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, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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I. INTEREST OF THE *AMICUS CURIAE*

The International Association of Drilling Contractors ("IADC") is a non-profit global oil and gas drilling industry organization with members comprising hundreds of oil and gas drilling firms.[1] The IADC's member firms employ thousands of employees across the United States who are required to wear various types of personal protective equipment on a daily basis to provide protection from potential job-related hazards. Clarity and consistency could be provided to the IADC's member organizations if the Court were to issue the requested writ of certiorari and find in Precision's favor.

II. SUMMARY OF THE ARGUMENT

In its precedential opinion in *Tyger v. Precision Drilling Corp*., 78 F.4th 587 (3d Cir. 2023) (the "Opinion"), the Third Circuit created a different and impossible test that breaks with United States Supreme Court precedent under *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014) and ignored the reasonable rationale of the District Court.

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certify that this brief was wholly authored by IADC's counsel, and no party, party's counsel, or other person aside from IADC, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

Busk holds that a compensable activity must be integral and indispensable to the principal work the employee is hired to perform. Instead of following the well-reasoned opinion of the District Court and other circuit courts that have crafted reliable tests within the requisite *Busk* framework, like *Perez v. City of New York*, 832 F.3d 120 (2d Cir. 2016), the Third Circuit declared a striking new test under the guise of "clarifying" what it means for tasks to be integral and indispensable in the Third Circuit. This purported clarification essentially eliminates the "integral" element of the test as required by the *Busk* standard, expressly conflicts with the holding of the Second Circuit in *Perez*, does little to define what particular donning and doffing activities are compensable under the Fair Labor Standards Act ("FLSA"), and ultimately requires a jury to decide the compensability of such activities in virtually all cases. Further, the additional fact-intensive analysis for either the compensability of the work, or the lack thereof under the *de minimis* exception to compensation, serves to create an impossible dynamic for employers to navigate and ultimately will require either undue compensation or undue litigation on the part of employers. This Court should grant Precision's Petition for Writ of Certiorari and set forth a standard test for compensability of personal protective equipment ("PPE") that employers can apply with reasonable certainty, such as the Second Circuit's "transcends ordinary risk" test.

III. ARGUMENT

A. The Third Circuit set out an entirely new test, which paves a path of uncertainty, litigation, and the likelihood of a jury trial for all employers who have any apparel requirement.

The breadth of the Third Circuit's Opinion is sweeping and will impact nearly every industry in the United States—particularly given that vast numbers of companies are amenable to suit in the Third Circuit by virtue of Delaware incorporation. Respondents and innumerable workers across the country are required to wear basic PPE such as hardhats, safety glasses, earplugs, gloves, steel-toed boots, non-skid shoes, high-visibility vests and clothing, fire-retardant coveralls, thermal, weather and waterproof clothing, and pants and shirts that cover full legs and arms.

This generic PPE is not limited to blue-collar workers in the drilling industry but includes millions of workers across the country. According to a study conducted by the U.S. Office of Personnel Management, among the 153 million civilian workers in the U.S., the top 20 blue-collar jobs in the country make up an estimated 112 million jobs.[2] And virtually all of these workers—custodians, mechanics, electricians, cooks—

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[2] *See* Twenty Largest Blue-Collar Occupations, U.S. Office of Personnel Management (2017) at https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/the-twenty-largest-blue-collar-occupations/.

wear some form of generic PPE for protection from potential (but common) hazards.

Before the Third Circuit issued this opinion, at least 112 million workers never had an expectation that lacing up their steel-toed boots, putting on their neon safety vests, or zipping up their standard work coveralls was compensable work. Nor have their employers had such an expectation, regardless of whether these everyday activities have been done at the employees' homes, on the tailgate of their F-150 pickup truck (either in a personal driveway or in a company parking lot), at a man-camp near the worksite, or right before clocking in at the front gate. Now, the Third Circuit's opinion has upended the customs and practices of countless workers and employers—most of which benefit employees—and contravenes legislative history and established precedent.

