No. 06-3502

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MELANIA FELIX DE ASENCIO, MANUAL A. GUTIERREZ, ASELA RUIZ, EUSEBIA RUIZ, LUIS A. VIGO, LUZ CORDOVA, AND HECTOR PANTAJOS, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

PLAINTIFFS/APPELLANTS,

V.

TYSON FOODS, INC.,

DEFENDANT/APPELLEE

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1-1, in addition to the parties and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement of Defendant-Appellee, which is hereby incorporated by reference into this Certificate, the Chamber of Commerce of the United States of America submits that the following persons and entities have an interest in the outcome of this matter:

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The Chamber of Commerce of the United States of America does not have a parent company and no publicly held corporation owns 10% or more of its stock.

Dated: December 21, 2006

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUES

SECONDARY SOURCES

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is being filed on behalf of the Chamber of Commerce of the United States of America. It is filed pursuant to the accompanying Motion for Leave of this Court. Defendant-Appellee consented to the filing of this brief, but Plaintiffs-Appellants have withheld their consent.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in many cases before the United States Supreme Court and the federal Courts of Appeals, including numerous Fair Labor Standards Act ("FLSA") cases.

The Chamber agrees that all employers must comply with the duties imposed by the FLSA to compensate workers for all hours worked. However, FLSA lawsuits increasingly seek compensation for activities

excluded from compensation under the FLSA, seek windfall compensation for preliminary, non-integral, *de minimis* activities that often promote employee convenience and are difficult for employers to monitor.

Plaintiffs-Appellants would have this Court expand the meaning of "work" under the FLSA beyond its ordinary custom and usage, and beyond that which Congress intended. Doing so would create substantial ambiguity in the limitations of compensation coverage under the FLSA and arguably create coverage where none existed before, creating wide-ranging negative repercussions for U.S. employers and their employees.

Because the Chamber believes the district court properly advised the jury on the meaning of the term "work" based on governing authority, including that of the United States Supreme Court, and because the Plaintiffs' position would exceed the limits of FLSA compensability, the Chamber has filed this brief in support of Appellee, Tyson Foods, Inc., and in support of affirmance of the decision below.

STATEMENT OF THE ISSUE

Whether the district court erred by instructing the jury that "work" under the FLSA means "any 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 its business."

Plaintiffs raise a number of other arguments in their brief. The Chamber, however, only addresses the threshold and principal issue of this appeal - whether or not the district court properly instructed the jury on the meaning of "work." The Chamber maintains the instruction was proper.

STATEMENT OF THE CASE

The Plaintiffs in this action are production employees in Tyson's New Holland, Pennsylvania poultry processing facility. See DeAsencio v. Tyson Foods, Inc., 2002 U.S. Dist. LEXIS 16750 (E.D. Pa. Sept. 9, 2002). Plaintiffs allege that Tyson failed to pay them their minimum hourly pay rate for all hours of work performed up to forty hours per week and failed to pay them overtime for hours worked in excess of forty hours per week as required by the FLSA, 29 U.S.C. § 201 et seq., and the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 et seq. Id. Specifically, Plaintiffs allege that Tyson does not pay them for donning, doffing and sanitizing clothing before and after their shifts and breaks. Id.

At the end of the trial, the district court gave the jury the following instructions defining "work":

> Work is any 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 its business. . . .
>
> . . . .
>
> I said it requires exertion, either physical or mental, but exertion is not, in fact, necessary for all activity to constitute work under the Fair Labor Standards Act. There – an employer, if he chooses, may hire a worker to do nothing or to do nothing but wait for something to happen. So that would be an exception of the usual situation where the definition of work requires exertion.

(J.A. 2209:20-2211:1). The jury ultimately returned a unanimous verdict finding that Plaintiffs had not "provided representative evidence that [the activities at issue] are 'work'" for purposes of the FLSA. (J.A. 3094). Based on the jury's verdict, the district court entered judgment on behalf of Tyson Foods. (J.A. 3).

SUMMARY OF ARGUMENT

The district court properly instructed the jury that "work" is interpreted for FLSA purposes in accordance with its common understanding and usage as meaning "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."

