No. 11-____

IN THE

Supreme Court of the United States

MOUNTAIRE FARMS, INC., *et al.*,
Petitioners,

v.

LUISA PEREZ, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 4(a)(2) of the Portal-To-Portal Act refines the definition of compensable time under the Fair Labor Standards Act to exclude "time an employee spends in activities which are preliminary or postliminary to [the] principal activity." 29 U.S.C. § 254(a)(2). The circuit courts are sharply divided, along a number of different lines, as to whether time spent donning and doffing generic safety or sanitary gear, such as smocks, hairnets, and gloves, is compensable work time or non-compensable "preliminary or postliminary" time.

The questions presented are:

(1) Whether donning and doffing generic safety and sanitary gear is, as some circuits have held, "preliminary or postliminary activity" excluded from compensable time under the Portal Act; or is, as the Fourth Circuit held in this case and as other circuits have held, "integral and indispensable" to an employee's work and thus compensable; or is, as still other circuits have held, either compensable itself as "work" or not compensable as "not work."

(2) Whether compensable time is measured from the time an employee first obtains the first piece of generic safety and sanitary gear, through the time the employee last disposes of the last piece of gear, despite this Court's admonition in *Alvarez* that "waiting time" is not compensable.

(3) Whether compensable time is measured as the *mean* time for performing the subject activity, rather than, as this Court instructed in *Anderson*,

the "*minimum* time reasonably necessary" for accomplishing the activity.

(4) Whether the Fourth Circuit's aggregation of time increments across plaintiffs, work-weeks, and work-years conflicts with this Court's prior precedents creating a *de minimis* exception to the FLSA.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Mountaire Farms, Inc., and Mountaire Farms of Delaware, Inc., both Delaware corporations, were defendants in the U.S. District Court for the District of Maryland and appellants/cross-appellees before the U.S. Court of Appeals for the Fourth Circuit. They are privately held companies with no publicly owned or traded stock, and no publicly-held company owns more than 2% of their stock.

Respondent Luisa Perez was the named plaintiff representing a class of approximately 280 plaintiffs who filed written consents to join the action filed in U.S. District Court as a collective action pursuant to 29 U.S.C. §216(b). The other plaintiffs/respondents are Ray Barrientos; Maria Gomez; Juana Miguel; Gibran Moya Rivera; Gloria Paneto Castro; Shitwa Perez Lopez; Jose Antonio Santiag Lugo; Maritza Alcover; Julio Cifuentes; Juan C. Compian; Carmen Otero; Irma R. Perez; Julisa Sanchez; Carlos Tollinichi Lopez; Daysi De Jesus Vanegas; Haydee A. Betancourt; William Velazquez Rivera; Luz E. Villareal; Celso Escalante Lopez; Manuel M. Herrera; Luis Lopez Ortolaza; Alex J. Millet Caban; Jorge L. Negron Martinez; Jannett Ramirez Sepulveda; Christian H. Serrano; Catalina Velasquez; Avila E. Avila; Juan Rosa Camacho; Victor Manuel Diaz; Rafael Fonseca Villafane; Yamilette Garcia Quinones; Luis R. Irizarry; Elidad Perales; Maria Perez Marrero; Sandra Rivera Diaz; Pedro Tirado Barreto; Yahaira Torres Cintron; Victor G. Torres Lopez; Antelma Vasquez; Brian Vazquez Perez; Ana M. Puentes; Abner Velez Silva; Ana

Maria Zamora; Raquel Arce Ramos; Ernesto Benavides; Angel Luis Calderon Suarez; Vicente Castro, Jr.; Oscar Colon Mangual; Marisol Cotto Rodriguez; Jerry Famania Roche; Maria Febrez; Guillermo Gonzalez; Sylvia Gonzalez; Elvia Gudino; Rafael Infante; Angel M. Munoz Perez; Rosa R. Nieves; Rufina Ortiz; Abel Ortiz Mazariegos; Cuauhtemoc Ramiez; Hector Zalazar; Agustin Bravo Gonzales; Leonel Bueno; Alberto Colon Cruz; Ivan Crespo; Olga Galarza Osorio; Victor Gracia Lopez; Waldermar Mendez Vazquez; Romelia Perez; Florencia Perez Escalante; Mauricio Pucio; Maria J. Rivera; Esperanza Rodriguez; Ramon Rodriguez Guzman; Ruben Velasquez; Ideliz Velasquez Vargas; Jesus Malpica Velez; Brenda Matos Caraballo; Sofia Medrano; Huto Morales; Edgardo Ortiz Hernandez; Thomas Padilla Silva; Lenny Santiago Lebron; Rodolfo Velez Cubero; Adrian Brizeno; Castillo Manuel Montes; Mary L. Garcia; Paula Mejia Mendez; Eleazar Perez Ortiz; Felix Bonilla; Andrew A. Long; Julian Morales; Stacey M. Norat Rosa; Jean Paul Souil; Adrian D. White, Sr.; Denes Alexandre; Dieupuifait Allius; Marie G. Allius; Jose Manuel Anaya; Jos C. Angeles; Eric Ayala Cruz; Elizabeth Baez; Jose L. Baez Rivera; Audin Bataille; Johanna Bermudez; Carlos G. Birriel Perez; Solange Blanchard; Floriberto Bonola Arellano; Cassandra Bowden; Anabel Busanet Vega; Leonide M. Cantave; Jesus Carrion; Exalus Charleron; James A. Dale; Timothy O. Dorsey; Marie N. Dorvilier; Luxone Dorvilus; Judith Ductan; Absalon Duverger; Solia C. Duverger; Rigoberto Escalante; Maria Estrada; Michael D. Farias; Mario Feliciano Flores; Liduvina Figueroa; David T. Fogg; James Frazier; Leon N.

