No. 23-____

IN THE

Supreme Court of the United States

PRECISION DRILLING CORP.; PRECISION DRILLING OILFIELD SERVICES, INC.; AND PRECISION DRILLING COMPANY, LP,

Petitioners,

v.

RODNEY TYGER AND SHAWN WADSWORTH, individually and on behalf of all others similarly situated, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fair Labor Standards Act, which exempts from required compensation all activities that are "preliminary" or "postliminary" to employees' principal work activities, 29 U.S.C. § 254(a)(2), nevertheless requires employers to compensate employees for donning and doffing generic protective clothing that does not protect against job-specific hazards that transcend ordinary risks.

PARTIES TO THE PROCEEDING

All parties are listed in the caption to this petition, except for defendants identified as "John Does 1-10." Respondents' ("Plaintiffs"') operative complaint alleges that these individuals are "unknown persons" who directed, aided, abetted, or assisted petitioners in creating or executing relevant compensation policies or had control over processing payroll regarding Plaintiffs. Dkt. 18 at ¶¶ 13.[1] These unknown persons were never served but were identified as appellees below and are respondents under Supreme Court Rule 12.6.

[1] "Dkt" refers to docket entries in the district court.

RULE 29.6 STATEMENT

Petitioner Precision Drilling Company, LP is 99% owned by Precision Drilling LLC (a Louisiana LLC) and 1% owned by Precision Drilling Holdings Company (a Nevada Corporation). Precision Drilling Holdings Company is 100% owned by Precision Drilling (US) Corporation, a Texas corporation, which is 100% owned by petitioner Precision Drilling Corporation, a Canadian corporation that is publicly traded on the Toronto and New York stock exchanges. No publicly held corporation owns 10% or more of Precision Drilling Corporation's stock.

Petitioner Precision Drilling Oilfield Services, Inc. merged with and into petitioner Precision Drilling Company, LP in 2009.

STATEMENT OF RELATED PROCEEDINGS

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

This case presents an important and oft-recurring question of law on which the Circuits are expressly divided: whether the Fair Labor Standards Act ("FLSA") requires employers to compensate covered employees for pre- and post-shift time spent "donning" and "doffing" generic protective clothing, such as steel-toed boots and hard hats, that millions of workers throughout the Nation wear. In 1947, in response to this Court's overbroad reading of the FLSA—which had provoked a "flood of litigation" and unwarranted liability by improperly expanding the

compensable workday—Congress enacted the Portal-to-Portal Act ("PTPA") to narrow the FLSA by providing that tasks are non-compensable if "preliminary" or "postliminary" to the "principal activit[ies]" for which workers are employed. *Integrity Staffing Sols., Inc.* v. *Busk* ("*Busk*"), 574 U.S. 27, 31-33 (2014) (quoting 29 U.S.C. § 254(a)(2)). As *Busk* reiterated, for a task to be compensable it must be both an "indispensable" (*i.e.*, necessary or required) part of a job and an "integral" part of the employee's principal productive work, meaning that it must be an "intrinsic portion or element" of that job. *Id.* at 33 (quotation omitted). Being just "indispensable" or just "integral" is insufficient.

This case involves application of the same statute to a continually recurring issue: the compensability of time employees spend changing into and out of generic protective clothing. In the decision below, the Third Circuit expressly rejected as "too narrow" the legal rule employed by the Second Circuit—which the district court had applied to dismiss this case and which conforms with four other circuits' law—that such time is non-compensable unless the clothing guards against job-specific hazards that "transcend ordinary risks." *Perez* v. *City of New York*, 832 F.3d 120, 127 (2d Cir. 2016) (quoting *Gorman* v. *Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007)). *See* App. 11a ("we find the extraordinary-risk test too 'narrow.'") (citation omitted).

In place of the Second Circuit's clear rule, the Third Circuit adopted an unweighted, multi-factor balancing test that, it admitted, applies "murk[y]" legal standards. App. 7a-10a. And the court further held that a ***jury*** must decide the issue, App. 11a-12a, ensuring that employers will never know whether

time is compensable until they have endured the extraordinary expense and potentially enormous liability of collective-action jury trials, thereby reopening the floodgates of unwarranted litigation Congress sought to close with the PTPA.

Certiorari is warranted to review that decision. The Third Circuit deepened a circuit split on an important legal issue with enormous financial implications, given that millions of workers nationwide wear the same type of generic protective clothing at issue here. And the decision below is particularly pernicious, because it threatens employers with unpredictable liability to be imposed by juries under vague standards and implicates a wide swath of companies potentially subject to FLSA suits in that Circuit by virtue of incorporation in Delaware. Congress enacted the PTPA because the improper judicial expansion of the workday, if not corrected, would "bring about financial ruin of many employers," "halt[] * * * expansion and development," "curtail[] employment," and create "continuous uncertainty" for employers and employees, with "the courts of the country [being] burdened with excessive and needless litigation." 29 U.S.C. § 251(a); *Busk*, 572 U.S. at 32. The decision below repeats the same errors and threatens the same harms that led Congress to enact the PTPA in the first place. Certiorari is therefore warranted to restore uniformity on this critical legal issue upon which the Circuits are expressly divided.

OPINIONS BELOW

The Third Circuit's opinion reversing the district court's judgment is reported at 78 F.4th 587 and reproduced at App. 1a-12a. The district court's opinion is reported at 594 F. Supp. 3d 626 and reproduced at App. 13a-85a.

JURISDICTION

The Third Circuit issued its opinion and judgment on August 16, 2023, App. 1a, and denied petitioners' timely petition for rehearing en banc on December 1, 2023, App. 86a-87a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Relevant statutory and regulatory provisions—29 U.S.C. §§ 251, 254 and 29 C.F.R. §§ 790.6, 790.7—are reproduced in the appendix to this brief. App. 88a-101a.

