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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

1. In the years since *IBP, Inc.* v. *Alvarez*, 546 U.S. 21 (2005), employers in a host of industries have wrestled with multiple circuit court decisions instructing them, in conflicting ways, on when the paid workday starts and stops. *See Adams* v. *Alcoa*, __ F. Supp. 2d __, 2011 WL 4527664, at *5 (N.D.N.Y. Sept. 28, 2011) (noting that "the Courts of Appeals have adopted different approaches to determining whether donning and doffing particular protective gear is 'integral and indispensable' to employees' work" and citing the case below as among the differing approaches). The circuit split identified in this petition over the question whether donning and doffing activities are "integral and indispensable" to work, or are *themselves* "work," or are merely *preliminary to* "work," is significant, entrenched, and

outcome-determinative. The same facts, presented in FLSA cases arising in different circuits, will yield different results. That dissonance among the circuits causes costly uncertainties in employer practice, particularly with respect to those employers who operate facilities in multiple jurisdictions.

Yet respondents in their submission belittle the petition as presenting no "important issues" for resolution by the Court, and observe that "the Court has denied certiorari in at least four donning-and-doffing cases in the past five years." BIO 1. That is quite so. And that is as good a signal as any of the frequency with which these issues arise, and of the importance of these issues to employers and employees in industries as varied as the postal service, *Pirant* v. *U.S. Postal Service*, 542 F.3d 202 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 361 (2009); public utilities, *Gorman* v. *Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008); poultry processing, *De Asencio* v. *Tyson's*, 500 F.3d 361 (3d Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008); and construction, *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007), *cert. denied*, 552 U.S. 1077 (2007).

Indeed, in one of the most recent FLSA cases to be denied certiorari—*Pirant*—the Solicitor General in opposition actually *agreed* "that courts of appeals have taken different approaches to the question whether donning and doffing non-unique, non-burdensome gear qualifies as 'work' or as an activity that is 'integral and indispensable' to an employee's principal activities." *Pirant*, U.S. BIO 11 (citing and comparing *De Asencio*, 500 F.3d at 373, and *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 903-904 (9th Cir. 2003),

aff'd on other grounds, 546 U.S. 21 (2005), with *Gorman*, 488 F.3d at 593, and *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1125-26 (10th Cir. 1994)). The Solicitor General nevertheless recommended denial of certiorari in that case because the Seventh Circuit's decision was not a "suitable vehicle" for certiorari. *Pirant*, U.S. BIO 12. This petition presents no such "vehicle" issues. It catalogues multiple unsettled questions of law, across a significant number of circuits, on a detailed record, and it should be the charm.

2. Respondents also forthrightly acknowledge the "different results" across circuits in donning-and-doffing cases—but they ascribe those "different results" to "the type of industry in each case." BIO 1. That is wrong. The dissonance among the circuits arises not from "different job descriptions," *id.*, or specific industry practices, but from the various federal appellate courts' competing interpretations of the same language in Supreme Court decisions.

Respondents' attempt to impose some superficial order on the circuit split requires them to differentiate, first in general and then ever more meticulously, between and among what they dub "non-poultry or meat-packing cases" and "poultry and meat-packing cases." BIO 8, 11.[1] According to respondents, the "core focus on food" in the "poultry

[1] Respondents relatedly maintain that the FLSA's compensability analysis is " 'contact specific.' " BIO 8 (citing and quoting *Alvarez,* 339 F.3d at 902. What the Ninth Circuit actually said was that the Supreme Court's analysis of whether an activity is "principal," "integral" and/or "indispensable," or "work" is *context*-specific. *Alvarez*, 339 F.3d at 902. That does not mean it is *workplace*-specific.

and meat-packing cases" leads to a "stark difference" between results in the two categories. *Id.* at 10. In service of this theorem, respondents argue, using select decisions from various circuits, that different "workplaces," *id.* at 8, "where the donning and doffing" occurs, *id.* at 9, the "need for cleanliness on the worksite," *id.*, having to "don many items over an extended period," *id.*, and how "extensive" the gear donned, *id.* at 10, all contribute in their own way to the different results across different circuits.

