No.___

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

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the holding of *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), that time workers spend changing into and out of protective gear is part of the "workweek" for which the Fair Labor Standards Act requires compensation, is limited to donning and doffing "unique" gear and/or to job settings that present lethal dangers?

2. Whether the Portal-to-Portal Act's exclusion of "preliminary" activities, as construed in *Steiner*, allows an employer to deny pay for pre- or post-shift activities that are employer-required, undertaken for the employer's benefit, and indispensable to the performance of a worker's other job duties – on the ground they are not "integral" to those duties?

PARTIES

Plaintiff-Appellants filing this petition are: Richard C. Accomando, Don P. Agrest, Cheryl Allen, Darryl Allen, Vincent J. Ammerata, Ezio Babudri, John Baer, Irving G. Barlin, Richard Bedka, Donald T. Beusse, Edward P. Bordas, Michael Borkowski, William E. Boulton, Jr., Kevin E. Bowers, Anthony Buda, Judy Burkhart, Steven G. Byrne, Frank A. Cacciopoli, Robert W. Caputo, Edgardo Carballo, James M. Cillo, Thomas Clegg, James J. Collier, Jr., Howard J. Colville, Richard Colville, Richard Crowe, Nivaldo Cuevas, Kevin Cullen, Craig M. Cuvelier, John C. Daniele, Michael G. Deszaran, Martin M. Dwyer, George M. Eisenhut, Jr., Ramon Escaba, John Evangelista, James W. Fandel, Frank J. Fitchera, David L. Gabriel, Frederick J. Galbraith, Jose Gaspar, Howard Geisler, Mark Gentile, Rick Girardi, Donald Glas, James H. Gorman, Jr., Warren A. Graves, Gregg S. Gross, Michael Grosso, James J. Guiliano, Philip A. Hakala, Edward P. Halpin, Paul A. Hamilton, David F. Hickey, Timothy Higgins, Frank Hoffman, Thomas E. Horton, Anthony Jennings, Richard P. Jones, John Joy, James J. Keirnan, John J. Kenny, Robert Kilgore, Michael Koutsakos, Peter F. Labuda, George S. Leibler, Lynn Lettmoden, Winfield O. Lewis, Thomas A. Linke, Gary E. Lisewski, Richard F. Lombardo, Frederick W. Lohrfink, William J. Lucas, IV, Albert W. Manko, Rodney C. Mann, Frank Matra, Scott A. Matteson, Gennaro Mauro, Gerard McCue, John McLaughlin, Frederick W. Mertz, Patrick Miggins, Patrick D. Milewski, Thomas Mitchell, Jr., Robert W. Morlang, Jr., Phillip C. Mullen, Donald Nespoli, Gary M. Norton, Daniel A. Noto, George O'Dell, Richard N. O'Donnell, Mohammad Olfati, David Orce, Lambert D. Oscarson, David Owen, Austin J. Pagano, Joseph T. Palinkas, Ronald R. Parsons, Mark R. Pasquale,

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Defendant-Appellees below were: The Consolidated Edison Corporation and Entergy Nuclear Operations, Inc.

Eva L. Martinez and Robert Veteramo were *Plaintiffs* in the District Court, but not in the Second Circuit.

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JURISDICTION

The Court of Appeals entered its judgment denying rehearing and rehearing en banc on September 17, 2007. Justice Ginsburg extended the time to file to January 30, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 4(a) of the Portal-to-Portal Act, provides, in relevant part:

> * * * no employer shall be subject to any liability or punishment under the Fair Labor Standards Act * * * on account of the failure of such employer * * * to pay an employee overtime compensation, for or on account of any of the following activities * * *:
>
> (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).

29 C.F.R. § 790.8 "Principal" activities.

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, [65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.

* * * *

[65]Such a situation may exist 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 * * * *

[citation footnotes omitted]

STATEMENT

Petitioners, who were employed at respondents' nuclear power plant, brought suit claiming that time they were required to spend changing into and out of protective gear and undergoing safety and security inspections before and after scheduled shifts were part

of the statutory workweek for which compensation was required under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Portal-to-Portal Act (Portal Act), *id.* §§ 251 *et seq.*

Invoking this Court's pathmarking decision in *Steiner* v. *Mitchell,* 350 U.S. 247 (1956), the Second Circuit held that these activities, though employer-required and indispensable to performance of petitioners' job duties, were non-compensable "preliminary [and] postliminary" activities, see 29 U.S.C. § 254(a)(2), because the protective gear was "generic" and relatively easy to don; because the risks protected against were not "lethal" like the ones in *Steiner*; and because the activities were insufficiently "integral" to petitioners' other duties to count as "principal activities."

1. The Portal Act was enacted in 1947, in part as a response to the large, unforeseen employer liabilities that had resulted from decisions of this Court giving the terms "work" and "workweek" – critical, but undefined terms under the FLSA – a broad construction. See *Tenn. Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590, 598 (1944) (describing "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer"); *Armour & Co.* v. *Wantock,* 323 U.S. 126, 133 (1944) (clarifying that "exertion" is not in fact necessary for an activity to constitute "work"); *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946) ("workweek" includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace"); 29 U.S.C. § 251(a),(b)

(Portal Act congressional findings).

2. The 1947 measure, as this Court recently explained, took a two-pronged approach. See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 26-27 (2005). While Section 2 of the Act, 29 U.S.C. § 252, extinguished many existing FLSA backpay claims, Section 4, addressed to "future" rights and obligations, worked a much more discrete change. Rather than supplant "this Court's earlier descriptions of the terms 'work' and 'workweek,'" *Alvarez*, 546 U.S. at 28, that provision established specific exceptions, for time spent before and after the workday "traveling to and from the actual place of performance" of an employee's "principal activities," § 254(a)(1), and for other activities "preliminary or postliminary to * * * principal activities," *id.* § 254(a)(2).

