No. 14-1146

IN THE

# Supreme Court of the United States

TYSON FOODS, INC.,

*Petitioner*,

v.

PEG BOUAPHAKEO, *et al.*, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit**

## BRIEF FOR THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICUS CURIAE* [1]

The United Food and Commercial Workers International Union (UFCW) represents over 1.3 million members employed in a variety of industries, over 150,000 of whom are employed in the meatpacking and food processing industries affected by the donning and doffing and class and collective action issues at stake in this case. These members are typically low-wage workers employed in one of the nation's most dangerous industries. They rely on being paid for all hours worked to provide for their families, and they rely on the employer to properly record all hours worked. When they are not paid for all hours worked, they often rely on collective or class actions to recover their lost wages.

## SUMMARY OF ARGUMENT

For decades, Tyson Foods has unlawfully failed to record the actual time worked by its production line employees for all activities preceding and following their time on the production line, including the donning and doffing of personal protective equipment. Instead of recording employees' complete and accurate time worked, Tyson Foods uses a pay code to compensate employees for an approximate amount of time spent on a portion of those activities. Tyson Foods' continued failure to record any of the actual

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certify that this brief was not written, in whole or in part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

time spent on these tasks has made it increasingly difficult for employees to challenge the sufficiency of this proxy time payment. The business decision made by Tyson Foods to avoid creating and retaining records of time worked by its employees, as it is legally required to do, has left employees with no recourse but to develop alternative measures to more accurately approximate their full time worked. The time study at issue below is the most accurate and reliable measure against which Tyson Foods' proxy compensation system can be compared and evaluated.

## ARGUMENT

Tyson Foods' failure to maintain records of time expended on compensable work—which created the need for the time study in dispute below—is hardly unique. Indeed, it is the latest episode in a decades-long pattern of similar conduct by Tyson Foods.[2] Although Tyson Foods made a modest change to its payment practices about seventeen years ago by adopting the "K Code" system—an approximate amount of time added to employees' pay for pre- and post-production line work—it made no concomitant change to its record-keeping practices. Several courts

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[2] Tyson Foods acquired IBP, Inc., another meat processing company, in 2001. At that time, IBP had been the subject of over a decade of litigation challenging its analogous compensation and record-keeping practices. After acquiring IBP, Tyson assumed responsibility for the liability IBP faced for violating wage and hour laws; courts have treated the companies interchangeably since then. *See, e.g.*, *Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2013 WL 7045055, at *19-20 (D. Neb. Feb. 11, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015).

have since found that the K Code system does not fully compensate Tyson Foods' production line workers, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*. *See* Section I.B below. Tyson Foods' failure to record the actual time worked by its employees both before and after their time on the production line has left no record by which to assess the adequacy of the compensation that the K Code provides. The litigation below, and the time study used by the Respondents to approximate the amount of time spent on pre- and post-shift donning and doffing activities, were prompted by the infirmities of the K Code system and by Tyson Foods' continued failure to record the time expended on these activities. The FLSA requires no less.

## I. TYSON FOODS' CHALLENGED RECORD-KEEPING PRACTICES

The case below challenges Tyson Foods' failure to record the time worked by its production line workers in donning and doffing personal protective equipment before and after their shifts (and during their unpaid meal breaks) and correspondingly to compensate their workers for this work. Rather than record and pay for all this time, Tyson Foods uses a timekeeping system known as "gang time" or "mastercard time" to compensate its employees. This system limits compensation to the time spent on the processing line, excluding time preparing for and concluding work on the production lines and donning and doffing personal protective equipment. *See* Resp't's Br. at 7; *see also Acosta v. Tyson Foods*, *Inc.*, No. 8:08CV86, 2013 WL 7849473, at *19 (D. Neb. May 31, 2013) (presenting findings concerning the "gang time" system); *rev'd on other grounds*, --- F.3d ---, 2015 WL

5023643 (8th Cir. Aug, 26, 2015); *Garcia v. Tyson Foods, Inc.*, 766 F. Supp. 2d 1167, 1172 (D. Kan. 2011) (discussing the "gang time" system).

