



No. 07-1019

IN THE
Supreme Court of the United States

JAMES H. GORMAN, JR., *et al.*,
Petitioners,

v.

THE CONSOLIDATED EDISON CORP.
AND ENTERGY NUCLEAR OPERATIONS, INC.,
Respondents.

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

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent Entergy Nuclear Operations, Inc. is a subsidiary of Entergy Corporation. Entergy Corporation has no parent company. No publicly held company owns 10% or more of Entergy Corporation's stock.

Consolidated Edison Corporation is not respondent's correct name. Consolidated Edison Company of New York, Inc. is a subsidiary of Consolidated Edison, Inc. No publicly held company owns 10% or more of Consolidated Edison, Inc.'s stock.

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BRIEF IN OPPOSITION

Respondents Consolidated Edison Corporation ("Con Edison") and Entergy Nuclear Operations, Inc. ("Entergy") file this brief in opposition to the petition for certiorari in this case.

COUNTER-STATEMENT OF THE CASE

1. *Background.* Petitioners here are current and former employees of the Indian Point II nuclear power plant ("Indian Point" or "plant") in New York. The plant was owned and operated by Con Edison until September 2001, when it was sold to an affiliate of and ultimately operated by Entergy. App. 2a. In separate actions against Con Edison and Entergy brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, groups of employees asserted that they were entitled to be paid for time spent entering and leaving the plant and for time spent "donning and doffing" certain protective gear. *Id.* Both district courts and the Second Circuit rejected their claim and held that the relevant FLSA provisions, regulations, and precedent make clear that the activities at issue are not compensable under that Act.

Enacted in 1938, the FLSA regulates the hours worked and wages paid to employees engaged in producing goods for commerce. It mandates that employees receive "compensation for all work or employment . . . covered by the Act." *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944). In 1946, in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), this Court held that the FLSA required employers to pay employees for "all time during which an employee is necessarily required to be on the employer's premises, on duty or

at a prescribed workplace.” *Id.* at 690-91. Thus, the Court found that employees must be paid for the time spent walking on the employer’s premises before clocking in and for donning and doffing aprons and overalls. *Id.* at 691-93.

To override that ruling and “narrow[] the coverage of the FLSA,” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005), in 1947, Congress enacted the Portal-to-Portal Act, ch. 52, § 4, 61 Stat. 84, 86-87 (“Portal Act”). That Act “except[ed] two activities that had been treated as compensable under [the Supreme Court’s] cases: walking on the employer’s premises to and from the actual place of performance of the principal activity of the employee, and activities that are ‘preliminary or postliminary’ to that principal activity.” *IBP*, 546 U.S. at 27. As a result, the FLSA now states that employers are not required to compensate employees for:

- (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. [29 U.S.C. § 254(a).]

This Court has explained that “principal activities” under the FLSA are those which are an “integral and indispensable part of the principal [work] activities.” *IBP*, 546 U.S. at 29-30. See also 29 C.F.R. § 790.8(a) (defining “principal activities” as activities the

employee is “employed to perform”); *id.* § 790.8(b) (principal activities “include[] all activities which are an integral part of a principal activity”). And, as this Court has recognized, *IBP*, 546 U.S. at 40-41, the FLSA regulations that implement and flesh out employer obligations under the Act further provide that “checking in and out and waiting in line to do so, changing clothes, washing up or showering” are generally non-compensable preliminary or postliminary activities.” 29 C.F.R. § 790.7(g) & n.49. Instead, to be compensable, those activities must be “so directly related to the *specific work* the employee is employed to perform that [they] would be regarded as an integral part of the employee’s ‘principal activity.’” *Id.* (emphasis supplied).¹

This Court has made clear that “the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are ‘integral and indispensable’ to a ‘principal activity.’” *IBP*, 546 U.S. at 40-41.

2. In their complaints, the plaintiffs alleged that they spend between 10 and 30 minutes a day passing through security at the plant and donning safety boots, safety glasses and (for some) a helmet. The Entergy plaintiffs sought pay for:

- (i) Waiting in traffic outside the plant entrance;
- (ii) Badge inspection at the entrance, including a visual check of the interior of the car, and occasional random vehicle inspections (engine,

¹The exceptions in the Portal Act only provide default options. Those activities are not mandatorily compensable, but employees certainly can bargain for compensation for the time spent engaged in preliminary or postliminary activities. See *IBP*, 546 U.S. at 41.

trunk, glove compartment, undercarriage);

(iii) Parking and walking to the command post;

(iv) At the command post, waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector;

(v) Waiting in line to swipe an ID badge and to palm a sensor;

(vi) Going to the locker room to obtain and don metal capped safety boots, safety glasses, and a helmet (if applicable);

(vii) Walking to the job-site;

(viii) And at the end of the shift, doing many of these things in reverse. [App. 8a-9a (quoting Entergy Am. Compl. ¶ 15)].

