No. 07-1014

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

MELANIA FELIX DE ASENCIO, ET AL.

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

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REPLY BRIEF FOR PETITIONER

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In reversing the jury's verdict in petitioner's favor and holding that the donning and doffing of light protective clothing constitutes "work" under the Fair Labor Standards Act (FLSA), the Third Circuit expressly took sides in an ever-widening conflict concerning the meaning of the FLSA's foundational term "work." See Pet. App. 23a. The court of appeals specifically rejected the Tenth Circuit's decisions in *Reich v. IBP, Inc.*, 38 F.3d 1123 (1994), and *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (2006), which define "work" to include exertion, preferring instead to embrace the Ninth Circuit's decision in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (2004), which jettisons the exertion requirement.

The Third Circuit's decision, however, cannot be reconciled with this Court's precedent. This Court has repeatedly held that non-exertional acts are "work" only if the employee is specifically hired for

that purpose or if the parties otherwise regard them as compensable by custom or contract. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (looking to "agreements between the particular parties" to determine meaning of "work"); *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 169-70 (1945) ("bona fide contracts or customs" can settle "whether certain activity or nonactivity constitutes work"). Otherwise, exertion is required for an activity to qualify as work. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 323 U.S. 590, 598 (1944). In this case, respondents acknowledge that donning and doffing the clothing at issue entails no exertion, and they do not dispute the parties' understanding – and the custom throughout this and related industries – that employers are not required to pay compensation for these activities. See Pet. 5. Hence, they do not constitute "work" under this Court's decisions.

Respondents' only answer is to deny the conflict that the Third Circuit itself acknowledged, and to echo the confusion in the law by ignoring this Court's precedent. But, as *amicus curiae* the U.S. Chamber of Commerce explains, prompt resolution of those conflicts is profoundly important. The FLSA governs the compensation of more than 100 million Americans. Innumerable workplaces require employees to put on specified clothing or to otherwise conduct minor activities antecedent to the start of the normal work day. Enforcement of a single, uniform nationwide definition of "work" – which only this Court can impose – is thus critical for both employees and the employers whom courts of appeals have now left saddled with significantly divergent compensation obligations based solely on geography.

1. Respondents have no persuasive answer to petitioner's showing that the Third Circuit's decision in this case conflicts with this Court's precedents.

a. Respondents embrace the court of appeals' holding that "work" encompasses any "form of activity controlled or required by the employer and pursued for the benefit of the employer." Pet. App. 26a. That argument is precluded by this Court's repeated direction that "physical or mental exertion" is one of the "essential elements of work." *Jewell Ridge*, 325 U.S. at 163-64; see *Tennessee Coal*, 321 U.S. at 598 ("work" entails "physical or mental exertion"); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946) ("work" "involve[s] exertion of a physical nature"). The Third Circuit's ruling thus wrongly excludes "exertion" from the "work" analysis.

Respondents' attempts to defend that departure from precedent lack merit. First, respondents note that an employee may be hired to engage in non-exertional activities – for example, to "wait." See BIO 2 (citing *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)). That is true, but of no help to respondents. *Armour* held that the FLSA required paying firefighters for their "inactive duty" at the firehouse. 323 U.S. at 133. In so holding, the Court recognized that an employer *can* "hire a man to do nothing," and, in fact, that the firefighters in that case were hired to "[r]efrain[] from other activity" in case an emergency arose. *Ibid.* *Armour* thus established that, when an individual is hired merely to wait, that is his "work." *Ibid.* Here, by contrast, respondents were not "hired" for a non-exertive purpose such as putting on this light protective clothing.

