No. 07-____

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

MELANIA FELIX DE ASENCIO, ET AL.

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

---

PETITION FOR A WRIT OF CERTIORARI

THOMAS C. GOLDSTEIN
Counsel of Record
PATRICIA A. MILLETT
MICHAEL J. MUELLER
JOEL M. COHN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

Attorneys for Petitioner

QUESTION PRESENTED

Whether the court of appeals erred in holding, in conflict with the Tenth Circuit, that an activity constitutes "work" under the Fair Labor Standards Act, 29 U.S.C. § 207, even though the activity neither entails "exertion" nor is compensable as a matter of custom or contract.

PARTIES TO THE PROCEEDINGS

Petitioner is Tyson Foods, Inc. Respondents are the named plaintiffs, Melania Felix de Asencio, Manuel A. Gutierrez, Asela Ruiz, Eusebia Ruiz, Luis A. Vigo, Luz Cordova, and Hector Pantajos, who brought this representative action on behalf of themselves and other current and former employees at petitioner's New Holland chicken-processing facility. 533 such individuals opted to join this suit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tyson Foods, Inc., has no parent corporations, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases – Continued

Cases – Continued

Statutes and Regulations

In the Supreme Court of the United States

NO. 07-___

TYSON FOODS, INC., PETITIONER

v.

MELANIA FELIX DE ASENCIO, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

Tyson Foods, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 500 F.3d 361. The order of the district court (App., *infra*, 31a) is unreported. An earlier opinion of the court of appeals (App., *infra*, 51a) is reported at 342 F.3d 301, and two earlier opinions of the district court (App., *infra*, 32a & 46a) are unreported.

JURISDICTION

The court of appeals entered its judgment on September 6, 2007, and denied rehearing on October 5, 2007 (App., *infra*, 73a). On December 26, 2007, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including Feb-

ruary 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 75a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, regulates, *inter alia*, the hours worked and wages paid to employees engaged in the production of goods for commerce. Section 207 of the FLSA prohibits the employment of any person "for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207.

The statute defines to "employ" as including "to suffer or permit to work" (29 U.S.C. § 203(g)), but does not otherwise define what is compensable "work." In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), this Court defined work as "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" (*id.* at 598). The Court further held that, in "borderline cases," courts should look to "custom and contract" to determine whether an activity constitutes work. *Id.* at 603. As the Court later elaborated, when employees are hired to undertake a non-exertive activity, the parties' intent determines whether the FLSA's overtime obligation is triggered. See *Armour & Co. v.*

Wantock, 323 U.S. 126, 133 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37 (1944).

2. Petitioner operates two processing plants in New Holland, Pennsylvania. Employees at the plants don, doff, and clean certain lightweight sanitary and protective clothing before and after their shifts and at scheduled meal breaks. For example, most employees wear a cotton smock, hair nets, ear plugs, and safety glasses. Employees who use a knife on the job must also wear a cut-resistant glove.[1] Petitioner does not record the time employees spend putting on, removing, or cleaning that protective wear.[2]

Seven of petitioner's employees filed suit on behalf of themselves and a class of current and former employees alleging that petitioner's failure to pay for the time associated with donning, doffing, and cleaning protective wear violates the FLSA's overtime-pay provision, 29 U.S.C. § 207. The complaint seeks back

---

[1] Precisely which employees were required to wear which items was an issue at trial. Additional items worn by at least some employees include a dust mask, beard net, plastic apron, soft plastic sleeves, rubber boots, rubber gloves, and cotton glove liners. App., *infra*, 4a-5a.

[2] Some specified classes of employees are given fifteen more minutes of compensated off-duty time each shift than other classes of employees. This time is not tied to changing time, although petitioner argued at trial and on appeal that respondents who receive this extra paid time have no cause for complaint because even if petitioner were liable for the unrecorded changing time, this extra time was sufficient to make the employees whole.

pay, liquidated damages, and costs and attorney's fees, as well as declaratory relief.

Evidence at trial showed that employees put on, remove, and clean the protective wear at varied paces. Some employees arrive and get ready five minutes before the processing line starts. Others arrive an hour and a half before the line starts to engage in personal activities, like playing dominoes in the cafeteria. Those employees put on and take off their protective clothing at different times prior to or after their shift, and they often do so while walking between different locations at the facility, while talking to one another, or while doing both.

The central question at trial was whether the dressing activity constituted "work," such that it commenced or concluded the "continuous workday" during which employees are compensated. See generally *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). The district court instructed the jury that "work 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." App., *infra*, 4a. The court also advised the jury that an employer also may contract for "a worker to do nothing but wait for something to happen," which would be an "exception" to "the usual situation where the definition of work requires exertion." *Ibid.* Finally, the court instructed the jury that:

> 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 light-

> weight 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 or wash their hands or gloves while walking, talking or doing other things?

App., *infra*, 9a-10a. The employees objected to the instruction on the ground that the definition of "work" does not require exertion. *Id.* at 8a. The employees did not present evidence at trial that the parties had agreed by contract or were bound by custom to treat the donning and doffing time as work. Nor did the employees request a jury instruction on whether any contract or custom existed that would treat the donning and doffing time as compensable work.

The jury returned a unanimous verdict in favor of petitioner, finding that the employees had not "provided representative evidence that [the activities at issue] are 'work' for purposes of the FLSA." App., *infra*, 10a (modification in original).

3. The court of appeals reversed and remanded. App., *infra*, 30a. The court held that the district court erred in instructing the jury that "work" requires exertion. The court held, instead, that work is any "form of activity controlled or required by the employer and pursued for the benefit of the employer." *Id.* at 26a. The court opined that its test could be derived from *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), in which this Court held, based on the particular "arrangements between the parties" (*id.* at 134), that, for firefighters, simply waiting on call could be deemed compensable work. App., *infra*, 26a. Based on *Armour*, the court of appeals con-

cluded here that "exertion is not in fact, required for activity to constitute work." *Ibid.*

The court of appeals also discussed *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), in which this Court had held that walking time following the start of the work day was compensable under the Portal-to-Portal Act, App., *infra*, 17a-21a. Although the court of appeals "recognize[d] * * * that whether donning and doffing is work was not directly at issue in *Alvarez*," the court concluded that *Alvarez* supported its reading of *Armour*. App., *infra*, 20a-21a.

Finally, the court of appeals acknowledged that its definition of "work" conflicted with the Tenth Circuit's decision in *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), but was consistent with the rule adopted by the Ninth Circuit in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004). App., *infra*, 23a.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision in this case is contrary to this Court's longstanding interpretation of the FLSA and, by siding with the Ninth Circuit and rejecting a decision of the Tenth Circuit, widens a conflict between the courts of appeals on the frequently recurring question of what constitutes "work" under the FLSA. Indeed, the conflict in the circuits has now left petitioner, which owns IBP, Inc., the defendant in the Tenth Circuit case, with directly conflicting legal obligations for compensating similar employee activity based solely on geography. Moreover, the FLSA applies to tens of thousands of employers, many of which have operations in multiple circuits. Employers nationwide, both within and outside of the Third Circuit, face substantial uncertainty

in estimating salary costs when deciding whether to hire factory workers within the United States. Accordingly, this Court's intervention is necessary to restore uniformity and stability to the workplace.

I. The Courts Of Appeals Are Divided Over The Proper Application Of A Federal Law That Applies To Employers Nationwide

A. As the court of appeals acknowledged, App., *infra*, its definition of compensable "work" under the FLSA squarely conflicts with Tenth Circuit law. See *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); see also *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) (reaffirming *Reich* test).

In *Reich*, the Tenth Circuit held, following this Court's decision in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), that an activity qualifies as "work" under the FLSA if it (i) entails physical or mental *exertion* (whether burdensome or not), (2) is controlled or required by the employer, and (3) is pursued necessarily and primarily for the benefit of the employer and his business. *Reich,* 38 F.3d at 1125 (citing *Tennessee Coal*, 321 U.S. at 598).

Applying that test, the Tenth Circuit held in *Reich* that the time employees spent donning, doffing, and washing sanitary and protective clothing, such as hard hats, earplugs, safety footwear, and safety eyewear, "is not work within the meaning of the FLSA," because it does not entail "physical or mental exertion (whether burdensome or not)." 38 F.3d at 1125. Putting on and taking off the sanitary and protective wear, the court explained, takes little time and "requires little or no concentration." *Id.* at 1126. The

items could "easily be carried or worn to and from work and can be placed, removed, or replaced while on the move or while one's attention is focused on other things." *Ibid.* The court accordingly concluded that "any time spent on these items is not work." *Ibid.*

Reich held that, by contrast, the time spent donning and doffing more substantial and specialized protective gear, such as "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," was work under the FLSA. 38 F.3d at 1124. That is because "[t]hese items are heavy and cumbersome, and it requires physical exertion, time, and a modicum of concentration to put them on securely and properly," and thus donning and doffing those items of protective wear "differ[s] in kind, not simply degree, from the mere act of dressing." *Id.* at 1126.

More recently, in *Smith*, *supra*, the Tenth Circuit reaffirmed that work requires exertion, absent some separate contractual understanding between the parties.[3] In *Smith,* rig workers argued that the time spent loading their work clothing (gloves, hardhats, boots, and coveralls) into their truck each morning

---

[3] The Tenth Circuit recognizes the contract-based exception to the exertion requirement that is not at issue in this case, but which this Court outlined in *Armour* and *Skidmore*, *supra*, under which non-exertive "'time spent lying in wait' in which an employee may be called upon for the employer's purposes should be compensated." *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998) (quoting *Armour*, 323 U.S. at 126).

before driving to work constituted "work" that started their workday. *Smith*, 462 F.3d at 1288. Applying *Reich*, the Tenth Circuit held that the employees' activity was "properly considered not work at all" because, like the donning and doffing in *Reich*, it took "all of a few seconds and requires little or no concentration." *Smith*, 462 F.3d at 1289 (quoting *Reich*, 38 F.3d at 1126).

The Third Circuit's decision in this case cannot be reconciled with those decisions of the Tenth Circuit. While the Tenth Circuit held that donning and doffing protective wear was not "work" when it took only a short time and required no concentration (*Reich*, 38 F.3d at 1126), the Third Circuit held that donning and doffing indistinguishable protective wear was work even though the testimony at trial showed that it took only "seconds" to put on and employees "didn't have to think about it."

Rather than follow *Reich*, the court of appeals here tracked the Ninth Circuit's decision in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), which had "rejected *Reich*" (App., *infra*, 23a; see *Ballaris*, 370 F.3d at 911 (noting that *Reich* "reached a contrary conclusion")), and which held that "'work' includes even *non-exertional* acts" (App., *infra*, 24a (quoting *Ballaris*, 370 F.3d at 911)).

As a result of the court of appeals' decision to break with the Tenth Circuit, putting on and removing protective eyewear, footwear, and earplugs is "work" for petitioner's employees within the States composing the Third Circuit, but is not "work" for the employees of petitioner's wholly owned subsidiary, just because the latter are located in the States composing the Tenth Circuit. The operation of a single

term in a single federal law designed to establish uniform nationwide standards for employee hours and compensation should not vary based on nothing more than accidents of geography.

B. The circuit conflict is indicative of the broader confusion in the courts of appeals over the circumstances in which non-exertive activity constitutes "work" and thus may commence or conclude the continuous workday. The First, Second, Seventh, and Federal Circuits all rely on the *Tennessee Coal* exertion test as the primary definition of "work" under the FLSA. See *Plumley v. Southern Container, Inc.*, 303 F.3d 364, 371 n.4 (1st Cir. 2002); *Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995); *Sehie v. Aurora*, 432 F.3d 749, 754 (7th Cir. 2005); *Adams v. United States*, 471 F.3d 1321, 1325 (Fed. Cir. 2006). Those courts have struggled, however, with determining when to apply this Court's decision in *Armour*, and thus when to hold that the parties have contractually agreed to compensate a non-exertive activity as work.

For example, the Seventh Circuit in *Sehie v. Aurora*, 432 F.3d 749 (7th Cir. 2005), applied this Court's *Tennessee Coal* test, including its exertion requirement, and held that the employer "must pay [the employee] for any (1) physical or mental exertion; (2) controlled and required by the employer, and (3) pursued necessarily and primarily for the benefit of the employer." *Id.* at 754. The court nevertheless indicated "that all hours that the employee is required to give his employer are hours worked, even if they are spent in idleness" (*id. at 751* (citing *Armour*, 323 U.S. at 133)), a reading of *Armour* that ignores its focus on the agreements between the parties and

which, if applied literally, would remove the exertion requirement from the "work" analysis.

The Second Circuit's decision in *Reich v. New York City Transit Auth.*, 45 F.3d 646 (2d Cir. 1995), similarly announced that it would apply the *Tennessee Coal* exertion test. *Id.* at 651. But the court noted that "on occasions, courts have found that compensable work can occur despite absence of exertion, where, for example, employees have been required to stand by and wait for the employer's benefit." *Ibid.* But like the Seventh Circuit, the Second Circuit made no mention of the contractual analysis required by *Tennessee Coal* and *Armour*.

The First Circuit, for its part, has noted that the *Tennessee Coal* test, including the exertion requirement, "has withstood the test of time, and constitutes the yardstick by which claims under the FLSA are measured." *Plumley*, 303 F.3d 364, 371 n.4 (1st Cir. 2002). But that court has also acknowledged that, notwithstanding *Tennessee Coal*'s language, the "extent of exertion involved carries little legal weight, because 'an employer, if he chooses, may hire [one] to do nothing, or to do nothing but wait for something to happen.'" *Ibid.* (quoting *Armour*, 323 U.S. at 133).

