No. 16-1189

In The
Supreme Court of the United States

E. I. DU PONT DE NEMOURS
AND COMPANY AND ADECCO USA, INC.,

Petitioners,

v.

BOBBI-JO SMILEY, AMBER BLOW
AND KELSEY TURNER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF

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REPLY BRIEF

The Brief in Opposition ("Opp.") urges this Court to deny review by simply pretending that the Third Circuit's decision "peacefully coexist[s]" with the squarely conflicting decisions by the Seventh and Eleventh Circuits in *Barefield v. Village of Winnetka*, 81 F.3d 704 (7th Cir. 1996) and *Avery v. City of Talledega*, 24 F.3d 1337 (11th Cir. 1994). (Opp. 12). Respondents argue that there is no "true conflict" (Opp. 1, 11) because *Barefield* and *Avery* are supposedly factually distinguishable. However, Respondents relied on the same purported factual distinctions in their arguments before the Third Circuit, but that court did not deem the cases distinguishable. Instead, the Third Circuit expressly disagreed with the holdings of the Seventh and Eleventh Circuits that the Fair Labor Standards Act ("FLSA") permits employers to use compensation paid for *bona fide* meal breaks that has been included in the regular rate as credits against overtime compensation owed for pre- and post-shift work time. (Pet. App. 21-22).

Respondents also claim that the Third Circuit's decision is faithful to this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000). But there is no basis whatsoever for Respondents' contention that "[t]he Third Circuit applied prevailing Supreme Court rules for interpreting the FLSA." (Opp. 1). Quite to the contrary, the Third Circuit's conclusion that the FLSA's lack of express authorization of the offset practice at issue means that it is implicitly prohibited

squarely conflicts with this Court's holding in *Christensen*, which criticized such an interpretation of the statute as "exactly backwards." 529 U.S. at 588. Under *Christensen*, a challenged pay practice does not violate the FLSA unless the statute expressly prohibits it. *Id*. The Third Circuit and the Department of Labor ("DOL") both repeatedly acknowledged that Section 207 of the FLSA "fail[s] to expressly prohibit offsetting where the compensation used to offset is included in the regular rate." (Pet. App. 17; *see also id*. at 20, 73-74). Under *Christensen*, the Third Circuit's acknowledgment of the "FLSA's silence" (Pet. App. 17) concerning Petitioners' pay practice should have compelled the conclusion that it is permissible.

As to the second question presented by the Petition, Respondents say precious little. They do not dispute, nor could they, that the DOL amicus briefs in this case represented the first time it has ever expressed a position on whether the FLSA allows the offset practice challenged here. Nor do Respondents dispute that the courts of appeals have rendered a multitude of conflicting rulings on whether *Skidmore* deference should be accorded to statutory interpretations by agencies expressed for the first time in litigation. Indeed, Respondents do not address any of the numerous conflicting decisions cited in the Petition. (Pet. at 32-38). Respondents' only argument against a grant of certiorari on the administrative deference issue is that the Third Circuit would have decided this case the same way even if it had not relied upon the DOL's statutory

interpretation. (Opp. 1, 14). Not only is that pure conjecture, it is refuted by: (a) the Third Circuit's express acknowledgment that the statute is silent concerning the permissibility of the challenged pay practice; and (b) the court's failure to cite *any* prior precedent holding that the FLSA bars employers from using compensation paid for break time that is included in the regular rate as a credit against compensation owed for work time. The Third Circuit's decision makes clear that the *Skidmore* deference it accorded to the DOL amicus briefs was dispositive.

Significantly, Respondents do not dispute that the questions presented in the Petition are important and recurring. Each of those questions has given rise to circuit decisions in direct conflict with one another, and this Court should grant certiorari to resolve those conflicts.

