No. 24-____

IN THE

Supreme Court of the United States

EAST PENN MANUFACTURING COMPANY, INC.,

Petitioner,

v.

LORI CHAVEZ-DEREMER
SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL J. MUELLER
EVANGELINE C. PASCHAL
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave. NW
Washington, DC 20037

ELBERT LIN
Counsel of Record
DAVID M. PARKER
DAVID N. GOLDMAN
HUNTON ANDREWS KURTH LLP
Riverfront Plaza
East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8200
elin@huntonAK.com

Counsel for Petitioner

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QUESTIONS PRESENTED

For the last three decades, this Court's atextual interpretation of the Fair Labor Standards Act (FLSA) in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), has both exploded in importance and fostered confusion, prompting two attempts at clarification by this Court while imposing billions in liability on employers.

In *Steiner*, this Court relied primarily on snippets of legislative history to expand FLSA liability contrary to clear statutory text. Shortly after the FLSA was originally passed, this Court construed the term "work" to include "preliminary activities" such as changing clothes. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-693 (1946). Congress responded with the Portal-to-Portal Act, which amends the FLSA to say "preliminary and postliminary" activities are not compensable and only "principal" activities are. But in *Steiner*, this Court again expanded FLSA liability by creating a third category: "preliminary and postliminary" activities *deemed* to be "principal activities" if a court or jury finds them "integral and indispensable" to such principal activities.

The questions presented are:

1. Whether time spent on "integral and indispensable" activities is measured based on reasonable duration (as three circuits have held), or actual duration (as four circuits have held).

2. Whether this Court should overrule *Steiner*.

PARTIES TO THE PROCEEDING BELOW

Petitioner East Penn Manufacturing Company, Inc. was the defendant in the district court and the appellant/cross-appellee in the Court of Appeals.

Respondent is Lori Chavez-DeRemer in her official capacity as the Secretary for the United States Department of Labor.[1]

RULE 29.6 DISCLOSURE STATEMENT

Under this Court's Rule 29.6, Petitioner East Penn Manufacturing Company, Inc., states that it is not publicly traded and has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Secretary Chavez-DeRemer was automatically substituted for one of her predecessors, former Acting Secretary Julie A. Su, who was the most recently named plaintiff in the district court and the appellee/cross-appellant in the Court of Appeals. Ms. Su and several of her predecessors were automatically substituted pursuant to Rule 25(d) throughout the district court proceedings in this case.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Secretary, U.S. Dep't of Labor* v. *East Penn Mfg. Co.*, Nos. 24-1046, 24-1059 (3d Cir.), judgment entered on December 19, 2024.
- *Su* v. *East Penn Mfg. Co.*, No. 5:18-cv-01194-GEKP (E.D. Pa.), judgment entered on May 31, 2023.

The following proceeding is directly related to this case under this Court's Rule 14.1(b)(iii):

- *East Penn Mfg. Co.* v. *Chavez-DeRemer*, No. 5:24-cv-03077-JLS (E.D. Pa.), case pending.

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The district court's opinion granting in part both parties' motions for partial summary judgment (App. 16a-107a, *infra*) is reported at 555 F. Supp. 3d 89. The opinion denying Petitioner's motion for reconsideration regarding summary judgment (App. 108a-113a, *infra*) is unreported but available at 2021 WL 4215503. The opinion denying Petitioner's motion for judgment as a matter of law, a new trial, or remittitur (App. 114a-148a, *infra*) is unreported but available at 2023 WL 7336368.

JURISDICTIONAL STATEMENT

The court of appeals entered judgment on December 19, 2024, and denied rehearing on February 20, 2025. Justice Alito extended the deadline for this petition to June 20, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are reproduced at App. 149a-169a, *infra*.

INTRODUCTION

For decades, employers and courts have struggled with *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)—an atextual decision from a bygone era of statutory construction. When *Steiner* was decided, many justices viewed legislative history as equally important as (or even *more* important than) the statutory text itself. And *Steiner* is a classic of the genre. After simply

declaring the relevant text of the Fair Labor Standards Act (FLSA) ambiguous, *Steiner* jumped to and relied primarily on select remarks unearthed from admittedly "conflicting" legislative history. Were *Steiner* decided today, this Court would follow a very different approach and reach a very different result.

Aside from being wrong, *Steiner* has increasingly bedeviled employers and courts. After lying relatively dormant for decades, *Steiner* has become ever more important over the past thirty years. In just the last five or so, FLSA cases have cost employers nearly $2 billion. And as the amount of litigation has grown, so has confusion in the lower courts, leading to multiple circuit splits. In fact, this Court has twice tried to provide clarity to *Steiner*'s creation—so-called "integral and indispensable" activities—but the confusion persists, as shown by this case and others.

It is difficult to overstate the burden of *Steiner*. The question driving this chaos occurs in almost every sector of the American economy: whether activities that take place before and after the productive work shift, such as changing clothes or showering, are "integral and indispensable" to the employee's "principal activities" and thus compensable under the FLSA. When aggregated across many thousands of employees and multiple years, these "integral and indispensable" activities create massive liability risk. And that risk is exacerbated, particularly for businesses with nationwide operations, by courts disagreeing over how to identify and measure those activities.

None of that should be a surprise. "[P]roblems … arise when judges create atextual legal rules and frameworks. Judge-made doctrines have a tendency to distort the underlying statutory text, impose unneces-

sary burdens on litigants, and cause confusion for courts." *Ames* v. *Ohio Dep't of Youth Servs.*, 145 S.Ct. 1540, 1548 (2025) (Thomas, J., concurring).

This case provides an opportunity to dispel all this confusion. The Court could just settle the question of how to measure time employees spend conducting "integral and indispensable" activities, an important issue that stems from *Steiner* and has split the circuits. Or, this Court could overrule *Steiner* and finally end *all* the confusion and harm caused by the decision's fundamentally flawed statutory construction, as this Court has done recently in overruling or cabining other similar precedents. See *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 396 (2024) (overruling precedent that "cannot be squared with" the statute's plain text); *Groff* v. *DeJoy*, 600 U.S. 447, 468 (2023) (disavowing a statutory "gloss" that was inconsistent with the plain text).

The petition should be granted.

STATEMENT OF THE CASE

A. Legal background

1. As relevant here, the Fair Labor Standards Act of 1938 requires employers to pay overtime to a wide swath of workers. 29 U.S.C. § 201 *et seq*. Violations can trigger lawsuits from employees (individually or collectively) or an enforcement action by the Secretary of Labor. *Id.* §§ 215(a)(2), 216(b)-(c). Remedies include damages (presumptively doubled as liquidated damages), civil penalties, injunctions, and attorney's fees. *Id.* §§ 216-217.

Both liability and damages depend on the amount of compensable "work" employees have performed. But when passed, "the FLSA did not define 'work' or

'workweek.'" *Integrity Staffing Sols., Inc.* v. *Busk*, 574 U.S. 27, 31 (2014). So in several decisions, "[t]his Court gave those terms a broad reading." *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 225 (2014). The last—*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)—held that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed workplace." *Id.* at 690-691. And that included "preliminary activities," like changing clothes or walking to work stations. *Id.* at 692-693.

2. "Congress responded swiftly" to *Anderson* with the Portal-to-Portal Act of 1947 (29 U.S.C. § 251 *et seq*.). *Busk*, 574 U.S. at 32. In Congress's view, the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees," creating "immense" and "wholly unexpected liabilities." 29 U.S.C. § 251(a). Within six months of *Anderson*, "a flood of litigation" ("more than 1,500 lawsuits") had sought "nearly $6 billion in back pay and liquidated damages for various pre-shift and post-shift activities." *Busk*, 574 U.S. at 31-32 (citing S. Rep. No. 37, 80th Cong., 1st Sess. 2-3 (1947) ("Senate Report")). These lawsuits threatened "financial ruin" for employers, "excessive and needless litigation" for courts, and "windfall payments" for employees. 29 U.S.C. § 251(a). In sum, *Anderson* threatened "the national prosperity of the United States." H.R. Rep. No. 71, 80th Cong., 1st Sess. 42 (1947).

To address this "emergency," 29 U.S.C. § 251(b), the Portal-to-Portal Act "provided two statutory remedies." *IBP, Inc.* v. *Alvarez,* 546 U.S. 21, 26 (2005). First, Section 2 eliminated all pending working-time claims that did not rely on a prior contract, custom, or

practice. 29 U.S.C. § 252(a). Second, Section 4 "narrowed" the scope of compensable activities for future claims. *Alvarez*, 546 U.S. at 27.

Section 4, which would soon be addressed by *Steiner*, excluded liability 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.

29 U.S.C. § 254(a). It then defined "preliminary" and "postliminary" activities as those that "occur either prior to the time … at which [an] employee commences, or subsequent to the time … he ceases, such principal activity or activities." *Ibid.* Though mentioned separately, the traveling described in the first paragraph plainly falls within that definition.

Section 4 thus recognizes two categories of activities: (1) "principal activities" that the "employee is employed to perform"; and (2) "activities which are preliminary to or postliminary to" a principal activity.

3. Nine years later, *Steiner* recognized a third category of activities: those that meet the statutory definition of "preliminary and postliminary" activities, but also are "integral and indispensable" to a "principal" activity. 350 U.S. at 252-253. In *Steiner*, the Secretary sued for time spent by employees of a battery manufacturer "changing clothes at the beginning of the shift and showering at the end." *Id.* at 248. The Secretary "concede[d] that these activities ordinarily constitute 'preliminary' or 'postliminary'

activities." *Id.* at 249. But because they were "compelled" by the nature of the work, the Secretary claimed they were compensable as "an integrable and indispensable part of the production of batteries." *Id.* at 248-249.

The Court agreed, holding that "the term 'principal activity or activities' in Section 4 embraces all activities which are an integral and indispensable part of the principal activities." *Id.* at 252-253. It first asserted, without any explanation, that "[t]he language of Section 4 is not free from ambiguity and the legislative history of the Portal-to-Portal Act becomes of importance." *Id.* at 254. *Steiner* then cited a "colloquy between several Senators" that, the Court concluded, "demonstrates the Senate intended" to compensate employees for all activities that "are an integral part of and are essential to the principal activities of the employees." *Ibid*. *Steiner* acknowledged "some conflicting history in the House," but disregarded it in favor of the "more clear cut" and "persuasive" remarks in the Senate. *Ibid*.

Steiner then turned to text, but not that of Section 4. *Id.* at 254-255. Rather, *Steiner* looked to other provisions of the FLSA and a 1947 "bulletin" from the Department of Labor. *Id.* at 254-256 & n.9. It ultimately concluded "[o]n the whole" that Congress intended to compensate employees not just for "principal activities," but also for activities that are "an integral part of and indispensable to their principal activities." *Id.* at 255.

4. For the next 40 years or so, litigation under *Steiner* remained relatively sparse. But "after decades of relative silence," *Steiner* returned to the fore as FLSA litigation "roared back to life in the late 1990's." Panich & Murray, Labor & Employment Corner, *Back*

on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act, The Federal Lawyer 14, 14 (March/April 2011) ("Panich & Murray").[1]

With this "explosion of litigation," *ibid.*, came confusion in the lower courts over *Steiner*. The Second Circuit, for example, lamented that "authorities offer little guidance as to the meaning of the term 'principal activity or activities,' or how to distinguish non-compensable preliminary/postliminary activities." *Reich* v. *N.Y. City Trans. Auth.*, 45 F.3d 646, 649 (2d Cir. 1995). It found that "no clear standards" had "emerge[d]" beyond "certain generalizations" and "the guidance that does exist tends to be circular." *Ibid.* Another court observed that decisions applying *Steiner* "have differed as to the proper test to apply, as well as to the test results." *Aguilar* v. *United States,* 36 Fed. Cl. 560, 566 (1996).

5. In response to this confusion, this Court has twice sought to clarify *Steiner*.

In 2005, *Alvarez* confronted whether "integral and indispensable" activities constitute "principal activities." As *Steiner* acknowledged—and lower courts continued to recognize—these activities fit the statutory definition of "preliminary and postliminary" activities. *E.g.*, 350 U.S. at 249 ("these activities ordinarily constitute 'preliminary' or 'postliminary' activities").[2] But

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[1] See Diener, *Judicial Approval of FLSA Back Wages Settlement Agreements,* 35 Hofstra Lab. & Emp. L.J. 25, 34 (2017) ("Through the 1990s and the 2000s …, courts saw a substantial uptick in the number of FLSA claims, a trend that continued into subsequent decades.").

[2] See, *e.g.*, *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 283 (1st Cir. 2004), aff'd in part, 546 U.S. 21 (2005) (Portal-to-Portal Act "exempts from compensation activities which are preliminary or postliminary … unless they are an 'integral and indispensable

Steiner declared them compensable because they also are "integral and indispensable" to "principal activities." The question in *Alvarez* was whether they are not only compensable but deemed "principal activities" themselves.

That question—which *Alvarez* answered in the affirmative—mattered because of the "continuous workday rule." *Alvarez*, 546 U.S. at 28. Under that rule, all time between the first and last "principal" activities of the day constitutes a "continuous workday," during which all activities are compensable, regardless of whether they are themselves "work." 29 C.F.R. § 790.6(a). So if "integral and indispensable" activities are deemed "principal" activities, they start the "continuous workday" clock. *Alvarez* agreed with that understanding, holding that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a)." 546 U.S. at 37.

But *Alvarez* "left many questions unanswered, such as what constitutes 'any activity that is "integral and indispensable."'" Barbu, *The Ubiquitous Blackberry: The New Overtime Liability,* 5 Lib. U. L. Rev. 47, 60 (Fall 2010) (quoting *Alvarez*, 546 U.S. at 37). In the following years, "[l]itigants and lower courts continue[d] to grapple" with "integral and indispensable" activities. Alfred & Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 ABA J. of Lab. & Emp. L. 363, 363, 382 (Spring 2011); see *Perez* v. *Mountaire Farms, Inc.,* 650 F.3d 350, 381 (4th Cir. 2011) (Wilkinson, J., concurring in part) ("The case law in this area is itself a mush ….").

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part of the principal activities'"); *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), aff'd, 546 U.S. 21 ("Not all 'preliminary or postliminary' activities can go uncompensated[.]").

So the Court intervened again in 2014, this time to resolve disagreement over the compensability of security screenings and also to clarify what, exactly, the terms "integral and indispensable" mean. *Busk*, 574 U.S. 27. Circuit courts used conflicting tests, many of which asked whether the activity was "necessary to the principal work performed and done for the benefit of the employer." *Id.* at 30-31.

