No. 17-995

In the Supreme Court of the United States

AMERICAN FUTURE SYSTEMS, INC.,
DBA PROGRESSIVE BUSINESS PUBLICATIONS, ET AL.,
PETITIONERS

v.

R. ALEXANDER ACOSTA, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the hours worked for which petitioners were required to pay the federal minimum wage to employees under 29 U.S.C. 206(a)(1) include short breaks up to 20 minutes in duration.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 873 F.3d 420. The opinion of the district court (Pet. App. 32a-70a) is not reported in the *Federal Supplement* but is available at 2015 WL 8973055.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2017. The petition for writ of certiorari was filed on January 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, requires, *inter alia*, that an employer pay each of its "employees" who is not otherwise exempt at a rate not less than the federal minimum

wage rate, which is currently $7.25 per hour. 29 U.S.C. 206(a). Cf. 29 U.S.C. 213 (2012 & Supp. IV 2016) (minimum-wage exemptions). This case concerns whether the time spent by an employee on short breaks no longer than 20 minutes in the midst of a workday qualifies as hours "worked" for which the employer must pay the minimum wage.

The FLSA generally defines an "employee[]" to whom an employer must pay at least the minimum wage, 29 U.S.C. 206(a), to mean "any individual employed" by the employer. 29 U.S.C. 203(e)(1). The term "[e]mploy," in turn, includes "to suffer or permit to work." 29 U.S.C. 203(g). The FLSA, however, does not define the term "work." *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 875 (2014). Instead, this Court has construed "work" to have a "broad reading," *ibid.*, which extends beyond activity requiring "exertion" and includes inaction and non-productive activity, because an employee may be employed "to do nothing, or to do nothing but wait for something to happen." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25 (2005) (quoting *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944)).

In June 1940, shortly after Congress enacted the FLSA, the Wage and Hour Division in the Department of Labor (Department) issued an interpretive bulletin setting forth its conclusion that "[e]mployees coming under the provisions of the [FLSA] must be paid for short rest periods * * * up to and including 20 minutes" as "'hours worked.'" Wage & Hour Div., U.S. Dep't of Labor, *Press Release R-837: Employees Must Be Paid For Short Rest Periods* (June 10, 1940) (*1940 Interpretation*) (available at Gov't C.A. Br. Addendum A); see Pet. App. 20a n.63 (quoting *1940 Interpretation*). If longer breaks are "customarily taken by employees,"

the agency explained, whether such periods would qualify as "'hours worked'" would depend on the employee's "freedom * * * to leave the premises and go where he pleases during the intermission"; whether "the duration of the intermission" is "sufficient to permit the employee reasonable freedom of action"; and whether the break "is clearly not an attempt to evade or circumvent the provisions of the [FLSA]." *1940 Interpretation*; see Pet. App. 20a n.63. The Department's 1942 enforcement handbook accordingly reflected that interpretation of the FLSA, explaining that "rest periods of twenty minutes or less" qualify as "hours worked." Wage & Hour and Pub. Contracts Divs., U.S. Dep't of Labor, *Field Operations Handbook*, at H-14.V.A (rev. Dec. 1943) (available at Gov't C.A. Br. Addendum B).

In 1949, Congress significantly revised the FLSA. See Fair Labor Standards Amendments of 1949 (1949 Amendments), ch. 736, 63 Stat. 910. Among other things, Congress enacted a partial definition of "[h]ours [w]orked." § 3(d), 63 Stat. 911 (29 U.S.C. 203(*o*)). Under that definition, "the hours for which an employee is employed" for "the purposes of [Section 206's minimum-wage provisions]" shall "exclude[]" certain "time spent in changing clothes or washing at the beginning or end of each workday." *Ibid.*; see 29 U.S.C. 203(*o*). That partial definition excluding certain activity from "hours worked" does not affirmatively define the term. Section 16(c) of the 1949 Amendments, however, stated that "[a]ny * * * interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor * * * in effect under the provisions of the [FLSA] of 1938, as amended, on the effective date of this Act, shall remain in effect," except to the extent that any such interpretation "may be inconsistent with the provisions of

this [1949] Act, or may from time to time be amended, modified, or rescinded" by the agency. 1949 Amendments § 16(c), 63 Stat. 920.

