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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

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 and organizations of every size, operating in every industry of the Nation's economy, and transacting business throughout the United States as well as in countries around the world.

One of the Chamber's central functions is to represent its members' interests in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases raising issues of vital concern to the nation's business community, including cases construing the Fair Labor Standards Act ("FLSA").

The Chamber agrees that all employers must comply with their obligations under the FLSA to provide overtime pay to employees who work in excess of 40 hours per week. However, FLSA lawsuits increasingly seek overtime pay for activities excluded from compensation under the FLSA, and seek windfall compensation for preliminary and non-integral activities

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[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. All parties have consented to the Chamber's filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

that are undertaken by an employee for his or her convenience and for which it is difficult, if not impossible, for an employer to monitor or track.

This case presents an extraordinary opportunity for the Court to provide needed clarity regarding what constitutes "work" within the meaning of the FLSA. This is an issue of enormous importance to every sector of this Nation's economy. While "donning and doffing" policies of meat- and poultry-processing plants have generated high-profile litigation over what time spent at the workplace is compensable, *see, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (hereinafter, "*Alvarez*"), the issue of what actually constitutes "work" is at the center of myriad other lawsuits affecting the "old economy" and the "new economy" alike. The Chamber and its members – and their millions of employees – have an overwhelming interest in the Court's review of this case to resolve the conflicts in the lower courts and to provide much needed clarity for both employers and employees.

SUMMARY OF ARGUMENT

1. The question presented in this case transcends poultry-processing plants. The answer to the question will impact every corner of the Nation's economy. The question presented is central to the application of the FLSA, one of the most important pieces of legislation governing the Nation's workplaces. The Petition for Writ of Certiorari filed by Tyson Foods, Inc. ("Tyson") squarely presents the question of what constitutes "work" within the meaning of the FLSA. While the Court addressed in *Alvarez* the issue of whether non-productive time spent *after* the first principal work

activity of the day is compensable, the Court has not addressed the issue of what actually constitutes "work" within the meaning of the FLSA in more than a half century. *See Tenn. Coal, Iron & Rail Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161 (1945) . As explained in Tyson's Petition – and as elaborated upon below – the lower courts have struggled over the last 60 years to divine a useful definition of "work" from this Court's aged precedent.

This Court has *never* addressed what constitutes "work" in the modern economy. Indeed, when the Court decided *Tennessee Coal*, *Armour*, and *Jewell Ridge*, many of the activities that now are routine – indeed, pervasive – in almost every workplace in the country, did not exist (*e.g.*, the booting up of computers). The lower federal courts inconsistently apply the test for "work" announced in *Tennessee Coal*. Many courts disagree over the relevant standards and others seemingly fail to apply any standards at all. As the Chief Judge of the Court of Appeals for the Second Circuit recently observed in expressing disagreement with a panel's conclusion that certain activities constituted "work" under *Tennessee Coal*: "In lieu of undertaking the prescribed analysis under *Tennessee Coal*, the majority announces the tautology that '[w]ork is work, after all.'" *Chao v. Gotham Registry, Inc.*, No. 06-2432, 2008 WL 191038, *13 (2d Cir. Jan. 24, 2008) (Jacobs, C.J., concurring in part) (quoting maj. op. at *11).

Seventy years after the FLSA was enacted and over sixty years after the Court decided *Tennessee Coal*,

Armour and *Jewell Ridge*, the lower courts are still struggling to meaningfully interpret the very word that is at the core of the FLSA. What has resulted is a patchwork of conflict and confusion that continues to bedevil employers and employees alike, and which contravenes one of the very purposes of the FLSA – to provide a uniform body of federal law establishing minimum working conditions. *See Tennessee Coal*, 321 U.S. at 602.

