No. 23-954

In the
Supreme Court of the United States

PRECISION DRILLING CORP.;
PRECISION DRILLING OILFIELD SERVICES, INC.; AND
PRECISION DRILLING COMPANY, LP,
Petitioners,

v.

RODNEY TYGER AND SHAWN WADSWORTH, Individually and on behalf of all others similarly situated,
Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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AMICUS CURIAE'S STATEMENT OF INTEREST[1]

Amicus Curiae, the National Association of Manufacturers ("NAM"), respectfully submits this Brief in support of Petitioners. The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs 13 million men and women, contributes $2.85 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM's members require a predictable standard for determining whether an employee's time donning and doffing personal protective gear ("PPE") is compensable under the Fair Labor Standards Act of 1938 ("FLSA"). Although this particular case concerns donning and doffing for oil- and gas-drilling rig workers, donning and doffing is ubiquitous. Many American workers don and doff clothes prior to and after the conclusion of the workday.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* makes the following disclosure: No counsel for a party to this matter authored any portion of this brief or made a monetary contribution to fund the preparation or submission of this brief. The Parties received timely notification of the filing of this brief pursuant to Supreme Court Rule 37.2.

In the manufacturing setting, workers routinely don and doff generic PPE, the type of PPE at issue in this case. As of January 2024, there were 132.55 million full-time employees in the United States according to Bureau of Labor statistics.[2] Conservatively, donning and doffing precedent could affect 65 to 75 million employees, as well as the numerous employers who employ them, based on 1999 statistics indicating that more than 55% of all private sector employees don and doff protective clothing.[3] (Petition, p. 23). This includes numerous manufacturing companies represented by the NAM.

Given these statistics, the NAM has a strong interest in ensuring a predicable framework for determining whether donning and doffing time is compensable under the FLSA.

SUMMARY OF ARGUMENT

This Court should grant review to address the Third Circuit's departure from this Court's precedent, which deepens a circuit split on the framework for assessing the compensability of donning and doffing time, as well as subsequent walking time. Under this Court's precedent, an activity is compensable under

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[2] *Monthly Number Of Full-Time Employees in the United States from February 2022 to February 2024,* https://www.statista.com/statistics/192361/unadjusted-monthly-number-of-full-time-employees-in-the us/#:~:text=As%20of%20January%202024%2C%20there,132.59%20million%20full%2Dtime%

[3] *See* Federal Reserve Bank, St. Louis. All Employees. Total Private (https://fred.stlouisfed.org/series/USPRIV).

the FLSA only if "integral and indispensable" to the activities an employee is hired to perform. The Third Circuit's amorphous three-factor test governing compensability—which considers the location of where employees change, applicable regulations on gear, and the type of gear at issue—impermissibly eliminates the "integral" portion of the "integral and indispensable" test mandated by this Court and allows for time doffing and doffing generic PPE to be compensated, even if only necessary to protect against ordinary risks.

The Third Circuit relies on Fourth and Sixth Circuit precedent to support its test, but those flawed opinions are inconsistent with the mandate *subsequently* set forth by this Court. Those opinions are also inconsistent with opinions from the Second, Fifth, Seventh, Tenth, and Eleventh Circuits, which have all ultimately concluded what the NAM believes is the correct result: that the donning and doffing of generic PPE is non-compensable. While many courts have ultimately reached the correct result in the NAM's view, the varying approaches and conflict now deepened by the Third Circuit calls out for this Court's review.

This circuit split sows significant uncertainty for manufacturers. The Third Circuit's test allows not only for the most simple and ubiquitous tasks of donning and doffing of generic gear to be compensable, but also the preceding and subsequent walk time during the continuous workday, which in some cases can be significant. This invites a flood of litigation to resolve the compensability question and could force employers to adjust business operations by having to

either overpay for walking time or shortening the workday.