Because the terms "integral and indispensable" are not found in the Portal-to-Portal Act, the *Busk* Court applied principles of statutory interpretation to the language of *Steiner*. See *id.* at 33. Looking to dictionary definitions (including those from when *Steiner* was decided), *Busk* held that an activity is "integral and indispensable … if it is an intrinsic element of [principal] activities and one with which the employee cannot dispense if he is to perform his principal activities." *Ibid.*

In so doing, *Busk* rejected the Ninth Circuit's test for "integral and indispensable" activities. Because if 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. And "[a] test that turns on whether the activity is for the benefit of the employer is similarly overbroad." *Ibid.*

As explained below, Section II.B.1-2, *infra*, these efforts in *Alvarez* and *Busk* to salvage *Steiner* have "left the law in a confused state," with the FLSA "routinely interpreted differently by lawyers, judges, arbitrators, employers, and labor leaders." Ritzman, *A State of Confusion: How the FLSA Is Failing to Ensure A Fair Day's Pay and How to Address It*, 50 U. Tol. L. Rev. 163, 163 (2018).

B. Factual background

The employer here is very similar to the battery manufacturer in *Steiner*. Defendant-petitioner East Penn pays thousands of hourly employees to manufacture and recycle lead-acid batteries at facilities in Lyon Station, Pennsylvania. See App. 3a, 21a, *infra*.

Because many employees are exposed to lead and other hazards, they must perform certain activities before and after their productive shift. *Id.* at 3a, 21a-22a. Before entering the production area, they change into uniforms. *Id.* at 3a, 21a, 115a. They also don additional personal protective equipment (PPE), such as safety glasses, earplugs, shoes, respirators, and/or hard hats. *Id.* at 3a. After their shifts, uniformed employees change back into their street clothes before leaving. *Id.* at 22a. Some are also required to shower first. *Ibid.*

To account for these activities, East Penn compensates employees for a period at the beginning and end of each shift. *Id.* at 3a, 115a-116a. Originally, East Penn paid its employees for five minutes at the beginning of each shift and another five minutes at the end. *Id.* at 3a. In 2016, East Penn increased the second period to ten minutes. East Penn based these periods on the time an employee reasonably needs to conduct these activities. See *id.* at 116a.

C. Procedural history

Soon after East Penn decided to increase the end-of-shift paid period, the Secretary launched a two-year investigation into East Penn's compensation practices. *Ibid.* The Secretary then filed this lawsuit in March 2018. See *ibid*.

The Secretary sought back wages for 11,780 current and former hourly employees. See *id.* at 4a. It argued

that East Penn was required to pay these employees for the actual time it took them to conduct the activities described above, rather than the reasonable time it should have taken them. See *id.* at 3a-4a, 16a-18a. According to the Secretary's expert, these activities actually took, on average, 15.6 minutes at the beginning of the shift and 11 minutes at the end. *Id.* at 4a.

After nearly two years of discovery, both parties moved for summary judgment. East Penn did not dispute that the challenged activities were "integral and indispensable" under *Steiner*, while expressly preserving the argument that *Steiner* should be overruled. *Id.* at 170a-171a. The parties disagreed instead over whether employees should be compensated for the time these activities actually took or the time they reasonably should have taken. *Id.* at 33a-34a. On that issue of first impression in the Third Circuit, the district court sided with the Secretary, holding that actual time is the appropriate metric for purposes of assessing liability. *Id.* at 43a. But the district court left open, without further explanation, that reasonable time could be used "in the calculation of damages once liability is established." *Ibid.*

The case proceeded to a lengthy and complex jury trial involving approximately 60 witnesses and over 400 exhibits. *Id.* at 116a-117a. Evidence included employee testimony, security-camera footage, East Penn's policies and procedures, a "time study" by the Secretary's expert, and over 12 million time records. *Id.* at 117a, 175a. After two months, the district court instructed the jury, over East Penn's objection, to calculate damages based on the amount of time it actually took East Penn's employees to conduct the activities at issue. *Id.* at 139a-140a.

The jury awarded approximately $22.25 million. *Id.* at 4a. East Penn renewed its objection that damages should have been based on reasonable time. *Id.* at 140a. The district court disagreed. *Ibid.*

East Penn timely appealed, and the Third Circuit affirmed. *Id.* at 3a. The court first acknowledged that East Penn had preserved the argument that *Steiner* should be overruled. *Id.* at 4a. It then agreed with the district court that East Penn's employees should be compensated for actual time, regardless of what was reasonable. *Id.* at 7a-9a. In so ruling, the Third Circuit purported to "join" the Sixth Circuit and "contrast[ed]" the Tenth Circuit's "reasonable time" approach. See *id.* at 9a.

The court denied East Penn's petition for rehearing. *Id.* at 15a. This petition timely followed.

REASONS FOR GRANTING THE PETITION

This Court can remediate some—indeed, all—of the confusion and harm that continues to arise out of *Steiner*'s indisputably flawed statutory construction. At a minimum, this Court could resolve the circuit split over how to measure time spent on *Steiner*'s "integral and indispensable" activities. But this Court also could, and should, go further by overruling *Steiner*.

I. This Court should resolve how time spent on "integral and indispensable" activities is measured.

A. The circuits are divided over whether reasonable time or actual time is the correct metric.

Seven circuits are split almost evenly over how to measure time spent conducting "integral and indispensable activities" under *Steiner*. The First, Ninth, and Tenth Circuits have allowed measurement based on "reasonable time." *Tum*, 360 F.3d at 283; *Alvarez*, 339 F.3d at 914; *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994). In contrast, the Second, Fourth, and Sixth Circuits—and now the Third—have required "actual" time. *Holzapfel* v. *Town of Newburgh,* 145 F.3d 516, 526 (2d Cir. 1998); *Mountaire Farms,* 650 F.3d at 372; *Brock* v. *City of Cincinnati*, 236 F.3d 793, 802-803 (6th Cir. 2001); App. 9a, *infra*.

1. The First, Ninth, and Tenth Circuits allow reasonable time.

In *Reich*, the Tenth Circuit held that "reasonable time is an appropriate measure" of time spent conducting "integral and indispensable" activities. 38 F.3d at 1127. The employees of a meat processor spent time "putting on, cleaning, and taking off … personal protective gear." *Ibid.* But because the employees had "considerable … discretion with regard to the time and speed" of these activities, the Tenth Circuit held that the "reasonable time to conduct these activities, … rather than the actual time taken" was "an appropriate measure." *Ibid.*

In its decision in *Alvarez*, the Ninth Circuit expressly joined the Tenth. 339 F.3d 894. There, the district court held that the same meat processing company from *Reich* must pay for time spent donning, doffing, and cleaning certain personal protective gear. *Id.* at 901. In doing so, "the district court adopted—as the Tenth Circuit did in *Reich*—a compensation measure based on a 'reasonable' quantification of plaintiff's work time." *Id.* at 914. The Ninth Circuit affirmed, holding that "[t]he use of reasonable time" was permitted in cases, like the one before it, where the tasks at issue were more "uniform" and "subject to dilatoriness." *Id.* at 914-915.

Finally, the First Circuit in *Tum* found "no error" in an instruction directing the jury to consider "reasonable" and not "actual" time. The jury had been instructed "not to decide the actual time it may take any individual employee to perform [the challenged] activities," but instead to "decide the amount of time [that] is reasonably required by a reasonably diligent associate or employee to don and doff the required clothing and equipment." 360 F.3d at 283 n.7. Quoting this instruction, the court held that "the jurors were clearly apprised of their duty," and had not been "confused or misled." *Id.* at 283.

2. The Second, Fourth, and Sixth Circuits require actual time.

In contrast to the above, the Second Circuit in *Holzapfel* reversed a district court for instructing the jury to calculate the time "reasonably necessary" to conduct "integral and indispensable" activities performed by K-9 officers caring for their dogs. 145 F.3d at 523. The district court had "relied upon *Reich* … to justify the 'reasonableness' element" in its instructions. *Id.* at 526. But the Second Circuit

disagreed, because "the word 'reasonable' is not found in the [FLSA's] definition of 'work'" or the phrase "integral and indispensable." *Id.* at 523.

The Sixth Circuit adopted this analysis in *Brock*, which also involved time spent caring for police canines. 226 F.3d at 804. Acknowledging the circuit split, the Sixth Circuit noted that the Tenth Circuit had applied a "reasonable time" standard to prevent overcompensating employees "for tasks on which they could spend an inordinate amount of time," while "[t]he Second Circuit rejected the 'reasonable time' standard." *Id.* at 802. The court then expressly sided with the Second Circuit, holding that "[c]ourts should not inquire into the reasonableness of the amount of work employees actually performed" and should "instead measure, if possible, how much time the officers spent." *Id*. at 803.

Finally, the Fourth Circuit also required "actual time" in its *Mountaire Farms* decision. The employer had urged "that compensable time instead should have been calculated by adding together the minimum amounts of time expended by the best-performing employee in completing each activity." 650 F.3d at 372. The Fourth Circuit found "no merit in this argument," holding that compensation was properly based on "the amount of time that employees … actually spend donning and doffing." *Ibid.*

3. The Third Circuit deepens the split by requiring actual time.

In the decision below, the Third Circuit joined the courts rejecting "reasonable time" and holding that "the correct measure is actual time." App. 7a, *infra*; see *id.* at 9a ("join[ing] the Sixth Circuit in basing liability on the actual time that workers spend"). Echoing the

Second Circuit, the Third Circuit reasoned that "[t]he Act's text focuses on actual time." *Id.* at 8a.

In so doing, the Third Circuit attempted to minimize the split by describing the Tenth Circuit in *Reich* as having allowed "reasonable time" only in the context of calculating damages, and not for purposes of liability. *Id.* at 9a. But this naked effort to "cert-proof" the decision fails for several reasons.

First, other courts do not similarly downplay the split. For example, neither the Second nor Sixth Circuit—both of which expressly rejected *Reich*—so qualified their disagreement with the Tenth Circuit. Likewise, the Eighth Circuit—which has itself yet to weigh in—observed without caveat that the "circuits are divided" on this question. *Lopez* v. *Tyson Foods, Inc.*, 690 F.3d 869, 878 (8th Cir. 2012) (contrasting the Ninth and Tenth Circuits with the Second and Sixth Circuits).[3]

Second, while the Third Circuit purported to distinguish between calculating liability and calculating damages, it didn't apply that distinction in practice. Instead, it affirmed the district court's judgment "across the board," App. 4a, *infra*, which includes the use of "actual time" for both liability *and* damages, see *id.* at 3a-4a, 7a (discussing damages award and "actual time" jury instruction).

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[3] See Barron, *"A Fair Day's Pay for A Fair Day's Work": Why Congress Should Amend the Fair Labor Standards Act to Include an Actual Time Test for Retroactive Damages,* 99 Iowa L. Rev. 1297, 1309 (2014) ("[C]ircuit courts are split over how to calculate retroactive damages ….").

B. Reasonable time is the correct metric.

The Third Circuit not only deepened this circuit split; it also picked the wrong side. Reasonable time is the proper metric for "integral and indispensable" activities.

This issue was settled by *Anderson* nearly 80 years ago. 328 U.S. 680. After deeming pre-shift walking time compensable, *Anderson* limited damages "to the minimum time necessarily spent" on that activity. *Id.* at 692. As *Anderson* explained, "[i]t would be unfair and impractical" to compensate employees for actual time, because many "took roundabout journeys and stopped off en route for purely personal reasons." *Ibid.* *Anderson* also reasoned that unlike actual time, "precise calculation of the minimum walking time is easily obtainable." *Ibid.* This aspect of *Anderson* was unaffected by the Portal-to-Portal Act—which doesn't address how to pay for activities not covered by contract, custom, or practice—and therefore still controls.

Consistent with *Anderson*, the Department of Labor itself long agreed that reasonable time is an appropriate metric. As early as 1956, it allowed employers to provide "given amounts of time" for "clothes changing and wash-up activities," so long as "the time set is reasonable in relation to the actual time required." App. 178a, *infra*. The Department stood by this position for decades. See, *e.g.*, *id.* at 181a (1996 Field Operations Handbook); U.S. Br. 29, *Alvarez*, *supra* (No. 03-1238) (arguing that lower courts correctly "awarded compensation for a 'reasonable' period of walking time," consistent with the "continuous workday" principle).

The Third Circuit's reasoning to the contrary is not persuasive. It did not even acknowledge the Department's statements above. And while the Third Circuit acknowledged that *Anderson* "required reasonable time instead of actual time," its basis for ignoring that conclusion does not stand up. App. 8a, *infra*. The court reasoned that *Anderson*'s holding applied to a specific activity—pre-shift walking time—that "no longer counts as work" under the Portal-to-Portal Act. *Ibid.* But that misses the point, which is that in changing what activities are compensable, the Portal-to-Portal Act did not affect *Anderson*'s logic about how to measure the time spent on such work. To that, the Third Circuit provides no response.

The decision below also asserted that "[t]he Act's text focuses on actual time," citing 29 U.S.C. §§ 206(a)(1), 207(a)(1), 211(c). App. 8a, *infra*. But those provisions say nothing about actual time.[4] Instead, the only references to "actual time" came from the Third Circuit's own dicta in decisions on other FLSA issues. See *id*. at 8a-9a.

[4] See 29 U.S.C. § 206(a)(1) ("Every employer shall pay each of his employees … wages at the following rates"); *id.* § 207(a)(1) ("Except as otherwise provided …., no employer shall employ any of his employees … for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."); *id.* § 211(c) ("Every employer … shall make … such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment … by him ….").

II. Alternatively, this Court should overrule *Steiner*.

This Court could just resolve the circuit split above. Or, it could moot that split *and* dispel much broader confusion by overruling *Steiner* altogether.

"*Stare decisis* is not an inexorable command." *Loper Bright Enters.* v. *Raimondo,* 603 U.S. 369, 407 (2024) (citation omitted). When deciding whether to apply it, this Court considers several factors, including "the quality of [a precedent's] reasoning, the workability of the rule it established, and reliance on the decision." *Ibid.* (citation omitted). Each of these factors "weigh[s] in favor of letting *[Steiner]* go." *Ibid*.

A. *Steiner* was wrongly decided.

Steiner "was not just wrong," but "exceptionally ill founded." *Knick* v. *Twp. of Scott*, 588 U.S. 180, 203 (2019). It is a textbook example of the "bygone era of statutory construction" when the Court "inappropriately resort[ed] to legislative history before consulting the statute's text and structure." *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 428 (2019) (citation omitted).

1. *Steiner* added words to the plain text of Section 4(a).