These allegations are “substantially similar” to the allegations by the Con Edison plaintiffs in the proposed amended complaint in their separate action. App. 8a.

At oral argument, “plaintiffs’ counsel conceded that the protective gear listed in the complaint (helmets, safety glasses, and steel-toed shoes) were the only protective gear that plaintiffs were required to wear.” App. 13a n.6. It was also undisputed that once they were “[i]n the nuclear containment area . . . Indian Point employees wore specialized gear and dosimeters, and were compensated for donning and doffing.” *Id.* at 11a n.4, 45a n.5. Finally, it was undisputed that all persons who enter the Indian Point plant – employees and visitors – were subject to the waiting and screening requirements described above. *Id.* at 44a.

3. *Con Edison Action.* In the initial complaint in their action against Con Edison, the plaintiffs made

several claims, but their principal allegations centered around their claim that Con Edison's method of calculating the hourly overtime rate failed properly to account for the premium paid to those who work the nightshift. App. 2a. Months after the district court for the Southern District of New York (McMahon, J.) adopted the relevant parts of the report and recommendation of the magistrate and dismissed these allegations, the Con Edison plaintiffs sought leave to amend their complaint to assert the new FLSA claim that the time spent passing through security and donning and doffing safety shoes, goggles, and helmet should be compensated. *Id.*

For two, independent reasons, the court denied the motion for leave to amend, again adopting the magistrate's report and recommendation. App. 37a. First, the court held that the claim lacked merit and was thus futile. The court explained that "the check-in and check-out procedures . . . were followed by everyone who entered and exited the plant, including non-employees." *Id.* at 44a. And, the court noted that after "passing through an x-ray and detectors for radiation, metal, and explosives, as well as an electronic identification machine," the employees "went to their lockers to change clothing and/or put on hard hats and safety glasses, if necessary, or proceeded directly to their workstations." *Id.* (emphasis supplied).² Thus, the court concluded that these activities were not "performed as part of the regular work of the employee," *id.*; indeed, the court noted that plaintiffs stated that the activities' purpose was "to ensure the security of the Indian

² For example, one Con Edison plaintiff deposed about his new FLSA claim, when asked about going to the locker room, testified: "I didn't have to. I didn't normally change." See Appendix in Court of Appeals at A768.

Point Plant.” *Id.* at 45a (emphasis omitted). The court contrasted the plaintiffs’ situation with the employees in the nuclear containment area who were compensated for donning and doffing special protective gear, and with the employees in other cases in which donning and doffing were deemed integral parts of employees’ principal activities. *Id.* at 45a n.5.

In addition, the court concluded that even if the activities were compensable, they were *de minimis*. App. 46a-48a.³

Second, the court independently concluded that plaintiffs had failed to satisfy their burden to explain their delay in making this claim and to demonstrate that Con Edison would not suffer undue prejudice. App. 49a. The motion for leave to amend was filed two years after the suit was brought, and months after cross-motions for summary judgment had been filed and decided in favor of Con Edison. *Id.* And, plaintiffs’ excuse – that they learned the facts late in discovery – was “undermined by [counsel’s] admission that Plaintiffs were aware of the facts underlying this claim since the 1980s.” *Id.* at 50a. The court found this excuse – counsel’s ignorance of the facts – “does not constitute a satisfactory explanation for the delay in raising this claim.” *Id.* at 51a.

³ Petitioners say that the activities at issue “took an estimated 30 minutes each day until 2004 and 18 minutes thereafter.” Pet. 7. The trial court found that the “majority of the time spent in such activities was waiting time,” and that the time of the actual security procedures was *de minimis*. App. 48a. Moreover, because the ingress and egress time is clearly preliminary and postliminary, respectively, the only activity relevant is donning and doffing a helmet, goggles and shoes – clearly *de minimis*.

Finally, the court found that allowing the amendment would prejudice Con Edison: It would require a substantial number of additional depositions and discovery; and, because Con Edison no longer owns Indian Point, “evidence which might have been readily available to Defendant two years ago, when the action was commenced, had, with the passage of time and the inevitable fading of memories become less available from the new owner of the plant.” App. 52a.

Based on this analysis, the court concluded that plaintiffs, “who have had the benefit of more than two years of discovery and have already moved for summary judgment, should not now be permitted to amend their claim.” App. 52a. See *id.* at 55a (explaining that the motion for leave to amend should be denied “at this extremely late date, which is a year and a half after the court-ordered deadline for amending pleadings, and which follows the close of discovery and the decision on defendant’s summary judgment motions”).

4. *Entergy Action.* The Entergy plaintiffs’ FLSA claim was “substantially similar” to the claim set forth in the proposed amended complaint in the Con Edison case. App. 8a. The district judge for the Southern District of New York (Robinson, J.) granted Entergy’s motion to dismiss. *Id.* at 2a-3a.