I. The Third Circuit's Decision Creates A Circuit Split And Is Contrary To This Court's Decision In *Christensen*

A. The Circuit Conflict Is Real

The Third Circuit's decision squarely conflicts with the decisions by the Seventh and Eleventh Circuits in *Barefield* and *Avery*, respectively. In each of those cases, the employers voluntarily paid the employees for *bona fide* meal breaks, just as Petitioners did. And in each of those cases, like this case, the employers included those payments in the regular rate

and applied them as credits against overtime compensation owed for pre- and post-shift work. The only difference between this case and *Barefield* and *Avery* is that the Seventh and Eleventh Circuits held that the challenged credits were permitted under the FLSA, while the Third Circuit held that they are not. *See Barefield*, 81 F.3d at 710 ("the meal periods are not compensable [hours worked] under the FLSA and [defendant] may properly offset the meal break against the compensable roll call time worked by plaintiffs"); *Avery*, 24 F.3d at 1344 ("If the meal beak is not compensable time under the FLSA, then the [employer] should be allowed to offset the amount it pays for the meal break against any amount it owes the plaintiffs for pre- and post-shift time at work.").

Respondents' contention that "[t]here is no true conflict" between the Third Circuit's ruling and the decisions in *Barefield* and *Avery* rests on supposed "factual differences" that are either immaterial or nonexistent. (Opp. 1). Significantly, the Third Circuit did not express agreement with Respondents' argument that *Barefield* and *Avery* are distinguishable, but instead simply refused to follow the holdings in those cases that the challenged offset practice is permissible under the FLSA. (Pet. App. 21-22).

Respondents emphasize that the employees in both *Barefield* and *Avery* were law enforcement employees, and therefore Section 207(k) of the FLSA (29 U.S.C. § 207(k)) was implicated in those cases. (Opp. 11-12). However, Section 207(k) had no bearing at all on the holdings by the Seventh and Eleventh Circuits

that the challenged credits were permissible under the FLSA.[1] It is worth noting that Respondents place great reliance on the Third Circuit's earlier decision in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005), yet that case too was brought by law enforcement employees.

Respondents also argue that this case supposedly differs from *Barefield* and *Avery* because the payments for the meal breaks in those cases were "voluntary," whereas they claim that the Petitioners' payments were made pursuant to an "agreement" with the employees. (Opp. 11-12).

However, as discussed in the Petition, the District Court's summary judgment ruling specifically found that Respondents "failed to establish that the parties had an agreement to treat the paid non-work time meal periods as 'hours worked'" and "defendants' meal period policy did not create a contract, express or implied, which converted plaintiffs' meal period time into 'hours worked.'" (Pet. App. 42). That finding was *not* reversed on appeal by the Third Circuit. (Pet. App. 4-5, 21 and n.8). In fact, the Third Circuit recognized that

[1] Section 7(a) of the FLSA requires employers to pay overtime to employees who work more than 40 hours per week. 29 U.S.C. § 207(a). Section 7(k), however, provides a partial exemption from those overtime provisions, and permits public agencies to establish a "work period" that lasts from seven to 28 days for employees engaged in law enforcement or fire protection activities. Section 7(k) does not relate at all to the issue of using payments for non-work time included in the regular rate as credits against overtime compensation owed for work time.

Petitioners "had voluntarily included non-work pay" in "the regular rate calculation." (Pet. App. 15).[2]

Thus, Respondents' repeated assertion that there is "an unresolved fact issue regarding the existence and terms of an agreement" concerning the payments for meal break time that should compel denial of certiorari is flat-out wrong. (Opp. 9; *see also id.* at 1, 3 n.2, 8).

Respondents' claims to the contrary notwithstanding, *Barefield* and *Avery* do not have "important factual differences" from this case (Opp. 1), and the circuit conflict engendered by the Third Circuit's ruling is real. That conflict creates particularly significant problems for employers with nationwide operations, such as DuPont, and will encourage forum-shopping by plaintiffs.

Respondents also emphasize that the Third Circuit relied in part upon its earlier ruling in *Wheeler v. Hampton Twp.*, 399 F.3d 238 (3d Cir. 2005). However, the court's citation of *Wheeler*, which involved issues very different from those presented here,[3] plainly has

[2] Just as they did in the courts below, Respondents attempt to make much of the fact that Petitioners did not provide their employees with documentation explaining the pay practice used to calculate the sums set forth in their weekly paystubs. Neither the District Court nor the Court of Appeals ascribed any significance to that fact, correctly recognizing that the only relevant issue is whether the pay practice is permissible under the FLSA, not whether it was reduced to writing.