2. The legal principles developed in the so-called "donning and doffing" cases, which concern "traditional" manufacturing industry environments, are being applied – wrongly – to so-called "new economy" industries. Employees are aggressively seeking to extend principles announced in donning and doffing cases to every type of job, whether requiring personal protective equipment or not, blue collar or white collar, without due regard for this Court's precedent or, frankly, common sense. The United States Department of Labor ("DOL") estimates that the FLSA covers 130 million American workers.[2] Every day, covered workers engage in preliminary activities before their scheduled shifts begin. For instance, tens of millions of non-exempt employees turn on their computers before performing their first principal activity. Examples of other preliminary activities are limitless. Some common examples include reviewing messages on a Blackberry or other personal digital assistant ("PDA"), checking voicemail, entering a passcode into a cash register, and even turning the key

[2] *See* DOL, Wage and Hour Division, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act*, *available at* http://www.dol.gov/esa/regs/ compliance/whd/whdfs14.pdf (last visited Feb. 28, 2008).

in an ignition to warm up a vehicle in winter. Often employees perform these activities, all of which may be preliminary to performing one's job to some extent or another, before they get their first cup of coffee or while reading the morning newspaper, surfing the Internet or, as in this case, playing Dominoes. *See* Tyson's Petition at 4. The significance of the question "what is work" is more important now than ever, as increasing numbers of employees are telecommuting or otherwise performing preliminary activities at home. For example, is a telecommuter working "on the clock" if, prior to taking a shower and getting the children off to school, the employee boots up his or her computer in order to be ready for work after the school bus arrives? Common sense suggests not, but scores of cases seek to take advantage of the lack of clarity in the FLSA and its regulations, as well as the stark conflicts in the lower courts' FLSA jurisprudence. The Court should review this case to clarify that the definition of "work" does *not* encompass pre-schedule, non-exertive activities.

There is a deepening and widening split in the lower courts over the definition of "work." The circuits are split over whether the Court's decision in *Armour*, 323 U.S. at 133, impliedly overruled the Court's holding in *Tennessee Coal*, 321 U.S. at 598, that exertion is a prerequisite, in most circumstances, of "work" within the meaning of the FLSA.[3] As explained in Tyson's

[3] The Chamber agrees that an employee who is "engaged to wait," as opposed to one "waiting to be engaged," may be compensated for periods of non-exertive activity because, in those cases, the employer has hired the employee specifically to refrain from exertion. *Skidmore v. Swift & Co.*, 323 U.S. 134, (Cont'd)

Petition, the Third and Ninth Circuits have held that exertion is not a prerequisite, while the Tenth Circuit has held that, at least in cases of this nature, exertion is required before an activity rises to the level of "work." The circuit conflict is particularly pronounced at this time. The Court separately has before it a Petition for Writ of Certiorari filed by the *plaintiff employees* in *Gorman v. The Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), *petition for cert. filed*, 2008 WL 336233 (U.S. Jan. 30, 2008) (No. 07-1019). In their Petition, the *Gorman* plaintiffs argue that the Second Circuit's decision from which they seek review is in conflict with the Third Circuit's decision in this case. *See* Gorman Petition, 2008 WL 336233 at * 10. When read together, Tyson's Petition and the plaintiffs' Petition in *Gorman* reveal two inarguable conclusions: (1) there is a conflict among the circuits on the issue of what constitutes "work" under the FLSA; and (2) the law on this critical issue is in disarray.

3. The Court's guidance is required to resolve persistent confusion in the lower federal courts regarding the definition of, and proper framework within which to analyze, "work." As a result of the disarray in the underlying cases, employers have great difficulty discerning their statutory obligations and financial

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(Cont'd)

137 (1944); *see also Armour*, 323 U.S. at 133 ("an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen"). That circumstance is markedly different from situations in which an employee is not yet required to perform services for the employer, but chooses to perform some preparatory task instead of, or contemporaneously with, a personal endeavor.

liabilities. As explained below, this adversely impacts the Nation's commerce and fair competition. Employees also suffer from uncertainty in determining whether or not certain time is compensable. Congress expressly intended to resolve these problems with the passage of the FLSA.

The definition of "work" has become muddled in the 60 years since this Court decided *Tennessee Coal.* The lower courts' confusion over this basic and recurring issue, and the resulting circuit conflicts it has created, are compromising the FLSA. As explained below, Congress intended for the FLSA to create a uniform body of law that would promote fair competition across the United States. Yet, the law now imposes different burdens on employers (and, as here, even on the same employer) depending on the geographic location of the workplace. The lack of uniformity in federal case law contravenes one of the purposes behind the FLSA and makes it impossible for employers to determine accurately how much they owe employees and, conversely, for employees to know how much they are owed. Employers and employees require more direction in ordering their affairs than the unhelpful conclusion that "[w]ork is work, after all." *Gotham Registry, Inc.*, 2008 WL 191038 at *4.[4]

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[4] The *Chao* majority's tautology is reminiscent of Justice Stewart's famous statement regarding obscenity: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (commenting that obscenity "may be indefinable"). In a later decision on obscenity, the Court eschewed "fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.'" *Miller v. California*,

(Cont'd)

This case raises issues of vital importance to tens of millions of employees covered by the FLSA and to employers in many industries. The Court should grant Tyson's Petition to resolve the circuit split and to provide much needed guidance to employers and employees alike.

