No. 06-3502

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MELANIA FELIX DE ASENCIO, MANUEL A. GUTIERREZ,
ASELA RUIZ, EUSEBIA RUIZ, LUIS A. VIGO,
LUZ CORDOVA, HECTOR PANTAJOS,

Plaintiffs-Appellants,

v.

TYSON FOODS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this Brief as *amicus curiae* in support of Plaintiffs-Appellants. The Secretary supports Plaintiffs-Appellants' argument that the district court incorrectly instructed the jury that, for the poultry workers' donning, doffing, and washing to constitute "work" under the Fair Labor Standards Act ("FLSA" or "Act"), it must involve physical or mental exertion. This instruction ignored a long line of Supreme Court precedent, recently re-affirmed in *IBP,*

Inc. v. Alvarez, a donning and doffing case, indicating that "'exertion' [i]s not in fact necessary for an activity to constitute 'work' under the FLSA." 126 S. Ct. 514, 519 (2005).[1]

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in the issue presented in this appeal because she administers and enforces the FLSA. *See* 29 U.S.C. 204, 216, 217. Consistent with that responsibility, the Department of Labor ("Department") has issued interpretive regulations addressing "hours worked" under the FLSA. *See* 29 C.F.R. Pt. 785. In addition, the Secretary has filed legal actions seeking compensation under the FLSA for donning and doffing in the poultry processing industry. *See Chao v. Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala., filed May 9, 2002); *Chao v. Perdue Farms, Inc.*, No. 02-CV-33 (M.D. Tenn., filed May 9, 2002) (consent judgment); *Chao v. George's Processing, Inc.*, No. 02-CV-03479 (W.D. Mo., filed Nov. 20, 2002) (consent judgment). The Department also recently has issued formal guidance regarding the meaning of "work" in the donning and doffing context after the Supreme Court's decision

[1] Plaintiffs-Appellants raise a number of other arguments in their brief. This amicus brief, however, addresses only the threshold issue of whether the district court properly instructed the jury on the definition of "work" under the FLSA because that is the only issue the jury reached. *See De Asencio v. Tyson Foods, Inc.*, No. 00-CV-4294 (E.D. Pa.), Docket No. 212, Jury Verdict Form.

in *Alvarez*. *See* Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006).[2]

STATEMENT OF THE ISSUE

Whether the district court erred by instructing the jury that poultry processing plant employees' donning, doffing, and washing of protective clothing and equipment constitute "work" under the FLSA only if these activities require exertion.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiffs sued Defendant Tyson Foods, Inc. ("Tyson") alleging violations of the overtime compensation provision of the FLSA. *See* 29 U.S.C. 207(a)(1).[3] Specifically, Plaintiffs claimed that donning and doffing protective clothing and equipment at the poultry plant, and washing their hands and this equipment, constitute "work" under the FLSA. *See* Docket No. 171, Joint Pre-trial Memorandum, at 2. Accordingly, such activities and associated walking time are compensable "hours worked." *Id.* Tyson countered that such activities are not

[2] A copy of the Department's Advisory Memorandum is included in the addendum to this brief.

[3] Plaintiffs also alleged violations of state law; however, those allegations are not at issue in this appeal. *See* Docket No. 163, Memorandum and Order, dated May 25, 2006, ruling that state law claims may not be pursued at trial commencing June 5, 2006.

"work" because they involve minimal effort and take little time. *Id.*

The case was tried before a jury beginning June 5, 2006. *See* Docket No. 182 (minute entry). On June 21, 2006, the jury returned a special verdict in favor of Tyson because it found that the poultry workers' donning, doffing, and washing activities were not "work" under the FLSA. *See* Docket Nos. 211 (minute entry), 212 (jury verdict form). Pursuant to this verdict, the district court entered an order of judgment in favor of Tyson on June 21, 2006. *See* Docket No. 214. Plaintiffs filed a timely notice of appeal on July 21, 2006. *See* Docket No. 240.

B. Statement of Facts

Plaintiffs are current and former hourly employees at Tyson's two chicken-processing plants in New Holland, Pennsylvania. *See* Docket No. 171, Joint Pre-trial Memorandum, at 3. They are required to put on and take off (referred to as "donning and doffing") protective clothing and equipment and engage in related sanitizing activities, such as rinsing this clothing and washing their hands, at the beginning and end of their shift and before and after meal breaks. *Id.* at 3-4. Tyson does not record the time spent by its employees performing these activities. *Id.* at 4.

