No. 11-497

IN THE

Supreme Court of the United States

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

v.

LUISA PEREZ, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Because an important issue for resolution has not been presented, and because the Court has no unique federal question to resolve, petitioners have not carried their burden of demonstrating by "compelling reasons" that the writ should be granted. Sup. Ct. R. 10.

The "split in the circuits," to which petitioners refer, is a consequence of the issues being inherently fact specific, which causes different results depending upon the type of industry in each case. The differing results are not caused by the applications of different legal standards, but by different job descriptions. As a consequence, the Court has denied certiorari on at least four donning-and-doffing cases in the past five years, and should follow this precedent by denying certiorari again.

STATEMENT OF THE CASE

Petitioners Mountaire Farms, Inc. and Mountaire Farms of Delaware, Inc. (Mountaire) engage in the poultry business. Respondent Luisa Perez and about 250 opt-in respondents are or were workers at the Millsboro, Delaware plant owned and operated by Mountaire. This plant slaughters, processes, and distributes 1.5 million chickens per week. Pet. App. at 52a. In January 2006, workers brought this action against Mountaire in the United States District Court for the District of Maryland. The workers sought compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.,* for time spent donning and doffing Personal

Protective Equipment (PPE), washing and sanitizing themselves and their PPE, and walking from post to post. Mountaire has refused to pay the workers for this work.

After denying Mountaire's motion for summary judgment and certifying this as a collective action, the district court conducted a bench trial in March 2009. Its many findings of fact included the following:

Pursuant to United States Department of Agriculture and Occupational Safety and Health Administration safety regulations, as well as the mandatory practices at Mountaire Farms, prior to entering the chicken production areas, the workers must wash and don PPE. Pet. App. at 52a-54a. Their required PPE includes smocks, aprons, helmets, steel-toed boots, hair/beard nets, ear plugs, rubber gloves, safety glasses, mesh cut-resistant gloves, chain gloves, and sleeves. *Id.* at 53a. Not only are the PPE required by federal law, they are also required by Mountaire, and employees may be disciplined or fined for failing to wear any of the required PPE. *Id.* at 57a. Moreover, the trial judge found that in addition to being necessary, the PPE are primarily donned for Mountaire's benefit: wearing the PPE keeps the product clean and sanitary, keeps the line moving by avoiding injury to the workers, and protects workers from loud noise, cutting injuries, chicken fat, and blood. *Id.* at 85a-88a.

The PPE must be donned in the appropriate way to be effective. When the workers arrive at the plant, they generally retrieve any stored PPE from their lockers and walk to the place where Mountaire stores the clean smocks. *Id.* at 54a-55a. They obtain a clean smock, don it, and then don all the other PPE over their smocks. *Id.* at 54a. They must then walk through crowded hallways to the production line. *Id.* at 57a. Some workers don their PPE prior to walking down the hall, and others don it after walking down the hall but before entering the production area. *Id.* at 54a.

Mountaire provides an unpaid 36-minute lunch break each day. *Id.* at 58a. At the daily lunch break the workers partially doff their PPE, and most workers sanitize their aprons, boots, and gloves so that they may eat without blood and other chicken parts on their persons. *Id.* at 55a. Mountaire also prohibits the workers from taking their aprons, gloves, sleeves, or smocks into the restrooms. *Id.* at 54a.

At the conclusion of the day, the workers sanitize their PPE, doff them, place the smocks in a hamper, and return the rest of the PPE to their lockers. *Id.* at 55a & 56a.

After hearing testimony from two experts, the district court made several findings regarding the time consumed by the workers' donning and doffing. It found that the workers' expert, Dr. Radwin, conducted a study that was a "practical real-time

evaluation of the donning and doffing process." *Id.* at 74a. Dr. Radwin concluded that the workers reasonably spent an average of 20.879 minutes to don and doff their PPE throughout the day, including about 6.7 minutes around the lunch break. *Id.* at 65a & 66a. Dr. Davis, Mountaire's expert, found that the workers spent a total of 10.2 minutes donning and doffing each day. *Id.* at 73a. Dr. Davis determined the timing of the donning and doffing by asking Mountaire to designate participants to come to a conference room, where Dr. Davis laid out all their PPE on a table. *Id.* at 69a-70a. After explaining that he would be timing them, he watched as they put on and took off their PPE. *Id.* The court correctly found that this study was an "academic, rather than a real time, exercise that excluded washing, sanitizing and waiting time" and that did not have a random sampling of participants. *Id.* at 75a. The court found Dr. Radwin's time was a slight "overestimation" and that the actual total donning and doffing and walking time throughout the day was 17 minutes. *Id.* at 76a & 102a.