ARGUMENT

In its decision in this case, the Court of Appeals for the Third Circuit incorrectly answered the threshold question, "what is 'work'?" This decision intensifies an existing split among the Courts of Appeals. The uneven application of the FLSA by the lower federal courts makes it nearly impossible for employers, especially large employers with operations in several states, to gauge whether their employment practices comply with the FLSA. Consequently, employers run the risk of significant, yet unpredictable, liability in the form of back wage payments, statutory liquidated damages and attorneys' fees.

(Cont'd)

413 U.S. 15, 30, 32 (1973) (explaining that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."). One would think that the courts would have less difficulty defining the contours of "work," but the lower federal courts are split on this issue. More important, Congress enacted the FLSA to establish "fixed, uniform national standards" regarding minimum wages and maximum hours in the workplace. There simply is no valid reason why donning glasses or aprons, or turning on a computer, in Maine and Mississippi should be treated any differently in Las Vegas or New York City. But, as the two pending Petitions demonstrate, they may be.

I. THE DECISION BELOW IS OF IMMEDIATE NATIONAL SIGNIFICANCE BECAUSE MASS WAGE AND HOUR COLLECTIVE ACTIONS ARE PROLIFERATING.

Seizing on the law's ambiguities and the judicial discord, employees have barraged employers in many industries with mass FLSA lawsuits, the outcome of which often depends, in whole or in part, on the seemingly elusive definition of the most essential term in the entire FLSA – "work." Wage and hour cases – particularly collective actions under Section 216(b) – are among the fastest growing areas of litigation in the country. *See* Michael Orey, *Wage Wars: Workers—From Truck Drivers To Stockbrokers—Are Winning Huge Overtime Lawsuits*, Bus. Wk., Oct. 1, 2007 (estimating that "over the last few years companies have collectively paid out more than $1 billion annually to resolve [FLSA] claims"), *available at* http://www.businessweek.com/magazine/content/07_40/b4052001.htm; Kris Maher, *Workers are Filing More Lawsuits Against Employers Over Wages,* Wall St. J., June 5, 2006, at A2; Stephen Franklin, *Workers Long for Overtime: Employers See More Suits Alleging They Failed to Pay for Extra Hours,* Hous. Chron., July 24, 2006, at 1 (experts say wage and hour cases are "the nation's fastest-growing legal battlefront"); Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues,* SM097 ALI-ABA 435, 455 (2007) (noting the "recent proliferation of employee collective action lawsuits"); John P. McAdams & Michael A. Shafir, *Parent Company Liability Under the Fair Labor Standards Act,* 25 No. 3 Trial Advoc. Q. 16, 20 (2006) ("Collective actions under the FLSA are

one of the fastest-growing areas of litigation of any kind[.]").

FLSA suits have increased by 230 percent since 1990, and by 120 percent since 2000 alone. In Fiscal Year 2006, the last year for which statistics are available, 4,207 FLSA actions were filed in the federal district courts, up from 1,935 in FY 2000 and 1,257 in FY 1990. Statistics Division, Administrative Office Of The U.S. Courts, *Judicial Facts And Figures*, Table 4.4 (2006); *see also* Statistics Division, Administrative Office Of The U.S. Courts, *Federal Judicial Caseload Statistics*, Table C-2 (2001, 2006) (reporting that roughly 1,900 FLSA cases in 2000 increased to roughly 4,400 in 2006). And, from 2001 to 2004, the number of FLSA collective actions filed in district courts nearly tripled, from 397 to 1,076. Amy I. Stickel, *FLSA Suits Take Flight: Other Types of Employment Cases Stay Grounded,* Counsel to Counsel, Mar. 2005, at 17. These trends are in part a reflection of the fact that the statute and the DOL's implementing regulations are difficult to comply with and to apply. *See, e.g.,* Victoria Roberts, *Attorneys Explore Reasons for Surge in Wage and Hour Lawsuits, Offer Strategies,* Daily Lab. Rep. (BNA), Dec. 12, 2002, at C-1 ("the FLSA is a complex law that is tricky for employers to apply").