3. This Court construed the Section 4(a)(2) exception in *Steiner* and *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), companion cases in which employers charged by the Secretary of Labor with violating the FLSA, claimed that time employees spent sharpening knives before taking their place on a meatpacking plant production line (*King Packing*) and time battery factory workers spent changing into and out of protective clothing and bathing after their shifts (*Steiner*) were "preliminary and postliminary" activities, which did not count toward their employees' statutory "hours worked."

The Court rejected both employers' contentions, holding generally that activities "performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable

part of the principal activities for which covered workmen are employed," 350 U.S. at 256, and that the showering and clothes changing (and knife sharpening) so qualified.

This conclusion, *Steiner* explained, was supported by the Portal Act's legislative history – a key sponsor of the law had explained that when an "'employee could not perform his activity without putting on certain clothes, then the time used in changing * * * would be compensable'" (though no compensation would be due "'if changing clothes were merely a convenience to the employee'"), 350 U.S. at 254 n.5 & 258 (quoting 93 Cong. Rec. 2297-2298) (Sen. Cooper); by the Labor Department's 1947 interpretation of the law, see *id.* (citing 29 C.F.R. § 790.8); and by an intervening act of Congress that had endorsed the administrative construction, 350 U.S. at 255 & nn. 8-9.

4. The Court returned to Section 4(a) in *Alvarez*, deciding two consolidated cases involving the FLSA rights of workers in meat and poultry processing plants. After reaffirming *Steiner*'s holding that "integral and indispensable" pre- and post-shift activities are compensable, notwithstanding § 4(a)(2), see 546 U.S. at 30 (and noting that neither employer challenged the lower courts' findings that donning and doffing protective gear passed the *Steiner* test, *id.* at 32), *Alvarez* rejected the employers' main contention, that time employees spent *walking* between the production line and the donning and doffing location was non-compensable "travel" under Section 4(a)(1).[1]

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[1]The Court noted that the court of appeals decision in *Alvarez* had distinguished between claims for donning more cumbersome, as against "non-unique," protective gear "such as hardhats and safety

That exclusion was inoperative, the Court held, because, by its terms, Section 4(a) applies only to activities before and after the workday – and because activities that satisfy the *Steiner* test are "themselves 'principal activities,'" *id.* at 33, which commence the statutory workday, *id.* at 34.

The Court rejected, however, the *Tum* employees' claim that *Steiner* also entitled them to pay for time spent *waiting* to don protective gear. Noting approvingly the employer's observation that not every "necessary" activity is an "integral and indispensable" one, the Court explained that this waiting time was "two steps removed from the productive activity on the assembly line," *id.* at 42, contrasting it to "donning of certain types of protective gear, which is *always* essential if the worker is to do his job," *id.* at 40 (emphasis original) – adding that the statutory "analysis would be different" if the employer had "required its employees to arrive at a particular time in order to begin waiting." *id.* n.8.

5. The collective actions here were brought by individuals who had been employed in various positions at the Indian Point II nuclear power plant in Buchanan, New York, claiming, *inter alia*, FLSA back pay for substantial amounts of time they were required to spend each day undergoing an array of mandatory safety and security examinations and changing into

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goggles," holding that the latter was "'de minimis as a matter of law.'" 546 U.S. at 30 (quoting 339 F.3d 894, 904 (9th Cir.2003)). The First Circuit in *Tum* had affirmed the district court's judgment that, once time spent walking and waiting were excluded, *all* claims for donning and doffing (including both what the Ninth Circuit termed unique and generic gear) were barred as de minimis. 360 F.3d at 278.

and out of protective gear.[2]

Petitioners alleged that these activities – which took an estimated 30 minutes each day until 2004 and 18 minutes thereafter (the employer having streamlined its procedures, App.23a) – were "integral and indispensable" to their principal job duties, Entergy Compl. ¶15, explaining that they were mandated by the employers and for the employers' benefit – many were necessary for respondents' to maintain their Nuclear Regulatory Commission operating license, see, *e.g.*, 10 C.F.R. § 73.55(d) – and that employees were required to complete them before the start of their scheduled shift.

6. After the district courts issued decisions holding that these claims failed as a matter of law, the Second Circuit heard the appeals together, issuing a single opinion affirming the judgments in both respondents' favor.[3]

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[2]Separate suits were filed against respondents Con Edison, which owned the plant until 2001, and Entergy, which had then acquired it, and were assigned to different district judges. Although the district courts reached substantively similar conclusions – and the appeals were heard and decided together, see n. 3, *infra*, – the cases were decided in different procedural postures: the *Entergy* court held principally that the complaint failed to state a claim, Fed. R. Civ. P. 12(b)(6), while the court in *Con Edison* concluded, *inter alia*, that a proffered amended complaint would be "futile." The court of appeals did not attach significance to these procedural differences, noting the "substantial[] similari[ies]" between the two rejected complaints, App.2a, and that both decisions were "based on * * * interpretation of the FLSA," and subject to *de novo* review, *id.* 7a. & n.1.

[3]Although the cases were heard and decided in tandem and both the Second Circuit's opinion and its judgment denominated them

Recognizing the dispositive question to be whether the activities qualified as "'integral and indispensable' to a 'principal activity' under *Steiner*," App.7a (quoting *Alvarez*, 546 U.S. at 39-40); *id.* ("If so, they are compensable under the FLSA"), the court of appeals rejected petitioners' contention that the activities so qualified, because they were (1) required by the employer; (2) undertaken for the employer's benefit; and (3) indispensable to performance of the employee's job duties.

Quoting dictionary definitions to illustrate that the terms "integral" and "indispensable" are not "synonymous," App.9a, the court held that the *Steiner* test should be read as imposing two analytically distinct requirements – deciding that "the activities for which plaintiffs here seek compensation," though "arguably indispensable," failed the separate "integrality" requirement, as a matter of law.[4]

The various inspections, the court explained, while "necessary in the sense that they are required and

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"consolidated," App.1a, they had not been the subject of a formal pre-argument consolidation order. When petitioners (represented by present counsel) submitted a single rehearing petition bearing both docket numbers and covering both cases, the appeals court clerk's office initially declined to accept it, indicating, *inter alia*, that separate petitions were necessary; petitioners then filed a motion asking the Second Circuit to accept the single petition as tendered, which the court granted.