Frazier; Melvin O. Giddins; Marta Gonzales; Roberto J. Gonzalez; Mayra Gonzalez Santiago; Larry Harmon; Maria Hernandez; Manuel M. Herrera; Berrios Herrera Hamilton; Romelus Jean–Lucner; Jean C. De Jesus; Eleazar Jimenez; Erick Jimenez Tirado; James Johnson; Lisson Joseph; Ania B. Jules; Julien Jules; Jeomar Lebron Rivera; Joy Lecates; Jaques Litus; Marie Yolene Louis; Fernando Maldonado; Enid Mandez Vazquez; Ivan Marrero; Esperanza Martell; Luis S. Martinez; Intermo Mazariegos; Jesse Meeks; Juan Mercado; Nayra Mercado Guerra; Linda Mercado Morales; Charles Mood, Jr.; Jose Morales; Nelia Morales; Sylviana Moriden; Ines Munguia; Edwin Nieves Nieves; Yashira M. Ocasio Rivera; Manford Oney; Andrea Osten; Jerry J. Patton; Charles L. Payton; Delmar Perez Godines; Elias Perez Mazariegos; Betzaida Perez Mendez; Ricardo Quinones Roman; Angel Alicea Ramirez; Jannette Ramirez Sepulveda; Julie L. Ramos; Cynthia Reddick; Irwin Rivera; Gilberto Rivera Laboy; Jonathan Rivera; Juana Roblero De Leon; Ivan Rodriguez; Julio Rodriguez Cedeno; Abdiel Rodriquez Crespo; Ruben Rumos; Cynthia Sanchez; Monica Sanchez; Dersy Sanchez Castro; Giselle D. Santiago; Brenda Sastre; Richard L. Satchell; Victor Segarra Vazquez; Rafael D. Silverio; Bonaficio Solomon; Dolores Solomon; Kelly Taylor; Henry Texeira Jimenez; Charles E. Timmons, Jr.; David Torres; Jason Torres Rodriguez; Grace Turnage; Anel Ulysse; Francisco Vargaz–Franqui; Luis A. VasqWez; Niurka M. Velez Montalvo; Sandra E. Villata; Lena Roman Villegas; Velus Virgile; Sandy Dee Williams; Bessie A. Wright; David Adams; Elisee Ariste; Carlos Cintron; Maria

Cisneros; Yarleem Colon Garcia; Mandel Corbin; William Cuffee; Fred D. Custis; Menieze Gustin; Alonzo Hagans; Sylphane Jean Lestin; Johnny J. Lopez; Manuel Lopez; Larry McCoy Cooper; Carod Merise; Daueyson Negron; Jennifer Pena Ayala; Maribel Perez; Lilia B. Rivera; Pierre L. Saint Hilaire; Tyrell Timmons; Susan Tripp; Marilu Velez Claudio; Luis E. Alvarado Morales; Joyce A. Askius; Noel Barrios; Paul Desrarius; Olisia Ductan; Joseph L. Garcia; Sylvia Gonzalez; Guillermina Guerrero; Javier Hernandez; Claretta Jackson; Eric Resto; Rios Eduardo Ruiz; Moises Rivera; Alberto Rivera Falcon; Sara J. Rocha; Juliana Rodriguez Andino; Adela J. Sanchez; Neredia Elizabeth Wright; Marie L. Altenor; Carmen Silvia Apodaca; James L. Bolden; Saint–Remy Charles; Renise Florestal; Luis C. Garza; Maria De La Luz Gonzalez; Gil Gonzalez; Rosa Gonzalez; Salvador Guerrero Romero; Louise V. Harris; Villa Louigene; Luis R. Rivera Marrero; Yolanda Martinez; Francisco A. Medina; Elie Monfort; Blanca A. Perdomo; Carlos Luis Perez; Jesus M. Quezada; Carlos J. Reyes; Ofelia Rodriguez; Miguel A. Santiago Rodriguez; Berenice S. Santos; Lamont D. Savage; Charles Savage, Jr.; Glydis A. Smith; Alma Venegas; Francisco Zamora, Sr.; Cheryl Zamudio; Ernst Cantave; Antonio Carter; William Cesar; Malvin Cintron Ortiz; Iris N. Cirino Pizarro; Regina Cisneros; Johnie Conquest; Guadalupe Diaz Perez; Erena Flamer; Marie Georges; Perr Giddens; Jennifer Gonzalez; Maurice Gordon; Everardo J. Juarez; Yoon Soo Kwak; Maria Herminia Moore; Carlos Morales Colon; Shawn S. Mullen; Tracy A. Nock; Mercelant Ocean; Lavi Oras; Claudia Ortega; Juan Pagan Santiago; Michelle Pointdujour; Gloria

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Aurelia Gil Ventura; Margarita Gil Ventura; Jean Lesly Charles; Jacques Decembre; Marie Yanick Delva; Jean Dumonvil Lima; Marie M. Guerrier; Aristen Ilera; Laumise Ilera; Robeldo Lopez; America D. Macedo; Reymundo Martinez; Tomas Mazariegos Velasquez; Jean Mondestin; Jean Louis Noel; Ramiro Noriega; Miguel A. Ortiz Serrano; Omaira Otero Marrero; Larry D. Phillips; Amelice Pierre; Gadoul Pierrilus; Julio Angel Santiago Padilla; and Randy De Jesus Soto. All were appellees/cross-appellants before the U.S. Court of Appeals for the Fourth Circuit.

The Public Justice Center; Legal Aid Bureau, Incorporated; Legal Aid Justice Center; Maryland Employment Lawyers Association; Metropolitan Washington Employment Lawyers Association; Secretary of Labor, and U.S. Department of Labor appeared on behalf of Appellees as amici before the U.S. Court of Appeals for the Fourth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mountaire Farms, Inc., and Mountaire Farms of Delaware, Inc. (collectively "Mountaire") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 650 F.3d 350 (4th Cir. 2011) and reproduced at page 1a of the appendix to this petition ("Pet. App."). The District Court's decision is reported at 610 F. Supp. 2d 499 (D. Md. 2009) and is reproduced at Pet. App. 50a.

JURISDICTION

The judgment of the Fourth Circuit was entered on June 7, 2011; rehearing was denied on July 5, 2011. Pet. App. 110a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Portal-To-Portal Act provide as follows:

> **29 U.S.C. § 251: Congressional findings and declaration of policy.**
>
> (a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 *et seq*.], 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, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including

liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

* * *

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

* * *

29 U.S.C. § 254(a): Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such

> principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

INTRODUCTION

This case presents fundamental questions, and an overripe circuit split, about the compensability of certain pre- and post-shift activities under the Fair Labor Standards Act of 1938 ("FLSA") and the Portal-to-Portal Act of 1947 ("Portal Act"). Multiple circuits have weighed in on the question of how to distinguish between preliminary and postliminary activities that are "integral and indispensable" to work, and thus compensable under the FLSA, and those that are not. Those circuits have created different tests, and those different tests have produced different outcomes from circuit to circuit in factually identical circumstances. This Court's review is needed to restore clarity to a hopelessly muddled area of FLSA law.

STATEMENT OF THE CASE

The Fair Labor Standards Act and the Portal Act. Congress passed the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 *et seq.*, in 1938, to require employers to pay a minimum wage for all hours worked, and overtime for all hours worked in excess

of 40 in any work week. But the FLSA itself did not define what constituted "work," which in due course gave rise to litigation. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 593 (1944), was the first Supreme Court case to take up the issue. Presented with the question whether travel time to and from the surface of a mine to the mine's inner working face was included in the compensable workday, the Court in *Tennessee Coal* concluded that travel time was compensable. As the Court explained, the miners' travel time was "compulsory," was "spent for the benefit of petitioners and their * * * operations," and travel to the working face was "essential to petitioners' production." *Id.* at 599.[1] *See also Jewel Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161 (1945) (travel time from portal of mine to mine face was compensable "work" under FLSA).