The implications of the circuit split extend beyond FLSA cases. Most states have adopted wage and hour statutes similar to the FLSA and look to the federal courts' interpretation of the FLSA for guidance. The circuit split compounds the danger of a wrong compensability determination in these states for two reasons. First, some states permit class actions, as opposed to the opt-in collective action mechanism of the FLSA. Second, some states have significantly larger recovery periods. These dual factors, when combined with the Third Circuit's opinion, will create the potential for tenfold damages as compared to those recoverable under the FLSA, which only exacerbates the grave uncertainty for employers. The NAM urges the Court to grant review to resolve this uncertainty.

ARGUMENT

I. The Third Circuit's Decision Rejected A Workable Test For Donning And Doffing Generic PPE In Favor Of An Impractical Multi-Factor Test That Ignores This Court's Precedent.

The FLSA's minimum wage and overtime requirements require an employer to pay an employee for each hour worked and overtime wages for each hour worked beyond 40 hours in a work week. *See* 29 U.S.C. §§ 206(a)(1), 207(a)(2). The absence of a definition for work and work week in the FLSA has required courts to expound on the terms' meanings. In a 1946 case, this Court stated that the "workweek

include[d] all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). This resulted, as this Court subsequently explained, in a "flood of litigation" stemming from employees seeking compensation for "time spent traveling between mine portals and underground work areas" and "time spent walking from timeclocks to work benches." *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31 (2014).

Congress thus passed the Portal-to-Portal Act of 1947 ("PTPA") to stem the tide of litigation. The PTPA limited the start- and end-points of compensable time by removing from the FLSA's scope all "activities which are preliminary to or postliminary to" an employee's principal work activities. *See* 29 U.S.C. § 254(a)(2). This language rendered compensable "[a]ctivities performed either before or after [an employee's] regular work shift" if those "activities are an integral and indispensable part of the[ir] principal activities." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). And in *Busk*, this Court clarified that both prongs of the test must separately be met for an activity to be compensable. 574 U.S. at 33-34. *Busk* further explained that "[a]n activity is . . . integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.* at 33.

The District Court adhered to *Busk* by applying the Second Circuit's test set forth in *Perez v. City of New York*, 832 F.3d 120, 127 (2d Cir. 2016) to

determine whether the time the plaintiffs spent donning and doffing generic PPE—fire retardant overalls, steal-toe boots, hard hats and safety glasses—at the beginning or end of their workday is compensable under the FLSA. Under that test, courts must consider "whether the gear guards against workplace dangers that accompany the employee's principal activities and transcend ordinary risks" prior to determining whether donning and doffing time is compensable. *Tyger v. Precision Drilling Corp.*, 594 F. Supp. 3d 626, 656 (M.D. Pa. 2022) (citing *Perez*, 594 F. Supp. 3d at 127). This places the focus on "the gear at issue, the employee's principal activities, and the relationship between them." *Id.* Accordingly, the District Court considered whether the generic PPE the plaintiffs donned and doffed was "integral," and determined it was not "integral" to the principal activities of the rig workers because "the hazards . . . described are either ordinary, hypothetical, or isolated." *Id.*

In reversing the District Court's well-reasoned decision, the Third Circuit outlined "three key factors to consider" in determining the compensability question that, for all practical purposes, abandoned the "integral" requirement mandated by this Court in *Busk*: (i) the location of where employees change; (ii) whether applicable regulations mandate use of gear; and (iii) the type of gear at issue. *Tyger v. Precision Drilling Corp.*, 78 F.4th 587, 593-94 (3d Cir. 2023).

With respect to the first factor, the courts and the Department of Labor have consistently concluded that when employers are given the option to change from home, such donning and doffing time is generally

non-compensable as a matter of law. *See e.g.*, *Bamonte v. City of Mesa*, 598 F.3d 1217, 1232-33 (9th Cir. 2010) (in a case where officers argued they should be compensated for donning and doffing their gear, rejecting their argument that although they had the option of taking the uniform and gear on and off at home, it was relevant that they preferred to do so at the police station for safety reasons); DOL Wage and Hour Advisory Memorandum No. 2006-2 ("It is our longstanding position that if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant").