[4]Webster's Third New International Dictionary (Unabridged) (1986), the court recorded, defines "'indispensable'" as "'necessary,'" App.9a (quoting *id.* at 1152), "while 'Integral' means, *inter alia*, 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole,'" *id.* (quoting Dictionary, at 1173).

serve essential purposes of security," were nonetheless non-compensable under *Steiner* – because "they are not *integral* to [petitioners'] principal work activities," App.11a (emphasis added).

The claim for donning and doffing protective gear, the court then held, met the same fate. After first acknowledging that *Steiner*, "dealing as it does with donning and doffing gear that protects against workplace dangers," was "in one sense the most apt analog," App.10a, the Second Circuit explained that this Court's decision could and should be given a "narrow interpretation," *id.*, one that precluded compensation for the donning of "generic" protective gear here. *Id.*13a. Explaining that the environment of the battery plant was so toxic that it "could not sustain life" without "the taking of the measures required," the Second Circuit reasoned that *Steiner* should be understood as holding 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, 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.

Id. 11a.

The court of appeals recognized that this conclusion was contrary to the law of the Ninth Circuit, which had held (in a part of its *Alvarez* decision that was not challenged in this Court) that the "donning, doffing, and cleaning of non-unique gear (*e.g.*, hardhats) [was] 'integral and indispensable' as that term is defined in *Steiner*," 339 F.3d at 903, but described it as consistent with decisions of other federal courts, App.13a (citing

Reich v. *IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir.1994) and *Anderson* v. *Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir.2002) (not precedential)); with a Department Labor regulation identifying "changing clothes" under "normal[]" conditions as a "preliminary" activity, App.13a (citing 29 C.F.R. § 790.7(g)) (emphasis omitted); and with a prior Second Circuit decision, which had described Section 4(a) as meant to lift the compensation duty for "'relatively effortless'" tasks, *id.* 13a (quoting *Reich* v. *N.Y. City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995)).[5]

REASONS FOR GRANTING THE WRIT

The decision in this case has added dramatically to the conflict and confusion that had already characterized the lower federal courts' answers to basic and frequently occurring questions under the FLSA and the Portal Act. Each of the Second Circuit's holdings – that *Steiner*'s test for "principal activities" imposes a separate "integrality" requirement; that donning protective gear is a principal activity only in "lethal" settings; and that compensation for donning and doffing time depends on whether the gear is "unique" or "generic" – conflicts squarely with decisions of other Courts of Appeals, with the Department of Labor's clear, consistent (and correct) interpretation of the statute, and with this Court's decisions in *Steiner* and *Alvarez*, and they leave workers and employers in

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[5]The court declined to decide the employers' contention that, even if the activities were held to be "principal" under the FLSA, petitioners' claims would be barred as "de minimis," observing that, in light of *Alvarez*, that doctrine's application "is perhaps unclear." See App.13a-14a & n.7.

the Second Circuit subject to a strikingly different FLSA regime than those elsewhere. In view of the large practical significance of these questions, the gravity of the Second Circuit's errors, and Congress's strong intent that employees' rights (and employers' obligations) under the FLSA be predictable and uniform, this Court's review is warranted.

I. This Court's Review Is Needed To Settle That Time Spent Donning and Doffing Employer-Required Protective Gear Is Compensable Under the FLSA

When and whether time spent donning and doffing protective gear is a compensable "principal activity" within the meaning of the FLSA and the Portal Act is an issue that arises in workplaces across the country and one that has taken on greater salience since this Court's decision in *Alvarez*, which strongly reaffirmed the vitality of *Steiner* as precedent and called attention to "donning and doffing" issues – but was not specifically called upon to resolve when donning and doffing is a "principal activity" under the *Steiner* test. See *De Asencio* v. *Tyson Foods, Inc.*, 500 F.3d 361, 363 & nn.1, 2 (3d Cir. 2007) (describing "considerable interest" in the issue, noting *amicus curiae* briefs filed, *inter alia*, by the Secretary of Labor, the U.S. Chamber of Commerce, American Meat Institute, as well as recent scholarly and practice-oriented literature examining the issue).[6]

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[6]Prior to *Alvarez*, some courts had come to view *Steiner* as a near dead letter, see *Pilgrim's Pride*, 147 F. Supp. 2d at 563 ("most federal courts have relegated the precedential value of the *Steiner* decision to its unique facts"); *Reich* v. *IBP*, 820 F. Supp. 1315, 1324 (D. Kan. 1993) – a judicial attitude that presumably affected employees' inclination and ability to assert and protect their statutory rights. *Alvarez*'s prominent and unstinting affirmation

The Second Circuit decision in this case deepens and widens the conflict among lower courts on these questions. See *Lugo* v. *Farmer's Pride, Inc.*, 2008 WL 161184 (E.D. Pa. Jan. 14, 2008), *5 (noting persistent disagreement "[i]n the three years since *Alvarez*"). The decision below cast its lot with courts that have held that donning and doffing "generic" protective gear is not compensable, but those decisions have been squarely rejected by other courts of appeals; they conflict with the Department of Labor's interpretation of the statute, and, quite clearly, with this Court's holding in *Steiner* itself.

The need for this Court's intervention is made much greater here by the Second Circuit's holding (bound up with the court's novel reconception of the "integral and indispensable" test, see *infra*) that Section 4(a) bars claims for donning and doffing in "non-lethal" work settings. That holding adds new, significant – and wholly unwarranted – uncertainty into wage and hour law; unlike the court's ruling concerning "generic" gear, the "lethality" limitation can claim no support from other federal courts, which have consistently sustained donning and doffing claims in non-lethal settings, and the Second Circuit was wrong to conclude that *Steiner* supports – or even permits – such a restriction.

