No. 07-1014

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

MELANIA FELIX DE ASENCIO, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was correct in holding that workplace activities required by an employer and performed for the employer's benefit constitute "work" under the Fair Labor Standards Act even if the activities do not require a significant level of exertion.

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INTRODUCTION

Tyson Foods asks this Court to decide whether tasks that an employer requires its employees to perform in the workplace as a condition of employment are "work" under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201. Although Tyson claims that there is "confusion in the courts of appeals" on the issue, Pet. 10, this Court already answered the question Tyson poses more than sixty years ago in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Anderson* defined the term "workweek" under the FLSA, and thus "work," to include "*all time* during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.* at 690-91 (emphasis added). Just three years ago in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25-26 (2005), the Court reaffirmed the continuing vitality of this rule.

Tyson attempts to narrow the established meaning of the word "work" by imposing the additional requirement that an activity exceed a certain threshold of exertion. Following Tyson's suggestion, the district court instructed the jury that, even if required by an employer, an activity is not work if it involves only lightweight equipment, does not require significant concentration, or can be completed "while walking, talking or doing other things." Pet. App. 9a-10a. The FLSA, however, does not excuse payment of wages for activities that a court deems to be "easy." *Id.* On the contrary, this Court has explicitly held that "'exertion' [is] not . . . necessary for an activity to constitute 'work' under the FLSA," *Alvarez*, 546 U.S. at 25, and that any activity required by an employer and pursued for the employer's benefit is work "whether burden-

some *or not*." *Tenn. Coal, Iron & R.R. Co. v. Muscoda, Local No. 123*, 321 U.S. 590, 598 (1944) (emphasis added). Indeed, the Court has held that an employee can be engaged in work even when hired "to do nothing, or to do nothing but wait for something to happen." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

Tyson's claim that the courts of appeals are split on this issue is based on a single case, the Tenth Circuit's decision in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994). *Reich*, however, was decided before this Court in *Alvarez* stated unequivocally that work does not require exertion. In any case, *Reich* exempted from the definition of "work" only very short and unmeasurable periods of activity that took "all of a few seconds" and could be completed by employees at home. *Id.* at 1126. In this regard, *Reich* merely repeated the rule previously stated by this Court in *Anderson*—that activities do not involve compensable working time under the FLSA when they cannot be accurately recorded and take no more than a few seconds or minutes to complete. *Anderson*, 328 U.S. at 692. Tyson identifies *no* decisions holding that anything more than a de minimis amount of activity was not work.

The real impetus for Tyson's petition is not any confusion in the courts of appeals, but Tyson's own policy view that requiring wages for non-exertive work would give rise to "unanticipated and unbargained-for labor costs." Pet. 19. What Tyson fails to recognize is that Congress already addressed this precise concern when it adopted the Portal to Portal Act of 1947. *See* 29 U.S.C. § 251(a) (statement of purpose); *Alvarez*, 546 U.S. at 26-28. Although Congress adopted the Act in response to concerns over *Anderson*'s broad definition

of the statutory workweek, it did not choose to address these concerns by "chang[ing] this Court's earlier descriptions of the terms 'work' and 'workweek'" under the FLSA. *Alvarez*, 546 U.S. at 28. Instead, Congress provided that certain "preliminary and postliminary" activities would be exempt from the FLSA's protections *even if they could otherwise be considered "work."* *Id.* at 26-27. If this Court were to redefine work in the way Tyson suggests, it would overrule Congress's decision to exclude from FLSA coverage only "preliminary and postliminary" activities. The result would be to leave large classes of employees unprotected by the FLSA.