The NAM agrees changing clothes at home is of course non-compensable. Practically speaking, though, many employers will permit changing at home while also permitting it at the workplace. The location of changing, however, has no bearing on whether the generic PPE is integral or indispensable, and the test articulated by the Third Circuit provides a disincentive for employers to even allow changing in the workplace at all.

As to the second factor, the Third Circuit concluded that "changing is more likely to be integral when 'the changing of clothes is required by law.'" *Tyger*, 78 F.4th at 593. But there can be a gulf between a common-sense regulatory rule regarding generic PPE and a conclusion that the donning and doffing of such PPE is integral to a specific job. Many employees don and doff steel-toed shoes at their place of employment even though that gear is not "integral" to their job. If an overly active agency promulgates a regulation requiring steel-toed shoes in a particular

setting, the Third Circuit's test would "suggest that gear is integral" to an employee's principal activities, even if it does not meet the definition of integral set forth in *Busk*.[4] According to *Busk*, however, an activity can be "indispensible" (*i.e.*, required or necessary) to a particular job without being "integral." The Third Circuit's focus on what regulations do or do not require effectively reads the integral requirement out of this Court's test.

Finally, the Third Circuit instructs trial courts to consider "what kind of gear is required—by regulation, employers, or the work's nature." *Tyger*, 78 F.4th at 593. This factor, which again focuses on whether a regulation is applicable, is problematic for the same reasons outlined above. Moreover, the fact that an employer requires gear does not establish that the gear is integral. *See Busk*, 574 U.S. at 36 ("If the test could be satisfied merely by the fact that an employer required an activity, it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address.").

The Third Circuit attempts to minimize the effect of its departure from this Court's precedent by speculating that some cases could be resolved under the "*de minimis*" doctrine—a doctrine that precludes recovery of otherwise compensable time if it is *de miminis*. *Tyger*, 78 F.4th at 594. But it then underscores the frailty of that position by noting the

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[4] The Third Circuit test also provides an incentive for regulatory overreach. Given this Court's recent consideration of *Relentless Inc. v. Department of Commerce*, Case No. 22-1219, and *Loper Bright Enterprises v. Raimondo*, Case No. 22-451, a court's reliance on such regulations may be of dubious foundation.

doctrine is "fact-specific," which, in other words, will foster unpredictability by sending such questions to be decided by a jury rather than being decided as a question of law. *Id*.

By abandoning this Court's mandate to consider whether donning and doffing is "integral," the Third Circuit's test effectively overrides Congress' intent in passing the PTPA. *See* 29 U.S.C. § 251(a) (explaining Congress's intent to amend the FLSA to override judicial interpretations of work that contribute to extended and continuous uncertainty). In particular, employers are now subject to lawsuits that could expose them to extensive and unforeseen liability that Congress sought to avoid.

II. The Issue Of Donning And Doffing Of Generic PPE Has Created a Well-Developed Circuit Split In Need Of Resolution By This Court.

The circuits are split on the appropriate test to determine whether donning and doffing time is compensable under the FLSA. The Third Circuit cited case law from the Fourth and Sixth Circuits to support its rejection of the Second Circuit test set forth in *Perez*. *Tyger*, 78 F.4th 594 (citing *Perez v. Mountaire Farms*, 650 F.3d 350 (4th Cir. 2011); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010)). But, like the Third Circuit's test here, the Fourth and Sixth Circuits' opinions are fatally flawed in light of this Court's specific guidance that provides, "[a] test that turns on whether the activity is for the benefit of the employer" is "overbroad." *Busk*, 574 U.S. at 36. But those cases impermissibly focused on that factor and

were decided prior to *Busk*, which renders their reasoning as having essentially no precedential value.