Moreover, many of these cases reflect attempts to extrapolate the legal principles developed in cases such as this one, which concern donning and doffing of personal protective equipment in "traditional"

manufacturing industries, to the so-called "new economy" industries. As recently cautioned:

> The U.S. Supreme Court's decision in *Alvarez* requires all employers, meat producers or otherwise, to re-evaluate their criteria for determining the compensable workday including all activities that are "integral and indispensable" to the employees' principal activities. In this regard, the Supreme Court's decision is not limited to the activity of donning and doffing protective gear but extends to any preliminary activity required of employees to perform the primary activities of their jobs. Examples of potentially compensable preliminary activities include tasks such as "scrubbing up," changing into a required uniform, inspecting a rig or vehicle prior to transporting goods or people, loading or unloading cargo for delivery or receipt, or *even booting up a computer*.

W. Kirk Turner and Rachel B. Crawford, *U.S. Supreme Court Ruling Requires Employers to "Gear-Up" For Paying Employees Increased Compensation*, 77 Okla. B. J. 845 (Mar. 11, 2006) (emphasis added), *available at* http://www.okbar.org/obj/articles_06/031106turner.htm. In fact, the Assistant Solicitor of the DOL has explained that the DOL equates practices "seen in meat and poultry plants," such as "donning and doffing clothing," with practices "in 'new economy' jobs," such as logging onto a computer. *FLSA: Enforcement Efforts Extend to Call Centers, Other 'New Economy' Jobs, DOL Official Says,* Daily Lab. Rep. (BNA) Feb. 18, 2005, at C-1.

With increasing frequency, plaintiffs are pursuing multi-million dollar damages claims through collective actions premised on inapt analogies between the preliminary and postliminary activities in a slaughterhouse (or other jobs requiring the donning and doffing of heavy personal protective equipment) and activities in a conventional office setting, such as starting a computer. *See, e.g., Osby v. CitiGroup, Inc.*, No. 07-cv-6085 (W.D. Mo.), Amended Compl. ¶3 ("Although *Alvarez* arose in the donning and doffing context in a meat processing plant, its holding is directly applicable to the call centers operated by CitiGroup.") (citing *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005)).[5] In *Jewell Ridge*, the

[5] A quick review of trade journals and the federal courts' PACER docketing system demonstrates the proliferation of mass collective action lawsuits in which plaintiffs seek millions of dollars in recoveries by attempting to apply donning and doffing principles to such tasks as typing a password into a computer. Set forth below is a list of federal court complaints in which plaintiffs claim that some form of non-exertive, pre-shift activity starts the continuous workday, even though the employee is free to perform the task at a time of his or her choosing, and is free to pursue personal endeavors (*e.g.*, chit-chat with friends, surf the Internet, grab a cup of coffee, read the newspaper, or even leave the premises to smoke a cigarette) after having performed the task. Undoubtedly, there are many more cases than located through this quick review. Notably, none of the cases deal with poultry-processing plants or personal protective equipment. *Stefaniak v. HSBC*, Case No. 05-CV-6528 (S.D.N.Y.); *Gibson v. Southwestern Bell Telephone Co.*, Case No. 08-CV-2017 (D. Kan.); *Bruner v. Sprint/United Management Co.*, Case No. 07-2164-KHV (D. Kan.); *Norman v. Dell, Inc.*, Case No. 07-CV-6026 (D. Or.); *Abney v. TeleTech Holdings Inc.,* Case No. 5:04-cv-04012-RDR-K (D. Kan.); *Smith v. TeleTech Holdings Inc.*, Case No. 3:04-cv-05353-FDB (W.D. Wa.); *Studley v. TeleTech Holdings,* (Cont'd)

Court reversed the district court's finding that coal miners were *not* working when "forced to travel in underground mines . . . beneath the crust of the earth . . . subjected to constant hazards and dangers . . . [and] left begrimed and exhausted by their continuous physical and mental exertion." *Jewell Ridge*, 325 U.S. at 166. There, the Court held that "[t]o conclude that such subterraneous travel is not work is to ignore reality completely." *Id.* Today, plaintiffs – and some courts – ignore reality completely, arguing that the holdings of *Tennessee Coal*, *Armour*, and *Jewell Ridge* apply with equal force to trivial tasks, such as putting on hair nets and gloves, punching a password into a computer, or checking an email.