STATEMENT OF THE CASE

A. The Enactment Of The PTPA And This Court's Prior Interpretations.

The FLSA, enacted in 1938, sets minimum wages as well as required overtime for any covered employee working more than forty hours in any given workweek. 29 U.S.C. §§ 206, 207. Ever since the statute's enactment, however, there has been uncertainty on a key question underlying many of its provisions: when does the compensable workday begin and end? In the statute's first decade, this Court interpreted that workday expansively. For example, in *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), the Court held that time miners spent traveling between an employer-provided changing house and the mine was compensable, *id.* at 594, 599, but did not reach the question whether the time spent changing clothes (which the lower court had excluded) was compensable, *id.* at 593 & n.4. Then, in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court held that compensable work included the time factory workers spent walking to their workspaces after

punching in, as well as time spent "putting on aprons and overalls, removing shirts, * * * putting on finger cots," and engaging in other preliminary activities preceding their productive work. *Id*. at 683, 692-93.

As recognized in Congress, *Anderson* created a "dramatic influx of litigation involving vast alleged liability." 93 Cong. Rec. 2087 (1947) (Sen. Donnell). It "provoked a flood of litigation" in which unions and employees filed more than 1,500 FLSA lawsuits seeking nearly $6 billion in back pay and liquidated damages "for various preshift and postshift activities." *Busk*, 574 U.S. at 31-32 (citing S. Rep. No. 37, 80th Cong., 1st Sess., 2-3 (1947)).

Congress' solution was the PTPA, which was enacted to curtail *Anderson*'s expansive interpretation and the uncertain liability it imposed on employers. Congress recognized that, among other problems, the Court's interpretation had "create[ed] wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers" that "would bring about financial ruin" of many companies, would "create[e] both an extended and continuous uncertainty on the part of industry" as to companies' financial condition, would grant "windfall payments" to employees for activities no one expected to be compensable, and would "burden[]" courts "with excessive and needless litigation." 29 U.S.C. § 251(a). Accordingly, while the PTPA left in place the Court's definition of "work" and "workweek," Congress explicitly limited the start- and end-points of compensable time by removing from the FLSA's scope all "activities which are preliminary to or postliminary to" an employees' principal work activities. *See* 29 U.S.C. § 254(a)(2).

Nine years later, in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the Court confronted the PTPA's application to work clothing. There, the job site, a battery plant, was filled with poisonous chemicals, including liquids, powders, and fumes that "permeate[d] the entire plant and everything and everyone in it." *Id.* at 249. The employer, recognizing the "very great" risk of lead poisoning and other similar hazards, provided employees with work clothing—which under their working conditions "rapid[ly] deteriorate[ed]" in as little as "a few days"—and required them to change and shower at the end of each shift. *Id.* at 250-51. All parties agreed that given the circumstances these activities were indispensable, and the Court further held that they were also "an integral * * * part" of work in that plant, *id.* at 256, and therefore that the time spent by the workers changing and showering on-site was compensable.

More recently, in *Busk*, the Court applied the *Steiner* test to hold that time spent by warehouse workers in security screenings following the workday were not compensable under the FLSA. It was not enough that the screenings were required by the employer or even necessary for its business, because compensable work must be ***both*** "an intrinsic element" of "the principal activities that an employee is employed to perform" ***and*** "one with which the employee cannot dispense if he is to perform his principal activities." *Id.* at 37. As the Court held, "[t]he Court of Appeals [had] erred by focusing on whether an employer ***required*** a particular activity" because "[t]he integral and indispensable test is tied to the productive work that the employee is ***employed to perform***." *Id.* at 36 (emphasis original).

The "integral" element thus focuses on whether the activity at issue is an intrinsic part of the specific job an employee is hired to do. It is thus distinct from the "indispensable" element, which asks whether the activity is a necessity for that job. And because compensability requires both elements, *Busk* recognizes that any given activity may meet one of these elements but not the other. Thus, it is not sufficient that a particular activity is required to do the job: "[i]f the test could be satisfied merely by the fact that an employer required an activity, it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address." *Id.* at 36.

Busk, however, left unanswered the specific legal question in this case: whether time spent donning and doffing generic protective clothing is exempted by the PTPA where, as here, the clothing does not protect against the sort of unusual, job-specific, and significant dangers at issue in *Steiner*, but rather only guards against ordinary and sporadic risks present in vast numbers of jobs. That question divided not only the district court from the Third Circuit in this case, but has also led to an intractable split among the circuits.

B. Proceedings In The District Court And First Appeal.

Petitioners (collectively, "Precision") operate oil- and gas-drilling rigs. App. 4a. Plaintiffs, rig workers employed by Precision, filed this case in 2011 as an FLSA collective action.[2] As relevant here, Plaintiffs seek classwide compensation for approximately 1,000 workers for time spent donning and doffing protective

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[2] A collective action is the FLSA's version of a class action. *See* 29 U.S.C. § 216(b).

clothing and time spent walking to and from pre- and post-shift meetings. *See* App. 13a-14a. The parties are in agreement that walking time is compensable only if the donning and doffing is. App. 85a n.280.

Precision's rigs are typically manned around the clock by two crews that each work 12-hour shifts. App. 14a-15a. At the start of each shift, many rig workers arrive at a "change house" where they usually don protective basic protective clothing including fire-retardant coveralls, steel-toed boots, hard hats and safety glasses. App. 14a, 47a n.123.[3] Employees (who often live in company-provided crew quarters) usually don this protective clothing in on-site change houses Precision provides for them. *See* App. 47a n.123. But additional equipment—such as chemical suits or respirators—is donned on-the-clock when employees perform specific jobs that require that specialized gear protecting against unusual risks. App. 32a-33a.