While those circuits have generally stressed, consistent with this Court's decision in *Tennessee Coal*, that "exertion" is required for "work," those courts have not addressed whether a minor, non-exertional activity that is undertaken in preparation for working or occurs after productive work has ended is itself "work," and their analyses of *Tennessee Coal* and *Armour* underscore the need both for resolution of the inter-circuit conflict and clarification of the proper mode of determining the commonly arising

question whether an activity is "work" under the FLSA.

C. Given the contradictory rulings and analyses in the courts of appeals, it is not surprising that the decisions of district courts are also in widespread conflict, and the sheer volume of decisions testifies to the importance and the frequency with which the question of the proper definition of "work" recurs. Several district court decisions have followed the Tenth Circuit's lead and held that an activity does not constitute "work" if it involves no exertion. See, *e.g.*, *Pressley v. Sanderson Farms, Inc.*, No. Civ.A. H-00-420, 2001 WL 850017, at *2-*3 (S.D. Tex. Apr. 23, 2001) (time spent by poultry employees donning, doffing, and cleaning a smock, apron, cotton and/or rubber gloves, rubber sleeves, a hairnet and earplugs is not "work"), *summarily aff'd*, 33 Fed. App'x 705 (5th Cir. 2002); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 561-562 (E.D. Tex. 2001) (time spent by poultry employees donning, doffing and cleaning hair net, ear plugs, gloves, smock, apron, plastic sleeves, glasses, and mesh glove was not "work" because those activities could be performed while walking, took little time, required little concentration or energy, and involved items that were not cumbersome or heavy), *summarily aff'd*, 44 Fed. App'x 652 (5th Cir. 2002); *Bejil v. Ethicon, Inc.*, 125 F. Supp. 2d 192, 196 n.3 (N.D. Tex. 2000) (time spent by suture-manufacturer's employees putting on and removing lab coat, dedicated shoes, hair covering, and beard net was not "work" under *Reich*).

Other district courts follow the rule of the court of appeals here and have held that exertion is not an element of "work." See, *e.g.*, *Chao v. Tyson Foods,*

Inc., No. 2:02-CV-1174-VEH, slip. op. (N.D. Ala. Jan. 22, 2008); *Lopez v. Tyson Foods*, No. 8:06CV459, 2007 WL 1291101 (D. Neb. March 20, 2007); *Garcia v. Tyson Foods, Inc.*, No. 06-2198-JWL, slip op. (D. Kan. Feb. 16, 2007); *Jordan v. IBP, Inc.*, No. 02-1132, slip op. (M.D. Tenn. Oct. 13, 2004).

In sum, the split among the Third, Ninth, and Tenth Circuits over the meaning of work; the confusion in the First, Second, and Seventh Circuits about the relationship between this Court's decisions in *Tennessee Coal* and *Armour*; and the disarray in the district courts together subject employers like petitioner to flatly irreconcilable legal obligations with respect to similar employee conduct. This Court's restoration of uniformity is critical both for employees and for the day-to-day decisionmaking of employers.

II. The Court Of Appeals' Decision Conflicts With Decisions Of This Court

The Third Circuit's decision conflicts with decisions of this Court repeatedly holding that, absent a contractual or customary understanding to the contrary, "work" under the FLSA requires an element of exertion. In *Tennessee Coal*, this Court held that "work" means "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. Applying that test, the Court concluded that long walks and hazardous rides in ore skips to and from the mining area at the beginning and end of each workday constituted compensable work. *Id.* at 595-597. While the strenuous character of the miners' travels was apparent, the Court explained that,

in "borderline cases where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment," courts should look to "custom and contract" for guidance. *Id.* at 603.

In *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), this Court elaborated on the "custom and contract" test for "work." The Court held that the time corporate firemen spent waiting on call constituted "work," even if it was non-exertive. The Court explained that waiting time constitutes work if "scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances" reveal that "the employee was engaged to wait," as opposed to the employee just "wait[ing] to be engaged." *Skidmore*, 323 U.S. at 137; see *Armour*, 323 U.S. at 133; see also *Alvarez*, 546 U.S. at 25 (noting that exertion is not required when "'an employer * * * hire[s] a man to do nothing, or to do nothing but wait for something to happen'") (quoting *Armour*, 323 U.S. at 133). The Court stressed in *Skidmore* that such contract-based definitions of "work" arise solely from agreement by the parties. The FLSA "does not impose [such] an arrangement upon the parties." 323 U.S. at 137. Rather, the FLSA "imposes upon the courts the task of finding what the arrangement was." *Ibid.*

The next year, the Court confirmed that the "exertion" test for "work" controls, in the absence of any special contractual agreement between the parties. In

Jewell Ridge Coal Corp. v. Local No. 6167, 325 U.S. 161 (1945), the Court addressed whether underground travel between the portals and working faces of the employer's coal mines constituted "work." In so doing, the Court analyzed "all three of the essential elements of work as set forth in the *Tennessee Coal* case," including determining whether the activity entailed "[p]hysical or mental exertion (whether burdensome or not)." *Id.* at 163-164. The Court explained that the *Tennessee Coal* test controlled because the case did not involve "the use of bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or nonactivity constitutes work," as it did in *Armour*. *Jewell Ridge*, 325 U.S. at 169-170. See also *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-693 (1946) (activities that "involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit" constitute "work" and, accordingly, "must be included in the statutory workweek and compensated accordingly, *regardless of contrary custom or contract*") (emphasis added).

Read together, this Court's decisions in *Tennessee Coal*, *Jewell Ridge*, and *Mt. Clemens* on the one hand, and *Armour* and *Skidmore* on the other, chart two distinct paths for determining whether an activity constitutes "work" under the FLSA. The employee must show either that (i) the work entails "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," *Tennessee Coal*, 321 U.S. at 598, or (ii) "the agreements between the particular parties" denominated the non-exertive activity to be com-

pensable work, *Skidmore*, 323 U.S. at 136. Those alternative definitions of work have been demarcated by this Court's precedent for decades and, in that respect, have been left untouched by Congress.

The Third Circuit here, like the Ninth Circuit precedent that it followed, has collapsed those two distinct tests into a single inquiry into whether the activity is "controlled or required by the employer and pursued for the benefit of the employer." App., *infra*, 26a; see *Ballaris*, 370 F.3d at 911. And indeed the Third Circuit's formulation is further flawed because, without comment, it seemingly eliminates *Tennessee Coal*'s requirement that the activity at issue be undertaken *primarily* for the benefit of the employer. The result is a definition of "work" that sweeps far beyond the two categories this Court's precedent has carefully marked out and enforced.

Contrary to the court of appeals' reasoning (App., *infra*, 20a-21a), this Court's decision in *Alvarez* offers no support for such a significant expansion of the definition of "work." In *Alvarez*, this Court held that certain time spent walking and waiting was compensable under the FLSA not because it constituted "work" but because it occurred between the first and last principal activities of the employees' workday, and hence during the "continuous workday." *Alvarez*, 546 U.S. at 37.[4] That decision thus arose not under

[4] In *Alvarez*, the Ninth Circuit had found that the dressing activities were work in the first instance, and that they were integral and indispensable to the employees' principal activities. See *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003). These aspects of the Ninth Circuit's decision were not challenged in this Court: *Alvarez* assumed these conclusions to be

the FLSA's established definition of "work," but under the Portal-to-Portal Act's specific limitations on compensable work. Following this Court's decision in *Anderson*, Congress enacted the Portal-to-Portal Act, 29 U.S.C. §§ 251 *et seq.*, which excluded from the FLSA's coverage (i) travel time before and after an employee's principal activities (*id.* § 254(a)(1)), and (ii) preliminary and postliminary activities before and after an employee's principal activities (*id.* § 254(a)(2)). In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court held that otherwise preliminary activity that followed an employee's first principal activity of the day did not fall within the Section 254(a)(2) exception. *Alvarez*, in turn, held that walking that follows an employee's first principal activity does not fall within the Section 254(a)(1) exception.[5] *Alvarez* further held that the walking time was compensable without regard to whether it constitutes "work" because it occurs during the "continuous workday" – *i.e.*, during the time between the employee's first and last principal activities. Under the applicable Department of Labor regulation, all time "between the commencement and completion on the same workday of an employee's principal activity or activities" is part of the "workday." 29 C.F.R. § 790.6(b) (2005).

---

correct and instead addressed only the *consequences* of those holdings on the compensability of walking time subsequent to the dressing. See *Alvarez*, 546 U.S. at 32.

[5] *Alvarez* also held that certain pre-donning waiting time was "preliminary" and thus was non-compensable under the Portal-to-Portal Act. *Alvarez*, 546 U.S. at 40.

The court of appeals erred in concluding that its decision was supported by *Alvarez*. In fact, this case involves a question antecedent to the one presented by *Alvarez*. The question here is whether respondents donning and doffing activities constitute "work" and hence may commence or conclude the "continuous workday." The court of appeals incorrectly assumed that activities that were compensable because they fell within the "continuous workday" in *Alvarez* necessarily constitute "work" under the FLSA in all circumstances. The "continuous workday" regulation makes clear that the inquiries are distinct, explaining that a workday "includes all time within that period *whether or not the employee engages in work* throughout all of that period." 29 C.F.R. § 790.6(b) (emphasis added). The court of appeals thus fundamentally misread *Alvarez* when it concluded that the employees' walking and waiting activities in that case could not be compensable "if they were not work themselves" (App., *infra*, 21a). In fact, whether an activity falls within a "continuous workday" and whether it independently qualifies as "work" are two distinctly different inquiries under the FLSA. This case involves the core definition of "work" and the test adopted by the court of appeals squarely conflicts with this Court's longstanding definition of that term under the FLSA.

III. The Question Presented Is One Of Recurring And Pressing National Importance

Prompt resolution by this Court of the proper definition of "work" under the FLSA is critical. The FLSA's coverage is sweeping; the statute governs tens of thousands of employers and millions of em-

ployees in the United States. Indeed, every large employer whose employees are "engaged in commerce or in the production of goods for commerce" is bound by the FLSA's strict regulation of both the hours of and pay for "work." 29 U.S.C. §§ 206(a), 207(a)(1). The definition of compensable and regulated "work," moreover, lies at the heart of the FLSA's application.

Furthermore, employees engaged "in the production of goods for commerce" and in commerce generally commonly use some form of protective and sanitary gear, such as hard hats, safety glasses, earplugs, gloves, and hairnets, in a wide range of industries. See *Reich*, 38 F.3d at 1125. The court of appeals' decision thus "open[s] the door to lawsuits from every industry where such equipment is used, from laboratories to construction sites," and the potential liability it creates in terms of unanticipated and unbargained-for labor costs is enormous. *Ibid.*[6]

---

[6] *Alvarez* and *Ballaris* did in fact open this door to burdensome litigation. Significant decisions in at least six donning and doffing cases have been handed down in the Ninth Circuit alone since July 2007. See, *e.g.*, *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS (CONSOLIDATED), 2007 WL 4532218 (N.D. Cal. Dec. 19, 2007) (donning and doffing inventory control equipment); *Lemmon v. City of San Leandro*, No. C 06-07107 MHP, 2007 WL 4326743 (N.D. Cal. Dec. 7, 2007) (donning and doffing police uniforms); *Abbe v. City of San Diego*, Nos. 05cv1629 DMS (JMA), 06cv0538 DMS (JMA), 2007 WL 4146696 (S.D. Cal. Nov. 9, 2007) (donning and doffing police uniforms); *Olson v. Tesoro Ref. & Mktg. Co.*, No. C06-1311RSL, 2007 WL 2703053 (W.D. Wash. Sept. 12 2007) (donning and doffing personal protective gear at oil refinery); *Martin v. City of Richmond*, 504 F.Supp.2d 766 (N.D. Cal. 2007) (donning and doffing police uniforms); *Bamonte v. City of Mesa*, No. CV 06-01860-

The unanticipated cost to employers does not stop there. If donning and doffing such lightweight protective and sanitary clothing constitutes "work," then many employers may have to confront a new beginning to the "continuous workday," which could exponentially expand unanticipated labor costs.

In short, the practical and economic effects of altering the FLSA's definition of labor are substantial and are economically destabilizing to employers. That is particularly true for the large number of interstate employers subject to the FLSA, which now face contradictory hour-and-wage obligations for employees engaged in similar tasks that depend entirely on geography. Even for employers who operate outside of the Third, Ninth, and Tenth Circuits, the inter-circuit conflict has introduced substantial uncertainty in business planning, decisionmaking, and labor negotiations. That kind of instability directly impairs the ability of the American economy to maintain its dwindling manufacturing sector. This Court's prompt restoration of uniformity and stability in the law is vital, as this Court has long recognized that "federal labor-law principles" must "necessarily [be] uniform throughout the Nation." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988).

PHX-NVW, 2007 WL 2022011 (D. Ariz. July 10, 2007) (donning and doffing police uniforms).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. GOLDSTEIN
Counsel of Record
PATRICIA A. MILLETT
MICHAEL J. MUELLER
JOEL M. COHN
CHRISTOPHER M. EGLESON
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000

FEBRUARY 2008

TABLE OF CONTENTS

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3502

MELANIA FELIX DE ASENCIO; MANUEL A. GUTIERREZ; ASELA RUIZ; EUSEBIA RUIZ; LUIS A. VIGO; LUZ CORDOVA; HECTOR PANTAJOS, on behalf of themselves and all other similarly situated individuals,

Appellants

v.

TYSON FOODS, INC.