A. There Is Broad Disagreement And Confusion As To Whether Donning "Non-Unique" Protective Gear Is A Principal Activity

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of *Steiner* – and the Labor Department's strong endorsement of such claims – has significantly raised awareness of these issues in both workplaces and courtrooms.

1. The Second Circuit Decision Adds To The Sharp Conflict Among The Courts of Appeals

The Second Circuit's decision in this case is the fourth by a court of appeals to hold that time an employee spends at his place of work donning and doffing "generic" employer-required protective gear is *not* part of the workweek under the FLSA and the Portal Act. See *Reich* v. *IBP*, 38 F.3d 1123, 1126 (10th Cir. 1994); *Anderson* v. *Pilgrim's Pride Corp.*, 44 Fed. Appx. 652 (5th Cir.2002) (not precedential); *Alvarez*, 339 F.3d at 901 & n. 6 , 903; cf. *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) (holding, outside donning context, that activity required by law is not for benefit of employer under the integral and indispensable test).

But these decisions fall far short of establishing judicial consensus – or coherence – on this proposition. Numerous other courts of appeals have squarely rejected this conclusion (as has the Department of Labor, see *infra*), and the (divergent) interpretations of the statute advanced in support of it. Indeed, the decisions with which the Second Circuit purported to align itself are in sharp disagreement with one another as to how the pivotal provisions should be interpreted.

For example, while the decision below and the Fifth Circuit's (non-precedential) decision in *Pilgrim's Pride* held that donning and doffing "generic" protective gear is a non-compensable preliminary activity under the Portal Act, the Ninth and Tenth Circuits have carefully considered and rejected that analysis. Thus, *Alvarez* squarely held that "ease of donning and ubiquity of use [do] not make the donning of such equipment any less integral and indispensable," 339 F.3d at 903. And the Tenth Circuit decision the court

below professed to follow explained:

> The fact that such equipment is well-suited to many work environments does not make it any less integral or indispensable to these particular workers than the more specialized gear. In fact, the same reasons supporting the finding of indispensability and integrality for the unique equipment (*i.e.* company, OSHA, and Department of Agriculture regulations requiring such items and the health, safety, and cost benefits to the company of the employees wearing the items) apply with equal force to the "standard" equipment.

38 F.3d at 1125; accord *Tum*, 360 F.3d at 279 (donning and doffing gear "required by [the employer] and or government regulation * * * are integral to the principal activity and therefore compensable")*Spoerle* v. *Kraft Foods Global, Inc.*, 2007 WL 4564094, *3 (W.D. Wis. Dec. 31, 2007) ("Because plaintiffs need to put on the equipment in order to perform their job safely, their doing so is 'an integral and indispensable part' of a 'principal activity'").

Meanwhile, the *Tenth Circuit's* holding, that donning and doffing standard protective gear does not qualify "as work within the meaning of the FLSA." *Reich*, 38 F.3d at 1125, because it "does not involve 'physical or mental exertion,'" *id.* (quoting *Tennessee Coal*, 321 U.S. at 598) – though buttressed by the Second Circuit decision – has likewise been subject to withering attack. *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), held that donning and doffing gear is compensable "work," even if it "relatively effortless," explaining that "the term 'work,' as used in the FLSA, includes even non-exertional

acts," *id.* at 910.[7]

And the Third Circuit, in a closely-reasoned opinion rendered after the Second Circuit's decision in this case, reversed a jury's verdict that the donning and doffing standard protective equipment was not "work" within the meaning the FLSA. After surveying this Court's case law, the court concluded:

> it was error for the jury instruction to direct the jury to consider whether the gear was cumbersome, heavy, or required concentration to don and doff. This language in effect impermissibly directed the jury to consider whether the poultry workers had demonstrated some sufficiently laborious *degree* of exertion, rather than some form of activity controlled or required by the employer and pursued for the benefit of the employer.

De Asencio, 500 F.3d at 373; and it went on to hold that "the donning and doffing activity * * * constitute[d] 'work' as a matter of law," *id.* Accord *Davis* v. *Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1322 (M.D. Ala. 2004); *Gonzalez* v. *Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 923 (N.D. Ill. 2003) ("donning and doffing of sanitary and safety equipment * * * constitute work"); *Garcia,* 2007 WL 1299199, *3 (concluding that holding of *Reich* v. *IBP* "cannot be reconciled with *Alvarez*['s] instruction that

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[7]Although the Tenth Circuit's post-*Alvarez* opinion in *Smith* v. *Aztec Well Servicing Co.*, 462 F.3d 1274, 1289 (2006), quoted the *Reich* holding with apparent approval, a district court of that Circuit recently concluded that the appeals court "if revisiting *Reich*, would [decide] that case differently," *Garcia* v. *Tyson Foods, Inc.*, 474 F. Supp. 2d 1240, 1246 (D. Kan. 2007), reconsideration motion denied, 2007 WL 1299199, *2 (May 2, 2007).

any activity that is integral and indispensable to a principal activity constitutes compensable work for purposes of the FLSA").[8]

2. The Second Circuit's Construction Of The Act Conflicts Squarely With The Department of Labor's Longstanding Interpretation

Although the decision below posited that the distinction between "unique" and "generic" protective gear was supported by the Department of Labor's interpretation of the FLSA, that assertion is starkly refuted by the plain language of the agency's longstanding Portal Act regulations – and by the Department's own clear and recently reaffirmed construction of them. As the Department recently explained, it has long been its view that "the time, no matter how minimal, that an employee is required to spend putting on and taking off gear on the employer's premises is compensable work," Wage and Hour Advisory Memorandum No. 2006-2, at 2, and that "[w]hether required gear is unique or non-unique is irrelevant to whether donning or doffing is a principal activity," *id.* at 3; see also Br. *Amicus Curiae* of Sec. Of

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[8]Although not embraced by the Second Circuit, the Ninth Circuit's holding in *Alvarez*, that time spent donning and doffing non-unique gear was "de minimis as a matter of law," has also been called into question. The Department of Labor has strongly criticized the Ninth Circuit's premise that the de minimis rule applies to "certain activities 'as a matter of law,'" U.S. Dept. of Labor, Wage and Hour Advisory Memorandum No. 2006-2 at 3 (reproduced *infra*, at p. 58a); see *id.* (explaining that this Court's *Alvarez* decision "renders the Ninth Circuit's 'de minimis as a matter of law' discussion untenable"); see generally 29 C.F.R. § 785.47; see also *Fast* v. *Applebee's Int'l, Inc.*, 502 F. Supp. 2d 996, 1006 (W.D. Mo. 2007) (de minimis doctrine does not apply where amounts of time involved are small, but easily measured).