As this Court now recognizes, "[s]tatutory construction must begin with the language employed by Congress." *Milner* v. *Dep't of Navy*, 562 U.S. 562, 569 (2011) (citation omitted). "[T]he ordinary meaning of that language accurately expresses the legislative purpose." *Ibid.*

Here, the text recognizes two types of activities. A "principal activity" is that "which such employee is employed to perform." 29 U.S.C. § 254(a)(1). And a

"preliminary" or "postliminary" activity occurs "prior to" or "subsequent to" the first or last "principal activities" of the day. *Id.* § 254(a). The text says nothing about activities that are "integral and indispensable" to a principal activity.

Steiner's task should have been easy. The activities at issue—changing clothes and showering—occurred "prior to" and "subsequent" to the employees' productive work and thus meet the statutory definition of preliminary and postliminary activities. Indeed, the Government conceded that these activities "ordinarily constitute 'preliminary' or 'postliminary' activities." *Steiner*, 350 U.S. at 249. Conversely, these activities fall outside the definition of "principal" activities—the employees are not "employed to perform" them. 29 U.S.C. § 254(a)(1). That should have been the beginning and end of the analysis.

But *Steiner* skipped right over the text. With no explanation, it declared the Portal-to-Portal Act "not free from ambiguity." 350 U.S. at 254. And then it assigned primary "importance" to "conflicting [legislative] history," and grafted words plucked from a single floor debate—namely, "integral" and "indispensable"—onto the text of Section 4. *Ibid.*; see also *id.* at 256 (quoting Senator Cooper).

Everything about that was wrong. For starters, *Steiner*'s uncritical invocation of "ambiguity" abdicated the Court's fundamental duty to say what the law is. *Loper Bright*, 603 U.S. at 400 ("[W]hen faced with a statutory ambiguity," courts "do not throw up their hands."). *Steiner* then compounded that error by turning to "floor statements by individual legislators," which "rank among the least illuminating forms of legislative history." *N.L.R.B.* v. *SW Gen., Inc.*, 580 U.S. 288, 307 (2017); see *United States* v. *Trans-Missouri*

Freight Ass'n, 166 U.S. 290, 318 (1897) ("[D]ebates in congress are not appropriate sources of … the meaning of the language of a statute ….").

Worse still, *Steiner* "allow[ed] ambiguous legislative history to muddy clear statutory language." *Milner*, 562 U.S. at 572. *Steiner* itself acknowledged "conflicting" statements in the House. 350 U.S. at 254 & n.6. And those statements—contrary to the ones in the Senate—confirm that *no* preliminary or postliminary activities are supposed to be compensable (absent contract, custom, or practice), even "the laying out of work" to be done "in the next few minutes." 93 Cong. Rec. 4388-4389 (1947).

Ultimately, *Steiner* committed the error present "in most incorrect interpretations of statutes"—it "add[ed] words to the law to produce what [wa]s thought to be a desirable result." *E.E.O.C.* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). That, however, "is Congress's province." *Ibid.*; see also *Muldrow* v. *City of St. Louis*, 601 U.S. 346, 347 (2024) (refusing to "add words … to the statute Congress enacted").

2. *Steiner* is logically incoherent.

Were augmenting the statutory text not error enough, *Steiner* is also logically incoherent.

Steiner's holding has been understood as deeming certain preliminary or postliminary activities both "integral and indispensable to principal activities" *and* "themselves principal activities." *Alvarez*, 546 U.S. at 33. But that isn't possible. One thing cannot be defined in relation to another—A is "integral and indispensable" to B—and also *be* the other. If they're *related*, they can't also be the *same*.

But that's just the tip of the iceberg. Put fully in context, *Steiner* makes even less sense. The statute creates two categories—A ("preliminary and postliminary activities") and B ("principal activities")—which are defined in a mutually exclusive way. A are those activities "which occur either prior to the time on any particular workday at which [an] employee commences, or subsequent to the time on any particular workday at which he ceases," B. 29 U.S.C. § 254(a). So A≠B. *Steiner* then says that sometimes activities in A have a particularly close relationship to ("are integral and indispensable to") activities in B. And when that is so, according to *Steiner*, somehow A=B.

This logical incoherence creates another problem: the goalposts for compensability can shift indefinitely, such that B eventually swallows A. This Court recognized as much in *Alvarez*. As noted, *Alvarez* held that donning protective gear was both "integral and indispensable" to a "principal" activity (processing meat), and also a "principal" activity itself. But in that case, what about the time spent waiting to receive this gear from the employer? 546 U.S. at 40. If this "predonning waiting time" is "integral and indispensable to the principal activity of donning," is waiting now a "principal activity" too? *Ibid*. If so, then what about *pre*-waiting time, like walking to the changing room? In other words, why can't a plaintiff just keep stretching the line of compensability from one "integral and indispensable" activity to another, until B subsumes A completely?

As *Alvarez* recognized, the only way to impose a "limiting principle" was to effectively establish two tiers of principal activities. *Id.* at 41. To be compensable, an activity must be "integral and indispensable" to the "*productive* activity" that the

employee was hired to perform. *Id.* at 42 (emphasis added). If an activity is "two steps removed from the productive activity"—*i.e.*, integral and indispensable to *another* activity that is integral and indispensable to the productive activity—it is not compensable. *Ibid.* Because "predonning waiting time" was "two steps removed from the productive activity," it was not compensable. *Ibid*.

But the statute only recognizes one type of "principal activity": that which the worker is "employed to perform." 29 U.S.C. § 254(a). So what *Alvarez* really did was create a second "atextual legal rule" to mitigate the "problems … aris[ing]" from the first, and thereby further "distort the underlying statutory text." *Ames*, 145 S.Ct. at 1548 (Thomas, J., concurring). We are now completely through the looking glass.

3. *Steiner*'s limited textual analysis is not convincing.

After cherry-picking legislative history, *Steiner* did turn to *other* textual provisions. But that does not absolve its failure to consider the text of Section 4(a). In any event, its reasoning regarding the other provisions is unpersuasive.

First, *Steiner* asserted that if Congress had wanted to exclude future liability for "integral and indispensable" activities, then "the very different provisions of Sections 2 and 4 would have been unnecessary" because "Section 2 could have been given prospective as well as retroactive effect." 350 U.S. at 255-256. But making Section 2 "prospective as well as retroactive" would have gone too far, precisely *because* these provisions are "very different." Section 2 broadly eliminates *all* pending claims not based on contract, custom, or practice. 29 U.S.C. § 252(a). By contrast,

Section 4 narrows the scope of future claims not based on contract, custom, or practice—to only those based on "principal" activities. See pp. 4-5, *supra*. If Section 2 were made prospective, such "principal" activities would *not* be compensable. That would restrict future claims more than Congress wanted, which is exactly why Congress made these provisions "very different" to begin with.

Second, *Steiner* was also wrong in reasoning that unless "integral and indispensable" activities were deemed compensable under Section 4, Section 3(o) of the FLSA would be impermissibly redundant. 350 U.S. at 255.[5] Perhaps, among other reasons, Congress wanted to be "doubly sure." *Barton* v. *Barr*, 590 U.S. 222, 239 (2020) (citing *Wis. Cent. Ltd.* v. *United States*, 590 U.S. 222, 281-282 (2020); *Marx* v. *Gen. Rev. Corp.*, 568 U.S. 371, 385 (2013); *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004)); see also *Rimini St., Inc.* v. *Oracle USA, Inc.*, 586 U.S. 334, 346 (2019) ("Sometimes the better overall reading of the statute contains some redundancy."). And that would certainly make sense here, where Congress was addressing an "emergency" that threatened to cause "financial ruin" and destroy "the national prosperity of the United States." See p. 4, *supra*.

Indeed, Congress made at least one other provision in the Portal-to-Portal Act redundant. It specifically excluded travel "to and from the actual place of performance of the principal activity," even though this same activity is also excluded as "preliminary or

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[5] Section 3(o) allows employers and unions to "exclude[] any time spent in changing clothes or washing at the beginning or end of each workday" from compensated hours through a collective-bargaining agreement, custom, or practice. 29 U.S.C. § 203(o).

postliminary." See 29 U.S.C. § 254(a)(1)-(2). Since Congress deliberately used a belt-and-suspenders approach in Section 4, it would come as no surprise to find the same approach in Section 3(o), too.[6]

Finally, *Steiner*'s reliance on Section 16(c) of the 1949 Amendments is a model of begging the question. Section 16(c) preserved prior regulations by the Secretary, but *only* if they were not "inconsistent with" the FLSA, including as amended by the Portal-to-Portal Act. 29 U.S.C. § 208 note (1952 ed.). In relying on Section 16(c), *Steiner* simply assumed that the regulation at issue, which discussed "integral and indispensable" activities, was consistent with the Portal-to-Portal Act. See 350 U.S. at 255 & n.8 (citing 29 C.F.R. § 790.8). It wasn't, for the reasons just explained.

4. Congress has not implicitly ratified *Steiner*.

While Congress has not overruled *Steiner*, it hasn't ratified it, either. As this Court has long warned, "[i]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969); see also, *e.g.*, *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 580 U.S. 405, 424 (2017) ("[C]ongressional inaction lacks persuasive significance in most circumstances.") (citation omitted). Indeed, "[t]his Court has many times reconsidered statutory constructions that have been passively abided by Congress," *Zuber*, 396 U.S. at 185 n.21—including just last year in *Loper Bright*. See *Monroe* v. *Pape*, 365 U.S. 167, 221 (1961) (Frankfurter,

[6] See 95 Cong. Rec. 11433 (1949) (Rep. Lucas) (acknowledging that Section 3(o) was "not … necessary" because "[t]he Portal-to-Portal Act was intended to cover just such situations").

J., dissenting) ("Decisions involving statutory construction, even decisions which Congress has persuasively declined to overrule, have been overruled here."). And for good reason: "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber*, 396 U.S. at 185 n.21. In short, "Congressional inaction cannot amend a duly enacted statute." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

Congress's silence is particularly uninformative here, where *Steiner* spent "decades" in "relative silence," before "roar[ing] back to life" starting in the late 1990's. Panich & Murray 14. By the time *Steiner* was dusted off the shelf, Congress had reconstituted and entered a different political era.

Finally, Congress shouldn't have to correct this Court twice. It did so once with the Portal-to-Portal Act, after *Anderson* created "an avalanche of unexpected claims," Senate Report 41, and risked "financial ruin" for employers nationwide, 29 U.S.C. § 251(a). In doing so, Congress could not have more plainly distinguished between "principal" activities and "preliminary and postliminary" ones. *Id.* § 254(a). This Court should not "wait helplessly for Congress to correct [*Steiner's*] mistake." *Loper Bright*, 603 U.S. at 411.

B. *Steiner* is not administrable.

Aside from being wrong, *Steiner* has been anything but administrable since its resurgence.

1. *Steiner* is inherently difficult to apply.

The difficulty with applying *Steiner* starts with the decision itself. As one court put it, the notion that principal activities include those activities "integral

and indispensable" to principal activities is "circular." *N.Y. City Trans.*, 45 F.3d at 649; see Section II.A.2, *supra*. And as time came to show, the meaning of "integral and indispensable" is open to substantial, reasonable debate. See, *e.g.*, *Mountaire Farms,* 650 F.3d at 365 ("In contrast [to other circuits], the Second Circuit has interpreted the holding in *Steiner* more narrowly.").

That is why this Court has stepped in twice already, most recently with *Busk* in 2014. See pp. 7-9, *supra*. But *Busk* only highlighted the inherent challenges with *Steiner*. Since the terms "integral" and "indispensable" are not found in the statute, *Busk* was forced to apply dictionary definitions to the language in *Steiner*'s opinion—something this Court has repeatedly criticized. *E.g.*, *Brown* v. *Davenport*, 596 U.S. 118, 141 (2022) ("This Court has long stressed that the language of an opinion is not always to be parsed as though we were dealing with the language of a statute.") (citation omitted).

Furthermore, *Busk* warned that *Steiner*'s malleable standard could be read to "sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address." 574 U.S. at 36. Indeed, "[b]efore … *Busk*, courts routinely decided the integral-and-indispensable issue by asking these two questions: whether the employer required the activity or whether the activity benefited the employer." *Aguilar* v. *Mgmt. & Training Corp.*, 948 F.3d 1270, 1276 n.3 (10th Cir. 2020). But that is precisely the same broad definition of "work" that Congress overruled with the Portal-to-Portal Act. See *Tenn. Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (defining "work" as "physical or mental exertion … controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business").

Perhaps unsurprisingly, even after *Busk*, lower courts continue to see *Steiner* as "abstract," "murk[y]," "fact-intensive," and "not amenable to bright-line rules." *Tyger* v. *Precision Drilling Corp.*, 78 F.4th 587, 592 (3d Cir. 2023), cert. denied, 144 S.Ct. 2604 (2024); see *Perez* v. *City of New York*, 832 F.3d 120, 124 (2d Cir. 2016) ("[T]his standard is markedly fact-dependent …."); *Llorca* v. *Sheriff, Collier Cnty.*, 893 F.3d 1319, 1324 (11th Cir. 2018) ("This inquiry is fact-intensive and not amenable to bright-line rules.").

2. *Steiner* continues to cause conflict and confusion in the lower courts.

The lower courts are not just confused; they continue to be divided in a variety of ways. Initially, they still disagree over how to apply the "integral and indispensable" test. And they further disagree on subsequent subsidiary issues, such as who decides whether an activity is "integral and indispensable," and how time spent on such activities should be measured, as discussed earlier.

a. To start, circuit courts dispute whether *Busk* materially changed the test for identifying "integral and indispensable" activities. Two circuits continue to rely on prior circuit-level precedent that employs factors *Busk* expressly rejected—specifically, whether an employer "required an activity" and "whether the activity is for the benefit of the employer." 574 U.S. at 36-37. The Second Circuit still holds that the more an activity "is undertaken for the employer's benefit," and "the less choice the employee has in the matter," "the more likely such work will be found to be compensable." *Perez*, 832 F.3d at 124 (citation omitted). And the Third Circuit says that its current test "mirrors" a similar pre-*Busk* case. *Precision*

Drilling, 78 F.4th at 594 (citing *Franklin* v. *Kellogg Co.,* 619 F.3d 604, 619-620 (6th Cir. 2010)).