Despite repeated litigation that successfully challenged the "gang time" system, Tyson Foods continues to use this system to the exclusion of accurate and complete record-keeping. Rather than track the time employees spent donning and doffing protective gear and completing related activities, Tyson Foods elected to implement the "K Code" system. The K Code represents an approximate amount of time, initially four minutes and later increased by varying amounts, that is added to each employee's pay as a proxy to compensate for a portion of the actual time spent on pre- and post-production line work, including donning and doffing some personal protective equipment. *See*, *e.g.*, *Acosta*, 2013 WL 7849473, at *19-20 (explaining the use of K Code time to compensate employees for donning and doffing); *Gomez*, 2013 WL 7045055, at *2 (same); *Garcia*, 766 F. Supp. 2d at 1172 (explaining K Codes and their history). By refusing to record the actual time worked on pre- and post-production line activities, Tyson Foods maintained no records by which to assess the sufficiency of the compensation provided by the K Code.

### A. Tyson Foods Has a History of Failing to Record All Time Its Production Line Employees Have Worked, Despite Numerous Challenges and Court Decisions Rejecting These Practices

Litigation challenging the failure to maintain records of time employees worked—including the use

of "gang time" and the refusal to compensate for donning and doffing time—began more than 25 years ago. *See*, *e.g.*, *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 794 (M.D. Tenn. 2008) (explaining, in a similar case, that "[t]his case represents yet another chapter in a long history of litigations that span multiple fora, all of which involve . . . the defendants here and the question of whether their compensation practices violate the Fair Labor Standards Act.")

In 1988, the Department of Labor sued IBP, Inc., a beef processing plant that was later acquired by Tyson Foods. *See Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1318 (D. Kan. 1993). The court entered an injunction in 1996 directing that IBP "make, keep and preserve adequate records of its employees and of the wages, hours, and other conditions and practices of employment and to implement record-keeping practices sufficient to record the time spent by each employee in performing pre-shift and postshift activities found to be compensable under the Act." *See Acosta*, 2013 WL 7849473, at *9-11 (providing the text of the injunction); *Reich v. IBP, Inc.*, No. 88-2171-EEO, 1996 WL 445072, at *1 (D. Kan. July 30, 1996) (discussing and imposing the injunction), *aff'd sub nom. Metzler v. IBP, Inc.*, 127 F.3d 959, 965 (10th Cir. 1997) (internal citation omitted).

When Tyson Foods acquired IBP in 2001, it assumed responsibility for compliance with this injunction. *See Jordan v. IBP, Inc.*, No. 3:02-1132, 2004 WL 5621927, at *12 (M.D. Tenn. Oct. 12, 2004) (holding that the *Reich* injunction did not shield Tyson Foods from liability following this Court's later ruling in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)); *cf. Acosta*, 2013 WL 7849473, at *17 (discussing Tyson Foods' efforts

to avoid compliance with the injunction and courts' rejections of those efforts).

Ultimately, this injunction failed to induce IBP to "make . . . adequate records" and "implement record-keeping practices sufficient to record the time spent by each employee in performing pre-shift and postshift activities." *See Acosta*, 2013 WL 7849473, at *9-11. The Department of Labor was forced to bring a second enforcement action, *Herman v. IBP, Inc.*, No. 98-cv-2163, Docket #1, slip op. (D. Kan. Apr. 10, 1998), which was quickly settled following the company's implementation of the K Code time system. *See Herman v. IBP, Inc.*, No. 98-cv-2163, Docket #26, slip op. (D. Kan. Jul. 16, 1999) (dismissing the case with prejudice); *see also Acosta*, 2013 WL 7849473, at *9-11 (discussing *Herman*).

In 2001, the Department of Labor issued an Opinion Letter to Tyson Foods that "reiterate[d] . . . the Department's longstanding position that . . . [a]n employer must compensate its employees for any activity that is an integral and indispensable part of the employee's principal activities, including the putting on, taking off and cleaning of personal protective equipment." T. Michael Kerr, Adm'r of the Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter, Fair Labor Standards Act, 2001 WL 58864, at *1 (Jan. 15, 2001); *see also Acosta*, 2013 WL 7849473, at *10-11 (providing the same construction of the letter). The letter went on to reassert that "in order to comply with the FLSA and its implementing regulations . . . , 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." DOL Opinion Ltr., 2001 WL 58864, at *2 (emphasis added).