[3] In *Wheeler*, pursuant to a collective bargaining agreement, the employer included pay for holidays, personal days, vacation, and sick days in the regular rate, but excluded incentive/expense

no relevance to the circuit conflict and the suitability of *this* case for the Court's review.

In explaining why it had invited the DOL to participate in this case as an amicus, the Third Circuit emphasized that the FLSA issue presented here is "important." (Pet. App. 6). Respondents do not dispute the importance of this issue, which affects untold numbers of employers and employees nationwide. It is also noteworthy that Respondents make no effort to defend the Third Circuit's unsubstantiated assertion that allowing the Petitioners' challenged pay practice "would necessarily shortchange employees." (Pet. App. 18). That erroneous contention was contradicted by the Third Circuit's own concession that "[t]he paid break time always exceeded the amount of time Plaintiffs spent donning and doffing and providing shift relief" (Pet. App. 5), a critically-important fact that is inexplicably ignored by the Respondents in their Opposition.

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pay, which must be included. 399 F.3d at 241. The plaintiffs contended that the failure to include incentive/expense pay affected the regular rate, which resulted in overtime violations. *Id*. at 241-42. The Third Circuit held that the employer could not contract around the FLSA and was required to include incentive/expense pay in the regular rate. *Id*. at 243. It rejected the employer's alternative argument that the holiday/personal/vacation/sick pay could be credited against the incentive/expense pay because both were required to be paid, the former pursuant to the collective bargaining agreement and the latter pursuant to statute. *Id*. at 243-44.

B. The Third Circuit's Decision Is Also Contrary To *Christensen*

Respondents' argument that the Third Circuit's decision is in harmony with this Court's decision in *Christensen* fares no better than their specious claim that no circuit conflict exists. It is noteworthy that Respondents assiduously avoid any mention of the repeated acknowledgments by both the Third Circuit and the DOL that the FLSA does not speak to whether employers may use compensation paid to employees for non-compensable, *bona fide* meal breaks that is included in their regular rate of pay as a credit against compensation owed for work time. (Pet. App. 17, 20, 73-74). Nor do Respondents address this Court's express holding in *Christensen* that a challenged pay practice does not "violat[e] the FLSA" "[u]nless the FLSA *prohibits* it." 529 U.S. at 588 (italics in original). *Christensen* makes pellucidly clear that where, as is undisputed here, the FLSA is "silent" concerning a pay practice, a court may not conclude that "the FLSA implicitly prohibits such a practice." *Id*. at 582, 585. Yet that is precisely what the Third Circuit did in this case.

Respondents are simply wrong when they argue that "the *Christensen* decision endorses the use of *expressio unius* in interpreting the FLSA." (Opp. 10). The exact opposite is true – this Court *rejected* the reliance by the employees and the DOL on that canon in *Christensen*. 529 U.S. at 582-83 and n.4. The Court found "unpersuasive" their argument that "the express grant of control to employees to use compensatory time, subject to the limitation regarding undue disruptions of

workplace operations, implies that all other methods of spending compensatory time are precluded." *Id*. at 582-83. By the same token, the Third Circuit's reasoning that Congress's express authorization of the use of credits in Section 207(h)(2) with respect to three categories of extra compensation *excluded* from the regular rate in Section 207(e)(5)-(7) means that these are the "only" credits permitted under the FLSA (Pet. App. 13, 15) is directly contrary to *Christensen*.

Thus, Respondents' assertion that "the Third Circuit in this case used *expressio unius* to interpret the FLSA" (Opp. 10), far from militating against a grant of certiorari as argued by Respondents, instead provides a compelling reason for review and reversal.

Respondents have argued that Petitioners waived their right to argue that the Third Circuit's decision is contrary to *Christensen* because they did not cite *Christensen* in their brief in the Third Circuit. (Opp. 5-7). That argument is unfounded. Petitioners had prevailed in the District Court, and courts "do not ordinarily require appellees to raise every possible ground for affirmance in their appellate briefs." *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 963 (10th Cir. 2009). *Accord Eichorn v. AT&T Corp*., 484 F.3d 644, 657-58 (3d Cir. 2007) ("the defendants were the *appellees* in the previous appeal. As such, they were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds.")