By contrast, the Fifth, Ninth, and Tenth Circuits understand *Busk* as a sea-change that washed away these prior tests. The Tenth Circuit "disclaim[s] reliance" on any "pre-*Busk* cases that turned on these now-disapproved rationales." *Aguilar*, 948 F.3d at 1276 n.3 (citations omitted). The Fifth Circuit likewise refuses to rely on prior cases that "focus[] on whether [the activity] primarily benefits the employer," since those cases "were all decided prior to *Busk*." *Bridges* v. *Empire Scaffold, L.L.C.*, 875 F.3d 222, 227 (5th Cir. 2017). So, too, the Ninth. See *Balestrieri* v. *Menlo Park Fire Prot. Dist.,* 800 F.3d 1094, 1101 (9th Cir. 2015) ("Under [*Busk*], it is not enough … that the employer requires it and it is done for the benefit of the employer.").

b. Circuit courts also continue to disagree over how to interpret "integral and indispensable" in the common context of "donning and doffing" PPE, yielding a "problematic circuit split." Walck, *Taking It All Off:* Salazar v. Butterball *and the Battle over Fair Compensation Under the FLSA's "Changing Clothes" Provision*, 89 Denv. U. L. Rev. 549, 557 (2012). Before *Busk*, the Second Circuit had held that this activity is compensable if, and only if, it "protects against workplace dangers that transcend ordinary risks." *Gorman* v. *Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007). But multiple circuits rejected this "narrow" test, and employed broader multi-factored tests instead. *Mountaire Farms,* 650 F.3d at 365; see, *e.g.*, *Franklin,* 619 F.3d at 619 (holding that the Second Circuit interpreted *Steiner* too "narrowly," and siding with the Ninth and Eleventh Circuits).

Busk did not resolve this conflict. The Second Circuit has now doubled down on its prior test. *Perez*, 832 F.3d at 125 (applying *Gorman*). And the Third Circuit has joined the Fourth and others in rejecting that test. *Precision Drilling*, 78 F.4th at 594 (citing *Mountaire Farms*, 650 F.3d at 365; *Franklin*, 619 F.3d at 619). This growing conflict has prompted several petitions to this Court. See Pet. for Cert., *Precision Drilling Co.* v. *Tyger*, No. 23-654; Pet. for Cert., *Mountaire Farms* v. *Perez*, No. 11-497.

c. Even after courts decide what standard to apply, there is conflict over secondary questions, too. As already discussed, the circuits are split over how to measure time spent on "integral and indispensable" activities. See Section I.A, *supra*.

Courts also appear confused regarding who should decide whether an activity is "integral and indispensable." This Court addressed this matter more than 40 years ago—this "is a question of statutory construction that must be resolved by the courts." *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 738 n.13 (1981). Nevertheless, circuits have applied "different standards," with some courts treating this as a "question of fact." *Holzapfel*, 145 F.3d at 521 (citations omitted); see also, *e.g.*, *Lopez* v. *Tyson Foods, Inc.,* Civ. No. 8:06-cv-459, 2007 WL 1291101, at **3-4 (D. Neb. Mar. 20, 2007) (deeming question of "whether [donning and doffing] activities are an integral and indispensable part of the work requirements" as a "factual issue"); *Nichols* v. *City of Chicago*, 789 F. Supp. 1438, 1441 (N.D. Ill. 1992) ("Whether an activity is preliminary or postliminary to a principal activity is a question of fact.").

Courts also disagree when assessing whether "integral and indispensable" activities are "de minimis"—

another area where caselaw is "a mush." *Mountaire Farms*, 650 F.3d at 381 (Wilkinson, J., concurring in part). For example, some courts consider whether the "total number of minutes claimed by *all* plaintiffs" is de minimis. *Perry* v. *City of New York*, 78 F.4th 502, 532 n.25 (2d Cir. 2023) (citing Ninth and Tenth Circuit decisions); see App. 10a, *infra* (holding that the entire $22.5 million award was not "de minimis"). By contrast, other courts conduct "a plaintiff-by-plaintiff inquiry" instead. *Perry*, 78 F.4th at 532 n.25.

C. *Steiner* confers minimal reliance interests.

Finally, there are minimal reliance interests at stake. "Preliminary or postliminary" activities—whether integral and indispensable or not—are still compensable by agreement. 29 U.S.C. § 254(b)(1). That is, and has always been, one key way the statute accommodates the policy concern that seemingly drove *Steiner*. Congress determined that while principal activities must be compensated, the marketplace can better decide which "preliminary or postliminary" tasks should *also* be compensable for any given job, and how much employers should pay for such activities. Employers can compete for workers by offering to pay for such activities. Or, unions can negotiate on the workers' behalf. *Ibid*. In other words, these issues "are properly presented to the employer at the bargaining table, see 29 U.S.C. § 254(b)(1), not to a court in an FLSA claim." *Busk*, 574 U.S. at 37.

Worker compensation remains amply protected in other ways too. Employers must still pay for all

preliminary or postliminary activities made compensable by "custom or practice." 29 U.S.C. § 254(b)(2). And states remain free to require compensation for preliminary and postliminary activities. See, *e.g.*, *id.* § 218(a).

Lastly, and in any event, *Steiner* has primarily helped plaintiffs' attorneys, not workers. As Judge Posner once explained, forcing employers to pay for "preliminary or postliminary" activities makes them "less willing to pay … a high wage" for the employees' actual work. *Sandifer* v. *U.S. Steel Corp.*, 678 F.3d 590, 594 (7th Cir. 2012), aff'd, 571 U.S. 220. Employers therefore "push hard to reduce the hourly wage so that [their] overall labor costs do not rise." *Ibid.* Accordingly, successful plaintiffs often receive only a one-time "windfall" payment. See *id.* at 598 (quoting 29 U.S.C. § 251(a)).

And that "windfall" can also harm the workers' "own long-term interests." *Ibid.* Many industries currently harmed by *Steiner* are "international and highly competitive," meaning they could ultimately go "where so much American manufacturing has gone in recent years—abroad." *Ibid.* In short, many of *Steiner*'s costs to employers are "borne ultimately by the workers." *Id.* at 597.

* * *

This Court should return to the plain text of the Portal-to-Portal Act, which distinguishes "preliminary or postliminary" activities from "principal" ones. Courts need not, and should not, further undertake the judge-made question whether a preliminary or postliminary activity is "integral and indispensable" to a principal activity.

III. This case is an ideal vehicle for resolving these important questions.

A. "Integral and indispensable" activities are now profoundly important.

In recent decades, the FLSA has seen an "explosion in litigation." Panich & Murray 14. From 1990 to 2014, the number of FLSA lawsuits increased by nearly 650%.[7] And the amounts at stake have skyrocketed too. Between 2021 and 2024 alone, over 3,000 damages awards were entered in FLSA cases, totaling more than $1.9 billion,[8] much of it attributable to *Steiner*. See, *e.g.*, The Fair Labor Standards Act: Hr'g Before the H.R. Subcomm. on Workforce Protections, 112th Cong., 1st Sess., Serial No. 112-33, p. 26 (2011) ("One particularly intense area of litigation has concerned the 'donning and doffing' of protective clothing.").

And then there's the cost of uncertainty. Circuit splits and unpredictable litigation outcomes hinder employers who conduct business nationwide, or even

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[7] Seyfarth Shaw LLP, FLSA Cases 1990, 1993-1999, 2000-2014, Graph Based on Federal Judicial Caseload Statistics, https://tinyurl.com/FLSAcases1990 (last visited June 17, 2025); see also Bruner, *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) (noting that FLSA lawsuits "increased more than 300%" between 2007 and 2017).

[8] Lex Machina Legal Analytics (employment cases, FLSA case tag, pending between 2021 and 2024), https://law.lexmachina.com (last accessed June 17, 2025); see also Seyfarth Shaw LLP, 2024 FLSA Litigation Metrics & Trends 15, https://tinyurl.com/FLSAfilings2024 (FLSA filings 2014-2024) (last visited June 17, 2025) (noting that around 750 federal collective-action lawsuits settled during this period for more than $1.2 billion).

across circuit lines. Such employers must often conform to the strictest obligations, handicapping them when compared to local competitors.

Finally, "integral and indispensable" activities are prevalent in countless sectors of the American economy. For example, workers in a wide variety of industries don and doff uniforms or PPE. See, *e.g.*, *Sandifer*, 571 U.S. 220 (steel workers); *Perez*, 832 F.3d 120 (park rangers); *Gorman*, 488 F.3d 593 (nuclear power plant employees); *Precision Drilling*, 78 F.4th 643 (oil-rig workers); *Mountaire Farms*, 650 F.3d 350 (meat processors); *Von Friewalde* v. *Boeing Aerospace Operations, Inc.*, 339 Fed. Appx. 448 (5th Cir. 2009) (per curiam) (airline employees); *Franklin*, 619 F.3d 604 (frozen food processors); *Musch* v. *Domtar Indus., Inc.*, 587 F.3d 857 (7th Cir. 2009) (paper mill workers); *Balestrieri*, 800 F.3d 1094 (firefighters); *Aguilar*, 948 F.3d 1270 (prison guards); *Llorca*, 893 F.3d 1319 (police officers). Others spend time "booting up and shutting down their computers." *E.g., Cadena* v. *Customer Connexx LLC*, 51 F.4th 831 (9th Cir. 2022); see also *Peterson* v. *Nelnet Diversified Sols., LLC*, 15 F.4th 1033 (10th Cir. 2021). All these industries, and many more, are directly burdened by *Steiner*.

B. This case is the right vehicle.

This case is also an ideal vehicle for resolving the questions presented. Both questions are purely legal. And both were properly preserved, as the decisions below acknowledged. App. 4a, 7a, *infra*; see *id.* at 33a-34a. Indeed, this is the Court's first real opportunity to overrule *Steiner*. It didn't have that option in *Alvarez* or *Busk*. See *Alvarez*, 546 U.S. at 523 ("Moreover, IBP has not asked us to overrule *Steiner*."); Pet. for Cert. i, *Busk*, *supra* (No. 13-433). It does now.

Both questions are also material to the outcome. The second question is case-dispositive. Without *Steiner*, East Penn's employees would not be entitled to additional compensation for the preliminary and postliminary activities at issue (beyond what East Penn previously provided). East Penn's employees are not represented by any union, and the Secretary has not argued (and could not argue) that additional pay is required under any contract, custom, or practice. See 29 U.S.C. § 254(b)(1). Further, resolution of the first question could require reversal of the rulings below on both liability and damages.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

MICHAEL J. MUELLER
EVANGELINE C. PASCHAL
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Ave. NW
Washington, DC 20037

ELBERT LIN
Counsel of Record
DAVID M. PARKER
DAVID N. GOLDMAN
HUNTON ANDREWS KURTH LLP
Riverfront Plaza
East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8200
elin@huntonAK.com

Counsel for Petitioner

June 20, 2025

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

———

Nos. 24-1046, 24-1059

———

SECRETARY, UNITED STATES DEPARTMENT OF LABOR,

Cross-Appellant (No. 24-1059)

v.

EAST PENN MANUFACTURING COMPANY, INC.,

Appellant (No. 24-1046)

———

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5:18-cv-01194)
District Judge: Honorable Gene E.K. Pratter

———

Argued: September 23, 2024 (No. 24-1046)
Submitted: September 23, 2024 (No. 24-1059)

Before: KRAUSE, BIBAS, and AMBRO,
Circuit Judges

———

(Filed: December 19, 2024)

———

Michael J. Mueller **[ARGUED]**
Evangeline C. Paschal
Perie Reiko Koyama
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue NW
Washington, DC 20037

Tonya M. Gray
HUNTON ANDREWS KURTH LLP
1445 Ross Avenue
Suite 3700
Dallas, TX 75202

Thomas Vanaskie
STEVENS & LEE, P.C.
425 Biden Street
Scranton, PA 18503

Daniel B. Huyett
STEVENS & LEE, P.C.
111 N. Sixth Street
Reading, PA 19601

Counsel for Appellant (No. 24-1046)

Jesse Z. Grauman **[ARGUED]**
U.S. DEPARTMENT OF LABOR
DIVISION OF FAIR LABOR STANDARDS
Room N2716
200 Constitution Avenue NW
Washington, DC 20210

Jennifer L. Stocker
U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
200 Constitution Avenue NW
Washington, DC 20210

Counsel for Cross-Appellant (No. 24-1059)

———

BIBAS, *Circuit Judge*.

Hourly employees earn hourly pay. East Penn Manufacturing tries to dodge this basic requirement. First, it claims that employees bear the burden of proving that their unpaid working time was more than *de minimis* (trivial). And second, it claims that employers need pay only for the reasonable time it takes to complete assigned tasks, not the actual time. Not so. Because the District Court correctly rejected both claims as well as various other ones, we will affirm.

I. East Penn Did Not Fully Pay Workers for Changing and Showering

East Penn makes and recycles lead-acid batteries. Because that work involves lead and other hazards, some workers must wear uniforms and shower after their shifts. The uniform is a T-shirt and work pants. Many workers must also wear protective equipment, like safety glasses and shoes; some must use hard hats and respirators too.

Until 2003, East Penn did not pay hourly workers for time they spent changing or showering. That year, it started giving workers a five-minute grace period at the start of each shift to dress and get to their workstations, plus five minutes at the end to undress and shower. In 2016, it doubled the post-shift grace period to ten minutes. But it did not record how much time workers actually spent changing and showering.

The government sued East Penn under the Fair Labor Standards Act for failing to pay employees for all time spent changing and showering. 29 U.S.C.

§§ 207, 211(c), 215(a)(2), (5). As part of the suit, the government hired an expert, Dr. Robert Radwin, who estimated that workers averaged 15.6 minutes dressing pre-shift and 11 minutes undressing and showering—more time than they were paid for.

At summary judgment, both sides agreed that changing and showering are "integral and indispensable" to the workers' principal activities. App. 148 (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)). So the District Court granted summary judgment on that issue to the government and told East Penn that it had to pay employees for that time. *Steiner*, 350 U.S. at 256. (Though East Penn challenges *Steiner*, it recognizes that precedent binds us.) At trial, the jury found that East Penn owed 11,780 hourly uniformed workers roughly $22.25 million in backpay. The District Court declined to award liquidated damages.

East Penn appeals, and the government cross-appeals the denial of liquidated damages. We will affirm across the board.

II. EMPLOYERS BEAR THE BURDEN TO PROVE THAT UNPAID TIME IS *DE MINIMIS*

The District Court instructed the jury that East Penn bore the burden of proving that any unpaid time was "trivial, minor, immaterial, too small to be meaningful or worth the effort, to be taxed, measured, or counted." App. 427. East Penn challenges that instruction. We review claims that a jury instruction misstated the law de novo. *Franklin Prescriptions, Inc. v. N.Y. Times Co.*, 424 F.3d 336, 338 (3d Cir. 2005). This instruction was right.