After describing the activities for which plaintiffs sought compensation, the trial court concluded that none was “integral to the performance of [their] principal activity.” App. 29a. The court found that “time spent complying with the plant’s security procedures [is] connected to maintaining the security of the plant and . . . not directly connected [with the plaintiffs’ principal activity].” *Id.* The court supported this conclusion by observing that “all people

who enter the plant, visitors and employees alike, must go through the same process that Plaintiff does.” *Id.* at 29a-30a. The court then rejected the claim that time spent donning and doffing “steel-toed boots, safety glasses and a helmet” – akin to those which could be “purchase[d] at an ordinary hardware store,” *id.* at 31a – was integral to the employees’ principal activities.

Like the district court in the Con Edison case, this trial court held, in the alternative, that if the donning and doffing were integral to plaintiffs’ work, it “is de minimis, and, therefore, non-compensable.” App. 31a n.9 (citations omitted). The court also denied a subsequent motion for leave to amend to describe the preliminary and postliminary activities in more detail as futile. *Id.* at 3a, 34a.

5. *Court of Appeals.* The appeals in these matters were consolidated before the Second Circuit. App. 1a. After *de novo* review of the district courts’ rulings, *id.* at 7a-8a, the court of appeals affirmed both decisions. The court first observed that plaintiffs’ arguments “relie[d] chiefly on the idea that [the activities alleged] are ‘indispensable’ or required – without accounting for [this Court’s] requirement that they be ‘integral’ as well.” *Id.* at 9a (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)). The court then examined the dictionary definitions of these terms, as well as the case law delineating when an activity is “integral” to the performance of a principal activity. *Id.*

The court noted that in *Steiner*, the donning and the doffing of protective gear was “integral” to principal work activities because

when work is done in a lethal atmosphere, the measures that allow entry and immersion into

the destructive element may be integral to all work done there, just as a diver's donning of wetsuit, oxygen tank and mouthpiece may be integral to the work even though it is not the (underwater) task that the employer wishes done. [App. 10a-11a.]

By the same token, in this case, the court pointed out that "[i]n the nuclear containment area – which more closely resembles the battery plant – Indian Point employees wore specialized gear and dosimeters, and were compensated for donning and doffing." *Id.* at 11a n.4. But, the court concluded, the donning and doffing of routine gear – *viz.*, "metal capped safety boots, safety glasses, and a helmet (if applicable)," *id.* at 8a – is not "integral" to the principal activities for which the employees are employed; but is instead preliminary and noncompensable. *Id.* at 11a, 13a-14a.

The court observed that there was nothing "special about these shoes, or glasses, or safety caps." App. 14a. And, the court stated that the "pleadings would not contradict a conclusion that the time so spent would be *de minimis*." *Id.* The court, however, reserved that alternative ground for decision, instead holding that donning and doffing the hard hats, glasses and shoes were preliminary and postliminary activities not compensable under the Portal Act. *Id.*

The court reached the same conclusion with respect to the employees' time spent on ingress and egress, explaining that the time spent "waiting in line at the vehicle entrance through the final card-swipe and handprint analysis" are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time." App. 11a. The court pointed out that the "plain wording" of that Act exempts from FLSA coverage

“walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is engaged to perform.” *Id.* (quoting 29 U.S.C. § 254(a)(1)) (citing 29 C.F.R. § 790.7(c)). And, the court reasoned that the screening measures at issue are not “principal activities” of employment, because “the security measures at entry are required (to one degree or another) for everyone entering the plant – regardless of what an employee does (servicing fuel rods or making canteen sandwiches) – and including visitors.” *Id.* at 12a.

REASONS FOR DENYING THE PETITION

I. THE QUESTION WHETHER THE DONNING AND DOFFING OF MINIMAL GENERIC PROTECTIVE GEAR IS COMPENSABLE IS NOT WORTHY OF THIS COURT’S REVIEW.

There is no real conflict among the courts of appeals that warrants this Court’s review. Although some courts characterize the donning and doffing of minimal generic protective gear in different ways, there are no decisions by any court of appeals affirming or awarding compensation for such activities. There is no conflict in outcome here, just alternate pathways to the same result.

Moreover, the Second Circuit’s reasoning is firmly based on the Portal Act. In that statute Congress expressly overruled this Court’s decision in *Anderson*, which, *inter alia*, had found time spent donning work aprons and overalls compensatory. Section 4(a)(2) of the Portal Act excepts from FLSA coverage preliminary and postliminary activities, such as the donning of aprons and overalls in *Anderson*. Finally, the decision below conflicts with neither this Court’s

precedent nor with any Department of Labor regulations. In this setting, respondents submit that neither the issue nor these cases are worthy of this Court's review.

A. No Court Of Appeals Has Awarded Compensation For The Time Spent Donning And Doffing Minimal Protective Gear Such As That At Issue.

