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

REPLY BRIEF FOR THE PETITIONERS

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As the petition demonstrated, the Second Circuit's decision warrants this Court's review (1) because it adds to the acknowledged Circuit conflict over whether time spent donning employer-required "non-unique" protective gear is compensable under the FLSA and Portal Act – placing that court in direct conflict with the Labor Department's controlling interpretation and enforcing a "lethality" limitation that is contrary to precedent and statutory text; (2) because the court's freestanding "integrality" requirement is irreconcilable with other courts' construction of § 4(a)(2) and *Steiner* itself and (3) because conflict and uncertainty about the meaning of "work" and "principal activity" is especially intolerable, given the role those building-block terms play in the millions of employment relationships governed by the FLSA.

None of the arguments against certiorari succeed:

1. Respondents' startling claim that the entrenched and acknowledged Circuit conflict is "more apparent than real" depends entirely on assigning new and unfamiliar meanings to the words "conflict" and "real." In ordinary parlance – and under this Court's Rules – an appellate decision like the one below, *affirming* a district court's judgment as a matter of law, does *not* reach the "same result," Opp. 10, as one *rejecting* the same construction of the statute and remanding, even if neither "affirm[s] [an] award[of] compensation," *id.*

Respondents' purported demonstration of "consistency" with the "Labor Department's interpretation" of the FLSA (Opp. 16) likewise fails to live up to its billing. On close reading, the Opposition does not deny that the Second Circuit's *construction of the statute* is irreconcilable with the Secretary's, but only ventures a *post-hoc* defense of the "outcome"

below, *id.*, based on *respondents'* (erroneous) reading of regulatory language not relied on by the appeals court.

2. As for *Steiner*, it is respondents' emphatic defense of "the Second Circuit's analysis" that turns out to be "plainly wrong," Opp. 18. Respondents spotlight the court's observation that "'[i]n the nuclear containment area – which more closely resembles the [*Steiner*] battery plant – Indian Point employees wore specialized gear and dosimeters, and were compensated for donning and doffing,'" Opp. 9 (quoting App. 11a n.4), apparently unaware that it repeats ***the very distinction this Court rejected in Steiner.*** The employer there, arguing that time spent changing into "old, clean work clothes," 350 U.S. at 256, was "preliminary" and non-compensable, emphasized that:

> In those instances where special equipment is required such as respirators, gloves, etc., defendants' employees are paid for the time taken in putting on such special equipment * * * * Those employees whose duties required them to constantly handle toxic matter were furnished masks * * * aprons and gloves which protected them from the hazards of handling the matter. This certain or special clothing and equipment necessary to the employees' principal activity of manufacturing batteries was donned and taken off * * * after the employee had punched the time clock * * * and the employee was compensated for the time so spent.

Br. for Pet., No. 55-22 at 5-6. Nor, as we show below, is this the only way the "*Steiner*" the Opposition accuses petitioners of misreading differs from the case actually decided by this Court.

3. And *Steiner* is not the only decision that must be stretched to conform to the "apparent" conflict thesis. The influential decision in *Dunlop* v. *City Electric, Inc.*, 527 F.2d 394 (5th Cir. 1976), described (Opp. 23) as enforcing a "close relationship" requirement similar to the unprecedented "integrality" one imposed below, in fact rejected that rule. And the decision in *this* case, which respondents say must be "fair[ly] read," Opp. 20, as embracing a "functional," Opp. 24, multi-factor, interpretation, did not rely on or mention the distinguishing "facts" respondents identify; the disposition followed directly from the two conclusions of law described accurately in the petition: (1) that § 4(a)(2) imposes a separate "integrality" requirement; and (2) that donning protective gear is "integral" only in "lethal" work environments.

4. Respondents' perfunctory "vehicle" arguments notwithstanding, the decision here, a final decision that expressly resolved basic and recurring questions about the meaning of central provisions of a critically important federal statute – and did so in a manner that squarely conflicts with other courts of appeals and the Labor Department – provides this Court an appropriate opportunity to bring needed clarity to the law.