The Court revisited the question of compensable working time two years later in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The *Anderson* Court held that the "minimum time" pottery plant employees "necessarily spent" in walking to work after punching their time clocks was compensable "working time." *Id.* at 691. According to the Court, the time employees spent walking to their work stations was " 'physical and mental exertion (whether burdensome or not) controlled or

[1] The Fifth Circuit in *Tennessee Coal* concluded that the time workers spent at the surface before actually entering the mine—including, for example, "obtaining and returning tools, lamps and carbide and checking in and out," was *not* part of the compensable work day, reversing the district court's conclusion to the contrary. 321 U.S. at 593. "No review [was] sought of the exclusion from the workweek of the activities at the surface." *Id.* at 593 n.4.

required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' " *Id.* at 691-692 (quoting *Tennessee Coal*, 321 U.S. at 598).

The Court also held that employees were entitled to compensation for certain "preliminary activities" at their work benches, including "putting on aprons and overalls, removing shirts, taping or greasing their arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-693. But the Court explained that "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours," such time should be excluded as de minimis; the FLSA did not mandate compensation for "[s]plit-second absurdities." *Id.* at 692.

A "vast flood of litigation," involving "vast alleged liability," arose in *Anderson*'s wake. 93 Cong. Rec. 2082, 2087 (1947) (noting the "immensity of the [litigation] problem" the *Anderson* decision created); *see* 29 U.S.C. § 251(a) (noting the existence of "wholly unexpected liabilities, immense in amount and retroactive in operation" following *Anderson*). Congress responded by enacting the Portal Act, 29 U.S.C. § 251 *et seq*. The Portal Act allows an employer to *exclude* from compensable time the time employees spend

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal

> activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. [29 U.S.C. § 254(a).]

A few years passed, another circuit conflict presented itself, and this Court granted certiorari to resolve it. The petitioners in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), worked in a battery factory and handled toxic chemicals during their shifts. The company required workers to shower and change clothes at the end of the shift, to minimize the potential for absorption into the bloodstream (or the transport home on clothing) of lead or lead compounds. *Id.* at 250-251. The Court concluded that the time the workers spent changing clothes and showering after their shift was compensable. *Id.* at 256. As the Court explained, "activities performed either before or after the regular work shift, on or off the production line, are compensable * * * if those activities are an integral and indispensable part of the principal activities" for which the workers are employed. *Id.* The Court noted, however, that "the question of changing clothes and showering under normal conditions" was not before it, because "the Government concedes that these activities ordinarily constitute 'preliminary' or 'postliminary' activities excluded from compensable work time as contemplated in the [Portal] Act." *Id.* at 249.

In *IBP, Inc.* v. *Alvarez*, 546 U.S. 21 (2005), the Court took up a question over which the circuits had become divided in the years following *Steiner*: whether "walking time" was compensable time under

the FLSA and the Portal Act. The employees in the *Alvarez* case, meatpacking workers, donned smocks, hard hats, earplugs, hairnets, and safety goggles before walking to their workstations. Some employees, depending on their role, also wore specialized protective gear, such as chain-link metal aprons, leggings, vests, protective sleeves, and Kevlar gloves. *See Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 899 & n.2 (9th Cir. 2003). The poultry plant workers in the case consolidated with *Alvarez* for Supreme Court review, *Tum* v. *Barber Foods, Inc.*, were required only to wear lab coats, hairnets, earplugs, and safety glasses; other gear such as gloves, aprons, and sleeve covers was optional. *See Tum*, 360 F.3d 274, 277 (1st Cir. 2004), *aff'd in part and rev'd in part*, 546 U.S. 21 (2005). After the workers donned their smocks and other gear, they walked to their workstations. The principal question in *Alvarez* was whether that "walking time" from changing station to work station was compensable.[2]

The Court held that an activity that is "integral and indispensable" to a principal activity is *itself* a "principal activity" for purposes of the Portal Act.

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[2] The subsidiary question in *Alvarez* was "whether the time employees spend waiting to put on the protective gear is compensable." 546 U.S. at 24. The Court answered this question in the negative. *Id.* at 42. The *Tum* employees separately had sought certiorari on the question whether employees had a right to compensation for "time spent donning and doffing equipment that is necessitated by the employees' working conditions but not expressly required by the employer or by law." 2004 WL 1588308 (2004) (petition for certiorari). That question was not within the certiorari grant. *See* 543 U.S. 1144 (2005) (granting certiorari as to question 1 only).

546 U.S. at 37. It further held that the performance of one "integral and indispensable" activity renders all subsequent activities compensable under the FLSA's "continuous workday" theory. *Id.* Thus, any walking time that occurs after the beginning of the employee's *first* principal activity and before the end of the employee's *last* principal activity was compensable. *Id.*

The lower courts in *Alvarez* had concluded that the workers' donning of "required protective gear [was] integral and indispensable to the employees' work," *id.* at 30, and the employers had not sought Supreme Court review of that question.[3] The *Alvarez* Court thus took as a given, and did not rule on, whether the time spent donning and doffing generic, non-unique sanitary or safety gear was so "integral and indispensable" to an employee's work as to be compensable.

B. Factual Background. Respondent Luisa Perez filed, and approximately 280 other plaintiffs joined, a collective action under the FLSA, 29 U.S.C. § 216(b). They alleged that Mountaire owed them back pay and overtime for the time they spent donning, doffing, and sanitizing generic sanitary and protective gear such as smocks, hairnets, earplugs, hard hats, and gloves, and walking to and from their work stations, at the beginning and end of their shifts and meal breaks in Mountaire's non-union poultry processing facilities.

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[3] The Ninth Circuit in *Alvarez* v. *IBP* agreed with the district court that time spent donning and doffing non-unique protective gear, such as hard hats and safety goggles, was "de minimis as a matter of law." 339 F.3d at 904 (quotation omitted).

The District Court concluded that the employees' acts of acquiring, donning, doffing, and releasing their sanitary and protective gear all were "integral and indispensable" to the employees' work in the poultry plant—thus rendering *all* activities from the point of acquisition until the disposal of the gear part of the "continuous work day" described in *Alvarez*. The court accordingly awarded back pay for pre- and post-shift, and pre- and post-meal break, donning and doffing of generic sanitary and protective gear. The court also awarded attorneys' fees, which the FLSA requires be awarded to prevailing plaintiffs. But recognizing that the law was unsettled, the court did not award liquidated damages or an additional year of liability to the plaintiffs, finding that Mountaire's FLSA violation was in good faith and not "willful." Pet. App.107a.[4]

Mountaire appealed. The plaintiffs cross-appealed the District Court's denial of liquidated damages and "third-year liability."