Other circuits have reached different conclusions. For example, in *Llorca v. Sheriff, Collier County*, 893 F.3d 1319 (11th Cir. 2019), county sheriffs' deputies sought compensation for the 30 minutes per shift it took them to don and doff protective gear—a "'duty belt,' a radio case, pepper mace, a baton strap, a magazine pouch, a radio, a flashlight, handcuffs, a holster, a first-responders pouch, and a ballistics vest." *Id.* at 1322. The Eleventh Circuit concluded that the time was "arguably indispensable" but not "integral" to the deputies' principal activities and therefore non-compensable. *Id.* at 1324-25 (citing *Busk*, 574 U.S. at 33; *Gorman*, 488 F.3d at 594). The Eleventh Circuit reasoned that "the mere fact that the deputies must go through the activity of donning and doffing the gear in order to have it available when they are on duty does not make the donning and doffing process an intrinsic element of law enforcement." *Id.* at 1324-25.

In *Pirant v. U.S. Postal Serv.*, 542 F.3d 202 (7th Cir. 2008), the Seventh Circuit held that because the employee "was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes," the donning and doffing of this type of work clothing is not 'integral and indispensable' to an employee's principal activities and therefore is not compensable under the FLSA." *Id.* at 208-09.

The Fifth and Tenth Circuits have similarly concluded that the donning and doffing of generic PPE is non-compensable. *See Aguilar v. Mgmt. & Training*

Corp., 948 F.3d 1270, 1283 (10th Cir. 2020) (concluding "[g]eneric tools and equipment like screwdrivers and paperwork are common to a variety of jobs and therefore play no specialized role in most types of work, no matter how necessary they might be to a particular job"); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125-26 (10th Cir. 1994) (concluding that time spent donning and doffing generic PPE such as hard hats, earplugs, safety footwear, and safety eyewear not work); *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F.App'x 448, 454 (5th Cir. 2009) (donning and doffing of generic protection gear such as safety glasses and hearing protection, constituted "non-compensable, preliminary tasks" under the PTPA).

In sum, the circuits are deeply divided on the proper approach. For the NAM, the ultimate answer is obvious in light of the PTPA. As the Tenth Circuit stated in *Reich*, "[w]e understand the [district] court's reluctance to find that these workers should be compensated for putting on a hard hat, safety glasses, earplugs, and safety shoes. Such a holding would open the door to lawsuits from every industry where such equipment is used, from laboratories to construction sites." *Reich*, 38 F.3d at 1125. The Third Circuit's opinion opens the door to such a holding and would be inconsistent with the express purpose of the PTPA. Specifically, the Third Circuit's test prevents district courts from resolving the compensability of donning and doffing generic PPE as a matter of law and instead requires a jury to decide, which conflicts with this Court's precedent, Congressional intent, and the bulk of circuits to have considered the issue. As such, this case is appropriate for this Court's resolution.

III. The Circuit Split Sows Uncertainty To The Detriment of Employers.

The misguided approach of the Third, Fourth, and Sixth Circuits has opened the floodgates for claims regarding the compensability of time spent donning and doffing generic PPE—like protective glasses, hard hat, or protective boots—which will likely have a significant adverse impact on businesses, contrary to the intent of the PTPA. *See* 29 U.S.C. § 251(a) (explaining Congress's intent to amend the FLSA to override judicial interpretations of work that could financially ruin many employers, impair their credit, contribute to extended and continuous uncertainty, provide windfall payments in matters that should be decided for employers as a matter of law, and lead to baseless claims for extra compensation).

Under the continuous workday rule, employers must compensate employees for the time between the beginning of their work duties to the end of those duties. 29 C.F.R. § 790.6(a). If the time spent donning generic PPE is compensable, then the walk to the place where the employee performs his or her work is also compensable, as well as the walk from the place where work is performed to the place where the employee doffs the generic PPE. Because donning and doffing generic PPE are tasks performed by millions of Americans daily (*supra*, p. 2, n. 3), consistency in the law is needed. The circuits' divided approach to resolving compensability questions places employers at risk of a flood of litigation to resolve those questions, contrary to the express intent of the PTPA.