Though the Fair Labor Standards Act says nothing about excluding trivial time, courts have recognized

an atextual *de minimis* exception. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), *superseded by statute on other grounds as recognized in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C. Cir. 1972). The line between negligible and material time is hazy. Employers must pay workers for "giv[ing] up a substantial measure of [their] time and effort," but not for "only a few seconds or minutes of work beyond the scheduled working hours." *Id.*

In the absence of a clear statutory directive, when deciding who bears the burden of proving a statutory defense, we consider five factors. *Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 361 (3d Cir. 2015). Because the *de minimis* defense is atextual, these factors do not fit perfectly, so we adapt them as needed. Applying them, we hold that the burden of proving the *de minimis* defense belongs on the employer.

Most importantly, we consider whether the doctrine is "framed as an exception to a statute's general prohibition or an element of a prima facie case." *Id.* at 361. Because the Act does not mention a *de minimis* defense, we cannot look for answers in the statutory text. But we can ask whether the doctrine overlaps with the elements of the plaintiff's case. *See In re Sterten*, 546 F.3d 278, 284–85 (3d Cir. 2008). It does not. The *de minimis* doctrine, like other affirmative defenses, "will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Affirmative Defense*, *Black's Law Dictionary* (12th ed. 2024). That suggests that the defendant bears the burden of proof.

The other *Evankavitch* factors—whether the defense will unfairly surprise plaintiff, the party who controls the relevant information, the statutory

scheme, and "policy and fairness considerations"—collectively confirm that the employer bears the burden of proof. 793 F.3d at 361. Here, until the defense is raised, plaintiffs would not anticipate the relevance of administrative efficiency in recordkeeping, which is a factor bearing on whether unpaid time is *de minimis*. *See De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 374 (3d Cir. 2007). Plaintiffs would likely seek "different discovery" or alter "trial strategy [if] the defendant affirmatively pleaded the defense." *Evankavitch*, 793 F.3d at 365. After all, employers control the information needed to prove the defense. And that assumption is embedded in the statutory scheme. The Act pushes the responsibility to gather information about wages and hours onto the employer. 29 U.S.C § 211(c). These are just the kinds of "other policy or fairness considerations" that *Evankavitch* instructs us to consider. 793 F.3d at 361.

So we join the Seventh, Ninth, and Tenth Circuits in placing the burden of proof on the employer. *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011); *Cadena v. Customer Connexx LLC*, 107 F.4th 902, 911, 915 (9th Cir. 2024) (relying on *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1057 n.10 (9th Cir. 2010)); *Peterson v. Nelnet Diversified Sols., LLC*, 15 F.4th 1033, 1042–43 (10th Cir. 2021).

Because the *de minimis* doctrine is an affirmative defense, employers must plead it in the answer. Fed. R. Civ. P. 8(c)(1). Yet "[o]ften[,] evidence that a particular consequence or fact is *de minimis* will not be evident from the face of the complaint, but will only emerge with discovery." *Corbin v. Time Warner Ent.-Advance/Newhouse P'ship*, 821 F.3d 1069, 1080 (9th Cir. 2016) (not treating the *de minimis* doctrine as an affirmative defense, in tension with statements in

Cadena and *Rutti* that the employer bears the burden of proving time *de minimis*). So district courts "should freely give leave [to amend and add this defense] when justice so requires." Fed. R. Civ. P. 15(a)(2).

III. EMPLOYERS MUST PAY FOR ACTUAL, NOT REASONABLE, TIME SPENT

At summary judgment, the District Court held that East Penn had to pay workers for the time they actually spent on changing and showering, not just the time reasonably needed to do so. And it instructed the jury that East Penn had "to pay each of its employees for the time spent." App. 425.

On appeal, East Penn says it did enough by paying them for the two grace periods, the time it believes was reasonable. Focusing on actual time, it worries, would reward employees for dragging their feet or tending to personal matters. But under the Act, the correct measure is actual time.

East Penn argues that the Supreme Court has already resolved this issue, but it has not. True, as East Penn notes, *Anderson v. Mt. Clemens Pottery* held that "under the conditions prevalent in [the] plant, compensable working time was limited to the minimum time necessarily spent in walking at an ordinary rate along the most direct route." 328 U.S. at 692. The Court explained that "[m]any employees took roundabout journeys and stopped off en route for purely personal reasons." *Id.* So it limited the payment to time that benefited the employer: time spent working within the overall walking time.

But *Anderson*'s reach is limited because it addressed activity that was not clearly work. Realizing the "immense" liabilities that could arise from

Anderson, the next year Congress amended the statute to provide that preliminary walking activities are not work. *Steiner*, 350 U.S. at 253; 29 U.S.C. §§ 251(a), 254(a). *Anderson* reached its reasonable-time holding in the context of "*the conditions prevalent in [the] respondent's plant*" and the employees' activities. 328 U.S. at 692 (emphasis added). It recognized that "walking to work on the employer's premises" leaves a lot of room for loafing, so employers needed a reasonable limitation on compensation. *Id.* at 691.

Congress later eliminated payment for that walking time. 29 U.S.C. § 254(a). *Anderson* required reasonable time instead of actual time when tracking an activity that no longer counts as work. That carve-out does not apply here, where East Penn concedes that the changing and showering activities *are* work. Plus, the Supreme Court has distinguished the walking activities in *Anderson* from walking time incident to changing and showering. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 35 (2005). So we look to the text of the statute as our guide.

The Act's text focuses on actual time. "Among the bedrock principles of the [Act] is the requirement that employers pay employees *for all hours worked*." *Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 330 (3d Cir. 2016) (emphasis added). The wage-and-hour provisions track the hours that employees work; they say nothing about a reasonableness limit. 29 U.S.C. §§ 206(a)(1), 207(a)(1). Plus, the Act orders employers to track actual hours and keep records of them. *Id.* § 211(c). That requirement "ensure[s] that all workers are paid the minimum wage for every hour worked." *Williams v. Tri-Cnty. Growers, Inc.*, 747 F.2d 121, 128 (3d Cir. 1984). If reasonable time

sufficed, employers could instead estimate hours, but estimating violates the recordkeeping requirement. *Id.* If a worker lollygags, "the employer's recourse is to discipline or terminate the employee—not to withhold compensation." *Sec'y U.S. Dep't of Lab. v. Am. Future Sys., Inc.*, 873 F.3d 420, 432 (3d Cir. 2017) (internal quotation marks omitted).

We thus join the Sixth Circuit in basing liability on the actual time that workers spend. *Brock v. City of Cincinnati*, 236 F.3d 793, 802–03 (6th Cir. 2001); *see also Holzapfel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 526–28 (2d Cir. 1998) (using actual time instead of reasonable time at least in the context of K-9 officers); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 914 (9th Cir. 2003) (not "disagree[ing]" that the Act focuses on work actually performed, but applying a reasonable time standard to calculate class-wide damages), *aff'd on other grounds*, 546 U.S. 21 (2005). By contrast, the Tenth Circuit has used reasonable time, but only as part of a retroactive damages calculation. *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994) (using reasonable time when there were no records of actual time and explaining that there were "differences in personal routines"); *cf. Lopez v. Tyson Foods, Inc.*, 690 F.3d 869, 878 (8th Cir. 2012) (holding only that, on plain-error review, "the district court's 'reasonable time' instructions, if error, were not clear error" given the unclear case law on the issue).

IV. EAST PENN'S OTHER CLAIMS ALSO FAIL

East Penn raises a slew of other claims. None is persuasive.

A. Any error on the recordkeeping issue was harmless

Employers must keep records of their hourly employees' "[h]ours worked each workday and total hours worked each workweek." 29 C.F.R. § 516.2(a)(7). At summary judgment, the District Court held East Penn liable for not keeping required records of how long workers spent changing and showering. It also rejected East Penn's *de minimis* defense to that record-keeping violation.

East Penn says the court should have first let the jury decide whether the time spent was *de minimis*. 29 C.F.R. § 785.47 (providing that, in keeping records, employers may disregard "insubstantial or insignificant periods of time beyond the scheduled working hours"). But if there was error, it was harmless. The jury was instructed properly and found that the time spent was not *de minimis*. The jury found East Penn liable for $22.5 million of unpaid wages. Properly viewed in the aggregate, this sum is indeed not *de minimis*. *See De Asencio*, 500 F.3d at 375 (directing the District Court to consider unpaid time in the aggregate); *Cadena*, 107 F.4th at 911 ("[C]ourts have awarded relief for claims that, when aggregated, amounted to a substantial claim, even if the amounts might be minimal on a daily basis." (internal quotation marks omitted)). Because the time in question was not *de minimis*, East Penn had to keep records of that time. So any *de minimis* defense to recordkeeping would not apply.

B. There was enough representative evidence

Plaintiffs may prove claims under the Act by using representative evidence of some employees' experiences to show how employees in general were treated.

Reich v. Gateway Press, Inc., 13 F.3d 685, 701–02 (3d Cir. 1994). After trial, the District Court denied East Penn's motion for judgment as a matter of law, holding that the government had put on sufficient representative evidence. That ruling was proper too.

On appeal from the jury verdict, we "view[] the evidence in the light most favorable to the nonmovant" (here, the government) and must affirm if there is enough evidence "from which a jury reasonably could find liability." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993). This case clears that low bar. Though only a small number of employees testified, East Penn correctly concedes that "there is no bright-line test establishing the percentage of employees necessary to achieve a representative sample." Appellant's Br. 38. And though the employees were spread across twenty-four plants, they "were all subject to the same pay and uniform policies that provided insufficient time to complete clothes-changing and showering activities on East Penn's campus." App. 77–78. Plus, Dr. Radwin's expert time study gave the jury additional representative evidence. A reasonable jury could have seen all this as representative enough to support liability.

C. The District Court properly admitted the government expert's testimony

East Penn raises one final challenge: The District Court should not have admitted the testimony of the government's expert, Dr. Robert Radwin. He hired six research assistants to observe eight (out of twenty-four) plants: three large, three medium, and two small. They measured the time that 370 workers spent putting on clothing and 131 workers spent taking it off and showering. Dr. Radwin then prepared a report and testified about his findings.

East Penn argues that the District Court abused its discretion because Dr. Radwin's testimony was unreliable. It objects that, by averaging data across eight plants, he obscured differences among them. And it contends that he could not validly extrapolate from eight plants to all twenty-four.

As the District Court explained, despite any methodological flaws, Dr. Radwin's testimony was admissible. The court properly understood the legal standard: whether Dr. Radwin's technique was reliable enough to help the jury reach an accurate result. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994). Although East Penn challenges how he calculated and interpreted the results, such a challenge "ordinarily goes to the weight of the evidence, not to its admissibility." *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 83 (3d Cir. 2017). The District Court did not abuse its discretion by admitting his evidence.

V. THE DISTRICT COURT PROPERLY DENIED LIQUIDATED DAMAGES

The Secretary cross-appeals the District Court's refusal to award liquidated damages. Employers who violate the Act are liable for back pay plus "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). But courts have discretion not to award liquidated damages if the employer shows that its violation "was in good faith" and that it "had reasonable grounds for believing that [its] act or omission was not a violation" of the Act. *Id.* § 260. To qualify, the "employer must show that [it] took affirmative steps to ascertain the Act's requirements, but nonetheless, violated its provisions." *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 908 (3d Cir. 1991). We review the District Court's legal conclusion

that East Penn had reasonable grounds de novo, its underlying findings of historical fact for clear error, and its ultimate denial of liquidated damages for abuse of discretion. *Id.*

In finding the facts, the District Court did not clearly err. After trial, it held an evidentiary hearing, reviewed the documentary evidence, and weighed the witnesses' credibility. It found that East Penn had "relied in good faith on the advice of a properly experienced labor and employment attorney" and "tailored its policies in response to, and consistent with, the information and guidance it received from its attorney." App. 229–30 (footnotes omitted). Those findings were proper.

Based on those facts, the District Court correctly concluded that East Penn had reasonable legal grounds to think that its employment practices were lawful. Before this opinion, the Third Circuit had no controlling precedent on whether employers had to pay for actual or reasonable time. East Penn asked legal counsel how to follow the law, and counsel advised East Penn that it might be able to disregard pre-shift work as *de minimis*. Even though that advice turned out to be mistaken, following it was reasonable. So the District Court properly exercised its discretion not to award liquidated damages.

* * * * *

Under the Fair Labor Standards Act, employers must pay hourly employees for the time that they actually work, not just a reasonable amount of time. If employers claim that time was trivial, they bear the burden of proving that *de minimis* defense. Because the District Court correctly held East Penn to those requirements, we will affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 24-1046, 24-1059

(D.C. No. 5:18-cv-01194)

SECRETARY UNITED STATES DEPARTMENT OF LABOR,

Cross-Appellant (No. 24-1059)

v.

EAST PENN MANUFACTURING COMPANY, INC.,

Appellant (No. 24-1046)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, and HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES,

[*] *Circuit Judges*

The petition for rehearing filed by Appellant/Cross-Appellee in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of

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[*] Judge Ambro's vote is limited to panel rehearing only.

the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is DENIED.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: February 20, 2025
PDB/cc: All Counsel of Record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 18-1194

MARTIN J. WALSH,
Secretary of Labor,[1]

Plaintiff

v.

EAST PENN MANUFACTURING CO., INC.,

Defendant

MEMORANDUM

PRATTER, J. AUGUST 17th, 2021

The Secretary of Labor initiated this action against East Penn Manufacturing Co., Inc., a battery manufacturer, alleging that East Penn has failed to compensate its employees for time spent changing into and out of uniforms and personal protective equipment and showering at the end of a work shift. East Penn does not dispute that the time spent donning, doffing, and showering is compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 *et seq*. The crux of the dispute is whether East Penn's pay policies, which compensate employees based on what it deems a "reasonable" time for these tasks, are sound as a matter of law and

[1] Pursuant to Federal Rule of Civil Procedure 25(d), the latest Secretary of Labor, Martin J. Walsh, is substituted for Eugene Scalia as the plaintiff in this action.

sufficient as a matter of fact. Contrary to the Secretary's contentions, East Penn disputes that it is legally required to compensate for the actual time expended by any given employee. But to the extent that such compensation as it pays is deficient, East Penn then maintains that the difference between what is "reasonable" and what would be "actual" is de minimis. Like the Energizer Bunny, the parties have pounded their steady drumbeats, with each side steadfast in its belief that it poses the correct standard of measurement.

Following an extensive discovery period and a multitude of discovery disputes, including expert discovery[2], both parties moved for summary judgment. East Penn moved for partial summary judgment first on its good faith defense to the Secretary's claim for liquidated damages and to foreclose the Secretary's claim that East Penn willfully violated the FLSA. Doc. No. 155. East Penn then followed up with a second motion for partial summary judgment to foreclose certain categories of employees from a potential recovery class on the basis that the Secretary failed to produce sufficient evidence to prove uncompensated time as to them. Doc. No. 156.

