No. 03-1238

In the Supreme Court of the United States

IBP, INC., PETITIONER

v.

GABRIEL ALVAREZ, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The Portal-to-Portal Act of 1947 excludes from compensation "walking * * * to and from the actual place of performance of the [employee's] principal activity or activities," but only when the walking occurs "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). The question presented is whether the time employees must spend walking between the place where they don and doff required protective clothing and their work stations falls within that Portal Act exclusion when the donning and doffing are integral and indispensable parts of the employees' principal work activities.

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the compensability under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947 (Portal Act), 29 U.S.C. 251 *et seq.*, of time that employees must spend walking between the place where they don and doff required protective gear and their work stations when the donning and doffing are integral and indispensable parts of the employees' principal work activities. The United States has a substantial interest in the resolution of that question. The Secretary of Labor is responsible for enforcing the FLSA as amended by the Portal Act. 29 U.S.C. 204, 211, 216(c), 259. Consistent with that responsibility, the Department of Labor has issued regulations that address the compensability of walking time. See, *e.g.*, 29 C.F.R. 785.9, 785.34, 785.38, 790.6-790.8.

At the Court's invitation, the United States filed a brief at the petition stage of this case. While the United States suggested that prudential considerations counseled against review of the walking-time issue in this case, it argued that the issue warranted review in an appropriate case, and noted that the issue was presented in *Tum* v. *Barber Foods*, cert. granted, 125 S. Ct. 1295 (2005). The Court granted certiorari in *Tum* and consolidated that case with this one. The United States has filed an amicus brief in *Tum* arguing, *inter alia*, that the time that employees must spend walking between the place where they don and doff required protective gear and their work stations is compensable when the donning and doffing are integral and indispensable parts of the employees' principal work activities.

STATEMENT

1. The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees a minimum wage for the hours they work. 29 U.S.C. 206. The FLSA also generally requires employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207. In calculating hours worked for minimum wage and overtime purposes, the FLSA generally includes all time spent on "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." *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Compensable time thus generally includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946).

Applying those general principles, the Court ruled that activities that are performed before and after the employee's

normal shift can be compensable work. In *Tennessee Coal*, the Court held that underground travel between a mine's portal and the employee's work place within the mine is compensable work. 321 U.S. at 598. In *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMW*, 325 U.S. 161, 163-166 (1945), the Court reaffirmed that conclusion. And in *Mt. Clemens*, 328 U.S. at 690-692, the Court held that walking from an employer's time clock to the employee's place of work and back is compensable work. *Mt. Clemens* also held that certain pre-shift activities, such as greasing arms and sharpening tools, are compensable work. *Id.* at 692-693.

Congress viewed *Mt. Clemens* as "creating wholly unexpected liabilities, immense in amount and retroactive in operation," 29 U.S.C. 251(a), and it enacted the Portal Act to address that "emergency." 29 U.S.C. 251(b). See *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956). For claims arising before the date of the Act, the Portal Act completely eliminated employer liability for failure to pay minimum wage and overtime with respect to work that was not compensable by contract or custom. 29 U.S.C. 252.

Congress took a different approach to claims arising after the date of the Act. For those claims, Congress provided that, absent contract or custom, no employer shall be liable for failure to pay minimum wages or overtime for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subse-

> quent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

Thus, absent contract or custom, the Portal Act excludes from compensation travel and other preliminary and postliminary activities when they occur before employees begin their first principal activity or after they conclude their last principal activity of the day. Travel and other activities that occur between the first and last principal activities of a workday, however, are not excluded from compensation by the Portal Act.

In *Steiner*, the Court held that time employees were required to spend changing clothes and showering before and after their shifts was not excluded from compensation under the Portal Act as "preliminary" and "postliminary" activity because it fell within the category of "principal activities." 350 U.S. at 252-253. The Court reasoned that the term "principal activity or activities" in the Portal Act encompasses all activities that are "an integral and indispensable part of the principal activities" an employee is hired to perform, *id.* at 253 (citation omitted), and that the required clothes-changing and showering at issue were an integral and indispensable part of the employees' principal employment activities. *Id.* at 256.

The Department of Labor has issued regulations construing the provisions of the Portal Act. The regulations provide that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to include all time within "the period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b). The regulations define the term "principal activities" to en-

compass "all activities which are an integral part of a principal activity," 29 C.F.R. 790.8(b), including "changing clothes on the employer's premises at the beginning and end of the workday," when the employee "cannot perform his principal activities without putting on [such] clothes." 29 C.F.R. 790.8(c).

2. Petitioner IBP, Inc. operates a meat packing plant in Pasco, Washington. Pet. App. 2a-3a. Employees at the plant slaughter and process meat. *Id.* at 3a. Those jobs are among the most dangerous in the United States. *Id.* at 2a.