The ultimate impact of the opinion, if allowed to stand, will cast doubt on every act of donning and doffing of PPE that takes place in the Third Circuit (or for work for an employer who is subject to suit in the Third Circuit); the only "clarity" it provides is a clear path to litigation. Indeed, the Third Circuit acknowledged that both the "integral and indispensable" determination and the backstop of the *de minimis* test (which would be unnecessary if the donning and doffing were non-compensable as a matter of law) are fact specific and require "definite findings." App. 11a. Yet even with the proffered "guideposts," the Opinion provides absolutely no practical guidance on how the compensability test should be applied by employers, trial courts, or

juries. Instead, the Third Circuit held that virtually every decision regarding compensability of donning and doffing protective gear must be determined by a jury.

In declining to provide any specific guidance regarding compensability of putting on and taking off protective gear in the instant matter, the Third Circuit has created a minefield for employers in the Third Circuit, or whose businesses are incorporated in Delaware. Employers who do business in the Third Circuit and who desire to have uniform payment practices will be forced to change their practices nationally to conform to this decision. Under the lower court's Opinion, employers cannot make **any** decisions regarding compensability of donning and doffing time in the Third Circuit with any degree of reasonable certainty. Rather, they are left with the outside hope that no one files suit against them for their practices, and if they are sued, that their practices will satisfy a jury in an unknown number of years after likely spending thousands and thousands of dollars litigating a case. Such an unnecessary expenditure of time and resources is wholly avoidable if this Court grants certiorari and directs the Third Circuit to either affirm the ruling of the District Court in the instant matter or otherwise delineate a test that would actually provide insight as to how a court should consider such questions.

Attempting to define the "integral" portion of the test, the Third Circuit concluded that the physical location of donning or doffing PPE is "likely to be relevant," but went on to state that not every employee

needs to change onsite for changing to be intrinsic. App. 7a-8a. This noncommittal standard exposes employers to open-ended liability, depending on when employees put on work clothing and the application of the continuous workday rule, which mandates that the time workers spend walking to and from the place where they actually perform their work after donning and before doffing gear, is compensable time. Indeed, this principle, combined with the Third Circuit's Opinion, could even conceivably result in required compensability for the commute of every blue-collar worker in the United States who slips on his work coveralls at home if such an event could be the first principal activity of the day, triggering this continuous workday doctrine, which is directly contrary to the purpose of the Portal to Portal Act. *See generally, e.g.*, Dep't of Labor Opinion Letter 2020-19 (discussing factors to consider when commute time can be compensable travel depending on where the first principal activity occurs).

Even the U.S. Department of Labor has stated that putting on work clothing at home is not "work," noting that "employees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours." *See* DOL Field Operations Handbook 31b13. And *Busk* says the same—requiring a particular activity does not make it compensable. *See* 574 U.S. at 36-37. Simply, there is nothing that changes about the act of putting on steel-toed shoes by virtue of a change of venue. Indeed, the mere fact that steel-toed shoes can be donned outside

of the workplace is evidence in and of itself that the act of donning the shoes is not integral and indispensable to the primary duty of ***whatever*** tasks that employee was hired to perform, contrary to the Third Circuit's interpretation of the relevance of the location where the gear is donned and doffed.

Regarding the location factor, the lower court also emphasizes custom and practical necessity, noting that both should inform compensability, but this rationale is hollow. App. 8a. Indeed, the Opinion cites to a statutory provision noting that custom can drive toward the opposite conclusion (non-compensability), *see* App. 8a-9a (citing 29 U.S.C. § 203(o)), and no statutes or caselaw to date have distilled the transient habits of an ever-evolving workforce to a conclusion of compensability. *Busk* itself challenged the Ninth Circuit's reliance on "required" activities; it follows that this Court should similarly reject a compensability requirement on a standard rooted in something as indefinite as the "custom" of the pertinent workforce, particularly one that is subject to rapidly evolving work practices in the modern workplace.