Precision does not require rig hands to use the change house. 3rd Cir. Supp. App'x A.696, A.714-15, A.990.[4] And where employees don and doff their protective clothing varies among rigs and individuals. As noted, many rig hands use the change house. But others use a crew trailer or Precision-provided crew quarters if they are living there. *Id*. at A.696, A.698, A.730-31, A.733, A.738-39, A.744. Others may change

[3] Employees also sometimes wear gloves and ear plugs as needed during the workday. They need not don those items before their shifts begin, however, but instead need only have them with them at that time. App. 33a.

[4] Although Plaintiffs dispute whether rig employees have a realistic option to don and doff protective clothing off-site, the district court granted Precision summary judgment without having to decide that issue, because it was not pertinent under the legal test the court applied. *Cf*. App. 15a n.7.

in the rig parking lot in or near their vehicles. *Id*. at A.697, A.724-25. Still others who live at home and drive to the worksite change into some or all of their protective clothing at home. *Id*. at A.874, A.990, A.996.

After putting on their protective clothing, rig workers walk to a pre-shift meeting that begins their workday. *See* App. 33a & n.71. And the workers reverse the process at the end of the day, at which time they usually leave their protective clothing at the change house to be cleaned. App. 46a-47a n.123. Although Precision provides washing machines for cleaning coveralls and gloves, employees are also allowed to wash that clothing at home. 3d Cir. Supp. App'x A.793, A.832, A.1027-28, A.1222-23.

In 2020, the district court first granted Precision summary judgment after excluding Plaintiffs' damages expert and holding that their claims could not succeed without his testimony. *Tyger* v. *Precision Drilling Corp.*, 2019 WL 6875731 (M.D. Pa. Dec. 17, 2019). The court also held that the proper inquiry for compensability was the Second Circuit's test: whether the clothing at issue protects against "workplace dangers that accompany the employee's principal activities and transcend ordinary risks." *Id*. at *1. On appeal, however, the Third Circuit reversed. It held that expert testimony was not required but did not address the district court's legal standard, instead remanding for further proceedings. *Tyger* v. *Precision Drilling Corp.*, 832 F. App'x 108, 116 (3d Cir. 2020).[5]

[5] The Third Circuit affirmed the district court's order excluding Plaintiffs' expert and also its finding that Precision had not willfully violated the FLSA. *Id.* at 112-13, 115-16.

On remand, the district court again granted Precision summary judgment. The court noted that the Third Circuit had not rejected its application of the transcendent-risk standard. App. 61a-62a. The district court traced the genesis of that standard as it developed in the Second Circuit and explained why it properly captured both the integral and indispensable elements this Court's precedents require. App. 65a-73a. The district court held that meeting that test required Plaintiffs to identify "serious" harms that occurred with a measurable frequency that the protective clothing adequately guards against. App. 73a-75a. The court then found the record undisputed that the only risks Plaintiffs could establish were "ordinary, hypothetical, or isolated," with serious incidents happening "once a decade—if that," and that the protective clothing at issue did little to guard against them. App. 77a-79a, 84a-85a. The district court therefore granted summary judgment to Precision under the Second Circuit's test. App. 85a. The court held that "[t]o find that the Employees' basic [protective clothing] guards against workplace hazards that accompany their principal activities and transcends ordinary risks would be out of step with courts across the country." App. 84a.

C. Proceedings In The Court Of Appeals.

Plaintiffs appealed, and again the Third Circuit reversed. The Third Circuit recognized that the FLSA requires compensation for donning some kinds of protective clothing but noted that determining what kinds are covered "is murkier." App. 7a. The Third Circuit, however, expressly rejected the Second Circuit's transcendent-risk test as "too 'narrow.'" App. 11a. (citation omitted). Instead, the court adopted an unweighted, multi-factor approach, under which

protective clothing should be considered "integral" by considering (1) whether "the vast majority" of employees "regularly" change on-site "out of practical necessity or in line with industry custom;" (2) whether government regulations require on-site changing; and (3) "what kind of gear is required—by regulation, employers, or the work's nature." App. 7a-10a. Finally, the Third Circuit held that a "jury will have to decide" whether that multi-factor test is satisfied in any given case, including this one. App. 12a.[6]

Precision timely petitioned for rehearing *en banc*, which was denied. App. 86a-87a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUIT COURTS ARE EXPRESSLY DIVIDED ON THE FREQUENTLY RECURRING LEGAL QUESTION THE PETITION PRESENTS.

The circuits are expressly divided on the legal question presented. The Second Circuit has adopted a bright-line test that the district court employed to dismiss this case. The Third Circuit, however, expressly rejected that rule as "too narrow," App. 11a (quotations omitted) adopting a different legal test, amalgamated from other circuits' law, that led to a different outcome. And contrary to the Third Circuit's view that the Second Circuit's test is unique, the law of four other circuit's either expressly follows or

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[6] The court also held that a jury would have to decide the separate question whether the donning-and-doffing is non-compensable because the time spent is "*de minimis*." App. 12a. That issue is not pertinent to this Petition. If the time is not compensable because, as the district court correctly held, donning-and-doffing of the protective clothing at issue is not "integral" to Plaintiffs' principal productive work, it is immaterial whether the separate *de minimis* exception applies.

parallels that of the Second Circuit. Certiorari is warranted to resolve this clear, intractable, and case-dispositive conflict among the Circuits on an important and recurring question of law.

