No. 11-2344

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DIMAS LOPEZ, *et al.*,

PLAINTIFFS-APPELLANTS,

v.

TYSON FOODS, INC.,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court
for the District of Nebraska

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(a), the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of the Plaintiffs-Appellants in this "donning and doffing" case arising under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq*., as amended by the Portal-to-Portal Act of 1947 ("Portal Act"), 29 U.S.C. 251 *et seq*.

INTEREST OF THE SECRETARY OF LABOR

The Secretary administers and enforces the FLSA as amended by Portal Act. *See* 29 U.S.C. 204, 211, 216(c), 217. Consistent

with that responsibility, the Department issued interpretive regulations addressing the compensability of "hours worked" under the FLSA, *see* 29 C.F.R. Part 785, and the Portal Act, *see* 29 C.F.R. Part 790. The Department also issued formal guidance on the compensability of donning and doffing activities under the FLSA after the Supreme Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (in which the United States participated as amicus curiae). *See* Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006) ("Advisory Memo. 2006-2").

Moreover, with the goal of achieving nation-wide uniformity, the Secretary has entered into settlement agreements in *Chao v. Perdue Farms, Inc.*, No. 2-02-0033 (M.D. Tenn. May 10, 2002), *Solis v. Pilgrim's Pride Corp.*, No. 1:07-CV-1832 (W.D. Ark. Feb. 1, 2010), and *Solis v. Tyson Foods, Inc.*, No. 2:02-CV-01174 (N.D. Ala. June 4, 2010), whereby each poultry processing company agreed to compensate employees for all time during the continuous workday, including all time spent by employees donning, doffing, sanitizing, waiting, and walking before and after their shift and meal periods. Further, the Secretary filed amicus curiae briefs and presented oral argument in *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011), and *Helmert v. Butterball, LLC*, Nos. 4:08-cv-342, 4:10-cv-1025, 2011 WL 3157106 (E.D. Ark. July 27, 2011), where she argued that the courts should apply the "continuous workday" rule, requiring

that employees be compensated for all time between the first principal activity of donning and the last principal activity of doffing (outside of bona fide meal periods or off-duty time). These two courts specifically rejected reasonable time as an appropriate measure of compensation during the continuous workday.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by instructing the jury that only the reasonable amount of time spent on pre- and post-shift activities by employees at the Lexington, Nebraska plant was compensable.

ARGUMENT

THE DISTRICT COURT'S INSTRUCTION TO THE JURY THAT ONLY THE REASONBLE AMOUNT OF TIME SPENT IN PRE- AND POST-SHIFT ACTIVITIES IS COMPENSABLE, AND NOT THE ACTUAL AMOUNT OF TIME SPENT DURING THE CONTINUOUS WORKDAY, WAS AN ABUSE OF DISCRETION.

A. Donning and Doffing Sanitary Items and Protective Equipment is Integral and Indispensable to the Employees' Principal Activities and, Therefore, Those Activities are Principal Activities that Start and End the Compensable Continuous Workday.

1. The jury instructions (Nos. 15 and 17) erroneously stated that employees should be compensated for only the time reasonably spent in pre- and post-shift activities.[1] The FLSA

[1] Indeed, the district court's instructions were clearly in tension with the district court's own continuous workday instruction (No. 18). Moreover, their use was clearly

generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946); *see Alvarez*, 546 U.S. at 25. This rule reflects Congress' judgment that an employee should generally receive compensation for all time that he is under the direction or control of the employer. *See Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

2. The Portal Act creates a limited exception to this general rule. It excludes from compensation travel to and from the location of the employee's principal activity, and activities that are "preliminary to or postliminary" to that principal activity, "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). The Portal Act excludes travel and other preliminary and postliminary activities only when they occur outside the workday, which is defined as "the period between the

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prejudicial to the employees. *Compare* Jury Verdict (Doc. 1045), *Garcia v. Tyson Foods, Inc.*, No. 06-2198-JTM (D. Kan. Mar. 16, 2011) (jury returned a verdict in favor of the employees of Tyson's Emporia, Kansas meat processing plant when the jury instructions did not contain an erroneous instruction on reasonable time).

commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. 790.6(b). This principle, known as the "continuous workday" rule, requires an employer to pay an employee for all activities (outside of bona fide meal breaks and off-duty time) that occur during the workday – after the employee commences his first principal activity and before he concludes his last principal activity. *See Alvarez*, 546 U.S. at 28; *see also* Wage and Hour's Interpretative Bulletin No. 13 (reissued October 18, 1939) (employee's working hours will include "all hours from the beginning of the workday to the end with the exception of period when the employee is relieved of all duties for the purpose of eating meals"). Thus, compensable time during the continuous workday is not affected by the Portal Act.