The current proliferation of litigation – in which plaintiffs seek outsized damages under the FLSA for pre- and post-shift activities that heretofore had been understood by management and labor as "non-work" – is precisely the situation Congress intended to remedy through the enactment of Section 4 of the Portal-to-

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Inc., Case No. 1:04-cv-00401-WMS (W.D.N.Y.); *Martin v. TeleTech Holdings Inc.*, Case No. 2:04-cv-06591-TJH-E (C.D. Ca.); *Hens v. ClientLogic Operating Corp.*, Case No. 1:05-cv-00381-WMS-HKS (W.D.N.Y.); *Jones v. Qwest Communications International, Inc.*, Case No. 07-2979 (MJD/AJB), (D. Minn.); *Sherrill v. Sutherland Global Services, Inc.*, Case No. 05-Cv-6537L (W.D.N.Y.); *Clarke v. Convergys Customer Management Group, Inc.*, Case No. H-04-3972 (S.D. Tx.); *Cornn v. UPS*, Case No. 3:03-cv-02001-TEH (N.D. Ca.); *Richards v. Computer Sciences Corp.*, Case No. 3-03-CV-00630(DJS) (D. Conn.); *Johnson v. Maximus*, Case No. 07-cv-264 (E.D. Tx.); *Brooks and Russo v. AT&T, Inc.*, Case No. 07-cv-3054 (N.D. Ga.).

Portal Act, 29 U.S.C. § 254(a) ("the Portal Act"). Congress enacted the Portal Act in response to a series of this Court's decisions, most notably *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that burdened employers with unexpected FLSA liabilities and unraveled established compensation patterns in many industries. As Section 1 of the Portal Act observes:

> The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation.

See 29 U.S.C. § 251. This case affords the Court the opportunity to ensure that the FLSA is interpreted in a manner consistent with the legislative purpose behind the Portal Act – a purpose that has become obscured over the last 60 years.

II. AS DEMONSTRATED BY TYSON'S PETITION AND THE PENDING PETITION FILED BY *PLAINTIFFS* IN *GORMAN v. CONSOLIDATED EDISON CORP.*, A SIGNIFICANT CIRCUIT CONFLICT EXISTS, REQUIRING A COHERENT DEFINITION OF "WORK."

The touchstone of the FLSA is the following prohibition: "[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). As the Court observed in *Alvarez*, the word "employ" is defined in the Act as including "to suffer or permit to work." 29 U.S.C. § 203(g). Congress, however, did not define the most important word in the entire statute, "work." *Alvarez*, 546 U.S. at 25.

Over 60 years ago, the Court attempted to fill this statutory void by defining the word "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." *Tennessee Coal*, 321 U.S. at 598 (emphasis added). Three months after the *Tennessee Coal* decision, the Court clarified that "work" does not require "exertion" in certain employment settings, such as when an employer "hire[s] a man to do nothing, or to do nothing but wait for something to happen." *Armour*, 323 U.S. at 133 (holding that firefighters' "inactive duty" in a firehouse must be compensated where employer

hired them to "[r]efrain[] from other activity"). As discussed in Tyson's Petition,[6] the Court never eliminated the exertion requirement from the definition of "work." *See Jewell Ridge*, 325 U.S. at 164-66 (reiterating, after *Armour*, that work typically requires "physical or mental exertion").[7]

"Considerations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades." *Alvarez*, 546 U.S. at 32; *see also Armour*, 323 U.S. at 132-33 ("It is timely again to remind counsel that words of our opinions are to be read *in the light of the facts of the case under discussion.*") (emphasis added); *cf. John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750, 756-57 (2008) ("*[S]tare decisis* in respect to statutory

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[6] The Chamber of Commerce agrees with Petitioner that, under this Court's precedent, Respondents must prove, *inter alia*, that the activities in question required exertion. The Chamber does not retread that ground herein, except as necessary to illustrate that some lower federal courts, over time, have erred in their interpretation and application of the Court's holdings.

