No. 04-66

IN THE

Supreme Court of the United States

Abdela Tum, *et al.*,

Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

This Court has held that employees are entitled to compensation under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, for the time their employer requires them to spend donning and doffing health and safety equipment.

The Questions Presented are:

1. Are employees entitled to compensation for the time they must spend *walking* to and from required health and safety equipment distribution stations?

2. Are employees entitled to compensation for time they must spend *waiting* to receive equipment at required health and safety equipment distribution stations?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Nicholas Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Heido Wallace, and Mintwab Yimam.

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BRIEF FOR THE PETITIONERS

Petitioners Abdela Tum et al. respectfully request that this Court reverse the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit on rehearing (Pet. App. 1a-19a) is reported at 360 F.3d 274. The report and recommendation of the magistrate judge (Pet. App. 20a-48a), dated January 23, 2002, is unpublished. The district court's order adopting this report and recommendation (*id.* 49a-50a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on March 10, 2004. This Court granted certiorari on February 22, 2005. 125 S. Ct. 1295. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Appendix to this Brief reproduces the relevant provisions of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, and implementing regulations of the Department of Labor.

STATEMENT

Employees in many diverse industries must wear specialized clothing and equipment to perform their jobs. The requirement may be imposed by government regulation or by employer policy. In either event, the purpose of the requirement is to fulfill the employer's obligations to conduct its operations safely and to produce safe products. Whether the worker is wearing fire protection gear near a blast furnace, a clean suit in a semiconductor factory, or – as in this case – protective gear and sanitation equipment in a food processing plant, donning and doffing of required clothing and equipment can be a time-consuming process.

This Court has held that the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act (Portal Act), 29 U.S.C. 251 *et seq.*, requires employers to compensate their employees for the time it takes to don and later doff the required equipment. *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). Accord Pet. App. 7a. This case arises because the act of changing clothes often amounts to a minority of the time employees must spend in the process of donning and doffing. Workers frequently must walk between different equipment distribution stations and wait in line at each of those stations to obtain the equipment. At the end of their shift, workers must remove and return this equipment, a process that often involves once again walking and waiting in line. The questions presented by this case address whether workers are entitled to compensation for the closely related walking and waiting time inherent in this required donning and doffing process. The court of appeals held that they are not.

A. Statutory and Regulatory Background

1. The Fair Labor Standards Act requires covered employers to pay qualifying employees a minimum hourly wage. 29 U.S.C. 206(a). The Act's "maximum hours" provision further sets a maximum "workweek" of forty hours, beyond which the employer must pay at least time-and-a-half wages. *Id*. § 207(a)(1).

Congress did not define the term "work" or the bounds of the "workweek" in the FLSA. Administrative regulations[1] and the decisions of this Court interpreting the statute, how-

[1] Shortly after each statute was enacted, interpretative regulations were promulgated for the FLSA and the Portal Act by the Administrator of the Wage and Hour Division of the Department of Labor. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255 & nn.8-9 (1956); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-38 (1944). The relevant regulations, which are currently codified at 29 C.F.R. Parts 785 and 790, are reproduced in the Appendix to this Brief.

ever, have long made clear that "work" under the FLSA encompasses those activities that are "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Thus, the "workweek ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premise, on duty or at a prescribed work place,'" 29 C.F.R. 785.7 (citation omitted), with the exception of bona fide breaks during which "an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes," *id*. § 785.16(a). Of particular relevance here, work under the FLSA specifically includes time spent walking and waiting under the employer's control and direction. See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946) (walking); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-38 (1944) (waiting).

2. In 1947, Congress amended the FLSA through passage of the Portal Act. Section 4 of the Portal Act, the provision applicable to this case, presumptively eliminated employers' prospective obligation under federal law to pay compensation for certain classes of 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).[2] Thus, the Act renders walking and other preliminary or postliminary activities presumptively non-compensable when they occur outside the workday, defined by the first and last principal activity of the day. Accordingly, Section 4 "did not change" the standard previously set by the FLSA for identifying compensable work, "except to provide an exception for preliminary and postliminary activities." 29 C.F.R. 785.7.

In determining whether Section 4 of the Portal Act applies to particular activities, the threshold question is thus when the workday begins and ends. The Act defines the workday as running between the first and last principal activities of the day. 29 U.S.C. 254(a); 29 C.F.R. 790.6. The term "principal activities" encompasses "all activities which are an integral part of a principal activity," 29 C.F.R. 790.8, including activities such as putting on and taking off clothing and equipment required to perform the basic duties of a job, *Steiner* v. *Mitchell*, 350 U.S. 247, 255-56 (1956). Accordingly, the workday begins with the commencement of the first activity that is "integral and indispensable" to an employee's principal work activities and ends with the completion of the last such activity. Time spent between those events – including activities such as walking and waiting – occur during the workday and therefore by definition fall outside Section 4's exemption from compensation.

B. Procedural History

1. Respondent Barber Foods, Inc. operates a poultry processing plant in Portland, Maine. It runs two daily production shifts, each requiring approximately 150 employees.

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[2] The exemption is only presumptive because time encompassed by the Portal Act's exception is nonetheless compensable when provided by contract or custom. 29 U.S.C. 254(b).

Petitioners are current and former hourly-wage employees at respondent's plant.[3] Pursuant to federal health and safety regulations and company policy, respondent requires its employees to don protective equipment before beginning their activities on the production floor. See Pet. App. 7a. All employees at the plant must, at a minimum, wear lab coats, hair nets, earplugs, and safety glasses. In addition, depending on their jobs, respondent may also require employees to wear vinyl gloves, hard hats, back belts, steel-toed boots, steel mesh gloves, and other equipment. *Id.* 3a.

Respondent alone controls the distribution of this required equipment, which is dispensed at distribution stations that respondent has dispersed at various points throughout its plant. Under respondent's distribution process, employees must spend considerable time collecting, donning, and doffing this equipment. On a typical day, employee begin by waiting in line at equipment "cages" to receive some of their required work gear. They must then proceed to another area to wait in line to retrieve required lab coats from racks along a narrow hallway. Petitioners must then continue through this often crowded hallway – sometimes donning pieces of their gear as they walk – to tubs containing still more equipment. After retrieving additional equipment from the tubs, petitioners generally must proceed to the locker room to retrieve gear, such as hard hats and boots, maintained in their personal lockers. They must then don that gear and then walk up a stairway to stand in line to clock in at the entrance to the factory floor.

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[3] This case involves four classes of employees: (1) rotating associates who work on the production lines that create finished products; (2) set-up operators who maintain the machinery; (3) meatroom associates who blend the raw meat with other ingredients; and (4) shipping and receiving associates who ship the finished products. Pet. App. 2a. Claims originally brought on behalf of maintenance and sanitation workers are no longer a part of the case.

Pet. App. 23a-28a.[4] At the end of their shifts, respondent requires employees to reverse the process, removing all of their required equipment and returning it to the cage and various designated lockers, laundry bins, and trash cans. *Ibid*.

On average, the donning and doffing process mandated by respondent takes each of its employees approximately twenty minutes to complete every working day, or more than an hour and a half per week.[5] However, during the period relevant to this suit, respondent refused to pay them for any of this time. Instead, petitioners were only paid from the time that they punched in at a time clock located at the entrance to the production floor, which they could enter only after having fully donned the required gear. Pet. App. 4a, 23a, 25a. Similarly, because petitioners were required to punch out before removing and disposing of the equipment, *id.* 4a, they re-

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[4] The donning and doffing process varies to a degree from employee to employee depending on the type of work performed by each employee. See Pet. App. 22a-25a.

[5] Because the courts below held that the walking and waiting time was non-compensable as a matter of law, neither the trial court nor the jury ever determined how long the process took in its entirety, including the integral walking and waiting time. The testimony at the summary judgment stage, however, indicated that rotating associates took a total of twenty to thirty minutes each day to complete the donning and doffing process. See J.A. 174-76, 178, 214-17, 247-48. Some rotating associates were required to spend an additional six to seven minutes waiting for their supervisor to issue job assignments prior to punching in. *Id.* 177, 183. Set-up operators spent a total of twenty to thirty-five minutes in the donning and doffing process. *Id.* 152-55, 157-58, 161-64, 256-57, 262-63. Meatroom employees spent approximately fifteen minutes on these same activities and, every other day, an additional five to fifteen minutes washing their boots as required by respondent. *Id.* 190, 196-98, 203-04, 154. Finally**,** shipping and receiving employees spent a total of fifteen to twenty minutes in the donning and doffing process. *Id.* 135-36, 139.

ceived no compensation for the lengthy doffing process either.

2. Petitioners filed this collective action suit alleging, among other things, that respondent's refusal to compensate them for these donning and doffing activities – the actual clothes-changing, as well as the attendant walking and waiting – violated the FLSA.

Adopting a magistrate's recommendation, the district court separately analyzed the walking, waiting, donning and doffing components of petitioners' claims. First, the court granted respondent summary judgment as a matter of law on petitioners' claim for compensation for time they were required to spend walking and waiting. The district court deemed these periods of time "preliminary" and "postliminary" to the workday under the Portal Act and, therefore, not compensable. Pet. App. 33a-34a.

Second, the district court denied respondent summary judgment with respect to the time petitioners spent specifically in the act of clothes-changing. It reasoned that this activity was not "preliminary" or "postliminary," Pet. App. 40a, but rather was "an integral part of the [petitioners'] work for [respondent]," *id.* 37a.

The case then proceeded to trial. The jury was presented with the question whether respondent was required to compensate petitioners for the time that they spent actually putting the equipment on and, later, taking it off. Respondent argued that it was not required to pay even for this time because it was "*de minimis*." Permitted only to consider this time in isolation from the related walking and waiting time, the jury deemed it to be *de minimis* and therefore not compensable. The district court accordingly entered judgment in favor of respondent on all of petitioners' claims. J.A. 8-9.

3. The First Circuit affirmed.[6] The court of appeals agreed with the district court and petitioners that the donning and doffing of mandatory safety equipment is compensable work under the FLSA and the Portal Act. It explained that this conclusion followed from this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), which held that donning required work clothes at a car battery plant was compensable because it was an "integral part of and indispensable to [employees'] principal activities" at the plant, *id*. at 254. See Pet. App. 7a.