3. The Supreme Court concluded 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," and therefore is compensable under the FLSA. *Alvarez*, 546 U.S. at 37. Such an activity commences and ends the continuous workday, and marks the beginning and end of compensable time. *See id.*; *see also* Advisory Memo. 2006-2, at 2. Therefore, if the donning and doffing of sanitary items and protective equipment is integral and indispensable to the employees' principal activities, the donning and doffing themselves are

principal activities that mark the beginning and the end of the continuous workday, and the employees are entitled to compensation for those activities and any other activities, including any walking, waiting, and washing that occur between the first and last principal activities. *See Alvarez*, 546 U.S. at 37. The Supreme Court thus rejected any legal distinction between the compensability of activities that happen during the production shift and those that occur pre- and post-shift during the continuous workday.

4. Donning and doffing activities are work and integral and indispensable activities. The Supreme Court in *Steiner v. Mitchell*, 350 U.S. 247 (1956), concluded that changing into old clean work clothes and showering on the employer's premises by battery plant workers were integral and indispensable to the employees' principal activities, and thus employees should be compensated for time spent donning and doffing and showering. *See* 350 U.S. at 249, 254-58. In reaching that conclusion, the Court found persuasive Senator Cooper's statement during debate on the Portal Act that "if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable." *Id.* at 258. *Steiner*'s holding was also based in part on the Department's regulations interpreting the Portal Act. *Id.* at 255 n.9 (relying on 29 C.F.R. 790.8). These regulations state

that if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c). The regulations explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer or by the nature of the work." 29 C.F.R. 790.8(c) n.65. By contrast, "if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c).[2]

The Supreme Court in *Alvarez* reaffirmed this precedent in the context of donning and doffing sanitary items and protective equipment in poultry and meat processing plants. The Court necessarily accepted the Ninth Circuit's and First Circuit's determination that donning and doffing required sanitary items and protective equipment was integral and indispensable to the poultry and meat processing employees' principal work activities

[2] The Department's position is that "if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." Advisory Memo. No. 2006-2, at 3. The option must be meaningful and not illusory. *See Perez*, 650 F.3d at 368.

when it concluded that any walking and waiting time that occurs after such donning and doffing is compensable. *See* Alvarez, 546 U.S. at 37, 39. As stated by the Fourth Circuit, "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." *Perez*, 650 F.3d at 368.

5. Several other courts have specifically concluded that donning and doffing of sanitary items and protective equipment is integral and indispensable and thus compensable. The Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005), held that donning and doffing required sanitary items and protective equipment was integral and indispensable to the meat processing employees' principal work activities. *Id*. at 902-03. The court ruled that an activity is integral and indispensable if it is necessary to the principal work performed and done for the benefit of the employer. *Id.* The Ninth Circuit concluded that the donning and doffing in a meat processing plant was "necessary to the principal work performed," because the donning and doffing of the equipment on the plant premises was required by law, by the rules of the employer, and by the nature of the work. *Id.* at 903. Moreover, the court concluded that the donning and doffing of this equipment "is, at both broad and basic levels, done for

the benefit of [the employer]" because it allows the employer to satisfy its requirements under the law, and prevent unnecessary workplace injury and contamination. *Id.*; *see Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911-12 (9th Cir. 2004).