The Fourth Circuit affirmed the District Court in part.[5] Surveying the circuits to have applied what

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[4] A finding of "willful" violation subjects an employer to a three-year, rather than a two-year, statute of limitations for back pay liability. 29 U.S.C. § 255(a).

[5] After the District Court's decision in this case, the Fourth Circuit had rejected "meal break" donning and doffing claims. *Sepulveda* v. *Allen Family Foods*, 591 F.3d 209, 216 n.4 (4th Cir. 2009), *cert. denied*, 131 S. Ct. 187 (2010). The Court of Appeals accordingly reversed that aspect of the District Court's decision in this case that had found "meal break" donning and doffing compensable, and subtracted that time from the total time period claimed. The Court of Appeals also affirmed the District Court's denial of third-

the court called the "*Steiner* test," the Court of Appeals concluded that the test "is applicable to issues of donning and doffing at the beginning and the end of work shifts in the poultry processing industry." Pet. App. 15a The court acknowledged that the Second Circuit had "interpreted the holding in *Steiner* more narrowly," *id.* at 14a [Slip Op. 31], such that "donning and doffing is only 'integral and indispensable' to a principal activity when the principal activity is performed in a lethal environment." *Id.* But the Fourth Circuit sided with the Sixth and Ninth Circuits, both of which previously had applied *Steiner*'s "integral and indispensable" test to cases involving workers at poultry and meat-processing plants. *Id.* at 13a-14a (citing *Franklin* v. *Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010) and *Alvarez* v. *IBP*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21).

The Fourth Circuit next employed what it called a "two-part definition" of *Steiner*'s phrase "integral and indispensable": According to the court of appeals, a preliminary or postliminary activity is "integral and indispensable" to the principal activity when the activity is "(1) necessary to the principal work performed; and (2) primarily benefit[s] the employer." Pet. App. 15a [Slip Op. 32]. Borrowing a page from the unreviewed portion of the Ninth Circuit's *Alvarez* opinion, the Fourth Circuit further opined that an act is "necessary to a principal activity if it is required by law, by company policy, or by the nature of the work performed." *Id.* (citing *Alvarez*, 339 F.3d at 903).

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year liability and liquidated damages, rejecting the plaintiffs' challenge on cross-appeal.

The Fourth Circuit then proceeded to apply its "two-part definition" to the question whether the poultry plant employees' acts of donning and doffing sanitary and protective gear were "integral and indispensable" to their principal work. But before it did so, it rejected Mountaire's contention that because the poultry workers' sanitary and protective gear was generic—which is to say, not specialized or unique to that industry—the gear could not be "integral" or "indispensable" to the poultry line job. Pet. App. 17a According to the court, donning caps, earplugs, hairnets, smocks and aprons is "necessary" to their work on the plant's production line, due to "overriding concerns of safety and sanitation." *Id.* at 18a. And those activities "primarily benefit[ed]" Mountaire, the court found, because—again—of their "importance * * * in ensuring the safety and sanitation of the 'production line.' " *Id.* The Court of Appeals accordingly concluded that donning and doffing protective and sanitary gear at the beginning and end of poultry plant employees' work shifts was " 'integral and indispensable to chicken processing.' " And although this Court specifically *did not reach* the question whether the donning and doffing of generic sanitary and protective gear in *Alvarez* was "integral and indispensable" to the respondents' meatpacking and poultry operations there, the Fourth Circuit nonetheless opined that "it would be illogical to conclude that the Supreme Court would have held the walking time to be compensable if it entertained serious doubts regarding the compensability of the donning and doffing activities themselves." Pet. App. 36a. Thus, on the strength of the Court's prior inaction on the question, the Fourth Circuit found it to be "manifest" that the poultry

workers' donning and doffing were not merely preliminary or postliminary, but "mark the beginning and end" of the compensable work day. *Id.*

After finding donning and doffing work clothing to be "integral and indispensable" to poultry employees' work on the line, the Fourth Circuit next took up the calculation of compensable time. This Court specifically directed in *Alvarez* that "waiting time" was not compensable. But the Fourth Circuit concluded that compensable time would be measured from the moment employees first picked up their first piece of gear, until the time they disposed of their last piece of gear. Pet. App. 29a-30a. This Court specifically directed in *Anderson* that compensable time was based on the "minimum time" employees "necessarily spent" in walking to their work stations. 328 U.S. at 692. But the Fourth Circuit adopted plaintiffs' expert's (far more accommodating) summation of *mean* times for each activity. Pet. App. 29a. And although this Court cautioned in *Anderson* that courts calculating "working time" be wary of assigning compensable significance to "split-second absurdities," the Fourth Circuit *aggregated* the mean donning-and-doffing time—*10.204* minutes, according to plaintiffs' expert, calculated out to the thousandth decimal point—over "an annual work schedule of fifty weeks," multiplied by the number of employees who opted into the case, multiplied by the six-year period at issue in the case. By the end of all those multipliers, the Court of Appeals had come up a "significant" number. Pet. App. 34a The Fourth Circuit thus concluded that the time at issue was not de minimis. *Id.*

Judge Wilkinson concurred in part and concurred in the judgment, observing, among other things, that this case "illustrates the litigation difficulties that the de minimis rule was meant to forestall." Pet. App. 44a. He closed his concurrence by noting that "[t]he caselaw in this area is a mush, albeit one that redeemably recognizes the need to compensate workers fairly for work performed without driving companies crazy with microscopic litigation." *Id.* at 49a.

Mountaire sought rehearing, contending, among other things, that the Fourth Circuit's decision conflicted with multiple Supreme Court precedents on donning and doffing, measuring time, and the "de minimis" exception. Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION EXACERBATES A CIRCUIT SPLIT OVER WHETHER DONNING AND DOFFING ACTIVITIES ARE "INTEGRAL AND INDISPENSABLE" TO WORK, OR THEMSELVES "WORK," OR MERELY PRELIMINARY AND NOT "WORK."

Alvarez, like its distant predecessor *Anderson*, has given rise to a "vast flood" of high-dollar litigation in its wake. 93 Cong. Rec. at 2089. *See*, *e.g.*, *In re Tyson Foods Inc. Fair Labor Standards Act Litig.,* No. 4:07-md-01854 (M.D. Ga.) (Order of Sept. 15, 2011, approving settlement of up to $17.5 million to class members, plus up to $14.5 million in attorneys' fees); *De Asencio* v. *Tyson Foods Inc.*, 500 F.3d 361 (3d Cir. 2007) (reversing jury verdict for employer in 540-worker collective action); *Solis* v. *Tyson's Foods*,

No. 2:02-cv-1174 (N.D. Ala.) (jury verdict for plaintiffs for $9 million invalidated after poll; subsequent trial resulted in $250,000 award); *Trotter v. Purdue Farms, Inc.,* No. Civ. A.99-893 (D. Del. 2002) ($10 million to settle donning and doffing claims). In the years after *Alvarez*, the federal circuits have reached highly inconsistent results on the question of whether the donning and doffing of generic safety and sanitary gear is preliminary to work, and thus excluded from compensable time by virtue of the Portal Act, *or* whether it constitutes an "integral and indispensable activity," and thus is compensable by way of *Steiner*.