Given this Court's longstanding doctrines resolving the question presented and the lack of any split in the circuits on the issue, Tyson's petition should be denied

STATEMENT

This case was brought against Tyson by line workers at a chicken-processing facility in New Holland, Pennsylvania. Pet. App. 4a. Tyson requires plant employees to wear protective gear at all times while on the production line to protect them from animal flesh, blood, and fecal matter present throughout the facility, and to comply with federal sanitation rules governing food production. *Id.* at 4a & n.3, 52a. Because Tyson does not allow this gear to be worn outside the production area, employees are forced to arrive early and leave late to make time for donning, doffing, washing, and sanitizing the equipment. *Id.* at 4a-5a. Employees are also required to spend time before and after their two unpaid meal breaks engaged in the same activities. *Id.* Tyson, however, does not pay its employees for any of the time spent on these tasks because it

chooses to pay wages only for "line time," meaning time that employees spend actually working on the production line. *Id.* at 36a-37a, 49a.

Congress enacted the FLSA to ensure "a fair day's pay for a fair day's work." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). The FLSA requires employers to pay a prescribed minimum wage for time worked, including an overtime rate "for a workweek longer than forty hours." 29 U.S.C. § 207(a)(1). Whether an employee's activity falls under the FLSA, and thus becomes subject to minimum-wage and overtime protections, depends on whether the activity is part of the statutory "workweek," and thus whether it is "work." *Alvarez*, 546 U.S. at 25-26.

Although the statute does not define the terms "workweek" or "work," this Court adopted a "broad" reading of these terms in a series of cases beginning more than sixty years ago. *See id.* In *Tennessee Coal*, the Court defined "work" as "physical or mental exertion (*whether burdensome or not*) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. at 598 (emphasis added). A few years later, *Anderson* defined "workweek" as "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." 328 U.S. at 690-91. Throughout its decisions on the FLSA, the Court has stressed that the statutory language must be read in a commonsense way, as it is ordinarily used, and not in a "narrow, grudging manner" that would deprive employees of compensation under the Act. *See, e.g.*, *Tenn. Coal*, 321 U.S. at 597-98.

In this case, Tyson asked the district court to adopt just the sort of grudging definition against which *Tennessee Coal* warned, arguing that activities occurring before the production line begins and after it ends, although required to be performed at the plant and solely for the company's benefit, are not "work" under the FLSA, and therefore do not require payment of wages. Tyson has repeatedly advanced this radical and unsupported view in other courts and has repeatedly lost, leading one district court to note Tyson's "deeply-entrenched resistance to changing their compensation practices to comply with the requirements of FLSA." *Jordan v. IBP*, No. 02-1132, --- F. Supp. 2d ---, 2008 WL 943592, at *1 (M.D. Tenn., Mar. 31, 2008). Here, however, the district court accepted Tyson's contention, instructing the jury over plaintiffs' objections that "if the donning, doffing and washing at issue do not require physical or mental exertion, the activities are not work." Pet. App. 9a-10a.

To determine whether the tasks require "exertion," the court told the jury it could consider whether the gear was "heavy or cumbersome" or "lightweight and easy to put on or take off," and whether workers "need to concentrate" while completing the tasks or whether they could perform the tasks "while walking, talking or doing other things." *Id.* The court acknowledged this Court's holding in *Armour*, 323 U.S. 126, that employees who are hired to wait for something to occur may be engaged in "work" even if they are doing nothing at all. Pet. App. 9a. Nevertheless, the court told the jury that this was an "exception" to the "usual situation where the definition of work requires exertion." *Id.*

During deliberations, the jury sent a note to the court, asking: "What is the meaning of exertion in the definition of work? Physical, or should we determine what or how much exertion?" *Id.* at 10a. In response, the court re-read its prior instructions. *Id.* The jury then returned a verdict for Tyson. *Id.* To the first interrogatory on the verdict form, asking whether the activities at issue constituted "work," the jury answered "no." *Id.* Based on this answer, the jury did not reach the question whether the work was de minimis. *Id.*

Plaintiffs appealed to the Third Circuit, arguing that the court had improperly instructed the jury on the definition of "work." *Id.* at 3a. The Secretary of Labor submitted a brief in support of plaintiffs stating that Tyson's practices violated both the FLSA and agency regulations defining the "continuous workweek." *Id.* at 11a. The court of appeals reversed. *Id.* at 30a. The court noted that this Court in *Armour*, 323 U.S. 126, had held that exertion is not necessary for an activity to constitute "work," a holding that was recently reaffirmed by *Alvarez*. Pet. App. 20a, 26a. The court concluded that the district court's instructions "impermissibly directed the jury to consider whether the poultry workers had demonstrated some sufficiently laborious *degree* of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer." *Id.* at 26a.