Petitioner requires its employees to wear protective gear when performing their jobs. Pet. App. 4a n.2. All employees must wear outer garments, hardhats, hair nets, ear plugs, gloves, sleeves, aprons, leggings, and boots. *Ibid.* Employees who use knives must also wear chain-link metal aprons, leggings, vests, sleeves, and gloves, plexiglass arm guards, Kevlar gloves, and puncture-resistant protective sleeves. *Ibid.* Under petitioner's work rules, employees must gather their assigned protective gear, don the gear in a plant locker room, and prepare work tools before entering the slaughter or processing floors. *Id.* at 3a. After completing their shift on the floor, employees must clean their tools, doff their gear, and store the gear at a plant locker room. *Id.* at 3a-4a. Petitioner pays its employees for the time period that begins with the processing of the first piece of meat and ends with the processing of the last piece of meat. *Id.* at 6a.

3. Respondents work in the slaughter and processing divisions of petitioner's Pasco plant. Pet. App. 6a. They filed suit against petitioner under the FLSA and state law, challenging petitioner's failure to pay them for the time spent donning and doffing protective equipment and walking from the locker room to their work stations and back. *Ibid.*

After conducting a bench trial, the district court ruled in respondents' favor on most issues. Pet. App. 35a-82a. The

court found that the donning and doffing of unique protective gear, such as mesh gloves, metal aprons, leggings, vests, plexiglass arm guards, and protective sleeves are "integral and indispensable" parts of respondents' principal activities and are therefore compensable work under the FLSA. *Id.* at 54a. The court further determined that a reasonable amount of time walking from the locker room to the work station and back is compensable. *Id.* at 54a. The district court rejected petitioner's contention that such walking time is non-compensable under the Portal Act. *Id.* at 53a-54a. The court reasoned that donning protective gear begins the workday and doffing that gear ends it, and that the Portal Act's exclusion applies only to walking time that occurs outside the workday. *Ibid.*[1]

4. The court of appeals affirmed the district court's FLSA rulings. Pet. App. 1a-34a. The court of appeals held that donning and doffing of protective gear are "integral and indispensable" parts of respondents' principal activities and are therefore work that is compensable under the FLSA. *Id.* at 11.

The court also held that respondents are entitled to compensation for "the reasonable walking time from the locker to work station and back * * * for employees required to don and doff compensable personal protective equipment." Pet. App. 18a. The court reasoned that respondents' workday begins when they don required safety

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[1] The district court rejected petitioner's argument that the donning and doffing of unique protective gear are non-compensable as a result of collective bargaining pursuant to the FLSA's clothes-changing exclusion in 29 U.S.C. 203(*o*). Pet. App. 64a-65a. And it determined that the donning and doffing of "non-unique protective equipment"—hardhats, earplugs, frocks, safety goggles, hair nets, and boots—are not compensable in part because the "time it takes to complete such work is de minimis as a matter of law." *Id.* at 54a & n.6. The court of appeals affirmed both rulings, *id.* at 13a-17a, and they are not at issue here.

gear, that walking from the locker room to the work station and back occurs during the workday, and that the Portal Act does not exclude from compensation walking that occurs during the workday. *Id.* at 17a-18a.

SUMMARY OF ARGUMENT

The time that petitioner's employees must spend walking between the place where they don and doff required protective gear and their work stations is compensable. Under the FLSA and the Portal Act, walking time is compensable when it occurs during the workday. Because the workday of petitioner's employees begins when they don protective gear and ends when they doff that gear, the walking in between occurs during the workday and is compensable.

A. The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946). The Portal Act creates a limited exception to that general rule, excluding from compensation travel time and "preliminary" and "postliminary" activities, but only when they occur outside the workday—either before an employee "commences" or after he "ceases" his "principal activity or activities." 29 U.S.C. 254(a).

In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the Court held that the donning and doffing of clothing are "principal activities" within the meaning of the Portal Act when they "are 'an integral and indispensable part of the principal activities.'" *Id.* at 253 (citation omitted). Under *Steiner*'s interpretation of the Portal Act, when donning and doffing of required protective gear are integral and indispensable parts of the employees' principal activities, walking that occurs *after the commencement of donning and before the completion of doffing* occurs during the workday. Such post-

donning and pre-doffing walking therefore falls outside the Portal Act and is compensable. As both courts below concluded, here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal work activities. Accordingly, the walking that occurs after the commencement of donning and before the completion of doffing is compensable.

B. Petitioner argues that *Steiner* did not hold that the term "principal activities" includes integral and indispensable activities. That argument ignores the dispositive language from *Steiner* as well as the legislative history and agency interpretation that underlie the Court's express and unambiguous holding.

C. The Department of Labor's longstanding regulations confirm that the walking time at issue is compensable. Those regulations provide that the Portal Act "ha[s] no application" to walking that occurs during the "workday," *i.e.*, during the time period "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." 29 C.F.R. 785.38, 790.6, 790.7(c). Because the walking time at issue occurs during the workday, it is compensable under the regulations.

D. The Secretary's interpretation is consistent with the purposes of the Portal Act. That Act's principal purpose was to remedy the large and unexpected retroactive liability created by the Court's holding in *Mt. Clemens* that walking from the time clock to an employee's work station and certain other preliminary activities were compensable. Congress fully addressed that emergency by enacting a purely retrospective provision that relieved employers of that liability for activity occurring before enactment of the Portal Act.