In response, the Secretary filed a motion for partial summary judgment on no less than 11 separate issues. Doc. No. 161. The Secretary asks the Court first to find, as a matter of law, that East Penn must pay its employees for actual time worked, not a "reasonable" duration of time for the subject tasks. He also moves for a finding that East Penn violated

[2] The Court previously considered and ruled on the admissibility of each of the parties' respective *Daubert* challenges. *Scalia v. E. Penn Mfg. Co.,* No. CV 18-1194, 2020 WL 5409164 (E.D. Pa. Sept. 9, 2020).

the recordkeeping and overtime provisions of the FLSA, that such violations were willful, and that the uncompensated time was not de minimis. The Secretary then filed two motions to strike certain of East Penn's exhibits supporting its motion for summary judgment, Doc. No. 198, and East Penn's Notice of Supplemental Authority, Doc. No. 231. The Court held oral argument on these fully briefed motions.

While the motions for summary judgment were pending, the parties could not resist filing additional discovery related motions. The Secretary filed a notice to amend Schedule A to his complaint, adding a few thousand additional East Penn employees to the group deserving compensation under the Secretary's theories. East Penn responded with a motion to strike. Doc. No. 251.[3]

Having powered through literally stacks of competing briefs, the Court finds that many of the issues raised in parties' motions for summary judgment to be premature and thus not properly resolvable at this stage of the proceeding.

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[3] The Court previously granted the Secretary's motion to compel East Penn to provide an updated list of names and contact information for its Pennsylvania-based employees. *Walsh v. E. Penn Mfg. Co.*, No. CV 18-1194, 2021 WL 1318003, at *1 (E.D. Pa. Apr. 8, 2021).

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BACKGROUND[4]

East Penn manufactures and recycles lead acid batteries at its Lyon Station, Pennsylvania campus. Doc. No. 156-2 ¶ 1; Doc. No. 157 ¶ 2. The Lyon Station facility consists of roughly 30 separate divisions and plants, including automotive, industrial, metals, and manufacturing support services. Doc. No. 156-2 ¶¶ 2-4; Doc. No. 157 ¶¶ 5-6, 8. East Penn employees are not union represented and have not entered into a collective bargaining agreement with their employer. Doc. No. 157 ¶ 11; Doc. No. 176-1 ¶ 11(a).

Most of East Penn's plants operate 24 hours a day, divided into three consecutive eight-hour shifts, Doc. No. 157 ¶ 19; Doc. No. 176-1 ¶ 19(a). The exception is East Penn's "continuous operations" departments which—as its name suggests—operate with partially overlapping eight-and-a-half hour shifts. *Id.* The overlapping scheduling ensures that the machines in those plants are never taken offline.

East Penn requires that all employees at the Lyon Station campus wear personal protective equipment, regardless of their risk of exposure to lead, chemicals, or other hazards. Doc. No. 157 ¶ 39; Doc. No. 176-1 ¶ 39(a). Because of the chemicals with which they work, certain East Penn employees are required to change out of their street clothes and into a uniform prior to entering the production floor at the beginning of their shifts. Doc. No. 157 ¶ 42; Doc. No. 176-1 ¶ 42(b). This uniform is supplied each day and the employee is required to be fully dressed in the uniform prior to entering the production floor. Doc. No. 157 ¶ 47-48; Doc. No. 176-1 ¶¶ 47(b), 48(a).

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[4] The relevant facts are from the undisputed factual record. Facts that remain in dispute are so noted.

Depending on the hazards associated with the job, East Penn also requires certain employees to wear additional PPE, including safety shoes, respirators, and hard hats. Doc. No. 157 ¶ 41; Doc. No. 176-1 ¶ 41(a).

At the end of their shifts, uniformed employees remove their uniforms and change back into their street clothes prior to leaving the facility. Doc. No. 157 ¶50; Doc. No, 176-1 ¶ 50(a). Some of them also shower as part of their end-of-shift activities. The parties dispute whether all uniformed employees are required to shower as part of the end of shift activities. Doc. No. 157 ¶ 54; Doc. No. 156-2 ¶ 109; Doc. No. 176-1 ¶ 54(b). East Penn maintains that only uniformed employees who work in defined lead exposure areas must shower. Doc. No. 176-1 ¶ 54(b). But it is undisputed that employees face disciplinary action for failing to wear their uniforms and for failing to shower, if showering is required. Doc. No. 176-1 ¶¶ 60-61.

A. Tracking East Penn Employees' Time

East Penn maintains two sets of time records for each of their employees. The first is what East Penn deems "actual" time (or "Act1" as appears on some time sheets). Per East Penn policy, all employees are required to swipe in and out using a card-scanning system located in the plant to which they are assigned. Doc. No. 157 ¶¶ 62, 63; Doc. No. 176-1 ¶¶ 62(a), 63(a). Employees are required to swipe in no more than 14 minutes before the start of their shift and 14 minutes after the end of their paid shift. Doc. No. 157 ¶ 69; Doc. No. 176-1 ¶ 69(b). The time clock system records these swipe times to the minute, which are then preserved in East Penn's "mainframe." Doc. No. 157 ¶¶ 65-67; Doc. No. 176-1 ¶¶ 65(a)-67(a).

The second set of time records is for "adjusted" time. Adjusted time corresponds to the employees' scheduled shift times and does not show the 1-14 minutes before and after shifts.[5] Doc. No. 157 ¶¶ 77, 82; Doc. No. 176-1 ¶¶ 77(b) 82(b). Both the actual and adjusted time entries appear on an employee's Payroll Transaction Edit List. Doc. No. 157 ¶ 82; Doc. No. 176-1 ¶ 82(a). East Penn does not pay for "actual" time that is, the recorded between the swipes. Instead, East Penn pays employees based on "adjusted" time—the length of their scheduled production shift—which is paid out in 15-minute increments. Doc. No. 157 1 ¶ 69; Doc. No. 176-1 ¶ 69(b). Some employees swipe in when their shift time officially starts so there is no discrepancy between "actual" and "adjusted" time. Doc. No. 176-1 ¶ 123(b) (Secretary's time study expert admitted some of his subjects did indeed have identical "actual" and "adjusted" times).

The parties dispute the import of time clocks and East Penn's requirement that employees clock in and out no more than 14 minutes from the start and end of their shifts. East Penn maintains that the time clock policy is used only as an attendance tool to ensure that employees are in the plant for their full shift, not to mark the official beginning or ending of the continuous workday as a means to calculate pay.[6]

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[5] For example, an employee who swipes in at 6:46 a.m. for a 7:00 a.m. shift would have an Actual Time entry of 6:46 a.m. and an Adjusted In time of 7:00 a.m.

[6] Department of Labor ("DOL") regulations do not require that employers use time clocks for purposes of calculating pay. 29 C.F.R. § 785.48(a) ("In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not

Doc. No. 176-1 ¶ 69(b). The Secretary contends that the "14-minute rule" is probative of East Penn's knowledge that its employees required more than the time East Penn has allotted to complete pre- and post-shift activities.

B. East Penn's Pay Policies for Donning and Doffing

There are two pertinent East Penn policies governing beginning and end-of-day activities. East Penn's Time Clock and Pay Procedures, effective as of 1998, require that each employee be at her or his workstation at shift starting time. Doc. No. 157 ¶ 71; Doc. No. 176-1 ¶ 71(a). In 2003, East Penn formalized a five-minute "grace period" for compensable start-of-shift clothes changing (the 2003 Company Uniform Policy). Doc. No. 157 ¶ 94; Doc. No. 176-1 ¶ 94. Under this policy, "for pay purposes," employees have five minutes after the start of their shift to report to their workstation. Doc. No. 176-1 ¶ 71(b).

In 2016, in response to an employee complaint, East Penn increased its paid shower and end-of-shift clothes changing time in all plants to ten minutes (the 2016 Personal Protective Equipment/Uniform/Shower Policy).[7] Since then, if an employee works in an area that requires a uniform, the following policy applies:

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engage in any work. Their early or late clock punching may be disregarded.").

[7] The evolution of East Penn's compensation policies bears on both the Secretary's motion for summary judgment as to East Penn's liability for liquidated damages and willfulness claim and East Penn's motion for summary judgment as to its good faith defense to the Secretary's request for liquidated damages. For that reason, the Court recounts that history in detail in Section IV, *infra*.

1. Employees are expected to be at their designated workstations wearing their uniform and other PPE (Personal Protection Equipment) at the start of their shift. For pay purposes, *employees will be granted a five-minute grace period* after the start of the shift to report to their workstation for the purpose of donning uniforms. Employees may be granted longer clean up time in departments or under certain circumstances when approved by Plant Management of Supervisor.

2. Employees will be granted a *10-minute shower time* which includes walking distance to the locker room, doffing the uniform and showering.

Doc. No. 155-64 (emphases in original).

C. Time Spent by Uniformed Employees on Pre and Post Shift Activities

The time that East Penn employees spend donning, doffing, and showering is compensable. The parties dispute whether the employees performed this compensable work outside of their eight-hour shift times.

During discovery, East Penn stated that its pertinent personnel are aware that some employees don their uniforms prior to the start of their shift and that some employees arrive at their workstations prior to the start of their shift. Doc. No. 176-1 ¶ 98(b). In support of its motion for summary judgment, East Penn submitted some 650 employee declarations.[8]

[8] In his reply to his motion for partial summary judgment, the Secretary again asks the Court to prevent East Penn from using these witness declarations. The Secretary contends that these declarations were obtained through coercion and were made

Employees attest to the time they arrive at work and their pre- and post-shift routine, including estimating the amount of time for each. Of those, roughly 200 employees acknowledged that the grace period exists, and of that subset, some of them stated that they make use of the grace period some portion of the time. Doc. No. 176-1 ¶¶ 94(b), 97(b), 98(b). Other employees declare that they acquire and don their uniform prior to the shift start.

To support its claim that employees were expected or made to work off the clock, the Secretary submitted the results of a time study conducted by his expert, Dr. Robert G. Radwin. Dr. Radwin conducted what is known as a "did-take" study that measures the actual time employees spent to perform given tasks. Of the 29 plants within the Lyon Station complex, he selected a subset of eight plants to study. Within those eight plants, he and his research team ultimately observed the pre-shift activities of 370 randomly selected employees who were required to wear uniforms and PPE and post-shift activities of 131 employees who were likewise required to wear uniforms and shower. Doc. No. 174 at 9.

To determine when uniformed employees begin their pre-shift activities, Dr. Radwin measured the time between their "first touch"—i.e., when they acquired their uniform or PPE item—and compared that time to their shift start time. Doc. No. 157 ¶ 112.

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against the employee's legal interests. The Court previously considered—and rejected—the Secretary's arguments of this ilk, finding that the evidence weighed in East Penn's favor and that the Secretary failed to provide evidence to support his claims. *Scalia v. E. Penn Mfg. Co.,* No. CV 18-1194, 2020 WL 3186213, at *11 (E.D. Pa. June 13, 2020). The Court finds no reason to disturb its prior ruling.

Dr. Radwin concluded that, for those uniformed employees, the 370 uniformed employees performed their "first touch" approximately 15.6 minutes before their shift time started. Doc. No. 157 ¶ 114. As for measuring the time to complete end-of-shift activities, Dr. Radwin recorded the time that uniformed employees left the production floor and the time of their last touch. Doc. No. 157 ¶ 115. For this span of time, he estimated that an average of 11.0 minutes had elapsed. Doc. No. 157 ¶ 116. Dr. Radwin did not compare the results of his study to the amount of time East Penn's pay policies operate to compensate an employee.

As with its *Daubert* challenge to Dr. Radwin, East Penn once again raises several challenges to his methodology, as well as the results of the study. Doc. No. 176-1 ¶ 116(b). East Penn criticizes Dr. Radwin for estimating a single average he then extrapolated to all plants, disputes the scope of activities Dr. Radwin considered to trigger a "first touch," and challenges the relevance of his estimates to non-uniformed employees given Dr. Radwin's admission that his study results were "applicable only to employees who were [sic] uniforms." Doc. No. 156 Ex. 18 (Radwin Depo. Tr.). at 115:22-24; 579:21-23; 583:14-19.

Regardless of East Penn's challenges to the time study, East Penn admits that Dr. Radwin's "own subjects acquired and donned their uniform either entirely or *partially on paid time,* i.e., during East Penn's grace period." Doc. No. 176-1 ¶ 98(b) (emphasis added).

LEGAL STANDARDS

A court can properly grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" if there is a sufficient evidentiary basis on which a reasonable jury could return a verdict for the non-moving party. *Kaucher v. Cty. of Bucks,* 455 F.3d 418, 423 (3d Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.* (citing *Anderson,* 477 U.S. at 248). Under Rule 56, a court must view the evidence presented in the light most favorable to the non-moving party. *See Anderson,* 477 U.S. at 255. However, "[u]nsupported assertions, conclusory allegations, or mere suspicions are insufficient to overcome a motion for summary judgment." *Betts v. New Castle Youth Dev. Ctr.,* 621 F.3d 249, 252 (3d Cir. 2010).

The movant bears the initial responsibility to establish the basis for the motion for summary judgment and identify the portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof on an issue, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. After the moving party has met its initial burden, the non-moving party must set forth specific facts showing that there is a genuinely disputed factual issue for trial by "citing to particular parts of materials in the record, including depositions, documents, electronically

stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322.

When parties file cross-motions for summary judgment, "the court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard." *Auto-Owners Ins. Co. v. Stevens & Ricci Inc.,* 835 F.3d 388, 402 (3d Cir. 2016) (alteration omitted) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720 (3d ed. 1998)).

DISCUSSION

I. Applicable FLSA Law

The Court begins its evaluation of the three cross-motions for summary judgment and three motions to strike by providing an overview of the FLSA, the Portal-to-Portal Act, and case law bearing on the compensability of the activities at issue in this case and an employer's statutory obligations.

Though perhaps surprising, the FLSA does not define "work." The Supreme Court has described work, for purposes of the Act, as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *IBP, Inc. v. Alvarez,* 546 U.S. 21, 25 (2005).