Similarly, the Sixth Circuit concluded that donning and doffing of food safety uniforms, hairnets, beard nets, safety glasses, earplugs, and bump caps by employees at a breakfast food processing plant was integral and indispensable when the activities were required by the employer and performed primarily for the benefit of the employer because the items ensured sanitary working conditions and untainted products. *See Franklin v. Kellogg Co.*, 619 F.3d 604, 620 (6th Cir. 2010). More recently, the Fourth Circuit in *Perez* held that the time spent by employees in a poultry processing plant donning and doffing protective equipment and sanitary items at the beginning and end of each workday is compensable. 650 F.3d at 367-68. Following the reasoning of *Steiner* and *Alvarez*, the court concluded that the donning and doffing was integral and indispensable when there was evidence that the activities were necessary because employees are required by federal law and company policy to wear and wash sanitary items and protective equipment on the production line, and when there was evidence that the activities primarily benefitted the employer because

the items ensure safety and sanitation on the production line. *Id.* at 366-67.

6. The donning and doffing by Tyson's employees is work and is integral and indispensable to their principal activities of meat processing. Tyson's employees cannot process meat on the production line without putting on certain required "non-unique" sanitary items, such as ear plugs, hard hats, smocks or whites, hair and beard nets, and cotton gloves, and "unique" protective equipment, such as mesh aprons, scabbard (holster), cut resistant gloves, arm guard and cut resistant mesh sleeves. *See* 29 C.F.R. 790.8(c).[3] Tyson admits that all employees must don their sanitary and protective equipment before beginning work on the production line and must doff it before leaving the plant at the end of their shift. Indeed, it is undisputed that the sanitary and protective equipment is not only required by USDA and OSHA regulations, but also by Tyson's own corporate

[3] Whether an item is "unique" or "non-unique" is not dispositive in determining whether donning and doffing is compensable. *See Alvarez*, 546 U.S. at 32; *see also* Advisory Memo. No. 2006-2, at 3. Indeed, the Supreme Court in *Steiner* ruled compensable the donning and doffing of "non-unique" equipment – namely "old but clean work clothes" – because they were integral and indispensable to the employees' principal activities. *See* 350 U.S. at 256. As the Fourth Circuit in *Perez* stated, "[t]he work clothes at issue in *Steiner* were simply described as 'old but clean work clothes,' and the Supreme Court did not characterize the clothes as 'special.' Thus, we hold that these terms are not relevant to our 'integral and indispensable' analysis, and we do not classify the employees' protective gear in this manner." 650 F.3d at 366 (internal citations omitted).

policies. *See* 29 C.F.R. 790.8(c) n.65. Moreover, the employees' donning and doffing is done for the primary benefit of Tyson, because it protects employees from workplace hazards and the product from contamination.[4] These facts establish that the donning and doffing of sanitary items and protective equipment is integral and indispensable to the employees' principal activities at the Lexington facility. Because the donning and doffing here is integral and indispensable to meat processing, such activities are principal activities that start and end the continuous workday.

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[4] Tyson's argument that the employees receive the primary benefit of wearing the protective equipment such as mesh guards, hard hats, and safety glasses because it protects from workplace injuries is unavailing. The Supreme Court in *Steiner* held that donning and doffing of old clean work clothes and showering is integral and indispensable and thus compensable because such measures were required to "make the[] plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation." 350 U.S. at 251. Thus, the Supreme Court recognized that employee safety and protection is a benefit to the employer. Moreover, other courts have recognized that employee safety or a reduction in workers compensation claims is a primary benefit to the employer. *See Perez*, 650 F.3d at 367 (concluding that the employees' acts of donning and doffing primarily benefit the employer when the factual record established that these activities protect the workers, help keep workers' compensation payments down, keep missed time to a minimum, and shield the company from pain and suffering payments); *Franklin*, 619 F.3d at 620 ("Certainly, the employees receive protection from physical harm by wearing the equipment. However, the benefit is primarily for Kellogg, because the uniform and equipment ensures sanitary working conditions and untainted products."); *Alvarez*, 339 F.3d at 903 (concluding that donning and doffing is for the benefit of the employer because it prevents unnecessary workplace injury and contamination).