All of these fine-milled distinctions are categories entirely of *respondents'* construction. The cases do not turn on those distinctions, which is why this Court and other courts freely cite decisions across varying workplaces in support of their analysis and conclusions. See, for example, *IBP* v. *Alvarez*, 546 U.S. at 29-30 (a meat and poultry case), which cites *Steiner* v. *Mitchell*, 350 U.S. 247 (1956) (a battery manufacturing case) and *Von Friewalde* v. *Boeing Aerospace Op's*, 339 Fed. Appx. 448, 453 (5th Cir. 2009) (a case about aircraft manufacturing), which cites *Alvarez*, 339 F.3d at 902; *Pirant*, 542 F.3d at 208 (a case involving the postal service), which cites *Reich*, 38 F.3d 1123 (meat) and *Anderson* v. *Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002) (poultry). And *IBP* v. *Alvarez* itself, after all, is a precedent applicable to "non-poultry" cases just as much as "poultry" cases. *See, e.g.*, *Kuebel* v. *Black & Decker Inc.*, 643 F.3d 352, 359 (2d Cir. 2011) (power tools); *Franklin* v. *Kellogg Co.*, 619 F.3d 604, 611 (6th Cir. 2010) (breakfast cereal); *Bamonte* v. *City of Mesa*, 598 F.3d 1217, 1220 (9th Cir. 2010) (police officers); *Dager* v. *City of Phoenix*, 380 Fed. Appx. 688, 689 (9th Cir. 2010) (police officers); *Albrecht* v.

Wackenhut Corp., 379 Fed. Appx. 65, 67 (2d Cir. 2010) (security); *Whalen* v. *United States*, 93 Fed. Cl. 579, 588 (Fed. Cl. 2010) (air traffic controllers).

Respondents' own examples from the meat and poultry industry, sparse as they are, demonstrate that circuit law, not the trappings of each workplace, governs compensability. In *Salazar* v. *Butterball, LLC*, 644 F.3d 1130 (10th Cir. 2011), the Tenth Circuit rejected poultry industry donning and doffing claims. In *De Asencio*, 500 F.3d at 373, the Third Circuit allowed them. The Fifth Circuit has affirmed the rejection of poultry industry donning and doffing claims. *See, e.g.*, *Anderson* v. *Pilgrim's Pride*, 147 F. Supp. 2d 556, *aff'd*, 44 F. Appx. 652; *Pressley* v. *Sanderson Farms*, 2001 WL 850017, at *3 (S.D. Tex. 2001), *aff'd*, 33 F. Appx. 705 (5th Cir. 2002).[2] And the Fourth Circuit in this case allowed them. Pet. App. 22a. There is, in short, no uniformity and predictability among the circuits—not even as to the "poultry and meatpacking" category respondents have devised.

Nor, similarly, is there any predictability among the circuits on the "non-poultry and meatpacking" side of respondents' imaginary ledger. *Compare, e.g.*,

[2] Respondents point out that the Fifth Circuit's decisions are unpublished. BIO 7, 12. But this Court regularly grants certiorari to resolve circuit conflicts created or perpetuated by an unpublished decision. *See, e.g.*, *Crawford* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 275 (2009) (reviewing unpublished decision where the decision conflicted with other circuits); *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 474 (2006) (same). *See also* Robert L. Stern, *et al.*, Supreme Court Practice § 4.11, at 263 (9th ed. 2007) (noting that the Court "might view an unpublished or summary decision on a subject over which the courts of appeals have split as signaling a persistent conflict").

Gorman, 488 F.3d at 593 (rejecting donning and doffing claims of workers at nuclear plant), *with Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004) ("clean room" manufacturing workers must be compensated for changing into "bunny suits"). Even in one particular category of employment—police work—some courts have denied donning and doffing claims by law enforcement officers. *See, e.g.*, *Dager*, 380 F. Appx. 688; *Bamonte*, 598 F.3d 1217; *Reed* v. *Cnty. of Orange*, 716 F. Supp. 2d 876, 882–883 (C.D. Cal. 2010); *Musticchi* v. *City of Little Rock*, 734 F. Supp. 2d 621, 626 (E.D. Ark. 2010); *Edwards* v. *City of New York*, 2011 WL 3837130 (S.D.N.Y. Aug. 29, 2011). But other courts have allowed such claims to go forward. *See*, *e.g.*, *Lesane* v. *Winter*, 2011 WL 6976649 (D.D.C. Dec. 30, 2011) (denying employer's motion for summary judgment on donning and doffing claim); *Rogers* v. *City and County of Denver*, 2010 WL 1904516 (D. Colo. May 11, 2010) (same); *Lemmon* v. *City of San Leandro*, 538 F. Supp. 2d 1200 (N.D. Cal. 2007) (donning and doffing compensable, but time *following* donning and doffing not compensable).