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 00-cv-04294)
District Judge: Honorable Robert F. Kelly

Argued July 12, 2007

Before: SLOVITER, ALDISERT, and ROTH, Circuit Judges

(Filed September 6, 2007)

Thomas J. Elliott
Frederick P. Santarelli (Argued)
Franco A. Corrado
Elliott, Greenleaf & Siedzikowski

Blue Bell, PA l9422

Attorneys for Appellants

Michael J. Mueller (Argued)
Joel M. Cohn
Michael S. McIntosh
Akin, Gump, Strauss, Hauer & Feld
Washington, DC 20036

Attorneys for Appellee

Howard M. Radzely
Solicitor of Labor
Steven J. Mandel
Associate Solicitor
Paul L. Frieden
Counsel for Appellate Litigation
Joanna Hull (Argued)
U. S. Department of Labor
Washington, DC 20210

Attorneys for Amicus Curiae Appellants,
Secretary of Labor

Robin S. Conrad
National Chamber Litigation Center, Inc.
Washington, DC 20062

Thomas J. Walsh, Jr.
Arnold E. Perl
Patrick D. Riederer
Ford & Harrison LLP
Memphis, TN 38120

Attorneys for Amicus Curiae Appellee,
Chamber Commerce of the United States

David R. Wylie
D. Christopher Lauderdale
Jackson Lewis LLP
Greenville, SC 29601

Attorneys for Amicus Curiae Appellee,
National Chicken Council and American Meat Institute

OPINION OF THE COURT

SLOVITER, Circuit Judge.

In instructing the jury in this case brought by poultry workers under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA" or "Act"), the District Court stated that in considering whether the workers' donning, doffing and washing was "work" under the Act, the jury must consider whether the activities involved physical or mental exertion. The jury decided the issue of work against the workers and therefore never reached the defenses proffered by the employer. The workers appeal, arguing that the District Court's instruction on donning and doffing was erroneous as a matter of law.[1] This is an issue that has created considerable interest.[2]

---

[1] The National Chicken Council and the American Meat Institute, as well as the Chamber of Commerce of the United States of America, have submitted briefs as amici curiae in sup-

I.

Plaintiffs/Appellants are current and former chicken processing plant workers in New Holland, Pennsylvania, who brought this action against Tyson Foods, Inc. ("Tyson"), arguing that Tyson does not pay them for the time they spend "donning and doffing," as well as washing, their work gear. Tyson requires its employees to put on and take off safety and sanitary clothing (i.e., "donning and doffing"), and engage in washing activities, pursuant to government regulations and corporate or local policy and practice.[3] This time must be spent six times a day: before and after their paid shifts and two daily meal breaks. Most employees generally wear a smock, hairnet,

---

port of Tyson. The Secretary of Labor has submitted a brief as amicus in support of the appellant workers.

[2] *See, e.g.,* Rachael Langston, *IBP v. Alvarez: Reconciling the FLSA With the Portal-To-Portal Act,* 27 Berkeley J. Emp. & Lab. L. 545 (2006); Lynn M. Carroll, *Employment Law-Fair Labor Standards Act Requires Compensation for Employees Walking to and From Workstations-IBP, Inc. v. Alvarez,* 40 Suffolk U.L.Rev. 769 (2007); Robert J. Rabin, *A Review of the Supreme Court's Labor and Employment Law Decisions: 2005-2006 Term,* 22 Lab. Law 115 (Fall 2006); Tresa Baldas, *I Have to Put That on? Pay me for the Time!,* The National Law Journal, July 2, 2007, at 6; Nicholas D'Ambrosio, *When Donning and Doffing Work Gear is Considered Compensable Time,* The Business Review, September 8, 2003, http://www.bizjournals.com/albany/stories/2003/09/08/smallb3.html; Michael Matza, *Settlement Gives Meat Workers More Pay,* Phila. Inquirer, June 13, 2007, at C01.

[3] Tyson's internal operating requirements provide that a worker may not keep the gear at home and wear it to the plant nor can a worker wear the gear home. *See* App. at 1402-03, 1798; *see also* 9 C.F.R. § 416.1 *et seq.* (1996) (requiring that food processing establishments "must be operated and maintained in a manner sufficient to prevent the creation of insanitary conditions and to ensure that product is not adulterated").

beard net, ear plugs, and safety glasses.[4] Additional sanitary and protective items that certain employees wear include a dust mask, plastic apron, soft plastic sleeves, cotton glove liners, rubber gloves, a metal mesh glove, and rubber boots.

Tyson's witness Michael Good, the complex's manager, testified that these activities take six to ten minutes collectively per shift (presumably per employee). Appellants' expert estimated that the activities take 13.3 minutes per shift.[5] Although Tyson does not record the time its workers spend on donning and doffing, Tyson avers that certain of the employees receive an extra fifteen minutes of compensation "which is enough to fully compensate the plaintiffs for the very activities that are the basis for this suit." Appellee's Br. at 6. However, Good testified at trial that employees in the "receiving, killing, and picking" and "evisceration" departments do not receive the extra fifteen minutes of compensation.

---

[4] At oral argument, Tyson disputed that it necessarily required such gear, but the parties stipulated that the clothing was required in their joint pre-trial memorandum. Tyson notes in its brief that some employees wear less than the typical set of gear, pointing to testimony where a worker wore "just the smock[,]" App. at 876, or where workers did not wear smocks or safety glasses.

[5] Although appellants' expert had originally estimated the actions took 15.7 minutes, Tyson's expert excluded certain non-compensable activities, such as swiping of time card and time spent before the donning of gear, and appellants do not disagree. *See IBP, Inc. v. Alvarez,* 546 U.S. 21, 40-41, 126 S. Ct.. 514, 163 L. Ed.2d 288 (2005) (predonning waiting time, and waiting for supplies, not a principal activity and excluded from coverage under Portal-to-Portal Act of 1947, 29 U.S.C. § 251 et seq.); *Anderson v. Mt. Clemens Pottery,* 328 U.S. 680, 689, 66 S. Ct.. 1187, 90 L. Ed. 1515 (1946) (ignoring swiping-at-clock time).

Appellants filed suit against Tyson on August 22, 2000, under both the FLSA and state law (the Pennsylvania Wage Payment and Collection Law ("WPCL"), 43 Pa. Cons.Stat. §§ 260.1-260.45) on behalf of themselves and similarly situated co-workers at Tyson's chicken processing complex, alleging that Tyson was liable to its employees for time spent donning, doffing and washing. *See De Asencio v. Tyson Foods, Inc.,* 342 F.3d 301, 304, 312 (3d Cir. 2003). Appellants sought collective treatment of their FLSA action under the Act's opt-in provisions; 540 workers joined the suit. On interlocutory appeal, this court decided that "the District Court did not exercise sound discretion in granting supplemental jurisdiction over the WPCL action," and denied certification of the WPCL class with respect to all plaintiffs. *De Asencio,* 342 F.3d at 312.

Tyson subsequently moved for summary judgment, arguing first, that "the acts of donning, doffing, and sanitizing protective clothing and equipment are not work as defined by the FLSA." App. at 2357. Second, Tyson argued that, "if such activities are work, then they are *de minimis* and thus should not be compensated."[6] *Id.* Third, Tyson alleged that the activity, if work, would nevertheless be "not compensable under the Portal to Portal Act." *Id.* In denying summary judgment on each of these bases, the District Court concluded that it would be "hasty" to rule on the mixed law/fact question of whether the

---

[6] The *de minimis* doctrine is discussed further infra; generally, certain brief moments of work may be deemed difficult to quantify and record and are therefore considered uncompensable.

activity was compensable "work" without further development of the record. It observed that there was "minimal relevant case law in our jurisdiction" and "there is significant disagreement among the jurisdictions who have considered these issues." *Id.* The Court believed "such a decision would be a mistake and a disservice to the body of law on which we depend" and concluded that, in view of the "many disputed factual issues intertwined with the legal issues" on these three points, "summary judgment is not appropriate and would be premature at this time." App. at 2357, 2359.

Trial commenced in this action in June 2006.[7] In their joint pretrial memorandum, the parties identified the legal issues at trial to be "1. Whether the activities and time at issue constitute 'work' for purposes of the FLSA?... 2. Whether the time incurred on such activities is de minimis for purposes of the FLSA? 3. Whether the 'opt-ins' [to the class] are similarly situated and have put on representative evidence for purposes of the FLSA?"App. at 2478. To expedite the trial, Tyson withdrew "its position that the clothes-changing and washing activities were not 'integral and indispensible' to the principal activities that the plaintiffs were hired to perform." *Id.*

During the charging conference, the parties

---

[7] Appellants also argue that the District Court erred in refusing to postpone the trial to "avoid inherent prejudice from the intense extraordinary public debate and onslaught of negative publicity about immigrant workers in America, which pervaded the national and local media immediately prior to and throughout the time of the June, 2006 trial." Appellants' Br. at 4-5. Because of our disposition of this case, this is a moot issue.

sparred over the definition of "work" that would be read to the jury. Appellants' counsel argued that "[a]ny instruction that equates work with the need for any level of physical or mental exertion directly contradicts the [Supreme Court's] decision in *IBP v. Alvarez,* where the [C]ourt expressly stated [that] exertion is not, in fact, necessary for an activity to constitute work under the FLSA," and counsel cited to *Armour & Co. v. Wantock,* 323 U.S. 126, 65 S. Ct.. 165, 89 L. Ed. 118 (1944), in support of that proposition. App. at 2035. In response, Tyson's counsel argued that *Alvarez* does not overrule the Supreme Court's pre-*Armour* definition of work as "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." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 598, 64 S. Ct.. 698, 88 L. Ed. 949 (1944). They argued that the *Armour* decision, which held that time on call spent by a private firefighting force could be deemed "work," merely "talks about a situation where an individual is engaged to wait," App. at 2036, and that "[w]e don't have that situation here. Here we have a situation where they're alleging that certain types of physical activities are work, and it's our position that in that context, it's *Tennessee Coal*... [that] should be applied and that's what our instruction tracks, [y]our Honor." App. at 2037. In response, appellants' counsel emphasized that the Supreme Court's *Alvarez* decision "unanimously, unanimously stated that" the *Armour* decision "clarif [ied] that exertion is not, in fact, necessary for an activity to constitute work under the FLSA, period. And I don't know how you can get

around that." App. at 2037.

The District Court ultimately gave the following work instruction:

> Work is what we're talking about. What-does the activity the plaintiffs claim they were doing or performing, was it work? To find that an employee should be paid for an activity under the Fair Labor Standards Act, you first need to determine whether or not the activity at issue is work. The law states that work 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[. T]here-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.*
>
> 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 exer-*

> *tion, 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 or wash their hands or gloves while walking, talking or doing other things?

App. at 2209-11 (emphasis added).

Following two and one-half hours of deliberation, the jury submitted a written question to the Court: "What is the meaning of exertion in the definition of work? Physical, or should we determine what or how much exertion?" App. at 3096, 2236. Following argument from the parties, the District Court read the jury the Webster's Dictionary definition of "exertion" and re-read the above jury charge on "work." App. at 2236-39. Thereafter, the jury returned a unanimous verdict finding plaintiffs had not "provided representative evidence that [the activities at issue] are 'work' " for purposes of the FLSA. App. at 3094-95. As a result, the jury did not reach the questions on the back of the verdict form as to whether the work was *de minimis* or whether appellants had been paid extra minutes to compensate for such time. Based on the jury's verdict, the District Court entered judgment on behalf of Tyson Foods.

II.

"Although we generally review jury instructions for abuse of discretion, our review is plenary when the question is whether a district court's instructions misstated the law." *United States v. Dobson,* 419 F.3d

231, 236 (3d Cir. 2005) (internal citations and quotations omitted). "As on all occasions when we consider jury instructions[,] we consider the totality of the instructions and not a particular sentence or paragraph in isolation." *United States v. Coyle,* 63 F.3d 1239, 1245 (3d Cir. 1995).

Appellants, and the Secretary of Labor as amicus, argue that although the jury instructions noted that "exertion is not, in fact, necessary" for activity to constitute work under the FLSA, the District Court erred in informing the jury that such exertionless work is an exception to the "usual situation[.]" They assert it was error to inform the jury that "[f]or each job position, if the donning, doffing and washing at issue do not require physical or mental exertion, the activities are not work." App. at 2210. In response, Tyson argues that the "heavy or cumbersome" language in the instruction was appropriate, relying in the main upon *Reich v. IBP, Inc.,* 38 F.3d 1123, 1125-26 (10th Cir. 1994) (holding that "[t]he placement of a pair of safety glasses, a pair of earplugs and a hardhat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration," so that these activities did not meet the "physical or mental exertion" requirement and accordingly could not be considered "work" under the FLSA).

The FLSA does not define the term "work." In its opinion in *Alvarez* issued in 2005, a unanimous Supreme Court provided a concise survey of how its case law has defined the term:

> Our early cases defined [work] broadly. In *Tennessee Coal, Iron & R. Co. v. Muscoda*

> *Local No. 123,* 321 U.S. 590, 64 S. Ct.. 698, 88 L. Ed. 949 (1944), we held that time spent traveling from iron ore mine portals to underground working areas was compensable; relying on the remedial purposes of the statute and Webster's Dictionary, we described "work or employment" as "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." The same year, in *Armour & Co. v. Wantock,* 323 U.S. 126, 65 S. Ct.. 165, 89 L. Ed. 118 (1944), we clarified that "exertion" was not in fact necessary for an activity to constitute "work" under the FLSA. We pointed out that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Two years later, in *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 66 S. Ct.. 1187, 90 L. Ed. 1515 (1946), we defined "the statutory workweek" to "include all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." Accordingly, we held that the time necessarily spent by employees walking from time clocks near the factory entrance gate to their workstations must be treated as part of the workweek.

Alvarez, 546 U.S. at 25-26, 126 S. Ct.. 514 (certain internal citations omitted).

The *Alvarez* Court then discussed how, in response to *Anderson,* 328 U.S. at 691-92, 66 S. Ct.. 1187, where the Court held that the term "workweek" in the FLSA included the time employees spent walking from time clocks near a factory entrance to their workstations, Congress passed the Portal-to-Portal Act in order to shield employers from unexpected liability. The Act excluded the activities of "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities[.]" *Alvarez,* 546 U.S. at 27-28, 126 S. Ct.. 514 (quoting 29 U.S.C. § 254). The *Alvarez* Court explained, however, that "the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the term[ ] 'work.' " *Id.* at 28, 126 S. Ct.. 514.