The district court found no willfulness in Mountaire's refusal to pay for donning-and-doffing time. *Id.* at 106a. Accordingly, it limited back pay to two years and declined to order statutory damages. *Id.* at 107a.

Mountaire appealed to the Fourth Circuit, arguing that the district court erred in holding that it violated the FLSA. The Fourth Circuit affirmed the judgment, except for the time spent donning and

doffing at the meal period, which it reversed based on recent Fourth Circuit precedent and the inter-panel-accord rule. *Id.* at 24a-26a.

The Fourth Circuit's opinion is a well-reasoned analysis that correctly applies the legal tests laid out by the Court regarding whether work is compensable as a principal activity. It held that whether the donning and doffing in the case was "integral and indispensable" (and hence compensable as a principal activity), depended on whether the acts were necessary to the principal work and primarily benefitted the employer. *Id.* at 15a-16a. Using this two-part test, the court found that the donning and doffing of PPE was integral and indispensable. It cited the district court findings that the employees do not have a meaningful option to don and doff their PPE at home, and that given the nature of the jobs and the need for strict compliance with sanitation measures, they must don and doff their gear at work. *Id*. at 21a-22a. The court also found that the PPE are required by federal law, as well as by company policy, and that the employees needed to wear PPE, given the nature of the work. These requirements, the court rightly found, mean that the donning and doffing is necessary. *Id*. at 21a-22a.

Based on many of the above-articulated facts, determined to be true by the district court, the Fourth Circuit concluded that the donning and doffing was integral and indispensable.

Judge Wilkinson concurred in Judge Keenan's "thoughtful opinion," agreeing that "donning-and-doffing at the beginning and end of the workday is compensable." *Id.* at 39a.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT POSE "AN IMPORTANT QUESTION OF FEDERAL LAW"

Mountaire has failed to meet the heavy burden required of those seeking certiorari. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. To obtain review in this case, Mountaire must pose an "important question of federal law." Rule 10(c). The Fourth Circuit has rendered a well-reasoned decision, but one that fails to raise a broad, national consequence.

The Court's past actions support denying the writ. By denying certiorari in several similar donning-and-doffing cases, the Court has already determined that the issues posed are not "important questions." *See Pirant v. United States Postal Serv.,* 130 S. Ct. 361 (2009); *De Asencio v. Tyson Foods, Inc.*,128 S. Ct. 2902 (2008); *Gorman v. Consol. Edison Corp.*, 128 S. Ct. 2902 (2008); *Bonilla v. Baker Concrete Constr., Inc.*, 128 S. Ct. 813 (2007). Each of these denials of certiorari came after the Court had set out the basic donning and doffing rules in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). The petition in

this case identifies no reason for a different result here.

In addition, several of the circuit court decisions relied upon by petitioner are unpublished and therefore do not establish precedent. Fifth Circuit Internal Operating Procedures 47.5.4; *see Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 Fed. App'x. 448 (5th Cir. 2009)*; Anderson v. Pilgrim's Pride Corp.*, 44 Fed. App'x. 652 (5th Cir. 2002); *Pressley v. Sanderson Farms, Inc.,* 33 Fed. App'x. 705 (5th Cir. 2002). By categorizing these decisions as not for publication, these circuit panels did not view their opinions as being "important." Thus, this precedent also counsels against granting the writ.