In response to Tyson's argument that the Tenth Circuit in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), had held that workplace activities must involve exertion to qualify as work, the Third Circuit noted that the activities at issue there were so insubstantial

as to be de minimis. Pet. App. 21a. The court also noted that, even assuming the 1994 decision in *Reich* was addressing anything beyond de minimis activities, its holding was inconsistent with this Court's 2005 decision in *Alvarez*. *Id.* at 21a-25a. The court therefore concluded that the activities at issue constituted "work" and reversed the district court's decision. *Id.* at 26a.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ALREADY ANSWERED THE QUESTION PRESENTED.

A. The Statutory "Workweek" Under the FLSA Includes All Time that an Employee Is Required to Spend at the Workplace Under the Employer's Control.

Tyson's claim that there is "widespread uncertainty" among the federal courts about whether "work" under the FLSA requires some level of exertion runs headlong into *Alvarez*, which held just three years ago that "exertion *[is] not in fact necessary* for an activity to constitute 'work.'" 546 U.S. at 25 (emphasis added).

Like this case, *Alvarez* involved FLSA claims by meat- and chicken-processing workers who were not paid for time spent donning and doffing protective gear. *Id.* at 30-31, 37-38. The defendants in *Alvarez*, unlike Tyson here, conceded that the donning and doffing time was compensable. *Id.* at 32. The remaining issue for the Court was whether the time employees spent walking to the production line *after* putting on the gear, and the time spent waiting to remove the gear at the end of the workday, was also compensable.

Id. at 24, 32. The Court concluded that it was. *Id.* at 37. Although the Court did not mention the difficulty of the walk or level of exertion required, the walking time that the Court concluded was "work" was no more strenuous than the donning, doffing, and cleaning at issue here. Indeed, one of the factors Tyson urges the Court to consider in determining whether a task involves exertion is whether employees can complete the tasks "while walking," Pet. 4-5, which, in the case of the time spent by the employees in *Alvarez* engaged in nothing *but* walking, was true by definition. Moreover, the Court in *Alvarez* could not have held, as it did, that time spent *waiting* to doff and clean safety gear was work, while simultaneously believing that the time spent actually doffing and cleaning the gear was not.

Without acknowledging the definitions of "work" and "workweek" in *Alvarez*, Tyson takes issue with the Third Circuit's reliance on the case, arguing that *Alvarez* involved a separate question—whether the walking time was part of the "continuous workday," in which case it would be unaffected by the Portal to Portal Act, or whether it was "preliminary or postliminary" to the workday, in which case the Portal to Portal Act would have precluded recovery. *Id.* at 18. As Tyson concedes, however, the question whether an activity constitutes "work" is a question "antecedent" to the question whether the work is affected by the Portal to Portal Act. *Id.* If an activity is not "work," it cannot be part of the "workday," and thus there would have been no need for this Court to reach the question of the Portal to Portal Act's applicability. For this reason, the Third Circuit below noted that "the Court [in *Alvarez*] could not have concluded that walking and waiting time are compensable under the Portal-to-

Portal Act if they were not work themselves." Pet. App. 20a-21a.

Even if Tyson could distinguish *Alvarez*, its position would still be precluded by *Anderson*. The employer in *Anderson* required employees prior to the start of the paid workday to walk to their work benches and perform various preliminary tasks, such as flipping switches, gathering equipment, removing shirts, and putting on aprons, overalls, and finger protectors. 328 U.S. at 682-83. None of these tasks was strenuous or difficult; indeed, the Court noted that the employees' walk was "along clean, painted floors" in a "brightly illuminated and well ventilated building," and that employees were free to stop to converse with each other along the way. *Id.* The other preliminary tasks, many of which bear a striking resemblance to the donning and doffing activities here, took no more than three or four minutes to complete. *Id.* at 683.