A. The Third Circuit Below Expressly Rejected The Second Circuit's Legal Test, Instead Adopting Other Circuits' Views.

The circuit split on the question presented is clear, deep, and openly acknowledged. In *Gorman*, 488 F.3d at 593, and *Perez*, 832 F.3d at 127—one case decided before *Busk* and one after—the Second Circuit applied the "integral and indispensable" test to the donning and doffing of protective clothing and arrived at an easily-applied rule of law: such time is non-compensable unless the clothing protects against job-specific hazards that "transcend ordinary risks." The district court had no difficulty applying that rule to dismiss this case on summary judgment. But the Third Circuit rejected the Second Circuit's test, reversed the grant of summary judgment, and remanded for a jury to consider compensability under a different legal rule that, according to the Third Circuit, "mirrors" the rule adopted by the Sixth Circuit and others. App. 10a.

Gorman involved essentially the same generic protective clothing that is at issue in this case (there worn by nuclear power plant employees): "helmet[s], safety glasses and steel-toed boots." 488 F.3d at 594. The Second Circuit recognized that such clothing may be "indispensable" ***without*** being "integral," which means that government or employer requirements that employees wear such gear would not, by themselves, make the donning-and-doffing time compensable. *Id.* As in *Steiner*, what made the difference was whether the clothing protected against risks that "transcend[ed] ordinary" ones: in those

circumstances, the protective clothing would be "integral" to the job because it addressed non-ordinary risks specific to the job itself. *See id.* at 593 (citing example of diving suit for underwater job). Otherwise, donning and doffing is simply "changing clothes" between normal work and home activities, which the Department of Labor ("DOL") and this Court have considered non-compensable ever since the PTPA was enacted. *See id.* at 594. As DOL regulations have long provided, the basic activity of "changing clothes" is non-compensable when "performed under the conditions normally present." 29 C.F.R. § 790.7(g). *Accord Busk*, 574 U.S. at 34-35. Thus, donning and doffing work clothes is non-compensable under "normal[]" (*i.e.*, ordinary) conditions; as the Second Circuit held, it only becomes compensable when those conditions are extraordinary.

As here, the generic gear in *Gorman* did not protect against any out-of-the-ordinary risks; to the contrary, the nuclear plant employees were already compensated for donning specialized protective gear when entering places where radiation was a real risk. 488 F.3d at 593 n.4. The required helmets, steel-toed boots, and safety glasses were at most necessary (*i.e.*, indispensable) to the employees' work; but they were not integral when donned under the "normal conditions" present in the rest of the facility. *Id.* at 594. And as the court explained, protective clothing is not "rendered integral by being required by the employer or by government regulation." *Id.*

In *Perez*, decided after this Court reiterated the integral-and-indispensable test in *Busk*, the Second Circuit considered the issue as it pertained to gear worn by police officers. The court reaffirmed its adherence to the *Gorman* rule. The Second Circuit

read *Gorman* in light of *Busk* to hold, in relevant part, that a bulletproof vest might qualify as integral to a police officer because facing gunfire was not an "ordinary risk of employment." 832 F.3d at 124, 125. Similarly, other tools such as a "baton, mace, or handcuffs" that are "relatively specialized products * * * used primarily by law enforcement personnel" might also be integral. *Id.* at 126-27. But compared to these specialized tools, the Second Circuit reconfirmed that "generic protective gear"—items that are "widely available to the public and commonly worn in a range of settings"—can satisfy the "integral" element only if they protect against "workplace dangers that accompany the employee's principal activities and transcend ordinary risk." *Id.*

Applying the Second Circuit's test, the district court in this case dismissed Plaintiffs' claims on summary judgment. It held that donning Plaintiffs' "basic PPE"—which includes steel-toed boots, coveralls, a hard hat, and safety glasses—was not integral and indispensable to their jobs because that clothing protected against only "ordinary, hypothetical, or isolated" risks. App. 84a; *see also* App. 78a (serious workplace accidents identified by Plaintiffs "happen once a decade—if that"). Moreover, just as in *Gorman*, Precision compensated employees when donning and doffing additional, specialized gear protecting against more immediate and perilous hazards, such as "when mixing drilling chemicals, a time when their exposure could be dangerous." App. 32a-33a, 84a; *see also* App. 32a (Precision employees who work at high elevations are compensated for donning extra fall protection).

On appeal, however, the Third Circuit expressly rejected the Second Circuit's legal rule and reversed the district court based on that legal disagreement.

Relying on pre-*Busk* decisions from the Fourth and Sixth Circuit, the Third Circuit expressly rejected the Second Circuit's legal test as "far afield from the statutory terms," holding that "we find the extraordinary-risk test too 'narrow.'" App. 11a (quoting *Perez* v. *Mountaire Farms*, 650 F.3d 350, 365 (4th Cir. 2011) ("*Mountaire Farms*") and citing *Franklin* v. *Kellogg Co.*, 619 F.3d 604, 619-20 (6th Cir. 2010)). This conflict among the circuits, moreover, was outcome-determinative. Whereas the district court had no difficulty dismissing Plaintiffs' claims on summary judgment under the Second Circuit's test, the Third Circuit reversed and remanded for trial under its divergent legal rule.