Respondents' argument ignores the companion ruling in *Skidmore*, which held that claims for compensation for non-exertional activities are resolved by determining – through "scrutiny and construction of the agreements between the particular parties" and "appraisal of their practical construction of the working agreement by conduct" – whether the employee was "engaged to" perform the acts in question. 323 U.S. at 137. The FLSA "does not impose [such] an arrangement upon the parties"; it instead "imposes upon the courts the task of finding what the arrangement was." *Ibid.*

One year after its decisions in *Armour* and *Skidmore*, this Court reconfirmed the proper "use of bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or nonactivity constitutes work." *Jewell Ridge*, 325 U.S. at 169-70. Respondents fail to address that aspect of *Jewell Ridge* and ignore *Skidmore* completely. They likewise take no heed of this Court's numerous decisions emphasizing the importance of "custom or contract" in "borderline cases." *Tennessee Coal*, 321 U.S. at 603; see *Armour*, 323 U.S. at 134 ("under the circumstances and the arrangements between the parties the time . . . was working time"); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946) (only when an activity requires exertion must it be compensated "regardless of custom or contract").

Respondents thus err in asserting that petitioner's reading of the FLSA would "impos[e] the additional requirement that an activity exceed a certain threshold of exertion" (BIO 1), and so leave an employee like "a security guard who sits at a desk all day" uncompensated (*id.* at 10). In fact, if an employee is

hired to perform activities, like waiting, that do not require exertion, those activities constitute "work." But if an employee engages in non-exertional activities ancillary to her job, as here, the determination whether those acts are "work" turns on whether there is a custom or contract indicating that the parties intended that they would be compensated.

Second, respondents rely on the statement in *Anderson* that the "*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" (328 U.S. at 682-83). But as the jury found here, respondents were not so constrained. They are free to don and doff the light clothing when and where on the premises they please (hence the jury's finding that they were not on duty at the time), and petitioner compensates them for all the time they are "necessarily required" to be "at a prescribed workplace."

Beyond that, *Anderson* no more overruled *Tennessee Coal* and its progeny than did *Armour*. The definitions of "workweek" and "work" may be "related" (BIO 10), but they are not the same. Cf. 29 C.F.R. § 790.6(b) ("workday" exists "whether or not the employee engages in work"). Indeed, *Anderson* itself defined "*work*" to mean activities that "involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit." 328 U.S. at 692-93. The

Third Circuit's categorical excision of the element of exertion defies rather than comports with *Anderson*.[1]

The Third Circuit's ruling also makes no practical sense. Respondents do not dispute that, if they put the *identical* clothing on at home, the *identical* activities would not constitute "work," placing controlling weight on the fact that the activities occur at petitioner's plant. See BIO 15-16. But nothing in the FLSA mentions, much less renders determinative, the fact that ear plugs and safety glasses are best donned upon arrival rather than beforehand.

b. Respondents' effort to find support in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), for the Third Circuit's decision fares no better. To be sure, *Alvarez* was a donning and doffing case. But the similarity ends there. The employer in *Alvarez* did not challenge the decision of the court below in that case that the employees' clothes-changing was compensable (see *id.* at 31; accord BIO 7), and this Court decided the case based on that assumption (546 U.S. at 32). The Court's decision in *Alvarez* accordingly was limited to the question of whether walking and waiting time that follows a compensable activity is compensable

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[1] Respondents note (Br. 9) that the employees in *Anderson* "perform[ed] various preliminary tasks, such as flipping switches, gathering equipment, and removing shirts, and putting on aprons, overalls, and finger protectors." 328 U.S. at 682-83. True, but *Anderson* does not suggest, much less hold, that such activities are "work" as a matter of law. Instead, it was the combination of activities in *Anderson* that involved exertion. *Id.* at 692-93. Here, by contrast, the jury found that donning respondents' much more limited attire does not entail exertion. Pet. App. 10a.

under the exception to the FLSA provided by the Portal to Portal Act, 29 U.S.C. §§ 251 *et seq*. See BIO 13-14 n.1 (question in *Alvarez* "presupposes that the activities were 'work'"). More specifically, the employees argued that walking and waiting were compensable *regardless* of whether they constituted "work" because they occurred during the "continuous workday." See *Alvarez*, 546 U.S. at 28-29 (citing 29 C.F.R. § 790.6(b)). This Court held only that donning and doffing activities that were conceded to be "work" can mark the start and end of the employees' continuous workday. See 546 U.S. at 37.