Seizing on different portions of this Court's analysis in *Alvarez* and *Steiner*, some circuits opine on whether safety or sanitary coverings can be "indispensable" without being "integral." Others base their decisions on whether the gear in question is "unique" or "non-unique;" still others question whether the gear can properly be regarded as "clothes," and still others ask whether donning and doffing actually constitutes "work." More than a simple split among the circuits, the current disarray in views resembles a compound fracture. The unfortunate result is that essentially identical fact patterns can produce widely varying results, from summary judgment in favor of the employer to multi-million-dollar liability against the employer, all depending on the circuit in which the issue arises.

A. Second, Fifth, Seventh, and Ninth Circuits: No Compensation For Donning And Doffing Non-Unique Gear

Led by the Second Circuit, a number of post-*Alvarez* appellate decisions have denied donning and

doffing claims when the gear involved is "non-unique" or generic, even if required by the employer or government regulations. Some courts conclude that donning and doffing of such gear may be "indispensable" to work—perhaps even required by state or federal regulation—but not *integral* to the work. Other courts conclude that donning and doffing nonunique gear is merely preliminary, and thus not compensable under the Portal Act.

Second Circuit. In *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586, 594 (2nd Cir. 2007), employees at a nuclear power station brought an action seeking compensation for time they were obliged to spend for security-related activities, as well as donning and doffing of protective gear, at the beginning and end of their work day. The Second Circuit rejected their claim, holding that "a helmet, safety glasses, and steel-toed boots may be indispensable to plaintiffs' principal activities without being integral. The donning and doffing of such generic protective gear is not different in kind from 'changing clothes and showering under normal conditions,' which, under *Steiner*, are not covered by the FLSA." *Gorman*, 488 F.3d at 594 (footnote omitted). The Second Circuit also concluded that the donning and doffing of generic protective gear was not rendered "integral" merely by dint of being required by the employer or by government regulation. *Id.* (citing *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994) (donning and doffing safety glasses, a pair of earplugs, a hard hat and safety shoes, "although essential to the job, and required by the employer," are pre- and postliminary activities)).

The losing employees in *Gorman* sought a writ of certiorari from this Court, pointing out, among other things, the "[b]road disagreement and confusion" among courts even then about whether donning non-unique protective gear was a principal activity. Pet. For Cert., *Gorman* v. *Consolidated Edison Corp.*, No. 07-1019, at 12. Certiorari was denied. 553 U.S. 1093 (2008).

Ninth Circuit. In *Bamonte* v. *City of Mesa*, 598 F.3d 1217, 1232 (9th Cir. 2010), the Ninth Circuit followed *Gorman*, recognizing that "there is a difference between an indispensable activity and an integral activity. That an activity is indispensable does not necessarily mean that the activity is integral to the principal work performed." *Bamonte*, 598 F.3d at 1232. The *Bamonte* plaintiffs were police officers who sought compensation for time they spent donning and doffing uniforms and accompanying gear. The Ninth Circuit restated its conclusion in *Alvarez* that "the time spent donning and doffing "non-unique protective gear such as hardhats and safety goggles * * * is not compensable," *Bamonte*, 598 F.3d at 1226, citing *Alvarez*, 339 F.3d at 903.[6]

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[6] In *Alvarez*, the Ninth Circuit had also rejected claims for compensation for the donning and doffing of "nonunique" gear on the alternate ground that it was de minimis:

> [W]e agree with the district court's alternative conclusion as to why time spent donning and doffing non-unique protective gear such as hardhats and safety goggles is not compensable. The time it takes to perform these tasks vis-a-vis non-unique protective gear is de minimis as a matter of law * * * . In this context, "donning and doffing" and "waiting and walking" constitute compensable work activities except for the de minimis time associated with

The Ninth Circuit concluded, however, that donning what it called "unique" gear—such as Kevlar gloves and metal-mesh leggings—*was* a "principal activity" after which other activities were compensable by virtue of the "continuous workday" rule. *Alvarez*, 339 F.3d at 903.

Fifth Circuit. In *Von Friewalde* v. *Boeing Aerospace Operations, Inc.*, 339 F. Appx. 448, 454 (5th Cir. 2009), the Fifth Circuit, in an unpublished decision, agreed with the Second Circuit in *Gorman* "that donning and doffing of generic protection gear such as safety glasses and hearing protection are * * * 'non-compensable, preliminary tasks' under the Portal-to-Portal Act." 339 F. Appx. at 454 (quoting *Gorman*, 448 F.3d at 594). The Court left open the possibility that other activities, such as checking out specialized tools, might be compensable if they required more than a de minimis amount of time.

The Fifth Circuit also has rejected donning and doffing claims in the poultry industry where the generic sanitary and protective gear donned and doffed by workers is functionally identical to the gear at issue in this case. In *Anderson* v. *Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 F. Appx. 652 (5th Cir. 2002) and *Pressley* v. *Sanderson Farms*, 2001 WL 850017, at *3 (S.D. Tex. 2001), *aff'd*, 33 F. App'x. 705 (5th Cir. 2002), the Fifth Circuit found that donning, doffing, and walking time in poultry processing plants was properly excluded from compensable time under the Portal-to-Portal Act. And more recently, faced with

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the donning and doffing of non-unique protective gear. [*Alvarez*, 339 F.3d at 903-904.]

yet another poultry-industry donning and doffing claim, the district court in *Isreal* v. *House of Raeford Farms of La., LLC*, ___ F. Supp. 2d ___, 2011 WL 1188698 (W.D. La. 2011) (appeal dismissed) determined that it would follow these decisions. As the district court explained:

> [C]ourts have taken different paths when assessing this issue, and no particular path appears to be extraordinarily more logical than the others or to have commanded a substantial majority of support. Under these circumstances, where the law is not certain, the better course for this court is to follow the Fifth Circuit's decision in Boeing and find that the donning and doffing of the gear at issue in this case were not principal activities or compensable. There is certainly a logical force behind that determination, and following the rule will promote consistency of the law among the district courts within the Fifth Circuit. [*Isreal*, 2011 WL 1188698 at *9.]