Any "important question of federal law" posed in this case has already been settled by this Court in 2005 in *Alvarez*, which held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." 546 U.S. at 37. To determine what constitutes "integral and indispensable" activity, the courts have uniformly referred to noncontroversial guides that measure factors such as (1) necessity of the work performed, (2) whether the employer requires it, (3) whether it primarily benefits the employer, and (4) whether the activity is required by law, company policy, or the nature of the work. *See, e.g.*, *Franklin v. Kellogg*, 619 F.3d 604, 619 (6th Cir. 2010); *Bonilla v. Baker Constr. Inc.*, 487 F.3d 1340, 1244 (11th Cir. 2007); *Alvarez v. IBP, Inc.,* 339 F.3d 894, 902-03 (9th Cir. 2003); *see generally Dunlop v.*

City Elec., Inc., 527 F.2d 394, 401 (5th Cir. 1976). These widely-accepted, overlapping guidelines were properly employed by the Fourth Circuit in the instant case. They pose no need for further refinement or elaboration by the Court.

II. THERE EXISTS NO MATERIAL SPLIT IN THE CIRCUITS

Under the FLSA the compensability analysis is "contact specific." *Alvarez*, 339 F.3d at 902; *Bamonte v. City of Mesa,* 598 F.3d 1217, 1232-1233 (9th Cir. 2010); *id.* (concurring and dissenting opinion) ("the fact sensitive compensability analysis"). What is integral and indispensable in each case does not depend on which circuit issued an opinion, but rather depends on the requirements of the particular job at issue. A review of the "circuit conflict" cases that petitioner cites firmly supports this view.

A. THE NON-POULTRY OR MEAT-PACKING CASES

Most of the cases upon which petitioner relies for its claim of circuit conflict center upon workplaces far different than the poultry plant in the present case. A review of these opinions demonstrates the fact sensitivity regarding the outcome in each, and particularly how reflective they are of the particular industry.

One variable turns on where the donning and doffing takes place. Having to change at the plant tends to support the right to compensation. *See Franklin*, 619 F.3d at 608; *Ballaris v. Walker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004) (being required to change at the plant "weighs heavily" in favor of compensability). Being able to don and doff at home, however, tends to lead to the denial of compensation. *See Bamonte*, 598 F.3d at 1226.

Another factor is the need for cleanliness on the worksite. Donning to promote an unusually clean environment tends toward compensability, *Ballaris* 370 F.3d at 911-912 (control airborne impurities in silicon wafer factory), while in a normal office setting the lack of this factor leads toward noncompensibility. *See Bamonte*, 598 F.3d at 1232-33 (police station); *Pirant v. United States Postal Serv.*, 542 F.3d 202, 208 (7th Cir. 2008) (postal office).

Having to don many items over an extended period tends toward compensability. *See Ballaris*, 370 F.3d at 905 (gowning activities took 30 minutes a day); *Franklin*, 619 F.3d at 620 (required pants, shirt, special shoes, hair nets, beard nets, safety glasses, ear plugs and bump caps). Donning just a few items goes in the opposite direction. *See Musch v. Domtar Indust.*, 587 F.3d 857, 860 (7th Cir. 2009) (workers failed to prove that they had daily need to shower and change); *Pirant*, 542 F.3d at 208 (only uniform, gloves and work shoes).

B. THE POULTRY AND MEAT PACKING CASES

The poultry and meat processing industries tend to have similar worker practices and job structures. They differ greatly from the jobs in the other industries outlined above. For both industries, the core focus on food leads to this stark difference. *Alvarez,* 339 F.3d at 898.

These industries involve many chances for worker injury due to cutting and contamination by splattered blood and fat. "It is one of the most dangerous jobs in America." *Id.* Because of public health concerns, poultry and meat plants are closely regulated by federal agencies. *Id.* (one of most regulated businesses in America). This regulation includes safety rules mandated by the Department of Agriculture and the Occupational Safety and Health Administration. Compliance with these rules is mandatory, not discretionary. Pet. App. at 52a, ¶ 7 & at 53a, ¶ 14.

Poultry and meat processing work entails not just donning and doffing, but donning and doffing intertwined with walking and washing the body and tools. Pet. App. at 54a, ¶ 15; *see Alvarez.,* 339 F.3d at 903.