Plaintiffs incorrectly argue that the Supreme Court, which first defined "work" for FLSA purposes in Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), modified the definition only a few months later in Armour & Co. v. Wantock, 323 U.S. 126 (1944). Plaintiffs specifically argue that Armour eliminated the word "exertion" from the meaning of work. In Armour the Supreme Court suggested that an employer can hire an employee to not exert him or herself - to do nothing or to wait to do something. Armour, 323 U.S. at 133. Importantly, in reaching its holding, the Court did not overrule the definition set forth in Tennessee Coal. Rather, it distinguish the normal meaning and usage of the term "work" in the spirit of the FLSA to cover instances where the very reason for hiring an individual was for that individual to be available to perform duties when needed – in other words, to engage someone to wait. Courts have consistently adopted the meaning set forth in Tennessee Coal, and the narrow exception set forth in Armour, since 1944.

Plaintiffs here attempt to extend coverage to activities typically considered to be preliminary, non-integral, and *de minimis*. In so doing they seek to impose a vague, overbroad and abnormal meaning of "work" under the FLSA. Plaintiffs' viewpoint that exertion is no longer permitted in defining the meaning of "work" is an aberration and a fundamental

perversion of the common usage of the term "work." It necessarily overexpands what is and is not compensable under the FLSA, an expansion that would lead to absurd and harmful results. Accordingly, not only is Plaintiffs' interpretation of the meaning of "work" erroneous, but proceeding under their meaning would create FLSA liability far beyond what Congress intended.

ARGUMENT

Plaintiffs' central issue in the trial of this case was whether or not the acts of putting on, taking off, and washing certain clothing constituted "work" and were therefore compensable under the FLSA. Plaintiffs principally take issue on appeal with the district court's instruction to the jury on the meaning of "work." A fair reading of the Supreme Court's interpretation of the FLSA and the Portal-to-Portal Act reveals that the district court correctly instructed the jury. Plaintiffs' position, as well as the Secretary of Labor's as *amicus curiae*, is flawed for a number of reasons. First, governing authority interprets the meaning of "work" consistent with the district court's jury instruction. Second, Plaintiffs disregard the common usage of the term "work" and instead promote an overly-expansive application of the FLSA. If Plaintiffs were to prevail, their interpretation of "work" would greatly expand the scope of the FLSA to cover activities not

previously covered and would necessarily lead to consequences Congress did not intend.

1. GOVERNING PRECEDENT SUPPORTS THE JURY INSTRUCTION.

Congress enacted the FLSA in 1938 to require employers engaged in the production of goods for commerce to pay their employees a minimum wage for all hours worked as well as overtime payments of one-and-one-half times the regular rate of pay for hours worked in excess of 40 hours in a workweek. 29 U.S.C. § 201 et seq. The statute did not define the term "work."

In a seminal case, Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944), the Supreme Court first addressed the meaning of "work" to determine whether underground travel in an iron ore mine was compensable under the FLSA. The Court explained that, to be consistent with the purpose and structure of the FLSA, employees must be compensated for the time they spend in *actual labor*. Id. at 598. The Court noted that, absent any special definitions, Congress uses language in its plain and ordinary meaning:

> [I]n the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used – as meaning 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.

Id. The Court also cited Webster's dictionary definition of "work": "to exert oneself physically or mentally for a purpose . . . to exert oneself thus in doing something undertaken chiefly for gain . . . as distinguished from something undertaken primarily for pleasure. . . ." Id. at n.11.

Even the dissent in Tennessee Coal advocated the idea that Congress intended its words to be interpreted in accordance with common usage: "The Act does not define 'workweek' for the evident reason that Congress believed it had a conventional meaning which all would understand and to which all could conform their practices." Id. at 607.

Since 1944, virtually every court to consider the compensability of clothes changing in the workplace has adopted the Tennessee Coal definition of "work."

The same year as Tennessee Coal, the Supreme Court decided Armour & Co. v. Wantock, 323 U.S. 126 (1944). In Armour, the Court addressed the compensability of inactive time of fire fighters. The Court acknowledged that these employees' sole duty was to fight fires and understood that a large part of their time was spent idle. Id. at 127-29. The Court recognized that these employees were hired with a specific intent to be

available to perform duties when needed. Id. at 127-28. Accordingly, the Court cited with approval the Tennessee Coal definition of "work," but distinguished the facts of the case from the general principles of the FLSA and the Court's prior holding, explaining that an employer may "hire a man to do nothing, or to do nothing but wait for something to happen." Id. at 133. The Court specifically held that the FLSA "does not exclude as working time periods contracted for and spent on [inactive] duty. . . ." Id. While this case deviated from the normal usage of the term "work," it appropriately applied the principles of the FLSA to a unique and distinguishable situation where an employee is largely hired to do nothing but be available to perform his or her duties.