At trial, the parties stipulated that "[p]ursuant to government regulations and corporate or local policy and practice, Tyson requires production employees at its New Holland facilities to wear certain safety and sanitary clothing and engage in certain washing activities." Tr., 6/19/06 afternoon session, at 42-43. The parties agreed that workers wore "a variety of sanitary and protective clothing and equipment," including "a cotton smock . . . a hair net; a beard net, for men with facial hair; earplugs; safety glasses; a dust mask; a plastic apron; soft plastic sleeves; cotton glove liners; rubber gloves; a metal mesh glove; and rubber boots." *Id.* at 43-44.[4]

C. The District Court's Jury Instruction and the Jury's Verdict

At the end of the trial, the district court gave the jury the following instruction defining "work" under the FLSA:

> [W]ork is any physical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and its business. . . .
>
> I said it requires exertion, either physical or mental, but exertion is not, in fact, necessary for all activity to constitute work under the Fair Labor Standards Act . . . an employer, if he chooses, may hire a worker to do nothing or to do nothing but wait for something to happen. So that

[4] Despite these stipulations, Tyson has argued that the following are disputed issues of fact: "[w]hether all of the donning, doffing, or washing activities at issue are required or controlled by Tyson Foods"; and "[w]hether all of the donning, doffing, or washing activities at issue are necessarily and primarily for the benefit of Tyson Foods or for the hourly employees." *See* Docket No. 171, Joint Pre-trial Memorandum, at 7; *see also* Tr., 6/20/06 morning session, at 54-64.

> would be an exception of the usual situation where the definition of work requires exertion.
>
> The plaintiffs claim that their donning, doffing, washing and rinsing activities are work. In deciding whether these activities are work under the law, you may consider the following factors. *For each job position, if the donning, doffing and washing at issue do not require physical or mental exertion, the activities are not work.* Therefore, you may ask yourself, is the clothing heavy or cumbersome or is it lightweight and easy to put on or take off? Does an employee need to concentrate to wash their hands or gloves or put on or take off these clothes? Can an employee put on or take off their clothes and wash their hands or gloves while walking, talking or doing other things?

Tr., 6/20/06 afternoon session, at 14-16 (emphasis added).

After deliberating for a short time, the jury asked the court, "What is the meaning of exertion in the definition of work? [P]hysical, or should we determine what or how much exertion?" Tr., 6/21/06, at 9. In response, the court re-read in full its instruction on "work" to the jury, quoted above. *Id.* at 10. After further deliberation, the jury concluded that Plaintiffs did not establish that their donning, doffing, and washing activities are "work" under the FLSA, and returned a verdict in favor of Tyson. *Id.* at 14-15.

SUMMARY OF THE ARGUMENT

The district court's charge to the jury that the employees' donning, doffing, and washing must involve exertion to constitute "work" under the FLSA was clearly wrong. As the Supreme Court recently reiterated (following precedent it first

established over 60 years ago) in a case addressing the compensability of time spent donning and doffing some of the same protective equipment that is at issue here, "'exertion' [i]s not in fact necessary for an activity to constitute 'work' under the FLSA." *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 519 (2005). Similarly, the Department's longstanding regulation on this issue states that "work" does not require any exertion, and the "[t]he workweek ordinarily includes 'all . . . time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.'" 29 C.F.R. 785.7 (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946)). Further, the Department recently stated in an Advisory Memorandum that, under Supreme Court precedent, "the time, no matter how minimal, that an employee is required to spend putting on and taking off gear on the employer's premises is compensable 'work' under the FLSA." Wage and Hour Advisory Memorandum No. 2006-2, at 2. Both the Department's longstanding regulation and its recently issued Advisory Memorandum are entitled to controlling deference. *See Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002).

The district court thus erred by instructing the jury that "work" requires exertion and that it therefore should consider whether the clothing at issue is heavy or cumbersome, and whether the employees' activities required concentration or

could be performed "while walking, talking or doing other things." Tr., 6/20/06 afternoon session, at 15-16. The district court compounded this error when it responded to the jury's specific question about what "exertion" means by simply repeating its erroneous instruction. In light of this fundamental legal error, this Court should reverse the district court's judgment in favor of Tyson, and remand the case for the district court to give a correct instruction on the definition of "work" under the FLSA.[5]

ARGUMENT

THE DISTRICT COURT IMPROPERLY INSTRUCTED THE JURY THAT AN ACTIVITY CONSTITUTES "WORK" UNDER THE FLSA ONLY IF IT INVOLVES EXERTION

A. Supreme Court Precedent Establishes that Exertion Is Not Necessary for an Activity to Constitute "Work" Under the FLSA

1. The FLSA generally requires employers to pay a minimum wage to covered employees, *see* 29 U.S.C. 206(a), and compensate these employees at one and one-half times their regular rate of pay for all hours worked in excess of forty hours in a workweek. *See* 29 U.S.C. 207(a)(1); *see also Turner v. City of*

[5] If the evidence establishes that the donning, doffing, and washing activities at issue are required or controlled by Tyson, performed on its premises, and for the employer's benefit, then these activities would constitute "work" as a matter of law. However, in light of the apparent dispute regarding these facts discussed in note 4, *supra*, the Secretary does not take a position on these subsidiary factual issues in this amicus brief.