The *Alvarez* decision was a consolidated appeal of *Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003), and *Tum v. Barber Foods, Inc.,* 360 F.3d 274 (1st Cir. 2004). The Supreme Court held, in response to a question raised in both cases, that the time employees spend walking between changing areas (where they had donned required protective gear) and production areas, and time spent waiting to remove that gear at the end of the work day is compensable under the FLSA, as amended by the Portal-to-Portal Act. The Court further held, in response to a question raised only in *Tum,* that time spent waiting to receive gear before the work shift begins is not compensable, although it emphasized that its analysis would be different if an employer required its em-

ployees to arrive at a certain time and then wait to don the gear.

It is useful to examine the lower court opinions in *Tum* and *Alvarez.* In *Alvarez,* beef and pork slaughter and processing employees brought an FLSA action, arguing that they should be compensated for donning and doffing of their gear (which was, for certain employees, heavier and more elaborate than that at issue in the instant case, including a chain-mail type material for knife-wielding employees). The Court of Appeals for the Ninth Circuit explained the breadth of the definition of "work" under the FLSA, and then explained how the Portal-to-Portal Act and the *de minimis* doctrine nevertheless operate to narrow the compensability of such work. The Court of Appeals observed, as did the Supreme Court in its consideration of the case, that *Tennessee Coal* defined work as "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." *Alvarez,* 339 F.3d at 902 (citations and internal quotations omitted) (emphasis added). The Court of Appeals explained:

> Definitionally incorporative, [*Tennessee Coal*]'s "work" term includes even non-exertional acts. *See [Armour]* (noting that even "exertion" is not the *sine qua non* of "work" because "an employer ... may hire a man to do nothing, or to do nothing but wait for something to happen"). Plaintiffs' donning and doffing, as well as the attendant retrieval and waiting, constitute "work" under [*Tennessee Coal*'s] and *Ar-*

> *mour*'s catholic definition: "pursued necessarily and primarily for the benefit of the employer,"... these tasks are activity, burdensome or not, performed pursuant to IBP's mandate for IBP's benefit as an employer. The activities, therefore, constitute "work."

Id. (certain internal citations omitted).

The Ninth Circuit's opinion observed, however, that the conclusion "[t]hat such activity is 'work' as a threshold matter does not mean without more that the activity is necessarily compensable." *Id.* It explained how two sources of law in particular may operate to block compensation for such broadly defined "work." The first is the Portal-to-Portal Act, which, the court explained:

> relieves an employer of responsibility for compensating employees for "activities which are preliminary or postliminary to [the] principal activity or activities" of a given job. 29 U.S.C. § 254(a) (1999). Not all "preliminary or postliminary" activities can go uncompensated, however. "[A]ctivities performed either before or after the regular work shift," the Supreme Court has noted, are compensable "if those activities are an integral and indispensable part of the principal activities."

Alvarez, 339 F.3d at 902 (quoting *Steiner v. Mitchell,* 350 U.S. 247, 256, 76 S. Ct.. 330, 100 L. Ed. 267 (1956)).

As to the second of the two sources, the Court of Appeals explained that *de minimis* work is also non-

compensable, and cited to *Anderson,* 328 U.S. at 692, 66 S. Ct.. 1187 ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours ... such trifles may be disregarded [, for] [s]plit-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA].").

The *Alvarez* Court of Appeals then agreed with the district court's post-bench-trial conclusions in its findings of fact and conclusions of law as to why certain of the donning and doffing were compensable and others were not. As all the donning/doffing/washing was mandated and necessary to the principal work being performed, the donning and doffing was compensable as an integral and indispensable part of the principal activity pursuant to the Portal-to-Portal Act. Nonetheless, the court concluded that the donning of certain items, such as safety goggles and hardhats, was noncompensable as *de minimis.* It stated:

> While we do not suggest that the donning of such gear is "trifl[ing]," *see* [*Anderson*], 328 U.S. at 692 [66 S. Ct.. 1187], we do believe that neither FLSA policy nor "the actualities" of plaintiffs' working conditions justify compensation for the time spent performing these tasks. Accordingly, donning and doffing of all protective gear is integral and indispensable…and generally compensable. However, the specific tasks of donning and doffing of non-unique protective gear such as hardhats and safety goggles is noncompensable as *de minimis*... In

> sum, we agree with the district court's conclusion, but for different reasons in part. In this context, "donning and doffing" and "waiting and walking" constitute compensable work activities except for the *de minimis* time associated with the donning and doffing of non-unique protective gear.

Alvarez, 339 F.3d at 904 (certain internal citations omitted).

On appeal, the Supreme Court, in its *Alvarez* opinion, referenced its holding in *Steiner v. Mitchell,* 350 U.S. 247, 254, 76 S. Ct.. 330, 100 L. Ed. 267 (1956). In *Steiner,* the Supreme Court had concluded that in enacting the Portal-to-Portal Act Congress still intended that an employee's activities fall "within the protection of the [Fair Labor Standards] Act if they are an integral part of and are essential to the principal activities of the employees." 350 U.S. at 254, 76 S. Ct.. 330. The *Steiner* Court therefore held "that activities performed either before or after the regular work shift ... are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed…."*Id.* at 256, 76 S. Ct.. 330. Subsequently, the Supreme Court held in *Alvarez,*"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 is thus compensable under the FLSA. *Alvarez,* 546 U.S. at 37, 126 S. Ct.. 514 (emphasis added); *see also Mitchell v. King Packing Co.,* 350 U.S. 260, 76 S. Ct.. 337, 100 L. Ed. 282 (1956) (applying *Steiner* to hold

that workers in a meat packing plant were entitled to compensation for the time spent sharpening their knives, because the knife-sharpening activities were an integral part of, and indispensable to, the principal activities for which the workers were employed).

Accordingly, in *Alvarez,* the Court noted that the employer "does not challenge the holding below that, in light of *Steiner,* the donning and doffing of unique protective gear are 'principal activities' under [Section] 4 of the Portal-to-Portal Act" but, rather, challenged whether post-donning/pre-doffing walking time was compensable under the Portal-to-Portal Act.*Alvarez,* 546 U.S. at 32, 126 S. Ct.. 514. The Court concluded that such walking time after donning is compensable because the donning was an unchallenged principal activity and therefore it triggered the start of the workday.[8] In other words, donning "gear that is 'integral and indispensable' to employees' work is a 'principal activity' under the statute," and, thus, "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 [the Portal-to-Portal Act's exclusion of walking time], and as a result is covered by the

---

[8] In *Alvarez,* the Court noted that "[T]he Department of Labor has adopted the continuous workday rule, which means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.' [29 C.F.R.] § 790.6(b). These regulations have remained in effect since 1947, see 12 Fed.Reg. 7658 (1947), and no party disputes the validity of the continuous workday rule." *Alvarez,* 546 U.S. at 29, 126 S. Ct.. 514.

FLSA."*Alvarez,* 546 U.S. at 37, 40, 126 S. Ct.. 514.

The Supreme Court next turned to the decision in *Tum v. Barber Foods, Inc.,* 360 F.3d 274 (1st Cir. 2004). In that case, the Court of Appeals had agreed that "[i]n the context of this case, Employees are required by [employer] Barber Foods and or government regulation to wear the gear. Therefore, [donning and doffing] are integral to the principal activity and therefore compensable." *Id.* at 279, 360 F.3d 274.[9] However, the Court of Appeals had held that the pre-donning waiting time, post-donning walking time, pre-doffing waiting time and pre-doffing walking time were all excluded from FLSA coverage by the Portal-to-Portal Act. The Supreme Court disagreed with almost all of these holdings. The Court held that the Court of Appeals was incorrect with regard to its treatment of post-donning walking time, and pre-doffing waiting and walking time. It stated, "[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 time spent waiting to doff is not affected by the Portal-to-Portal Act and is instead covered by the FLSA."*Alvarez,* 546 U.S. at 40, 126 S. Ct.. 514. Moreover, it also stated that the Court of Appeals

---

[9] The district court in *Tum* ruled in a pretrial motion that donning/doffing was integral to plaintiffs' employment at the chicken processor in question, thus removing it from exclusion under the Portal-to-Portal Act, and this, as noted, was affirmed on appeal to the First Circuit. The jury in *Tum,* however, had "concluded that such time was *de minimis* and therefore not compensable" and so, nevertheless, ruled for Barber on the question of compensation for this work. *Alvarez,* 546 U.S. at 39, 126 S. Ct.. 514.

was incorrect in concluding that the "walking time was a species of preliminary and postliminary activity excluded from FLSA coverage...."*Id.* at 39, 126 S. Ct.. 514.

The Supreme Court only affirmed the Court of Appeals' conclusion, that *pre*-donning waiting time was not a "principal activity." It explained that the Portal-to-Portal Act mandated that such preshift activities are uncompensable: "unlike the donning of certain types of protective gear, which is *always* essential if the worker is to do his job, the waiting may or may not be necessary in particular situations or for every employee. It is certainly not 'integral and indispensable' in the same sense that the donning is. It does, however, always comfortably qualify as a 'preliminary' activity." *Id.* at 40, 126 S. Ct.. 514. The Court observed, however, that such a conclusion would be different if "Barber required its employees to arrive at a particular time in order to begin waiting." *Id.* at 40 n. 8, 126 S. Ct.. 514.

In light of the foregoing, we conclude that *Alvarez* not only reiterated the broad definition of work, but its treatment of walking and waiting time under the Portal-to-Portal Act necessarily precludes the consideration of cumbersomeness or difficulty on the question of whether activities are "work." Activity must be "work" to qualify for coverage under the FLSA, and that "work," if preliminary or postliminary, will still be compensable under the Portal-to-Portal Act if it is "integral and indispensable" to the principal activity. Under *Alvarez,* such activities are, *in themselves,* principal activities. Although we recognize, of course, that whether donning and doffing is work was not di-

rectly at issue in Alvarez,[10] the Court could not have concluded that walking and waiting time are compensable under the Portal-to-Portal Act if they were not work themselves.

Tyson relies upon *Reich v. IBP, Inc.,* 38 F.3d 1123, 1127 (10th Cir. 1994), a pre-*Alvarez* case, in support of the District Court's use of the "cumbersome" language in the jury charge. In *Reich,* the Court of Appeals for the Tenth Circuit held that the donning and doffing of standard, non-unique protective material, such as hard hats, earplugs, safety footwear, and safety eyewear, was not "work" in light of *Tennessee Coal* and its progeny. 38 F.3d at 1125. Of some importance, the *Reich* court acknowledged that it "could also be said that the time spent putting on and taking off these items is *de minimis* as a matter of law, although it is more properly considered not work at all. Requiring employees to show up at their workstations with such standard equipment is no different from having a baseball player show up in uniform, a businessperson with a suit and tie, or a judge with a robe. It is simply a prerequisite for the job, and is purely preliminary in nature." *Id.* at 1126 n. 1.

Following issuance of the *Alvarez* decision, at least one district court in the Tenth Circuit has considered and rejected the continued viability of *Reich.* In *Garcia v. Tyson Foods, Inc.,* 474 F.Supp.2d 1240 (D. Kan. 2007), the court stated that it was

> convinced that the Circuit, if given the op-

---

[10] The Supreme Court observed that Alvarez's employer did not challenge that the donning and doffing of unique gear are principal activities. *Alvarez,* 546 U.S. at 32, 126 S. Ct.. 514.

> portunity to revisit the issues in *Reich,* would approach its analysis of the pertinent issues differently in light of *Alvarez,* regardless of whether the Circuit ultimately reached the same conclusions concerning compensability. Significantly, the Circuit did not analyze the issues through the lens of the continuous workday rule as clarified by the Supreme Court in *Alvarez.* In light of *Alvarez,* it would seem that the Circuit, if revisiting *Reich* today, would focus not on whether the donning and doffing constituted 'work' within the meaning of *Tennessee Coal,* but on whether standard protective clothing and gear are 'integral and indispensable' to the work performed by production employees. Indeed, the Circuit in *Reich,* although in dicta, certainly stated that standard clothing and gear are integral and indispensable to the work performed by production employees, suggesting that the Circuit might reach a different conclusion on compensability if analyzed in the context of *Alvarez.*

Id. at 1246.

The *Garcia* court rejected the argument that the Tenth Circuit's post-*Reich* opinion in *Smith v. Aztec Well Servicing Co.,* 462 F.3d 1274 (10th Cir. 2006), was indicative of the continuing vitality of *Reich* after *Alvarez.* It noted that "the Circuit's ultimate holding in *Smith*-that travel time was not compensable-was based on its conclusions that the plaintiffs' travel time was not integral and indispensable to the plain-

tiffs' principal activities and that the plaintiffs' travel time did not otherwise fall within the continuous workday. This analysis, a markedly different one than the *Reich* analysis, is in accord with *Alvarez* and further suggests that the Circuit, if revisiting *Reich,* would approach that case differently." *Garcia,* 474 F.Supp.2d at 1247 (certain internal citations omitted). Unlike the District Court in *Garcia,* we will not speculate about what another Court of Appeals would do if it reconsidered the issue in light of *Alvarez.*

We conclude instead that the better view is that stated in *Ballaris v. Wacker Siltronic Corp.,* 370 F.3d 901 (9th Cir. 2004), which rejected *Reich* and reaffirmed the analysis the Ninth Circuit had previously set forth in its opinion in *Alvarez,* which was affirmed by the Supreme Court. The *Ballaris* court noted that, generally, preliminary and postliminary activities remain compensable so long as those activities are an integral and indispensable part of the principal activities. It observed that 29 C.F.R. § 790.8(c) "provides: 'Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, 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.' ...Further, '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,' the activity may be considered integral and indispensable to the principal activities." *Ballaris,* 370 F.3d 901, 910

(quoting 29 C.F.R. § 790.8(c)) (emphasis added by *Ballaris* court).