The Department's interpretation of "hours worked" in this short-break context has since remained consistent. See Pet. App. 13a-14a & nn.40-41 (citing illustrative agency documents). In 1955, the Department published its interpretation for inclusion in the Code of Federal Regulations, reiterating that "[r]est periods of short duration, running from 5 minutes to about 20 minutes, are common in industry" and "must be counted as hours worked." 20 Fed. Reg. 9963, 9965 (Dec. 24, 1955) (29 C.F.R. 785.3(c) (Cumulative Supp. 1962)) (explaining that short breaks "promote the efficiency of the employee"). The Department's interpretation is now codified at Section 785.18, which provides:

> Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked.

29 C.F.R. 785.18.

That understanding that "hours worked" includes short breaks is not absolute in all contexts. In 2010, Congress amended the FLSA to exempt employers from an obligation under federal law to compensate an employee for "reasonable break time" when the break is provided "for an employee to express breast milk for her nursing child." 29 U.S.C. 207(r)(1)(A) and (2).

2. Petitioner American Future Systems creates business-information publications and employs workers —telemarketers—to sell those publications to business executives by telephone. Pet. App. 3a, 34a. Petitioner Edward Satell, who owns "at least 98%" of the company,

both serves as the company's President and Chief Executive Officer and is "responsible for the policies, operations, and results of the [c]ompany." *Id.* at 75a. Petitioners employed more than 6500 telemarketers, who worked in 14 (now ten) call centers in Pennsylvania, Ohio, and New Jersey. *Id.* at 34a, 76a; see Gov't C.A. Br. 4; Gov't C.A. Supp. App. 13, 16-53 (list of over 6500 employees).

Before July 2009, petitioners operated under a policy that gave each of their telemarketers two 15-minute paid rest breaks each day. Pet. App. 4a. Effective July 24, 2009, Congress raised the federal minimum-wage rate nearly 11% from $6.55 to $7.25 per hour. 29 U.S.C. 206(a)(1).

In July 2009, petitioners adopted a new compensation policy that eliminated the two 15-minute paid breaks and replaced them with what petitioners call a "flex time" policy. Pet. App. 4a, 35a. Under the new policy, petitioners' telemarketing employees could decide what hours they would work during petitioners' operating hours (*i.e.*, 8:30 a.m. to 5:00 p.m., Monday through Friday), so long as the employee did not work more than 40 hours each week. *Id.* at 4a. Every two weeks, each employee was required to estimate the total number of hours she would work in the upcoming two-week pay period. *Ibid.* If the employee failed to generate enough sales in a particular day, petitioners could send the employee home early. *Ibid.* And if the employee "fail[ed] to work the number of hours" she estimated for the pay period, the employee was "subject to discipline, including termination." *Ibid.*

Petitioners paid their telemarketers only for actual time they were logged on at a workstation and for logged-off periods less than 90 seconds in duration. Pet.

App. 5a. Moreover, petitioners required that each telemarketer log off her workstation unless she was "on an active sales call," "recording the results of a call," "engaged in training or administrative activities," or "engaged in other activities that [the company] considers to be work-related." *Id.* at 36a.

Under the new policy, an employee was permitted to log off from her workstation during a workday "at any time, for any reason, and for any length of time" and could "leave the office" when logged off. Pet. App. 5a. Those unpaid breaks included, for instance, time necessary to "use the bathroom or get coffee." *Ibid.* The employee, moreover, was still obligated to ensure that such break periods—which petitioners did not count as hours worked—did not in aggregate reduce the total "number of hours" to which she had committed to work during each pay period. See *id.* at 4a.

Petitioners' new policy did not significantly change the total amount of short breaks that petitioners' telemarketers took each day. Cf. Gov't C.A. Br. 7-9 (explaining how petitioners' policies and management effectively limited the length of potential breaks). Whereas employees had previously had two 15-minute (paid) breaks under the pre-July 2009 policy, Pet. App. 4a, under petitioners' new policy, the employees on average took a total of 32 minutes per day of short breaks—*i.e.*, breaks up to 20 minutes in duration, *id.* at 117a. That aggregate of 32 minutes of break time reflected that petitioners' employees on average took 4.4 short breaks per day: 1.7 breaks shorter than five minutes in duration; 1.6 breaks between five and ten minutes in duration; and 0.80 breaks between ten and

15 minutes in duration. See Pet. App. 117a-119a.[1] On average, only one in three employees took a single daily break lasting 15 to 20 minutes. See *ibid.* (0.33/day).[2]

Short breaks, the evidence reflects, were important for telemarketers to be able to maintain the energy and attitude necessary to successfully sell petitioners' products over the phone. Gov't C.A. Br. 7. Telemarketers generally used such breaks for brief respites from work and did not typically leave the premises or do anything beyond going to the bathroom, getting coffee, smoking a cigarette, making a phone call, or chatting with a coworker. C.A. App. 285, 690. Petitioners' new compensation policy thus did not meaningfully alter the total length of short breaks taken by petitioners' employees (about 30 minutes per day), see Pet. App. 4a, 117a, but it did alter employees' compensation by declaring that such "break time is NOT paid," *id.* at 35a (citation omitted).