A few months after Armour, in Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161 (1945), the Court reaffirmed its interpretation of "work" from Tennessee Coal. In Jewel Ridge, the Court once again evaluated the compensability of traveling in underground mines. The Court determined that the travel was compensable because it involved (1) physical or mental *exertion*; (2) *exertion* controlled by the employer; and (3) *exertion* pursued necessarily and primarily for the benefit of the employer and his business. Id. at 164-65. The Court again explained that the plain language of the Act necessitated that the workweek

be computed on the basis of hours spent in *actual work* and that compensation be paid accordingly. Id. at 167. The fact that Jewel Ridge cited with approval the Tennessee Coal interpretation of "work" refutes any suggestion that Armour changed or modified that interpretation.

Two years later, in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), the Supreme Court held that employees were entitled to compensation under the FLSA for time spent walking to work on the employer's premises and for time spent in preliminary activities after arriving at work, such as changing clothes and putting on aprons. In reaching this decision, the Court once again cited with approval its interpretation of the meaning of "work" set forth in Tennessee Coal. Id. at 691-92. The Court also applied the *de minimis* rule, which disregards matters that concern only "a few seconds or minutes of work beyond the scheduled working hours. . . . **It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.**" Id. at 692 (emphasis added); see also 29 C.F.R. § 785.47 (stating that insubstantial or insignificant periods of time in certain circumstances may be disregarded).

In response to the Court's overbroad holding in Anderson, Congress enacted the Portal-to-Portal Act, 29 U.S.C. § 251(a) et seq., amending

certain provisions of the FLSA. "Based on findings that judicial interpretations of the FLSA had superseded 'long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation,'" Congress narrowed coverage of the FLSA by eliminating from coverage (1) walking to and from the actual place of performance of the principal activity, and (2) activities which are preliminary to or postliminary to the principal activity. See IBP, Inc. v. Alvarez, 546 U.S. 21 (2005). The practical effect of the Portal-to-Portal Act was to overturn Anderson, but not to define, re-define or change the meaning of "work" as the Supreme Court had articulated it in Anderson or in Tennessee Coal and its progeny.

In 1956, the Court addressed the issue of preliminary and postliminary activity, in Steiner v. Mitchell, 350 U.S. 247, 256 (1956). Only 12 years after Tennessee Coal, and directly after Congress enacted the Portal-to-Portal Act, the Court could have altered or amended its prior definition of "work." The Court, however, chose not to disturb that definition, or even to address it. Instead, the Court distinguished between two types of activities – preliminary/postliminary and primary. The Court held that the facts of Steiner supported the holding that putting on and taking off *unique protective gear* under hazardous conditions was compensable because it was

an integral and indispensable part of the principal activities for which the employees are employed. Steiner, 350 U.S. at 256. The Court contrasted the burdensome and essential donning of specialized gear with the donning of effortless gear, stating that "changing clothes and showering under normal conditions" were preliminary or postliminary and therefore not compensable. Id. at 249.

The next significant Supreme Court decision did not occur until last year, in IBP, Inc. v. Alvarez. There the Court held that employees should be compensated for the time spent walking to and from their workspace after the employee's first principal activity. Plaintiffs, in this case, argue that in IBP the Supreme Court modified the meaning of "work" under Tennessee Coal by removing the element of "exertion." Yet a fair reading of IBP dictates otherwise. The IBP opinion's introduction acknowledges the Tennessee Coal interpretation of "work," and simply recognizes the distinction of the "engaged to wait" cases set forth in Armour. The meaning of "work," or the compensability of donning and doffing, however, were not before the Court. As a result, the Court did not alter its meaning of "work," or disturb the Ninth Circuit's determination that the donning and doffing of non-unique items worn by the plaintiffs were non-compensable. See IBP, 546 U.S. 21; Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003).

These Supreme Court cases provide guidance to the application of the FLSA, as amended by the Portal-to-Portal Act, limiting compensability under the FLSA to hours "worked" in the "workweek." Each case has remained faithful to the plain, ordinary and reasonable meaning of the term "work" – stressing that it should be applied with its conventional meaning. Most notably, these cases have all relied upon the principles and definitions set forth in Tennessee Coal. The jury instruction was thus consistent with the governing case law. Accordingly, Plaintiffs are incorrect in their assertion that the district court applied the wrong legal standard when it adopted the meaning of "work" set forth in Tennessee Coal.[1]

II. FACTORS ARE APPROPRIATE WHEN EVALUATING WHETHER OR NOT ACTIVITIES QUALIFY AS WORK.

In addition to disputing the Supreme Court's interpretation of "work" under the FLSA, Plaintiffs complain that the district court erred when it instructed the jury that they could consider various factors when determining whether the disputed activities constituted "work." While Plaintiffs latch on to language in Tennessee Coal, supra, that the FLSA is "remedial and humanitarian in purpose," and in IBP, supra, that the Court defined work

[1] Their assertion is further weakened by the district court's contemporaneous instruction that "exertion is not, in fact, necessary for all activity to constitute work under the Fair Labor Standards Act. . . ." (J.A. 2209:20-2211:1). This instruction addressed the "waiting time" distinction set forth in Armour, supra.