However, Tyson Foods continued to rely on the K Code as a proxy for the compensable time worked, rather than begin recording all the time actually worked before and after its production lines were in operation. In doing so, Tyson Foods avoided creating any records by which the sufficiency of its K Code time could be assessed. *Cf. Acosta*, 2013 WL 7849473, at *11-12, *17 (discussing Tyson Foods' unsuccessful attempts to use the *Reich* injunction and early correspondence with the DOL to avoid liability under the DOL's 2001 Letter); *Garcia v. Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1245-46 (D. Kan. 2007) (discussing Tyson Foods' efforts to avoid liability by using the *Reich* injunction to evade compliance with the Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005)).

Tyson Foods' adoption and continued use of the K Code system has led to approximately a dozen lawsuits challenging its lawfulness.[3] In each of these

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[3] *See, e.g.*, *Garcia v. Tyson Foods, Inc.*, 770 F.3d 1300 (10th Cir. 2014); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003); *Abadeer v. Tyson Foods, Inc.*, 975 F. Supp. 2d 890 (M.D. Tenn. 2013); *Gomez v. Tyson Foods, Inc.*, 976 F. Supp. 2d 1169 (D. Neb. 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015); *Acosta v. Tyson Foods, Inc.*, No. 8:08CV86, 2013 WL 7849473 (D. Neb. May 31, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023643 (8th Cir. Aug. 26, 2015); *Lopez v. Tyson Foods, Inc.*, No. 8:06CV459, 2008 WL 3485289 (D. Neb. Aug. 7, 2008); *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790 (M.D. Tenn. 2008); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840 (E.D. Wash. May 16, 2005); *see also Guyton v. Tyson Foods, Inc.*, 767 F.3d 754 (8th Cir. 2014); *Robinson v. Tyson Foods, Inc.*, 254 F.R.D. 97 (S.D. Iowa 2008). Another twenty cases that also challenged the use of "gang time" and Tyson Foods' compensation and record-keeping practices were combined into a multi-district litigation. *See, e.g.*, *In re Tyson Foods*, 694 F. Supp. 2d 1372 (M.D. Ga. 2010).

cases, as in the case at bar, plaintiff production line workers asserted that Tyson Foods' "mastercard," "gang time," and/or "K Code" systems were insufficient to capture all compensable time under federal and state laws. In nearly all of these cases, courts have found that Tyson Foods' K Code system and its corresponding failure to record all actual time worked by its employees failed to comply with the FLSA. *See*, *e.g.*, *Alvarez v. IBP*, *Inc.*, 339 F.3d 894, 908 (9th Cir. 2003) (explaining that the K Code system "merely embodies an effort to overcome a settlement impasse"); *Acosta*, 2013 WL 7849473, at *6, *20 (holding that "Tyson cannot credibly contend that payment of K-code time amounted to record-keeping that satisfies DOL requirements," and that, by using K Code time, "Tyson has not compensated its employees for all of the work activities that have been found to be compensable in this and previous cases"); *Gomez v. Tyson Foods*, *Inc.*, No. 8:08CV21, 2013 WL 1090362, at *2 (D. Neb. Mar. 15, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015) (deciding all liability issues against Tyson Foods after rejecting the argument "that the company has kept proper and accurate records based on the fact that its time records include four minutes of time for donning and doffing," because such approximation was "not accurate"); *Lopez v. Tyson Foods*, *Inc.*, No. 8:06-459, Docket #235, slip op. at *4-5, *27 (D. Neb. Apr. 6, 2011) (concluding that "plaintiffs have worked hours that they have not been paid for" because Tyson Foods' employees are paid for "gang time" plus "K code time" and "Tyson does not keep track of the 'actual' time plaintiffs spend on such activities").