Philadelphia, 262 F.3d 222, 224 (3d Cir. 2001). Thus, the FLSA reflects "a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment." *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

The Act does not specifically define the terms "work" or "workweek."[6] The Supreme Court, however, has construed these terms broadly. In *Tennessee Coal,* the Court defined "work" "as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. at 598. Later that Term, the Court clarified that this definition was "not intended as a limitation on the Act" and held that waiting, which requires no exertion at all, can be "work" under the Act. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen."). Thus, as early as 1944, the Supreme Court held that exertion is not required for an activity to constitute "work" under the FLSA.

2. Tyson argued below that *Armour* established a narrow exception to the general rule from *Tennessee Coal* that exertion

[6] The most relevant definition, in section 3(g) of the Act, provides that "'[e]mploy' includes to suffer or permit to work." 29 U.S.C. 203(g).

is required for an activity to constitute "work." *See* Tr., 6/19/06 afternoon session, at 66-67, 69-70. That exception, according to Tyson, is applicable only in "waiting time" cases, specifically, where an individual has been engaged to wait. *Id.* The judge's instruction indicates he accepted this argument. Tr., 6/20/06 afternoon session, at 15 ("[E]xertion is not, in fact, necessary for all activity to constitute work under the Fair Labor Standards Act . . . an employer, if he chooses, may hire a worker to do nothing or to do nothing but wait for something to happen. So that would be an *exception* of the usual situation where the definition of work requires exertion.") (emphasis added). A careful review of Supreme Court case law, however, clearly shows that the holding in *Armour* (and its companion case, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)), is not a limited "waiting time" exception to the rule in *Tennessee Coal*. It is instead a "clarifi[cation] that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA." *Alvarez,* 126 S. Ct. at 519.

Indeed, the Supreme Court has held in a number of cases that donning and doffing and similar activities constitute "work" under the Act, irrespective of the effort required to perform such activities. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 693 (1946), the Court held that certain preparatory activities, including putting on aprons and

overalls, turning on light switches, and opening windows, all of which took three to four minutes at most, "are clearly work falling within the definition enunciated and applied in the *Tennessee Coal* and *Jewell Ridge* [*Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945)] cases."[7] The Court stated that these activities are "controlled or required by the employer and pursued necessarily and primarily for the employer's benefit. They are performed solely on the employer's premises and are a necessary prerequisite to productive work." *Mt. Clemens*, 328 U.S. at 693. Significantly, the Court in *Mt. Clemens* defined the "statutory workweek," which provides the basis for minimum wage and overtime compensation under the FLSA, *see* 29 U.S.C. 206(a), 207(a), as including "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." 328 U.S. at 690-91. Thus, the Supreme Court in *Mt. Clemens* did not specify exertion as a necessary component of "work" in any context.

The decision in *Mt. Clemens* prompted Congress to pass the Portal-to-Portal Act (codified as amended at 29 U.S.C. 251-262) ("Portal Act"), which excludes from compensation travel time and other "preliminary" and "postliminary" activities, but only when

[7] In *Jewell Ridge*, the Supreme Court had reaffirmed the conclusion it reached in *Tennessee Coal*.

they occur before employees begin their first principal activity or after they conclude their last principal activity of the day. *See Alvarez*, 126 S. Ct. at 519-20. The Portal Act, however, does not change the definition of "work" or "workweek" under the FLSA. *See id.* at 520; s*ee also* 29 C.F.R. 785.7.