For prospective claims, Congress sought to preserve the existing law that had required compensation for all activities

during the workday and had included within the workday all activities that are integral and indispensable to an employee's principal work activities. The only way in which Congress sought to cut back on existing law was by excluding from compensation walking and certain other activities that take place before the workday begins and after it ends. Because the post-donning and pre-doffing time at issue here occurs during the workday, the Secretary's position that such walking time is compensable is consistent with the purposes of the Portal Act.

E. A holding that the walking time at issue is compensable does not lead to anomalous results. The supposed anomalies identified by petitioner are simply the consequence of the FLSA's allocation of authority to the employer to determine when and where its employees will perform their principal activities, and the Portal Act's bright-line rule that an employee's workday begins with his first principal activity.

ARGUMENT

Under the FLSA and the Portal Act, walking time is compensable when it occurs during the workday. The workday of petitioner's employees begins when they don protective gear in the locker room and it ends when they doff and store their gear in the locker room. Accordingly, as the court of appeals correctly held, the time that respondents must spend walking from the locker room to their work stations and back occurs during the workday and is compensable.

A. The Walking Time At Issue Is Compensable Under The Language Of The Portal Act As Interpreted In *Steiner*

1. The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed

workplace." *Anderson* v. *Mt. Clemens*, 328 U.S. 680, 690-691 (1946). That rule reflects Congress's judgment that an employee should generally receive compensation for all time that he is under the direction or control of the employer. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

The Portal Act creates a limited exception to that general rule. It excludes from compensation "walking" to and from "the actual place of performance" of an employee's principal activity or activities, and other "preliminary" and "postliminary" activities, but only when they occur outside the "workday"—"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). Walking that occurs during the workday—after the employee commences his first principal activity and before he concludes his last principal activity—is not affected by the Portal Act. Instead, such walking is compensable in accordance with the general rule that compensation is required for all time the employee is required to be "on the employer's premises, on duty or at a prescribed workplace." *Mt. Clemens*, 328 U.S. at 691.

2. Because the Portal Act only excludes from compensation walking that occurs before an employee's first principal activity and after the employee's last principal activity, the scope of the Portal Act's exclusion depends on the meaning of the term "principal activity." The Court addressed the meaning of that term in *Steiner*. In that case, the Court held that the term "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." 350 U.S. at 252-253 (citation omitted). Based on that interpretation, the Court held that clothes changing and showering that are integral and indispensable parts of an employee's

principal job activities are themselves encompassed within the category of principal activities and therefore fall outside the scope of the Portal Act's exclusion for preliminary and postliminary activity. *Id.* at 256.

3. Applying the terms of the Portal Act as interpreted in *Steiner* to the circumstances of this case, the time petitioner's employees spend walking between the locker rooms where they don and doff protective gear and their work stations is compensable. In order to perform their jobs, petitioner's employees are required by petitioner to don and doff protective gear on petitioner's premises. Pet. App. 3a-4a & n.2. Accordingly, as the court of appeals determined, here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal job activities and therefore qualify as compensable "principal activities" within the meaning of the Portal Act. See *id.* at 11a-13a.

Because petitioner's employees' first act integral and indispensable to their "principal activity" is donning their protective gear and their last such act is doffing that gear, those activities mark the boundaries of their "workday" and determine the scope of the Portal Act's walking-time exclusion. 29 U.S.C. 254(a). Thus, the walk from the plant entrance to the locker room at the beginning of the day is excluded from compensation because it occurs "prior to the time" at which petitioner's employees "commence[]" the "principal activity" of donning. *Ibid.* Similarly, the walk from the locker room to the plant exit at the end of the day is excluded from compensation because it occurs "subsequent to the time" at which petitioner's employees "cease[]" their "principal activity" of doffing. *Ibid.* In contrast, the walk from the locker room to the work station at the beginning of the day and the reverse walk at the end of the day occur *after* petitioner's employees "commence[] the principal activity" of donning and *before* they "cease[] their "principal

activity" of doffing. *Ibid.* Those walks therefore occur *during* the "workday" and are compensable. *Ibid.*

B. Petitioner's Efforts To Show That *Steiner* Is Not Controlling Are Unpersuasive

1. Petitioner does not challenge the court of appeals' determination that the donning and doffing of protective gear are integral and indispensable parts of its employees' principal activities. Instead, relying on a dictionary definition of the term "principal," petitioner argues that the term "principal activity or activities" refers to the "the most important or consequential task (or tasks) the employee was hired to accomplish." Pet. Br. 15. Petitioner further argues that integral and indispensable donning and doffing do not fall within that definition. *Ibid.*

Petitioner's resort to a dictionary definition is unavailing, because the Court authoritatively construed the term "principal activity or activities" in *Steiner* to encompass activities that are integral and indispensable parts of principal activities. Once the Court authoritatively construes a statute, that interpretation becomes "an integral part of the statute" that "should be accepted and followed." *Gulf, C. & S. Ry.* v. *Moser*, 275 U.S. 133, 136 (1927); see *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation."). In the intervening fifty years since *Steiner*, neither Congress nor this Court has altered *Steiner*'s interpretation of the term "principal activity or activities." Petitioner offers no basis for revisiting that interpretation now.