The Third Circuit also admitted that its rule is amorphous and difficult to apply. As the court noted, under the circuits' divergent tests, while employers must "sometimes" pay workers for donning and doffing protective gear, "which gear counts is murkier." App. 7a. In place of the Second Circuit's easily-applied test, the Third Circuit directed a jury to apply an unweighted, multi-factor balancing test to determine compensability. But while the Third Circuit noted the separate requirement that an activity must be "integral" to be compensable, *cf.* App. 10a, each of its factors for that requirement, unlike the Second Circuit's test, turns on whether the clothing or on-site changing is necessary or required by the job or regulations—*i.e.*, whether it is "indispensable." The Third Circuit's "integral" test considers (1) whether most employees "regularly" change at work "out of practical necessity or in line with industry custom"; (2) whether regulations require the clothing; and (3) and what clothing is required "by regulation, employers, or the work's

nature." App. 7a-10a. As explained above, *Busk* made clear that such considerations go to the "indispensable" element, not the "integral" one.

A similar legal defect infects the pre-*Busk* Sixth and Fourth Circuit decisions the Third Circuit relied on, which also conflict with the Second Circuit's rule. In *Franklin*, the Sixth Circuit held that *Gorman* "interpreted *Steiner* narrowly" and that the Second Circuit's rule "appears to be unique" and diverged from the law of two other circuits. 619 F.3d at 619. The Sixth Circuit elected instead to "follow the reasoning" of the other circuits' decisions. *Id*. at 620.[7] Likewise, in *Mountaire Farms*, the Fourth Circuit held that *Gorman* had interpreted *Steiner* "more narrowly" than other circuits, and given those "opposing views" elected not to follow the Second Circuit's rule. 650 F.3d at 365.

Both the *Franklin* and *Mountaire Farms* holdings, like the Third Circuit's rule, are contrary to this Court's governing test. Both of those pre-*Busk* cases turned on whether the activity was required and primarily benefited the employer. *See Franklin*, 619 F.3d at 619-20 (applying test that changing time is compensable if employer "require[s]" clothing and wearing it is "for the benefit of the company" or it "primarily benefits the employer") (citations omitted); *Mountaire Farms*, 650 F.3d at 366 (applying test that

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[7] Those decisions were *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004) and *Bonilla* v. *Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007). As noted below, the rule applied in these cases—that an activity is compensable if it is necessary and primarily benefits the employer—is inconsistent with this Court's later holding in *Busk* as well as the Eleventh Circuit's post-*Busk* jurisprudence. *See infra* at 18, 20-22.

time is compensable if it "necessary" and "primarily benefit[s] the employer") (citation omitted). But in *Busk*, this Court rejected such approaches, holding that "[a] test that turns on whether the activity is for the benefit of the employer is * * * overbroad." *Busk*, 574 U.S. at 36. And both courts, like the Third Circuit, effectively nullified the separate requirement that a compensable activity be "integral"—*i.e.*, intrinsic—to a specific job.

B. The Decision Below Also Conflicts With Holdings of Four Other Circuits.

The Third Circuit, quoting *Franklin*, believed the Second Circuit's approach was "unique." App. 11a (quoting 619 F.3d at 619). But that characterization is inaccurate. Four other circuits have adopted tests that either follow or mirror that of the Second Circuit. To the extent these circuits do not use *Gorman*'s specific "transcendent" risk language, they nonetheless employ reasoning that excludes from compensation generic protective gear that protects against only intermittent hazards and is not an integral component of employees' principal activities.

In *Llorca* v. *Sheriff, Collier County*, 893 F.3d 1319 (11th Cir. 2019), the Eleventh Circuit considered gear sheriff's deputies were required to wear, including a uniform, a "duty belt" (containing a radio, mace, baton strap, flashlight, handcuffs, holster, and first-responders pouch), and a ballistics vest. *Id.* at 1322. Citing the Second Circuit's decision in *Gorman*, the court held that even though the gear was "arguably indispensable" to the deputies' work, that did "not make the donning and doffing process an intrinsic element of law enforcement." *Id.* at 1324-25 (citing *Busk*, 574 U.S. at 33; *Gorman*, 488 F.3d at 594). And because the "donning and doffing [wa]s an entirely

separate activity from the deputies' principal law enforcement duties," it was non-compensable. *Id.* at 1325.

In *Musch* v. *Domtar Industries, Inc.*, 587 F.3d 857 (7th Cir. 2009), the Seventh Circuit held that time spent changing and showering after shifts at a paper mill where employees were allegedly "exposed to hazardous chemicals" was non-compensable when such exposure was only intermittent and the defendant already compensated employees for ameliorating actual exposure to chemicals by requiring them to change and shower immediately. *Id.* at 858-59, 860-61. As in the Second Circuit cases, because the plaintiffs "failed to demonstrate that chemical exposure is so pervasive that it require[d] th[o]se post-shift activities," they were done "under normal conditions" and were not compensable. *Id.* at 860-61. And even before *Musch*, the Seventh Circuit held that where an employee "was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes," the "donning and doffing of this type of work clothing is not 'integral and indispensable' to an employee's principal activities and therefore is not compensable under the FLSA." *Pirant* v. *U.S. Postal Serv.*, 542 F.3d 202, 208 (7th Cir. 2008). As the court reasoned, such activities are "akin to the showering and changing clothes 'under normal conditions' that the Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity." *Id.* at 208-09.

In *Von Friewalde* v. *Boeing Aerospace Operations, Inc.*, 339 F. App'x 448 (5th Cir. 2009), the Fifth Circuit "agree[d] with the Second Circuit" that the "donning and doffing of generic protection gear such as safety

glasses and hearing protection" were non-compensable. *Id.* at 454 (citing *Gorman*, 488 F.3d at 594). More recently, the Fifth Circuit affirmed that *Busk* disrupted prior case law by making clear that a focus on employer benefits or requirements is improper and that the correct inquiry is whether an activity "is * * * intrinsic to [employees'] principal activities * * *." *Bridges* v. *Empire Scaffold, LLC*, 875 F.3d 222, 227-28 (5th Cir. 2017).