The court of appeals also agreed with the district court that the walking and waiting components of petitioners' donning and doffing activity were non-compensable under the Portal Act, rejecting petitioners' two arguments for reversal. Pet. App. 8a-12a.

First, petitioners contended that these activities occurred during the workday, and therefore fell outside the scope of Section 4, because the donning and doffing process delineated the boundaries of their workday. The court of appeals held, however, that an "integral and indispensable" activity like the donning and doffing of safety gear could not begin and end the workday. Petitioners' contrary view, the court of appeals opined, would constitute an unwarranted "expansion of the ordinary 'workday,'" lead to absurd results, and undermine the purposes of the Portal Act. Pet. App. 9a-10a. The court acknowledged that its construction of the statute conflicted with the Secretary of Labor's interpretation of the Act and the Department's regulations, as expressed in the *amicus* brief that he filed on petitioners' behalf. *Id*. 10a. But the court concluded that the Secretary's interpretation "pushes so far that it threatens to undermine the Portal-to-Portal Act." *Ibid*.

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[6] The First Circuit issued two opinions. After initially affirming, see 331 F.3d 1 (2003), the panel granted petitioners' petition for rehearing, which was supported by the Department of Labor as *amicus curiae*, and withdrew its initial opinion. The panel subsequently issued a second opinion, again affirming. Pet. App. 1a-19a.

Second, and alternatively, petitioners argued that the waiting time inherent in the donning and doffing process was compensable as an "integral and indispensable" part of their principal activities. The court of appeals disagreed. It construed the Department of Labor's implementing regulations – contrary to the Department's own interpretation of those regulations – to provide that this "waiting time is intended to be preliminary or postliminary." Pet. App. 12a.

Accordingly, under the court of appeals' decision, petitioners were entitled to compensation only for the amount of time spent in the act of putting on and taking off the required equipment. However, because that time, standing alone, had been found *de minimis*, see Pet. App. 5a, petitioners were denied all compensation for the entire donning and doffing process.

One judge separately concurred to suggest an alternative interpretation of the Portal Act that would "treat required donning and doffing as compensable when more than *de minimis* but, where it is not, [would] leav[e] both it and any associated walking and waiting time as non-compensable." Pet. App. 18a. He noted, however, that neither this suggestion nor the Secretary's contrary position was "impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy." *Id.* 19a.

4. Petitioners filed a petition for writ of certiorari on July 8, 2004. This Court granted the petition in part on February 22, 2005, consolidating the case for argument with No. 03-1238, *IBP* v. *Alvarez*.

SUMMARY OF THE ARGUMENT

Every morning, respondent requires its employees to arrive early at work and begin the lengthy process of acquiring and donning various pieces of equipment before they proceed to the factory floor. At the end of the day, respondent requires its employees to reverse the process. There is no dispute that the employees spend this time at respondent's direction and for respondent's benefit. There is accordingly no

question that the time spent qualifies as "work" within the ordinary meaning of the Fair Labor Standards Act. The only question is whether the Portal Act obviates respondent's obligation to pay petitioners for this work. It does not.

1. The Portal Act was passed in response to this Court's decision in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that – contrary to both the expectations of most employers at the time and the collective bargaining contracts in many industries – the time employees spent traveling from the factory gate to their work benches and time spent in other preliminary activities were compensable time under the FLSA. Congress responded to the ensuing flood of "portal-to-portal" litigation by enacting in the Portal Act two different rules, one for cases arising before the passage of the Act, and another to govern compensation in the future. The provision governing pre-existing cases (Section 2) pervasively relieved employers of liability for any unpaid wages unless the activity in question was made compensable by contract or custom, regardless of when during the day that activity occurred. See 29 U.S.C. 252. The provision governing future cases such as this one (Section 4) was substantially more limited and more favorable to employees. Section 4 does not limit in any respect employees' right to compensation for activities that occur during the workday, defined by the first and last principal activity of the day. See 29 U.S.C. 254.

The walking and waiting time in this case occurs during the workday and, accordingly, the Portal Act has no application. In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), this Court held that changing in and out of required work clothes was compensable under the Portal Act because it is an "integral part of and indispensable to [employees'] principal activities." *Id*. at 254. Under this precedent, donning and doffing constitute part of petitioners' principal activities. And because they are the first and last principal activities of the day, the donning and doffing process marks the boundaries of petitioners' workday. The walking and waiting that occur after the don-

ning commences, and before the doffing is complete, therefore occur during the workday and are outside of the scope of Section 4's exemption from compensation.

The First Circuit concluded that activities like donning and doffing, while compensable under *Steiner*, nonetheless do not constitute part of petitioners' "principal activities" and, consequently, cannot delineate the boundaries of the workday. That holding was erroneous. Consistent with the statute, regulations, and legislative history, *Steiner* held that donning and doffing are compensable notwithstanding the Portal Act precisely because they constitute "part of" the employees' "principal activities," 350 U.S. at 254, not because the Court determined to create an extra-textual exception to Section 4 for activities that are "integral and indispensable" activities but are not quite principal activities themselves.

Nor is there any basis to believe that Congress intended to render walking or waiting generally non-compensable regardless of when they occur during the day. While Section 4(a)(1) mentions walking to a place of the performance of a principal activity, the Act denies compensation for such walking only if it occurs "prior to" or "subsequent to" petitioners' principal activities. 29 U.S.C. 254(a). Accordingly, the Act does preclude compensation for petitioners' walk from the factory gate to the donning area, but it does not apply to walking during the workday. Were the statute read otherwise, employees' right to compensation would start and stop repeatedly through the workday as, for example, they walked from one chicken processing station to the next, or from the factory floor to a knife-sharpening station and back. That result not only would be unadministrable, but it would also conflict with the well-settled "continuous workday" rule, under which employees are entitled to compensation for all hours spent during the workday except during bona fide breaks. Congress limited Section 4 to activities outside of the workday for the specific purpose of maintaining that rule of compensation.

The court of appeals wrongly believed that its broad construction of the Portal Act – and its narrow reading of employees' right to compensation – was necessary to avoid absurd results and to preserve the intended scope of the Act's provisions. Contrary to the court of appeals' fears, there is no risk that petitioners' interpretation would give workers the power to extend the workday by donning and doffing their safety equipment whenever they please. To the contrary, respondent can control the length of the work day simply by directing when and where petitioners don and doff their equipment. Moreover, respondent can limit its donning and doffing costs by improving the efficiency of its equipment distribution system. At the same time, petitioners' interpretation preserves the intended scope of the Portal Act. Nothing in petitioners' argument requires respondent to pay employees for ordinary commuting time, the walk from the factory gate to the donning area, ordinary clothes-changing, or any of the other truly preliminary and postliminary activities that Congress intended to address in Section 4.

2. In any event, even if the walking and waiting in this case occurred outside the workday proper, they would still be compensable as part and parcel of the principal activities of donning and doffing required safety equipment. As the First Circuit recognized, *Steiner* established that the Portal Act does not deny compensation for activities that are an "integral part of and indispensable to [employees'] principal activities." 350 U.S. at 254. The First Circuit also recognized that, under *Steiner*, donning and doffing of required equipment constitutes such compensable activities. The court wrongly concluded, however, that *Steiner*'s holding did not extend to walking and waiting that are inextricable from the donning and doffing process.

The clothes-changing and showering activities found compensable in *Steiner* clearly entailed walking and waiting as employees were given work clothes, changed into them in locker rooms, changed out of them at the end of the day, dropped them off for laundering by the employer, and pro-

ceeded to take showers. 350 U.S. at 251. In both this case and *Steiner*, the integral walking and waiting during the donning and doffing process cannot sensibly be distinguished from the clothes-changing itself. Petitioners undertake the walking and waiting solely in order to complete the required donning and doffing that are under the control, and for the benefit, of respondent. They are just as much a part of petitioners' work as are putting on and taking off the equipment.

3. There is no basis for accepting the alternative theory proposed by the concurrence below that would render walking and waiting time non-compensable if the actual donning and doffing of the required equipment, considered in isolation, took a *de minimis* amount of time. That theory was not the basis of the decision below and, in any event, the time at issue in this case is not *de minimis* under any proper legal standard. Moreover, the suggestion of the concurrence is inconsistent with the text and purposes of the Portal Act. There is no durational qualifier for "principal activities" under the Act. In fact, Congress understood that many workers begin their days with a series of short preparatory activities that, if considered in isolation, could be seen as *de minimis.* Importing a *de minimis* test into the determination of when the workday starts and ends would add an element of unfairness and uncertainty into the Act that would inevitably result in confusion, labor conflict, and increased litigation.

ARGUMENT

The First Circuit's decision in this case fundamentally misconstrues the Portal-to-Portal Act. Respondent requires petitioners to engage in a lengthy process of donning and doffing health and safety equipment in order to comply with respondent's legal obligations and to protect the quality of its food products. It is uncontestable that all of this time – which petitioners spend entirely at the direction of respondent – is compensable work under the Fair Labor Standards Act. Nor is that time exempted from compensation by the Portal Act, for two independent reasons. First, the donning and doffing

process occurs during the workday, which begins when employees stand in line to receive their first piece of required equipment and ends when they remove the last piece of equipment. Second, the walking and waiting time is an integral part of the donning and doffing process, an activity this Court has previously held to be compensable because it is not covered by the Portal Act.

I. The Walking And Waiting Time At Issue In This Case Is Compensable "Work" Under The FLSA.

As a threshold matter, the time petitioners spend walking and waiting during the donning and doffing process is subject to the minimum wage and overtime requirements of the FLSA because it constitutes compensable work within the meaning of that statute. Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). The Act "was designed to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.'" *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (emphasis omitted) (quoting message of President Roosevelt at signing of the FLSA).

The FLSA did not define the "work" for which the hourly minimum wage was due or identify the boundaries of the compensable workday. Litigation regarding the compensability of activities occurring at the margin of the workday began to reach this Court in the mid-1940s. In *Tennessee Coal* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), for example, the Court held that the FLSA required employers to compensate employees for time spent traveling between the surface and the working "face" of an iron ore mine, rejecting the view that the FLSA left the definition of work to be resolved by contract. *Id*. at 602. Instead, the Court gave the statutory term "work" its ordinary, dictionary meaning as in-

cluding all "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 598.