In *Ballaris,* plaintiffs were silicon wafer manufacturing workers who were required to "gown," i.e., don "bunny suits," and certain of whom were also obligated to don plant uniforms underneath the suits as well. The *Ballaris* court, relying on its decision in *Alvarez,* explained that the exertion of the changing activities was not at issue in deciding whether they were "work" or not: "In *Alvarez,* we held that donning and doffing of all protective gear was compensable worktime. We further held that, in considering whether putting on and taking off safety goggles was excluded, the ease of donning and ubiquity of use did not make the donning of such equipment any less integral and indispensable. We clarified that the term 'work,' as used in the FLSA, includes even *non-exertional* acts. We also made it clear that the donning and doffing of various types of safety gear, as well as the attendant retrieval and waiting, constituted 'work.' " *Ballaris,* 370 F.3d at 910-11 (internal quotations and citations omitted) (emphasis added).

The *Ballaris* court then explained that the fact that the employer required, and strictly enforced, its policy that employees don the attire, and, furthermore, that "this activity was performed at both broad and basic levels for the benefit of the company," led to the conclusion that the activity was not precluded by the Portal-to-Portal Act as merely preliminary. *Id.* (internal quotations to panel decision in *Alvarez* omitted) (citing *Dunlop v. City Electric, Inc.,* 527 F.2d 394, 399-401 (5th Cir. 1976) (suggesting that the employer's directive to perform an action weighs in favor

of compensability)). The *Ballaris* decision thus supports a much broader definition of "work" in the first instance, and notes that such "work" may nevertheless be deemed uncompensable under the Portal-to-Portal Act if it is not integral and indispensible to a given job.[11]

In light of the broad remedial purpose of the FLSA, *see, e.g., Brock v. Richardson,* 812 F.2d 121, 123 (3d Cir. 1987) ("The Fair Labor Standards Act is part of the large body of humanitarian and remedial legislation enacted during the Great Depression, and has been liberally interpreted."), we conclude that it was error for the jury instruction to direct the jury to

---

[11] The Secretary of Labor also highlights an interesting provision of the FLSA, 29 U.S.C. § 203(*o*), which provides, under the heading of "Hours Worked," that "[i]n determining ... the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." Of course, no such collective-bargaining agreement is at issue in this case, but the very existence of this carve-out for changing time under the heading "Hours Worked" in the statute provides at least some indication that such activity is itself properly considered "work" under the FLSA. *See Turner v. City of Philadelphia,* 262 F.3d 222, 224 and 224 n.1 (3d Cir. 2001) (examining § 203(*o*) and noting that "[w]e assume *arguendo,* as plaintiffs would have us do, that *clothes and uniform change time would ordinarily be included within hours worked*... Defendants do not dispute this point."). No mention of the "cumbersome" or "heavy" nature of the changing or washing may be found in the statute. *See Steiner,* 350 U.S. at 255, 76 S. Ct.. 330 (observing that the "clear implication" of the statute is that changing and washing *is* a principal activity unless otherwise excluded from coverage by statute).

consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language in effect impermissibly directed the jury to consider whether the poultry workers had demonstrated some sufficiently laborious *degree* of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer; *Armour* demonstrates that exertion is not in fact, required for activity to constitute "work."

III.

In light of the foregoing analysis, the undisputed facts established that the donning and doffing activity in this case constitutes "work" as a matter of law. Because the jury was erroneously instructed on the definition of "work," we will remand to the District Court for further proceedings consistent with the above analysis.[12] Although preliminary or postliminary work is non-compensable under the Portal-to-Portal Act if the work is not " 'integral and indispensable' to [the] 'principal activit[ies]' " of a given job, *Alvarez,* 546 U.S. at 37, 126 S. Ct. 514, we note that Tyson explicitly withdrew any defense that, if work,

---

[12] Appellants also challenged the continuous workday instruction given at trial. The continuous workday is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Alvarez,* 546 U.S. at 29, 126 S. Ct.. 514 (internal quotations and citations omitted). We believe a correct definition of work would alleviate any concerns that appellants would have on this point were there to be a second trial; in any event, the District Court properly instructed the jury on the continuous workday rule, and "[n]o litigant has a right to a jury instruction of its choice, or precisely in the manner and words of its own preference." *Douglas v. Owens,* 50 F.3d 1226, 1233 (3d Cir. 1995).

donning or doffing was not integral or indispensable in the joint pre-trial memorandum. We leave it to the District Court to determine the preclusive effect, if any, of this withdrawal in any further proceedings.

On remand, the District Court will also need to consider the *de minimis* doctrine, which provides a limiting principle to compensation for trivial calculable quantities of work. Tyson argues that any guidance we may give as to the content of the doctrine would be merely advisory; we disagree. *See Douglas,* 50 F.3d at 1228 ("In light of our decision to remand for a new trial, it is not necessary to address the issue of the jury instruction regarding the law governing the use of force against prisoners. Nonetheless, because of the likelihood that this issue will undoubtedly arise again during the new trial, we will give directions on the issue to the district court."); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.,* 750 F.2d 1552, 1566 (Fed. Cir. 1984) ("Trans-World raises both of those issues in its appeal. Nyman's first response is that we should not consider those issues, on the ground that since the jury did not reach the question of damages because it concluded that both patents were invalid, Trans-World is seeking an advisory opinion on an issue that neither the jury nor the district court decided. Those issues, however, undoubtedly will arise on the retrial of the question of damages that will be held.").

We therefore proceed to provide some comments on the *de minimis* doctrine. In *Anderson,* the Court explained that "[t]he workweek contemplated ... must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few

seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Anderson,* 328 U.S. at 692, 66 S. Ct. 1187.

The Court of Appeals for the Ninth Circuit has held that, "in determining whether otherwise compensable time is *de minimis,* we will consider (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States,* 738 F.2d 1057, 1063 (9th Cir. 1984) (holding that time difficult to calculate, small in the aggregate, and irregularly performed is *de minimis).* The regulation appearing in 29 C.F.R. § 785.47 notes that:

> In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 66 S. Ct.. 1187, 90 L. Ed. 1515 (1946))[.] This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to

> count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

Appellants argue that the *de minimis* charge that the District Court gave only instructed the jury to consider whether the donning/doffing activities were *de minimis,* and not whether that time, when aggregated with post-donning/pre-doffing walking time, was *de minimis*. App. at 2212-15. We agree that this is an issue that should be reconsidered on remand. *See Lindow,* 738 F.2d at 1063 ("[W]e will consider the size of the aggregate claim. Courts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim."); *Reich v. New York City Transit Authority,* 45 F.3d 646, 652 (2d Cir. 1995) (same).

Finally, appellants assert that the District Court should not have charged the jury that so-called "additional" or "extra" minutes, which Tyson claimed it gave certain workers some of the time as non-"work" compensation, was a defense under the FLSA for the uncompensated time. They argue in particular that the damages and liability portions of the trial were bifurcated, and the issue of payment was to be addressed at a later phase of the proceedings. We agree. It is clear that all of the workers in the class were not so compensated. To the extent this issue may arise again on remand, we believe that questions regarding

such payments are more appropriately resolved at the damages stage.

IV.

For the foregoing reasons, we will reverse and remand this matter to the District Court for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

MELANIA FELIX DE ASENCIO, et al.:

Civil Action

v. ::

TYSON FOODS, INC. : No. 00-4294

O R D E R

Before the Honorable Robert F. Kelly

AND NOW, this 21st day of June, 2006, in accordance with the verdict of the jury on this date,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant and against all the plaintiffs.

It is further ORDERED that the Court having ruled upon all the pertinent pending motions during the trial of the above matter, all outstanding motions are denied as moot.

BY THE COURT
ATTEST:
Thomas Garrity
Deputy Clerk

APPENDIX C

United States District Court, E.D. Pennsylvania

Melania Felix DE ASENCIO, Manuel A. Gutierrez, Asela Ruiz, Eusebia Ruiz, Luis A. Vigo, Luz Cordova and Hector Pantajos, on behalf of themselves and all other similarly situated individuals, Plaintiffs,

v.

TYSON FOODS, INC., Defendant.

No. CIV.A. 00-CV-4294.
July 17, 2002.

MEMORANDUM

ROBERT F. KELLY , Sr. J.

Presently before this Court is the Plaintiffs' Motion for Class Certification of the Pennsylvania Wage Payment and Collection Law Claims. For the reasons that follow, the Motion will be granted.

I. *BACKGROUND*

On August 22, 2000, the named Plaintiffs filed a representative action for the purpose of obtaining monetary, declaratory, and injunctive relief under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §

201 , *et. seq.,* and the Pennsylvania Wage Payment and Collection Law ("WPCL"), 42 P.S. § 260.1, *et seq.* The Plaintiffs are or were employed by the Defendant, Tyson Foods, Inc. ("Tyson"), as production employees in Tyson's New Holland, Pennsylvania poultry processing facility ("New Holland Facility"). The Plaintiffs allege that Tyson has failed to pay its production employees at its New Holland Facility their minimum hourly pay rate for all hours of work performed up to forty hours per week and has failed to pay them overtime for hours worked in excess of forty hours per week as required by the FLSA and WPCL.

Specifically, the Plaintiffs claim that Tyson paid, and continues to pay, its New Holland, Pennsylvania production employees only during the time that the production lines are in operation. Plaintiffs further allege that production employees are required to spend unpaid time, when the production lines are not in operation, donning, doffing and cleaning various pieces of safety and sanitary equipment such as aprons, gloves, coveralls, boots, et cetera, and to spend unpaid time on other company mandated activities such as reporting to group leaders and cleaning out their lockers. Because these activities are performed while the production lines are not in operation, the Plaintiffs allege that they are not paid for these activities.

The time period for potential plaintiffs to opt-in to the FLSA collective action ended July 24, 2001 and the collective action was defined at 504 members. In this current Motion, the Plaintiffs request class certification of the WPCL claim. The potential class for

this claim is approximately 3,400 production employees.

II. *STANDARD*

In order for a court to certify a class under Federal Rule of Civil Procedure 23 ("Rule 23"), the moving party must satisfy the requirements of Rule 23(a) and any one of the requirements of Rule 23(b). *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 55-56 (3d. Cir.1994). Rule 23(a) and (b) provide:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible

standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23. The requirements under Rule 23 should be given a liberal rather than a restrictive

construction. *Stewart v. Assocs. Consumer Disc. Co.*, 183 F.R.D. 189 (E.D.Pa.1998).

III. *DISCUSSION*

The Plaintiffs allege that all of the requirements of Rule 23(a) and every section of Rule 23(b) have been met in the instant case. Therefore, the Plaintiffs claim that class certification is appropriate. Tyson, does not counter the Plaintiffs' arguments that the requirements of Rule 23 are met in this case. Instead, Tyson raises several arguments that the Motion should be denied for other reasons. Based upon the Plaintiffs' arguments and the Court's own analysis, we find that the Rule 23 requirements have been met in this case. Furthermore, as discussed below, we do not find Tyson's arguments compelling. Therefore, we will grant this Motion and certify the class.

A. The Requirements of Rule 23(a) Have Been Met

First, the class is so numerous that joinder of all members is impracticable because the potential class consists of approximately 3,400 production employees. Fed. R. Civ. P. 23(a)(1).

Second, common questions of law and fact exist. Fed. R. Civ. P. 23(a)(2) .“The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” *Baby Neal*, 43 F.3d at 56. Here, the common questions of law and fact revolve around the allegations that Tyson has violated the

WPCL by not paying the New Holland facility production workers for all work performed prior and subsequent to "line time," particularly the time spent donning, doffing, and cleaning protective equipment and garments.

Third, the named Plaintiffs' claims are typical of the claims of the class. Fed. R. Civ. P. 23(a)(3)." Typicality entails an inquiry whether the named plaintiff's individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." Baby Neal, 43 F.3d at 57-58 (internal citations and quotations omitted)."[C]hallenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Id.* at 58. Here, the Plaintiffs' claims are "typical" because they, as well as all the production employees at the New Holland Facility, allege that they are not paid for the donning, doffing, and cleaning of protective equipment which they are required to wear.

Fourth, the Plaintiffs will fairly and adequately protect the interests of the proposed class. Fed. R. Civ. P. 23(a)(4) . In order to meet this factor, "(a) the plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d. Cir. 1992) (internal quotations omitted). Here there is no suggestion that the Plaintiffs' counsel is inadequate and

there is no conflict between the interests of the named Plaintiffs and the interests of any other production worker. The named Plaintiffs share the same interest as the other production workers, which is being paid for time spent donning and doffing protective equipment.

B. The Requirements of Rule 23(b)(3) Have Been Met

Because we find that Rule 23(b)(3) is met, we will not discuss the other sections of Rule 23(b) , as only one of the sections needs to be met in order for a class to be certified. *Baby Neal*, 43 F.3d at 55-56. First, common questions predominate over individual questions because the Plaintiffs' only allegation is that Tyson refuses to pay all production employees in the New Holland Facility for all hours worked, including time spent donning, doffing and cleaning safety and sanitary equipment and clothing. Furthermore, all of the production workers share the WPCL as a common remedy. If the potential class members each brought individual cases, this same question would be needlessly re-litigated using the same evidence, numerous times. *See, e.g. Joseph v. General Motors Corp.*, 109 F.R.D. 635, 642 (D.Colo.1986) (finding common questions predominated over individual questions).

Second, the class action is superior to other means of adjudication. In fact, according to the Plaintiffs, a class action is the only method that most of the production workers can utilize to seek redress. Here, the potential class members are mostly Spanish speaking

immigrants, which, without class litigation, would force them to individually confront Tyson, a multi-billion dollar-a-year corporation. The Court in *Weeks v. Bareco Oil Company*, 125 F.2d 84 (7th Cir. 1941), recognized that this is the type of situation that class actions were designed to address and stated that "[t]o permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants." *Id.* at 90.