"broadly," they disregard the fact that courts routinely analyze the factors and circumstances of the challenged activity in determining whether it rises to the level of work.

Courts routinely evaluate the specific facts and circumstances of each case when determining whether the acts of putting on and taking off of clothing constitute work, and in doing so regularly evaluate the difficulty of "donning" and "doffing." Since Congress cannot set *per se* rules for every industry and every job category segregating what is work and what is not work, a factor-specific analysis is critical to ensuring that the courts will properly and predictably determine the compensability of disputed activities.

In Tennessee Coal, the Court went to great lengths to describe the treacherous conditions which miners face when traveling to the face of a mine to begin productive work. Tennessee Coal, 321 U.S. at 594-97. In Jewell Ridge, the Court utilized the Tennessee Coal meaning of "work" and conducted a detailed analysis of the factors and circumstances of the disputed activity in concluding that it was compensable. See Jewell Ridge, 325 U.S. at 163-65. In Anderson, the Court specifically explained that *de minimis* activities are excluded from coverage under the FLSA, stating "it is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." Anderson, 328

U.S. at 692. An evaluation of the factors and circumstances is necessary to evaluate whether or not an activity is *de minimis*.

Lower courts have likewise assessed various factors when determining if disputed activity constitutes work. See e.g. Reich v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994) (evaluating the difficulty of putting on such clothing items as safety glasses, earplugs, hard hats, and shoes in determining that such items require little or no additional effort to put on as compared to normal clothing); Anderson v. Pilgrim's Pride Corp., 147 F. Supp. 2d 556, 561-62 (E.D. Tex. 2001) (preliminary activities took little time, required little concentration, were not cumbersome or burdensome, and could even be performed while walking).

All of these cases demonstrate that the district court did not err in offering guidance to the jury through the consideration of various factors when determining whether the disputed activity qualified as "work" and was compensable, or was *de minimis* and could be disregarded.

III. SECRETARY OF LABOR'S ADVISORY MEMORANDUM IS NOT ENTITLED TO DEFERENCE.

In its *amicus* brief, the Secretary of Labor urges the Court to give deference to a recent Wage and Hour Advisory Memorandum which purports to interpret the FLSA as providing that "the time, no matter how minimal, that an employee is required to spend putting on and taking off

gear on the employer's premises is compensable 'work' under the FLSA." See Secretary of Labor Amicus Brief at p. 7, 18. The Secretary's argument is erroneous on multiple levels.

First, it is an internal memorandum to staff members regarding the Acting Administrator's personal views of the state of the law following IBP. See Wage and Hour Advisory Memorandum No. 2006-2.

Second, the Advisory Memorandum only interprets settled Supreme Court law. It is not an individual interpretation of the FLSA offered in the absence of Supreme Court interpretation. In Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837 (1984), the Court explained that judicial deference may be given to an agency's reasonable interpretation of an ambiguous statute entrusted to its administration. By contrast, interpretations such as those in opinion letters, policy statements, agency manuals and enforcement guidelines do not warrant deference. Christensen v. Harris Co., 529 U.S. 576, 587 (2000); see also Packard v. Pittsburgh Transp. Co., 418 F.3d 246 (3d Cir. 2005) (citing Madison v. Res. For Human Dev., Inc., 233 F.3d 175, 186 (3d Cir. 2000)) (to grant Chevron deference to informal agency interpretations would unduly validate the results of an informal process).

The Secretary of Labor's request for deference to its Advisory Memorandum is baseless, as it is nothing more that an informal interpretation of Supreme Court precedent. It was not promulgated in the exercise of authority; rather, it was meant to be an interpretative rule. Further, once the Supreme Court has determined a statute's meaning, the Court adheres to its ruling under the doctrine of *stare decisis*.