Labor, *De Asencio* v. *Tyson*, No. 06-3562 (3d Cir.), at at 8 n.5 ("donning [and] doffing * * * required or controlled by [employer,] performed on its premises, and for the employer's benefit * * * constitute[s] 'work' as a matter of law").[9]

In claiming fidelity to the administrative construction, the Second Circuit decision highlighted language in the Department's regulations that lists "'checking in and out and waiting in line to do so, *changing clothes,* washing up or showering, and waiting in line to receive pay checks,'" as activities that are "preliminary," under the Portal Act, App13a (quoting 29 C.F.R. § 790.7(g)) (emphasis added by Second Circuit), and read "effortless" donning of "generic" gear here to be such an activity.

But, as the Secretary of Labor recently observed (in a legal memorandum urging another federal court to reject the Second Circuit's holding in this case), the decision below "inexplicably ignored a footnote appended [to the regulatory provision quoted]," Br. *Amicus Curiae*, *Dege* v. *Hutchinson Technology, Inc.*, No. 06-3754 (D. Minn., filed Sep. 12, 2007) at 13, which states that "changing of clothes, may in certain situations be * * * an integral part of the employee's 'principal activity,'" and refers to 29 C.F.R. § 790.8(c), which, in turn, provides

> Among the activities included as an integral part of a principal activity are those closely related

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[9]While the Labor Department's interpretation applies only to donning and doffing on the employer's premises, some decisions have taken a less categorical approach, treating location as a relevant, but not necessarily controlling, factor, see, *e.g.*, *Lemmon* v. *San Leandro*, 2007 WL 4326743, *6 (N.D. Cal. Dec. 7, 2007).

> activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[FN65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.

id. (footnotes with citations omitted). The regulation further explains: "such a situation may exist 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.* n.65.

The Secretary's conclusions that the Portal Act exclusion applies only to clothes-changing for the employee's convenience – and that donning and doffing *any* clothes and gear (whether generic or unique) without which an employee "cannot perform his principal activities" is compensable work – preclude the Second Circuit's contrary rule. The Department's interpretation of its own rules, which is not only free from "plain[] erro[r]," *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), but compelled by their plain language, was binding on the Second Circuit, *id.*; see also *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2349 (2007) (crediting interpretation advanced in Department of Labor Advisory Memorandum).

And the Second Circuit did not purport to reject § 790.8(c) itself – nor could it have. Not only was that

provision adopted essentially contemporaneously with enactment of Section 4(a), see 12 Fed. Reg. 7655, (Nov, 18, 1947), by the official Congress entrusted with administering the statute, see *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001) (according deference to "agency's steady interpretation of its own 61-year-old regulation implementing a 62-year-old statute"),[10] but it was cited and relied upon by this Court in *Steiner*, see 350 U.S. at 255 & nn. 8 & 9, which both held the relevant statutory language ambiguous, *id.* at 254, cf. *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967, 982 (2005), and concluded that Congress had affirmatively endorsed the administrative interpretation in subsequent amendatory legislation, 350 U.S. at 254-55 & n. 8 (discussing 63 Stat. 920 (1949) § 16(c)). See *Barnhart* v. *Walton*, 535 U.S. 212, 221-22 (2002) (regulation entitled to *Chevron* deference in light of "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful

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[10] 29 C.F.R. § 790.1(a) n.5, explains:

> The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

consideration the [a]gency has given the question over a long period of time"); cf. *Alvarez*, 546 U.S. at 32 ("Considerations of *stare decisis* are particularly forceful * * * when a unanimous interpretation of a statute [*i.e.*, *Steiner*] has been accepted as settled law for several decades").

3. The Exclusion For "Generic" Protective Gear Is Irreconcilable With *Steiner*

As decisions disagreeing with the Second Circuit's construction have taken pains to explain, a rule that donning "non-unique" protective gear is "preliminary" under the Portal Act or not "work" under the FLSA, in addition to conflicting with the settled administrative construction, is flatly incompatible with this Court's controlling precedent.

It is not realistically possible to derive a distinction based on "uniqueness" of the protective gear and/or the "onerousness" of doffing from *Steiner* v. *Mitchell*. While the conditions protected against in that case were extreme, the donning and doffing held compensable involved putting on and taking off ***"old, clean work clothes,"*** upon entering and before leaving the plant, 350 U.S. at 256 (emphasis added) – the opposite of "specialized" or "cumbersome" gear. Nor can *Steiner* be read as leaving undecided whether this clothes-changing (and bathing) was "work." Although the parties' dispute focused on the words of Section 4(a)(2), *Steiner*'s *holding* was that these activities must "be included in measuring the work time for which compensation is required under the Fair Labor Standards Act," 350 U.S. at 247.