[7] Though "exertion" need not be burdensome, there must be at least some mandate from the employer that the employee be on premises and the task must require a modest level of concentration and consume more than a trivial amount of the employee's time. *See Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (donning of various items did not require "exertion" because doing so "requires little or no concentration" and [s]uch items can easily be carried or worn to and from work and can be placed, removed, or replaced while on the move or while one's attention is focused on other things.").

interpretation has special force, for Congress remains free to alter what we have done. . . . Congress has long acquiesced in the interpretation we have given.") (citations and quotations omitted); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 551-52 (1991) ("[S]*tare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them.") (O'Connor, J., dissenting). The Third Circuit abandoned this Court's precedent when holding, in the context of this case, that exertion is not a prerequisite of "work." The Third Circuit reached this result in reliance upon the Ninth Circuit's erroneous decision, *Ballaris v. Wacker Siltronic Corp.* 370 F.3d 901, 910-11 (9th Cir. 2004) (holding that non-exertional activities constitute "work").

Standing in contrast to the holdings of the Third and Ninth Circuits are holdings of the Second and Tenth Circuits. *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994); *Smith v. Aztec Well Servicing, Inc.*, 462. F.3d 1274 (10th Cir. 2006); *Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) ("To resolve the dispute in this case, it is necessary to return to the basic principle that underlies the FLSA: Employees are entitled to compensation only for 'work.'") (citing *Tennessee Coal*, 321 U.S. at 598); *Gorman*, 488 F.3d 586.[8] These cases have properly reconciled *Tennessee Coal* and *Armour*,

[8] *See also Lemmon v City of San Leandro*, No. C 06-07107 MHP, 2007 WL 4326743, *3 n.3 (N.D. Ca. Dec. 7, 2007) ("In light of clear Ninth Circuit precedent [*Ballaris*], this court declines defendant's invitation to adopt the Second Circuit's interpretation of 'integral and indispensable' as defined in *Gorman*").

holding that exertion is required except when an employee is "engaged to wait" and not "waiting to be engaged." *Skidmore*, 323 U.S. at 137.

While the Respondents in this case have waived their right to oppose the instant Petition, the *plaintiffs* in *Gorman* recently filed a Petition for Writ of Certiorari. *See* Gorman Petition, *supra*, 2008 WL 336233 (No. 07-1019). That Petition underscores the need for this Court's intervention. There, the plaintiffs assert a glaring circuit split and significant confusion over the definition of the critical term "work" in the FLSA:

> The decision in this case has added dramatically to the conflict and confusion that had already characterized the lower federal courts' answers to basic and frequently occurring questions under the FLSA and the Portal Act. . . . The Second Circuit decision in this case deepens and widens the conflict among lower courts on these questions.

Id. at **10, 12 (citing *Lugo v. Farmer's Pride, Inc.*, No. 07-cv-00749, 2008 WL 161184, *5 (E.D. Pa. Jan. 14, 2008) (observing that the *Alvarez* Court addressed donning and doffing only in *dicta*, but since then "courts have disagreed as to whether [such activity] is covered under the FLSA"). Aside from certain factual distinctions, the only real difference between Tyson's Petition and the Gorman Petition is that the *Gorman* plaintiffs argue for a different resolution to the conflict than does Tyson.

III. THIS CASE PRESENTS AN OPPORTUNITY FOR THE COURT TO PROVIDE MUCH-NEEDED GUIDANCE FOR EMPLOYERS AND EMPLOYEES IN ALL SECTORS OF OUR ECONOMY.

The decisions of the lower courts are anything but uniform and predictable. As a result, employers have great difficulty discerning their statutory obligations and financial liabilities. This adversely impacts the Nation's commerce because employers cannot optimally allocate their capital and human resources. It also interferes with fair competition because employers in one circuit have higher labor and litigation costs than competitors located in circuits that apply the FLSA differently. Employees also suffer from uncertainty in determining whether or not certain time is compensable. Congress expressly intended to resolve these problems with the passage of the FLSA and the Portal Act.