The Third Circuit also determined that specialty gear is more likely to be integral to the work being performed, but also states that "even generic gear can be intrinsic." App. 9a. This vacillation provides no guidance for employers, and instead makes it impossible for employers to gauge compliance and creates two equally untenable options—compensate employees for each article of PPE they don and doff or litigate the compensability of each of those items to a class-action

jury trial. Indeed, as a result of the Third Circuit's new test, even the following rote activities could create a fount of costly new litigation:

- A waiter putting on non-skid shoes before coming to work so he does not slip on a wet kitchen floor;
- A road worker putting on her neon vest when she climbs into her pickup truck every morning on her way to a job site;
- A nurse putting her scrubs on at home before heading to the hospital;
- A construction worker placing her safety glasses on her head as she walks from her car to the worksite;
- A pipeline worker putting on long underwear to protect against the cold as he walks the pipeline.

These types of basic PPE, worn by millions of workers every day, are the same in kind as the PPE at issue in this case; yet the compensability of these generic items has resulted in over a decade of litigation for Appellees. By denying Precision's Petition, this Court would doom countless other employers to a similar fate of costly, protracted litigation in an already over-burdened court system.

The Third Circuit also determined that whether gear is required (by regulation, by employers, or by the nature of the work) would color compensability. This prong of the lower court's test confuses the

"indispensable" element with the separate "integral" element and fails to consider that while some agencies, like OSHA, may have specific regulatory sections that apply to specific industries, workplaces, or work conditions, common law and state and federal regulatory and statutory law create a far greater umbrella. For example, OSHA's general duty clause requires all employers to provide a work environment "free from recognized hazards that are causing or likely to cause death or serious physical harm." 29 U.S.C. § 654.

Essentially, when the Third Circuit said that courts (or juries) should consider what kind of gear is required "by regulation, employers, or the work's nature," it created a test that could sweep in all protective gear. App. 9a. The IADC cannot contemplate any piece of protective gear, from steel-toed shoes to hardhats, which will not be required by an employer when also required by the nature of the work. OSHA's requirements to provide a work environment free from recognized hazards necessitate this result. Indeed, what the Third Circuit has done here is expressly what *Busk* prohibited—developing a test that hinges compensability on whether it is a "required" activity.

The Third Circuit also opined that the concerns of Precision and the IADC about the narrowness of its test are "overblown" and are resolved by the *de minimis* doctrine but ignored the false promise of security created by such guidance.[3] App. 11a. The necessarily

[3] Even the reliance of the *de minimis* test as a backstop to compensability of such time is feckless in certain states, including

fact-intensive *de minimis* doctrine should not be the fail-safe for this analysis. Per *Busk*, the analysis should be controlled by the examination of whether the gear is integral and indispensable—a control valve that does not exist under the Third Circuit's test, despite the court's assertion that the Opinion "clarified" the standard at issue.

The instant case and the application of this "murk[y]" test to the facts at issue clearly manifest those concerns. *See* App. 7a. The PPE in question here—hardhats, safety glasses, earplugs, gloves, steel-toed boots, and fire-retardant coveralls—is not specialized. And though it may take "only a few seconds or minutes" to change into and out of this generic gear, the lower court held that a jury must decide the *de minimis* question. *See* App. 11a (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946)). However, because the gear is not "integral" to the employees' work to begin with, there is no need to reach that latter question. Accordingly, the IADC disagrees with the Third Circuit's contention that concerns about the new test are "overblown." The lower court's reliance on the *de minimis* doctrine to stem the tide of litigation instead of providing a manageable framework

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Pennsylvania, as a number of states do not recognize *de minimis* time as not compensable under their state's wage and hour laws. *See*, *e.g.*, *In re Amazon.com, Inc.*, 255 A.3d 191, 208 (Pa. 2021) (holding that the that the *de minimis* doctrine does not apply to Pennsylvania state law wage and hour claims). This is particularly relevant here, as the instant case originated in the United States District Court for the Middle District of Pennsylvania.

for determining whether the gear is integral and indispensable further exacerbates those fears.