If further buttressing were necessary, *Alvarez* reinforces *Steiner* on both points. In addition to broadly reaffirming *Steiner* as precedent, 546 U.S. at

32, *Alvarez* made plain that activities meeting the "integral and indispensable test "are themselves 'principal activities,'" 546 U.S. at 23, see *Garcia*, 2007 WL 1299199, *2-3 (reading *Alvarez* as having foreclosed Tenth Circuit's *Reich* holding that an activity passing the *Steiner* test might not be "work"). And the Court explained that Section 4 did not, as some lower court decisions had suggested, "overrule" pre-1947 case law concerning the meaning of "'work' and 'workweek," 546 U.S. at 27 – including *Armour* v. *Wantock*, which "clarif[ied] that 'exertion' [is] not in fact necessary for an activity to constitute 'work' under the FLSA," 546 U.S. at 25. See *De Asencio*, 500 F.3d at 372-73 ("*Alvarez* * * * necessarily precludes the consideration of cumbersomeness or difficulty on the question of whether activities are 'work'"); see also *Davis*, 302 F. Supp. 2d at 1322 (explaining that donning and doffing qualifies as "work," even under the *Tennessee Coal* test).

Finally, as a number of courts have noted, though the *Ninth Circuit* decision this Court upheld in *Alvarez* involved only employees who donned "unique" protective gear, the Court's observations that "doffing gear that is 'integral and indispensable' to employees' work is a 'principal activity' under the statute," 546 U.S. at 40, and is compensable because the gear is "*always* essential if the worker is to do his job," *id.* (emphasis original), were made in the Court's discussion of the companion case, *Tum*, which involved claims for donning "generic," as well as "unique," gear, see 360 F.3d at 277 ("rotating associates" required to don lab coats, hairnets, earplugs and safety glasses); *Spoerle*, 2007 WL 4564094 * 5 ("After *Alvarez,* there can be little doubt that donning and doffing protective

gear at the beginning and end of the workday are 'principal activities' under the Portal-to-Portal Act"); *Bishop* v. *United States,* 72 Fed. Cl. 766, 780 (2006) (describing *Alvarez* as having "endorsed" conclusion that donning and doffing protective gear are "principal activities"); *Lopez* v. *Tyson Foods,* 2007 WL 1291101, *3 (D. Neb. Mar. 20, 2007) (describing "the analysis used in *Reich*" as "severely undermined" by *Alvarez*).

B. The Second Circuit's "Lethality" Limitation Is Drastically At Odds With Settled Law In Other Jurisdictions – And With A Fair Reading of *Steiner*

In its effort to explain how the *Steiner* donning claim (but not petitioners') could satisfy the supposed "integrality" requirement, but see pp. 25-31, *infra,* the decision below held that compensability for changing into and out of protective gear is limited to that needed to survive "lethal" work environments. This extraordinary rule – which is now the law for workers and employers in the Second Circuit – conflicts sharply with other courts' settled construction of the FLSA and Portal Act, and it rests on a reading of *Steiner* that is not merely "narrow," App.10a, but simply untenable.

The Second Circuit's limitation is obviously irreconcilable with decisions that have held donning and doffing gear required by the employer for non-safety purposes to be a "principal activity" see, *e.g.*, *Ballaris,* 370 F.3d at 910-12 (upholding compensation for changing into uniform required "to improve overall business performance" and promote cleanliness); *Lee* v. *Am-Pro Protective Agency, Inc.* , 860 F. Supp. 325, 327 (E.D. Va. 1994) (security guard uniform); *Brock* v. *Mercy Hosp. & Med. Ctr.* , 1986 WL 12877, *6 (S.D. Cal. May 6, 1986) (holding donning and doffing hospital uniforms "integral and indispensable" to

employees' principal activities, given uniforms' importance to identifying hospital employees); see also *Davis*, 314 F. Supp. 2d at 1322 (discussing hairnets and other gear worn for workplace hygiene reasons).

Many other cases have involved items required to protect against workplace risks that, while serious, would not satisfy the Second Circuit's understanding of "lethal" – *i.e.*, those in which gear is required to "sustain life," App.10a (indeed, *Steiner* itself did not involve special breathing apparatus, but rather clothes, which protected workers' skin from direct chemical exposure). See, *e.g.*, *Tum*, 360 F.3d at 277 (hairnets, earplugs, and safety goggles); *Alvarez*, 339 F.3d at 903 (plastic hardhats and safety goggles); *Spoerle*, 2007 WL 4564094, *4 (describing Second Circuit's distinction between donning protection against "hazards that kill and hazards that maim (or pose only a *risk* of death)" as 'bizarre" and "troubling"). And the leading decisions – many of which were supported by comprehensive factual findings – are conspicuously quiet as to the gravity of the workplace risks. See *id.* (*Alvarez* "did not suggest that donning and doffing time was compensable only if the relevant gear was necessary to protect the employee from "a lethal atmosphere").

These cases are consistent with the Labor Department's long-held view that donning and doffing gear without which an employee "cannot perform his principal activities" is a principal activity. 29 C.F.R. § 790.8(c). Under this standard, the degree of danger facing an employee may be relevant – because gear *not* mandated by the employer may still be found required (and compensable) "by the nature of the work," *id.* n.65; cf. *Tum*, 360 F.3d at 280 (holding donning of non-

required gear to be non-compensable). But under this rule, in cases where 'where the changing of clothes on the employer's premises is required by law [or] by rules of the employer,'" it will be integral and indispensable to the principal activities, without probing whether the underlying requirement guards against truly lethal (or less grave) risks. See *Alvarez*, 339 F.3d at 903 (describing as "beyond cavil" that "donning enabling [employer] to satisfy its [workplace safety law] requirements" are for employer's benefit).

The court of appeals did not offer any reason based in the text of the FLSA or Section 4(a) for drawing a line between lethal and non-lethal environments, nor did it explain its premise that *Steiner* warranted a "[n]arrow interpretation," App.10a. In fact, this Court and the Labor Department have long counseled that FLSA exemptions "are to be * * * construed [narrowly] against the employers seeking to assert them," *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); 29 C.F.R. 790.2(a); see *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) ("the terms 'principal activity or activities' * * * are to be read liberally"); *Dunlop* v. *City Elec., Inc.*, 527 F.2d 394, 398 (5th Cir. 1976) (same). And whatever sense such an approach might make with respect to a decision whose vitality is open to question, it is highly inappropriate for a precedent unanimously reaffirmed three Terms ago. See *Alvarez*, 546 U.S. at 32.