B. The Compensable Continuous Workday is Not Qualified By Any Reasonableness Standard.

1. The "continuous workday" rule requires employees to be compensated for all time spent during such workday (outside of bona fide meal periods and off-duty time), regardless of how long those activities take to perform or whether productive work is being performed during the entire time. *See Alvarez*, 546 U.S. at 37; *see also* 29 C.F.R. 790.6(b).[5] The Supreme Court

[5] The Department's "hours worked" regulations exclude from compensable time during the continuous workday "bona fide meal periods." The bona fide meal period exception from the continuous workday, however, clearly is not applicable until the employee ceases performing work before the start of the meal break; similarly, it is not applicable once he resumes work after the actual meal period. *See* 29 C.F.R. 785.19 ("Bona fide meal periods are not worktime."). Tyson's employees are performing work until they complete doffing and washing, and therefore must be compensated for the time spent performing those activities and any other work activities as part of the continuous workday. Not until the completion of these and any other work activities can it be said that the bona fide meal period has begun, irrespective of any claims by an employer that the meal break period starts before then. Similarly, the employees' bona fide meal period ends once they again are required to engage in work activities, such as re-donning and/or washing their sanitary and protective equipment in order to return to the production line. *See* Wage and Hour Opinion Letter, 2001 WL 58864, at *2 (Jan. 15, 2001) (opinion on the 3(o) issue later withdrawn) ("[T]he meal period may not include any time performing 'work,' and that time spent donning and doffing of personal protective equipment, clothing or gear before or after the meal period is compensable."). The bona fide meal period exception simply does not apply to a situation where the employer requires its employees to engage in a few minutes of work at the beginning and end of each and every employer-established meal period without compensation. Thus, Tyson's employees must be compensated for all donning and doffing and related activities that occur at the start and end of their employer-provided meal period as part of the continuous

applied this rule broadly, holding that "during a continuous workday, 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 is excluded from the scope of that provision, and as a result is covered by the FLSA." *Alvarez*, 546 U.S. at 37. The Court rendered this holding without considering whether those employees took roundabout journeys or stopped off en route for purely personal reasons. Thus, the Court did not analyze the compensability of the walking time during the continuous workday in terms of whether it was "reasonable." Similarly, the Supreme Court in *Alvarez* concluded that the First Circuit was incorrect in holding that pre-doffing waiting time was not compensable on the ground that it "qualified as a 'preliminary or postliminary activity'" and was thus excluded by the Portal Act. *Id.* at 39-40. Rather, the Court, again without applying a test of "reasonableness," stated that "[b]ecause doffing gear that is 'integral and indispensable' to employees' work is a 'principal activity' under the statute, the continuous workday rule mandates that

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workday. *See Perez*, 650 F.3d at 369 ("If we were writing on a clean slate, we would hold that . . . these activities are not part of the 'bona fide meal period' but are compensable as 'work' under the continuous workday rule."). Therefore, the district court's jury instruction (No. 19) that required that the meal period be analyzed as a whole to determine compensability, without regard to whether any work was performed, was an abuse of discretion.

time spent waiting to doff [as opposed to time spent waiting to don in that case] is not affected by the Portal-to-Portal Act and is instead covered by the FLSA." *Id.* at 40.[6] A reasonableness standard, which would not compensate an employee for all of the time spent during the continuous workday, is therefore inconsistent with the holding in *Alvarez*.[7]

2. Moreover, the Ninth Circuit in *Alvarez* rejected "reasonable time" in the context of donning and doffing during the continuous workday at a meat processing plant. *See* 339 F.3d at 914. Adopting a continuous workday theory, the Ninth Circuit

[6] Although the Supreme Court described the jury's factual findings in *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 9 (1st Cir. 2004), *rev'd on other grounds*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), as including "the amount of time reasonably required for each category of employees to don and doff" required protective gear, *Alvarez*, 546 U.S. at 39, it made no mention of any "reasonableness" criterion in holding that all post-donning and pre-doffing walking and waiting time is compensable as part of the continuous workday. Thus, any reliance on *Tum* is misplaced.