In defense of its narrowness, the Third Circuit asserted that its proffered test is in line with "most of [its] sister circuits," and then cited to two pre-*Busk* circuit opinions—*Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011) and *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010). App. 11a. However, the court in *Mountaire Farms* expressly notes the lack of binding authority on the definition of "integral and indispensable" (650 F.3d at 365), and both *Mountaire Farms* and *Franklin* define the phrase in its conjunctive, rather than analyzing it as two separate requirements, as *Busk* demands. *Id*. at 365-66; 619 F.3d at 619-20. In other words, these cases are outdated and uninformed by this Court's defining principles in *Busk*. Notably, in support of its assertion that the post-*Busk* Second Circuit test utilized by the District Court is "unique," the Third Circuit cited *Franklin*, which predates *Busk* by four years. App. 11a. At bottom, the Opinion ignores the guardrails put in place by *Busk* that were intended to provide clarity on what preliminary and postliminary activities are compensable and alleviate the concerns expressed by Precision and the IADC—that the Third Circuit's new test provides no practical guidance or certainty as to what the law requires. Such legal uncertainty reduces the efficacy of the law and precedent put in place both by Congress and the Supreme Court, and clearly disadvantages employers expected to implement compliant policies.

By laying out an unworkable and vague framework for employers to determine if donning and doffing time is compensable, the Third Circuit has invited litigation over each piece of personal protective equipment required at every employer, regardless of industry. Indeed, even in the instant case, the Third Circuit's decision, if allowed to stand, will likely extend the litigation by an indeterminable amount of time, in order to allow the parties to re-litigate the case under the new standard.

The sweeping breadth of the Third Circuit's decision will impact workers across the United States, in all industries, and will result in the loss of benefits for employees. This ruling, if applied across the country, would impact tens of millions of U.S. workers who are required by law or their employer to don generic PPE—construction workers, mechanics, warehouse employees, farmers, food service workers, factory workers, just to name a few. Companies that employ any of these types of workers within the Third Circuit will now be faced with a concededly "murky" test to determine if the donning and doffing of even the most basic PPE is compensable. *See* App. 7a. The Third Circuit's Opinion highlights exemplar scenarios such as the Phillie Phanatic mascot or a butcher covered in blood, but does not acknowledge the more common scenarios akin to the issues in this case—putting on a hardhat while walking onto the worksite, slipping on a pair of steel-toed shoes before heading out the door, or draping earplugs over a shoulder that will be inserted once the shift starts. The ubiquity, simplicity, and ease of these

types of PPE are not controversial—and yet, the lower court's Opinion puts into question whether these simple preliminary and postliminary tasks that are performed by a significant percentage of U.S. workers are compensable, and the only avenue for employers to create more certainty on these issues is through protracted litigation.

Due to the prevalent nature of these types of PPE, many workers, similar to the employees in the instant case, enjoy benefits provided by their employers with respect to laundering clothing or storing PPE in a locker onsite. Not only would employers be likely to take away such benefits customarily provided to their employees in order to lessen the risk that the time spent changing be considered compensable, but, as a result of the Third Circuit's Opinion if allowed to stand, companies would actually be incentivized to forbid any sort of clothes changing or PPE storage at the worksite, reducing important benefits for the modern blue-collar worker and returning some workers to change in the basement bathrooms of their homes as steel mill and mine workers once did in industrial Pennsylvania. The financial harm and uncertainty to employees and employers alike as a result of the Opinion far outweigh any potential benefits that could be derived from the nebulous test set forth by the Third Circuit, and this Court should grant Precision's Petition for a Writ of Certiorari.

IV. CONCLUSION

The issue presented here is of significant concern to the employers and companies who comprise the IADC. For the foregoing reasons, and those stated in Precision's Petition for a Writ of Certiorari, the Petition should be granted and the Court should clarify the test for compensability of donning and doffing PPE for employers—and employees—across the nation.

Respectfully submitted,

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