Petitioners paid their telemarketers on average the federal minimum wage of $7.25 per hour. Pet. App. 5a.[3]

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[1] For example, petitioners' time records showed that 32.52% of all breaks (including long breaks) lasted from 91 seconds up to five minutes. Pet. App. 118a. That 32.52% figure and data showing an average of 5.15 total breaks per day, *id.* at 117a, reflected an average of 1.7 breaks under five minutes per day.

[2] Petitioners' time records also indicate that employees took on average less than one break longer than 20 minutes each day. Pet. App. 117a, 119a (0.75 long breaks per day, *i.e.*, 14.63% of 5.15). Those longer breaks, which the government has not argued were "hours worked," would have, for instance, enabled petitioners' employees to eat lunch. Cf. *id.* at 125a-126a (provisions in petitioners' policy prohibiting any employee from "eating food at [her] desk" and authorizing instead an unpaid lunch break of up to 45 minutes).

[3] In 2009 and 2010, Ohio's minimum wage was $7.30 per hour. See Ohio Dep't of Commerce, *Annual Report FY2010*, at 11 (2010); see

After subtracting the 32 minutes per day of short breaks, petitioners' employees worked, on average, five hours and ten minutes per day. *Id.* at 117a; see *id.* at 5a. At that rate, petitioners paid telemarketers less than $37.50 per day of work, *i.e.*, less than $188 per week. The 32 minutes of daily short-break time at issue in this case—160 minutes per week—reflects just under $19.50 in additional weekly pay per employee, *i.e.*, more than 10% of the wages paid to such telemarketers.

3. The Department filed this FLSA enforcement action against petitioners on behalf of petitioners' employees. Pet. App. 5a. The Department alleged, as relevant here, that petitioners were required—but failed—to count the short, authorized breaks of 20 minutes of less as hours worked for which petitioners must pay their employees at least the minimum wage. See *ibid.*

a. The district court granted partial summary judgment to the Department. Pet. App. 32a-70a. As relevant here, the court concluded that the FLSA required that petitioners pay the minimum wage for their employees' short breaks up to 20 minutes in length. *Id.* at 41a-60a. The court concluded that the Department's longstanding and consistent interpretation to that effect, which dates to 1940, was entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). See Pet. App. 45a-51a. "[C]ourts considering break periods of 20 minutes or less," the court observed, have "consistently f[ound] such breaks compensable in all types of working environments." *Id.* at 53a.

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also Ohio Rev. Code Ann. § 4111.02 (Lexis Nexis Supp. 2018) (explaining that minimum-wage rate is set annually by the Ohio Director of Commerce). Petitioners' separate July 2010 policy for Ohio indicates that petitioners paid a base rate of $7.30 per hour in Ohio. Gov't C.A. Supp. App. 7.

The district court further determined that petitioners' 2009 change in policy was not made in good faith, Pet. App. 65a-67a, rejecting petitioners' contention that they had "acted in good faith and had reasonable grounds for believing" that the policy change was lawful, *id.* at 65a. Petitioner Satell, the court explained, had consulted the Department's website, admitted that he was "at least 'vaguely aware'" of the Department's regulation addressing short breaks of up to 20 minutes, and had read court decisions on the subject. *Id.* at 66a (citation omitted). The court rejected petitioners' assertion that they made the policy change in good faith after seeking legal advice, because petitioners failed to disclose whether the policy change "contravened the legal advice" they received. *Id.* at 67a.

b. After the parties stipulated to the quantum of damages, the district court entered final judgment. Pet. App. 73a.