There is no serious dispute that the activities at issue in this case constitute compensable "work" under the FLSA. Respondent and other similarly situated employers require employees to don and doff the health and safety equipment. See Pet. App. 6a-7a; *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 902 (CA9 2003). Respondent furthermore specifies the means by which the employees must acquire that equipment on respondent's premises. The process designed by respondent requires employees to wait for significant amounts of time to receive the equipment and to travel between multiple distribution stations. Throughout this donning and doffing process, employees are under the control of respondent. The activity is accordingly "work" compensable under the terms of the FLSA. See, *e.g.*, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946) (walking time constituted work when "[s]uch time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory"); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136 (1944) ("[N]o principle of law found either in the statute or in Court decisions precludes waiting time from also being work time."); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) (waiting time constitutes work when "spent predominantly for the employer's benefit").

The only remaining question, therefore, is whether Congress withdrew the right to compensation for this time when it enacted the Portal Act. It did not.

II. The Court of Appeals Erred In Its Determination That The Donning And Doffing Process Does Not Start And End The Workday.

When applicable, Section 4 of the Portal Act excuses an employer from paying the minimum wages or overtime pay otherwise required by the FLSA for an activity unless the ac-

tivity is made "compensable by either * * * an express provision of a written or nonwritten contract" or by "a custom or practice." 29 U.S.C. 254(b)(1)-(2). Section 4 only applies, however, to certain activities that occur at certain times of the day. The provision applies only to "(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." 29 U.S.C. 254(a)(1)-(2). Most important for present purposes, Section 4 only applies to these activities when they occur *outside the workday*. That is, Section 4 applies only to activities that 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." *Id.* § 254(a).

Section 4's restriction to activities occurring outside the workday is a critical and intentional limitation on the statute's scope. As the Senate Report explains, Section 4 was drafted to ensure that "activities of an employee which take place during the workday" were "*not affected* by this section and such activities will continue to be compensable or not without regard to the provisions of this section." S. Rep. No. 80-48, at 47 (1947) (emphasis added). Thus, "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act." *Id*. at 48.[7]

The administrative regulations interpreting the Portal Act likewise provide that the Act "does not affect the computation of hours worked within the 'workday' proper * * * and its provisions have *nothing to do* with the compensability under the [FLSA] of any activities engaged in by an employee during that period." 29 C.F.R. 790.6(a) (emphasis added); see

[7] The Senate Report is particularly significant because Section 4 originated as a Senate proposal. See *Steiner* v. *Mitchell*, 350 U.S. 247, 272-73 (1956).

also *id*. § 790.7 ("[T]he criteria described in the Portal Act have no bearing on the compensability or status as worktime under the Fair Labor Standards Act of activities that are not 'preliminary' or 'postliminary' activities outside the workday."). Thus, the regulations provide that the Portal Act applies only to activities that "take place before or after the performance of all the employee's 'principal activities' in the workday." *Id.* § 790.4(b). These regulations were promulgated shortly after the Portal Act was enacted and provide "informed conclusions as to the meaning of the law" to be used by the Department of Labor "to carry out [its] statutory duties of administration and enforcement." *Id*. § 790.1(c).[8] Even under ordinary circumstances, such regulations are due deference as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) . However, the deference due here is heightened considerably because, as this Court observed in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), Congress expressly approved the regulatory interpretation of the Portal Act when it amended the statute in 1949 "after hearing from the Administrator his outstanding interpretation of the coverage of certain preparatory activities." *Id*. at 255 (citing Pub. L. No. 81-393, § 16(c), 63 Stat. 911, 920 (1949)).

While the First Circuit agreed that Section 4 does not apply to activities during the "workday," it rejected petitioners' claims because it concluded that the donning and doffing process falls outside the scope of the workday contemplated by the Portal Act. Pet. App. 9a-10a. That construction of the workday, however, fundamentally misconstrues the statute.

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[8] The Department of Labor is authorized to enforce the FLSA through civil actions for unpaid wages, liquidated damages, civil penalties, and injunctive relief. 29 U.S.C. 216(c), (e); *id.* § 217.

A. The Workday Is Bounded By The Donning And Doffing Process, And Includes Related Walking And Waiting.

Under the Portal Act, an employee's workday is bounded by the employee's first and last "principal activities." See 29 U.S.C. 254(a); S. Rep. No. 80-48, at 48 (1947) ("[T]he particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[s] the beginning and the end of his workday."). "Periods of time between the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a). In this case, petitioners' first and last "principal activities" are the process of first donning and later doffing required health and safety equipment. That process includes the time petitioners are required to wait for equipment and walk between distribution stations.

This Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), established that donning and doffing required by an employer constitute principal activities under the Portal Act. The employees in *Steiner* manufactured car batteries and spent approximately thirty minutes per day changing in and out of work clothes provided by the employer and showering at the end of the day. *Id*. at 251. The employer refused to compensate the workers for this time, contending that the changing and showering "activities fall without the concept of 'principal activity.'" *Ibid*. The term "principal activity," the employer argued, was limited to the employee's core productive duties on the assembly line, in contrast to preparatory activities such as donning and doffing clothing. *Id*. at 251-52.

This Court squarely rejected that construction of the Portal Act. The Court concluded that the term "principal activities" includes activities that "are an integral part of and indispensable to [employees'] principal activities." 350 U.S. at 255. The Court observed that this definition was consistent

with both the legislative history and the administrative regulations adopted by the Department of Labor. *Id.* at 255 & n.9 (citing 29 C.F.R. 790.8). Under this definition of a "principal activity," the Court had no difficulty in concluding that the workers' claims did not fall within Section 4's exemption from compensation. 350 U.S. at 256. "[I]t would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Ibid.* See also *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 263 (1956) (sharpening knives part of meatpackers' principal activities).

Like the workers in *Steiner*, petitioners begin their workday when they commence the process of donning required safety equipment, their first principal activity of the day.[9] The workday ends when the employees remove their last piece of equipment to complete the doffing process, the final principal activity of the day. All waiting and walking time between these two events – whether waiting in line for the next piece of equipment, walking between the donning and doffing areas and the factory floor, or walking from one part of the plant to another during the shift – falls outside of the scope of the Portal Act because it does not occur "*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) (emphasis added). Accord *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 906-07 (CA9 2003).

The First Circuit rejected this conclusion on the ground that it required an untenable "expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies the 'integral and indispensable' test itself

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[9] This process begins when petitioners take their place in line to receive the first piece of equipment. See 29 C.F.R. 790.7(h) (waiting for a principal activity to begin is an integral part of the principal activity); see also *infra* 39.

starts the workday, regardless of context." Pet. App. 9a. The court of appeals did not elaborate on its reasoning. But it apparently would distinguish a supposedly "true" principal activity (such as the work on the production floor), which would both be compensable *and* start the workday, from "integral and indispensable" activities (like donning and doffing), which would be compensable but may or may not start the workday, depending on their "context." This view fundamentally misconstrues the Portal Act and this Court's decision in *Steiner*.

Contrary to the apparent view of the First Circuit, there is no distinction between a "principal activity" and an "integral and indispensable activity." There certainly is no logical basis for assigning the donning and doffing of required safety equipment lesser status under the FLSA and the Portal Act. The activities themselves are of considerable importance to the employer in ensuring the quality of its product. In the semiconductor industry, for example, creating high-quality computer chips requires an extraordinary level of cleanliness in the workplace that can only be accomplished if workers go through an extensive "gowning" process that can involve up to a dozen stages of decontamination procedures. See *Ballaris* v. *Wacker*, 370 F.3d 901, 903-04 (CA9 2004). In other industries, the donning and doffing of safety gear are vital to permit workers to perform their duties in dangerous environments, such as those near a blast furnace or in a toxic chemical plant, where work otherwise simply could not be performed at an acceptable risk to human life. Frequently, the activity is necessary to reduce the incidence of, and the employer's financial exposure for, serious workplace injuries. In the parallel *Alvarez* case, for example, employees who process slaughtered cattle wear chain-link metal aprons, plexiglass arm guards and Kevlar gloves to protect themselves from serious injury from the extremely sharp knives and saws they must use to perform their jobs. 339 F.3d at 898 n.2. There is no basis for concluding that donning and doffing such equipment are any less a part of the worker's principal activities

than the time spent etching the semiconductors, tending the blast furnace, or carving the beef.

Certainly nothing in *Steiner* supports such a distinction. This Court's reference in *Steiner* to "integral and indispensable" activities was simply an interpretation of the statutory phrase "principal activity or activities." Under the plain text of the Portal Act, the workers in *Steiner* could recover only if their clothes-changing activities did not occur "prior to" or "subsequent to" their "principal activity or activities." 29 U.S.C. 254(a). Adhering to the statutory language, this Court found the donning and doffing compensable because it concluded that "principal activities" include those that are "an integral and indispensable *part of* the principal activities for which covered workmen are employed." 350 U.S. at 248 (emphasis added). Nothing in the opinion suggests that this Court intended to create an additional extra-textual exception to Section 4 for activities that were related to – but not in and of themselves – principal activities.

The Department of Labor's regulations likewise make clear that the Act draws no distinction between "principal activities" and "integral and indispensable" activities. "The term 'principal activities,'" the regulations explain, "includes all activities which are an integral part of a principal activity." 29 C.F.R. 790.8. Thus, for example, the regulations provide that travel is compensable as part of a day's work when it is preceded by activities such as "report[ing] to a meeting place to receive instructions * * * or to pick up tools." *Id.* § 785.38.[10] Under the First Circuit's rule, by contrast, such

[10] Although the regulations defining "hours worked" in Part 785 of Title 29 of the Code of Federal Regulations were promulgated more recently than the original Portal Act regulations in Part 790, and were not among those regulations ratified by the 1949 Act described in *Steiner*, 350 U.S. at 255, the "hours worked" regulations nonetheless are consistent with the Portal Act regulations and provide further guidance on the agency's interpretation of that Act. See *Skidmore*, 323 U.S. at 140.