### B. Tyson Foods' Litigation History Demonstrates a Troubling Pattern of Conduct

Repeatedly, Tyson Foods has been cautioned or ordered to record the actual time employees expend on activities before and after its production line is in operation. Tyson Foods has "now been litigating this same issue for decades, reflecting what can only be described as a deeply-entrenched resistance to changing their compensation practices to comply with the requirements of [the] FLSA."[4] *Jordan*, 542 F. Supp. 2d at 794; *see also Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003); *Acosta*, 2013 WL 7849473, at *17, *22 ("since 2005, Tyson has performed great acts of legalistic legerdemain in its attempt to dodge the obliga-

[4] Courts have also rejected Tyson Foods' argument that it is administratively impractical to record the time actually spent at work by its production line employees. *See Gomez*, 2013 WL 7045055, at *18 ("Tyson has not shown that it would be impossible or impractical to record and pay for the donning and doffing activities. It admits that it has a time-keeping system. This system could be modified to include the donning, doffing and sanitizing time."); *Gomez v. Tyson Foods, Inc.*, No. 8:08CV21, 2013 WL 5516277, at *6 (D. Neb. Oct. 2, 2013), *rev'd on other grounds*, --- F.3d ---, 2015 WL 5023630 (8th Cir. Aug. 26, 2015) (rejecting Tyson Foods' administrative feasibility argument, explaining that "Tyson could easily have recorded and paid actual time by utilizing the time clocks it uses for attendance"); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1317-18 (N.D. Ala. 2008) (rejecting Tyson Foods' argument about its inability to move time clocks to better locations within the plant and concluding that the company could add new clocks to key areas of the plant and use its existing timekeeping system to track small amounts of time); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, slip op. at *52 (E.D. Wash. Dec. 9, 2004) (rejecting the argument that time in addition to the four minutes paid under the K Code system was either *de minimis* or nonexistent).

tions clearly imposed in *Alvarez*," but noting that it "could have avoided litigation by complying with DOL regulations and simply paying and recording actual time for donning and doffing").

Notwithstanding the admonitions of multiple courts, Tyson Foods has continued to refrain from recording the time expended before and after the production line operates. *See Abadeer*, 975 F. Supp. 2d at 912 (explaining that Tyson Foods has taken "a head-in-the-sand approach" to its record-keeping obligations whereby, "in the face of legal developments, Tyson neither altered its practices[,] . . . questioned its conformity with the law," nor "genuinely sought to reconcile its continuing disagreement with the law."); *see also Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2001 WL 34897841, at *7 (E.D. Wash. Sept. 14, 2001); *Gomez*, 2013 WL 7045055, at *19-20 (discussing *Alvarez* and noting that the "undisputed evidence shows that IBP does not record or compensate employees for the work that has been found to be compensable to this day"); *Acosta*, 2013 WL 7849473, at *11-12 (discussing *Alvarez* and noting that "IBP never attempted to measure, record, or compensate for substantial amounts of pre-shift, meal-break and post-shift work"); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *5 (E.D. Wash. May 16, 2005) (explaining that Tyson Foods has "not altered [its] recordkeeping system").

Against this consistent backdrop, the findings below that Tyson Foods has again failed to record the time its production line workers actually expended at work are not surprising. *See Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 799 (8th Cir. 2014) (recognizing, in the court below, that "Tyson has no

evidence of the specific time each class member spent donning, doffing, and walking" because it does not track or record this time).[5] Lacking records of the time actually worked during these periods, employees challenging the sufficiency of their compensation have been forced to rely upon expert-developed time studies to measure the actual amount of time worked by a sample of the affected workers.