But to read *Steiner* as supporting a rule of non-compensation in cases where the workplace risks are less than "lethal" is not to "interpret[]" it narrowly, App.10a; but to misconstrue it. The *Steiner* opinion indicates that the extreme conditions made that case an easy one, see 350 U.S. at 256 (conclusion was "not

difficult," because facts made donning and doffing so "clearly * * * integral and indispensable") – not one at the outer limit of "principal activity." And *the Court's reasoning* lends no support to the "lethality" limitation. See *Seminole Tribe* v. *Florida* 517 U.S. 44, 67 (1996) (cases' "explications of the governing rules of law" are binding) (citation omitted). In rejecting the employer's arguments, the Court relied principally on legislative history distinguishing between clothes changing necessary for job performance and that which was a "mere[] convenience to the employee," *id.* at 258 – a far more inclusive criterion, plainly, than non-lethality; on the Labor Department's § 790.8 interpretation, which had incorporated this distinction, see *supra* – and on 1949 amendments, which the Court read as endorsing those rules, 350 U.S. at 255 & nn. 7-9.

II. The Second Circuit's Formulation of The *Steiner* Standard Conflicts With Other Courts' – And With *Steiner* Itself

A. The Second Circuit's "Integrality" Requirement Opens A Wide Gulf Between That Court And The Other Courts of Appeals

In reading *Steiner* to impose a freestanding, dictionary-driven "integrality" requirement, the decision below is not, as the Second Circuit suggested, of a piece with the "substantial body of case law" giving meaning to the statutory distinction between "preliminary" and "principal" activities. App.4a. On the contrary, the Second Circuit, by holding that an activity required by the employer, for the employer's benefit and indispensable to the performance of the employee's duties is *not* thereby "principal," breaks with other courts on the central point on which these courts have been in agreement.

As the Secretary of Labor observed, in urging the *Dege* court to reject the employer's *Gorman*-based argument, the most influential and "widely accepted test for determining whether an activity is integral and indispensable," see *Amicus* Br. 12 n.7, was established by the Fifth Circuit three decades ago in *Dunlop* v. *City Electric*. In that case, the court of appeals, after describing "the excepting language of Section 4 [as] intended to exclude from FLSA coverage only those activities 'predominantly * * * spent in (the employees') own interests," (quoting *Jackson* v. *Air Reduction Co.*, 402 F.2d 521, 523 (6th Cir. 1968)), overturned a district court decision that had held time electricians spent filling out forms and fueling trucks to be non-compensable "preliminary activities" – because they were not "directly related" to "the installation and repair of electrical wiring." 527 F.2d at 400. These activities were compensable under *Steiner*, the court explained, because they were "indispensable to the operation of the business," *id.* See *id.* ("what is important is that such work is necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business." Accord *Barrentine*, 750 F.2d at 50 ("in order for a particular activity to be 'integral and indispensable,' it must be necessary to the principal activity performed and done for the benefit of the employer"); *Alvarez*, 339 F.3d at 902-03 (same); cf. *Bonilla*, 487 F.3d at 1344 ("an activity is integral and indispensable * * * [if] * * * required by the employer, necessary for the employee to perform her duties, and

primarily for the benefit of the employer").[11]

Indeed, even decisions expressing a less narrow view of the Section 4(a) exclusion than did *Dunlop*, have agreed that "[t]he more the preliminary (or postliminary) activity is undertaken for the employer's benefit, the more indispensable it is to the primary goal of the employee's work, and the less choice the employee has in the matter, the more likely such work will be found to be compensable," *Bobo* v. *United States*, 136 F.3d 1465, 1467 (Fed. Cir. 1998) (quoting *Reich*, 45 F.3d at 651) – a principle strikingly at odds with the Second Circuit's holding here, that activities (1) required by the employer, (2) for the employer's benefit, and (3) "arguably indispensable" to petitioners' job duties were noncompensable as a matter of law.

The large difference between the Second Circuit's construction and other courts' is evident in the results their standards actually produced. Thus, petitioners' activities here are, in the dictionary sense of the term, *more* "integral" than the ones held "principal" in leading decisions. Filling out forms was in no sense "'organically linked'" to the electrical work in *Dunlop*, nor was caring for canines at home or driving trucks a

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[11]Although the Eleventh Circuit purported to apply this standard in *Bonilla*, it held that the activities at issue were not for the "benefit" of the employer, because they were required by government regulation; the employer "had no discretion" to relieve employees of the obligation. See 487 F.3d at 1344. That understanding is plainly inconsistent with *Steiner*, which explicitly recognized the ability to operate consistently with State safety laws as a "benefit" to the employer, 350 U.S. at 250, with decades of precedent, see, *e.g.*, *Reich*, 38 F.3d at 1125; and with the Labor Department's longstanding interpretation of the Act. See, *e.g.* Wage & Hour Op. Ltr. (Oct. 7, 1997) (discussed *infra*).

"'constituent part,'" App.9a (quoting definitions) of the plaintiffs' job duties in *N.Y. Transit Authority* and *Secretary of Labor* v. *E. R. Field, Inc.* , 495 F.2d 749 (1st Cir. 1974). While those cases involved activities that could have been (but were not) performed by some other employee, petitioners could not have done their jobs without personally undergoing the examinations or donning and doffing the protective gear.

The Labor Department's longstanding construction of the Act is, unsurprisingly, consistent with these judicial decisions – and irreconcilable with the Second Circuit's holding. In a series of opinion letters, the Department has explained that mandatory pre- and post-shift drug-testing and other examinations, whether initiated by the employer or a government regulator, are compensable "principal activities." The Department has explained – in language that resonates for the claims of petitioners, who were required to undergo examinations (for radiation, explosive materials, and weapons) before being allowed to start work and leave the plant each day:

> Whenever an employer imposes special requirements or conditions that an employee must meet before commencing or continuing productive work, the time spent in fulfilling such special conditions is regarded as indispensable to the performance of the principal activity the employee is hired to perform. Included in this general category are required physical examinations and drug testing. Where the Federal government requires employees to submit to physical examinations and drug testing as a condition of the employer's license to operate its business, both the drug tests and physical examinations are for the

benefit of the employer.