Nevertheless, the Court concluded that these activities constituted "work" under the FLSA. *Id.* at 692-93. Although the activities did not require significant exertion, employees completed them "only because they were compelled to do so by the necessities of the employer's business," and, during this time, were "under the complete control of the employer." *Id.* at 691. The Court held that "[t]he statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.* at 690-91. That definition of "workweek," reaffirmed three years ago in *Alvarez*, remains the controlling definition under the FLSA.

B. No Particular Level of Exertion Is Required for an Activity to Constitute "Work."

Tyson ignores the definition of "workweek" provided by *Anderson* and *Alvarez*, instead relying on the related definition of "work" as set forth in *Tennessee Coal*, 321 U.S. at 598. The Court there, in the course of examining the claims of miners forced to travel in uncomfortable and dangerous conditions underground, defined work as "exertion (whether burdensome or not) undertaken under the employer's control and for the employer's benefit." *Id.*. Tyson hyperfocuses on the Court's use of the word "exertion," apparently assuming that the word indicates some predetermined level of mental or physical difficulty. Pet. 10-12. Because the courts of appeals do not require a showing of such difficulty, Tyson concludes that there is general "confusion" among these courts. *Id.* at 10.

The reason that the courts do not require a showing of difficulty, however, is not that they are confused; it is that no such showing is required. *Tennessee Coal* did not equate "exertion" with physical or mental strain. To the contrary, the Court expressly qualified the word by specifying that the exertion may be "burdensome *or not*." 321 U.S. at 598 (emphasis added). Although "exert[ing]" oneself can, in some contexts, imply a "tiring effort," its most basic meaning is simply to "put forth" or "put . . . into action." Webster's Third New International Dictionary 795 (1965). Tyson's mistake is to confuse the requirement of exertion with the requirement of a certain *level* of exertion. Many employees covered by the FLSA have jobs that involve little or no exertion, such as a security guard who sits at a desk all day, a retail clerk who only occasionally rings up sales on a cash register, or a recep-

tionist who spends most of the day reading magazines while waiting for the phone to ring. Regardless of whether these employees' exertions are heavy or slight, they are still engaged in work and are entitled to compensation under the FLSA.

If there were any doubt about the requirement of exertion after *Tennessee Coal*, the Court resolved it later that same year when it held, in *Armour*, 323 U.S. 126, that an activity can constitute work even if it involves *no* exertion. The employer in *Armour* attempted to rely on the Court's use of the word "exertion" for the proposition that privately employed firefighters were not doing "work" when they spent time during their shifts "sleeping, eating, playing cards, listening to the radio," and engaging in other activities that required little or no exertion. *Id.* at 128-32. The Court rejected the employer's argument. *Id.* at 132-33. Noting that "[g]eneral expressions transposed to other facts are often misleading," the Court stated that "[t]he context of the language in *Tennessee Coal* should be sufficient to indicate the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts." *Id.*; *see also Alvarez*, 546 U.S. at 25 ("[I]n *Armour* we clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA."); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 286 (2d Cir. 2008) ("[T]he Supreme Court's definition . . . does not purport to establish a 'special meaning' for work, but simply to guide the courts in applying the word as it is commonly used and understood.").

Tyson's only explanation for *Armour*'s holding is that it created an "exception" to the general rule that work requires effort. Pet. 8 n.3. Tyson argues that this

Court's decisions, "read together," "chart two distinct paths for determining whether an activity constitutes 'work.'" *Id.* at 15. In Tyson's view, the second "path," defined by *Armour*, comes into play when an activity does not involve "exertion" (as Tyson incorrectly reads the word) but the parties have nonetheless provided by "custom and contract" that the activity (or non-activity) is "work." *Id.* at 15-16. But if *Armour* intended to create the two-tiered definition of work that Tyson reads into the Court's decision, it never said so. Nor have this Court's other cases, read individually or together, interpreted the FLSA in this way. Rather, *Armour* held that the relevant test for whether periods of non-activity constitute work is whether the "time is spent predominantly for the employer's benefit or for the employee's," a question that "depend[s] upon *all the circumstances of the case*." 323 U.S. at 133 (emphasis added).