No court of appeals has affirmed an award of compensation for the time spent donning and doffing minimal protective gear akin to that at issue here. Petitioners nonetheless seek to leverage the different theories that the courts employ to reach the same result into a circuit conflict with "practical significance," "leav[ing] workers and employers in the Second Circuit subject to a strikingly different FLSA regime than those elsewhere." Pet. 10-11. In fact, the differences among courts on the issue presented are more apparent than real and lack practical significance in the circumstances here – the donning and doffing of minimal, generic protective gear. There is no warrant for certiorari in this context; it would not change the outcome of this case or of any other case involving similar facts.

The courts below held that the donning and doffing of the kind of gear at issue here is not integral and indispensable to the employees' principal activities. That was also the analysis and conclusion of the Fifth Circuit. See also *Anderson v. Pilgrim's Pride Corp.*, 44 F. App'x 652 (5th Cir. 2002) (per curiam) (not precedential). Where, as here, the donning and doffing consists of putting on a helmet, glasses and shoes, that activity is preliminary in the sense intended by the Portal Act, which was enacted to overrule not only this Court's ruling that preliminary walking time on the employer's premises was

compensable, but also the companion holding that the time spent donning aprons and overalls was compensable. See *Anderson*, 328 U.S. at 691-93. This was the precise example of a preliminary and postliminary activity that the Congress had before it when it created section 4(a)(2) of the Portal Act.

Moreover, the trial court's opinion in one of these consolidated cases indicates that the employees could have donned helmet, goggles and shoes before coming to work, if they wished to do so, making even clearer that these employees were simply dressing for work. See App. 44a; see also *supra* at 5 & n.2. Indeed, in the complaints at issue, the employees did not even allege what their specific job duties were, let alone explain how the donning and doffing of a helmet, goggles and boots were integral to those precise duties. App. 9a n.3 (“[t]he pleadings (and the proposed amended pleadings) omit plaintiffs’ particular responsibilities”).

Arriving at the same outcome as the court below, the Tenth Circuit concluded that activities such as putting on shoes, glasses and a helmet are not “work” within the meaning of the Act. See *Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994); *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1289 (10th Cir. 2006) (citing *Reich* with approval). *Reich* observed that “[t]he placement of a pair of safety glasses, a pair of earplugs and a hard-hat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration.” 38 F.3d at 1126. The Tenth Circuit acknowledged the overlap of its reasoning with the *de minimis* doctrine, recognizing 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 business person 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.]

Those courts of appeals that have found, in different factual settings, that such activities are integral to principal activities and/or are work, have either found that the activities are *de minimis* or remanded for such an inquiry. Cf. *Reich*, 38 F.3d at 1126 n.1 (quoted *supra*). Indeed, in *Alvarez v. IBP*, 339 F.3d 894 (9th Cir. 2003), the Ninth Circuit held that donning and doffing “non-unique” protective gear “such as hardhats and safety goggles” is “*de minimis* as a matter of law.” *Id.* at 904, quoted in *IBP*, 546 U.S. at 32; *Tum v. Barber Foods*, 360 F.3d 274, 278 (1st Cir. 2004) (jury concluded that donning and doffing time was *de minimis* and therefore not compensable). This Court’s decision in *Anderson* explained that “[w]hen 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].” 328 U.S. at 692.

This reasoning applies fully here both because the amounts of time involved are miniscule (the donning and doffing can be accomplished in less than a minute) and because the relevant period would be extremely difficult to track and measure (a function of whether the helmet and goggles are placed seriatim or simultaneously with two hands and of how fast one ties one’s boots). See 29 C.F.R. § 785.47 (authorizing disregard of *de minimis* time under

Anderson, where “there are uncertain and indefinite periods of time involved of a few seconds or minutes duration”).⁴

Petitioners also rely on two appellate decisions remanding cases for further proceedings to determine if donning and doffing time is *de minimis*. This reliance is misplaced. The Third Circuit’s recent decision in *DeAsencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3417 (Feb. 4, 2008) (No. 07-1014), accepted the employer’s concession (intended to expedite proceedings) that the employees’ donning and doffing of a smock, hairnet, beard net, ear plugs, safety glasses, and, for some, dust mask, plastic apron, soft plastic sleeves, cotton glove liners, rubber gloves, a metal mesh glove, and rubber boots, and washing of their work gear were integral to the employees’ principal activities. *Id.* at 373 (“Tyson explicitly withdrew any defense that, if work, donning or doffing was not integral or indispensable”). The court noted that the employer required that the gear had to be kept at the plant and donned and doffed there. *Id.* at 363 n.3. The court remanded the matter to the district court to address whether the activities at issue were *de minimis*. *Id.* at 373-74. See also *Balleris v. Wacker Siltronic Corp.*, 370 F.3d 901, 912

⁴ Petitioners have argued for a full 12-18 minutes per day, but those numbers are not relevant to the claim before this Court. That time includes periods waiting and going through security procedures. But petitioners’ argument is that donning and doffing non-unique, minimal protective gear presents a conflict, not donning and doffing combined with other activities. Moreover, because it is clear that the time waiting for ingress and egress is not a principal activity, it cannot be combined with donning and doffing to save it from being deemed *de minimis*. Both trial courts concluded that the time at issue was *de minimis*, *see supra* at 6, 8.