Wage & Hour Op. Ltr. (Oct. 7, 1997), 1997 WL 998042; accord Op. Ltr. (Sep. 15, 1997) 1997 WL 998039 ("time spent in drug testing and in physical examinations required by the Department of Transportation for commercial licensing purposes may be considered compensable hours of work * * * * The physical examination and the drug testing are essential requirements of the job and thus primarily for the benefit of the employer"); accord *Barrentine*, 750 F.2d at 50 (holding compensable time spent on "pre-trip safety inspection [required] by federal regulations").

B. *Steiner* Does Not Permit, Let Alone Support, The Second Circuit's Construction of Section 4(a)

The Second Circuit's lone reason for setting the law on this novel, fundamentally different course – that a separate "integrality" requirement is compelled by *Steiner*, *i.e.*, to assure that each distinct term in the Court's decision is given independent meaning, is fundamentally mistaken.

This "plain meaning" approach to the *Steiner* opinion ignores this Court's admonition that the language of its (and other courts') opinions is not to be parsed in the same fashion as are the words of a statute, see *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979), and even the canons of construction do not dictate that statutory phrases always be read word-by-word. Indeed, though the two alliterative words are not "synonymous,"App.9a, their dictionary definitions overlap substantially: thus, the first definition quoted by the Second Circuit below equates "integral" with "'essential to completeness'" – hardly the polar opposite of "'absolutely necessary'" *id.* (quoting Webster's 3d Third New International Dictionary (Unabridged) at

1152, 1173).[12]

These generalized reasons for caution pale, however, in comparison the bold red light that is the *Steiner* case itself. If, as the court below theorized, "integral" must operate as a term of limitation and be given independent effect, *the activities in Steiner itself would have failed.* In the dictionary sense, donning and doffing protective gear is no more a "constituent part" of making batteries than it is of working in a nuclear power plant: the activities are employer-required for the same reasons – to protect safety and public health, avoid costly accidents, and comply with regulatory mandates. See 350 U.S. at 250-51; *Spoerle*, 2007 WL 4564094, *3 ("Like the clothes changing in *Steiner,* * * * plaintiffs need to put on the equipment in order to perform their job safely, [so] their doing so is 'an integral and indispensable part' of a 'principal activity'"). And, to the extent conditions in the battery plant were, as the Second Circuit reasonably assumed, more hazardous to an unprotected worker than those petitioners faced, that difference would, as a semantic matter, sound in *indispensability*, not "integrality."

In fact, the circumstance the Second Circuit highlighted as most strongly supporting its conclusion of non-integrality here – that non-employee visitors to the Indian Point plant were required to submit to the same time-consuming examinations as were

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[12]Indeed, the materials on which the *Steiner* opinion relied belie the suggestion that the Court had any rigid distinction in mind; Section 790.8(c) uses one term to define the other – "among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance" – and the legislative history appended to the Court's opinion suggests the two terms were used largely interchangeably.

petitioners, see App.12a – would almost surely have been true in the *Steiner* battery plant (or in the hypothetical underwater worksite to which the Second Circuit analogized it, see App.11a). Presumably, a non-employee visitor to a battery plant, "permeated" by toxic chemicals, 350 U.S. at 249 (or to the submarine workplace) would *also* have been required to don and doff protective, "life-sustaining" gear, App.10a.

III. The Special Importance of Certainty And Uniformity Under the FLSA Strongly Support Certiorari Here

The considerations that ordinarily inform this Court's exercise of its discretionary jurisdiction – the interest in uniformity in lower courts' resolution of practically significant questions of federal law – apply with extraordinary force in this case. As described above, the Second Circuit decision below widens the gap between lower federal courts' already-conflicting interpretations of the FLSA and Portal Act, at a time when the practical importance of the issues presented is growing.

As all three branches of government have long recognized, uniformity and predictability are of special, surpassing importance under the FLSA. An original purpose of the law was to limit employers' ability to derive competitive advantage from paying sub-standard wages, see, 29 U.S.C. 202(a), (b), and, as discussed above, the Portal Act was enacted to relieve employers of large, unexpected liabilities, see 29 U.S.C. § 251(a). Other provisions of the Act reflect the premise that employers and employees alike benefit when their rights and obligations under the statute are clear and definite. See, *e.g.*, 29 U.S.C. § 259(a) (providing defense for employer actions "in good faith

in conformity with and in reliance on" the Wage and Hour Division's interpretation of the statute); accord 29 C.F.R. § 790.1(c) (noting value of "guid[ance] to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it") (citation omitted); *Skidmore* v. *Swift Co.*, 323 U.S. 134, 140 (1944) ("good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons").

The decision below directly implicates these concerns. It places employers operating in Circuits that follow the Department of Labor's longstanding construction of the statute at a disadvantage vis-a-vis those governed by Second Circuit law; it allows multistate employers to pay their New York, Connecticut, and Vermont employees less money than those doing precisely the same job in other jurisdictions; and it adds new layers of complexity and uncertainty to an already murky area of the law.

The Second Circuit's destabilizing decision in this case, finally, is remarkable both for its adventurous reinterpretation of this Court's (recently reaffirmed) *Steiner* precedent and for its patent incompatibility with the Secretary of Labor's consistently held and clearly expressed interpretation of the statute (one, indeed, specifically endorsed by Congress and by this Court decades ago). The effect of such judicial indifference to the Labor Department's role in administering and interpreting the statute is corrosive, undermining the voluntary compliance regime Congress intended and requiring employees to secure

their statutory rights through costly and inefficient litigation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2008