(italics in original).[4] Respondents' opening brief in the Third Circuit had argued that the FLSA, by its express terms, prohibited the Petitioners' pay practice. Thus, the issue of whether the FLSA implicitly prohibits that practice did not arise until the Third Circuit rendered its opinion on that basis, which then prompted Petitioners to raise *Christensen* in their rehearing petition.

In addition, numerous courts have held that "[w]here the question presented is one of law, we consider it in light of 'all relevant authority,' regardless of whether such authority was properly presented in the [lower court.]" *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 853-54 (9th Cir. 2007), *quoting Elder v. Holloway*, 510 U.S. 510, 516 (1994); *accord Metavante Corp. v. Emigrant Savings Bank*, 619 F.3d 748, 773 (7th Cir. 2010) ("A litigant may cite new authority on appeal."); *United States v. Rapone*, 131 F.3d 188, 196 (D.C. Cir. 1997) (no waiver where party "simply offers new legal authority"); *see also Hanover 3201 Realty LLC v. Village Supermarkets, Inc.*, 806 F.3d 162, 179 n.13 (3d Cir. 2015) ("Hanover Realty's failure to cite particular

[4] *Accord Independence Park Apts. v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("As appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds."); *Kessler v. Nat'l Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000) ("[A]ppellate courts should not enforce the [waiver] rule punitively against appellees, because that would motivate appellees to raise every possible alternative ground and to file every conceivable protective cross-appeal, thereby needlessly increasing the scope and complexity of initial appeals.").

cases within its broader argument for the sham exception does not amount to a waiver.").

II. Respondents Do Not Dispute That The Courts Of Appeals Are In "Disarray" Over Whether Deference Is Owed To Statutory Interpretations By Agencies First Expressed In Litigation

Petitioners previously demonstrated that the courts of appeals have rendered a plethora of conflicting opinions on the oft-recurring and important question of whether *Skidmore* deference is owed to an agency's statutory interpretation that is first advanced in litigation, such as in amicus briefs. In addition to the many conflicting decisions cited in the Petition, still more conflicting decisions on this issue are cited in *Flock v. U.S. Dep't of Transportation*, No. 16-1151 (pp. 28-32)[5] and in the amici curiae briefs supporting Petitioners. As one commentator has aptly observed, "the state of the law across the various circuits seems to be in disarray." George Hubbard, *Deference to Agency Statutory Interpretations First Advanced in Litigation? The Chevron Two-Step and the Skidmore Shuffle*, 80 U. Chi.L.Rev. 447, 466 (2013).

Respondents do not dispute that the courts of appeals are all over the map on whether *Skidmore* deference should be accorded to statutory interpretations first expressed by agencies in litigation. Instead, they

[5] Question 2 of the pending petition in *Flock* is very similar to Question 2 presented here by Petitioners.

take issue with Petitioners' assertion that the Third Circuit did not find the statute to be ambiguous concerning the permissibility of the offset practice at issue here. (Opp. 13). But Petitioners' statement was indisputably correct – *nowhere* in the Third Circuit's opinion or its Order inviting the DOL to submit an amicus brief (Pet. App. 56-57) did it conclude that the statute is ambiguous.

Also, Respondents are indulging in speculation when they argue that the result in this case "would stay the same" even if the Third Circuit had not accorded deference to the DOL's position. (Opp. 14). Nothing in the opinion supports that conjecture. Quite the opposite – the Third Circuit's heavy reliance on the DOL amicus briefs is manifest in its opinion. (Pet. App. 6-7, 18). Indeed, the court was unable to cite any provision of the FLSA expressly prohibiting the offset practice at issue, nor could it cite any prior precedent supporting its holding. Thus, the Third Circuit's deference to the DOL's statutory interpretation made all the difference in the outcome.

This case represents an ideal vehicle for this Court to clear up the rampant doctrinal confusion in the courts of appeals and to provide much-needed guidance concerning the important and recurring issue of whether deference should be given to statutory interpretations by agencies expressed for the first time in litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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