[7] Reliance on a passage from the Supreme Court's decision in *Mt. Clemens*, stating that "[i]t would be unfair and impractical to compensate" employees for taking a "roundabout journey[] and stopp[ing] off en route for purely personal reasons" in walking from time clock to work bench, 328 U.S. at 692, to support a conclusion that employees are not entitled to compensation for all of the time that they spend engaged in donning, doffing, and related activities is misplaced. It is important to recognize the context in which that statement was made. The Supreme Court was addressing (and attempting to limit its expansive ruling concerning) time that Congress in the Portal Act later designated as preliminary, non-compensable walking time, because it preceded the employee's first principal activity. *See* 29 U.S.C. 254(a). The Portal Act thus changed the legal landscape by redefining the boundaries of compensable work (first and last principal activities), thereby obviating the need to apply any "reasonableness" standard.

concluded that "[t]he district court properly reasoned that the workday commenced with the performance of a preliminary activity that was 'integral and indispensable' to the work, and the district court also properly determined that any activity occurring thereafter in the scope and course of employment was compensable." *Id.* at 906. The court stated:

> There is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done. . . . The district court correctly held that Pasco plant work time was continuous, not the sum of discrete periods.

Id. at 907. The Ninth Circuit decided, however, that the district court properly applied an appropriate measure of damages based upon *Mt. Clemens* by using an average in order to avoid "countless individual plaintiff-specific quagmires, while directing the parties to individualize the damage measure to the extent possible nevertheless." *Id.* at 914. In reaching that decision, the Ninth Circuit specifically noted that the district court had not concluded that "any particular plaintiff's 'work' was unreasonable or inherently noncompensable," and ruled that work could not be defined by an objective measure of reasonableness. *Id.* Thus, the Ninth Circuit recognized that when there are no records of actual time worked, plaintiffs can establish damages by an approximate award based on reasonable inferences. *Id.* at 914-15. In short, a reasonable

approximation of damages is appropriate when records are unavailable, but excluding activities from compensable time because they are "not reasonable" is not. Thus, the *Mt. Clemens* damages standard, which was intended to not penalize employees for an employer's failure to keep records by allowing an approximation of back wages due, cannot be used to support a "reasonable time" theory for measuring compensable work.

3. Following the reasoning of *Alvarez*, the Fourth Circuit in *Perez* concluded that "[u]nder the 'continuous workday rule,' the compensable workday begins with the first 'principal activity' of a job and ends with the employee's last 'principal activity,'" 650 F.3d at 363, and that under that rule, "the employees are entitled to compensation for those [donning and doffing] activities and any other activities, such as sanitizing and walking, which occur between the first and last principal activities." *Id.* at 368. Significantly, the Fourth Circuit rejected the employer's "reasonable time" argument. Specifically, the court rejected the argument that "compensable time instead should have been calculated by adding together the minimum amounts of time expended by the best-performing employees in completing each activity." *Id.* at 372. The court noted the fallacy in such an argument by explaining that this "method of calculation would not account for the fact that workers of different ages and states of well-being, with varying

degree of agility, are engaged in the performance of these activities." *Id.* Instead, the court concluded that in calculating back pay an average of all of the time taken by employees to perform donning and doffing and related activities "provides a more accurate representation of the amount of time that employees working at the plant actually spend donning and doffing." *Id.* Thus, while a calculation of back pay might necessitate an "average," the measure of compensable time is that time actually spent in donning and doffing.[8]

4. Agreeing with the Secretary, the district court in *Helmert* rejected the employer's position that the FLSA allows employees to be compensated for a reasonable amount of time spent in donning and doffing and related activities rather than actual time. Specifically, the district court concluded that "[i]t is clear from the Supreme Court's decision in *Alvarez* that employers are to record and pay employees for actual hours worked – in other words, all of the time between an employee's first principal activity and last principal activity that is not otherwise excluded under the Act." *Helmert*, 2011 WL 3157106, at *7. Moreover, the district court recognized the critical distinction between awarding damages based upon a reasonable estimate of hours worked when the employer has failed to keep

[8] No other appellate cases decided post-*Alvarez* have adopted a "reasonable" method of compensable time within the continuous workday.

records and allowing employers to compensate employees based on the amount of time a reasonably efficient employee would spend donning and doffing. The court rejected the latter, holding that "an employer may not compensate employees based on the amount of time a reasonably efficient employee would spend donning and doffing if the actual time is greater and the result is that the compensation falls below the minimum wage and overtime requirements of the FLSA." *Id.* at *10.