(9th Cir. 2004) (remanding for *de minimis* inquiry concerning donning and doffing of uniforms and “bunny suits” on the employer’s premises).

Of course, neither respondent here conceded that the activities at issue were integral and indispensable; they prevailed in arguing the opposite. Moreover, there is no conflict between these decisions and the decision below. In both *Balleris* and *DeAsencio*, the courts remanded for a *de minimis* inquiry under a rubric that would clearly result in a finding that the donning and doffing here is *de minimis*. And, in both these cases, the protective gear was much more extensive than what petitioners are required to wear. Finally, in both cases, the employer required that the unique protective gear be left at the facility and donned and doffed there; that was not so here. See App. 44a; *supra* at 6, 8.⁵

Under all of the approaches described above, the result would be the same as the result here and in

⁵ Petitioners cite district court decisions to buttress the conflict, but they all support respondents’ conclusion that donning and doffing minimal generic protective gear is not compensable. For example, petitioners cite *Davis v. Charoen Pokphand (U.S.A.), Inc.*, 302 F. Supp. 2d 1314 (M.D. Ala. 2004), holding that donning and doffing is work. Pet. 15, 21. But, that court reserved for trial the question whether the donning and doffing at issue is integral to a principal activity and whether it is *de minimis*. 302 F. Supp. 2d at 1323.

Petitioners also cite *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860 (W.D. Wis. 2007), Pet. 14, 21, 30, but its facts are inapposite. The protective gear “includes a hard hat or bump cap, steel-toed shoes or sanitation boots, ear plugs, hairnet and bead net, safety glasses, a freezer coat (if necessary), gloves, plastic gloves, paper frock or plastic apron, sleeves, slickers (for employees that work in wet areas) or a cotton frock.” 527 F. Supp. 2d at 862. “All of these items are owned by defendant and stored at the plant.” *Id.*

any other case presenting these facts. We have been unable to find *any* appellate decision holding that donning and doffing minimal protective gear of the sort at issue here is compensable, or entering a judgment to that effect. In these circumstances, neither the issue nor this case is worthy of this Court's review.

B. The Outcome Here Is Consistent With The Department Of Labor's FLSA Interpretations.

Petitioners point out that the Department of Labor has taken the view that the time an employee is required to spend donning and doffing gear on an employer's premises may be "work" and that the "changing of clothes, *may* in certain situations be . . . an integral part of the employee's 'principal activity.'" Pet. 17 (internal quotation marks omitted; omission in original) (quoting 29 C.F.R. § 790.7(g)). And, the Department has expressed its disagreement with what it misinterprets as the Second Circuit's holding in this case – that the preliminary and postliminary donning and doffing of generic protective gear is *never* an integral part of the employee's principal activity and thus could never be compensable. *Id.* But the result here is, in fact, consistent with the Secretary of Labor's FLSA interpretations. Indeed, petitioners' citations to the Secretary's briefs in other cases simply highlight that the Secretary did not participate in this case.

First, as cited *supra*, the Department of Labor has issued a regulation explaining when the *de minimis* doctrine bars claims. See 29 C.F.R. § 785.47. Under this regulation, the donning and doffing time here is *de minimis*.

Second, in arguing that the Secretary would reject the decision below, petitioners are relying on a regulation concerning the changing of clothes. See *id.* § 790.8(c). This regulation says that although changing clothes generally is not compensable, *id.* § 790.7(g) & n.49, it may be an integral part of a principal activity “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.” *Id.* § 790.8(c) n.65. As this regulation makes clear, however, if clothes-changing may be done “on the employer’s premises” for the employee’s convenience, it is “*not* directly related to his principal activities.” *Id.* And, petitioners appear to recognize this fact. They note that “[w]hile the Labor Department’s interpretation applies only to donning and doffing on the employer’s premises, some decisions have taken a less categorical approach.” Pet. 17 n.9. Where, as here, employees are free to put on their gear off-premises, this regulation has no application.

In sum, as the petition concedes (p. 18), “the Second Circuit did not purport to reject § 790.8(c).” The court instead used it to explain why the donning and doffing of minimal, generic protective gear is a preliminary activity here. In fact, this regulation does not suggest any different result here because the donning and doffing time at issue is *de minimis* under a different regulation, and because, on its own terms, the regulation indicates that when the activity could be performed away from the workplace, it is not compensable.

C. The Court Of Appeals’ Donning And Doffing Decision Is Wholly Consistent With This Court’s Precedents.

Petitioners also contend that this Court should grant review on the ground that the decision below

conflicts with *Steiner v. Mitchell*, 350 U.S. 247 (1956). This is plainly wrong. *Steiner* involved the donning and doffing of work clothes in order to work amidst the corrosive and toxic substances that “permeate[d]” a battery plant “and everything and everyone in it.” *Id.* at 249-50. This Court found that, in the particular circumstances presented there, donning and doffing clothes on the employer’s premises was “an integral and indispensable part of the principal activity of the employment,” with critically important implications for the employees’ health and the health of those exposed to them. *Id.* at 256. The Second Circuit’s analysis was wholly consistent with *Steiner*, expressly observing that “[i]n the nuclear containment area – which more closely resembles the battery plant – Indian Point employees wore specialized gear and dosimeters, and were compensated for donning and doffing.” App. 11a n.4.