Last, we find that the non-exclusive factors embodied in Rule 23(b)(3) also weigh in favor of class certification. First, as explained above, all of named Plaintiffs and the potential class members share the same interest in the proceedings because they all seek a common finding that Tyson violated the WPCL by failing to pay them for all work performed. Furthermore, none of the production employees have adverse interests which would require separate suits and they have little incentive or ability to prosecute their claims against Tyson in individual actions. Second, there is no other pending litigation. Third, Pennsylvania is a desirable forum because the New Holland Facility is located in this district and for reasons of judicial economy, it is desirable to concentrate all of the similar claims into one forum and into one suit. Fourth, there does not appear to be any overwhelming difficulties present in dealing with this class of approximately 3,400 Plaintiffs in a case involving only two claims. Therefore, because the Plaintiffs have shown that Rule 23 has been met, we will certify the class.

C. Tyson's Arguments against Class Certification

While Tyson does not argue that the requirements of Rule 23 have not been met, they do present several arguments as to why the Motion for Class Certification should be denied. Tyson also states that it does not oppose the Plaintiffs' present Motion to Certify to the extent that the WPCL class is limited to the 504 Plaintiffs who opted-in to the FLSA claim. (*See* Def.'s Supp. Brief Contra Class Certification/Mot. for Partial Summ. J., p.3, n.2). First, Tyson argues that the WPCL does not create a substantive right to compensation; but is only a statutory remedy when an employer breaches a contractual obligation to pay earned wages. *See Wildon v. Kraft*, 896 F.2d 793, 801 (3d Cir.1990). Tyson argues that any production employees without a FLSA claim would not be asserting any substantive right that could provide them with a remedy. However, in this case, the WPCL claim is separate and independent from the FLSA claim. The WPCL claim is not grounded in the FLSA claim, but instead is grounded in the allegation that Tyson breached an implied contract by failing to pay the production employees for work which they have performed for Tyson's benefit. Therefore, it is unnecessary for the WPCL claim to be supported by an FLSA claim because the WPCL claim is self supporting and, as discussed below, it is proper to exercise supplemental jurisdiction over the claim.

Second, Tyson claims that because Rule 23 does not apply to FLSA claims, it also does not apply to WPCL claims. In support of this assertion, Tyson

cites *Pirrone v. North Hotel Association*, 108 F.R.D. 78, 83 (E.D.Pa.1985). We find the reasoning presented by Tyson on this issue unpersuasive. 29 U.S.C. Section 216(b) provides a procedure where plaintiffs must affirmatively opt-in to a FLSA collective action. Specifically, Section 216(b) states "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."29 U.S.C. § 216(b). In a standard class action under Rule 23, however, the individuals within a class are class members unless they affirmatively opt-out of the class. Unlike the FLSA, the WPCL has no such provision mandating an opt-in approach, and thus, it is appropriate to utilize the opt-out procedures of Rule 23 in order to facilitate a class action.

Third, Tyson claims that the opt-out procedures of the standard Rule 23 class action are inconsistent with the opt-in procedures under 29 U.S.C. Section 216(b) the FLSA. However, because the FLSA claims and the WPCL claims are separate and distinct claims, they do not conflict and thus, they are not inconsistent with each other. Tyson cites *LaChapelle v. Ownes-Illinois, Incorporated*, 513 F.2d 286 (5th Cir.1975) for the proposition that "[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA [§][2]16(b)." *Id.* at 288. However, in *LaChapelle* the plaintiffs were attempting to utilize the opt-out procedures of Rule 23 in a federal ADEA case, which by its own language specifically adopts the opt-in procedures of 29 U.S.C. Section 216(b). *Id.* at

289.Here, the WPCL is not governed by 29 U.S.C. Section 216(b), and because it is a separate and independent claim from the FLSA claim, the two class procedures are reconcilable.

Alternatively, Tyson argues that the WPCL class should be limited to those who already have opted-in to the FLSA collective action. However, as stated, the Plaintiffs' WPCL claim is not premised on their FLSA claim. Both claims, while arising from the same situation, are separate and independent of each other. The WPCL claim, unlike the FLSA claim, alleges that Tyson fails to pay its production workers for *non-overtime hours* spent donning, doffing and cleaning sanitary and safety equipment and clothing. On the other hand, the FLSA claim only involves *overtime hours*. As discussed below, exercising supplemental jurisdiction over the WPCL claim is appropriate. Furthermore, it is appropriate to exercise supplemental jurisdiction over all of the WPCL class members, including those who lack an FLSA claim. *See Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 91-93 (S.D.N.Y.2001) . Common sense and concepts of judicial economy dictate that both claims be tried in one forum rather than have some of the WPCL claims and all of the FLSA claim tried in this Court, while a separate WPCL suit is commenced by the remainder of the potential class members in state court. Otherwise, we risk conflicting judgments and the wasting of judicial resources. Therefore, we will not limit the class as Tyson directs.

Fourth, Tyson argues that this Court should decline to exercise supplemental jurisdiction over the WPCL claim because the state law WPCL claims

would predominate over the federal FLSA claims. In support of this argument, Tyson notes that there would be 504 class members with both FLSA and WPCL claims and approximately 2,896 class members who would only have a WPCL claim. A district court may exercises supplemental jurisdiction over state law claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) . In order for the court to exercise supplemental jurisdiction, "[t]he state and federal claims must derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Here, the FLSA claim and the WPCL claim are entirely premised on the same conduct by Tyson. In a case such as this, where "the same acts violate parallel federal and state laws, the common nucleus of operative facts is obvious and federal courts routinely exercise supplemental jurisdiction over the state law claims." *Lyon v. Whisman*, 45 F.3d 758, 761 (3d. Cir.1995).

The FLSA claim and the WPCL claim are premised on the same events, and the two claims, while distinct, parallel one another. It is likely that the two claims will either prevail or fail together. Furthermore, adding extra class members alone, whose interests will be represented by the named Plaintiffs, will not make the state law claims predominate. Regardless of the number of class members, the named plaintiffs will represent all of those with an FLSA claim or a WPCL claim. In this case, it is appropriate to exercise supplemental jurisdiction as " 'considera-

tions of judicial economy, convenience and fairness to litigants' weigh in favor of hearing the state law claims at the same time as the federal law claims." *Borough of W. Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir.1995) (quoting *Gibbs*, 383 U.S. at 726). Moreover, we do find a compelling reason for this Court to decline to exercise supplemental jurisdiction over the WPCL claim.

For the foregoing reasons, the Plaintiffs' Motion for Class Certification of the WPCL claim will be granted. An appropriate Order follows.

ORDER

AND NOW, this 17th day of July, 2002, upon consideration of the Plaintiff's Motion for Class Certification of the Pennsylvania Wage Payment and Collection Law Claims (Dkt. No. 68), and any Responses and Replies thereto, it is hereby ORDERED that the Motion is GRANTED and the Plaintiff Class is hereby certified and defined as consisting of the following persons:

All current and former hourly employees of Tyson Foods, Inc.'s New Holland, Pennsylvania processing facility who have been employed as employees engaged in chicken processing at any time from August 22, 1997 to the present.

It is hereby further ORDERED that Plaintiffs Melania Felix de Ascensio, Manuel A. Gutierrez, Asela Ruiz, Eusebia Ruiz, Luis A. Vigo-Ramos, Luz Cordova, and Hector Pantajos are designated as the

class representatives and that the attorneys of record for the said named Plaintiffs are authorized to serve as counsel for the class in this action.

It is hereby further ORDERED that Tyson shall mail the Notice of Certification of the WPCL Class attached to this Order to the last known address of all putative class members as soon as possible, but not later than twenty (20) days from the date of this Order.

It is hereby further ORDERED that in view of prior disputes with regard to translations from English to Spanish, and for sake of convenience, counsel for Tyson shall work with Plaintiffs' counsel to develop a mutually agreeable translation of the attached Notice into Spanish. Tyson shall promptly file with the Court, and serve a copy to Plaintiffs' counsel written certification confirming it has fully complied with the Court's Order including the date(s) that it complied with the instant Order.

APPENDIX D

United States District Court, E.D. Pennsylvania

Melania FELIX DE ASENCIO, Manuel A. Gutierrez, Asela Ruiz, Eusebia Ruiz, Luis A. Vigo, Luz Cordova and Hector Pantajos, on behalf of themselves and all other similarly situated individuals, Plaintiffs,

v.

TYSON FOODS, INC., Defendant.

No. CIV.A. 00-CV-4294.

Sept. 9, 2002.

MEMORANDUM

KELLY.

Presently before this Court is the Defendant Tyson Foods Inc.'s ("Tyson") Motion for Summary Judgment on the Plaintiffs' FLSA Overtime Claim. For the reasons that follow, the Motion will be Granted in part and Denied in part.[1] Because the parties are well aware of the facts of this case, a short recitation

---

[1] Summary judgment is Granted in favor of Tyson only on the Plaintiffs' FLSA claim related to the time spent by the employees cleaning out their lockers each month, as the Plaintiffs do not dispute Tyson's arguments on this claim. Furthermore, the undisputed evidence shows that this activity takes only a couple of minutes each month to perform. Therefore, it is *de minimus* and thus not compensable. *See Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946).

should suffice. The Plaintiffs in this action are production employees in Tyson's New Holland, Pennsylvania poultry processing facility. The Plaintiffs allege that Tyson has failed to pay them their minimum hourly pay rate for all hours of work performed up to forty hours per week, and has failed to pay them overtime for hours worked in excess of forty hours per week as required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq*. and the Pennsylvania Wage Payment and Collection Law ("WPCL"), 42 P.S. § 260.1, *et seq*. Specifically, the Plaintiffs allege that Tyson does not pay them for donning, doffing and sanitizing protective clothing and equipment before and after their shifts and breaks. The current Motion for Summary Judgment was filed on June 11, 2002.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Summary Judgment is only appropriate if the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Wisniewski v. Johns-Manville Corp.,* 812 F.2d 81, 83 (3d Cir.1987).

Tyson presents three arguments in support of its Motion. First, Tyson argues that the acts of donning, doffing, and sanitizing protective clothing and equipment are not work as defined by the FLSA. Second, Tyson argues that if such activities are work,

then they are *de minimus* and thus should not be compensated. Third, Tyson alleges that pre-shift and post-shift donning, doffing, and sanitizing are not compensable under the Portal to Portal Act, 29 U.S.C. § 251, *et seq.* ("the Portal to Portal Act"). For each of these three issues, there is minimal relevant case law in our jurisdiction. Furthermore, there is significant disagreement among the jurisdictions who have considered these issues. We find that there are genuine issues of material fact entwined with each of these arguments that precludes the entry of summary judgment. All three of these issues would benefit from a full trial before a final decision is reached. We do not wish to be hasty and rule on these mixed issues of law and fact without a full record. We believe such a decision would be a mistake and a disservice to the body of law on which we depend.

First, Tyson argues that the acts of the donning, doffing, and sanitizing protective clothing and equipment are not work under the FLSA. Work is defined as "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." *Tennessee Coal, Iron & Railroad Co v. Muscodo Local No. 123,* 321 U.S. 590, 598, 64 S.Ct. 698, 88 L.Ed. 949 (1944). After viewing the facts in the light most favorable to the Plaintiffs, this Court finds that genuine issues of material fact remain regarding the level of physical or mental exertion required for donning, doffing and sanitizing the protective clothing and equipment, and whether these acts are primarily for Tyson's benefit.

Therefore, summary judgment on this issue would be premature and inappropriate.

Second, Tyson argues that if these activities are work, then they are *de minimus* and thus not compensable. *See Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 692, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). There are great disparities in the testimony and evidence regarding how much time the Plaintiffs spend donning, doffing and sanitizing protective clothing and equipment during the day. The genuine issues concerning this material fact must be resolved at trial.

Third, Tyson argues that the donning, doffing and sanitizing of protective clothing and equipment before and after "line time" are not compensable acts under the Portal to Portal Act. The Portal to Portal Act bars compensation for preliminary and postliminary activities which are performed before the employee begins his or her principal activity at the beginning of the workday and after such activity has ceased at the end of the workday. 29 U.S.C. § 254(a)(2). Tyson alleges that the donning, doffing, and sanitizing of protective clothing and equipment falls within this non-compensable category. However, such activities are considered part of the principal activity if the donning, doffing and sanitizing are "integral and indispensable part[s] of the principal activit[y]." *Steiner v. Mitchell,* 350 U.S. 247, 256, 76 S.Ct. 330, 100 L.Ed. 267 (1956). Here, viewing the facts in the light most favorable to the Plaintiffs, genuine issues of material fact remain regarding whether the donning, doffing, and sanitizing are suf-

ficiently integral and indispensable to the Plaintiffs' principal activities so that they are compensable under the Portal to Portal Act.

In view of the many disputed factual issues intertwined with the legal issues concerning these three arguments, summary judgment is not appropriate and would be premature at this time.

An appropriate Order follows.

ORDER

AND NOW, this 9th day of September, 2002, upon consideration of the Defendant's Motion for Summary Judgment on Plaintiffs' FLSA Overtime Claim (Dkt. No. 93), and any Responses and Replies thereto, it is hereby ORDERED that the Motion is GRANTED in part and DENIED in part. Summary Judgment is GRANTED in favor of the Defendant on the Plaintiffs' FLSA claim related to the time spent by the employees' cleaning out their lockers. The remainder of the Motion is DENIED.

APPENDIX E

United States Court of Appeals, Third Circuit

Melania Felix DE ASENCIO; Manuel A. Gutierrez; Asela Ruiz; Eusebia Ruiz; Luis A. Vigo; Luz Cordova; Hector Pantajos, on Behalf of Themselves and All Other Similarly Situated Individuals

v.