The definition of "work" has become muddled in the 60 years since this Court decided *Tennessee Coal.* The lower courts' confusion over this basic and recurring issue is undermining the objectives of the FLSA. When enacting the FLSA, Congress intended that "[n]o employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors." *See* H. Rep. No. 2182, 75th Cong., 3d Sess., pp. 6-7 (1938), *quoted in Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 n.25 (1945). Yet, the courts are interpreting the term "work" in anything but a uniform fashion. Employers

(and their counselors) cannot determine whether preliminary activities constitute "hours worked" for overtime calculations, while employees cannot meaningfully determine whether they have an entitlement to receive overtime pay. As an observer recently noted:

> In overtime cases, Depression-era laws aimed at factories and textile mills are being applied in a 21st century economy, raising fundamental questions about the rules of the modern workplace. . . . Then there's technology: In an always-on, telecommuting world, when does the workday begin and end? *The ambiguity now surrounding these questions is tripping up companies and enriching lawyers . . .*

See Orey, *Wage Wars, supra.* (emphasis added). This case presents a meaningful opportunity for the Court to provide necessary guidance on this fundamentally important question.

The issue at the core of this case – whether certain preliminary activities constitute "work" – is essential to the proper application of the FLSA. The DOL's regulations mandate that an employer count as hours worked all time that an employee is "suffered or permitted to work" if "**the employer knows or has reason to believe that the work is being performed**." 29 C.F.R. § 785.12 (emphasis added). Similarly, the DOL's regulations require an employer to maintain accurate records of "[h]ours **worked** each workday." 29 C.F.R. § 516.2(a)(7) (emphasis added). Yet, if an employer cannot determine what tasks constitute "work," it cannot (1)

meet its obligation to keep an accurate record of hours worked, or (2) pay its employees that to which they may be entitled.[9] Indeed, given the extraordinary costs associated with defending massive collective actions that have become the lawsuit "*du jour*," it is quite likely that risk-avoiding employers could end up paying more than required just to avoid the high cost of litigation.

Similarly, clarity is required so that employees may have confidence that they are being paid adequately. It is common, especially in an era of increased telecommuting, for employees to track their own hours worked. Yet, if employees do not know which activities count toward "hours worked," they cannot accurately record their time. Some employees may conclude that certain preliminary activities that are compensable should not be recorded as "work," potentially losing pay. Conversely, other employees may record time that does not constitute "work," resulting in an overpayment.

A recent DOL Opinion Letter illustrates the point. *See* Opinion Letter, FLSA 2008-2NA (Feb. 14, 2008), *available at* http://www.dol.gov/esa/whd/opinion/FLSANA/2008/2008_02_14 _02NA_FLSA.pdf. There, an

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[9] Simon J. Nadel, *As Overtime Lawsuits Renew FLSA Debate, Attorneys Advise Learning the Wage Law,* Daily Lab. Rep. (BNA), July 15, 2002 (observing that "[a]ttorneys on both sides of the law stress that employers must understand the wage and hour law or face costly litigation" and attributing rising litigation to "the antiquated nature of the FLSA" and "employers not having a clue what the law is") (internal quotations omitted).

employer requested an opinion regarding the legality of its timekeeping policy. The policy stated:

> [Nonexempt e]mployees performing on-line [training at] home are responsible for keeping accurate records of all time spent performing on-line [training]. The [time sheet] must be used, signed by the employee's manager and turned into the department time editor, in order for the employee to be compensated for their time. It is important to note that failure of an employee to accurately record time for on-line [training amounts to] falsification of payroll records. . . .

Id. (brackets and ellipses in original). The DOL opined that this policy was lawful. However, neither the Opinion Letter nor the existing body of fractured case law answers the threshold question of what "time" constitutes "work," such that the employee should record it and the employer must pay for it. While the time spent actually participating in the training likely would be compensable, what about the time an employee waits after starting the computer? It is the Chamber's strongly-held view that the *non-exertive* task of starting one's computer is not and has never constituted "work" within the meaning of the FLSA. However, absent clear guidance from the Court, employers will continue to face the explosion of cases discussed above (including those claiming that the fleeting, non-exertive act of typing a password into a computer triggers the continuous workday). These cases defy common sense, and

contradict the Court's landmark decisions in *Tennessee Coal* and *Jewell Ridge* that "exertion" generally is required for a task to be deemed work within the meaning of the FLSA.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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