Seventh Circuit. In *Pirant* v. *U.S. Postal Service*, 542 F.3d 202 (7th Cir. 2008), the Seventh Circuit ruled that a postal worker could not count time she spent each workday putting on and removing gloves, shoes, and a work shirt toward the minimum "work" hours for Family and Medical Leave Act (FMLA) eligibility. As the Seventh Circuit explained, this Court in *Steiner* noted that " 'changing clothes and showering under normal conditions' generally would not be compensable" work time. *Pirant*, 542 F.3d at 208 (quoting *Steiner*, 350 U.S. at 332). The *Pirant* plaintiff, the court went on,

> was not required to wear extensive and unique protective equipment, but rather only a uniform

> shirt, gloves, and work shoes. The donning and doffing of this type of work clothing is not "integral and indispensable" to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes "under normal conditions" that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity. [*Pirant*, 542 F.3d at 208-209.]

The next year, in *Musch* v. *Domtar Ind., Inc.*, 587 F.3d 857 (7th Cir. 2009), the Seventh Circuit, following *Pirant*, affirmed summary judgment for the employer, rejecting a FLSA claim for compensation for time paper mill employees spent putting on and taking off work clothes, safety shoes, and safety glasses before and after each workday; showering after each workday; and shaving as required by company policy. The Seventh Circuit reiterated that the plant workers' daily post-shift activities "are done 'under normal conditions' and are merely postliminary non-compensable activities." *Musch*, 587 F.3d at 861 (citing *Pirant*, 542 F.3d at 208).

B. Sixth and Fourth Circuits: Donning and Doffing Compensable Because "Integral and Indispensable."

Although it started out on substantially the same analytical road as the Second Circuit in *Gorman*, the Sixth Circuit reached an altogether different destination in *Franklin* v. *Kellogg Co.*, 619 F.3d 604. Workers at the employer's breakfast-cereal factory were required to wear company-provided uniforms consisting of pants, snap-front shirts bearing the

Kellogg logo and the employee's name, and slip-resistant shoes. Hourly production workers and maintenance employees also wore hair nets (and, where necessary, beard nets), safety glasses, ear plugs, and "bump caps," head coverings akin to hard hats.

In analyzing whether an activity was "integral and indispensable," the Sixth Circuit examined three factors: "(1) whether the activity is required by the employer; (2) whether the activity is necessary for the employee to perform his or her duties; and whether the activity primarily benefits the employer." *Franklin*, 619 F.3d at 620. The Sixth Circuit then "balanced" the factors, noting that "[b]ecause Franklin would be able to physically complete her job without donning the uniform and equipment, unlike the plaintiffs in *Steiner*, it is difficult to say that donning the items are *necessary* for her to perform her duties. Nonetheless, considering these three factors, we conclude that donning and doffing the uniform and standard equipment at issue here is a principal activity." *Id.* (emphasis in original).

The Fourth Circuit, as explained above, applied a different definition of "integral and indispensable" (one that echoes *Anderson*'s definition of "work" itself), similarly has held that pre-shift donning and post-shift doffing *were* compensable and were not de minimis as a matter of law, and specifically rejected the unique/non-unique distinction.

C. Tenth Circuit: Donning and Doffing Not Compensable Because Not "Work."

In *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), which predated and influenced the Ninth Circuit's unique/non-unique distinction in *Alvarez*, the Tenth Circuit ruled that the time "knife-wielding" employees spent donning protective gear *was* compensable, but that the time employees spent donning and doffing hard hats, earplugs, safety footwear, safety eyewear, and smocks was *not* compensable:

> A better explanation for the non-compensability of the donning and doffing of the latter items is that it is not work within the meaning of the FLSA. Work is "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." While the use of the standard safety equipment may have met the second prong of this test, it fails the first. [*Reich*, 38 F.3d at 1125-26 (quoting *Tennessee Coal*, 321 U.S. at 598)].

The *Reich* court explained that donning and doffing non-unique personal protective equipment was not "work" under the FLSA because it was analogous to "having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe." *Id.* at 1126 & n.1.

D. Third Circuit: Donning and Doffing Compensable Because "Work."

In *De Asencio* v. *Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007)—yet another poultry-industry case where workers were required to wear generic

gear consisting of smocks, hairnets, earplugs, and safety glasses—the Third Circuit held that the donning and doffing activity in that case constituted "work" as a matter of law and therefore was compensable. The Third Circuit followed its earlier holding in *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), a case predating *Alvarez*, which held that when an "employer required, and strictly enforced, its policy that employees don" personal protective equipment, and did so "for the benefit of the company," "the activity was not precluded by the Portal-to-Portal Act as merely preliminary." *De Asencio*, 500 F.3d at 372 (quoting *Ballaris*, 370 F.3d at 910-911).

The employer on the wrong end of the Third Circuit's decision sought certiorari, asking "[w]hether the court of appeals erred in holding, in conflict with the Tenth Circuit, that an activity constitutes 'work' under the Fair Labor Standards Act, 29 U.S.C. § 207, even though the activity neither entails 'exertion' nor is compensable as a matter of custom or contract." *Tyson Foods* v. *De Ascensio*, No. 07-1014, 2008 WL 336224 (2008) (petition for certiorari). In its petition, Tyson stressed, among other things, that the circuits' differing standards caused companies operating in more than one jurisdiction—like Tyson—significant compliance problems. *Id.* at *20. Certiorari was denied.

To sum up: if *Perez* had been filed in the Second, Fifth, Seventh, or Ninth Circuits, the court would have concluded under those circuits' precedents that the donning and doffing of non-unique smocks, aprons, hairnets, helmets, boots, and earplugs was noncompensable pursuant to the Portal Act and/or de

minimis, and Mountaire's motion for summary judgment would have been granted. But because this case was filed in the Fourth Circuit, the employer instead faces significant damages and attorneys' fees. This is hardly a consistent or predictable outcome for a law of national application.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT.

The Fourth Circuit's decision contributes to the mushrooming circuit split over the classification and treatment of donning and doffing claims. And the court's decision also conflicts with *this* Court's rulings on multiple fronts.

A. The Fourth Circuit Improperly Equated "Integral and Indispensable" with "Necessary," Contrary to *Alvarez*.

The Fourth Circuit held that the test to determine whether an activity is integral and indispensable is whether it is (1) "necessary to the principal work performed; and (2) primarily benefit[s] the employer." Pet. App. 15a. This is a curious definition of an activity "integral and indispensable" to work, for it echoes this Court's pre-Portal Act language defining work *itself*. The Court in *Tennessee Coal*, and again in *Anderson*, defined "work" as that "pursued *necessarily* and primarily for the *benefit* of the employer." 321 U.S. at 598; 328 U.S. at 691-692 (emphasis added). After the Portal Act, however, a preliminary or postliminary activity may well be "necessary" and primarily for the employer's "benefit," without necessarily being *compensable*. The Portal Act does not decree that

preliminary or postliminary activity is not "work"; rather, it relieves an employer from liability if it does not measure and specifically compensate employees for *certain categories* of "work": specifically, preliminary and postliminary tasks that are neither integral nor indispensable to their principal work. The Act cannot be circumvented merely by reverting to pre-Portal Act definitions of "work" to render such activities compensable.