I. The Conflict Over The Interpretation of the FLSA Is Real And Important

A. There is no genuine dispute that the Second Circuit here resolved important questions on which the federal courts of appeals are starkly divided: (1) whether "effortless" donning of "generic" protective gear is compensable work and (2) whether it falls within the § 4(a)(2) exclusion for "preliminary" activities. See Pet 12-16. Both the existence of the

conflict and the Second Circuit's decision's place within it have been recognized by numerous courts. See *id.*

Respondents' seemingly contrary claim – that this division of authority is "more apparent then real," Opp. 11 – depends entirely on defining what constitutes a "real" split in a way that defies logic and ignores the reasons why decisional conflicts concern this Court.

Respondents' insistence that only a decision affirming an "award[of] compensation" would "really" conflict with the one below not only excludes district court awards that were not appealed (and appellate decisions like *Steiner* itself, which uphold *injunctive* relief, but not "compensation"); it considers a decision like *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004) or *DeAsencio* v. *Tyson Foods, Inc.*, 500 F.3d 361 (3rd Cir. 2007), *rejecting* the Second Circuit's construction of the statute and remanding, to have reached the "same result" as the one here. The employer in *Ballaris*, which settled for a substantial sum a case previously dismissed by the trial court (consistently with Second Circuit rule), would likely be surprised to learn there is "no conflict in outcome," Opp. 10, as would the employer in *Tum* v. *Barber Foods,* which also settled after a verdict in its favor was reversed, by this Court.[1] See also Pet. for Certiorari, *Tyson Foods* v. *DeAsencio*, No. 07-1014.

To observe that these decisions did not "affirm awards," Opp. 11, is to say little more than that they

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[1]Respondents repeatedly (Opp. 13, 20) cite the First Circuit's *Tum* opinion as supporting their position. But the part of the decision they rely on, rejecting a donning claim as "de minimis," was *vacated* by this Court. See 546 U.S. at 39.

were rendered in appeals from trial court decisions in *defendants'* favor. (And the supposedly telling lack of award-affirming decisions doubtless reflects the strong incentives employers have to conform practices to the construction of the FLSA adopted by their regional Courts of Appeals – and the Labor Department, see 29 U.S.C. §§ 259, 260). When two (or more) courts of appeals hold that the same statutory provision means directly opposite things under the same circumstances, they are in conflict.[2]

Indeed, respondents' restrictive conception of when this Court's intervention is warranted makes especially little sense here. As the petition explained, the FLSA's reach and design mean that problems of legal uncertainty and nonuniformity are at least as important in workplaces as in courtrooms.

B. That there is less to respondents' claim of "consistency with the Labor Department's interpretations," Opp. 16, than meets the eye is unsurprising, given (1) the Department's Advisory Memorandum stating unequivocally that "[w]hether required gear is unique or non-unique is irrelevant to whether donning or doffing is a principal activity," App. 62a; (2) that this understanding follows directly from the plain language of 1948 regulations, which were ratified by Congress and endorsed by *Steiner*; and (3) the Department's express recognition that the

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[2]Respondents' more conventional effort to diminish the conflict, by suggesting that the items of protective gear here were less "extensive," Opp. 15, than in the First, Third or Ninth Circuit cases, misses the point. What divides the courts is that those have squarely held "cumbersomeness" and "uniqueness" *irrelevant* as a matter of law, whereas the Second Circuit held it *dispositive*.

Second Circuit's construction conflicts with its own, see Pet. 16.

Indeed, respondents do not actually defend the Second Circuit's interpretation of the FLSA or its regulations at all. Rather, their "rebuttal" turns out to be an attempted defense of the "*outcome*," Opp. 16, of this case, based on *their* interpretation of regulations not relied on below, principally 29 C.F.R. § 785.47, codifying the FLSA "de minimis" doctrine.

Respondents' argument thus concedes the central point – that workers and firms bound by the Second Circuit's construction of the Act and those following the Secretary's face fundamentally different rules of law – but it does not succeed on its own narrow terms, either. The Second Circuit *disclaimed* reliance on the de minimis doctrine, App. 13a n.7, for good reason: the district courts' version of it – *the same one respondents urge here* – has been rejected by the Labor Department, see App. 63a, and (apparently) by this Court, *Alvarez*, 546 U.S. at 39.[3] As for respondents' other "regulatory" defense – that the on-premises donning here was a matter of convenience, rather than necessity, Opp. 18 – no such argument was presented to, let alone credited by, the courts below, and it cannot be squared with a straightforward reading of

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[3] The baffling suggestion (Opp. 14 n.4) that petitioners seek compensation *only* for donning and doffing (not for undergoing security inspections) is contradicted by petitioners' submissions at every level. But even if that were the case, *Alvarez* makes clear that any "de minimis" analysis would require inclusion of post-donning walking time, and the Labor Department has settled that the doctrine does not excuse non-payment where an activity is performed regularly and the time involved is readily ascertainable. See Pet. 16 n.8.

petitioners' proposed complaint, see C.A.App.28 (Entergy Compl. ¶15(i)).