## II. TYSON FOODS' FAILURE TO KEEP RECORDS HAS CREATED THE NEED FOR WORKERS TO USE TIME STUDIES TO ENFORCE FEDERAL WAGE AND HOUR PROTECTIONS

### A. Enforcement of the Fair Labor Standards Act Depends Heavily on Employers Maintaining Accurate and Complete Records of All Time Worked by Their Employees

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, requires that employers "keep proper re-

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[5] *See also Gomez*, 976 F. Supp. 2d at 1183 ("The defendant did not keep or maintain records as to the amount of actual time the employees spent on the compensable activities"); *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1286 (D. Kan. 2012) ("Tyson does not record the compensable time worked by its employees"); *Garcia*, 770 F.3d at 1307 ("Tyson failed to record the time actually spent by its employees on pre- and post-shift activities"); *cf. Abadeer v. Tyson Foods, Inc.*, No. 3:09-cv-00125, 2014 WL 1709289, at *4 (M.D. Tenn. Apr. 3, 2014) (explaining that Tyson Foods tracked time from clocking in to starting work on the production line, but did not record or pay for time from donning frocks through clocking in prior to processing work).

cords of wages, hours and other conditions and practices of employment" to ensure that its mandate is achieved. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). The FLSA places on employers the responsibility for maintaining such accurate and complete records of time worked, because they are in the best "position to know and to produce the most probative facts concerning the nature and amount of work performed." *Id.* at 687.

Where an employer has failed to keep records of all time worked, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of the [FLSA]." *Id.* at 688. Any other conclusion would "place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation." *Id.* at 687; *see also id.* at 688 ("the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances"); *Abadeer v. Tyson Foods, Inc.*, No. 3:09-cv-00125, 2014 WL 1709289, at *2-3 (M.D. Tenn. Apr. 3, 2014) (same).

Although accurate and complete records of time actually worked constitute the best way of ensuring compliance with the FLSA, alternative means of estimating time worked must be available when employers fail to record all of this time, in order to ensure the protections provided by the FLSA are achieved.

### B. Tyson Foods' Failure to Record All Time Worked Created the Need for Respondents' Time Study

The FLSA places the initial burden on workers to demonstrate that they performed work for which they claim not to have been compensated, as well as the amount and extent of such work "as a matter of just and reasonable inference." *See Mt. Clemens*, 328 U.S. at 687-88. Where the time worked has not been recorded by the employer, workers claiming they were not fully compensated have employed methods such as the time study below for estimating the time they actually worked. *See*, *e.g.*, *Garcia*, 890 F. Supp. 2d, at 1284-85 (discussing the use of a time study); *Gomez*, 2013 WL 5516277, at *6 ("Tyson miscomprehends the essential fact that the plaintiffs are unable to establish damages on an individualized, job-by-job, day-by-day, basis because it elected not to keep records of actual time," and that such proof "is not possible as a result of Tyson's own actions"). For a further discussion of time studies, *see* Resp't's Br. at 16-17.

Numerous courts have concluded that time studies are a necessary and reliable means of estimating the amount of time actually worked "by a just and reasonable inference."[6] *See Gomez*, 976 F. Supp. 2d

[6] In fact, Tyson Foods itself has used similar time studies to support its own policies and positions. *See*, *e.g.*, *Acosta*, 2013 WL 7849473, at *5-6 (explaining that Tyson Foods' "arguments with respect to [Plaintiffs' expert] testimony are considerably weakened by the fact that its own time study used similar methodology"); *Garcia*, 890 F. Supp. 2d at 1289-90 (discussing

at 1182 (noting that the jury was permitted to and did credit the time study, at least in part); *Garcia*, 890 F. Supp. 2d at 1285 (accepting the time study to bolster the plaintiffs' damages claim); *cf. Garcia v. Tyson Foods, Inc.*, 770 F.3d at 1307 (holding that "the jury could reasonably rely on representative evidence to determine class-wide liability because Tyson failed to record the time actually spent by its employees on pre- and post-shift activities").

"In light of the fact that Tyson failed to keep records of actual time as required under [the] FLSA, [expert] time study and testimony provide an acceptable means of determining what those time records would have shown if Tyson had complied with its statutory obligations." *Acosta*, 2013 WL 7849473, at *6, *20-22. In the present case, the dearth of records from which to determine the adequacy of the compensation provided by the K Code system mandates the development of another measure against which the system can be compared. Time studies present the most reliable basis to make this comparison when employers fail to maintain contemporaneous records of all time worked.

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Tyson Foods' use of time studies); *Garcia*, 766 F. Supp. 2d at 1173 (same).

## CONCLUSION

For the reasons set forth above, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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