Respondents' attempt to conceal chaos beneath an orderly veneer is bankrupt factually as well as substantively. Most industrial jobs, after all, require some sort of specialized clothing, gear, or preparations, whether they involve poultry or pottery. The workers at the Mt. Clemens Pottery plant had to remove shirts, don overalls and aprons, grease their arms, and put on finger cots before their workday began. *Anderson* v. *Mt. Clemens Pottery*, 328 U.S. 680, 683 (1946). IBP's production workers wore smocks, hardhats, hairnets, earplugs, gloves, sleeves, leggings, and boots. *IBP*, 546 U.S. at 30.

Workers at Consolidated Edison don helmets, safety glasses, and steel-toed boots, and pass through multiple layers of security, before beginning work. *Gorman*, 488 F.3d at 594 n.6. Gear and garments may vary, but donning and doffing are common; and the circuits' widely varying treatment of FLSA donning and doffing claims cannot be ascribed merely to differences in the items donned and doffed.

3. Respondents devote a bare few paragraphs to the notion that the Fourth Circuit's decision below would be "upheld in the other circuits." BIO 11. What little they do say on the topic is demonstrably wrong. Respondents maintain that "*all* agree that once a unique item is donned, the continuous day rule makes all subsequent time compensable." BIO 12 (emphasis added and citations omitted). Not true. Neither the Third Circuit in *De Asencio* nor the Fourth Circuit in this case drew any distinction between "unique" and "non-unique" gear.

Respondents also attempt to distinguish the facts in *Gorman* (from the Second Circuit) and *Pirant* (from the Seventh Circuit) from the safety gear and processes at issue here. BIO 11-12. But there is no relevant distinction among these decisions for purposes of the courts' utterly conflicting FLSA analysis. Respondents next explain away the Fifth Circuit's multiple denials of donning and doffing claims because the decisions are unpublished. *Id.* at 12. But this Court regularly grants certiorari to review unpublished decisions. *See supra* at 4-5 n.2. And respondents maintain that the Ninth Circuit's relevant holdings are limited to the basic proposition that donning and doffing time is not compensable if *de minimis*. BIO 12. That again is not so; the Ninth

Circuit has held—quite unlike the Fourth Circuit here—that the time spent donning and doffing "non-unique gear such as hardhats and safety goggles * * * is not compensable." *Bamonte*, 598 F.3d at 1226; *Alvarez*, 339 F.3d at 903.[3] In sum, at least four circuits—the Second, Fifth, Seventh, and Ninth—would have concluded under those circuits' precedents that the donning and doffing of non-unique smocks, aprons, hairnets, helmets, boots, and earplugs was noncompensable and/or *de minimis*. The Fourth Circuit, however, found that time compensable and the employer liable.

4. Respondents offer little answer—other than quoting or paraphrasing the Fourth Circuit's ruling—to petitioners' additional questions for review. *See* Pet. i, Questions 2-4; BIO 14-18. Petitioners have explained that the Fourth Circuit's decision to start and stop time with *acquisition* and *release* of gear—rather than with donning and doffing—runs afoul of this Court's instruction in *Alvarez* that "the time employees spend waiting to put on" protective gear is not compensable. *See* Pet. i (Question 2); *id.* at 27-28. Respondents nonetheless maintain that "securing" or "receiving" gear—not *donning* gear—starts the compensation clock. BIO 15. As support, they cite a page from *IBP* v. *Alvarez* that recites the *Magistrate Judge's* opinion in that case, not this Court's holding. What this Court actually held in *IBP* was that the "time that elapses *before* the principal activity of donning integral and indispensable gear" must be excluded. 546 U.S. at

[3] As the petition explains, the Ninth Circuit in *Alvarez* held in the alternative that the compensation claims there were *de minimis*. *See* Pet. 18 n.6 (citing and quoting *Alvarez*, 339 F.3d at 903-904).

40 (italics in original). The time "before * * * donning" gear, of course, includes the time between "receiving" the gear and donning it.