2. Relying on highly selective quotations from the Court's opinion, petitioner claims that *Steiner* did not hold that the term "principal activity or activities" includes activities that are integral and indispensable parts of an employee's principal activities, but instead held only that the terms "preliminary" and postliminary" in 29 U.S.C. 254(a)(2)

do not include integral and indispensable activities. Pet. Br. 17-18. In fact, however, *Steiner* expressly and unambiguously held that the term "principal activity or activities" includes integral and indispensable activities.

The *Steiner* Court posed the question presented as "whether workers in a battery plant must be paid *as a part of their 'principal' activities* for the time incident to changing clothes at the beginning of the shift and showering at the end." 350 U.S. at 248 (emphasis added). The Court then answered that question by squarely holding that it "agreed" with the "conclusion" of the court of appeals in that case that "the term 'principal activity or activities' in Section 4 *embraces all activities which are 'an integral and indispensable part of the principal activities*,' and that the activities in question fall within this category." *Id.* at 252-253 (emphasis added). See *id.* at 255 (noting that the "clear implication" of Section 3(*o*) of the Act, 29 U.S.C. 203(o), is "that clothes changing and washing * * * are * * * a *part of the principal activity*" unless excluded under a collective bargaining agreement) (emphasis added). The Court's opinion in *Steiner* thus squarely forecloses the interpretive approach advocated by petitioner.

The Court based its unambiguous holding to that effect on two equally unambiguous sources. First, the Court found "persuasive" Senator Cooper's colloquy with other Senators, 350 U.S. at 254, and took the unusual step of attaching it as an appendix to its opinion. *Id.* at 256-259. In that colloquy, Senator Cooper stated that "[w]e believe that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion 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." *Id.* at 256-257.

Senator Cooper also quoted the Senate Report's statement that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof." *Id.* at 257. And Senator Cooper further stated that "in accordance with our intention as to the definition of 'principal activity,' if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity." *Id.* at 258.

Second, the Court based its interpretation on a regulation issued by the Department of Labor. See 350 U.S. at 255 & n.9. That regulation confirms that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," 29 C.F.R. 790.8(b), including "changing clothes on the employer's premises" if that activity is an integral part of the employee's principal activity, 29 C.F.R. 790.8(c).

Remarkably, petitioner does not even mention, much less attempt to deal with, the dispositive language from *Steiner* interpreting the term "principal activity or activities" to encompass integral and indispensable activities. Nor does petitioner acknowledge the unambiguous legislative history and agency interpretation to the same effect that underlie the Court's holding. Petitioner instead argues that *Steiner* could not have held that integral and indispensable donning and doffing were principal activities because the Portal Act refers to principal activities that commence and cease at an "actual place of performance" of such activities, and the actual place of performance of the employees' principal activities in *Steiner* was the production floor, not the locker room. Pet. Br. 18-19. But the employer made that very argument in *Steiner*, see 350 U.S. at 251-252, and the Court squarely rejected it, holding that integral and indispensable clothes changing is a compensable principal activity whether it occurs "on or off the production floor." *Id.* at 256. Con-

trary to petitioner's assertion, moreover, *Steiner*'s holding that integral and indispensable donning and doffing are principal activities does not mean that the principal activities of the employees in that case occurred at the locker room *rather than* the production floor. Instead, it means that the employees' principal activities were viewed at a sufficiently high level of generality that they spanned *both* the locker room and the production floor. Petitioner's argument is thus unfounded.

Petitioner ultimately appears to recognize that the term "principal activity or activities" encompasses integral and indispensable activities because it concedes that the Court held in *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), the companion case to *Steiner*, that "knife sharpening is a compensable 'principal' activity of butchers in [a] meatpacking plant." Pet. Br. 17 n.7. The Court held that knife sharpening was a principal activity only because it was "an integral part of and indispensable to the various butchering activities for which [the employees] were principally employed[.]" 350 U.S. at 263. Just as knife sharpening that is integral and indispensable to a principal activity is itself encompassed within the category of "principal activities," donning and doffing of protective gear likewise fall within that category when they are integral and indispensable to a principal activity. Petitioner offers no basis for distinguishing between the two.