5. Tyson's reliance upon several cases for the proposition that the FLSA supports a "reasonable time" method of compensation is unavailing. *See* Doc. 249. For instance, Tyson's reliance upon *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), is misplaced because several of its conclusions are no longer good law post-*Alvarez*. Both *Reich* and *Alvarez* concerned the donning and doffing of protective equipment in IBP's meat processing plants. In *Reich*, the Tenth Circuit held that putting on and taking off unique equipment was integral and indispensible to the work. 38 F.3d at 1125. However, it declined to hold that the workday began with this activity because "there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place." *Id.* at 1127. It further affirmed the district court's conclusion that "workers should be paid on the basis of a reasonable time to conduct these activities, not to

include 'wait and walk time,' rather than the actual time taken." *Id.* This ruling is in stark contrast to the holding in *Alvarez*, where the Supreme Court concluded that the donning and doffing of protective equipment which is integral and indispensable to the work performed was a principal activity that starts the workday, and that activities that occur after the first principal activity and before the last principal activity, including wait and walk time, are compensable. 546 U.S. at 33-34. Indeed, several courts have questioned whether *Reich* is still good law following *Alvarez*. *See Perez v. Mountaire Farms, Inc.*, 601 F. Supp. 2d 670, 678 (D. Md. 2009) ("*Reich* was decided before the Supreme Court's affirmed *Alvarez*, so its persuasiveness is not compelling."); *Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1246 (D. Kan. 2007) (stating it was "convinced that the [Tenth] Circuit, if given the opportunity to revisit the issues in *Reich*, would approach its analysis of the pertinent issues differently in light of *Alvarez*"); *Jordan v. IBP, Inc.*, No. 3:02-1132, 2004 WL 5621927, at *13 (M.D. Tenn. Oct. 12, 2004) (concluding that the Secretary's company-wide injunction requires Tyson to compensate for actual time spent by employees in donning and doffing).[9]

[9] The Department's injunction in *Reich* merely requires compliance with the FLSA. The subsequent dismissal in a separate enforcement action against IBP was predicated on the understanding that IBP could continue its recordkeeping and

Thus, Reich's conclusion that "reasonable time" is the appropriate measure for donning and doffing protective equipment can no longer stand.

Further, Tyson's reliance on *Anderson v. Wackenhut Corp.*, No. 5:07cv137-DCB-JMR, 2008 WL 4999160 (S.D. Miss. Nov. 19, 2008) (unpublished), is misplaced because that decision fundamentally misunderstood the Supreme Court's decision in *Alvarez* and the Department's regulations as to the continuous workday. The district court stated that the plaintiffs interpreted *Alvarez* too broadly when they argued that "since changing into protective gear is a principal activity, any activity following that principal activity necessarily is compensable work." 2008 WL 49999160, at *6. But in declining "to extend the holding in [*Alvarez*] quite so far," the district court relied on its view that the Supreme Court in *Alvarez* addressed only the compensability of walking time within the continuous workday, and not waiting time, which was at issue in

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compensation practices only until the Department announced its position on recordkeeping in the meat processing industry. *See* Letter to Robert L. Driscoll from Malinda B. Schoeb (July 16, 1999)(Doc. 31-10)("As we discussed previously, IBP, Inc. may continue its current practice with respect to recording and compensating pre- and post-shift compensable activities until such time as the Department announces its position with respect to recordkeeping in the industry."). In January 2001, the Administrator issued an opinion letter making clear that all pre- and post-shift time spent in donning and doffing and related activities in the meat processing industry must be recorded and paid. *See* Wage and Hour Opinion Letter, 2001 WL 58864, at *2.

Wackenhut. *Id.* As discussed *supra*, however, the Supreme Court in *Alvarez* explicitly concluded that all post-donning/pre-doffing waiting time is compensable. *See* 546 U.S. at 40. Similarly, relying upon a misreading of the Department's regulation, the district court also incorrectly stated that "the continuous workday doctrine does not automatically make all activity, work-related or non-work-related, compensable." 2008 WL 49999160, at *6. Once the continuous workday is established, however, it includes all time; the only exceptions to this rule are time spent during bona fide meal breaks or off-duty periods. *See* 29 C.F.R. 785.9 (a); 790.6(b). "In fact, *Alvarez* makes clear that walking time and waiting time that occur during the continuous workday are compensable regardless of whether they benefit the employer." *Helmert*, 2011 WL 3157106, at *10 (rejecting *Wackenhut*'s reasoning and recognizing that time during the continuous workday must be compensated regardless whether work was performed during the entire time).