TYSON FOODS, INC., Appellant.

No. 02-3719.
Argued April 24, 2003.
Filed Sept. 8, 2003.
As Amended Nov. 14, 2003.

Before: SCIRICA*, Chief Judge, AMBRO and GARTH, Circuit Judges

Opinion of the Court

SCIRICA, *Chief Judge*.

In a labor dispute over unpaid wages, plaintiffs gained certification of an opt-in class under the Fair Labor Standards Act and then sought certification of a Fed. R. Civ. P. 23(b)(3) opt-out class under the Pennsylvania Wage Payment & Collection Law. The District Court granted the Rule 23 certification. At issue is whether the District Court should have exercised supplemental jurisdiction over the state-law class under 28 U.S.C. § 1367.

---

* Judge Scirica began his term as Chief Judge on May 4, 2003.

I.

A.

Plaintiffs are hourly employees at defendant Tyson Foods' two chicken-processing plants in New Holland, Pennsylvania (Lancaster County). Plant One employees work on the production line slaughtering birds and producing meat for direct sale or further processing. Those at Plant Two process the chicken meat, producing prepared, packed chicken products, like chicken nuggets, chicken tenders, chicken patties, and Buffalo wings.

Animal flesh, blood, and fecal matter are present throughout both plants. To protect against disease and safety hazards, Tyson employees are required to perform "donning, doffing, and sanitizing" activities. This entails putting on protective clothing--like hairnets, earplugs, safety goggles, cotton smocks, gloves, and plastic aprons--before the start of their shift, and rinsing their clothing and washing their hands at the end of their shift. Employees receive two unpaid 30-minute meal periods per shift, and must don, doff, and sanitize at the beginning and end of these breaks.[1]

---

[1] Tyson cites significant differences among its hourly employees, contending they wear different clothing, resulting in time variations for donning and doffing. The parties agree there are at least four categories under which Tyson calculates employee working times, depending on the type of work and where they work on the production line.

Tyson ordinarily does not pay its employees for time spent donning and doffing.[2] The plaintiff employees are not organized nor do they work under a written contract. There is no collective bargaining.

B.

In August 2000, plaintiffs filed suit against Tyson under both federal law (the Fair Labor Standards Act, 29 U.S.C. §§ 201-219) and state law (the Pennsylvania Wage Payment & Collection Law, 43 P.S. §§ 260.1-260.45) on behalf of themselves and similarly situated co-workers at Tyson's chicken processing complex.

On October 4, plaintiffs sought collective treatment of their FLSA action under the federal statute's opt-in provisions. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). Plaintiffs did not seek class certification on the state-law WPCL action at that time.

On January 31, 2001, the District Court granted plaintiffs' request to issue notice to prospective class members under the FLSA action. The court's notice stated, in part, "The Court has not yet determined that the claims under the Pennsylvania WPCL can be pursued as a class action, and thus your right to participate in that claim will depend on a later decision by the Court."

---

[2] Tyson pays for donning and doffing in two limited instances, which are not relevant here.

On March 15, Tyson mailed out the notice to 3,400 prospective FLSA class members. On June 21, Tyson filed a motion to close the class period. At that time, 502 current and former employees-or 15 percent of the allegedly eligible class-had elected to join the FLSA action by filing written consent forms. Plaintiffs contested the motion to close, claiming that a substantial number of prospective plaintiffs never received notice and that Tyson improperly discouraged its current and former employees from participating in the action. The record showed that 783 putative FLSA class members never received notice of the opt-in action because Tyson mailed the notice to the wrong address.[3]

On July 24, the District Court closed the class period and denied plaintiffs' motion to reissue notice. The class consisted of 504 current and former employees. The District Court later dismissed, on summary judgment, the claims of 57 of those employees as barred by the statute of limitations. All parties acknowledge that the current size of the FLSA class is 447 persons.

On December 31, the District Court closed discovery. Nearly two months later, on February 22, 2002, plaintiffs filed a motion to certify the supplemental state-law WPCL action under Fed.R.Civ.P. 23. Plaintiffs' motion for class treatment under the supplemental state-law action was filed 17 months after their motion to certify the federal FLSA action. The

---

[3] Additional putative FLSA class members allegedly never received notice of the opt-in class because they had not been employed by Tyson at the time the notice was sent.

District Court heard arguments on whether plaintiffs could bring a WPCL action because they had not pleaded a contract claim, the predicate for a WPCL action. On May 14, plaintiffs argued for the first time that the WPCL action was grounded in an implied contract between Tyson and its hourly employees.[4]

On July 17, despite Tyson's objections that the WPCL certification motion was late and that the implied contract argument was new, the District Court granted plaintiffs' motion to certify the state WPCL action under Fed.R.Civ.P. 23(b)(3).[5] The state-law class, an opt-out class, consisted of approximately 4,100 persons, including approximately 700 employees hired after notice was sent to the FLSA class.

The District Court had subject matter jurisdiction over plaintiffs' FLSA action under 28 U.S.C. § 1331 and exercised supplemental jurisdiction over plaintiffs' state-law action under 28 U.S.C. § 1367. Tyson disputes the District Court's exercise of supplemental jurisdiction. Tyson petitioned for leave to appeal the

---

[4] Tyson avers it has made no promise to pay its employees for donning and doffing time.

[5] The Pennsylvania Wage Payment & Collection Law provides: Actions by an employee, labor organization, or party to whom any type of wages is payable to recover unpaid wages and liquidated damages may be maintained in any court of competent jurisdiction, by such labor organization, party to whom any type of wages is payable or any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action or on behalf of all employees similarly situated. Any such employee, labor organization, party, or his representative shall have the power to settle or adjust his claim for unpaid wages. 43 P.S. § 260.9a(b).

certification order under Fed.R.Civ.P. 23(f), which was granted. We have jurisdiction over the interlocutory appeal under 28 U.S.C. § 1292(e) and Fed.R.Civ.P. 23(f).

II.

A.

In 1938, Congress enacted the Fair Labor Standards Act to govern the maintenance of standard hour and wage practices. The FLSA requires employers to pay their employees at least a specified minimum hourly wage for work performed, 29 U.S.C. § 206, and to pay one and one-half times the employee's regular rate of pay for hours worked in excess of forty hours per week, 29 U.S.C. § 207. Employers who violate these provisions are "liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

The legislation propelled thousands of portal-to-portal lawsuits. The term "portal to portal" represents an employee's work day from starting time to quitting time. *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161, 188, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945) (Jackson, J., dissenting); *Connors v. Beth Energy Mines, Inc.*, 920 F.2d 205, 208 (3d Cir.1990) (work day was eight hours from portal-to-portal including thirty minutes for lunch). Between July 1, 1946 and January 31, 1947, employees around the

country filed 1,913 such actions under the FLSA. 93 Cong. Rec. 2,082 (1947).

The dramatic increase in these suits was a result of the Supreme Court's decision in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), which expanded the scope of compensable "working time" for FLSA purposes. *See* 93 Cong. Rec. 2,089 (1947) ("[W]hat is the cause of this widespread litigation? The immediate incident which apparently brought this vast flood of litigation upon our nation was the decision of the Supreme Court [in *Anderson*]."). Responding to this increase in litigation, Congress sought "to define and limit the jurisdiction of the courts" through the Portal-to-Portal Act, Pub.L. No. 80-49, ch. 52, § 1(b)(3), 61 Stat. 85 (1947). 93 Cong. Rec. 2,087 (1947) ("[T]he attention of the Senate is called to a dramatic influx of litigation, involving vast alleged liability, which has suddenly entered the Federal courts of the Nation."). Noting the "immensity of the [litigation] problem," *id.* at 2,082, Congress attempted to strike a balance to maintain employees' rights but curb the number of lawsuits. Under the Portal-to-Portal Act, an FLSA action for overtime pay could be maintained by "one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). But the statute contained an express opt-in provision: "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." *Id.*

Because the Portal-to-Portal Act amendment changed participation in an FLSA class from "opt-out" to "opt-in," FLSA plaintiffs could not certify a class under Fed.R.Civ.P. 23, even though federal subject matter jurisdiction obtained. *E.g., Lusardi v. Lechner*, 855 F.2d 1062, 1068 n. 8 (3d Cir.1988) ("Courts have generally recognized that Rule 23 class actions may not be used under FLSA § 16(b)."); 5 James Wm. Moore et al., Moore's Federal Practice § 23.06[1] (3d ed. 2003) ("Rule 23 is inapplicable to class proceedings under the FLSA."). The principal difference between FLSA class actions and Fed.R.Civ.P. 23 class actions is that prospective plaintiffs under the FLSA must consent to join the class.

As noted, plaintiffs here obtained federal court jurisdiction when they filed a FLSA action, alleging that Tyson was liable to pay its employees for time spent donning and doffing. The District Court ordered notice to prospective class members and later certified a class of 504 persons who consented in writing to become party plaintiffs.[6] The certification of this class is not problematic. But Tyson contends plaintiffs obtained federal jurisdiction, then used their supplemental state-law WPCL action and Fed.R.Civ.P. 23's opt-out provisions as an end run around the Portal-to-Portal Act's clear congressional mandate in favor of collective opt-in actions.[7]

---

[6] As noted, the current number of eligible plaintiffs in the FLSA class is 447.

[7] Plaintiffs argue Congress did not intend the Portal-to-Portal Act amendments to affect state-law actions. They cite legislative history that "[a]ctions under the common law, or under State

B.

At issue is whether the District Court properly exercised supplemental jurisdiction over the state-law WPCL opt-out action.

In 1990, Congress broadened district courts' ability to exercise supplemental jurisdiction over non-federal claims. 28 U.S.C. § 1367.[8] The statute explicitly pro-

---

statutes for recovery of wages are not affected" by the Act. H.R.Rep. No. 71 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1029, 1035. But plaintiffs' reference to the legislative history is misplaced. The cited statement pertained directly to the Act's imposition of a one-year statute of limitations on FLSA actions. *See Univs. Research Ass'n v. Coutu,* 450 U.S. 754, 781 n. 34, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981) ("Senator McGrath's statement strongly suggests that the limitations period of the Portal-to-Portal Act was designed to apply to the explicit statutory remedy set forth in the Davis-Bacon Act."). It did not coincide with the Act's provision that requires parties' consent to a collective action.

[8] 28 U.S.C. § 1367(a-c) provides:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as

vided for supplemental jurisdiction for "claims that involve the joinder or intervention of additional parties." *Id.*[9] Supplemental jurisdiction was not available where "expressly provided otherwise by Federal statute" or under one of the statute's enumerated exceptions. *Id.*

Section 1367 combined older notions of pendent jurisdiction and ancillary jurisdiction. Under the statute, which codified many of the principles enunciated in *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), a district court may exercise supplemental jurisdiction where state-law claims share a "common nucleus of operative fact" with the claims that supported the district court's original jurisdiction. *Id.; see also* 28 U.S.C. § 1367(a); *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions),* 148 F.3d 283, 303 (3d Cir.1998) (Section 1367 "does not permit courts to take jurisdiction over tangentially related claims. The issue is whether

---

plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law.

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

9 Moreover, the Federal Rules of Civil Procedure permit joinder where parties asserted "any right to relief ... and if any question of law or fact common to all these persons will arise in the action." Fed.R.Civ.P. 20(a).

there is a 'common nucleus of operative fact' and whether the claims are part of the 'same case or controversy under Article III.' "). Supplemental jurisdiction promotes "judicial economy, convenience and fairness to litigants." *Gibbs,* 383 U.S. at 726, 86 S.Ct. 1130.

Under section 1367, a district court has authority to exercise supplemental jurisdiction over non-federal claims arising from the same case or controversy as the federal claim. Here, the District Court determined the FLSA and WPCL actions arose from the same controversy and shared a common nucleus of operative fact. This ruling was not an abuse of discretion. Where "the same acts violate parallel federal and state laws, the common nucleus of operative facts is obvious." *Lyon v. Whisman,* 45 F.3d 758, 761 (3d Cir.1995). The FLSA and WPCL are parallel federal and state laws and the independent actions both address whether Tyson's employees should be paid for donning and doffing time, sufficiently demonstrating a common nucleus of operative fact.

Still, section 1367 provides specific exceptions to supplemental jurisdiction. There is no supplemental jurisdiction where a federal statute expressly provides otherwise, either through direct preclusion or preemption of state-law claims.[10] 28 U.S.C. §

---

[10] In certain federal statutes, Congress has expressly provided for the preemption of state-law claims. *E.g.,* Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1). But Congress did not do so here.

1367(a).[11] There are also explicit circumstances under which a district court may decline to exercise supplemental jurisdiction. 28 U.S.C. § 1367(c). At issue is whether this case involves one of those circumstances.

A district court has the responsibility to manage complex litigation. That responsibility requires a court to determine whether to exercise supplemental jurisdiction over pendent claims and parties. In enacting section 1367, Congress intended to enhance a district court's ability to gain jurisdiction over pendent claims and parties while providing those courts with the discretion to decline to exercise supplemental jurisdiction in several express circumstances. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs,* 383 U.S. at 726, 86 S.Ct. 1130.