Respondents contend that, "[i]f an activity is not 'work,' it cannot be part of the 'workday.'" BIO 8. That is wrong. Under the "continuous workday" rule, a workday "includes all time within that period *whether or not the employee engages in work* throughout all of that period." 29 C.F.R. § 790.6(b) (emphasis added).

By contrast, the activities for which respondents seek compensation do *not* occur during the continuous workday. Instead, this case presents the question that was assumed but not decided in *Alvarez*: whether the non-exertional donning and doffing of light clothing is "work" that starts and ends the workday. *Alvarez* is relevant only in that it highlights the sweeping implications of the question presented. If donning and doffing *are* "work," then, under *Alvarez*, they define the bounds of the employees' continuous workday, presumptively conferring a right to compensation for all the walking and waiting time that follows and precedes the donning and doffing activities. Respondents thus seek compensation not merely for the time they spend putting on a

smock, but also for all the time spent walking to the plant floor, as well as the parallel period at day's end. See Pet. 4.

2. Unlike respondents, the court of appeals acknowledged (Pet. App. 23a) that its decision conflicts with the Tenth Circuit's holding in *Reich*, reaffirmed post-*Alvarez* in *Smith*, that an activity is "not work" when it involves no exertion, takes "all of a few seconds and requires little or no concentration," *Reich*, 38 F.3d at 1126. Respondents' efforts to downplay that conflict fail.

Respondents emphasize that *Reich* predates this Court's decision in *Alvarez*, and place great weight on a single district court's prediction that the Tenth Circuit might reconsider *Reich*. The problem with that argument is that the Tenth Circuit has revisited *Reich* since *Alvarez* and *reaffirmed* its ruling. In *Smith*, the plaintiff employees invoked *Alvarez* to seek compensation for the time they spent traveling to their job sites, arguing that the need to load work clothing into their truck before traveling constituted their first "work" of the day and so started the continuous workday. *Smith,* 462 F.3d at 1289. The Tenth Circuit rejected that argument, holding that, under *Reich*, loading the clothing was "not work at all" (and hence could not commence the workday) because it took "all of a few seconds and require[d] little or no concentration." *Ibid.* Respondents' characterization of *Smith* as "*implicitly* concluding that the activities [in that case] would otherwise have been compensable 'work'" (BIO 15 (emphasis added)) defies the court's actual holding that those activities were *not* work.

Respondents' second error is in characterizing *Reich* as merely holding that that the employees' activities in that case were non-compensable as "de minimis" work. BIO 14. As even the Third Circuit acknowledged, *Reich* deemed it "more proper[]" to decide the "work" question and accordingly "*held* that the donning and doffing" there "was *not 'work'* in light of *Tennessee Coal* and its progeny." Pet. App. 21a (emphases added).

Contrary to respondents' argument (BIO 17), that distinction between activities that are not "work" and those that are "de minimis" work is not "semantic." The latter involves the amount of time that work takes and the practicality of recording that time. The former asks whether the activity is or is not work at all, with attendant implications for triggering the continuous workday. That is why the Third Circuit treated the issues as distinct (see Pet. App. 27a; BIO 17), and the jury was instructed to decide them separately (see Pet. App. 7a). *Reich* too distinguished the issues (compare 38 F.3d at 1126 with *id.* at 1126 n.1), focusing not just on the minimal time involved, but also on the fact that donning the clothing "require[d] little or no concentration" and "require[d] little or no additional effort to put on" because the items could be "placed, removed, or replaced while on the move or while one's attention is focused on other things" (*id.* at 1126).

Respondents' argument (BIO 2) that *Reich* involved clothing requirements that "could be completed by employees at home" also lacks merit. In *Reich*, just as in this case, "[r]egulations or other practical considerations necessitated that virtually all safety equipment and garments be kept on the

premises," so "the workers put the clothing and equipment on in the morning and left it behind at the end of the day." 38 F.3d at 1124.