"integral and indispensable" activities would not have begun the workday, even though the time spent at the meeting or collecting the tools was compensable under *Steiner*.

The relevant legislative history also provides that "[t]he term 'principal activity or activities' *includes* all activities which are an integral *part* thereof." S. Rep. No. 80-48, at 48 (1947) (emphasis added). Senator Cooper, a sponsor of the bill, further explained on the Senate floor "that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, *must be included in the concept* of principal activity." 93 Cong. Rec. 2297 (1947) (emphasis added). The Senator explained that the term is "sufficiently broad to *embrace within its terms* such activities as are indispensable to the performance of productive work." *Id.* at 2299 (emphasis added).

B. The First Circuit's Decision Is Contrary To The Continuous Workday Principle Embodied By The Portal Act.

The error of the court of appeals' construction of the Portal Act is further illustrated by the conflict between the decision below and the "continuous workday rule," a settled principle of compensation that Congress intended to codify in the Portal Act. Under that rule, a worker's compensable time runs uninterrupted throughout the workday, with the sole exception of bona fide breaks. See 29 C.F.R. 785.7, 785.16(a). The First Circuit's decision, however, provides that employees' entitlement to compensation starts and stops during the workday. That result not only conflicts with the terms of the continuous workday rule but also creates precisely the administrative problems and the potential for unfairness that the rule was intended to eliminate.

1. Congress enacted the Portal Act against the backdrop of a well-established administrative interpretation of the FLSA providing that an employee's "hours worked" "will include in the ordinary case all hours from the beginning of the workday to the end with the exception of periods when

the employee is relieved of all duties." Administrator Wage and Hour Division, Interpretive Bulletin 13, *reproduced in relevant part infra*, App., at 31a. This interpretation, first adopted in 1939 soon after the FLSA was enacted, implemented Congress's determination to ensure a fair day's pay for a fair day's work while also avoiding the practical difficulty and potential for abuse inherent in subjecting every minute of the workday to a separate determination of compensability.

In the Portal Act, Congress limited Section 4's exemption from compensation to activities occurring *outside* the workday precisely in order to ensure that the continuous workday rule would apply to activities occurring during the workday. Thus, the Senate report stated that "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act." S. Rep. No. 80-48, at 48 (1947). Senator Cooper explained that Congress intended to ensure that the "rules which have been already developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof." 93 Cong. Rec. 2297 (1947); see also *id*. at 2299 ("[T]his is the first legislation which confirms the interpretations which have been given by the Wage and Hour Administrator prior to this date."). Congress specifically recognized that one of those rules was the continuous workday principle. See S. Rep. 80-48, at 8 (quoting Bulletin 13).

Consistent with this congressional design, the Department of Labor's current regulations continue to recognize that the Portal Act does not apply to interrupt the continuous workday. Thus, the regulations provide that the "workweek ordinarily includes 'all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place,'" 29 C.F.R. 785.7 (citation omitted), with the exception of bona fide breaks during which "an employee is completely relieved from duty and which are

long enough to enable him to use the time effectively for his own purposes," *id*. § 785.16(a). In addition, the regulations specifically state that "Section 4 of the Portal Act does not affect the computation of hours worked within the 'workday' proper." *Id*. § 790.6(a); see also *id*. § 790.7(a).

2. The First Circuit's decision cannot be reconciled with the continuous workday rule because it interprets the Portal Act to create a markedly *discontinuous* workday. The court of appeals acknowledged that the acts of actually donning and doffing required equipment were compensable under the FLSA. Pet. App. 7a. But it held that the employees' compensable time ceases during intervening periods of walking and waiting. *Id.* 10a, 12a. On the First Circuit's construction, the compensable workday starts and stops repeatedly throughout the morning and afternoon as employees wait at each of the several donning and doffing stations and travel between these stations and the production floor.[11] Compensable time under the First Circuit's rule is difficult to record, or even to estimate. And, perhaps most significantly, the rule fails to account for the practical reality that all of the time spent during this process is under the direction and control, and for the benefit, of the employer. "There is nothing in the statute or regulations that would lead to the conclusion

[11] To be sure, under the court of appeals' decision, petitioners' own particular workday was not discontinuous, given that petitioners were deprived of any compensation for the entire donning and doffing process. But that continuity exists here only because the jury found that the actual donning and doffing took a *de minimis* amount of time in this particular case. That *de minimis* inquiry was fundamentally flawed, see Part III(B), *infra*, but even if it were not, the general legal principle proposed by the First Circuit would result in a discontinuous workday in many other cases in which the donning and doffing were not themselves *de minimis*. On the facts of the *Alvarez* case, for example, the First Circuit's rule would repeatedly start and stop the workday. See *Alvarez*, 339 F.3d at 904 (donning and doffing of individualized safety gear there not *de minimis*).

that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 907 (CA9 2003).

The same practical and equitable problems would arise in any number of other industries and professions in which the workday begins with a preparatory activity that does not meet the First Circuit's conception of a "true" principal activity. Take, for example, the workday of a prison guard who must arrive at work at 7 a.m., wait in line to receive his keys, radio and other equipment, and then walk to a meeting room for the morning briefing at 7:20. The briefing is scheduled to permit sufficient time for a thirty-minute discussion prior to the start of the shift at 8 a.m., but frequently lasts only ten minutes. Once the briefing is completed, the guard must walk ten minutes to his station and wait up to twenty minutes for his shift to start if the morning briefing was short. Under the First Circuit's view, the guard's workday does not begin until 8 a.m. when he began his "primary activity," Pet. App. 12a, an hour after he started his first compensable activity of the day. During that one-hour interval, the clock turned off and on repeatedly, but the guard accumulated only a few minutes worth of pay (and perhaps none, given the court's application of the *de minimis* rule, see Part IV(B)(1), *infra*). Yet Congress could not have intended that result, for the guard is constantly acting under the direction and for the benefit of the prison in the midst of the workday.

This scenario is common. Construction workers often are required to report to the company's headquarters to collect, prepare, and stow their tools for transport to the job site. *E.g.*, *Ladegaard* v. *Hard Rock Concrete Cutters, Inc.*, 2004 U.S. Dist. LEXIS 16288 (N.D. Ill. Aug. 17, 2004). Plumbing contractors report to their main offices to pick up work orders and supplies before proceeding to appointments. *E.g.*, *Dole* v. *Enduro Plumbing, Inc.*, 1990 U.S. Dist. LEXIS 20135 (D. Cal. 1990). Truck drivers fuel their vehicles or wait while their trailers are loaded before heading out to deliver their

loads. *E.g.*, *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721 (CA5 1961). In these and other industries, employees' preparatory activities are "integral and indispensable" to their principal activities, but are not the type of "primary activities" the court of appeals considered necessary to commence the workday. Pet. App. 12a.

There is no reason to conclude that Congress intended the Portal Act to deprive these workers of compensation for what is obviously substantial work for the benefit of their employers. The Portal Act was intended to remove unfair liability for businesses, not to create an inequitable windfall for employers.

C. The Court Of Appeals Fundamentally Misunderstood The Portal Act's Exclusion From Compensation For Walking And Waiting Time.

1. The court of appeals also erred in suggesting (see Pet. App. 12a) that the Portal Act's specific reference to "walking" in Section 4(a)(1), and the Act's broader purposes in general, justified the conclusion that "a reasonable amount" of walking and waiting "is intended to be preliminary or postliminary," regardless of when it occurs during the workday. See also *Alvarez* Pet. for Cert. 13, 17 (same). "Preliminary" activities are those that, in fact, precede *in time* the first principal activity of the day. See 29 U.S.C. 254(a) (describing acts "*prior to the time* on any particular workday at which such employee commences * * * such principal activity or activities" (emphasis added)). Walking and waiting that occur *after* or *during* a principal activity are not *preliminary* if the words "preliminary" and "prior to" are to be given a reasonable construction.

Thus, although Section 4 of the Portal Act lists "walking" as an activity that may in some instances be presumptively exempt from compensation, the statute by its terms applies only to walking that "occur[s] 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). See Part II(A), *supra*. Because the walking at issue in this case occurs during, or after, the "commencement" of the principal activity of donning, it is not preliminary. See 29 C.F.R. 790.6(a); *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 906-07 (CA9 2003) (Section 4(a)(1) of the Portal Act is not a "'stand alone' provision excluding from compensability any and all 'walking, riding, or traveling to and from the actual place of performance of the principal activity' without regard for the 'principal activity' itself").

Section 4(a)(1)'s reference to walking to a place of principal activity reflects Congress's effort to make absolutely clear that it did not intend for the term "principal activity" to include the initial walk from the factory gate to the place of the first principal activity of the day, lest a court conclude that the initial walk was an "integral and indispensable" part of that principal activity. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255, 256 (1956) (noting that the "integral and indispensable" interpretation of "principal activity" does not extend to activities "specifically excluded by Section 4(a)(1)").[12] But Congress did not exempt from compensation all walks to places where principal activities are performed regardless of when the walking occurs. Were the statute so read, every time an employee walked from one principal activity to another – for example, from one chicken processing station to the next,

[12] The list of activities in Section 4(a)(1)-(2) was added after the bill was revised to define the workday in terms of the employees' "principal activities" rather than in accordance with the terms of the employment contract. Compare S. Rep. No. 80-37, at 44, 47-48 (1947) with S. Rep. No. 80-48, at 48 (1947). That change in definition, with the accompanying intent to define "principal activity" to include "all activities which are an integral part thereof," S. Rep. No. 80-48, at 48, gave rise to the possibility that a court might erroneously deem the initial walk to the place of the first principal activity to be integral to that principal activity and, therefore, compensable. Subsection 4(a)(1) eliminated that risk.

from the factory floor to the knife-sharpening area, or from one construction site to another – the clock would stop and start. This is clearly not what Congress intended. See 29 C.F.R. 790.7(c) (the "'walking, riding or traveling' to which section 4(a) refers" does not include "travel from the place of performance of one principal activity to the place of performance of another").