Moreover, Tyson's insistence that non-exertive activities require the employee to prove entitlement to wages by "custom and contract," Pet. 13-14, seriously misreads this Court's decisions. Neither *Tennessee Coal* nor this Court's other cases required employees to *prove* entitlement to wages by custom and contract. Rather, the Court has stressed that custom and contract "cannot be utilized to *deprive* employees of their statutory rights." *Tenn. Coal*, 321 U.S. at 602-03 (emphasis added); *see also Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 166-67 (1945). Thus, when work is controlled by an employer, it "must be included in the statutory workweek and compensated accordingly, *regardless of contrary custom or contract*." *Anderson*, 328 U.S. at 692 (emphasis added). Tyson's formalistic two-step test would turn this doc-

trine on its head, creating exactly the sorts of "grudging" restrictions on payment of wages that *Tennessee Coal* warned against. *Tenn. Coal*, 321 U.S. at 597.

II. There Is No Conflict Over the Question Presented.

Although Tyson claims that there is general "confusion" in the courts of appeals on the question whether work under the FLSA requires exertion, all the decisions on which Tyson relies recognize that there is no exertion requirement. *See Sehie v. Aurora*, 432 F.3d 749, 751 (7th Cir. 2005) (holding that "all hours that the employee is required to give his employer are hours worked even if they are spent in idleness"); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911-12 (9th Cir. 2004) ("'[W]ork" includes even non-exertional acts."); *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) (noting that "courts have found that compensable work can occur despite absence of exertion"); *Plumley v. S. Container, Inc.*, 303 F.3d 364, 371 n.4 (1st Cir. 2002) ("We recognize, of course, that the extent of exertion involved carries little legal weight."). The unanimous position of the courts of appeals is backed by the Secretary of Labor, who argued as amicus curiae below that the district court erred in requiring a showing of exertion. Pet. App. 11a.[1]

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[1] The Chamber of Commerce, as amicus curiae for Tyson, points to the Second Circuit's decision in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), *cert. pending*, No. 07-1019 (filed Jan. 30, 2008), as evidence of a split. *Gorman*, however, did not involve the definition of "work." Rather, the case was about whether certain donning and doffing activities were excluded from the FLSA as preliminary or postliminary

The only court of appeals decision that Tyson claims directly conflicts with the decision below is the Tenth Circuit's decision in *Reich*, which held that certain activities, although "integral and indispensible" to a principal work activity and thus unaffected by the Portal to Portal Act, were nonetheless excluded from the FLSA's coverage because they took only a few seconds to complete and thus were not "work" under the statute. 38 F.3d at 1125-26. Even if *Reich* imposed an exertion requirement (which, as discussed below, it did not), that requirement could no longer stand after this Court's 2005 decision in *Alvarez*. As previously discussed, *Alvarez* concluded that walking and waiting activities were compensable under the FLSA without any discussion of whether those activities involved exertion. Moreover, *Alvarez* held that any activity that is integral and indispensable to a principal work activity must *itself* be a principal work activity under the Portal-to-Portal Act, and thus must be compensable under the FLSA. 546 U.S. at 37. *Alvarez* precludes the conclusion reached by the Tenth Circuit—that an activity can be "integral and indispensable" to work but not itself be work.

Therefore, if, as Tyson contends, there were a split in the circuits on the definition of "work," the split would need to have arisen *after* this Court's 2005 decision in *Alvarez* to be considered an appropriate candidate for review. The only Tenth Circuit decision on the issue since *Alvarez*, however, read *Reich* as holding that the activities at issue were excluded from the

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activities under the Portal to Portal Act. *Id.* at 593-95. That issue, which presupposes that the activities were "work," was never reached by the lower courts here, and, if Tyson has not already waived it, may become an issue on remand.