The gear donned is more extensive, generally including ear plugs, bump caps, smocks, hair/beard nets, and steel-toed rubber boots, as well as nitrile/latex/rubber gloves, aprons, safety glasses, mesh cut resistant gloves, chain gloves and sleeves,

and sometimes knives and scissors. Pet. App. at 53a ¶¶ 8 & 9; *Alvarez*, 339 F.3d at 899; *De Asencio v. Tyson Foods, Inc.*, 361, 363-4 (3d Cir. 2007); *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 277 (1st Cir. 2004) *rev'd on other grounds*, 546 U.S. 21 (2005). The large number of items to be donned, doffed, and sanitized requires greater work time.

Donning and doffing equipment and clothing at home is impractical. Pet. App. at 57a, ¶ 39. The worker would have to drive to and from the plant in dirty, blood-soaked attire at the end of every day, and the employer would have no way of knowing whether clothing had been appropriately washed and sanitized.

C. *PEREZ* WOULD BE UPHELD IN THE OTHER CIRCUITS

In summing up its claim that a split in the circuits exists, Petitioner proclaims: "if *Perez* had been filed in the Second, Fifth, Seventh, or Ninth Circuits, the court would have concluded under these circuits' precedents that the donning and doffing of non-unique smocks, aprons, hairnets, helmets, boots and earplugs was noncompensable . . . ." Pet. Brief at 24a.

The Second Circuit *Gorman* case turned on facts far different than those encountered here. Only three items were donned and doffed (a helmet, safety glasses and boots). 488 F.3d 586, 594 (2007). *Gorman*

suggested that the time spent was *de minimis*. *Id.* n.7.

As shown above, there exists no published authority to tell us what the Fifth Circuit would do.

The Seventh Circuit also encountered facts far different than in *Perez*. *Pirant* concerned office work involving a minimum of gear. 542 F.3d at 208. Furthermore, its setting was far from the filth and sharp instruments encountered in the *Perez* poultry setting.

The *Perez* respondents would also prevail if controlled by the Ninth Circuit's *Alvarez* opinion. *Alvarez* held that donning and doffing generic PPE can be compensable unless it is *de minimis*. 339 F.3d at 903; *accord Bamonte*, 598 F.2d at 1232. In *Perez*, the court found the activities to be more than *de minimis*. Pet. App. at 34a.

The Court highlighted the importance of the nature of the job in determining whether an action is indispensable and integral in *Steiner v. Mitchell*, 350 U.S. 247 (1947). There, changing old clothes, which surely would be deemed "non-unique," met the compensability test.

Furthermore, all agree that once a unique item is donned, the continuous day rule makes all subsequent time compensable. *Alvarez*, 546 U.S. at 29; *Bamonte*, 598 F.3d at 1227. The most basic item donned by the *Perez* workers is their smock, which

must be donned first. Pet. App. at 54a, ¶16. The continuous day then flows to the doffing of the smock and ends when it is returned. *Id.* at 97a. It accordingly does not matter whether PPE is labeled unique or non-unique.

Because this factual application turns on the unique aspects of each case, it is not surprising that some activities will be deemed compensable and others not. And because fact patterns differ so, it is not unexpected that the results will vary from court to court.

There is little this Court can do to alter these results or to make a test that is more refined. This is a split in factual presentation, not in legal standards.

It is not unusual that the fact-driven nature of a FLSA case precludes the Court's pronouncement of broad legal rules. In a case concerning whether waiting time must be considered working time, the Court declared:

> [W]e cannot lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.

Skidmore v. Swift, 323 U.S. 134, 136 (1944).

III. THE OTHER QUESTIONS PRESENTED ARE ALSO NOT WORTHY OF CERTIORARI

Mountaire also raises three minor issues. None is of particular import. None involves a circuit conflict. None is shown to arise with any frequency. Each is entirely fact bound.

Mountaire basically contends that the Court should second guess the methodology engaged in by respondents' expert in arriving at a measurement of the workers' time expended. Pet. Brief at 27-33. It seeks issuance of the writ to challenge the district court's fact finding, which in large part upheld the expert's conclusions. However, it is not the Court's task to sit in judgment of the district court's fact finding, which, in fact, was not "clearly erroneous."