The same analysis applies to the question whether the Portal Act renders *waiting* time presumptively exempt from compensation – it depends on when the waiting occurs. Section 4 exempts from compensation waiting prior to the commencement of an employee's principal activities. See, *e.g.*, 29 C.F.R. 790.7(h) (waiting by an employee who voluntarily arrived at work prior to required starting time is preliminary). By contrast, waiting that occurs during or between the first and principal activities of the day is outside the scope of the Portal Act. See, *e.g.*, *id.* § 785.15 (providing that "a factory worker who talks to his fellow employees while waiting for machinery to be repaired" is engaged in compensable work); *id.* § 790.7(h) (employees required to arrive at worksite at a particular time are entitled to compensation for time spent waiting for first principal activity to begin).[13]

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[13] The court of appeals' disregard for the temporal limitations of the Portal Act is starkly illustrated in its treatment of the time spent waiting to clock in. Respondent has positioned its time clocks so that petitioners must first don their equipment, then wait to punch in before entering the factory floor. Pet. App. 4a. Thus, the clocking-in process occurs after the first principal activity of the day. The court of appeals nonetheless concluded that waiting to clock in is always a "preliminary" activity under the regulations, regardless of when it occurs. *Id*. 11a. But the regulations make clear that time spent clocking in and out is among a number of "activities which *may* be performed *outside the workday* and, *when performed under the conditions normally present*, would be considered 'preliminary' or 'postliminary.'" 29 C.F.R. 790.7(g) (emphasis added). Of course, respondent may avoid having to pay for time

2. Disregarding the temporal limitations of the Portal Act ignores not only the plain language of the statute, but also the important congressional compromise that language embodies. Congress enacted the Portal Act in response to this Court's holding in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), that the FLSA required employees to be compensated for time spent walking from a plant entrance to the factory floor, as well as other preliminary activities. See *id.* at 691-92. "Work of that character," the Court held, "must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract." *Id*. at 692.

The decision in *Mount Clemens* prompted a wave of litigation. See, *e.g.*, S. Rep. No. 80-48, at 1-5 (1947). Numerous suits were instituted seeking recovery for past wages and liquidated damages for time that had previously been deemed not compensable by custom or contract. See, *e.g.*, H.R. Rep. No. 80-71, at 4 (1947). Congress responded by passing the Portal Act.

Congress's principal reaction to *Mount Clemens* was to limit substantially the *retrospective* liability imposed by this Court's ruling – *i.e.*, it addressed the claims that were filed in the wake of *Mount Clemens* and prior to the Portal Act's adoption. As this Court explained in *Steiner*, "The Portal-to-Portal Act was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" 350 U.S. 253. "This purpose was fulfilled by the enactment of Section 2" of the Act, *ibid.*, which governs employers' liability for "any activity of an employee engaged in prior to the date of the enactment of this Act." 29 U.S.C. 252. For those existing cases,

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associated with using the time clocks simply by requiring employees to clock in before donning and clock out after doffing.

Section 2 adopted a special retrospective rule: employees need only be compensated as contemplated by the terms of the employment contract or by the custom or policy of the employer. *Ibid.*[14] This rule applied regardless whether the activity occurred during the workday or outside of it. *Ibid.*[15]

The distinct question of what *prospective* rule should govern future claims under the FLSA was the subject of dis-

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[14] Congress also enacted several other provisions intended to address circumstances that exacerbated the problem of unexpected liabilities. See Section 6, 29 U.S.C. 255 (imposing uniform federal statute of limitations); Sections 9-10, 29 U.S.C. 258-59 (creating defense for good faith reliance on administrative rulings or interpretations); Section 11, 29 U.S.C. 260 (making liquidated damages discretionary for good faith violations).

[15] Section 2 provides:

> No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
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> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

pute and, ultimately, a compromise that governs this case. Some in Congress believed that the Court's basic error in *Mount Clemens* was imposing a uniform statutory definition of "work" rather than leaving the term to be defined by the contract or custom between employers and employees. See H.R. Rep. No. 80-71, at 2; 93 Cong. Rec. 1492 (1947) (statement of Rep. Gwynne); *id.* at 1497 (statement of Rep. Goodwin). These members advocated applying Section 2's broad proscription to all claims, past and future. *Ibid.* Other members of Congress, however, believed that a uniform federal definition of work was required in order to ensure that in the future workers would receive fair compensation for actual work performed during the workday. See, *e.g.*, H.R. Rep. No. 80-71, at 16-17 (minority report); 93 Cong. Rec. 2362 (1947) (statement of Sen. Donnell). The error in *Mount Clemens*, in their view, was simply that the Court defined work too broadly by including preliminary and postliminary activities as part of the workday. *Ibid.*[16] This latter view prevailed and is reflected in Section 4 of the Act, the provision that governs the case now before this Court. See S. Rep. No. 80-48, at 48.

The First Circuit thus misapprehended the relevance of the fact that Congress reacted to *Mount Clemens* by enacting the Portal Act. Congress did not respond to the decision by rendering all walking and waiting presumptively non-compensable regardless of when they occur in all future cases. Instead, Congress pervasively excluded compensation for such walking and waiting only with respect to cases arising before the enactment of the Portal Act, recognizing the unfairness to employers of this unexpected retrospective liability. See 29 U.S.C. 252. The rule for future cases, enacted in Section 4, was substantially more favorable to employees,

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[16] This Court's definition of work in *Tennessee Coal* and its progeny had not distinguished between activities that took place during or outside of the "workday." See, *e.g.*, *Jewel Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 169 (1945).

recognizing that employers could plan appropriately for their future liabilities for compensation.[17]

3. The First Circuit further erred in suggesting (Pet. App. 9a-10a) that petitioners' straightforward application of the statutory text would lead to absurd and unfair results. See also *Alvarez* Pet. for Cert. 17 (same). The court of appeals hypothesized, for example, that an employee could extend his workday by putting on a hard hat when he got out of bed in the morning, hours before his shift began. Pet. App. 9a-10a. Petitioners' construction of the Portal Act does not produce that absurd result. The employer has plenary authority over the start and conclusion of the workday, directing how and when to commence the first principal activity of the day, and how and when to complete the final principal activity. Here, respondent alone has the ability to arrange for the distribution of required health and safety equipment, including the time at which employees may arrive at distribution stations and the time at which the doffing process must be completed. An employee may no more unilaterally extend his workday by donning his equipment at the time of his choosing than he may extend his workweek by working after the end of his shift without his employer's consent. See, *e.g.*, 29 C.F.R. 790.7(h) ("Waiting time before the time established for the commencement of work would be regarded as preliminary activity when the employee voluntarily arrives early at his place of employment earlier than he is either required or expected to arrive.").[18]

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[17] Congress did not even intend to eliminate compensation for all of the activities found compensable in *Mount Clemens* itself. Compare, *e.g.*, 328 U.S. at 692-93 ("preparing the equipment for productive work" and "sharpening tools" compensable) with S. Rep. No. 80-48, at 48 (preparing lathe for work part of worker's principal activities); *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 262-63 (1956) (sharpening knives compensable under Portal Act).

[18] Moreover, even if an employer, for some reason, required or permitted an employee to don safety equipment at home several

Likewise, an employer is not required to permit employees to don their equipment early, only to then engage in idle conversation or other personal pursuits. Nothing prevents an employer such as respondent from requiring employees to arrive at the donning area at a specific time shortly before the start of the shift, don their equipment, and proceed immediately to the floor. Of course, if some employees choose to arrive to work earlier than required in order to stop by the cafeteria or visit with friends before the shift, respondent is not required to compensate them for that time. See 29 C.F.R. 790.7(h).

Nor does petitioners' interpretation of the Act unfairly burden respondent with the cost of unproductive time. Respondent may take any number of steps to reduce the cost of the donning and doffing process, including moving the equipment closer to the factory floor or improving the efficiency of the distribution process (for example, by designating additional staff to assist in distributing equipment from the cages or by opening additional cages). Congress would not have thought it unfair or inappropriate to place the cost of the inefficiencies of the current practice on the employer that controls the process, that alone has the power to make the procedure more efficient, and for whose benefit the process exists. Under the First Circuit's construction of the Portal Act, by contrast, respondent has no incentive to improve the process, because it bears none of the costs of its own inefficiencies.

The First Circuit's rule, moreover, is entirely unadministrable. The court of appeals held that "a reasonable amount of waiting time is intended to be preliminary or postliminary," Pet. App. 12a, but took no steps to define what constitutes a

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hours before the start of the shift, the interval between donning and the commencement of productive work would fall within the bona fide break rule, because that period of inactivity would be "long enough to enable him to use the time effectively for his own purposes," 29 C.F.R. 785.16(a).

"reasonable amount" of time to wait or what factors would inform that inquiry. Nor did the court of appeals give any indication of how employers and courts would discern which types of activities are "true" principal activities that commence the workday, and which are merely "integral and indispensable" activities that do not. Because the court of appeals developed these standards itself rather than deferring to the views of the Department of Labor, there are no administrative regulations that could aid in resolving these questions. The uncertainty inherent in such vague legal standards serves only to promote labor discord and, ultimately, litigation.

4. Finally, it bears noting that, as discussed above, the First Circuit's construction of the statute and the regulations conflicts with the views of the Department of Labor as expressed in the *amicus curiae* brief filed by the Department in that court.

To justify its rejection of petitioners' construction of the Portal Act, the court of appeals relied heavily on its conclusion that petitioners' interpretation is contrary to the view expressed in the Department of Labor's regulations. See Pet. App. 8a-9a, 11a-12a. The Department itself, however, explained to the First Circuit that respondent's interpretation of the regulations was incorrect and that the walking and waiting at issue in this case were compensable because they occurred during the workday. See *id*. 9a. This Court has held that the Department's interpretation of its own regulations "is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). As described above, the Department's interpretation of the regulations is not only reasonable, but is in fact compelled by the plain language of the Act and the underlying congressional purposes.[19]

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[19] Contrary to the suggestion of the court of appeals (Pet. App. 8a-9a) and the petitioner in *Alvarez* (Pet. for Cert. 13-14), footnote 49 to 29 C.F.R. 790.7(g) does not support the First Circuit's ruling. That footnote states, in relevant part:

5. The court of appeals rejected the Secretary's interpretation because it believed that the Secretary's position "pushes so far that it threatens to undermine the Portal-to-Portal Act." Pet. App. 10a. This conclusion was wrong. Petitioners' and the Secretary's interpretation leaves ample room for a robust application of the Portal Act to the types of preliminary and postliminary activities Congress intended Section 4 to address. For example, under petitioners' interpretation, the Act still exempts employers from having to compensate employees for ordinary commuting time, 29 C.F.R. 790.7(c), 785.35, for employer-provided transportation to a worksite at the beginning and end of the workday, *id*.