After Congress passed the Portal Act, the Supreme Court, in *Steiner v. Mitchell*, 350 U.S. 247 (1956), addressed the compensability of certain activities performed by employees working in a battery plant. Specifically, the Court addressed whether the time employees spent on the premises donning and doffing work clothes provided by their employer before and after their shifts, and showering at the end of the day, had "to be included in measuring the work time for which compensation is required under the Fair Labor Standards Act." *Id.* at 248. Although the Court did not specifically discuss the concept of "work," it held that the clothes-changing and showering were compensable under the Portal Act because they were "an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. The Court could not have reached this result if the clothes changing and washing activities were not "work" under the FLSA. *See Tennessee Coal*,

321 U.S. at 597 (FLSA guarantees "compensation for all actual *work*") (emphasis added).[8]

Just last Term, in *Alvarez*, the Supreme Court reaffirmed these precedents in the context of donning and doffing protective equipment in a poultry processing plant, the same type of plant in which Plaintiffs in this case worked. After discussing approvingly its broad characterization of "work" in *Tennessee Coal*, *Armour*, and *Mt. Clemens*, the Court concluded that "[o]ther than its express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work' and 'workweek,' or to define the term 'workday.'" *Alvarez*, 126 S. Ct. at 520. Thus, according to the Court, *Mt. Clemens's* statement that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace," 328

[8] The Court in *Steiner* noted that section 3(o) of the FLSA, which excludes clothes changing and washing time from "hours worked" if such time is excluded "by the express terms of or by custom or practice under a bona fide collective-bargaining agreement," 29 U.S.C. 203(o), supported the Department's position that the activities at issue were compensable "work." 350 U.S. at 255. The Court stated that section 3(o)'s "clear implication is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement." *Id.*

U.S. at 690-91, unequivocally remains good law. *Alvarez*, 126 S. Ct. at 519-20; *see also* 29 C.F.R. 785.7.

Significantly, in one of the appellate decisions reviewed in *Alvarez*, the First Circuit had held that the donning and doffing of required lab coats, hairnets, earplugs, safety glasses, steel-toed boots, aprons, and gloves was integral and indispensable to the employees' principal activity, and therefore is compensable "work" under the Act. *See Tum v. Barber Foods, Inc.*, 360 F.3d 274, 277, 279 (2004), *aff'd on this issue*, 126 S. Ct. 514 (2005). That court nonetheless concluded that walking after this donning activity was not compensable. *Id.* at 280-81. The Supreme Court reversed this latter ruling, holding that the walking time was compensable because it followed a principal activity. *See Alvarez*, 126 S. Ct. at 526-27. The argument that, after *Alvarez*, the very activities that made the walking time in *Tum* compensable -- the donning of required gear -- are not even "work" must be rejected out of hand.

3. Tyson relied on the Tenth Circuit's decision in *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125-26 (1994), to support its argument that, for an activity to constitute "work" under the FLSA, it must entail exertion. *See* Tr., 6/19/06 afternoon session, at 77. In *Reich v. IBP*, the court concluded that donning and doffing safety glasses, earplugs, hard hats, and

safety shoes in meat processing plants was not "work" under the FLSA because it took "all of a few seconds and requires little or no concentration." 38 F.3d at 1125-26. In contrast, the court held that donning and doffing of special protective gear used by knife-workers, including a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, a scabbard, and shin guards, did constitute "work" because the items were "heavy and cumbersome." *Id.* at 1126.

The Tenth Circuit's holding regarding "work" in *Reich v. IBP* was effectively overruled by *Alvarez*, as discussed above. Indeed, the Ninth Circuit decision that the Supreme Court affirmed in *Alvarez* had specifically concluded that meat processing employees' donning and doffing of required smocks, hardhats, hairnets, earplugs, face shields or safety glasses, gloves, plastic sleeves and leggings, aprons, and safety boots and shoes "constitute 'work' under [*Tennessee Coal*] and *Armour's* catholic definition: 'pursued necessarily and primarily for the benefit of the employer.'" *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd*, 126 S. Ct. 514 (2005). The Ninth Circuit clarified that *Tennessee Coal's* "'work' term" is "[d]efinitionally incorporative" and "includes even non-exertional acts." *Id.* As discussed above, the Supreme Court in

Alvarez adopted this definition. *See* 126 S. Ct. at 519 ("'exertion' [i]s not in fact necessary for an activity to constitute 'work' under the FLSA").

