evaluated only *predominance* because that question sufficed to decide the case. 624 F.3d at 548.

On predominance, the Ninth Circuit agrees with the Second Circuit's holding in *Myers* that a uniform employment policy alone does not suffice to establish predominance where legal issues relevant to the policy turn on employee-specific matters. *See Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 546 (9th Cir. 2013); *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 958-59 (9th Cir. 2009); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946-47 (9th Cir. 2009). The decision below reaffirmed this principle. Pet. App. 27 (noting that "it is an abuse of discretion for the district court to rely on uniform policies 'to the near exclusion of other relevant factors touching on predominance'" (quoting *In re Wells Fargo*, 571 F.3d at 955, and citing *Vinole* and *Wang*)).

For two reasons, the court of appeals nonetheless held that certification was not an abuse of discretion here. First, unlike in *Myers* or the Ninth Circuit cases to similar effect, in this case, under relevant principles of state substantive law, Flury's admissions on behalf of USSA obviated the need for a fact-intensive analysis. *See id.* at 28-29; *see generally supra* Part I. Second, the district court relied not only on general policies but also on testimony regarding "USSA's actual business practices" and "how USSA's 'policies and practices are implemented on the ground.'" Pet. App. 29 (quoting the district court). Thus, rather than identifying a conflict among the circuits, USSA is complaining that the rule on which the lower courts agree did not enable USSA to prevail on the facts presented.

Finally, USSA's glancing reference to the principle that class certification is inappropriate when "'[q]uestions of individual damages calculations

. . . overwhelm questions common to the class,'" Pet. 18 (quoting *Comcast*, 133 S. Ct. at 1433), does not help USSA's argument. The court of appeals duly considered whether damages inquiries would overwhelm common questions and concluded that the district court had not abused its discretion in finding that they would not. *See* Pet. App. 31-32 (explaining that, given the records in USSA's possession, "it would not be difficult to determine USSA's liability to individual plaintiffs, nor would it be overly-burdensome to calculate damages").

Because USSA has failed to identify a circuit split concerning predominance or commonality, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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