6. Under the Department's regulations and longstanding interpretation, employers are required to compensate employees for all time spent during the "continuous workday." The regulation at 29 C.F.R. 785.7 states that compensable time "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 work place." (Internal quotation marks

omitted.) And the regulation at 29 C.F.R. 790.6(b) states that the "workday," as bounded by an employee's first and last principal activities, "includes all time within that period whether or not the employee engages in work throughout all of that period."[10] The regulation at 29 C.F.R. 790.6(a) further states that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked" under the FLSA.

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[10] The hours worked regulations at 29 C.F.R. Part 785 have their origin in Interpretive Bulletin No. 13, which was originally issued in 1939 and was in effect when Congress enacted the Portal Act. The interpretive regulations at 29 C.F.R. Part 790, which the Department promulgated in 1947, *see* 12 Fed. Reg. 7655 (Nov. 18, 1947), were ratified by Congress in 1949 when former section 16(c) of the FLSA was enacted and have been endorsed by the Supreme Court. *See Steiner*, 350 U.S. at 255 n.8; *see also Alvarez*, 546 U.S. at 29. These longstanding regulations, which have been left undisturbed by Congress in subsequent reexaminations of the FLSA and which reflect the considered and detailed views of the agency charged with enforcing the Act, are entitled to controlling deference. *See Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002). The interpretation of these rules, as expressed in our amicus briefs as well as the Advisory Memo. 2006-2, is also entitled to controlling deference. *See Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2261 (2011); *Long Island Care at Home, LTD v. Coke*, 551 U.S. 158, 171 (2007); *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

In any event, the Department's longstanding regulations and amicus briefs are, at minimum, entitled to substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See e.g., Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008). The Department's longstanding position has the "power to persuade" because it is reasonable, consistent with the Act, and reflects the Department's careful consideration of the issue.

The Department reiterated these positions in the donning and doffing context, explaining that "time spent in those activities, as well as any walking and waiting time that occur after the employee engages in his first principal activity [of donning] and before he finishes his last principal activity [of doffing], is part of a 'continuous workday' and is compensable under the Fair Labor Standards Act (FLSA)." Advisory Memo. 2006-2, at 1; *see* Wage and Hour Opinion Letter, 2001 WL 58864, at *2 ("[U]nder the FLSA and the Portal-to-Portal Act, it is the Department's longstanding position that, as a general matter, compensable hours worked include all time from the moment each employee performs the first principal activity of the employee's workday until the last principal activity is concluded, less any bona fide meal periods or bona fide off-duty time."). The Department specifically rejected a reasonableness standard and stated that "in order to comply with the FLSA and its implementing regulations (see 29 C.F.R. 516.2), a company must record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear." Wage and Hour Opinion Letter, 2001 WL 58864, at *2.

7. Further, the Secretary engaged in litigation on the compensability of donning and doffing against Tyson and several of its competitors, including Perdue Farms and Pilgrim's Pride,

in an effort to compel compliance with the compensation and recordkeeping requirements of the FLSA. The Secretary entered into settlement agreements that required that each poultry processing plant record and compensate all time spent during the continuous workday, starting with the first principal activity of donning or sanitizing and ending with the last principal activity of doffing or sanitizing. *See* Perdue Farms Consent Judgment, ¶¶ 2, 3.B. (entered May 10, 2002); Pilgrim's Pride Consent Judgment, ¶¶ 2, 3, 5.B. (entered Feb. 1, 2010); Tyson Foods Consent Judgment, ¶¶ A.1., A.4.B. (effective June 4, 2010). For example, Tyson is required to

> [pay] for all hours worked from the start of [the employees'] first principal activity of the work day until the end of the last principal activity of [the employees'] work day, including any time spent walking or waiting after the first principal activity and before the last principal activity has been performed, with the exception of any time taken for any bona fide meal period or bona fide off-duty time . . . . This period of time is referred to herein as the "continuous workday."