Other decisions have also called into question the Tenth Circuit's *Reich v. IBP* holding that the donning and doffing of gear such as safety glasses and earplugs is not "work." *See Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911-12 (9th Cir. 2004) (donning and doffing cleanroom "bunny suits" constitutes "work" because it is "activity, burdensome or not, performed pursuant to Wacker's mandate for Wacker's benefit as an employer") (internal quotation marks and citation omitted); *Fox v. Tyson Foods, Inc.*, No. 99-BE-1612, 2002 WL 32987224, at *9 (N.D. Ala. 2002) (order adopting magistrate judge's report and recommendation) (poultry workers' donning and doffing of protective clothing and equipment qualifies as "work" under the FLSA; "the Supreme Court has clearly expressed its intention that the burdensomeness of the activity be disregarded in an assessment of whether the activity is 'work.'"); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 923 (N.D. Ill. 2003) ("[P]ace boners' and pace trimmers' donning and doffing of sanitary and safety equipment, equipment cleaning and knife sharpening constitute work because these activities are controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.") (internal

quotation marks and citation omitted). In fact, even the Tenth Circuit has deviated from its *Reich v. IBP* holding, stating that exertion is not, in fact, required for an activity to constitute "work" under the FLSA. *See United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1116 n.8 (1999). *But see Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1289 (10th Cir. 2006) (relying on *Reich v. IBP* to hold that loading personal safety equipment into vehicle used for commuting was not "work" under the FLSA). Thus, the Tenth Circuit's decision in *Reich v. IBP* cannot be relied on to support the jury instruction in this case.[9]

4. In light of the Supreme Court precedent discussed above, and in particular the Court's recent decision in *Alvarez*, the district court erred in instructing the jury that only activities involving physical or mental exertion constitute "work," and that the jury must therefore consider whether the poultry workers' clothing and equipment were heavy or cumbersome, and whether their donning, doffing, and washing of that clothing and equipment, or washing their hands, required

[9] For the same reasons, the decisions in *Pressley v. Sanderson Farms, Inc.*, No. H-00-420, 2001 WL 850017, at *2-3 (S.D. Tex. 2001), *aff'd*, 33 F. App'x 705 (5th Cir. 2002) (per curiam, unpublished opinion), and *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 561 (E.D. Tex. 2001), *aff'd*, 44 F. App'x 652 (5th Cir. 2002) (per curiam, unpublished opinion), which relied upon *Reich v. IBP* to conclude that poultry workers' donning and doffing of protective equipment does not constitute "work," are not persuasive.

concentration. Rather, to the extent that these activities were controlled or required by Tyson and done for its benefit, the employees' donning, doffing, and washing clearly satisfy the definition of "work" under the FLSA.

B. The Department's Recent Advisory Memorandum States that Employer-Required Donning and Doffing Performed on the Employer's Premises Qualifies as "Work" Under the FLSA

The broad construction of "work" set out by the Supreme Court also was recently articulated in the Department's Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006), which analyzes the impact of the *Alvarez* decision. That Memorandum states that under Supreme Court precedent, "the time, no matter how minimal, that an employee is required to spend putting on and taking off gear on the employer's premises is compensable 'work' under the FLSA." Wage and Hour Advisory Memorandum No. 2006-2, at 2. Similarly, the Secretary's longstanding regulations specifically provide that "work" does not require any exertion, and that "[t]he workweek ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace.'" 29 C.F.R. 785.7.

Both the Department's recently issued Advisory Memorandum and its longstanding regulations are entitled to controlling deference. *See Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (*Chevron* deference appropriate absent notice-and-comment

rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time"); *see also Robert Wood Johnson Univ. Hosp. v. Thompson*, 297 F.3d 273, 281-82 (3d Cir. 2002) (Secretary of Health and Human Services Medicare Geographic Classification Review Board guidelines entitled to *Chevron* deference); *cf. Skidmore*, 323 U.S. at 140 (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Ingram v. County of Bucks*, 144 F.3d 265, 268 (3d Cir. 1998) ("The Department of Labor's regulation of the Fair Labor Standards Act is entitled to substantial deference.").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and remand the case to the district court to provide a correct instruction on the definition of "work" under the FLSA.

Respectfully submitted,

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CERTIFICATE OF BAR ADMISSION

No certification of bar admission is required for attorneys representing the federal government or federal administrative agencies.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, VIRUS SCAN AND PDF DUPLICATION

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing *Amicus* Brief for the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,239 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface with 10.5 characters per inch, using Microsoft Office Word 2003, Courier New font, 12 point type.

3. The text of the brief transmitted to the Court as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. The PDF file was scanned for viruses using VirusScan Enterprises 7.1 by McAfee Security, and the scan indicated there were no viruses present.

11/8/06
Date

/s/ Joanna Hull
Joanna Hull
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2006, I sent by Federal Express overnight delivery the original and 9 copies of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* to the Clerk of the United States Court of Appeals for the Third Circuit. In addition, on this same date I sent an electronic version of this brief to the Court via e-mail.

I also certify that 2 copies of this brief have been served on each of the following counsel of record by first class mail, postage prepaid, and by e-mail, this 8th day of November, 2006:

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