Finally, in *Aguilar* v. *Management & Training Corp.*, 948 F.3d 1270, 1283 (10th Cir. 2020), decided after *Busk*, the Tenth Circuit distinguished "[g]eneric tools and equipment" from others that were "closely connected to the work of providing prison security." Donning the former was non-compensable because they were "common to a variety of jobs and therefore play no specialized role in most types of work, no matter how necessary they might be to a particular job." *Id.* (citing *Busk*, 574 U.S. at 36). Donning the latter, however, was compensable because the tools were closely related to the "essential functions" the employees were hired to carry out. *Id.*

Accordingly, contrary to the Third Circuit's view that the Second Circuit's test is unique, four other circuits have either adopted that test or applied similar logic. Indeed, while the Department of Labor supported respondents on the merits below (incorrectly, in Precision's view), it recognized that the Second Circuit's rule, or a similar test, was adopted by the Eleventh Circuit in *Llorca*. *See* DOL Third Circuit Br. at 20-21 n.3 (recognizing that in *Llorca* the Eleventh Circuit favorably cited *Gorman* and reached *Gorman*'s result). And even before *Busk*, the Government recognized circuit courts' different approaches to the issue. *See, e.g.*, Br. in Opp. at 11,

Pirant v. *U.S. Postal Serv.*, No. 08-1100 (U.S. filed June 29, 2009) (stating that "courts of appeals have taken different approaches to the question whether donning and doffing non-unique, nonburdensome gear qualifies as 'work' or as an activity that is 'integral and indispensable' to an employee's principal activities.") (citing, *inter alia*, *Gorman*). This intractable conflict among the circuits on a dispositive legal issue warrants certiorari. *See* Sup. Ct. R. 10(a).

II. THE DECISION BELOW CONTRAVENES THIS COURT'S HOLDINGS.

The Third Circuit's rule, moreover, conflicts with this Court's binding precedent as set forth in *Busk* and prior cases. Applying the Second Circuit's test, the district court properly focused on whether the generic protective clothing at issue in this case protects against hazards that are specific to Plaintiffs' jobs and transcend ordinary risks. That approach correctly addresses the test reiterated by this Court in *Busk*: whether donning protective clothing is ***both*** integral ***and*** indispensable to performing an employee's job. *Busk*, 574 U.S. at 33, 36. The district court properly distinguished job-specific hazards from ordinary, routine risks that are faced in vast numbers of labor jobs, and found the evidence undisputed that the risks that Plaintiffs' generic clothing guarded against were "either ordinary, hypothetical, or isolated" and therefore did not render donning and doffing that clothing compensable. App. 73a-85a.

The Third Circuit did not dispute that dismissal would be appropriate for these reasons if the Second Circuit's rule were applied. Instead, it rejected that rule in favor of an amorphous, jury-implemented test that effectively nullifies the "integral" element. That court's multi-factor test focuses on whether protective

clothing is required by an employer or regulation and whether it is regularly donned at work "out of practical necessity or in line with industry custom." App. 7a-10a. But this test, at bottom, focuses on whether changing into and out of protective clothing is "indispensable" to a job because it is either required or necessary, effectively eliminating the separate requirement that the task also be "integral"—*i.e.*, intrinsic—to that job. *Busk* held that it is the "work the employee is ***employed to perform***" and ***not*** employer or regulatory requirements that determines whether an activity such as donning protective clothing is "integral" and therefore compensable under the FLSA. 574 U.S. at 36 (emphasis original).

The compensability of such activities should not turn on whether the clothing provides protection from ordinary risks not specific to a particular job. For example, virtually every employee wears some form of footwear (*i.e.*, shoes) that protects against basic injuries that could result from going barefoot. A requirement that the footwear be reinforced beyond standard footwear—which affects not just Precision's employees but millions of workers in numerous industries—cannot suffice to make the reinforced footwear integral to the job of everyone who wears it to work.[8] The generic clothing worn by Precision's rig workers is no more intrinsic to their specific job than it is to the jobs of the millions of other workers in disparate industries who wear the same type of gear. And if employees must be compensated for changing into and out of steel-toed boots, there is no apparent

[8] In 1999, 1.2 million workers within OSHA's jurisdiction wore reinforced footwear, Employer Payment for Personal Protective Equipment, 72 Fed. Reg. 64,342, 64,393 (2007), which extrapolates to 2.9 million nationwide. *See infra* note 9.

logical reason why they should not also be compensated for putting on basic shoes that also protect against ordinary risks.

In fact, the Third Circuit's test would effectively reinstate the interpretation of the FLSA that the PTPA was expressly enacted to overturn. Congress principally enacted the PTPA to overrule *Anderson*. *See*, *e.g.*, *Busk*, 574 U.S. at 31-32; *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 61 (1953) ("The Portal-to-Portal Act was enacted to remedy what were deemed to be some harsh results of our decision in *Anderson* * * *."). In *Anderson*, 328 U.S. at 692-93, the Court had held that the FLSA covered donning basic protective clothing akin to that at issue here: "putting on aprons and overalls" and "finger cots" (individual finger coverings similar to gloves). The Court held that such donning was compensable work because it "involve[d] exertion," was "controlled or required by the employer and pursued necessarily and primarily for the employer's benefit," and was "performed solely on the employer's premises and [was] a necessary prerequisite to productive work." *Id*.