Employers can attempt to mitigate litigation risks, but their options for doing so are fraught with practical difficulties. Employers can pay for the donning, doffing, and walking time on the front end to prevent litigation, but how much is enough? In manufacturing plants, the walks will often vary—some employees will have very short walks, while others could be longer. Should an employer, particularly one who has a timeclock rounding system and pays in increments of a tenth or quarter of an hour, pay all individuals the same amount to account for the time of the individuals with the longest walks? That would provide a windfall for those with shorter walks. While payments could perhaps be individualized (likely at an overtime rate since most manufacturing workers already work 40 hours per week), an employee could take issue with the employer's walk time assessment and file a lawsuit. Thus, even an employer who wishes to absorb significant costs on the front end to avoid the risk of litigation likely could not eliminate that risk completely.

Another option for employers would be to simply restructure the workday to account for donning, doffing, and walking time within an eight-hour workday. Of course, this means decreased productivity, decreased value for shareholders, and potentially less pay or job security for the employees. This is a similarly untenable option. Given that employers cannot adequately resolve the uncertainty created by the Third Circuit's opinion, this Court's clarification is sorely needed.

IV. The Circuit Split Has Significant Implications Beyond FLSA Cases.

The uncertainty created by the circuit court split has implications for employers beyond the FLSA's collective action mechanism. The majority of states have adopted their own wage and hour laws.[5] Generally speaking, these laws complement the FLSA. State courts, which do not see wage and hour cases with the same frequency as federal courts, typically look to the federal courts' analysis of the FLSA for guidance in interpreting issues brought under their respective state analogues.[6] Potential liability under a state's FLSA analogue can be significantly higher than under the FLSA based on the aggregation mechanism plaintiffs can use to assert claims.

Under the FLSA, plaintiffs' potential recovery is limited due to the statute's opt-in collective action mechanism for pursuing claims. 29 U.S.C. § 216(b). The historical opt-in rate for FLSA claims hovers

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[5] Gregory K. McGillivary, *Wage and Hour Laws: A State–by–State Survey* (2004), and supplements thereto.

[6] *See e.g.*, *Roto-Rooter Services Co. v. Dept. of Labor*, 219 Conn. 520, 528 n.8, 593 A.2d 1386 (Conn. 1991) (noting that Connecticut courts interpreting its wage and hour statute look to the FLSA for guidance as the statutes are similar); *Anfinson v. FedEx Ground Package System. Inc.*, 174 Wash.2d 851, 867, 281 P.3d 289 (Wash. 2012) (noting that Washington courts should look to the federal courts' application of the FLSA to address legal questions arising under the Washington state wage law); *Vitali v. Reit Mgt. & Research, LLC*, 88 Mass. App. Ct. 99, 103, 36 N.E.3d 64 (2015) (noting that in interpreting the similar Massachusetts wage and hour law, courts should look to how federal courts have construed the FLSA).

between 15% and 30%, meaning many eligible individuals do not opt-in to these cases.[7]

The majority of states, however, either explicitly or through case law, permit class actions to redress potential wage and hour violations. The use of class actions instead of the FLSA's collective action mechanism represents a multi-factor increase in potential damages for any employer found to be in violation of a state analogue based on application of the Third Circuit's erroneous framework to determine compensability questions.

Further, some states have adopted statute of limitations periods for their state analogues that are longer than the FLSA's two-year limitations period for non-willful violations set forth in 29 U.S.C. § 255. *See e.g.*, KRS 337 et seq.; KRS 413.120 (five years in Kentucky); N.Y. Lab. Law § 198(3) and N.Y. Lab. Law § 663(3) (six years in New York). These extended statute of limitations periods alone allow litigants to recover damages more than twice in excess of what is available under the FLSA.

Consequently, employers could face a tenfold increase in potential damages for a claim that would never reach a jury but for the Third Circuit's departure from this Court's precedent and Congress' express intent as set forth in the PTPA. The NAM asks that the Court resolve the circuit split to provide

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[7] The opt-in rate in a FLSA collective action not backed by a union is generally between 15 and 30 percent. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual–Filed FLSA Collective Action and State–Law Wage Class Action, Lab. Law*. Winter/Spring 2005 311, 313–14.

needed certainty and predictability for its members and for employers across the United States.

CONCLUSION

For the foregoing reasons, the NAM urges this Court to grant the Petition.

Respectfully submitted,

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