Over 50 years ago, the Supreme Court held that the time spent walking to workstations after punching a timecard was compensable. *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 682-84 (1946). But the Court also introduced a limiting principle to the idea that any time spent on such work is necessarily compensable. "[I]nsubstantial and insignificant periods of time spent in preliminary activities need not be included in the statutory workweek." *Id.* at 693. The "de minimis" doctrine thus allows for "only a few seconds or minutes of work beyond the scheduled working hours . . . [to] be disregarded . . . " to avoid "[s]plit-second absurdities." *Id.* at 692; *see also* 29 C.F.R. § 785.47. The doctrine, which accounts for the realities of the industrial world, is not an unfamiliar principle of practicality.[9]

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[9] For example, the Internal Revenue Code recognizes that "de minimis fringe benefits," such as occasional snacks or coffee, provided by an employer can be excluded from an employee's gross income. I.R.C. § 132(a)(4). The de minimis principle is prevalent in property law too. When a party's encroachment onto a neighboring property is unintentional and slight, such that the cost of removal would be "so great as to cause grave hardship or otherwise make its removal unconscionable," the proper course of action is not to issue a mandatory injunction to compel the removal of the encroaching structure. *See, e.g., Golden Press, Inc. v. Rylands,* 235 P.2d 592 (Colo. 1951). Similarly, a defendant in a copyright action might assert a de minimis defense where the copying is so trivial "as to fall below the quantitative threshold of substantial similarity" and does not "qualitatively embod[y] the distinctive expression of the copyrighted material." *William A. Graham Co. v, Haughey,* 430 F. Supp. 2d 458, 473 (E.D. Pa. 2006); *see also Ringgold v. Black Entm't Television Inc.,* 126 F.3d 70, 74 (2d Cir. 1997). Collectively, the de minimis principle reflects judicial wisdom that the law does not engage in mere trifles. *Wis. Dep't of Revenue v. William Wrigley, Jr., Co.,* 505 U.S. 214, 231 (1992).

Concerned about the potential overbreadth of the result in *Mt. Clemens,* Congress enacted the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251 *et seq.,* which amended provisions of the FLSA and carved out activities that might otherwise be considered compensable. Relevant to this case, the Portal-to-Portal Act precluded compensation for "preliminary or postliminary" activities to the principal work. 29 U.S.C. § 254(a)(2). "Principal activities" are those that the employee is "employed to perform" or activities that are integral and indispensable to the principal activity. 29 C.F.R. § 790.8. The Portal-to-Portal Act did not, however, alter or amend the Court's definition of "work," nor did it disturb the de minimis doctrine. 29 C.F.R. § 785.7.

The Supreme Court subsequently held that activities before or after the workday that are an "integral and indispensable part of the principal activities" are compensable under the FLSA. *Steiner v. Mitchell,* 350 U.S. 247, 256 (1956). *Steiner* held that donning and doffing personal protective gear and post-work showering were integral and indispensable for certain workers in a battery plant who regularly handled hazardous materials. *Id.* at 249. The Court confirmed that it "would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Id.* at 256. Because the time spent changing clothes and showering constituted "work" under the FLSA, the battery plant employees were entitled to compensation during or for those activities.

Most recently in *IBP, Inc. v. Alvarez,* the Court sought to clarify the definition of "compensable time"

under the FLSA in light of both the Portal-to-Portal Act and *Steiner*. 546 U.S. 21 (2005). Finding that doffing gear that is integral and indispensable to work is a principal activity, the Court went on to hold that time spent waiting to doff is covered by the FLSA and is not affected by the Portal-to-Portal Act. *Id.* at 40. Conversely, it held that time spent waiting to don the first piece of gear—to mark the start of the continuous, and compensable, workday—is not covered by the FLSA. *Id.* at 42.

In some respects, the *Alvarez* decision announced some clear markers. The Department of Labor interpreted *Alvarez* to "clearly stand[] for the proposition that where the aggregate time spent donning, walking, waiting and doffing exceeds the de minimis standard, it is compensable." DOL Wage & Adv. Mem. No. 2006-2 n.1 (May 31, 2006). The Court, however, did not resolve all ambiguities that have percolated since *Steiner—notably* what the parties contend is a burgeoning circuit split over how to calculate compensable time.[10]

II The Secretary's Motion for Partial Summary Judgment

The Secretary requests that the Court rule in his favor on 11 separate issues that go both to East Penn's liability and available damages.[11] The Secretary

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[10] The district court in *Alvarez* pegged "the compensable time for each activity [] [to] the basis of a reasonable time, rather than the actual time required for each activity." *Alvarez v. IBP, Inc.,* 339 F.3d 894, 914 (9th Cir. 2003). When it affirmed the damages award, the Court did not weigh in either way on the appropriate method of calculating compensable time.

[11] Among other things, the Secretary moves for a finding that East Penn's violations were willful, that it is liable for liquidated damages, and that its actions warrant injunctive

seeks summary judgment in his favor as to the substantive FLSA claims as to liability and to foreclose East Penn from contesting damages, including by presenting a de minimis defense. The Court, having carefully reviewed the disputes of fact that prevent resolution of certain issues on summary judgment, grants the Secretary's motion in part and denies it in part.

A. Uncontested Issues

Of the 11 grounds raised by the Secretary, East Penn does not dispute two of them: it admits (1) that it is a covered enterprise engaged in commerce or in the production of goods for commerce under the FLSA, and (2) that the donning and doffing activities at issue are considered "integral and indispensable" within the meaning of *Steiner v. Mitchell,* 350 U.S. 247, 256 (1956). Accordingly, the Court grants summary judgment in the Secretary's favor as to these two undisputed issues.

B. Correct Measurement of Compensable Time

The Secretary moves for summary judgment as to the activities that start and stop the "continuous workday." The "continuous workday rule" defines the "workday" as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Alvarez,* 546 U.S. at 29 (quoting 29 C.F.R. § 790.6(b)). The Supreme Court held that "principal activity or activities . . . embraces all activities which are an

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relief. Because these arguments go to the scope of appropriate damages, the Court considers them along with East Penn's cross-motion as to its good faith defense and East Penn's effort to foreclose the Secretary's willfulness claim. *See* Section IV, *infra.*

integral and indispensable part of the principal activities." *Id.* at 29-30. Although East Penn admits that donning, doffing, and showering are integral and indispensable activities, it does not agree that it is obligated to pay for all time between the start and stop of the continuous workday (excluding meal breaks or off-duty breaks).

As has been previewed in prior memoranda throughout this litigation, the parties vigorously dispute the correct measure of the continuous workday. The Secretary asks the Court to find, as a matter of law, that East Penn must record and pay their uniformed employees for the *actual* time it takes to don and doff a uniform and shower. East Penn asserts that it must compensate its employees only for time reasonably spent donning, doffing, and showering. East Penn admits that it does not record and has not recorded and does not pay for the actual time spent on the indisputably compensable activities. But it contends that the 15 minutes of compensable time it applies to its employees (i.e., the five-minute grace period at the start, and the ten minutes at the end of the day) is reasonable and sufficient.

As a matter of legal principle, the Court cannot adopt East Penn's position. The Court reaches this conclusion having reviewed relevant case law, as well as the Department of Labor's rulings, opinions, and interpretations. Collectively, these sources support the Secretary's interpretation as a matter of precedent, pragmatism, and, of no small moment, achieving the purpose of the FLSA.

Although the Supreme Court in *Alvarez* did not reach the issue of the correct method of measurement, it unequivocally held that the continuous

workday rule requires that employees be compensated for all time spent during the continuous workday. 546 U.S. at 37. Nothing in the Court's opinion suggests that "all" is interchangeable or otherwise synonymous with "reasonable."

At first glance, the circuit courts of appeals that have addressed the correct measure appear to be split between an actual and reasonable time standard. Absent binding precedent from the Third Circuit Court of Appeals on this issue, this Court may look to other circuits for helpful guidance.[12] The Ninth and Tenth Circuit Court of Appeals appear to adopt a reasonable time standard, while the Second and Sixth Circuits have endorsed an actual time requirement.[13] But partitioning in this way is overly

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[12] Searching for a toehold in this Circuit, the Secretary relies on *Williams v. Tri-County Growers, Inc.,* involving estimating hours worked by farm laborers in the fields. 747 F.2d 121 (3d Cir. 1984). The appellate court held that the employers' estimation system failed to maintain the accurate records required under Section 11(c) of the FLSA. *Tri-County Growers,* although relevant insofar as it articulates an employer's record-keeping requirements, does not settle the actual versus reasonable time standard debate.

[13] Compare *Alvarez v. IBP, Inc.,* 339 F.3d 894, 914 (9th Cir. 2003), *aff'd on other grounds,* 546 U.S. 21 (2005) *and Reich v. IBP, Inc.,* 38 F.3d 1123, 1127 (10th Cir. 1994) *with Brock v. City of Cincinnati,* 236 F.3d 793, 903 (6th Cir. 2001) *and Holzapfel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 528 (2d Cir. 1998). The Eighth Circuit Court of Appeals in *Lopez v. Tyson Foods, Inc.* briefly discussed the split where the jury instructions provided that "only the time reasonably spent [on pre-shift or post-shift activities] is compensable" before finding that the employees failed to preserve the jury instruction challenge on appeal. 690 F.3d 869 (8th Cir. 2012). Reviewing the instructions only for clear error, the appellate court did not disturb the instructions given in the trial court; nor did it reach the question of the

reductive. That is because no circuit court has endorsed the reasonable time standard after *Alvarez* was issued.[14]

Moreover, when those courts that have endorsed a reasonable time standard, it was in the context of fashioning a damages award when there were no records of actual compensable time worked. The circuit "split" disappears when one considers the difference between liability and damages. In *Alvarez v. IBP, Inc.,* the Ninth Circuit affirmed the district court's decision to calculate compensable time on the "basis of a reasonable time" as "within the district court's discretion." 339 F.3d 894, 914 (9th Cir. 2003), *aff'd on other grounds,* 546 U.S. 21 (2005). Although the Tenth Circuit in *Reich v. IBP, Inc.* discussed a reasonable time measure for calculating back pay damages, the resulting permanent injunction obligated the defendant to "implement recordkeeping practices sufficient to record the time spent by each employee in performing pre-shift and post-shift activities found to be compensable under the Act." *Garcia v. Tyson Foods, Inc.,* 474 F. Supp. 2d 1240, 1248 (D. Kan. 2007) (discussing 38 F.3d 1123 (10th Cir. 1994)); *Jordan v. IBP, Inc.,* No. 3:02-1132, 2004 WL 5621927, at *13 (M.D. Tenn. Oct. 12, 2004) (discussing same). So put, the Tenth Circuit was not endorsing an employer's own "reasonable" calculation of work in perpetuity.

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correct calculation method, although it did note the absence of existing precedent endorsing either method.

[14] Contrary to East Penn's claim, the district court decisions endorsing the reasonable time standard that East Penn cites to were not all issued after *Alvarez.* Doc. No. 155-1 at 20.

Within this Circuit, East Penn interprets *Lugo v. Farmer's Pride Inc.* to "embrace" a reasonable time standard. No. CIV.A. 07-0749, 2011 WL 2550376 (E.D. Pa. June 23, 2011). It is true that *Lugo* permitted the defendant's expert to present evidence "to assist the jury in determining the reasonable amount of time that Defendant's employees spend on certain activities at the poultry production plant, including donning, doffing, sanitizing, washing, and walking." *Id.* at *1. But finding that the expert's methodology is admissible for consideration is not a ruling on the proper standard for measuring time worked.

In each of these cases, the courts relied on reasonable estimations as a proxy to reconstruct the amount of time the employees spent because there were no time records. It does not absolve an employer of its obligations under the FLSA to record and compensate for actual time. 29 U.S.C. § 211(c).[15]

Indeed, recent donning and doffing cases have held actual time is the appropriate standard because it more faithfully adheres to precedent and the

[15] As for the remainder of the district court opinions relied on by East Penn, the Court finds that these cases re-affirm the proposition that employees must be compensated for the actual time they worked. *See, e.g., Atbanese v. Bergen Cty., N.J.,* 991 F. Supp. 410, 426 (D.N.J. 1997) (ordering plaintiff to be compensated "for the actual time they spent . . . provided plaintiffs show that such time was reasonable"); *Bull v. United States,* 68 Fed. Cl. 212, 227-28 (Fed. Cl. 2005) (where employer has failed to maintain accurate records, the time claimed by plaintiffs must be reasonable); *Reich v. IBP. Inc.,* No. CIV. A. 882171, 1996 WL 137817 (D. Kan. Mar. 21, 1996), *aff'd sub nom. Metzler v. IBP, Inc.,* 127 F.3d 959 (10th Cir. 1997) (parties used reasonable amount of compensable time where employer failed to keep accurate records of pre- and post-shift activities).

statutory purposes of the FLSA. *See, e.g., Abadeer v. Tyson Foods, Inc.,* 975 F. Supp. 2d 890, 904 (M.D. Tenn. 2013) (holding that Tyson's reasonable time standard is wrong "[a]s a legal matter" and that neither the DOL regulation [regarding the continuous workday rule], nor the Supreme Court's recent affirmation of it in *Alvarez,* qualifies the rule with a reasonableness standard"); *Helmert v. Butterball LLC,* 805 F. Supp. 2d 655 (E.D. Ark. 2011) (holding that the policy of paying for six minutes a day to don and doff did not comply, as a matter of law, with the FLSA); *Smith v. Safety-Kleen Sys., Inc.,* No. 10 C 6574, 2011 WL 1429203, at *5 (N.D. 111. Apr. 14, 2011) (finding that employee who presented sufficient evidence that employer did not pay based on actual time spent donning and doffing may violate FLSA' s overtime requirements).

East Penn seizes on certain language in *Mt. Clemens* that comments on the unfairness and impracticality of compensating employees who take "roundabout journeys [to their workstation] for purely personal reasons." *Mt. Clemens,* 328 U.S. at 692. East Penn's argument is pragmatic and, for that reason, tempting. But it is not legally sound. Theoretically, a worker could arrive well in advance of his shift, don his uniform—thereby initiating the continuous workday—then lounge about for some extended amount of time, and claim compensation for that leisure time. The Court is certainly mindful of this possibility. To the extent East Penn is fearful of excess idling, it can implement policies to manage the work performed during the continuous workday. But speculation that an intrepid, self-indulgent employee might take advantage of the legal standard cannot support prophylactically chiseling wages.

Beyond persuasive jurisprudence, the Court can also consider the Secretary of Labor's and the Wage and Hour Division's rulings, opinions, and interpretations as they "constitute a body of experienced and informed judgment." *Mabee v. White Plains Pub. Co.,* 327 U.S. 178, 182 (1946) (citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)).

Support for the actual time standard appears in Department of Labor regulations, including one that East Penn relies on. Although 29 C.F.R. § 785.48(a) does not obligate an employer to use time clocks, for those that do—like East Penn—the regulation discourages discrepancies between clock records and "actual hours worked." That is because gaps in those time values "raise a doubt as to the accuracy of the records of the hours actually worked."