The Fourth Circuit also ignored critical language in *Alvarez* to the same effect:

> [T]he fact that certain preshift activities are *necessary* for employees to engage in their principal activities does not mean that those preshift activities are "*integral and indispensable*" to a "principal activity" under *Steiner*. For example, walking from a timeclock near the factory gate to a workstation is certainly *necessary* for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate *Anderson*'s holding that such walking time was compensable under the FLSA. We discern no limiting principle that would allow us to conclude that the waiting time in dispute here is a "principal activity" under § 4(a), without also leading to the logical (but untenable) conclusion that the walking time at issue in *Anderson* would be a "principal activity" under § 4(a) and would thus be unaffected by the Portal-to-Portal Act. [*Alvarez*, 546 U.S. at 40-41 (emphasis added)].

The Fourth Circuit thus reached the very conclusion that the Supreme Court in *Alvarez*

describes as "untenable." By defining "integral and indispensable" the same way *Anderson* defined "work," the Fourth Circuit effectively eliminated the protections for employers provided in the Portal Act.

B. The Fourth Circuit's Decision to Start and Stop Time with *Acquisition* and *Release* of Gear (Rather than Donning and Doffing) Conflicts with *Alvarez*.

The Fourth Circuit held that compensable time begins when an employee touches the first piece of sanitary or protective gear, and ends when the last piece of gear is released. Pet. App. 20a. (accepting plaintiffs' expert's study). But the *Alvarez* Court held that the clock starts to run with the *donning* of integral and indispensable equipment and stops with *doffing*, not with merely picking up a piece of equipment and letting it go. The difference between acquisition and donning may seem (to coin a phrase) de minimis, but as this case reveals, it has significant temporal, and financial, consequences.

The opening paragraph of *Alvarez* reveals this intention. The Court framed the question as "whether the time employees spend waiting to put on the protective gear is compensable under the statute." *Alvarez*, 546 U.S. at 24. The answer was "no:"

> [W]e are not persuaded that such waiting—which in this case is two steps removed from the productive activity on the assembly line—is "integral and indispensable" to a "principal activity" that identifies the time when the continuous workday begins. Accordingly, we hold that § 4(a)(2) excludes from the scope of the

> FLSA the time employees spend *waiting to don the first piece of gear* that marks the beginning of the continuous workday. [*Alvarez*, 546 U.S. at 42 (emphasis added).]

The Fourth Circuit exceeded the boundaries set by *Alvarez* when it included in the sum of compensable time the time that *precedes* donning, after gear is acquired, and that follows doffing, before it is released. The District Court observed, for example, that measuring from "acquisition" gave rise to some excessively lengthy time measurements; "one particular video showed an employee who moved sluggishly, much more slowly than others and loitered around the plant for a substantial period of time before his shift started." Pet. App. 102a. This is a textbook example of the "two steps removed" that Justice Stevens cut off in *Alvarez*. *Alvarez* dictates that the compensable-time clock does not start from the moment an employee picks up a hair net, but from the donning of "integral and indispensable" equipment.

C. The Fourth Circuit Ignored Binding Supreme Court Precedent in Finding that Plaintiffs Should Be Compensated for the *Average* Amount of Time Required to Complete "Integral and Indispensable" Activities, Rather than the *Minimum* Time Necessary.

This Court held in *Anderson* that employees are entitled to compensation only for the minimum amount of time such activities reasonably require:

> [U]nder the conditions prevalent in respondent's plant, compensable working time was limited to

> the *minimum time necessarily spent* in walking at an ordinary rate along the most direct route from time clock to work bench. Many employees took roundabout journeys and stopped off en route for purely personal reasons. It would be unfair and impractical to compensate them for doing that which they were not required to do. Especially is this so in view of the fact that precise calculation of the *minimum walking time* is easily obtainable in the ordinary situation. [*Anderson*, 328 U.S. at 692 (emphasis added)].

See also Rutti v. *Lojack Corp.*, 596 F.3d 1046, 1056 n.9 (9th Cir. 2010) (quoting *Anderson*'s "miminum time" language); *see also Musticchi* v. *City of Little Rock*, 734 F. Supp. 2d 621, 632 (E.D. Ark. 2010) (compensable working time was limited to minimum time necessarily spent " 'in walking at an ordinary rate along the most direct route' ") (quoting *Anderson*, 328 U.S. at 692); *Maciel* v. *City of Los Angeles*, 569 F. Supp. 2d 1038, 1052 n.16 (C.D. Cal. 2008) ("The Court acknowledges that *Anderson* states that the minimum time required to complete a given activity should guide the Court in determining whether an activity is de minimis * * * compensable working time was limited to the *minimum* time *necessarily* spent." (emphases added; citation and internal quote omitted).

Mountaire's expert timed workers donning and doffing gear in a conference room, measured the paths walked applying a standard walking speed used in motion study analysis, adjusted for plant conditions, and concluded that the minimum amount of time reasonably necessary for daily pre- and post-

shift donning and doffing was 3.3 minutes. Pet. App. 98a. The District Court and the Fourth Circuit did not accept this formulation, however. Instead, they adopted plaintiffs' expert's "mean" or "average" time calculation—in part, that is. The District Court felt compelled to unilaterally (and arbitrarily) discount the "20.879" minutes the plaintiffs' expert measured to 17 minutes.[7] Pet. App. 102a. The 17-minute number improvised by the District Court became gospel in the Fourth Circuit, which after subtracting donning and doffing time around meal breaks concluded that "10.204" minutes remained. Pet. App. 31a.

This is not a reliable empirical measure by any stretch. Nor, again, is this a trivial concern. As a practical matter, the Fourth Circuit's decision means that an employer must determine how long its particular employees take, *on average*, to accomplish their donning and doffing activities. The incentive to expand the amount of time is readily apparent, and the empirical difficulties in discerning "mean" employee time are just as evident. The Fourth Circuit could and should have avoided this mire by following *Anderson* and requiring proof of the minimum amount of time reasonably necessary to accomplish the activity in question, a calculation fraught with far less peril than a quest for means or averages to the thousandth decimal point.

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[7] The District Court ruled as follows: "I find that the actual total donning and doffing and walking time is 17 minutes, allowing for a reasonable discount in Dr. Radwin's analysis for laggards and outliers, and to account for any de minimis exclusions." Pet App. at 76a.

D. The Fourth Circuit's "Aggregation" Theory Defines this Court's De Minimis Rule out of Existence.

The Fourth Circuit also ran afoul of *Anderson* by employing a broad "aggregation" theory to defeat Mountaire's argument that the time in question was de minimis.