That donning and doffing in the *Steiner* setting was deemed “integral and indispensable” to the employees’ principal activities clearly does not mean that all donning and doffing at the employer’s plant meets this threshold, as the outcome in the courts of appeals’ decisions cited in I.A. demonstrates. Nothing in *Steiner* eliminates the *de minimis* rule. Moreover, *Steiner* expressly reconfirmed that the Portal Act was intended to overrule *Anderson*’s holding that certain preliminary and postliminary activities were compensable. As noted, subsection 4(a)(1) addresses walking time on the employer’s premises, while subsection 4(a)(2) addresses other preliminary and postliminary activities. The logical implication is that subsection 4(a)(2) was intended to address – and overrule – the *Anderson* Court’s decision that the donning and doffing of aprons and overalls is compensable. And, nothing in *Steiner*

casts any doubt on the meaning to be drawn from the history giving rise to the enactment of the Portal Act.

The court of appeals' decision in this case merely recognizes the distinction between the situation here (minimal generic donning and doffing, such as that in *Anderson*, made noncompensable by the Portal Act) and that in *Steiner* (where a full-scale clothing change was essential to employment and to health). There is no conflict between this Court's conclusion that in the specific circumstances in *Steiner*, the donning and doffing were integral and indispensable, and the Second Circuit's conclusion that in the wholly distinct circumstances here, donning and doffing are not integral.⁶

Petitioners also misleadingly quote snippets of the court of appeals' decision in which the court describes the facts in *Steiner* and distinguishes them from this case, and then they suggest that the Second Circuit has developed elaborate new tests for determining whether a given activity is integral to an employee's principal activities that conflict with the law of other circuits. For example, petitioners argue that the Second Circuit's position is that donning and doffing can be integral or indispensable only if the equipment

⁶ Petitioners also insinuate that the Second Circuit's donning and doffing decision is inconsistent with *IBP*, because that decision "precludes the consideration of cumbersomeness or difficulty on the question of whether activities are 'work.'" Pet. 21 (quoting *DeAsencio*, 500 F.3d at 372-73). But, the Second Circuit did not decide whether donning and doffing a helmet, goggles, and boots could ever be work; it held that these activities, in the circumstances of this case, are not integral and indispensable to an employee's principal activities. And, petitioners agree that this Court's decision in *IBP* did *not* resolve when donning and doffing are principal activities, rather than preliminary or postliminary activities that are not compensable under the Portal Act. See Pet. 11.

is “needed to survive ‘lethal’ work environments.” Pet. 22. That is not a fair reading of what the Second Circuit says.

The court simply describes the “lethal atmosphere” in *Steiner*, and observes quite correctly that *Steiner* would “support[] the view that when work is done in a lethal atmosphere, the measures that allow entry and immersion into the destructive element may be integral to all work done there.” App. 10a. But the court also cites with approval a number of other cases finding preliminary activities in other settings “integral” to an employee’s work and thus “principal activities” for which compensation is due. See *id.* at 9a-10a (citing *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (sharpening knife is integral to carving meat); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 717-18 (2d Cir. 2001) (powering up and testing an x-ray machine is integral to taking x-rays); *Reich v. N.Y. Transit Auth.*, 45 F.3d 646 (2d Cir. 1995) (feeding, training and walking dog is integral to K-9 officer’s work)). None of these cases involves an arbitrary “lethality” limitation, and the Second Circuit plainly has not adopted one.⁷

⁷ Petitioners also argue that the Second Circuit’s (non-existent) lethality limitation conflicts with decisions of other courts that have held that donning and doffing gear required by the employer for reasons other than safety is integral to the employee’s work. Pet. 22-23. The Second Circuit did not adopt any such limitation. Moreover, the court of appeals cases petitioners cite (*id.*) did not actually award compensation for the donning and doffing at issue. *Balleris*, as noted *supra*, remands the matter for consideration of whether the activity is *de minimis*. 370 F.3d at 912. *Tum* involves a jury verdict holding that the activities in issue were *de minimis*, 360 F.3d at 278, while in *Alvarez*, the court reached this conclusion. See 339 F.3d at 904.

Even petitioners recognize that “the degree of danger facing an employee may be relevant” to whether donning and doffing certain gear is integral and indispensable to the employees’ principal activities. Pet. 23. That is all that the Second Circuit said about *Steiner* here. Thus, petitioners’ characterization of the Second Circuit’s opinion – as treating donning and doffing clothing as integral and indispensable to an employee’s principal activities only if those activities would otherwise be lethal – is incorrect and misleading. In fact, the Second Circuit merely recognized that *Steiner* is solidly in line with a host of other decisions which have considered numerous relevant facts (of which entry into a lethal environment may be one) in determining when “preliminary activities” end and “work” actually begins.