4. The court of appeals affirmed. Pet. App. 1a-28a. The court held that the FLSA required that petitioners "compensate employees for all rest breaks of twenty minutes of less," during which they had "logged off of their computers and [were] free of any work related duties." *Id.* at 3a.

a. The court of appeals stated that the question in this case is whether the short breaks at issue "constitute 'work'" under the FSLA, which governs compensation for "hours worked" by employees. Pet. App. 8a. The court explained that although Congress has not defined the statutory term "work," it is "well established that some breaks constitute 'hours worked' under the FLSA." *Id.* at 8a & n.23 (citing, *e.g.*, *IBP, Inc.*, 546 U.S. at 25). Petitioners' employees, the court observed, required short breaks during the workday for "such basic

necessities as going to the bathroom," and petitioners' "refus[al] to call the[] time periods 'breaks" could not alter the legal character of those periods under the FLSA. *Id.* at 9a-10a.

The court of appeals afforded *Skidmore* deference to the Department's conclusion in 29 C.F.R 785.18 that short breaks under 20 minutes qualify as hours "worked" under the FLSA. Pet. App. 11a-16a. The court explained that the Department's interpretation is reasonable "given the language * * * of the FLSA" as well as the statute's purpose. *Id.* at 14a. The court also determined that the agency's interpretation, which originated in 1940, was "ratified" by Congress through Section 16(c) of the 1949 Amendments to the Act. *Id.* at 13a. The Department's relevant interpretation embodied in its regulation, the court added, falls "well within [the agency's] expertise"; is both "'longstanding and unchanging,'" *id.* at 15a-16a (citation omitted); and has been "consistent throughout the various opinion letters the [Department] has issued to address this matter," *id.* at 13a. In light of those considerations, the court concluded that the district court correctly afforded "substantial *Skidmore* deference" to the agency's interpretation. *Id.* at 16a.

The court of appeals rejected petitioners' contention that the understanding that short breaks up to 20 minutes qualify as compensable hours worked should not apply as a "bright-line rule" in this case, and that, instead, courts should determine "whether a given break is intended to benefit the employer or the employee." Pet. App. 18a. The court found no authority to support petitioners' argument. *Id.* at 18a-20a. The Department's understanding of short breaks, the court observed, had

been previously upheld because such breaks are "beneficial to the employer" in that they "promote more efficiency and result in a greater output" by employees. *Id.* at 19a (discussing *Mitchell* v. *Greinetz*, 235 F.2d 621 (10th Cir. 1956)). Petitioners' contrary interpretation requiring scrutiny of individual breaks, the court added, would be both "unworkable" and "burdensome." *Id.* at 21a.

b. The court of appeals separately rejected petitioners' challenge to the district court's grant of liquidated damages based on its rejection of their claim of good-faith conduct. Pet. App. 25a-27a. Petitioners do not challenge that determination in this Court.

ARGUMENT

Petitioners contend (Pet. 14-22) that the courts of appeals have divided over the proper method for determining when breaks qualify as "work" under the FSLA. Petitioners further contend (Pet. 22-25) that courts have divided over how to apply *Skidmore* deference in this context. Petitioners are incorrect on both grounds. The court of appeals correctly concluded that the short breaks in this case qualified as compensable work under the FLSA, and its decision does not conflict with any decision of this Court or any other courts of appeals. No further review is warranted.

1. Under the FLSA, an employer must pay each "employee[]" (who is not otherwise exempt) at a rate not less than the federal minimum-wage rate. 29 U.S.C. 206(a). The term "employee" in this context means "any individual employed" by the employer, 29 U.S.C. 203(e)(1), and the term "[e]mploy" includes "to suffer or permit to work," 29 U.S.C. 203(g). The FLSA, however, does not define the term "work." *Sandifer* v. *United*

States Steel Corp., 134 S. Ct. 870, 875 (2014). As a result, a central question in determining "the hours for which an employee is employed" "for the purposes of [the minimum-wage provisions of] [S]ection[] 206" is what qualifies as "[h]ours [w]orked," 29 U.S.C. 203(*o*). The court of appeals correctly determined that the short breaks in this case, each of which was less than 20 minutes in duration and on average collectively totaled only 32 minutes per day, qualify as "hours worked" for purposes of Section 206.