3. Petitioner argues (Br. 18) that even if integral and indispensable donning and doffing are "principal activities" within the meaning of the Portal Act, it does not follow that they can start and end the workday. Petitioner is mistaken. Under the terms of the Portal Act, the "workday" begins when an employee "commences" his "principal activity or activities," and it ends when an employee "ceases" his "principal activity or activities." 29 U.S.C. 254(a). Thus, once it is accepted that integral and indispensable donning and doffing

are themselves "principal activities," it necessarily follows that donning at the beginning of the day "commences" the employee's "principal activities" and therefore begins the "workday," and that doffing at the end of the day "ceases" the employee's "principal activities" and therefore ends the "workday." *Ibid.*

The Senate Report accompanying the Portal Act confirms that conclusion. That Report states: "It will be observed that the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[] the beginning and end of his workday." S. Rep. No. 48, 80th Cong., 1st Sess. 48 (1947). In the very next sentence, the Report states: "The term 'principal activity or activities' includes all activities which are an integral part thereof." *Ibid.* Those two sentences confirm that integral and indispensable donning and doffing will start and end the workday.

Petitioner argues (Br. 18) that even if integral and indispensable donning and doffing are principal activities that begin and end the workday, the walking time at issue nonetheless falls within the Portal Act's exclusion for "walking * * * to and from the actual place of performance of the [employee's] principal activity or activities." 29 U.S.C. 254(a). Once again, petitioner is mistaken. The Portal Act's walking-time exclusion applies only when the walking occurs "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, [his] principal activity or activities." 29 U.S.C. 254. Once it is accepted that integral and indispensable donning and doffing are principal activities that begin and end the workday, it necessarily follows that those activities occur in the actual place of performance of principal activities and that walking in between such places does not occur "either prior to the time" at which an employee "commences," or "subsequent to the

time" at which the employee "ceases," his "principal activity or activities." *Ibid.* Such walking therefore falls outside the Portal Act exclusion and is compensable.

4. Finally, petitioner argues that 29 U.S.C. 254(a) excludes from compensation "*all* pre- and post-shift walking." Pet. Br. 21; see *id.* at 24. The terms "pre-and post-shift" walking, however, do not appear anywhere in the text of Section 254(a). Moreover, the whole point of Section 254(a) is to determine the relevant compensable time period and when it begins and ends. Certainly the employer's conception of what constitutes "pre-shift" and "post-shift" walking is no more controlling than what the employees label the shift. Regardless of the employer's designation of the "shifts," the relevant statutory inquiry marks the beginning of the compensable workday from the first act integral and indispensable to an employee's principal activities and ends the compensable workday with the last such act. When, as here, disputed walking time occurs after the first principal activity and before the last principal activity, it is not subject to the Portal Act and is compensable.

In arguing otherwise, petitioner erroneously relies (Br. 19) on the statement in *Steiner* that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and are not specifically excluded by Section 4(a)(1)*." 350 U.S. at 256 (emphasis added). Rather than recognizing a sweeping pre- and post-shift walking exemption that has no textual anchor, the emphasized part of that statement simply means that walking that precedes the first principal activity or follows the last principal activity cannot itself be a compensable principal activity based on the theory that it is an integral and indispensable part of those principal activities. As the

Court's statement reflects, 29 U.S.C. 254(a)(1) absolutely excludes such walking from the category of principal activities, and that absolute exclusion cannot be overcome based on the theory that the walking alone is an integral and indispensable part of the employees' first and last principal activities. See 93 Cong. Rec. 2297 (1947) (Sen. Cooper) ("[w]alking, riding, or traveling time to the place where the principal activities are performed has been eliminated as a principal activity"); *id.* at 2299 (Sen. Cooper) (while the term "principal activity" embraces activities that are "indispensable to the performance of productive work," the walking, traveling, and riding covered by the Portal Act "are not an integral part of the employment for which the worker is employed").

In this case, however, the award of compensation for walking time is not based on the mistaken view that walking that precedes the first principal activity and follows the last principal activity is compensable as an integral and indispensable part of those principal activities. Instead, the court of appeals awarded compensation only for walking time that occurs *after* petitioner's employees commence their first principal activity of donning protective gear and *before* they cease their last principal activity of doffing that gear. The text of the Portal Act as interpreted in *Steiner* makes clear that such walking time is compensable, and nothing in the statement relied on by petitioner suggests otherwise.

C. The Department Of Labor's Regulations Confirm The Compensability Of The Walking Time At Issue Here

1. The Department of Labor has issued interpretive regulations that set forth principles for determining the number of hours worked, 29 C.F.R. Pt. 785, and address the effect of the Portal-to-Portal Act on that computation. 29 C.F.R. Pt. 790. The hours-worked regulations have their origin in Interpretive Bulletin No. 13, which was originally

issued in 1939 (shortly after enactment of the FLSA), and which was in effect when Congress enacted the Portal Act. The Portal Act regulations were originally issued in 1947, immediately after enactment of that Act. See 12 Fed. Reg. 7655 (1947). Those contemporaneous and longstanding regulations, which have been left undisturbed by Congress in its numerous subsequent reexaminations of the FLSA and which reflect the considered and detailed views of the agency charged with enforcing the FLSA and the Portal Act, are entitled to deference. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002) (*Chevron* deference appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time"); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").[2]

The Department's regulations reinforce the conclusion that walking is compensable when it occurs after the commencement and before the completion of compensable donning and doffing. The hours-worked regulations explain that compensable work generally includes all time "during which an employee is necessarily required to be on the