II. THE QUESTION WHETHER PETITIONERS’ DONNING AND DOFFING AND THEIR ACTIVITIES ENTERING AND EXITING THE PLANT ARE INTEGRAL TO THEIR PRINCIPAL ACTIVITIES IS NOT WORTHY OF THIS COURT’S REVIEW.

A. The Second Circuit’s Decision Does Not Conflict With Decisions Of Other Courts Of Appeals.

Petitioners next incorrectly contend that the Second Circuit adopted a definition of activities that are “integral and indispensable” to an employee’s principal activities that “opens a wide gulf” between it and other courts of appeals. Pet. 25 (capitalization omitted). They assert that under the relevant court decisions and FLSA regulations, all activities “required by the employer, for the employer’s benefit and indispensable to the performance of the employee’s duties” must be principal activities. *Id.*

This contention clearly is wrong. First, it does not include all elements of the test used by the courts of appeals in cases like this one. An employer may require employees to come to work dressed professionally; that is for the employer's benefit and indispensable to the performance of many employees' duties. But under relevant authority, that set of circumstances does *not* mean that the time the employee spends dressing is integral to the employees' principal activities. See *supra* at 17.

Petitioners' argument also overlooks the Department of Labor's additional requirements that, in order for donning and doffing time to be compensable, the employer must mandate that the employee dress on the employer's premises, and that the dressing activity must be "closely related" to the principal activities of the employee. See 29 C.F.R. § 790.8(c) (discussing the on-premises and closely-related requirements); see also Pet. 17 n.9 (discussing the on-premises requirement).

Petitioners further ignore that the time that an employee spends sitting in traffic each morning to enter a plant because the employer provides only a single entrance and the time required to walk from a parking facility to the place of the employee's work is not compensable. That waiting and travel time is required by the employer and for its benefit, as well as indispensable to the employee's performance of duties. But, it is not compensable time under the Portal Act. It is preliminary; it is not "closely related" the employee's principal activities. See 29 U.S.C. § 254(a)(1); 29 C.F.R. § 790.7(f), (g).

The court of appeals' decisions petitioners cite in an attempt to show that there is a conflict between the decision below and others reveal no such discord. In *Dunlop v. City Electric, Inc.*, 527 F.2d 394 (5th Cir.

1976), the court held that activities by the company's electricians – filling out forms and fueling trucks – were integral and indispensable to the employer's business of providing electrical services. These kinds of activities are clearly work; they are directly and organically related to the principal activities of electricians. Getting dressed in steel-toed boots and a helmet and following procedures to enter a workplace before “work” begins, by contrast, clearly are not themselves work.

This point is underlined by the facts that an employee can put on the generic gear involved in this case outside the workplace, and that visitors to the plants go through the same ingress and egress processes as employees, making clear that the activities are not “closely related” to employment. Petitioners did not even attempt to demonstrate a close relationship between their principal activities and the preliminary activities at issue by describing their jobs in the allegations of their complaints. See App. 9a n.3. (In *Dunlop*, moreover, the court of appeals remanded for a determination whether the activities were *de minimis*, see 527 F.2d at 401.)

Barrentine v. Arkansas-Best Freight System, Inc., 750 F.2d 47, 50 (8th Cir. 1984), is distinguishable in the same way. Pre-trip safety inspections required by the employer on its premises are “closely related” to the principal activity of driving. Indeed, the court specifically distinguished the pre-trip safety inspection (checking and servicing the vehicle) at issue in that case from the check-in and check-out procedures that are not compensable under the Portal Act, finding that the pre-trip safety inspection was “of a different nature” than such procedures. *Id.* at 50-51. And, *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340, 1344 (11th Cir.), *cert.*

denied, 128 S. Ct. 813 (2007), held that the activity at issue was *not* compensable because it was not undertaken for the employer's benefit, but simply to comply with a government regulatory mandate. Finally, *Bobo v. United States*, 136 F.3d 1465, 1467 (Fed. Cir. 1998), held that the restrictions that a dog placed on an INS dog-handling agent's commuting time may have given rise to some time during the trip that was integral to the handler's principal activities – *e.g.*, stopping to walk the dog. But the court went on to hold that the time was *de minimis*, and thus did not convert the commuting time to a principal activity. None of these cases suggests that the Second Circuit has adopted an idiosyncratic test for determining when a preliminary or postliminary activity is integral or “closely related” to an employee's principal activities.

As the examples set forth *supra* demonstrate, courts must draw lines between preliminary activities that benefit the employer and are necessary in order for work to begin and principal activities that share these elements but are different in that they have an additional relationship to the employees' principal duties. The FLSA regulations make clear that this is a functional test, focusing on how “closely related” the activities are to the primary duties of the employee's job. See 29 C.F.R. § 790.8(c). The courts in cases described above applied this functional test, as did the Second Circuit here. There is no inconsistency in these approaches.