a. This Court has long interpreted the term "work" in the FLSA "broadly." *Integrity Staffing Solutions, Inc.* v. *Busk*, 135 S. Ct. 513, 516 (2014); see *Sandifer*, 134 S. Ct. at 875. The Court has determined that "work" includes "'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.'" *Integrity Staffing Solutions, Inc.*, 135 S. Ct. at 516 (quoting *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). The Court has also "clarified that 'exertion' [i]s not in fact necessary for an activity to constitute 'work.'" *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25 (2005). An employee may be engaged in "work" under the FLSA even when not doing anything productive: an employer "'may hire a man to do nothing, or to do nothing but wait for something to happen.'" *Ibid.* (quoting *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944)). That broad understanding of "work" prompted Congress to enact the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, to protect "long-established customs" and "practices" in the workplace, 29 U.S.C. 251(a), by exempting employers from liability for certain "work-related activities." *Integrity Staffing Solutions, Inc.*, 135 S. Ct. at 516-517;

see *IBP, Inc.*, 546 U.S. at 26. Congress, however, has provided no alternative "definition of the term 'work'" and thus has "not purport[ed] to change this Court's earlier descriptions of the term[]." *IBP, Inc.*, 546 U.S. at 26, 28.

One manifestation of the Court's broad understanding of "work" under the FLSA is the so-called "continuous workday" rule, which generally treats the compensable workday as "'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" See *IBP, Inc.*, 546 U.S. at 28-29 (quoting 29 C.F.R. 790.6(b) (2005)). One exception from the continuous-workday rule involves bona fide meal periods, which traditionally have not been included as hours worked. See 29 C.F.R. 785.19. But unlike meal periods, "short" rest periods—that is, breaks of a "short duration" up to "20 minutes"—have "customarily [been] paid for as working time," 29 C.F.R. 785.18, and are thus properly understood to be part of the compensable workday. That principle flows not only from a "custom[]" consistent with the statutory framework, cf. 29 U.S.C. 251(a), but also from the recognition that short breaks up to 20 minutes "promote the efficiency of the employee," 29 C.F.R. 785.18. Such breaks as a class are logically understood primarily to benefit employers by enabling employees to maintain a higher degree of productivity throughout the workday.

Since 1940, shortly after Congress enacted the FLSA, the Department has consistently concluded that employees "must be paid for short rest periods * * * up to and including 20 minutes" as "'hours worked.'" *1940 Interpretation*; see p. 2, *supra*. Since 1955, that inter-

pretation has been formally codified in the Department's interpretive regulations (see p. 4, *supra*), now located at 29 C.F.R. 785.18, which continues to explain that "short" rest periods up to "20 minutes" in duration "must be counted as hours worked" under the FLSA. *Ibid.*

b. The court of appeals correctly held, in accord with the Department's longstanding interpretation in 29 C.F.R. 785.18, that the FLSA required petitioners to pay their employees for the short breaks at issue in this case. Pet. App. 3a; see *id.* at 8a, 11a-16a. As the court explained and for the reasons above, that "interpretation is reasonable given the language * * * of the FLSA." *Id.* at 14a. Although the FLSA requires compensation for "hours worked," the court recognized that Congress did "not define 'work'" and that, under this Court's construction of the term, "hours worked is not limited to the time an employee actually performs his or her job duties." *Id.* at 8a & n.25 (citing *Armour & Co.*, 323 U.S. at 133-134). The court also reasoned that the Department's interpretation had been previously upheld because short breaks "benefi[t]" an employer by "promot[ing] more efficiency and result[ing] in a greater output." *Id.* at 19a. That analysis properly follows the FLSA principles governing "hours worked."

Moreover, the court of appeals reasoned that, as this Court originally instructed in an FLSA case, the Department's interpretations of the FLSA "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Pet. App. 11a & n.33 (quoting appellate decision that quotes *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). *Skidmore* deference is warranted when a court concludes that the agency's non-binding interpretation

has the "'power to persuade'" in light of "the agency's care, its consistency, formality, and relative expertness" and "the persuasiveness of the agency's position." *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140) (footnotes omitted). And here, as the court of appeals correctly recognized, not only is the Department's interpretation a "reasonable" reading of the FLSA's "language," Pet. App. 14a, but the agency's interpretation has also been consistent over the nearly 80 years since the Department first applied its expertise to the question and determined in 1940 that short breaks up to 20 minutes in duration are part of "hours worked" for which the FLSA requires compensation. See *id.* at 13a, 15a-16a.