C. Rather than defend the rule that donning protective gear is a "principal activity" only in "lethal" environments, respondents insist that the Second Circuit did not in fact impose a "lethality" limitation, arguing (1) that its decision is "fair[ly] read" as treating lethality as one "relevant fact[]" among the "numerous" ones, Opp. 21, distinguishing the donning in *Steiner* from that here, and (2) that its approving citation of "integral and indispensable" decisions from *non*-lethal work settings, see Opp. 20, proves the court could not have meant what it appears to say.

The latter argument simply misses the point. The petition did not suggest that the Second Circuit now requires that *all* "principal activity" claims clear a highly-dangerous-workplace threshold – but rather that claims for *donning and doffing* protective gear are so limited, and none of the cases the Opposition highlights involved that activity.

As for the former, the striking difference between the decision below and other courts' donning decisions is *not* that the Second Circuit gave the "lethal environment" "factor" greater-than-usual weight in the "principal activity" determination, but rather, the absence of any other decision involving required protective equipment that attaches *any* significance to the danger level.

It is respondents' "characterization," Opp. 21, that does not survive a "fair reading," *id.* 20, of the Second Circuit's decision: lethality was *not* one of many grounds of distinction relied on below; it was the *only one*. And more important, it was the solitary factor the

court used to explain how the donning in *Steiner* could satisfy the "integrality" requirement, see *infra*.

Indeed, respondents' effort to marshal other factors, not relied on or mentioned by the court of appeals, to distinguish petitioners' claim from that in *Steiner*, doesn't help. The donning in *Steiner* was *not* required to occur on premises – the parties stipulated that the employer "did not require any employee to change clothes and some employees did not follow this procedure," Pet. Br., No. 55-22, at 5.

Those facts also explain respondents' mistaken claim (Opp. 21) of a concession in the petition. Our acknowledgment that lethality *may be* relevant to the "principal activity" determination was expressly directed at cases, like *Steiner*, in which the activity is asserted to be required by the "nature of the work," 29 C.F.R. § 790.8(c) n.65. Where, as here, *the employer* requires donning protective gear, no precedent or sensible reason supports deciding compensability based on the magnitude of danger protected against.

II. The Second Circuit Has Unsettled The Widely Accepted Understanding Of "Principal Activity"

Neither petitioners' case nor the Second Circuit's decision was confined to donning and doffing. Rather, the court's disposition of both that claim and that based on the mandatory inspections followed from its holding that § 4(a)(2) must be construed, in accordance with the "plain language" of *Steiner*, to exclude activities that, though "indispensable," do not also meet a separate "integrality" requirement.

The petition identified two large problems with this construction. First, and most glaringly, it cannot account for *Steiner* itself: although protection was

surely *indispensable* to the battery-plant work, it was no more "*integral*" – in the distinct sense the Second Circuit treated as critical – than the donning here. Indeed, the court's main explanation for ruling petitioners' activities not integral as a matter of law – that non-employees were subject to the same requirements, see App. 12a – surely would apply to *Steiner*, see Pet. 31; cf. *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994) ("that * * * equipment is well-suited to many work environments does not make it any less integral or indispensable to these particular workers").

Second, the freestanding "integrality" requirement cannot be reconciled with the "principal activity" test adopted by the large majority of courts of appeals and the Labor Department. See Pet. 25-28. Indeed, the Department has issued opinions advising employers that activities not meaningfully different from those here were "principal," not "preliminary," see *id.* 28-29.