Anderson held that the de minimis rule precludes employees from recovering for compensable work "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours." 328 U.S. at 692. The de minimis rule has been invoked and applied often since. In *Lindow* v. *United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), for example, the Ninth Circuit found 7 to 8 minutes per employee, per day, to be de minimis. And dozens of other cases after *Anderson* have found periods of up to 10 minutes per day, and sometimes more, to be de minimis, and thus excluded from compensable time. *See*, *e.g.*, *Rutti*, 596 F.3d at 1057-58 (filling out minimal paperwork at home de minimis); *Singh* v. *City of New York*, 524 F.3d 361, 371-372 (2nd Cir. 2008) (additional commuting time due to carrying briefcase de minimis); *Alvarez*, 339 F.3d at 903-904 (donning and doffing of hard hats and safety goggles de minimis); *Reich*, 38 F.3d at 1126 n.1 (same); *Aiken* v. *City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (dog-care duties during handlers' commute de minimis); *Bobo* v. *United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998) (same); *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 652-653 (2nd Cir. 1995) (same); *E.I. du Pont De Nemours & Co.* v. *Harrup*, 227 F.2d 133, 136 (4th Cir. 1955) (counting cash before start of cashier shift

de minimis); *Frank* v. *Wilson & Co.*, 172 F.2d 712, 716 (7th Cir. 1949) (clocking in, receiving instructions from supervisors, obtaining tools, and walking to work station all de minimis).[8]

All of these cases looked at the number of minutes at issue per day. But the Fourth Circuit in this case took a far different approach. It used a global aggregation theory, never before applied to de minimis inquiries as to hours worked, that reckoned the sum total of all the claimed minutes, times all the claimants, times the wage, times the number of years of liability at issue. Pet. App. 31a-35a. Needless to say, this boundless multiplication exercise is not likely to yield many "de minimis" findings, and it did not yield one here. And if the Fourth Circuit's theory had been applied by the Court in *Anderson*, or the panels in *Lindow*, *Rutti*, *Singh*, *Alvarez*, *Reich*, *Aiken*, *Bobo*, *Reich v. NYCTA*, *du Pont*, or *Frank*, *all of those decisions* would presumably have come out differently. For as the concurring Fourth Circuit judge in this case put it: "[T]here is no number so small that a suitable multiplier cannot make large." Pet. App. 38a. The

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[8] Even the Federal Government acknowledges a 10-minute rule for its own employees:

> If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes of work per day, the agency shall credit all the time spent in that activity, including the 10 minutes as hours of work. [5 C.F.R. § 551.412.]

Court should grant certiorari to review this issue as well.

III. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT.

Whether employees must be paid for donning and doffing generic safety and sanitary items affects hundreds of thousands of workers in hundreds of industries throughout the United States. All food processors must ensure sanitary conditions in the production area, which necessitate some combination of smocks, gloves and hairnets. Many high-tech manufacturers, such as pharmaceutical, silicon chip, and medical supply makers maintain "clean room" conditions that require similar attire to minimize contamination that could impair quality. The cascade of post-*Alvarez* litigation, like the litigation that followed *Anderson* and ultimately led to passage of the Portal Act, has consumed vast corporate and judicial resources. In addition to the meat and food processing cases discussed above (*Tyson Foods*, *Kellogg*), lawsuits have been filed against state and local governments by public safety officers seeking compensation for donning and doffing uniforms or caring for service animals (for example, *Turner* and *Maciel*) and by workers in other manufacturing operations (for example, *Rutti*).

In high-volume, low-margin industries where productivity is of the essence, even slight variations in cost or liability, multiplied by thousands of employees and billions of production units, can make the difference between profit and collapse. such variations are expected, to a certain extent, among state laws. But the FLSA should not produce tremendous liability in one circuit, and none just

across the state line in a neighboring circuit. The very unpredictability inherent in the current state of disarray has an adverse effect on business for all the reasons recited in 29 U.S.C. 251 that motivated Congress to enact the Portal Act in the first place.

The unpredictability of employer exposure state-to-state, and the irreconcilability of the circuit court decisions on point, has caught the attention of commentators as well. The authors of *Continuous Confusion: Defining the Workday in the Modern Economy*, for example, bemoan the "lack of cohesive guidance" as to what constitutes compensable "work" under the FLSA, and explain that "[l]itigants and the lower courts continue to grapple with the contours of the continuous workday and those activities that are integral and indispensable to principal activities." Richard L. Alfred & Jessica M. Schauer, 26 ABA J. of Labor & Emp. L. 363, 363, 382 (Spring 2011). *See also* James Watts, *Dressing For Work Is Work*: *Compensating Employees Under The Fair Labor Standards Act For Donning And Doffing Protective Gear*, U. Det. Mercy L. Rev. 297 (Winter 2010) at 298 (citing the *Alvarez* Ninth Circuit decision, *De Asencio*, *Reich*, and *Gorman*, and concluding that "[f]actual differences alone cannot explain these conflicting decisions, as some cases presented very similar circumstances. The true cause of this split is in the law itself—the circuit courts simply disagree on the proper test for determining when employees must be compensated."); Maria Barbu, *The Ubiquitous Blackberry*: *The New Overtime Liability*, 5 Lib. U. L. Rev. 47, 60, 61 (Fall 2010) (noting that "the Court's holding in *Alvarez* has left many questions unanswered, such as what constitutes "any activity that is 'integral and indispensable" ' and

what are the appropriate boundaries of a workday," and that "courts are still struggling to define what amounts to de minimis work") (footnotes omitted).

Courts and commentators thus agree: the issue of what constitutes compensable "work" after *Alvarez* is a question over which the circuits are increasingly divided. It is time for this Court to step in.

* * *

When it enacted the Portal Act, Congress concluded that the previous interpretation of the FLSA caused numerous significant harms, including the "extended and continuous uncertainty on the part of industry"; the "financial ruin of many employers"; and courts nationwide "be[ing] burdened with excessive and needless litigation." 29 U.S.C. § 251(a).

We have arrived at that pass yet again. The Fourth Circuit has transformed this Court's narrow judicial exception to the Portal Act—for preliminary or postliminary activities "integral and indispensable" to work—into a revival of pre-Portal-Act jurisprudence that nullifies the very Act passed to supersede it. The Portal Act was enacted to restore the distinction between compensable work and noncompensable activities preliminary to and postliminary of work. But there is no daylight between this Court's definition of "work" in *Tennessee Coal* and *Anderson* as that "pursued necessarily and primarily for the benefit of the employer and his business," and the Fourth Circuit's definition of preliminary and postliminary activities "integral and indispensable" to work as those that

are both "necessary" and which "benefit the employer." Pet. App.16a, 31a.

Certiorari should be granted to restore the force of the Portal Act. Businesses need clarity on the issue of what preliminary and postliminary activities are "integral and indispensable" to work, and thus compensable, and which—as the Portal Act directs—are not.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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APPENDICES