Such deference is particularly appropriate in this case because, as the court of appeals recognized, Congress in 1949 ratified the agency's 1940 interpretation that short breaks up to 20 minutes in duration qualify as part of "hours worked." When Congress enacted the 1949 Amendments to the FLSA, it enacted a partial definition of "[h]ours [w]orked" for "determining for the purposes of [the minimum-wage requirements of] section[] 206" the "hours for which an employee is employed." 29 U.S.C. 203(*o*); see 1949 Amendments § 3(d), 63 Stat. 911 (enacting Section 203(*o*)). That partial definition excluded from "[h]ours [w]orked" only certain "time spent in changing clothes or washing" at the beginning and end of each workday. 29 U.S.C. 203(*o*); see *Sandifer*, 134 S. Ct. at 876. But Section 16(c) of the amendment statute further directed that "[a]ny * * * interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor * * * in effect under the provisions of the [FLSA] of 1938 * * * shall remain in effect" unless inconsistent with the 1949

Amendments or "amended, modified, or rescinded" by the agency. 1949 Amendments § 16(c), 63 Stat. 920. Congress's own "understanding of the scope" of Section 206 is thus reflected by the fact that it "enacted Section 16(c) * * * after hearing from the Administrator his outstanding interpretation of the coverage" of that provision. *Steiner* v. *Mitchell*, 350 U.S. 247, 255 (1956) (footnote omitted); see *Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 292 (1959) (explaining that the "narrow issue" is whether Congress displaced a prior agency interpretation ratified by Section 16(c) by altering the preexisting scope of the FLSA "in the 1949 amendment").

Indeed, as the court of appeals noted, the FLSA's application to short breaks up to 20 minutes in duration is so well established that the requirement to pay minimum wages for such periods "has seldom * * * been questioned" in the nearly 80 years since 1940. Pet. App. 14a (citation omitted); see, *e.g.*, *Naylor* v. *Securiguard, Inc.*, 801 F.3d 501, 504-505 (5th Cir. 2015) (noting that neither side contended that the Department's short-break regulation was an "unreasonable interpretations of the FLSA"; explaining that short breaks are "deemed to predominantly benefit the employer by giving the company a reenergized employee"); *Mitchell* v. *Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956) (holding that the Department's "interpretative bulletin adhered to since 1940" is "the correct interpretation of the [FLSA] as it relates to the question of short break periods").

In 2010, Congress enacted legislation against the understanding that short breaks must normally be compensated as "hours worked" for which Section 206 requires compensation. Congress amended the FLSA to require that employers provide a "reasonable break

time" for employees to express breast milk and an appropriate location to do so. 29 U.S.C. 207(r)(1). But Congress separately provided that the employer "shall *not* be required to compensate an employee" under federal law for that "break time." 29 U.S.C. 207(r)(2) (emphasis added); see 29 U.S.C. 207(r)(4) (providing that Section 207(r) does not "preempt a State law that provides greater protections"). Unless employers were otherwise required to provide compensation under the FLSA for such "break time," Section 207(r)(4) would have no operative function. Petitioners' own understanding of "hours worked" in the FLSA, which would preclude compensation for a short break for the expression of breast milk, is thus difficult to reconcile with Congress's enactment of Section 207(r)(4).[4]

c. Petitioners argue (Pet. 15-17) that the FLSA requires compensation only for "work" that is found to primarily benefit the employer, which, in their view, requires that courts examine whether "a particular

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[4] As Section 207(r)(4) reflects, the principle that employer-authorized short breaks less than 20 minutes in duration qualify as compensable hours worked is not absolute in every context. That principle does not apply if an authorized short break is unilaterally extended by an employee without employer authorization. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter FLSA2001-16, 2001 WL 1869965 (May 19, 2001). An employer that is required under the Family and Medical Leave Act to provide 15-minute breaks every hour to a particular employee with a serious medical condition likewise need not provide compensation under the FLSA for such employee-specific medical breaks mandated by law, so long as the employee receives as many compensable rest breaks as her coworkers. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter FLSA2008-19, at 2-3 (Apr. 12, 2018), https://www.dol.gov/whd/opinion/FLSA/2018/2018_04_12_02_FLSA.pdf. No such atypical circumstances are presented here.

'break' is in fact 'work' time under the FLSA" by applying that test, Pet. 17. And in petitioners' view (Pet. 18), the court of appeals here erroneously "abjured the predominant-benefit test." That is incorrect. A central and longstanding basis for the conclusion that short breaks as a class qualify as "hours worked" under the FLSA is that such breaks benefit the employer by "promot[ing] the efficiency of the employee," 29 C.F.R. 785.18. The court of appeals recognized as much. Pet. App. 19a.