Tyson Foods Consent Judgment, ¶ A.1. Thus, Tyson has already consented to the payment of compensation for all time during the continuous workday; the fact that such consent took place in the context of its poultry processing plants, as opposed to its meat processing plants, is of no moment.

C. Reasonable Time is in Tension with the Concepts of Work and Suffer and Permit.

1. Payment for only "reasonable time" is in tension with the well-established definition of "work" under the FLSA. Work, as broadly defined by the Supreme Court, does not require any exertion but, rather, requires that an employee be engaged in some kind of activity that is controlled or required by the employer and pursued necessarily for the employer's benefit. *See Alvarez*, 546 U.S. at 25-26 (noting that *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), "clarified that 'exertion' was not in fact necessary for an activity to constitute 'work' under the FLSA"); *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) ("*Armour* demonstrates that exertion is not in fact, required for activity to constitute 'work.'"). The Supreme Court held in *Armour* that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." 323 U.S. at 133; *see* 29 C.F.R. 785.7 ("[I]dleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself . . . ."). Similarly, the Supreme Court held that an employer is required to compensate for "time spent waiting to doff." *Alvarez*, 546 U.S. at 40. It would be anomalous to require that employees don, doff, wash, and walk at a prescribed pace in order for their time to be compensable, while not disputing that

employees must be paid for idle or waiting time involving no exertion at all. Compensability simply does not depend on any ergonomic standard of efficiency.

2. Moreover, "reasonable time" is in tension with the well-established principle of "suffer or permit" under the FLSA. The Department's regulation states that "[w]ork not requested but suffered or permitted is work time. . . . The reason [such work is performed] is immaterial. [If] [t]he employer knows or has reason to believe that he is continuing to work . . . the time is working time." 29 C.F.R. 785.11; *see Rudolph v. Metro. Airports Comm'n*, 103 F.3d 677, 680-81 (8th Cir. 1996) ("Ordinarily, all time that an employer 'suffers or permits' its employees to work must be compensated."); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) ("[D]uties performed by an employee before and after scheduled hours, even if not requested, must be compensated if the employer knows or has reason to believe the employee is continuing to work.") (internal quotation marks omitted). Thus, an employer is responsible under the FLSA to compensate for all work, such as walking, waiting, sanitizing, etc., of which it is aware (unless otherwise excluded by the Portal Act). This responsibility to compensate for work that is suffered or permitted is not dependent on the reasonable manner in which such work is performed. Therefore, even if an employee walks slowly or in a

circuitous manner, and the employer knows or should know about this walking and does not adequately exercise its control to prevent it, it is work for which the employee must be compensated. Paying only "reasonable time" for any work thus flies in the face of the well established "suffer or permit" principle; if such work (irrespective whether it is performed "reasonably") is within the control of the employer, the employer must then either stop the work from being performed or compensate for such work accordingly.

3. Indeed, the regulation at 29 C.F.R. 785.13 clearly states that "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them." *See Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 288 (2d Cir. 2008) ("An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. . . . This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours.") (internal citations omitted); *Reich v. Dep't of Conservation and Natural Res.*, 28 F.3d 1076, 1082-83 (11th Cir. 1994) (an employer who does not want work to be performed has an obligation to exercise its control over the

workforce to prevent the work from occurring); *Mumbower*, 526 F.2d at 1188 ("The employer who wishes no such work to be done has a duty to see it is not performed. He cannot accept the benefits without including the extra hours in the employee's weekly total for purposes of overtime compensation.").

CONCLUSION

The jury instructions on reasonable time and the meal period were an incorrect statement of the law under the FLSA as amended by the Portal Act, and thus constituted an abuse of discretion on the part of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)(B)

I certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 6,762 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief was prepared using Microsoft Office Word, 2003 edition.

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CERTIFICATE OF SERVICE

I certify on that on October 24, 2011, I electronically filed the foregoing Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on October 25, 2011, I mailed 10 paper copies of the Secretary's foregoing brief to the Clerk of Court for the United States Court of Appeals for the Eighth circuit and mailed one copy to each of the following:

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