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

The first sentence of the footnote simply makes the observation that clothes-changing may or may not be a principal activity. While the second sentence is not a model of clarity, read in light of the regulations as a whole, it must be interpreted to simply take no position regarding the circumstances under which travel between a washroom or clothes-changing place and the place of performance of a principal activity would fall within Section 4(a) of the Portal Act. The footnote certainly cannot be read as intending to discard the longstanding continuous workday rule or to mean the opposite of what the agency clearly instructs in the main body of regulations. Nor has the Department of Labor so construed this footnote to its own regulations. See Brief for the Secretary of Labor As *Amicus Curiae* Supporting Petition for Panel Rehearing and Petition for Rehearing En Banc 10-11.

§ 790.7(f), and for the time spent walking from the plant entrance to the donning area where the day's principal activities begin, *ibid.* When an employer requires workers to use a time-clock prior to commencing their principal activities, time spent waiting to clock in also falls within the Portal Act limitations. *Ibid.* And time spent changing into ordinary work clothes or uniforms before and after work remains non-compensable, absent a contract or custom to the contrary. *Ibid.* These are precisely the types of activities that Congress was most concerned about when it enacted the Portal Act. See, *e.g.*, S. Rep. No. 80-48, at 47. By contrast, there is no warrant to extend the Portal Act's exemption from compensation to the activities at issue in this case, which occur during the workday, and which petitioners undertook entirely at respondent's direction, under respondent's control, and for respondent's benefit.

III. Petitioners Are Also Entitled To Compensation Because Walking And Waiting Are Integral And Indispensable To Their Principal Activities.

The previous section established that the court of appeals erred in holding that petitioners' donning and doffing activities occurred outside of the workday and, therefore, were exempt from compensation under Section 4 of the Portal Act. This Court need not, however, ultimately resolve the proper construction of the workday in order to decide this case. As the First Circuit recognized (see Pet. App. 7a), under *Steiner* v. *Mitchell*, 350 U.S. 247, 255 (1956), an activity that is "integral and indispensable" to a principal activity is compensable notwithstanding the Portal Act *regardless* of whether it occurs during the workday. The walking and waiting in this case are integral and indispensable to petitioners' principal activities and, therefore, are compensable on that independent basis.[20]

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[20] Of course, in petitioners' view, an "integral and indispensable" activity is compensable under *Steiner* because it is part of that

In *Steiner*, this Court held that Congress did not intend the Portal Act "to deprive employees of the benefits of the Fair Labor Standards Act" with respect to activities that "are an integral and indispensable part of their principal activities." 350 U.S. at 255. This Court further held that the term "principal activity or activities" includes any activity that is "'made necessary by the nature of the work performed,'" "'directly benefit[s]' petitioners in the operation of their business," and is "so closely related to other duties performed by [petitioners'] employees as to be an integral part [of] * * * the principal activities of said employees.'" *Id.* at 252 (internal citations omitted). See also 29 C.F.R. 790.8(b)-(c) (term "principal activity" includes "*all* activities which are an integral part of a principal activity," and *any* "closely related activities which are indispensable to [the] performance" of that activity (emphasis added)).

The walking and waiting in the case easily meet that standard. First, the walking and waiting are "made necessary by the nature of the work performed." *Steiner*, 350 U.S. at 252. In accordance with state and federal safety and sanitary regulations, respondent prohibits petitioners from working on the production floor unless they are wearing all of the required clothing and safety equipment. Pet. App. 23a-25a. Thus, the donning and doffing must take place away from the processing area, thereby necessitating the walking for which petitioners seek compensation. In addition, walking and waiting are required by virtue of the manner in which respondent has chosen to organize its process for distributing required equipment. Respondent has put the required lab coats on racks and tubs with other equipment along the hallway between the building entrance and the equipment cages. See *id.* 3a-4a. Employees must wait in line at the equipment cage, retrieve equipment, then walk to the racks, where there is additional waiting, and then to the tubs. See *id*. 4a. Workers

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principal activity and, therefore, necessarily occurs during the workday. See Part II(A), *supra*.

are also required to wear equipment that they store in personal lockers. See *id*. 3a-4a. All employees must walk from the initial donning area to the production floor, where still more equipment is stored in tubs. *Id*. 4a. By arranging its distribution of equipment in this manner, respondent has made both walking and waiting an integral part of the donning process. Similarly without post-shift waiting and walking time, petitioners could not doff their equipment in the manner prescribed by respondent. Nor could respondent ensure that the equipment was collected, cleaned, and ready for the next shift of workers.

All of this activity "directly benefit[s]" respondent "in the operation of [its] business." *Steiner*, 350 U.S. at 252. See also *id*. at 250-53 (clothes-changing compensable when undertaken to comply with state "industrial hygiene" requirements). Finally the walking and waiting are "closely related to other duties performed by" petitioners at the plant. *Id*. at 252. Indeed, the walking and waiting are inextricable from the donning and doffing process.

Petitioners' claims are, in fact, indistinguishable from those upheld in *Steiner*. Although not separately discussed, walking and waiting necessarily were a part of the clothes-changing and showering activities found compensable in *Steiner*. As described by this Court, the workers were required to pick up their work clothes and proceed to a changing area before beginning work. See 350 U.S. at 250-51 (describing process). At the end of the day, they were required to change out of their work clothes, take the soiled clothing to a collection point to be cleaned, walk to the showers, walk back to the changing area, and put on their street clothes. *Ibid*. Likewise, the knife-sharpening activities found compensable by this Court in *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), necessarily entailed walking between the slaughterhouse floor and the sharpening room, and between the emery wheel and the grindstone. See *id*. at 262. Respondent cannot plausibly claim that this Court intended to de-

prive the workers in *Steiner* and *Mitchell* of compensation for the inherent walking and waiting time in those cases.

The legislative history also refutes the court of appeals' assumption that Congress contemplated that walking and waiting generally would not be a constituent part of a principal activity. In one of the examples of a compensable principal activity given in the Senate Report, a garment worker in a textile mill was required to spend thirty minutes before each shift "distribut[ing] clothing or parts of clothing at the workbenches of other employees." S. Rep. No. 48, at 48 (1947). There can be no doubt that Congress intended the entire thirty-minute distribution process, including the walking from bench to bench, to be considered a principal activity. See, *e.g.*, 93 Cong. Rec. 2293-94 (1947) (colloquy between Sens. Cooper and Lodge).

The regulations accordingly provide that waiting time can be an integral and indispensable part of a principal activity, even when the waiting is the first activity of the day:

> Where * * * an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.

29 C.F.R. 790.7(h); see also *id.* § 790.6(b) (same); 93 Cong. Rec. 2298 (1947) ("[W]hen an employee reports at the actual place of performance of his principal activity, his workday commences, and the time should be compensated for.") (statement of Sen. Cooper). Likewise, the regulations specifically contemplate that travel may be an integral part of a worker's principal activities. See 29 C.F.R. 785.38 ("[T]ravel from job site to job site during the workday[] must be counted as hours worked"); *id.* § 790.7(c) (Portal Act does not apply

to "travel from the place of performance of one principal activity to the place of performance of another").

More generally, Congress made clear that it intended "the words 'principal activities' to be construed liberally" and "to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. 790.8(a). "[T]he only activities excluded from FLSA coverage are those undertaken 'for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer.'" *Dunlop* v. *City Electric, Inc.*, 527 F.2d 394, 398 (CA5 1976); see also *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50 (CA8 1984) (same). The walking and waiting in this case were undertaken solely because respondent required them as integral and indispensable parts of the donning and doffing process. The time is therefore compensable.

The court of appeals nonetheless held that the donning and doffing process as a whole did not constitute a "principal activity," because "a line must be drawn, otherwise an endless number of activities that precipitate the employees' essential tasks would be compensable." Pet App. 12a. While it is obviously true that a line must be drawn between principal and preliminary activities, the court of appeals erred in thinking that petitioners' position erodes the distinction Congress drew. The relationship between the walking and waiting and the principal activity of donning and doffing in this case is exceedingly close. Walking and waiting are not only required in order to complete the donning and doffing process, but are proximately and inextricably intertwined in the process itself. Indeed, the activities sometimes occur simultaneously. See Resp. Br. in Opp. 15 (noting that some employees don their clothes "along the way" from the final equipment station to the production floor). Petitioners' claim does not, therefore, rely on an attenuated chain of causation that could improperly expand the concept of "principal activity" or unduly restrict the scope of the Portal Act. Petitioners are accordingly enti-

tled to compensation because walking and waiting are integral and indispensable to their principal activities.

IV. The *De Minimis* Rule Has No Application To This Case.

A concurring opinion below suggested that petitioners were not entitled to compensation under the Portal Act for an entirely different reason. That opinion proposed "treat[ing] required donning and doffing as compensable when more than *de minimis* but, where it is not, leaving both it and any associated walking and waiting time as non-compensable." Pet. App. 18a. This Court need not evaluate this suggestion here, for it was not the basis of the decision below – a point that *respondent* made in opposing review of the *de minimis* issues in this case at the certiorari stage.[21]

If the Court were to consider the argument, however, it should hold that the amount of time spent on an activity is irrelevant to whether it constitutes a "principal activity" under the Portal Act. In any event, the donning and doffing at issue here were not *de minimis* under any proper legal standard.

A. The *De Minimis* Rule Has No Application To The Determination Whether Donning And Doffing Are "Principal Activities" Under The Portal Act.