Those elements are substantively indistinguishable from those the Third Circuit applied in the decision below, App. 7a-10a, even though *Anderson* was overruled by Congress with the express purpose of excluding such basic preliminary and postliminary activities from the FLSA's reach, 29 U.S.C. § 254(a)(2), and even though those elements ignore the "integral" analysis required by *Busk* and prior cases and embodied in the Second Circuit's test. Accordingly, by harkening back to pre-PTPA law that the statute was expressly intended to overrule, the Third Circuit's test threatens to reimpose the overbroad interpretation of the workday and

concomitant harm to the economy that the statute was intended to eliminate.

III. THE DECISION BELOW WILL HAVE FAR-REACHING, DETRIMENTAL EFFECTS ON A BROAD SWATH OF THE ECONOMY.

The Third Circuit's opinion raises an issue of exceptional importance because it will create uncertainty and unwarranted liability for large numbers of employers throughout the Nation. This case deals with quintessentially generic protective clothing—head protection, boots, coveralls, and safety glasses—of the kind worn by millions of Americans in all manner of labor jobs. *See*, *e.g.*, Jon Hamilton, *Encore: A new hard hat could help protect workers from on-the-job brain injuries*, NPR (Sept. 16, 2022) (https://tinyurl.com/4b3a46rj) ("More than 30 million workers in the U.S. wear safety helmets"). More generally, the compensability of donning and doffing basic protective clothing affects huge numbers of employers and employees. Based on 1999 data, more than 55% of all private sector employees wear protective clothing—including safety glasses, gloves, reinforced footwear, and hard hats.[9]

If not corrected by this Court, the Third Circuit's vague, multi-factor, jury-implemented test will result in the same "flood of litigation" the PTPA was enacted

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[9] In 1999, approximately 25 million private sector workers within OSHA's jurisdiction wore personal protective equipment. *See* 72 Fed. Reg. at 64,393. OSHA, however, only regulated 41% of U.S. workers at that time. *Id.* at 64,390 n.17. Extrapolating the 25 million nationwide thus yields 60.7 million workers, which was approximately 55% of the nation's 110 million private sector workforce in 1999. *See* Federal Reserve Bank, St. Louis, All Employees, Total Private (https://fred.stlouisfed.org/series/USPRIV).

to stop. *Busk*, 574 U.S. at 31; 29 U.S.C. § 251(a). The ease of bringing class-based donning-and-doffing claims, coupled with the FLSA's already "convoluted, counterintuitive, and difficult" requirements, "dr[ew] the attention of the plaintiffs' bar" and caused FLSA cases to quadruple between the late 1990s and 2009. Danuta Panich & Christopher Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under The Fair Labor Standards Act*, The Federal Lawyer, 14 (Mar. 2011) (https://tinyurl.com/36bku3nn). And FLSA lawsuits increased another 300% from 2007-2017. Jacob A. Bruner, Note, *Toiling in Factory and on Farm: An Employer-Friendly Approach to the Compensability of Donning and Doffing Activities under the FLSA*, 65 Clev. St. L. Rev. 427, 428 (2017). Donning-and-doffing "has been a major source of litigation" as "federal courts have struggled to adopt a uniform test * * *." *Id.* at 430, 442-43. Even in 2018, the law was in a "confused state," as "[t]he FLSA [was] routinely interpreted differently by lawyers, judges, arbitrators, employers, and labor leaders." Matthew E. Ritzman, Note, *A State of Confusion: How the FLSA Is Failing to Ensure a Fair Day's Pay and How to Address It*, 50 U. Toledo L. Rev. 163, 163-64 (2018). As explained above, that confusion has only further increased in donning-and-doffing cases, culminating in the decision below.

Moreover, the potential liability in such cases can be enormous, particularly when brought, as they normally are, as collective actions for years of back wages. Although the award to any employee may be relatively small, total awards even for a single workplace can be enormous.[10] And where, as under

[10] *See*, *e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442, 446 (2016) ($2.9 million judgment for single plant); *Su* v. *E. Penn*

the Third Circuit's test, liability is highly uncertain, that uncertainty can and often does contribute to very large settlements for employers unwilling or unable to endure the risk of a trial.[11]

Under the Second Circuit's test, and consistent with *Busk*, employees are compensated for donning protective clothing only if, unlike in this case, it protects against a risk of injury specific to the job those employees perform rather than generalized or sporadic risks present in vast numbers of workplaces. Indeed, this test is already used by employers like Precision who pay employees when they don specialized protective gear needed do jobs involving extraordinary, transcendent risks. By contrast, the Third Circuit's amorphous test will leave employers guessing how a jury will weigh its multiple factors and subparts to decide whether they owe overtime pay for large numbers of employees running back years. *See*, *e.g.*, Bruner, 65 Clev. St. L. Rev. at 454 ("The Second Circuit's approach in *Gorman* appears most suited for

Mfg. Co., No. CV 18-1194, 2023 WL 7336368, at *14 (E.D. Pa. Nov. 7, 2023) (judgment for $22,253,087 for facilities at one location); *Chavez* v. *IBP, Inc.*, No 01–5093, 2005 WL 8158575 (E.D. Wash. Nov. 28, 2005) ($11 million judgment for single plant under FLSA and similar state law).

[11] *See*, *e.g.*, Order, at 1, *In re Tyson Foods Inc. Fair Labor Standards Act Litig.*, No. 4:07-md-01854 (M.D. Ga. Sept. 15, 2011) (approving settlement of up to $17.5 million to class members, plus up to $14.5 million in attorneys' fees); *Trotter* v. *Perdue Farms, Inc.*, No. 99-893 (D. Del. 2002) ($10 million private settlement plus $10 million DOL settlement) (discussed at Lief Cabraser Firm Resume at 7 (http://tinyurl.com/twsn2dbc)); Kaufman Borgeest & Ryan LLP, *Wage and Hour Liability: Sample Verdicts and Reported Settlements in Excess of $2 Million (October 2012-October 2017)* (reporting settlements of $7,750,000 and $3,450,000 in donning-and-doffing cases) (http://tinyurl.com/4wryt9z5).

adoption by the Supreme Court from both a pragmatic and policy perspective" because it "ensures two very important outcomes: legitimate claims for uncompensated 'work' time are fully covered by the FLSA and frivolous suits fall by the wayside").