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[2] In 1949, moreover, as this Court indicated in *Steiner*, Congress amended the FLSA but specifically retained the Portal Act regulations, without expressing any disagreement with the provisions relevant here. See 350 U.S. at 255 & n.8; Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920. Indeed, petitioner concedes (Br. 31) that the Department's regulations interpreting the Portal Act were "adopted shortly after passage of the Portal Act and subsequently ratified by Congress."

employer's premises, on duty or at a prescribed work place." 29 C.F.R. 785.7 (citation omitted). That general rule applies not only to the time that an employee is involved in productive work, but also to required waiting time, 29 C.F.R. 785.7, 785.14-785.17, normal rest periods, 29 C.F.R. 785.18, and travel during the course of the workday. 29 C.F.R. 785.38. The hours-worked regulations except from that general rule and treat as non-compensable only "bona fide meal periods," 29 C.F.R. 785.19, and "[p]eriods 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." 29 C.F.R. 785.16.

The Portal Act regulations reaffirm that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to "include[] *all time* within" the "period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b) (emphasis added). Thus, "[p]eriods 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 Act had not been enacted." 29 C.F.R. 790.6(a).

The regulations specifically address the effect of that rule on the compensability of travel. They explain that time spent walking from the plant gate to the place where the employee performs his principal activity is excluded by the Portal Act from the category of "principal activities" and is not compensable. 29 C.F.R. 790.7(f), 790.8(a). On the other hand, travel from the place of performance of one principal activity to the place of performance of another principal activity is not subject to the Portal Act (because it occurs

during the workday) and is instead subject to the general rules for determining compensability under the FLSA. 29 C.F.R. 790.7(c).

Thus, under the Department's regulations, "[t]ime 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." 29 C.F.R. 785.38. For example, when an employee is required to report to a designated place to pick up his tools, and must then travel to another location to perform his work, "the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked." *Ibid.* Similarly, if an employee is required to report to a designated place for instructions, the travel from the place where he receives his instructions to the place where he carries out those instructions must be counted as hours worked. *Ibid.* In those examples, picking up tools and receiving instructions are integral and indispensable parts of the employees' principal activity or activities, and accordingly qualify as principal activities for purposes of the Portal Act. 29 C.F.R. 790.8(b). As a result, the travel that occurs after those initial activities and before the end of the workday is excluded from the scope of the Portal Act.

This case is controlled by the foregoing principles. As the court of appeals found, the donning and doffing of protective gear on petitioner's premises are integral and indispensable parts of the principal activities of petitioner's employees and therefore qualify as "principal activities." See 29 C.F.R. 790.8(c). The employees' workday therefore commences with donning and ends with doffing, and the necessary walking that occurs between those two points falls outside the Portal Act and is compensable.[3]

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[3] The Department of Labor has consistently taken the position in litigation that walking that occurs after integral and indispensable don-

2. Petitioner argues that the regulations support its position that the walking time at issue falls outside the workday because the regulations describe the workday as running from "whistle to whistle," and the "whistle to whistle" period in this case "runs from the time respondents must arrive at their work stations until the time they finally leave those posts at the end of the shift." Pet. Br. 31 (quoting 29 C.F.R. 790.6(a)). But petitioner fails to quote the remainder of the regulation on which it relies. What the regulation actually says is that the workday may be "*roughly* described as the period 'from whistle to whistle,'" 29 C.F.R. 790.6(a) (emphasis added), and it then specifies that the workday for purposes of the Portal Act encompasses the "period between the commencement and completion on the same workday of an employee's principal activity or activities," 29 C.F.R. 790.6(b). The Department's regulations further make clear that the length of the compensable workday is not controlled by the employer's designated shift or by when the whistle blows and that "[t]he 'workday' may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line." 29 C.F.R. 785.9(a). Thus, while the "whistle to whistle" period may provide a rough guide, under the Department's regulations—which petitioner describes as having been "ratified by Congress" (Br. 31)—the workday extends from the employees' first principal activity of donning to their last principal activity of doffing.

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ning and before integral and indispensable doffing is compensable. It has filed suits seeking compensation for such walking time. See *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994); *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. filed May 9, 2002); *Chao* v. *George's Processing, Inc.*, No. 6:02-CV-03479-RED (W.D. Mo. filed Nov. 20, 2002). It has obtained a consent decree that requires such compensation. *Chao* v. *Perdue Farms, Inc.*, Case No. 2:02-CV-0033 (M.D. Tenn. entered May 10, 2002). And it filed amicus briefs in the Ninth Circuit in this case and in the First Circuit in *Tum* arguing that such walking time is compensable.

Petitioner also argues (Br. 31) that a footnote in the Portal Act regulations "makes clear that a compensable 'integral and indispensable' activity does not render compensable all time spent walking between that activity and the actual work station." The footnote states:

> 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." 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.