The theory proposed by the concurrence below is both odd and unsupported by the language, history, and purposes of the Portal Act. Under the concurrence's construction,

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[21] Petitioners sought certiorari to review a related question under the *de minimis* doctrine, namely whether the "walking and waiting time [is] rendered non-compensable merely because the associated compensable donning and doffing time is *de minimis* in isolation, even if the aggregate waiting, walking, donning, and doffing period is not *de minimis*." Pet. i. Respondent opposed review of this question on the ground that the "issue was not addressed by the court of appeals and played no part in its decision." Resp. Br. in Opp. 19. This Court, in turn, granted certiorari on specified issues that did not include the *de minimis* issue. 125 S. Ct. 1295.

workers would be entitled to compensation for the entirety of a twenty-minute donning process if they spent five minutes waiting, followed by fifteen minutes donning clothing, but they would be entitled to no compensation whatsoever if they were required to spend fifteen minutes waiting, followed by five minutes of donning. There is no basis for concluding that Congress intended such an incongruous result. To the contrary, the duration of an activity has no bearing on whether it constitutes a "principal activity" under the Portal Act.

1. This Court raised the possibility of applying a *de minimis* doctrine to claims under the FLSA in the same decision that prompted Congress to enact the Portal Act, *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). That decision subjected employers to liability for failure to pay wages for preliminary and postliminary activities that many employers had previously thought non-compensable and for which they had kept no records. See S. Rep. No. 80-37, at 27 (1947). As a limitation on the scope of employer liability, this Court noted that its decision did not "preclude the application of a *de minimis* rule" when "the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours." 328 U.S. at 692. "[S]uch trifles may be disregarded," the Court explained, because "[s]plit second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act." *Ibid.*

The *de minimis* rule was applied in *Mount Clemens* to mitigate the potentially harsh effects of this Court's expansive interpretation of the workweek. See 328 U.S. at 692-93. Indeed, the opponents of the Portal Act argued that this *de minimis* limitation would ultimately lead to the dismissal of most of the litigation inspired by *Mount Clemens*, making a legislative solution unnecessary. See, *e.g.*, H.R. Rep. No 80-71, at 11-12 (Minority Report) (1947); 93 Cong. Rec. 2300, 2301 (1947) (statements of Sen. Pepper). The majority in Congress, however, was not persuaded. See, *e.g.*, 93 Cong.

Rec. 2300 (1947) (statement of Sen. Cooper). Congress enacted a different solution to distinguish between compensable and non-compensable "work beyond the scheduled working hours," *Mt. Clemens*, 328 U.S. at 692, providing in the Portal Act that – absent a contrary contract or custom – such claims are never compensable outside of the workday. See S. Rep. No. 80-48, at 47; H.R. Rep. No. 80-71, at 2-3.

There is no indication that Congress nevertheless intended for the *de minimis* rule to play a role in defining the workday under the Act.[22] The statute's language excludes from the Act's purview work between first and last "principal activity or activities," without reference to the amount of time devoted to the task. 29 U.S.C. 254. The regulations similarly contain no reference to duration in defining a "principal activity" or the workday. See, *e.g.*, 29 C.F.R. 790.8.

To the contrary, Congress contemplated that a compensable principal activity could be of short duration. As the regulations recount, Senator Cooper, one of the Act's sponsors, and Senator McGrath made this point in a colloquy on the floor – the very same colloquy on which this Court relied in *Steiner*. See 29 C.F.R. 790.8 n.63; 350 U.S. at 256-59. The exchange arose as Senator Cooper was explaining the meaning of "principal activity" by citing the example in the Senate Report of the garment worker distributing piecework prior to her nominal shift. See S. Rep. No. 80-48, at 48. Senator McGrath noticed that the example in the Report stated that the workers engaged in this preparatory activity for thirty minutes. He asked whether this number had any significance in determining whether or not the activity was a principal activity. Senator Cooper said it did not:

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[22] Petitioners do not suggest that the *de minimis* rule has no application to the determination of compensable time, only that it has no bearing on the determination of when the workday starts and ends under the Portal Act.

> Mr. COOPER. No; there was no definite purpose in using the words 'thirty minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.
>
> Mr. McGRATH. Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time.
>
> Mr. COOPER. I should certainly say so, as part of the principal activity.

93 Cong. Rec. 2298 (1947).

There were moreover important practical reasons for Congress to avoid adding a durational qualifier to the definition of a principal activity. Congress knew that a great many workers begin their day with a series of short preparatory activities, like the garment worker in the example above, or the workers in *Steiner*, or a lathe operator who is required to oil or clean his machine before the start of the shift. See S. Rep. No. 80-48, at 48. Viewed in isolation, each of the garment worker or lathe operator's tasks could be considered *de minimis*, especially if the court dissected walking and waiting time for separate consideration. Applying a *de minimis* rule to decide when the workday started in such circumstances would risk depriving such workers of compensation Congress believed they deserved.

2. It is not difficult to identify similar examples from common experience that demonstrate the substantial administrative difficulties that would arise under the theory advanced by the concurrence. Consider, for example, a school custodian who is required to report to the school every morning at 6 a.m. to commence a series of small activities necessary to prepare the school for the start of the day. She may spend a half-hour walking throughout the building, unlocking each classroom and turning on its lights. The actual moments of unlocking the doors and flipping the light switches may take

only a minute or two in total, excluding the walking time. She may then be required to wait for the school's principal to arrive (some days for five minutes, other days for fifteen), before unlocking the main entrances to the school, a process that takes another ten minutes, nine of which are consumed by walking. She must then walk across the school's campus to the maintenance shed to retrieve her cleaning supplies and carry them back to the school to start buffing the floors in the hallway. Under the rule suggested by the concurrence, it is unclear when the custodian's workday began and whether she is entitled to pay for any of this time. Even accepting that unlocking the doors, turning on the lights, and gathering cleaning supplies are "integral and indispensable" to the custodian's principal activities, those activities took only a few minutes when considered apart from the inherent walking and waiting.

As this example illustrates, applying a *de minimis* test to preparatory activities at the beginning of the workday creates a series of difficult questions of application. Should the employer consider the time spent donning each piece of equipment separately or all the pieces taken together? Compare *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 903 (CA9 2003) (considering time taken to don hard hats and safety goggles separately from time taken to don Kevlar gloves and metal-mesh leggings) with *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (CA10 1994) (considering time taken to don all gear collectively). Should donning and doffing time be considered separately or combined? Over the course of a day, a week, a pay period, a year? Must the time be recalculated every day when, for example, the duration of a morning meeting or the time spent gathering tools varies from day to day? And how much time is, in fact, *de minimis*? Five minutes per day? Fifteen? Thirty? These questions would not only have to be answered by each employer in the first instance, but would be subject to dispute by employees and, ultimately, determination by a jury. Cf. *Mt. Clemens*, 328 U.S. at 694 (noting *de minimis* inquiry turned on factual findings).

The uncertainty inherent in a *de minimis* standard ordinarily is mitigated by the very nature of potentially *de minimis* claims, which usually are not worth pursuing or defending against in litigation. However, by making the compensability of a substantial period of time (in this case, the twenty-minute donning and doffing process as a whole, accumulated over time) turn on the compensability of an arguably *de minimis* amount of time (the time spent changing) the rule proposed by the concurrence would sufficiently raise the stakes over the *de minimis* determination to make litigation under the standard worthwhile and, therefore, likely.

Congress acted to avoid such confusion and confrontation by creating bright lines in both the FLSA and the Portal Act, requiring overtime for work in excess of forty hours per week, 29 U.S.C. 207, but excusing employers from counting activities that occur before the first, or after the last, principal activity of the day, *id.* § 254. Indeed, Congress rejected the suggestion that it legislatively adopt a *de minimis* standard in response to *Mount Clemens* precisely because it viewed such a rule as unadministrable. See 93 Cong. Rec. 2300 (1947) ("[I]nstead of reducing or eliminating this litigation, it would have been increased, as we believe, tenfold.") (statement of Sen. Cooper). There is no ground for introducing a new element of ambiguity and unfairness into the statutory scheme.

B. No *De Minimis* Questions Arise In This Case Because The Walking And Waiting Here Are Not *De Minimis*.

In any event, there is no need for this Court to wade into this area to decide this case, for the time at issue here is not *de minimis* under any commonly accepted standard. The Department of Labor regulations provide that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." 29 C.F.R. 785.47. Thus, to qualify as *de minimis*, an activity must meet three criteria: (1) the amount of time must be "in-

substantial or insignificant"; (2) the activity must occur "beyond the scheduled working hours"; and (3) it must be administratively impracticable to record the time. None of these criteria is met in this case.[23]

1. The time involved in this case is not insubstantial. The donning and doffing process as a whole (including walking and waiting) took approximately twenty minutes per day because of the inefficient distribution process maintained by respondent. Such an expenditure of time is not *de minimis*. See, *e.g.*, *Steiner* v. *Mitchell*, 350 U.S. 247, 251 (1956) (finding compensable thirty minutes per day of clothes-changing and showers).[24]

The jury verdict below is not to the contrary. Because the district court concluded that the walking and waiting elements of the donning and doffing process were noncompensable as a matter of law, the jury was never asked to examine the evidence regarding the length of time it took petitioners to complete the donning and doffing process as a whole. See Pet. App. 13a-34a. Instead, the jury examined only the amount of time spent actually putting on and taking off the equipment. See *id.* 5a.

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[23] Similar standards have been applied by the lower courts, although often as factors to be considered rather than a three-part test. See *Lindow* v. *United States*, 738 F.2d 1057, 1062 (CA9 1984) (collecting cases); see also, *e.g.*, *Brock* v. *City of Cincinnati*, 236 F.3d 793, 804 (CA6 2001); *Kosakow* v. *New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 719 (CA2 2001); *Reich* v. *Monfort, Inc.*, 144 F.3d 1329, 1333-34 (CA10 1998); *Nardone* v. *General Motors, Inc.*, 207 F. Supp. 336, 340 (D.N.J. 1962).

[24] See also, *e.g.*, *Kosakow*, 274 F.3d at 719 (fifteen minutes per day not *de minimis*); *Monfort, Inc.*, 144 F.3d at 1334 (ten minutes per day by workers at meat processing plant were not *de minimis*); *Metzler*, 127 F.3d at 965 (district court did not abuse discretion by finding fourteen minutes per day at meat processing plant were not *de minimis*).