The decision will also have far-reaching effects. The Third Circuit encompasses Delaware, which, as of 2022, was the state of incorporation for nearly 70% of all Fortune 500 companies and registered about 79% of all IPOs in that year. *See* Delaware Division of Corporations, *Annual Report 2022*.[12] Any Delaware corporation is therefore potentially subject to an FLSA suit there. *See* 28 U.S.C. §§ 1391(b)(1), (c); *Daimler AG* v. *Bauman*, 571 U.S. 117, 137 (2014). Moreover, because of possible personal jurisdiction concerns, plaintiffs have further incentives to bring collective actions—which are far more costly for employers—in a defendant's state of incorporation. *See*, *e.g.*, *Canaday* v. *Anthem Cos.*, 9 F.4th 392, 396-97 (6th Cir. 2021). Accordingly, the Third Circuit's rule will not only create intolerable uncertainty and potentially massive liability for employers in the states it covers but will likely impose that crippling impact nationwide.

That was the very problem the PTPA sought to avoid. As noted above, in enacting the statute Congress expressly found that the courts' improperly broad expansion of the FLSA workday, if not corrected, would "bring about financial ruin of many employers" "halt[] * * * expansion and development," "curtail[] employment," and create "continuous uncertainty," with "the courts of the country [being]

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[12] Available at https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report-cy.pdf.

burdened with excessive and needless litigation." 29 U.S.C. § 251(a). Not only does the Third Circuit's test threaten "financial ruin" through massive collective-action liability for large numbers of employers, but its open-ended, jury-applied test, if allowed to stand, will create "continuous uncertainty" that will burden the courts with "excessive and needless litigation." *Id.*

Nor was the Third Circuit correct in its speculation that "the *de minimis* doctrine," *cf. supra* note 6, "stems the tide" caused by its overbroad rule, App. 11a. As the Third Circuit noted, this Court has made clear that the *de minimis* issue will normally present a jury question. *See* App. 11a (quoting *Andersen*, 328 U.S. at 692). In this case, for example, the district court noted the lead Plaintiff's testimony disputing Precision's *de minimis* argument. App. 68a n.220. Thus, that unresolved factual argument does not lessen the need for this Court to resolve the circuit split and hold that the activities at issue are non-compensable as a matter of law, which would obviate any need for a trial on the separate *de minimis* defense. *Cf. Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 235 (2014) (holding donning-and-doffing non-compensable under different provision of FLSA and noting that this holding would "avoid * * * judicial involvement in 'a morass of difficult, fact-specific determinations'" involved in the *de minimis* inquiry) (citation omitted).

The Third Circuit's extensive reliance on regulations also risks improperly handing inordinate control over FLSA compensation to a federal agency. Two of the three factors the Third Circuit identified as informing its test for whether an activity is "integral" rely directly on regulations, App. 8a-10a, and the remaining factor, "location," was cribbed in part from a regulation, *id.* at 7a-8a. Not only does this reliance

on regulations ignore *Busk*'s required focus on the work an employee is employed to perform, it could also allow the Department of Labor or other regulatory agencies to decide unilaterally whether a work activity is "integral" to a job (and thus effectively amend the FLSA) merely by requiring it in a regulation. That is not, and cannot be, the law.

Finally, Third Circuit's test potentially creates a disincentive for employers (like Precision) that offer changing facilities as a convenience for their employees. The Third Circuit held that the "location" of changing clothes—whether at home or on-site—affects whether an activity is "integral." App. 7a-8a (holding that "[l]ocation" is a key inquiry and that "[i]t matters where worker change"). But it is well-established that employees cannot be compensated for changing at home, since otherwise the "continuous workday" rule would mean they would also be compensated for commuting to work. *See*, *e.g.*, Dep't of Labor, *Wage & Hour Adv. Mem.* No. 2006-2, at 3 (May 31, 2006) ("It is our longstanding position that if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant."); 29 C.F.R. § 790.6. Accordingly, by offering a workplace location for changing into and out of basic protective clothing such as reinforced boots—even if solely for employees' convenience—employers risk a jury finding that donning is now "integral" because it occurs onsite, thereby requiring the employers not only to pay for their actual donning and doffing time but also for time spent walking to work locations afterward. App. 5a, 12a. That could discourage employers from providing such benefits,

and arbitrarily advantage employers whose jobsites make onsite changing impracticable.

The Third Circuit's test, which expressly conflicts with that of other circuits and creates intolerable uncertainty for employers, warrants this Court's review. The Third Circuit expressly departed from the legal rule applied by other circuits, the issue is far-reaching and important, and this case is an ideal vehicle to resolve it given that the Third Circuit's departure from the Second Circuit's test was outcome determinative. The purpose of the PTPA's exclusion of "preliminary" and "postliminary" activities was literally to establish thresholds—bright lines—at each end of a workday before and after which employers would not be subject to unexpected wage liability. By discarding the Second Circuit's sensible interpretation of the "integral" requirement in favor of a vague and unpredictable test that asks juries to balance largely irrelevant factors, the Third Circuit not only deepened a circuit split but augured a return to the very circumstances the PTPA was enacted more than 70 years ago to avoid.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, reverse the Third Circuit, and reinstate the district court's judgment.

Respectfully submitted,

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