29 C.F.R. 790.7(g) n.49 (citations omitted).

The exact import of the footnote is unclear on its face, particularly in light of the fact that the first-quoted sentence refers to postliminary activity whereas the second sentence seems to contemplate travel occurring *after* the washing or clothes-changing activity at issue (which, in the case of travel after postliminary activity (*e.g.*, post-doffing walking), would certainly be excluded from otherwise compensable time by the Portal Act in any event). At most, that passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act. Even that reading would provide no support for petitioner's contention that the Portal Act always excludes such walking from compensation.

In any event, the ambiguous passage cited by petitioner should not obscure what is clear. First, the regulations discussed above reflect the Department of Labor's long-

established general position that post-donning and pre-doffing walking falls outside the Portal Act when the donning and doffing are integral and indispensable parts of an employee's principal activities. In particular, that general position follows from the regulatory text providing that the Portal Act has no effect on walking that occurs during the workday, 29 C.F.R. 790.6(a), that the workday commences with the first principal activity and ends with the last principal activity, 29 C.F.R. 790.6(b), and that activities like donning and doffing that are integral and indispensable to a principal activity are themselves principal activities. 29 C.F.R. 790.8(b), 790.8(c).

Second, in the many years in which the Department has enforced the FLSA and the Portal Act, it has not issued any ruling identifying any circumstance in which walking that occurs in between integral and indispensable donning and doffing would be excluded from compensation under the Portal Act. And third, the Secretary has repeatedly taken the position in litigation that, in circumstances like those presented here, the Portal Act does not exclude from compensation walking that occurs after the commencement and before the completion of compensable donning and doffing. See n. 3, *supra*. In those circumstances, the regulations as a whole support the Secretary's position that the walking time at issue in this case is compensable.

Any doubt regarding the meaning of the regulations must be resolved in favor of the Secretary's interpretation. As this Court has recognized, courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to agency's interpretation of its regulations as set forth in amicus brief). The detailed and comprehensive regulations discussed above, when read as a whole, plainly support the Secretary's position regarding the compensability of

walking time like that at issue here. And in any event, that conclusion is also compelled by the text of the Portal Act as interpreted in *Steiner*.

D. A Holding That The Walking Time At Issue Is Compensable Is Consistent With The Purposes Of The Portal Act

Petitioner argues (Br. 26-30) that a holding that the walking time at issue is compensable would defeat the purposes of the Portal Act. Such a holding, however, would have no such effect.

The principal purpose of the Portal Act was to remedy an existing "emergency" that had been created by the Court's holding in *Mt. Clemens* that walking from the time clock to an employee's work station and certain other preliminary activities were compensable work. See 29 U.S.C. 251(b); *Steiner*, 350 U.S. at 253. Employees filed numerous claims in the wake of *Mt. Clemens*, and Congress believed that if those claims were allowed to proceed it would create "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). As the Court explained in *Steiner*, 350 U.S. at 255-256, Congress fully addressed that emergency by enacting Section 2 of the Portal Act, 29 U.S.C. 252, which relieved employers of all liability under the FLSA for activity that occurred before the enactment of the Portal Act, and eliminated federal court jurisdiction to adjudicate such claims, except where the activity was compensable under a contract or custom. See *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.) (upholding the constitutionality of Section 2), cert. denied, 335 U.S. 887 (1948).

Congress addressed prospective claims in Section 4 of the Act, 29 U.S.C. 254. For those claims, Congress did not intend any equivalent change from existing law. As the Court explained in *Steiner*, had Congress intended such a sweeping change, it would have made Section 2 prospective

as well as retroactive. 350 U.S. at 255-256. Instead, by limiting Section 4 to activities outside the "workday," 29 U.S.C. 254(a), by using the term "principal activities" to mark the boundaries of the compensable workday, *ibid*, and by including "integral and indispensable" activities within the concept of "principal activities," 350 U.S. at 252-253, Congress largely sought to "preserve[] to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act." *Id.* at 256 (Appendix) (quoting 93 Cong. Rec. 2297 (1947) (statement of Sen. Cooper)). The only way in which Congress sought to cut back on existing law was by excluding from compensation preliminary and postliminary activities and walking that occur outside the workday. See 29 U.S.C. 254(a)(1) and (2); 93 Cong. Rec. at 2299 (statement of Sen. Cooper). Because the walking time at issue occurs during the workday, a holding that such walking is compensable is fully consistent with the purposes of the Portal Act.

E. A Holding That The Walking Time At Issue Is Compensable Does Not Produce Anomalous Results

1. Petitioner argues that it is anomalous to hold that the walking time at issue is compensable, and identifies as the chief anomaly (Br. 32-33) the possibility that an employee who is required to retrieve gear at the gate would receive compensation for the walk to his work station, while an employee who is required to retrieve his gear at the work station would receive no compensation for the same walk. But an employer is entirely free under the FLSA and the Portal Act to require any or all of its employees to retrieve gear at whatever location(s) it chooses. To the extent that an employer chooses—presumably for its own convenience—to require its employees to retrieve gear at different locations, however, any differences in compensation for walking time that results would simply reflect the FLSA's allocation

of authority to the employer to control where its employees must begin their principal activities, and the Portal Act's creation of a bright-line rule that excludes walking time only when it occurs before the commencement of the first principal activity.