FLSA by the Portal to Portal Act, thus implicitly concluding that the activities would otherwise have been compensable "work." *Smith v. Aztec Well Servicing Co.,* 462 F.3d 1274, 1289 (10th Cir. 2006). The Tenth Circuit's decision in *Smith* is consistent with the Third Circuit's decision below and with the two other post-*Alvarez* decisions by the courts of appeals addressing the meaning of "work." *See Singh v. City of N.Y.*, No. 06-2969, --- F.3d ---, 2008 WL 1885327, at *3 (2d Cir. Apr. 29, 2008) ("[E]xertion is not necessarily required for an activity to be compensable . . . ."); *Gotham Registry,* 514 F.3d at 285 ("The broad meaning that has emerged from Supreme Court cases describes work as exertion *or* loss of an employee's time . . . ." (emphasis added)). *Smith* is also consistent with the prediction of the District of Kansas, which recently held that the Tenth Circuit "would approach its analysis of the pertinent issues differently" in light of *Alvarez* if given another opportunity, even if it ultimately reached the same result. *Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1246 (D. Kan. 2007). The district court's decision in *Garcia* is currently on appeal in the Tenth Circuit, and may give that court an opportunity to revisit *Reich* in light of *Alvarez*. At least until then, there is no need for this Court to reiterate, yet again, its unbroken view that "work" does not require exertion.

Even setting aside *Alvarez*, there is no conflict between *Reich* and other courts of appeals on the definition of "work." *Reich* held only that activities were not compensable when they could be completed at home and took no more than a "few seconds" to complete. 38 F.3d at 1126. The court's rationale was not based on the relative *difficulty* (that is, exertion level) of the work, but on the fact that the *duration* of the work

was very brief. *Id.* Thus, *Reich* does nothing more than apply this Court's decision in *Anderson*, which held that activities are not included in compensable work time when they take only a few seconds or minutes to complete and cannot be accurately measured. 328 U.S. at 692. In this regard, *Reich* is also in agreement with the Third Circuit's decision below, which noted that "trivial" quantities of work are not compensable under the FLSA. Pet. App. 27a.

Conversely, *Reich* recognized that even relatively short periods of time—for example, a period of ten minutes—would be a sufficient period of time to be compensable. *Reich*, 38 F.3d at 1126; *see also Anderson*, 328 U.S. at 683 (holding walking time lasting as little as thirty seconds, and other preliminary activities taking three or four minutes "at the most," to constitute "work"). Thus, the court held that knife workers who, like plaintiffs here, were required to don, doff, and clean several separate items of protective equipment, were engaged in compensable work under the FLSA. *Reich*, 38 F.3d at 1126 ("[T]he necessity to combine several items coupled with the need to regularly and thoroughly clean the equipment creates measurable additional working time."). The court also held that time spent picking up and donning sanitary outergarments at the start of the day, and doffing and depositing for laundering the garments at the end of the day, were "preliminary and postliminary" activities under the Portal to Portal Act, thus implicitly concluding that these activities were "work." *Id.*[2]

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[2] Tyson asserts that, in this case, "the testimony at trial showed that [the safety gear] took only 'seconds' to put on." Pet. 9. In fact, as the Third Circuit noted, Tyson's witness testified

To be sure, the Third Circuit below characterized the issue in different terms than did the Tenth Circuit in *Reich*. The court concluded that even very brief periods of activity can constitute "work" under the FLSA, but that these periods are nevertheless not compensable when they are so brief as to be "de minimis." Pet. App. 26a-27a. In contrast, the Tenth Circuit in *Reich*, although acknowledging that the minor tasks at issue there "could be said to be de minimis," concluded that "the better approach" was to say that the tasks were not "work" at all and thus fell entirely outside the framework of the FLSA. 38 F.3d at 1126 n.1. The difference between these approaches, however, is purely semantic. Regardless of whether trivial activities are noncompensable because they are "de minimis" or because they are not "work," the result is the same. Indeed, the courts of appeals have treated the two approaches interchangeably. Thus, although Tyson claims that the Ninth Circuit's decisions conflict with *Reich*, the Ninth Circuit actually *relied* on *Reich* in holding similar activities to be de minimis. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903-04 (9th Cir. 2003) ("We agree with [*Reich*'s] conclusion, both as a matter of logic and as a matter of law."), *aff'd*, 546 U.S. 21 (2005). Similarly, although acknowledging the difference in terminology, the Third Circuit below recognized the de minimis exception and noted the "importance" of the de minimis nature of activities to the decision in *Reich*. Pet. App. 21a. Such a difference in terminology does not constitute a circuit split.