Finally, respondents' effort to find marginal distinctions between the law in the Tenth Circuit and the Third Circuit fails to come to grips with both the reality and the practical consequences of the directly conflicting rules that employers now face. Petitioner is the employer in *both* this case *and* in *Reich*. See Pet. 6. Yet the two courts of appeals reached diametrically opposing conclusions regarding petitioner's legal obligations and the rights of petitioner's employees. As the *amicus* brief of the Chamber of Commerce underscores, petitioner is not alone in finding itself burdened with inconsistency and complexity in attempting to comply with what is supposed to be a single, uniform federal wage law. Respondents' recitation of frail distinctions cannot change the fundamental reality that multi-state employers now confront irreconcilably contradictory legal standards imposed by the different regional courts that (absent this Court's intervention) govern their liability under the FLSA.[2]

3. The frequency with which the question arises and its surpassing importance are so patent that respondents offer no response. As the Chamber of Commerce notes (Br. 4), the FLSA governs the compensation of more than 100 million Americans. Employers currently face an avalanche of class-wide

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[2] The conflict is amplified by the substantial body of case law within the Fifth Circuit (including two summary affirmances) adopting the same rule as *Reich*. See Pet. 12.

claims by workers seeking to obtain millions of dollars in damages by overturning the long-established understanding that employers do not owe compensation for the ancillary donning and doffing of light clothing and similar activities. See, *e.g.*, Pet. 19 n.6; U.S. Chamber Br. 9 ("Wage and hour cases . . . are among the fastest growing areas of litigation in the country," and cost more than $1 billion annually.); *id.* 12-13 n.5. Illustrating the trend, the courts have issued five new opinions addressing this topic since the petition was filed.[3] The potential unanticipated liability for American industry in a period of considerable economic uncertainty is crushing. And the harm to industry would be senseless because the damages awarded will normally be an unearned windfall: the affected companies are generally paying above minimum wage, so they could have attracted the same amount of labor at the same overall cost simply by recalibrating the wages they paid.

Because the question presented will determine not only retrospective liability, but also the prospective legality of innumerable pay policies adopted by employers across the country, certiorari should be

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[3] See *Singh v. New York*, --- F.3d ----, 2008 WL 1885327 (2d Cir. 2008) (carrying documents); *Maciel v. Los Angeles*, 2008 WL 833963 (C.D. Cal. 2008) (donning police gear); *Loodeen v. Consumers Energy Co.*, 2008 WL 718136 (W.D. Mich. 2008) (attending classes); *Bamonte v. City of Mesa*, 2008 WL 1746168 (D. Ariz. 2008) (donning police gear); *Jordan v. IBP, Inc.*, --- F. Supp. 2d ----, 2008 WL 943592 (M.D. Tenn. 2008) (donning protective gear).

granted to resolve as promptly as possible the foundational question of what constitutes "work."[4]

4. Finally, respondents' argument that this case is "interlocutory" is meritless. This case arises from a final jury verdict on the merits. That final judgment was vacated by the Third Circuit, and it is reinstatement of that final judgment that petitioner seeks. Given the full trial and jury verdict, retrial could not illuminate the important legal question presented, and the fact that the jury decided this case exclusively on this single ground makes the case an ideal vehicle for certiorari, as this Court's certiorari practice reflects. See, *e.g.*, *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201, 2207-08 (2007); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 77-78 (2006); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 138 (2004). Deferring review for another case will only perpetuate and exacerbate the uncertainty and the attendant costs to employers and employees alike.

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[4] The Court has the opportunity to address comprehensively the law relating to compensation for donning and doffing activities if it grants certiorari not only in this case, but also in *Gorman v. Consolidated Edison Group*, No. 07-1019 (filed Jan. 30, 2008) and/or *Anderson v. Cagle's Inc.*, No. 07-910 (filed Jan. 4, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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