The short breaks at issue in this case are typical of short breaks generally. Petitioners' employees on average took 32 total minutes of short breaks each day, three very short breaks less than ten minutes in duration and, on average, less than one daily break between ten and 15 minutes long. See pp. 6-7, *supra*. Petitioners' employees used those short breaks to use the bathroom, pour a cup of coffee, smoke a cigarette, make a short phone call, or chat with a co-worker. See p. 7, *supra*. Common experience—in addition to the Department's longstanding expertise—teaches that such short breaks within the workday "promote the efficiency of the employee," 29 C.F.R. 785.18. Indeed, that benefit for an employer is reflected in petitioners' own prior policy, which specified two *mandatory* and *paid* 15-minute breaks for employees each day. Pet. App. 131a. Petitioners' 2009 policy change, which the courts below found was not made in good faith (*id.* at 25a), to deprive employees of customary pay for such breaks thus ran afoul of the FLSA.[5]

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[5] Petitioners argued below that what they characterized as their "flex time" policy provided substantial benefits to employees. As the court of appeals recognized, however, petitioners' examples "involve[d] activities that cannot generally be performed in twenty

Petitioners assert (Pet. 23) that the court of appeals erroneously deferred to the Department's interpretation merely because it was "reasonable as a *policy* matter, not a legal one." That too is incorrect. The court analyzed the statutory text and the statutory meaning of "work" and concluded that "some breaks constitute 'hours worked' under the FLSA," Pet. App. 8a & nn.23, 25, before concluding that the agency's interpretation was "reasonable given the *language*" of the Act, *id.* at 14a (emphasis added). Moreover, petitioners themselves fail even to address Congress's 1949 ratification of the agency's interpretation. Cf. *id.* at 13a (listing that ratification as the first factor favoring adoption of the agency's interpretation). Nor do petitioners explain how their position can be squared with Congress's 2010 enactment of Section 207(r)(2), which rests on Congress's understanding that short breaks—even those that simply benefit employees expressing breast milk—would otherwise be compensable.

2. a. Petitioners principally argue (Pet. 15, 18-22) that certiorari is warranted because, they contend, the courts of appeals have divided over how to resolve the

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minutes." Pet. App. 24a. Indeed, the short breaks used by petitioners' employees are typical of efficiency-enhancing short breaks in workplaces generally. See pp. 6-7, *supra*.

Petitioners assert (Pet. 13 n.26) that they have altered their policy to require that all employee breaks must be 25 minutes in length in order to avoid paying their employees for short breaks. That new policy has not been litigated in this case and is not before this Court. Nevertheless, a 25-minute break would logically provide certain efficiency benefits to an employer and would need to be analyzed under the relevant circumstances to determine its compensability, including, *inter alia*, to determine whether the new policy reflects "an attempt to evade or circumvent the provisions of the [FLSA]," *1940 Interpretation*.

status of short breaks under the FLSA. No division of authority exists that might warrant this Court's review.

Almost all of the decisions that petitioners cite (Pet. 19-22) addressed meal breaks that were 30 minutes or longer.[6] The courts issuing those decisions had no occasion to consider whether the Department's longstanding position regarding *short* breaks up to 20 minutes in duration reflects the correct interpretation of the FLSA. None of those decisions cited 29 C.F.R. 785.18; addressed Congress's 1949 ratification of the Department's 1940 interpretation of the FLSA with respect to such short breaks; or otherwise discussed considerations distinct to the short-break context. The decisions examining longer meal breaks, which have traditionally been afforded different treatment than short rest breaks, reflect no division of authority relevant here.

The D.C. Circuit's decision in *Leone* v. *Mobil Oil Corp.*, 523 F.2d 1153 (1975), is similarly inapposite.

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[6] See, *e.g.*, *Roy* v. *County of Lexington*, 141 F.3d 533, 544-545 (4th Cir. 1998) (holding that 30-minute morning meal break and one-hour midday and evening meal breaks for Emergency Medical Service personnel were not compensable when the employees were not required to perform duties); *Reich* v. *Southern New Eng. Telecomms. Corp.*, 121 F.3d 58, 62-65 (2d Cir. 1997) (holding, consistent with the Department's position, that 30-minute lunch breaks were compensable where employer required workers to remain at outdoor worksites to serve security function); *Henson* v. *Pulaski Cnty. Sheriff Dep't*, 6 F.3d 531, 536 (8th Cir. 1993) (holding that sheriff's department was not obligated to pay for patrol officers' 30-minute meal breaks that began "only when the officers reach[ed] their break destination," which could be "wherever they please[d], even outside of their patrol area"); *F.W. Stock & Sons* v. *Thompson*, 194 F.2d 493, 495-497 (6th Cir. 1952) (holding that employer owed compensation for 40-80 minute lunch periods because employees' "duties and responsibilities to their employer were continued during the lunch periods").