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that the activities at issue took between six to ten minutes per shift, while plaintiffs' expert witness estimated a total of 13.3 minutes. Pet. App. 5a.

III. The Lack Of Finality Of The Third Circuit's Ruling Underscores The Conclusion That Review Should Be Denied.

Tyson ignores another compelling reason to deny review: the interlocutory nature of the ruling below. Although this Court+ has jurisdiction to review interlocutory decisions of federal courts of appeals under 28 U.S.C. § 1254(1), it seldom does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases").

The posture of this case is anything but extraordinary. The court of appeals reversed the judgment of the district court on the purely legal ground that the district court erred in instructing the jury that "work" requires some level of exertion. The court remanded the case to the district court, instructing the court to consider whether any of the activities involved were de minimis and whether Tyson had waived any defenses under the Portal to Portal Act. On remand, the court or jury will be free to find for Tyson on any lawful ground, in which case review on the question pre-

sented in the petition would not be necessary (or appropriate).

This case is an even less appropriate vehicle for immediate, interlocutory review than was true in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, there is no decision regarding liability, let alone the appropriate remedy.

Of course, plaintiffs believe that they will prevail on the merits. If they do, Tyson may appeal from the final decision and, ultimately, petition the Court on the meaning of "work" (and any other federal issue). *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was sui generis, here, if petitioner is correct that the meaning of "work" will arise frequently in the courts of appeals, there will be any number of appropriate future vehicles that would allow this Court to resolve the question. In the meantime, the Court should stay its hand and allow the case to run its course.

IV. Tyson's Policy Arguments Are Overblown and Have Already Been Addressed by Congress.

Tyson argues that the question whether "work" requires exertion is an issue of national importance because of the risk of unexpected liability to employers. Pet. 18-20. There is no reason, however, that liability predicated on this Court's sixty-year history of interpreting the FLSA should be unexpected to anyone. Moreover, Tyson fails to acknowledge that Congress in the Portal to Portal Act *already* addressed the concerns that Tyson expresses here. *See* 29 U.S.C. § 251(a) (statement of purpose). Congress passed the Portal to Portal Act following *Anderson* to protect employers from being required to pay employees for time that nobody expected would be compensable. As this Court recognized in *Alvarez*, however, the Portal to Portal Act did not "change this Court's earlier descriptions of the terms 'work' and 'workweek'" under the FLSA. *Alvarez*, 546 U.S. at 28. Instead, the Act created exceptions to liability under certain specified circumstances. *Id.* at 27-28. Thus, as noted above, whether an activity is "work" is a question separate and "antecedent" to the question whether the Portal to Portal Act's exceptions apply.

To redefine "work" in the way Tyson suggests would in some cases simply duplicate the protections Congress created for employers in the Portal to Portal Act. But, because activities that do not meet the definition of "work" fall entirely outside the scope of the FLSA, the Portal to Portal Act's limitation to activities that are "preliminary and postliminary" to an employee's principal work activities would never come into play, meaning that employers could refuse to pay employees for periods *even during the workday* when

the employees are working on relatively easy tasks, or on days when work is light. And for employees whose jobs are rarely or never strenuous—such as certain security guards, attendants, or clerical workers—the FLSA would be unavailable entirely. These workers would never be entitled to compensation because they would never be engaged in "work."

Congress has already adopted a limited statutory solution to the policy issues Tyson raises. The Court should not go beyond the Portal to Portal Act and adopt by judicial fiat a separate rule that would eviscerate the protections of the FLSA for many workers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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