2. Petitioner argues that another consequence of treating integral and indispensable donning as a principal activity is that it could trigger compensation for post-donning walks that take more time than donning. Pet. Br. 35. But all travel within the workday has the potential to be long in relation to the time spent "actually working" at the destination, yet all such time is compensable. Moreover, nothing in the Portal Act precludes an employer from reducing the amount of walking time by placing the location for donning close to the employees' work station.

Furthermore, Congress chose to permit the first and last "principal activity" to begin and end the workday, respectively, regardless of how long such activity takes to perform. 29 U.S.C. 254(a). As the legislative history shows, Congress's refusal to establish a minimum time period for an activity to qualify as a compensable "principal activity" was not inadvertent. During the course of the Senate debates, Senator McGrath asked Senator Cooper whether an employee's pre-shift activity of handing out clothes in the morning had to consume at least 30 minutes before it would be regarded as a compensable principal activity. Senator Cooper responded that it would be a compensable principal activity whether it took "15 minutes or 10 minutes or five minutes or any other number of minutes." 93 Cong. Rec. at 2298. Congress thus deliberately established a bright-line rule under which the first principal activity starts the workday regardless of how long it takes, rendering any subsequent activity, including walking time, outside the scope of the Portal Act.

The examples cited in the Department's regulations of picking up tools or receiving instructions at a designated location before traveling to a work site illustrate the effect of Congress's choice. See 29 C.F.R. 785.38. Picking up tools or receiving instructions might take only a few minutes or less. But as the regulations make clear, both activities are principal activities that can begin the workday, thereby rendering subsequent travel of much longer duration compensable. Similarly, when an employer requires its employees to don protective gear at a location that is distant from their work stations, there is nothing anomalous about requiring the employer to compensate its employees for travel from that location to the work station. Instead, as in the examples cited in the regulations, compensation under those circumstances implements the FLSA's basic rule that employees should receive compensation for all time during the workday that they are under the direction and control of the employer.

3. Petitioner also identifies as an anomalous consequence of the court of appeals' decision the fact that employees whose donning and doffing were found to be compensable will receive compensation for associated walking time, while employees whose donning and doffing were found non-compensable will not. Pet. Br. 35. But that difference flows from the court of appeals' ruling (unchallenged by respondents) that the donning of certain items could be treated as non-compensable under the de minimis rule without regard to the amount of associated walking time. For reasons explained in the government's brief in *Tum* (at 26-27), the court of appeals erred in its application of the de minimis rule. The de minimis rule applies to the aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity. Thus, both sets of employees identified by petitioner should receive compensation

for walking time, unless the aggregate amount of donning, doffing, and associated walking time is de minimis.

In any event, Congress expressly contemplated that donning gear could be a compensable principal activity for some employees and not others. See 29 C.F.R. 790.8(c) & n.66 (relying on the statement of Senator Cooper appearing at 29 Cong. Rec. at 2298). There is nothing anomalous about that difference in compensability also having consequences for the compensability of associated walking time. To the contrary, it is simply the result of the Portal Act's bright-line rule that the workday begins with the first principal activity.

4. Petitioner argues (Br. 37) that another consequence of the court of appeals' ruling is that even when the donning of particular items of gear is excluded from compensation pursuant to collective bargaining under 29 U.S.C. 203(*o*), associated walking time is compensable. The court of appeals, however, did not make any ruling on that issue, and the resolution of that question would depend on the proper construction of Section 203(*o*)—a question that is not presented here.

5. Finally, petitioner contends (Br. 38) that the court of appeals' judgment awarding compensation for only a "reasonable" amount of walking time is "flatly inconsistent" with the court's holding that "the workday actually commences with the first integral and indispensable act" and is continuous thereafter until the cessation of the last such act. Petitioner further contends (*ibid.*) that the court's judgment also conflicts with a Department of Labor regulation that specifies that an employee generally must be paid for all time within the workday, "whether or not the employee engages in work throughout all of that period." See 29 C.F.R. 790.6(b). Those contentions are without merit. The lower courts awarded compensation for a "reasonable" period of walking time as a *remedial* measure, and did so in circumstances in which petitioner did not keep records of the

time actually devoted to such walking. See Pet. App. 47a. Such a remedial approach does not impermissibly create a discontinuous workday or conflict with Section 790.6(b). It simply recognizes that when an employer has not kept accurate records, remedial awards may reflect a degree of approximation. *Mt. Clemens*, 328 U.S. at 687-688.

Thus, petitioner has failed to identify any anomaly that results from a holding that the walking time at issue is compensable. In any event, the text of the Portal Act as authoritatively interpreted in *Steiner* compels the conclusion that the walking time at issue is compensable because it occurs during the "workday"—after petitioner's employees' "commence[]" their "principal activity" by donning protective gear and before they "cease[]" their "principal activity" by doffing that gear. 29 U.S.C. 254(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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