After the Occupational Safety and Health Administration (OSHA) received a complaint about working conditions at a Mobil refinery, the four unionized plaintiff-employees in that case accompanied OSHA inspectors on the ensuing inspections, *id.* at 1154, which "took place at periodic intervals over twenty-one days." *Leone* v. *Mobil Oil Corp.*, 377 F. Supp. 1302, 1303 (D.D.C. 1974), aff'd, 523 F.2d 1153 (D.C. Cir. 1975). The four employees had a statutory "right to participate in [the] inspection," 523 F.2d at 1159, but the court concluded that the statute granting that right did "not itself provide for compensation" for the exercise thereof, *id.* at 1161. The court further *agreed* with the Department that the "FLSA does not require payment for inspection time," explaining that the Department's position was "consistent with other FLSA regulations which allow an employer and union to determine wage issues by the bargaining process." *Id.* at 1161, 1163 & n.10. Like the meal-break decisions, nothing in *Leone* speaks to the Department's short-break regulation here.

The one decision that petitioners cite concerning short breaks actually *adopts* the Department's interpretation. In its 1956 decision in *Greinetz*, the Tenth Circuit concluded in an FLSA enforcement action brought by the Department that two 15-minute rest breaks that an employer provided to employees were compensable under the FLSA as work time. 235 F.2d at 623-624. The court explained that the Department's 1940 interpretation that "short rest periods up to and including twenty minutes should be compensated," which had been "adhered to since 1940," was entitled to "great weight" under *Skidmore*. *Id.* at 624-625 & n.6. The court further stated that it was "in agreement with [the Department] as to the correct interpretation of the

Act as it relates to the question of short break periods." *Id.* at 625. The court stated that it could take "judicial knowledge of the fact, as pointed out in the [Department's] interpretive bulletin," that "short rest periods are rapidly becoming an accepted part of employment generally" and, while beneficial to employees, are "equally beneficial to the employer in that they promote more efficiency and result in a greater output." *Ibid.* The court did additionally explain that the "undisputed facts" of the case showed that the short breaks were "to the benefit of the employer," and that appears to be an additional factor supporting the court's judgment. *Id.* at 624. But nothing in *Greinetz* conflicts with the decision in this case because *Greinetz* agreed with the Department's interpretation and had no occasion to decide whether a court should depart from that agency interpretation based on factors specific to the case before it.

b. Petitioners separately argue (Pet. 22-25) that courts of appeals have divided over "how much deference" under *Skidmore* should be given to the Department's regulatory interpretations of the FSLA. But petitioners' single question presented is limited to the compensability of short breaks, Pet. i, and the fact that petitioners have "discussed this [second] issue in the text of [their] petition for certiorari does not bring it before [this Court]." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). At best, petitioners' deference question might be addressed in the context of the short-break question that petitioners present but, as previously explained, that question implicates no division of authority and does not warrant this Court's review.

In any event, petitioners do not identify a division of authority over the proper application of *Skidmore* deference. Under *Skidmore*, the "measure of deference to

an agency administering its own statute has been understood to vary with circumstances." *Mead Corp.*, 533 U.S. at 228. Thus, after assessing the factors relevant to the *Skidmore* inquiry, this Court has adopted a "spectrum of judicial responses, from great respect at one end, to near indifference at the other." *Ibid.* (citation omitted). The ultimate question is whether the agency interpretation has the "power to persuade." *Ibid.* (quoting *Skidmore*, 323 U.S. at 140). Petitioners' citation of decisions reaching different conclusions about the appropriate deference owed to different agency interpretations in different interpretive contexts, see Pet. 24-25, thus fails to identify any division of authority warranting review.[7]

[7] Petitioners argue (Pet. 25) that the court of appeals' decision to afford *Skidmore* deference is "inconsistent" with the Department's interpretive regulations, which state that they do not "carry the force of law." Petitioners' assertion of inconsistency is mistaken. The class of interpretive rules to which *Skidmore* deference applies themselves lack the "force and effect of law." See *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204, 1208 (2015) (citation omitted); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 & n.31, 315 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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