Petitioners also explained that the Fourth Circuit failed to hew to this Court's instruction in *Anderson* when it concluded that FLSA plaintiffs could be compensated for the *average* amount of time required to complete "integral and indispensable" activities, rather than the *minimum* time necessary to complete such tasks. *See* Pet. i (Question 3); *id.* at 28-30.[4] The *Anderson* Court concluded that workers should be compensated for the minimum time necessarily spent, because it found that the plant workers in that case "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." 328 U.S. at 692. The Fourth Circuit nonetheless concluded that means were better because a minimum time "would not account for the fact that workers of different ages and states of well-being, with varying degrees of agility, are engaged in the performance of these activities." Pet. App. 29a-30a.

Respondents candidly agree that *Anderson* held compensable working time to be limited to "the minimum time necessarily spent" in walking from

[4] The district court also found plaintiffs' expert's averaging results—20.685 minutes—excessive, so by pure judicial fiat the court trimmed them to 17 minutes to allow "a reasonable discount * * * for laggards and outliers." Pet. App. 76a. The Fourth Circuit then snipped out a mean meal break time, as required by *Sepulveda* v. *Allen Family Foods*, 591 F.3d 209, 216 n.4 (4th Cir. 2009), *cert. denied*, 131 S. Ct. 187 (2010), to arrive at its magical 10.204-minute result.

time clock to work bench. BIO 16 (citing and quoting *Anderson*, 328 U.S. at 692). But respondents maintain that "time measurement cannot be this elementary" where "[m]ore than walking time is at issue." BIO 16. They cite precisely zero cases for support of that unusual proposition. The Fourth Circuit's decision plainly conflicts with *Anderson*, as well as with the decisions of multiple other courts. *See* Pet. 29 (citing cases). Certiorari should be granted on this issue.

Finally, petitioners have explained that the Fourth Circuit's "aggregation" theory similarly conflicts with this Court's precedents. *See* Pet. ii (Question 4), 31-33. In determining whether the claimed compensable time was de minimis, the Fourth Circuit "consider[ed] the aggregate amount of compensable time involved." Pet. App. 34a. It then proceeded to reckon the sum total of *all* claimed minutes, times *all* claimants, times the wage, times the number of years of liability at issue, and after all this multiplication concluded that because each employee was due pay for approximately 42.5 hours *per year*, over a several-year period, the "annual amount per employee is significant." *Id.* (emphasis added). Respondents have absolutely nothing to say about this in their opposition. The Fourth Circuit's ruling renders the de minimis rule an empty set; for as Judge Wilkinson cautioned in his concurrence, "there is no number so small that a suitable multiplier cannot make large." *Id.* at 47a. Certiorari should be granted to address and resolve this issue as well.

CONCLUSION

The current chaos among legal standards has led to a target-rich environment for FLSA plaintiffs and their counsel. *See* H. Pogust & A. Sciolla, *Making Up for Lost Time*, Trial, Aug. 2010, at 28, 34 (observing that "no employer is immune" to donning-and-doffing litigation and citing suits against employers as diverse as Walmart, Starbucks, Rite Aid, FedEx, Home Depot, Taco Bell, Best Buy, the University of Phoenix, Tyson Foods, and AT&T as examples). And commentators have noticed. *See, e.g.*, D.B. Panich & C.C. Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act*, Fed. Lawyer, Mar.-Apr. 2011, at 14 (noting that decisions involving donning-and-doffing claims "could have a tremendous impact on how courts resolve a distinctly modern workplace issue coming to the fore: whether employers must pay nonexempt employees for time they spend checking their BlackBerries, personal data assistants (PDAs), voicemails, and the like outside their regular workdays and on their 'own time.' That question may well constitute the next big wave in FLSA litigation."); *Making Up for Lost Time*, *supra*, at 34 (noting that in industries outside meat and poultry, "results are inconsistent" as to whether donning and doffing is compensable); L.S. Wilson & M.A. Correll, *Recent Developments in Fifth Circuit Employment Law*, 43 Tex. Tech. L. Rev. 911, 922 (2011) (observing that "[t]he Fifth Circuit was not exempt from the recent surge in donning and doffing litigation seen around the country"). Consumers, taxpayers, and business owners have a compelling interest in predictability and the rule of law. The Supreme Court should grant certiorari and bring long-sought

order to this legal morass. For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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