IV. PLAINTIFFS' INTERPRETATION OF THE MEANING OF "WORK" WILL YIELD UNINTENDED HARMFUL CONSEQUENCES.

Plaintiffs and the Secretary of Labor both employ flawed arguments in an effort to expand the scope and applicability of the FLSA. They seek to change 60 years of governing precedent consistently holding that "work," as interpreted under the FLSA, shall be given its normal, conventional and common meaning and usage. They thereby attempt to make compensable the donning and doffing of basic, casual articles of clothing such as cotton smocks, hairnets, earplugs and safety glasses, which take seconds to put on or take off. The practical effect of their argument is to make the donning and doffing of gear *per se* compensable. This interpretation could lead to disastrous consequences.

If the Court determines such *de minimis* activities are compensable, it would subject employers in every industry and for every job category to

wholly unexpected liabilities. The activities subsumed into such a broad and expansive interpretation of "work" under the FLSA would vary widely. The accounting difficulties in tracking and recording time for activities that likely take a few seconds or minutes would be immense, particularly for work done by employees who do not work at a facility owned and run by the employer. And the consequences of the expansion would yield unintended and harmful results.

Take for example a manufacturing plant where workers arrive at the facility early to drop off their belongings in their locker, collect their tools, and then wait in the cafeteria drinking coffee until their shift starts. This time is currently not compensable under Tennessee Coal, supra, as the activity requires no exertion, Armour, supra, as they have not been engaged to wait, and Steiner, supra, as the activities are not principal and integral. See also 29 C.F.R. § 790.7(d) (carrying ordinary hand tools does not transform preliminary activity into a principle activity). But if Plaintiffs' interpretation of work is applied and all activities done for the employer are considered to be work, then the donning and doffing of their gear would be covered. And, if that time is compensable, then under IBP, supra, the time that follows arguably would be covered.

The donning and doffing of clothing in this case — to include putting on and taking off cotton smocks, hairnets, ear plugs, safety glasses, aprons and gloves — is not sufficiently distinguishable from the donning and doffing of any employer-mandated clothing. If the donning and doffing of gear in this case is compensable, then, for example, the time exerted by (1) a security officer putting on a uniform, a tie, a hat and a weapon holster; (2) a business man putting on a suit and tie; (3) a construction worker putting on protective boots, a tool belt and a hard hat; or (4) a janitor putting on work clothes and collecting his cleaning supplies, would all necessarily be compensable. If those scenarios are compensable, then FLSA coverage could extend to similar activities done prior to arriving at the workplace, such as a nurse who dons medical scrubs or a waitress who wears a uniform. Moreover, if putting on employer-mandated clothing is compensable, then taking off employer-prohibited clothing and items would logically be compensable as well. In that hypothetical scenario, a court could find compensable the time spent removing coats, hats, jewelry, perfume and even perhaps make-up. While these hypothetical factual circumstances may be extreme, they demonstrate the unintended consequences that could result if the Court adopts Plaintiffs' overbroad interpretation of "work."

These comparison scenarios all implicate the donning and doffing of normal gear which, under existing legal precedent, fail to rise to the level of "work." The donning and doffing of non-specialized gear consistently are excluded from FLSA coverage because they cannot be considered to be "work" under that term's normal and conventional usage and because the donning and doffing of simple, trouble-free clothing requires no exertion and is a *de minimis* activity. Yet under Plaintiff's approach, the FLSA would cover all such activities. Congress never intended such a result, one that would cause confusion and immeasurable damage to the operation of American businesses, large and small.

CONCLUSION

For the foregoing reasons of law and policy, the Chamber respectfully submits that this Court affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned counsel for the Chamber of Commerce of the United States of America, hereby certifies that they are a members of the bar of the United States Court of Appeals for the Third Circuit.

Executed this 21st day of December 2006.

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CERTIFICATE OF COMPLIANCE

1. The undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Rule of Appellate Procedure 29(d) because the brief contains 4,261 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared on a proportionally spaced type style using Microsoft Word in 14 point font Times New Roman type style.

3. The undersigned further certifies pursuant to Third Circuit Local Rule 31.1(c) that the text of the foregoing *Amicus* brief is identical in both its paper and electronic brief versions, and that a virus check was performed on the Portable Document File (PDF) copy of the *Amicus* brief using McAfee Virus Scan Enterprise software and that no viruses were detected.

Dated: December 21, 2006

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CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of December 2006, I caused copies of the foregoing Brief *Amicus Curiae* of the Chamber of Commerce of the United States of America to be filed with the Clerk's Office of the United States Court of Appeals for the Third Circuit and served by United States First Class Mail, postage prepaid, on the following counsel:

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