Respondents have little to say on the first point, quarantining their "explanation" of *Steiner* to a single, inscrutable footnote, Opp. 25 n.8, but they join issue on the second, (1) denying any "discord" between the Second Circuit's "integrality" requirement and other Circuits' governing "principal activity" law and (2) insisting that the activities the Labor Department has held compensable are distinguishable from those here.

But respondents' emphatic tone cannot make up for their failure to identify any decision in the half-century since *Steiner* actually embracing the Second Circuit's "indispensability-*and*-integrality" interpretation of § 4(a)(2), and the cases they claim enforced a similar, "close relationship" requirement do nothing of the sort.

Barrentine v. *Arkansas-Best Freight System, Inc.*, 750 F.2d 47 (8th Cir. 1984), did not, as the Opposition's ambiguously-placed quotation marks imply, use the phrase "'closely related'" Opp. 23; it merely held that the pre-shift activities at issue met the standard set down in *Dunlop*. And *Dunlop*, far from requiring that employees' activities be "directly and organically related" to other principal activities, Opp. 23, *rejected* as "irrelevant" the district court's "directly related" gloss. 527 F.2d at 398. The*Dunlop* rule, embraced by the Labor Department and numerous other Circuits, is essentially the opposite of the Second Circuit's: what these courts hold establishes an activity as "principal" as a matter of law -- that it is required by the employer, for the employer's benefit, and "indispensable" to the employee's other work – is what the decision below held *insufficient*, absent a separate, further showing of "integrality."[4]

Respondents' proffered distinction between the mandatory security inspections in this case and the pre-shift physical examinations and drug tests the Labor Department has pronounced "non-preliminary," see Pet. 28, also fails. Even if the tests here *were* manifestly less "invasive," Opp. 26 – and even if determining "integrality" based on a requirement's generality were less illogical than it is, but see *supra*, the Opinion Letters do not rely on (or mention) either

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[4]Respondents (Opp. 23) also enlist the Eleventh Circuit's decision in *Bonilla* v. *Baker Concrete Const., Inc.*, 487 F.3d 1340 (11th Cir. 2007), but that court applied the same *Dunlop*-based test the Second Circuit discarded here. As the petition explained (Pet. 28 n. 11), *Bonilla*'s rule of decision – that activities required by government regulation are not for employer's benefit – conflicts directly with *Steiner* and decades of subsequent cases.

ground. They apply a general statutory principle – that time spent fulfilling "special requirements * * * before commencing or continuing productive work" (including requirements imposed by the employer's government-regulator) is "considered compensable hours of work" – which applies equally here.

Nor, plainly, does *Alvarez*'s observation that not every "necessary" activity is "integral and indispensable," 546 U.S. at 40-41, support the Second Circuit's rule. The Court was not announcing an "integrality" requirement; it was rejecting a claim for *pre-donning waiting* time, and the critical, missing element highlighted in *Alvarez* is present here: unlike the workers there, petitioners *were* "required to arrive," *id.* at 40 n.8, in advance of their shift to perform the mandatory activities. See C.A. App. 28 (Entergy Compl. ¶15).

III. There Is No Legitimate Reason For Withholding Review

Respondents' strenuous efforts notwithstanding, there is no denying that the federal courts are sharply divided on the questions resolved by the Second Circuit here; that the court's construction of the statute conflicts with the Labor Department's; or that the practical significance of the disputed questions is large.

Indeed, this case is, in numerous ways, the logical "vehicle" for addressing these issues. The decision below was final, not interlocutory, compare *DeAsencio,* and, unlike in *DeAsencio,* the Portal Act issue, which often arises in tandem with statutory "work" arguments, has not been foreclosed. Indeed, while the vitality of the decision at the core of the *DeAsencio* petition's conflict claim – the Tenth Circuit's in *Reich*

– is uncertain post-*Alvarez*, see Pet. 15 n.7, authority opposed to the decision below continues to accumulate. And reviewing this decision, which extends beyond donning cases, would enable the Court to bring needed clarity to "principal activity" questions generally.

Respondents' "vehicle" claims – essentially assertions that the Second Circuit *could have* ruled for them on different grounds – give no reason for denying review. The decision below squarely resolved, in a lengthy published opinion, the broadly important questions raised herein. It did not rest on any of the factual or procedural "idiosyncracies" respondents now belabor; and even respondents do not suggest that any prevents the Court's reaching these questions.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

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