In fact, the Second Circuit's approach is akin to that utilized by this Court in *IBP*. In deciding the companion appeal of *Tum*, this Court rejected the *Tum* employees' claim that they were entitled to pay for time spent waiting to receive protective gear. Citing with approval the employer's statement that

not every “necessary” activity is “integral and indispensable,” 546 U.S. at 40-41, the Court stated that this waiting time was “two steps removed from the productive activity on the assembly line.” *Id.* at 42. This is analogous to the FLSA regulation’s “closely related” test and the Second Circuit’s framework in this case.

Finally, petitioners incorrectly assert that the Second Circuit followed a “fundamentally different course” than other courts of appeals because it allegedly misread *Steiner*. Pet. 29. Specifically, they erroneously assert that the Second Circuit erred by deciding that “integral” means something distinct from “indispensable.” *Id.* What petitioners fail to see, however, is that all other courts of appeals, see *supra*, and the Department of Labor regulations make clear that preliminary and postliminary activities (whether indispensable or not) are not compensable unless they are also “closely related” to the employee’s principal activities. This is simply another way of saying that the activities must be integral, as well as indispensable, which is precisely what the Second Circuit held here. App. 9a.⁸

⁸ Petitioners seem to say that the donning and doffing in *Steiner* would have failed the “integral” or “closely related” test. Pet. 30. The wearing of clothing is virtually always indispensable to the performance of employment duties, but the donning and doffing of clothes is generally considered preliminary and noncompensable. This Court found an exception to that general rule in light of the close link (*i.e.*, the integration) between the tasks to be performed and the necessity of donning and doffing the clothing worn in *Steiner*. See 350 U.S. at 250-51. It was the perceived integration – or, put differently, the close relationship – between the donning and doffing and the employee’s particular activities that caused this Court to conclude that the former activities were compensable. In other jobs, the degree of integration or closeness of the

B. The Second Circuit's Decision Does Not Conflict With Department Of Labor Opinion Letters.

Petitioners argue that the Second Circuit's determination that that the donning and doffing and ingressing and egressing at issue here are not integral to the employees' principal activities is inconsistent with certain Department of Labor opinion letters. Pet. 28. They claim that the decision is inconsistent with the letters addressing "mandatory pre- and post-shift drug-testing and other examinations." *Id.*

To state the nature of the activities addressed by the letters is to refute any claim of conflict. Initially, the testing and examinations addressed in these letters are relatively invasive procedures that are required only of employees. Moreover, their relationship to the employees' work is obvious. Waiting in line at a check point, and walking through a scanning machine are not comparable in either respect. *Id.* (describing Wage & Hour Op. Ltrs.). Indeed, as the Second Circuit noted, App. 12a, the minimally invasive set of check-in and check-out procedures that employees undergo here are the same procedures that all visitors to the plant must follow. Surely, this confirms that these processes are not "closely related" to the employee's principal activities.

relationship between clothing and principal activities simply is not as great. There is no inconsistency between *Steiner* and this case.

III. THIS PETITION IS A POOR VEHICLE FOR RESOLUTION OF THE PURPORTED CONFLICT.

Even if there were some reason for the Court to consider the question of whether donning and doffing a helmet, safety glasses and steel-toed boots and passing through security into and exiting from Indian Point are activities integral to their employment or preliminary and postliminary activities excepted from the FLSA by the Portal Act, this petition would be a poor vehicle to decide it. In each of these consolidated cases before the Court, there is at least one alternative ground for affirming the Second Circuit's judgment. This Court generally does not grant petitions to review legal rules unless its determination will affect the outcome in a case. See *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183 (1959).

The appeal in this case actually involved two district court cases which the Second Circuit heard in tandem. Both trial courts ruled in the alternative that even if compensable, the time spent on the activities in question was *de minimis*. See App. 46a-48a; *id.* at 31a n.9. In addition, in the Con Edison case, the district court independently held that plaintiffs had failed to excuse their inordinate delay in seeking to amend the complaint to state the claim at issue and that Con Edison was thereby prejudiced. Thus, the court denied plaintiffs' motion to amend their complaint to make the claim that they now ask this Court to review. *Id.* at 49a-53a. This is an independent alternative ground for upholding the judgment as to Con Edison that clearly is not presented by the petition for certiorari.

Further, the case is a poor vehicle because of its unique factual setting – *viz.*, that all visitors to the

plant, not just employees, are subjected to the same plant security procedures, making clear that the activities are not employment-driven. Indeed, strong evidence that the activities at issue are not integral to petitioners' principal activities is the fact that petitioners did not even describe their jobs in their complaints. See App. 9a n.3.

In sum, the Second Circuit's decision is not a worthy subject of this Court's review.

CONCLUSION

The petition for certiorari should be denied.

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