A. THE DISTRICT COURT CORRECTLY EXCLUDED WAITING TIME

Alvarez held that time spent by workers in waiting to put on protective gear was not compensable. 546 U.S. at 24. Instead, this was too removed from the productive activity. *Id.* at 42. Therefore, a worker standing in line to receive protective gear would not be engaging in a "principal activity."

In the instant case, the district court did not credit the workers with any time spent waiting. Instead, it started the compensation clock when their waiting was over and the first step to donning (securing protective gear) began. Pet. App. 62a, ¶ 74. Because a worker must don the smock first, Pet. App. 54a, ¶ 16, and because this timing is easily measured, receiving the smock is the logical marker for the start of the principal activity. *Id.* at 76a, ¶ 161.

The Fourth Circuit, citing the First Circuit's decision in *Tum v. Barber Foods, Inc.*, 360 F.3d at 283, found that the donning process necessarily included the employees' act of obtaining the gear and the doffing process necessarily entailed placing the gear in a bin or locker. Pet. App. at 42. This measurement is consistent with *Alvarez*, where the Court refused to start the clock for donning during the time spent before obtaining the clothing and equipment. 546 U.S. at 38.

Nothing in *Alvarez* was overlooked by the district court. Pinpointing the exact moment at which the "principal activity" was reasonably identified by the district court is a matter that should be left to the fact finder's discretion. It surely poses no "important question of federal law."

B. THE DISTRICT COURT CORRECTLY MEASURED WORKING TIME

The Court has held that "under the conditions prevalent in [respondent's] plant," the 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." *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 692 (1946).

In the instant case, however, time measurement cannot be this elementary. More than walking time is at issue. Also being measured are time spent donning, doffing, washing oneself, and sanitizing equipment, Pet. App. at 54a & 63a, activities that will vary from worker to worker. Indeed, because each worker has a different route to take and different gear to wear and clean, Pet. App. at 53a, ¶¶ 8-14, no single "minimum time" exists.

Furthermore, the district court rejected petitioners' time expert for the very reason that his flawed approach failed to establish any real-world minimum time. Pet. App. at 75a ¶ 159.

Finally, *Anderson* also held that a FLSA defendant has a duty to keep wage records. An employer who fails to keep records cannot complain that an employee's evidence on damages is inexact or imprecise. 328 U.S. at 688. In this case petitioner kept no wage records to show the time spent donning and doffing by each employee. This is not a

sufficiently significant issue for this Court to entertain.

C. THE COURTS CORRECTLY APPLIED THE *DE MINIMIS* EXCEPTION

Petitioners correctly note that *Anderson* held that a worker need not be compensated for time that was "*de minimis*." 328 U.S. at 692. Thus, trifles may be disregarded.

First, petitioners acknowledge that many courts have held the threshold of this measurement to be 10 minutes per day. Pet. at 31. Mountaire's own expert concluded that the workers were spending more than 10 minutes per day without compensation. Pet. App. at 73a. After subtracting for time spent at lunch breaks, the Fourth Circuit held that each worker was owed 10.2 minutes per day. *Id.* at 30a & 34a. Therefore, even applying the approach conceded by Mountaire, the unpaid time in this case was not *de minimis*.

Second, petitioners claim that the Fourth Circuit did not look at the number of minutes per day, but rather used a "global aggregation theory, never before applied to *de minimis* inquiries." Pet. at 32. This is not correct. The Fourth Circuit explicitly said that it would consider "whether the aggregate amount of time spent donning and doffing each day at the beginning and end of the work shifts, a total of 10.204 minutes, is *de minimis*." *Id.* at 31a. It rejected Petitioners' argument that ten minutes was

de minimis as a matter of law, and instead correctly analyzed the facts of the case using three well-established factors cited by petitioners in their petition. *See id.* at 33a; *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984).

The Fourth Circuit was unanimous in rejecting Mountaire's *de minimis* claim. Judge Wilkinson stated that he was "happy to join the court in concluding that the donning and doffing at the beginning and end of the workday is not *de minimis*." Pet. App. at 43a.

Therefore, the Court should decline to entertain petitioners' final question presented.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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