There is no basis for excluding the walking and waiting time from the *de minimis* analysis. As respondents acknowledged to the First Circuit, any activity can be analytically subdivided to the point where every component is *de minimis*, see Supp. Br. of Barber Foods 5-6, including petitioners' basic chicken processing duties and the clothes-changing found compensable in *Steiner*.[25] But the workday must be "computed in light of the realities of the industrial world," *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), and the reality in this case is that respondent has organized its donning and doffing process such that walking and waiting are a necessary and inextricable component of the process. See *supra* at 37-38. Even if it were appropriate to exclude compensation for such a process when it took a very short time, there is no basis for depriving petitioners of compensation for a lengthy process simply because some of its component parts can be completed quickly.

In any event, even if this Court considered only the time spent actually putting on and taking off the clothing and equipment, the time would not be *de minimis* when considered in light of its regular repetition. While spending a few minutes every now and again might be *de minimis*, the imposition of unpaid extra duties becomes substantial when repeated every working day. Even two minutes of daily unpaid time amounts to more than a full day of uncompensated work every year. There is no doubt that an employer would be liable for requiring employees to work without pay the last workday of every year. The injury to the employee, and benefit to the employer, is no different if the work is spread out over the course of a year. Courts have therefore looked to the total amount of a worker's time that has gone uncompensated in determining whether the worker's claim is *de mini-*

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[25] Thus, for example, the clothes-changing and showering in *Steiner* could be divided into smaller tasks – retrieving clothes, removing clothes, entering the shower, etc. – each of which involved *de minimis* time and would therefore be non-compensable.

mis, rather than looking exclusively to the size of the increments in which that claim accrued. See *Lindow* v. *United States*, 738 F.2d 1057, 1062 (CA9 1984) (collecting cases).

2. Even if this Court considered in isolation the time spent each day actually donning and doffing the equipment, and found it to be insubstantial, the *de minimis* rule would still not apply because the time is part of petitioners' regularly scheduled work time. To protect the integrity of the bright-line rules established in the Act, and to minimize the risk of strategic behavior by employers, the *de minimis* rule does not protect those who "arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him." 29 C.F.R. 785.47. Just as an employer may not set its hourly rate at five cents below the minimum wage and claim immunity under the *de minimis* rule, an employer may not schedule workers for forty hours and ten minutes per week, but then pay them only for forty hours. After all, the FLSA does not require employers to pay "*about* $5.15 an hour, *give or take*," or mandate overtime for any work above "forty *or so* hours per week." In the same vein, respondent may not structure its operations to require petitioners to routinely work more than forty hours per week by refusing to count donning and doffing time, even if that time is short.

3. Finally, respondent could easily record the amount of time petitioners spend each day in the donning and doffing process in a number of ways, including by simply moving the time clocks from the entrance to the factory floor to the entrance to the donning area.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

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APPENDIX

1. Part 790 and Title 29 of the Code of Federal Regulations provides, in relevant part:

§ 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 4, l947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,2 the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three Acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these Acts.[2]

For the sake of brevity, this Act is referred to in the following discussion as the Portal Act.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in

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[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes (61 Stat. 84; 29 U.S.C., Sup., 251 et seq.).

[2] 52 Stat. 1060, as amended; *29 U.S.C. 201* et seq. In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this Act, see footnote 17.

relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the Act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he makes these conclusions known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administration believes to be correct[5] and

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[3] Sections 790.23 through 790.29 in the prior edition of this part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

[4] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; Portal-to-Portal Act, sec. 10.

[5] 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

which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in[6] enforcement of the law will seek to apply it. As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained in this part.

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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.

[6] *Skidmore* v. *Swift & Co.*, 323 U.S. 134. See also *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *American Trucking Assn.*, 310 U.S. 534; *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572.

§ 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy.[9]

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[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provision of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, "employer," "employee," and "wage", when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter Act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12.

Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 93 Cong. Rec. 2098; colloquy between Senators Donnell and Ferguson, 93 Cong. Rec. 2127; statement of Representative Gwynne, 93 Cong. Rec. 1557.

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in statement of Senator Donnell, 93 Cong. Rec. 2177; see also statement of Senator Morse, 93 Cong. Rec. 2274; statement of Representative Walter, 93 Cong. Rec. 4389.

The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act"[11] that it "protects the legitimate claims" under that Act,[12] and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act."[13] It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor

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[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 93 Cong. Rec. 4390; statement of Senator Wiley, 93 Cong. Rec. 4269, 4270; statement of Representative Gwynne, 93 Cong. Rec. 1572; statements of Senator Donnell, 93 Cong. Rec. 2133-2135, 2176-2178; statement of Representative Robison, 93 Cong. Rec. 1499; Message of the President to Congress, May 14, 1947 on approval of the Act (93 Cong. Rec. 5281).

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 and 4371. See also statement of Senator Cooper, 93 Cong. Rec. 2295; statement of Representative Robsion, 93 Cong. Rec. 1499, 1500.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4391. See also statement of Representative Keating, 93 Cong. Rec. 1512.

[13] Statement of Senator Cooper, 93 Cong. Rec. 2300; see also statements of Senator Donnell, 93 Cong. Rec. 2361, 2362, 2364; statements of Representatives Walter and Robsion, 93 Cong. Rec. 1496, 1498.

Standards Act are to be given a liberal interpretation[14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.[15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is affected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of "hot" goods produced by employees not paid in accordance with the Act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the Act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in this part in connection with the discussion of specific provisions of the 1947 Act.

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[14] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *Rosenwasser*, 323 U.S. 360; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697.

[15] See *Phillips Co.* v. *Walling*, 324 U.S. 490; *Walling* v. *General Industries Co.*, 330 U.S. 545.

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

> . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating

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[26] The full text of section 4 of the Act is set forth in § 790.3.

[27] See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before

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[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

[32] Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296-2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297-2298. See also Senate Report, p. 48.

[33] See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal

[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the

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[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in § § 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the

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[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also § § 790.4 and 790.5.

workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor

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[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

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[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity

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[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include 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.[49]

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[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or

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[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

[53] See § § 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed

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[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commissioner of Internal Revenue*, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-134; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in

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[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] 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.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related

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[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[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. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

2. Part 785 and Title 29 of the Code of Federal Regulations provides, in relevant part:

SUBPART A

GENERAL CONSIDERATIONS

§ 785.1 Introductory statement.

Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage. Section 7 of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, or to any area or Regional Office of the Division.

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[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

SUBPART B
PRINCIPLES FOR DETERMINATION
OF HOURS WORKED

§ 785.9 Statutory exemptions.

(a) The Portal-to-Portal Act. The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar "preliminary" and "postliminary" activities performed "prior" or "subsequent" to the "workday" that are not made compensable by contract, custom, or practice. It should be noted that "preliminary" activities do not include "principal" activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the "workday". "Workday" in general, means the period between "the time on any particular workday at which such employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his "principal" activities. With respect to time spent in any "preliminary" or "postliminary" activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The "preliminary" or "postliminary" activity in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (*Galvin* v. *National Biscuit Co*., 82

F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F. 2d 963 (C.A. 2, 1949))

(b) Section 3(o) of the Fair Labor Standards Act. Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

SUBPART C
APPLICATION OF PRINCIPLES
WAITING TIME

§ 785.14 General.

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (*Skidmore* v. *Swift*, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (*Central Mo. Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8, 1948))

§ 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his

employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: *Skidmore* v. *Swift*, 323 U.S. 134, 137 (1944); *Wright* v. *Carrigg*, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); *Mitchell* v. *Wigger*, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); *Mitchell* v. *Nicholson*, 179 F. Supp, 292,14 W.H. Cases 487 (W.D.N.C. 1959))

§ 785.16 Off duty.

(a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) Truck drivers; specific examples. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and

is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore* v. *Swift*, 323 U.S. 134, 137 (1944); *Walling* v. *Dunbar Transfer & Storage*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford* v. *Chapman*, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson* v. *Daugherty*, 40 Supp. 279 (D. Md. 1941)).

§ 785.17 On-call time.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (*Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Handler* v. *Thrasher*, 191 F. 2d 120 (C.A. 10, 1951); *Walling* v. *Bank of Waynesboro, Georgia*, 61 F. Supp. 384 (S.D. Ga. 1945))

SUBPART C
APPLICATION OF PRINCIPLES
REST AND MEAL PERIODS

§ 785.18 Rest.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell* v. *Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard* v. *Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945))

§ 785.19 Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co*., 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson* v. *Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co*., 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

SUBPART C

APPLICATION OF PRINCIPLES

PREPARATORY AND CONCLUDING ACTIVITIES

§ 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, § 790.8 (b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

> (1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
>
> (2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(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, 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. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

§ 785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner* v. *Mitchell*, 350 U.S. 247 (1956).) In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (*Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

§ 785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of

clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and part 790 of this chapter.

SUBPART C
APPLICATION OF PRINCIPLES
TRAVELTIME

§ 785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "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 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." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in computing hours worked. However, ordinary travel from home to work (see § 785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See *Tennessee Coal, Iron & RR. Co.* v. *Musecoda Local*, 321 U.S. 590 (1946); *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 690 (1946); *Walling* v.

Anaconda Copper Mining Co., 66 F. Supp. 913 (D. Mont. (1946).

§ 785.35 Home to work; ordinary situation.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (*Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. A. 10, 1944))

SUBPART D

RECORDING WORKING TIME

§ 785.47 Where records show insubstantial or insignificant periods of time.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working

hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co*., 328 U.S. 680 (1946)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $ 1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that "To disregard workweeks for which less than a dollar is due will produce capricious and unfair results." *Hawkins* v. *E. I. du Pont de Nemours & Co*., 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

3. Interpretative Bulletin No. 13,[*] provides in relevant part :

INTERPRETATIVE BULLETIN NO. 13

Determination of Hours for Which Employees Are Entitled to Compensation Under the Fair Labor Standards Act of 1938

Originally issued July, 1939. Paragraph 15 revised October 1939 and October 1940. Revised November 1940.

General

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of Sections 6 and 7 of the Act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the Act, unless he is directed otherwise by the authoritative rulings of the courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin 4 is not within the scope of this bulletin.

2. The Act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is

[*] As set forth in Bureau of National Affairs, Wage and Hour Manual 172-173 (1944).

suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include in the ordinary case all hours from the beginning of the workday to its end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.