Because the FLSA does not expressly address supplemental jurisdiction, we consider the explicit statu-

---

[11] Moreover, although not relevant here, federal courts do not have subject-matter jurisdiction over certain pendent state-law claims where original jurisdiction is based on diversity rather than a federal question:

In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b).

tory circumstances enunciated in section 1367(c) under which a district court may decline to exercise supplemental jurisdiction. In codifying much of *Gibbs,* Congress granted district court judges discretion to determine whether to exercise supplemental jurisdiction. 28 U.S.C. § 1367(c); *see also New Rock Asset Partners v. Preferred Entity Advancements, Inc.,* 101 F.3d 1492, 1507 n. 11 (3d Cir.1996) (discretion in district court judges helps promote the economical resolution of cases). District courts may decline to exercise supplemental jurisdiction where:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c)(1-4).[12]

The dispositive provision here appears to focus on whether the state-law action substantially predomi-

[12] Subsection (3) is not relevant here since the District Court has not dismissed the FLSA action. We do not reach subsection (4), although it may be relevant. Congress provided that a District Court may decline to exercise supplemental jurisdiction where "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c)(4).

nates over the FLSA action. Where "the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *Gibbs,* 383 U.S. at 726, 86 S.Ct. 1130. Generally, a district court will find substantial predomination "where 'a state claim constitutes the real body of a case, to which the federal claim is only an appendage'-only where permitting litigation of all claims in the district court can accurately be described as allowing a federal tail to wag what is in substance a state dog." *Borough of W. Mifflin v. Lancaster,* 45 F.3d 780, 789 (3d Cir.1995) (citation omitted) (quoting *Gibbs,* 383 U.S. at 727, 86 S.Ct. 1130).

Our inquiry here centers on the terms of proof and the scope of the issues raised in the FLSA and WPCL actions.[13] As we have held, the WPCL " 'does not create a right to compensation .... [r]ather, it provides a statutory remedy when the employer breaches a contractual obligation to pay earned wages. The contract between the parties governs in determining whether specific wages are earned.' " *Antol v. Esposto,* 100 F.3d 1111, 1117 (3d Cir.1996) (quoting *Weldon v. Kraft, Inc.,* 896 F.2d 793, 801 (3d Cir.1990)). Because

---

[13] There are some differences in the comprehensiveness of the federal and state remedies as well since the FLSA remedy is only for overtime pay and the WPCL remedy is broader. And, as discussed *infra,* the WPCL claim may be dismissed without prejudice here and left for resolution to state tribunals. These factors further support a finding of substantial predomination by the WPCL claim under *Gibbs,* but our focus here is on the terms of proof and scope of the issues raised.

Tyson's employees do not work under an employment contract or a collective bargaining agreement, plaintiffs will have to establish the formation of an implied oral contract between Tyson and its employees. Even then, whether an implied contract may give rise to a claim under the WPCL has never been addressed by the Pennsylvania state courts and will require additional testimony and proof to substantiate beyond that required for the FLSA action.[14] Given the importance of the wage-protection legal scheme in Pennsylvania, the scope of the state issues may substantially predominate over the more straightforward federal scheme.

Another countervailing interest in relegating the WPCL claims here to state court is Congress's express preference for opt-in actions for the federal cause of action. Congress's interest in these matters is manifest. For policy reasons articulated in the legislative history, Congress chose to limit the scope of representative actions for overtime pay and minimum wage violations.

But the interest in joining these actions is strong as well. As noted, the actions share a common nucleus of operative fact and they arise from the same

---

[14] A federal court could have subject matter jurisdiction over two federal claims, one requiring opt-in and the other opt-out. For example, a federal employment discrimination action might be brought by a plaintiff class that also maintains an FLSA overtime pay action against their employer. But the outcome may be different where one of the claims is based in state law. Federal courts are courts of limited jurisdiction. Where a party seeks supplemental jurisdiction of a state-law action, we will evaluate jurisdiction under the statutory principles of 28 U.S.C. § 1367.

case or controversy. Moreover, joinder would permit the District Court to efficiently manage the overall litigation. Were supplemental jurisdiction not to obtain, and assuming the statute of limitations has not run, plaintiffs could file the WPCL action in state court and request an opt-out class on behalf of themselves and "other employes similarly situated." 43 P.S. § 260.9a(b).[15]

As we analyze the different levels of proof required and the relevant federal and state interests, the disparity in numbers here gives us pause. In terms of the number of plaintiffs, the sheer difference in numbers between the two prospective classes, 447 as opposed to 4,100, may constitute substantial predomination by the state WPCL action under section 1367.

Generally, the distinction between opt-in and opt-out classes is crucial. Under most circumstances, the

---

[15] Pennsylvania law provides for a modified opt-out class:

(a) Except as provided in subdivision (b) or as otherwise provided by the court, in certifying a plaintiff class or subclass the court shall state in its order that every member of the class is included unless by a specified date a member files of record a written election to be excluded from the class.

(b) If the court finds that

(1) the individual claims are substantial, and the potential members of the class have sufficient resources, experience and sophistication in business affairs to conduct their own litigation; or

(2) other special circumstances exist which are described in the order,

the court may state in its order that a person shall not be a member of the plaintiff class or subclass unless by a specified date the person files of record a written election to be included in the class or subclass.

Pa. R. Civ. P. 1711.

opt-out class will be greater in number, perhaps even exponentially greater. Opt-out classes have numbered in the millions. *See In re Prudential,* 148 F.3d at 289-90. The aggregation of claims, particularly as class actions, profoundly affects the substantive rights of the parties to the litigation. Notably, aggregation affects the dynamics for discovery, trial, negotiation and settlement, and can bring hydraulic pressure to bear on defendants. The more aggregation, the greater the effect on the litigation.

But the size of a prospective class is important for another reason. Within the universe of possible claimants, it determines how many prospective plaintiffs remain outside the class structure who are able to bring their own individual suits. A large class with few claimants with viable claims remaining outside is more likely to result in a resolution bringing "global peace." Conversely, a smaller class in relation to the universe of possible claimants, usually the result of an opt-in structure, will leave open the possibility of more suits, assuming these are actions that can be maintained individually.

We do not tout the relative merits of either approach. For our purposes, it is sufficient to note that mandating an opt-in class or an opt-out class is a crucial policy decision. Congress has selected an opt-in class for FLSA actions.[16]

---

[16] Similarly, Congress has selected an opt-in class for actions under the Age Discrimination in Employment Act. *See Sperling v. Hoffmann-LaRoche, Inc.,* 24 F.3d 463, 464 (3d Cir.1994) ("Section 7(b) of ADEA expressly borrows the opt-in class mechanism of section 16(b) of the Fair Labor Standards Act of 1938."). As

Predomination under section 1367 generally goes to the type of claim, not the number of parties involved. But the disparity in numbers of similarly situated plaintiffs may be so great that it becomes dispositive by transforming the action to a substantial degree, by causing the federal tail represented by a comparatively small number of plaintiffs to wag what is in substance a state dog.

Within the section 1367(c) analysis, certain issues of state law presented in the WPCL action also weigh heavily, tilting the balance against the exercise of supplemental jurisdiction. Pennsylvania courts have not addressed two novel and complex questions of state law squarely presented here: whether a WPCL action may rest on an implied employment contract that relies on alleged oral representations by Tyson managers; and whether the WPCL pertains to at will, non-collective bargaining employees. The need to resolve these issues, which are better left to the Pennsylvania state courts, weighs in favor of declining supplemental jurisdiction. 28 U.S.C. § 1367(c)(1).

Whether the allegations of an implied employment contract run to the entire WPCL class is also in dispute and would implicate the predominance inquiry of Fed.R.Civ.P. 23(b)(3). "In cases involving implied contracts of employment, the litigant will be able to reach the jury only if he can clearly show that he and the employer intended to form a contract." *DiBonaventura v. Consolidated Rail Corp.,* 372

---

noted, in the absence of contrary congressional mandates, class actions in federal court are governed by Fed.R.Civ.P. 23.

Pa.Super. 420, 539 A.2d 865, 868 (1988). Because the FLSA claim does not require an intent to form a contract, individual questions of implied contract formation with respect to each member of the WPCL class might conceivably predominate over the issues common to the claims of the FLSA plaintiffs.

We review a district court's exercise of supplemental jurisdiction for abuse of discretion. *See Lyon,* 45 F.3d at 760 ("[I]t is possible that even if the district court had the power to hear the supplemental claims, it abused its discretion in doing so."). In exercising supplemental jurisdiction over the WPCL action here, the District Court held that "adding extra class members alone, whose interests will be represented by the named Plaintiffs, will not make the state law claims predominate. Regardless of the number of class members, the named plaintiffs will represent all of those with an FLSA claim or a WPCL claim." *De Asencio v. Tyson Foods, Inc.,* 2002 WL 1585580, at * 5, 2002 U.S. Dist. LEXIS 13038, at *16 (E.D.Pa. July 17, 2002).

But whether the same group of named plaintiffs represent both the state and federal classes is not dispositive under *Gibbs.* Instead, a court must examine the scope of the state and federal issues, the terms of proof required by each type of claim, the comprehensiveness of the remedies, and the ability to dismiss the state claims without prejudice to determine whether the state claim constitutes the real body of the case. This necessarily is a case-specific analysis. Here, the inordinate size of the state-law class, the different terms of proof required by the im-

plied contract state-law claim, and the general federal interest in opt-in wage actions suggest the federal action is an appendage to the more comprehensive state action.

We also are mindful of the unique circumstances surrounding this litigation. On August 22, 2000, plaintiffs filed this suit. The complaint included both the FLSA and WPCL causes of action. On October 4, 2000, plaintiffs sought collective action treatment of their FLSA claim but did not seek certification of a class on the WPCL claim. It was not until nearly 17 months later, on February 22, 2002, after the District Court had closed the FLSA class period and ended discovery, that plaintiffs filed a motion to certify a class on the WPCL claim. Moreover, it was not until May 14, 2002, that plaintiffs first raised their implied contract theory to support the WPCL claim.

The way in which this suit evolved lends even greater credence to the conclusion that certification of the state-law class was plaintiffs' second line of attack when the FLSA opt-in period yielded a smaller than desired federal class. This may be proper strategy where the state and federal actions raise similar issues and require similar terms of proof. But here, the state interest in whether plaintiffs may prevail on an implied contract WPCL action is disproportionately high.[17]

---

[17] In discussing amendments to federal law, the Federal Courts Study Committee recommended: "In order to minimize friction between state and federal courts ... Congress should direct federal courts to dismiss state claims if these claims predominate or if they present novel or complex questions of state

Accordingly, we find the District Court did not exercise sound discretion in granting supplemental jurisdiction over the WPCL action.[18]

III.

Of the approximately 3,400 FLSA notices that Tyson mailed to current or former employees, nearly 800 of them were "undeliverable" and "returned to sender" due to incorrect addresses.[19] The record also demonstrates that Tyson hired approximately 700

---

law, or if dismissal is warranted in the particular case by considerations of fairness or economy." Report of the Federal Courts Study Committee, 47-48 (Apr. 2, 1990).

[18] Consistent with our holding, we will deny certification of the WPCL class with respect to all plaintiffs, including those who opted into the FLSA class. Our decision does not necessarily preclude the exercise of supplemental jurisdiction where all plaintiffs with state law claims have opted into the FLSA class. *See Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir.2003). These matters are committed to the sound discretion of the District Court. *See* 28 U.S.C. § 1367.

[19] The Notice and Consent Form, written in English and Spanish, was disseminated as follows:

(1) for existing workers who are class members, Tyson shall insert the Notice and Consent Form with the workers' next paycheck, along with a postage paid envelope addressed to Plaintiffs' counsel;

(2) for former workers who are class members, Tyson shall mail immediately the Notice with Consent Form to the workers' last known addresses, along with a postage paid envelope addressed to Plaintiffs' counsel; and

(3) Tyson shall promptly file with the Court, and serve a copy to Plaintiff's counsel, written certification confirming it has fully complied with the Court's Order including the date(s) that it complied with the instant Order.

employees after it mailed the notice, and those employees never received notice. Nevertheless, the District Court closed the opt-in period and denied plaintiffs' motion to reissue notice to all potential plaintiffs. The resulting number of 447 plaintiffs represented approximately 11 percent of the then-eligible class.

In class actions, courts have equitable powers to manage the litigation in order to promote judicial economy and fairness to litigants. *In re Diet Drugs Prods. Liab. Litig.,* 282 F.3d 220, 232 (3d Cir.2002) (noting the "equitable nature of class action proceedings"); *In re Orthopedic Bone Screw Prods. Liab. Litig,* 246 F.3d 315, 321 (3d Cir.2001) (discussing a court's equitable powers to "manage" class action litigation). For this reason, we direct the District Court to reopen the FLSA opt-in period for a reasonable period of time to allow additional notice to all eligible current and former employees. Tyson should make all reasonable efforts to provide notice to these potential class members.

IV.

For the foregoing reasons, we will reverse the judgment of the District Court and remand for proceedings consistent with this opinion.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3502

MELANIA FELIX DE ASENCIO; MANUEL A. GUTIERREZ; ASELA RUIZ; EUSEBIA RUIZ; LUIS A. VIGO; LUZ CORDOVA; HECTOR PANTAJOS, on behalf of themselves and all other similarly situated individuals, Appellants

v.

TYSON FOODS, INC.

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, ALDISERT, * and ROTH* Circuit Judges

The petition for rehearing filed by Appellee Tyson Foods, Inc., in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

*Hon. Ruggero J. Aldisert, Senior Circuit Judge, and Hon. Jane R. Roth, Senior Circuit Judge, as to panel rehearing only.

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter

Circuit Judge

Dated: October 5, 2007

CMH/cc: FAC, TJE, FPS, ill, CDL, ARP, PDR, TJW, JMC, MSM, MJM

APPENDIX G

Statutes and Regulations

29 U.S.C. § 203 ("Definitions") provides in relevant part:

(g) "Employ" includes to suffer or permit to work.

* * *

29 U.S.C. § 206 ("Minimum wage") provides in relevant part:

(a) Employees engaged in commerce; * * *

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than--

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day; * * *.

* * *

29 U.S.C. § 207 ("Maximum hours") provides in relevant part:

(a) Employees engaged in interstate commerce; * * *

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * *

29 U.S.C. § 254 ("Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation") provides in relevant part:

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947--

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

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. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and ac-

tivities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

* * *

29 CFR § 790.6 ("Periods within the 'workday' unaffected") provides in relevant part:

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[1] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the em-

---

[1] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

ployee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[2] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

[2] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.