In what has pre-occupied much of the parties' post-summary judgment briefing here, the parties have submitted dueling notices of supplemental authority from prior DOL interpretations and guidance. Each side claims they are providing the clean, unambiguous answer. The Court cannot agree. The stacks of briefing on competing interpretations alone suggest the answer is not so obvious. So, the Court gives minimal probative value to these "authorities."

The Secretary cites to a 2001 Opinion Letter from the Wage and Hour Division, which it argues establishes the DOL's endorsement of actual time. In response to whether an employer could permissibly pay all employees based on an average amount of time that all employees work, the DOL responded that "company must record and pay for each employee's actual hours of work, including compensable time spent putting on, taking off and cleaning his or her protective equipment, clothing or gear." Opinion

Letter Fair Labor Standards Act (FLSA), 2001 WL 58864, at *2.[16]

East Penn relies on the DOL's Wage and Hour Division Field Operations Handbook for what it contends supports a reasonable time standard. Courts have found that the Handbook lacks the force of law and is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844-45 (1984). *See, e.g., Morgan v.*

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[16] On September 2, 2020, East Penn filed a second notice of supplemental authority to attach a final rule published by the DOL on August 28, 2020. Doc. No. 238. East Penn argues that the new rule (which took effect on September 28, 2020) voided the January 15, 2001 DOL Opinion Letter upon which the Secretary relies as support for an actual-time standard.

East Penn notes that the January 15, 2001 Opinion Letter is conspicuously absent from the DOL's web archive. Doc. No. 238 at 2. The new Final Rule provides that any document not posted to its website is considered withdrawn. For this reason, East Penn argues that the Opinion Letter must be considered withdrawn. The Secretary responds that, regardless of whether the Opinion Letter currently applies, it was issued around the time East Penn implemented its written policies in 2003 and in 2016. So, it is relevant for the time period at issue.

On September 29, the Secretary filed a notice to address the state of the DOL's guidance, including an Opinion Letter and Field Assistance Bulletin issued last month. Doc. No. 244. The Secretary asserts that, since 1995, the DOL's guidance has consistently been to compensate for "all hours actually worked." Per a 1995 Opinion Letter, employers cannot average out an estimate of time worked and comply with overtime requirements of the FLSA. And, as recently as August 31, 2020, the DOL published an opinion letter advising that employers must pay overtime "for all hours actually worked."

Moreover, even adopting East Penn's argument that the August 2020 Final Rule explicitly provides for "reasonable" compensation—which it does not—the Court finds nothing that makes this rule retroactive.

Family Dollar Stores, Inc., 551 F.3d 1233, 1275 n.65 (11th Cir. 2008); *Chao v. Barker Bros., Inc.,* No. CV 04-1764, 2005 WL 8174446, at *9 (W.D. Pa. Nov. 22, 2005). However, the Handbook may be considered to the extent it offers persuasive guidance. *Skidmore v. Swift & Co.,* 323 U.S. 140 (1944); *Zellagui v. MCD Pizza, Inc.,* 59 F. Supp. 3d 712, 716 n.2 (E.D. Pa. 2014) (collecting cases).

The Handbook authorizes employers to "set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities, provided the time set is reasonable in relation to the actual time required to perform such activities." Dep't of Labor Wage and Hour Division, Field Operations Handbook ("FOH") § 31b01(a) (Sept. 19, 1996), https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-31#B31b01 (last accessed July 23, 2021). To the extent the Court considers the Handbook, it is at most of little relevance. That is because the cited provision applies where a collective bargaining agreement governs but is silent whether clothes changing and wash-up time should be included in hours worked. [17] *See* FOH

[17] In its Notice of Supplemental Authority, East Penn produced a 1956 DOL Opinion Letter stating that an employer could use a "reasonable" formula to calculate compensable pre- and post-shift activities. Doc. No. 223. East Penn argues that the reasonable formula was "ultimately memorialized in Section 31b011 of the FOH" and not conditioned on the existence of a CBA. The Court disagrees that this provision of the FOH applies whether or not the employer and employees have entered into a CBA. The current version of the FOH (at least since 1996) has slotted the formula clause under the CBA header and specifically provided that where the collective bargaining agreement is silent, the employer may use a reasonable formula. Endorsing East Penn's interpretation would require the Court to disregard the structure and logical rela-

§ 31b01 (entitled "Clothes changing and washup time where collective bargaining agreement makes no mention of practice."). CBAs are a means of ordering a labor relationship between employer and employees through the private law. *William F. Walsh Elec. Const., Inc. v. Bhd. of Elec. Workers, Loc. Union 98,* 587 F. Supp. 979, 982 (E.D. Pa. 1984) (citing *Nolde Brothers, Inc. v. Local No. 358 Bakery and Confectionery Workers Union,* 430 U.S. 243, 256 (1977) (Stewart, J. dissenting) ("A collective-bargaining agreement erects a system of industrial self-government"). Here, there is no CBA for East Penn employees.

But even if a CBA were in place, East Penn relies on version of the FOH from 1996. The later-in-time 2001 Opinion Letter from the DOL states that a company must record and pay for actual hours of work.[18]

Finally, the Supreme Court has consistently held that the FLSA should be liberally construed in favor of employees. *Mitchell v. Lublin, McGaughy & Assocs.,* 358 U.S. 207, 211 (1959); *American Future Sys.,* 873 F.3d at 426 ("The FLSA is a humanitarian

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tions of the parts of the FOB. *Accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 145 (2012) (discussing the "whole-text" canon).

[18] East Penn also relies on DOL regulations which state that employers are not even required to use time clocks, and, even if they are used, the swipe time records may be disregarded if they do not match actual working time. The FOH acknowledges this practice, known as long-punching, by recognizing that time records may show elapsed time greater than the hours actually worked. This happens if "an employee came in early for personal convenience and did no work prior to the scheduled beginning time" or "remain[ed] after their actual quitting time." But, because East Penn admits the swipes do not mirror *working* time, the Court fails to see the relevance of "long-punching" here.

and remedial legislation . . . ."). The actual time standard effectuates this employee-centric policy goal, incentivizing employers to comply with the FLSA's record-keeping requirements while guaranteeing that employees are appropriately compensated.

Accordingly, the Court grants summary judgment in the Secretary's favor on this point. It is improper as a matter of law for East Penn to pay an estimated amount of time for compensable pre- and post-shift activities, as they are properly part of the continuous workday. To the extent that the concept of "reasonableness" permeates this case, it is limited to the calculation of damages once liability is established.

To be sure, the Court's holding today does not absolve the Secretary, or any FLSA plaintiff, from the burden of establishing that the employees were not compensated for pre- and post-shift work. *See* Section II.D, *infra* (discussing the burden shifting under *Mt. Clemens* applies at the damages phase, not when establishing liability). Rather, the Court holds that the standard for compensable time is "actual" time, not "reasonable" time.

C. FLSA Recordkeeping Violation

Building from the position that the correct standard of compensable time is "actual" time, the Secretary next asks this Court to find that East Penn has violated its recordkeeping obligations under the FLSA because it does not have any records establishing the actual time spent on pre-and post-shift activities. At oral argument, East Penn conceded that it did not keep recorded measurements of each employee's actual time.

Section 11(c) of the FLSA requires employers to "make, keep, and preserve" accurate records of their

employees' "wages, hours, and other conditions and practices of employment." Pay records must include hours worked per day and week, the amounts paid to each employee, and the daily starting and stopping time of individual employees. 29 C.F.R. §§ 516.2(7), 516.2(8); 516.6(a)(1). The significance of the record-keeping requirement is its effect on the burden of proving liability. When an employer's records are inadequate, an employee need only show that he "performed work for which he was improperly compensated" and produce "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Martin v. Selker Bros., Inc.,* 949 F.2d 1286, 1297 (3d Cir. 2001). This abbreviated standard of proof does not penalize a worker whose employer has been derelict in his recordkeeping duties.

As a threshold matter, the parties dispute the meaning of adequate and accurate records. The Secretary contends that the records that East Penn does maintain are insufficient because there is time not accounted for. First, he maintains that the records of employees' shift times undercount work time. It is undisputed that certain uniformed employees donned and doffed their uniforms and showered outside of the eight-hour scheduled shifts. Second, the clock-in and clock-out times are not accurate because, according to the Secretary, the record evidence shows that employees performed compensable activities outside of this range too. And East Penn maintains that the swipe times are used only for attendance purposes, so the time intervals are not probative of time worked either.

East Penn does not have records of how long it actually takes each employee to perform the pre- and

post-shift activities each day, although it admits that the activities at issue are integral and indispensable (and therefore compensable). Doc. No. 176 at 7; *see* Section II.A, *supra.* East Penn maintains that it is not required to record the actual time worked because the standard is that the employer pay for reasonable time worked. As outlined above, the Court disagrees with East Penn's interpretation of the correct measure of compensable time as a matter of law. *See* Section II.B, *supra.* So, it rejects East Penn's attempt to side-step a potential recordkeeping violation in this manner.

East Penn admits that the paid eight-hour shift times "constitute[] the record of time worked." Doc. No. 176-1 ¶ 91(b). It maintains that the "punch-in and punch-out" time records are irrelevant for pay purposes because they "are used solely for attendance purposes." Doc. No. 176-1 ¶ 123(b). It is undisputed that there are no records of the actual time East Penn employees spend donning, doffing, and showering—even though such work is compensable. Doc. No. 176-1 ¶104(b) (admitting that "it has no documents that establish that each uniformed employee actually used some or all of the paid time at the end of their shift . . . ."). Because there is no dispute that the actual time spent on donning, doffing, and showering were not recorded for any employee at any time, the Court finds that the record-keeping practices here are deficient.

East Penn also misconstrues the nature of a recordkeeping violation. It responds that, to prove a recordkeeping violation, the Secretary must first show that the amount of time paid for donning, doffing, and showering is not sufficient. Not so. The problem here, as East Penn admits, is that it does

not record the actual time spent on indisputably compensable activities. So, the records that East Penn does maintain may be an inaccurate reflection of its employees' work hours. It has estimated how much it deems reasonable to complete these tasks and compensated based on that estimation. But recording only shift times is a recordkeeping violation when it is not reflective of actual hours worked. *Cf. U.S. Dep't of Lab. v. Cole Enters., Inc.,* 62 F.3d 775, 779 (6th Cir. 1995) (finding recordkeeping violation where only the scheduled shift hours were recorded, not the actual hours worked).

East Penn has not pointed to, nor is the Court aware of any de minimis defense to a record keeping violation. *Accord Perez v. Am. Future Sys., Inc.,* No. CV 12-6171, 2015 WL 8973055, at *14 (E.D. Pa. Dec. 16, 2015), *aff'd sub nom. Sec'y United States Dep't of Lab. v. Am. Future Sys., Inc.,* 873 F.3d 420 (3d Cir. 2017) (granting summary judgment to Secretary on recordkeeping claim when employer conceded that it failed to record the times its employees logged on and off its computer and telephone systems at its call center locations).

Because an employer commits a per se record-keeping violation exists when its records are inadequate, the Court grants the Secretary's motion for summary judgment on this issue.

D. Whether East Penn Violated the FLSA Overtime Requirements

The Secretary also moves for a finding that East Penn violated the FLSA's overtime provision by failing to compensate its uniformed employees for the actual time spent donning, doffing, and showering. In other words, the Court must find that no

reasonable jury could find that East Penn did not fully compensate its uniformed employees for the actual time spent on these activities. *Kaucher v. Cty. of Bucks,* 455 F.3d 418, 423 (3d Cir. 2006).[19]

Even though the Court found that East Penn's records are inadequate, *see* Section II.C, *supra,* the Secretary has the burden of proving that the employees have actually performed work for which they were improperly compensated. *Sec'y United States Dep't of Lab. v. Cent. Laundry Inc.,* 790 F. App'x 368, 371 (3d Cir. 2019); *Diabate v. MV Transp., Inc.,* No. CIV.A. 14-857, 2015 WL 4496616, at *12 (E.D. Pa. July 20, 2015) ("Although *Mt. Clemens* may offer a classwide basis for proving *damages,* proving liability in this case requires that [plaintiff] show that those in the plaintiff class performed uncompensated 'work.'"). It is only when such proof is offered that the Secretary can take advantage of *Mt. Clemens*' burden shifting to prove damages on a class-wide basis. *Mt. Clemens* does not relieve the Secretary of the initial burden of establishing that the employees have not been properly compensated for liability purposes.

East Penn does not dispute that it does not compensate for actual time spent on these activities. That is because East Penn maintains that it pays for what it deems a "reasonable" amount of time as part

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[19] In their most recent exchange of notices, the parties appeared to contest whether the Secretary expanded the damages claim beyond the time uniformed employees spent donning, doffing, and showering. Regardless, the Secretary moved for partial summary judgment here only as to a finding that East Penn's *uniformed* employees were not properly compensated for those activities. So, the Court will only consider that claim,

of the shift time. East Penn's undisputed pay policy for uniformed (non-continuous operations) employees provides for five minutes of donning time, should the employee use the "grace period," and ten minutes of doffing and showering time—independent of whether it takes employees more or less than this allotted amount of time. But, in opposing summary judgment as to its liability, East Penn argues that the Secretary has failed to show that the employees' claims exceed the time already compensated.

East Penn also asserts that the Secretary is required to establish liability as to each employee for whom the Secretary seeks damages. Again, not so. As the Supreme Court recently affirmed in *Tyson Foods v. Bouaphakeo,* 557 U.S. 442, 456 (2016), representative evidence is a permissible means of proving hours worked in an FLSA case when, as here, the employer has failed to keep adequate records. *See also Reich v. Gateway Press, Inc.,* 13 F.3d 685, 701 (3d Cir. 1994) ("Courts commonly allow representative employees to prove violations with respect to all employees.") (collecting cases).

In support of its motion, the Secretary relies on (1) East Penn's admissions, (2) employee declarations that East Penn gathered and submitted, (3) time study data from Dr. Radwin, and (4) East Penn's time clock records showing the swipe in and out time.

First, the Secretary relies on East Penn's own admissions that its pay practices violate the FLSA's overtime provision. In its responses to requests for admission and deposition testimony from managers, East Penn admits that it is aware that "some employees chose to don required PPE before their scheduled shift starting time, that "some employees chose to shower after their schedule shift time," and

that management observed employees arriving at their workstation prior to their shift time. Doc. No. 176-1 ¶¶ 96, 99-100. It is undisputed that East Penn employees are paid for their scheduled eight-hour shift time. Doc. No. 176-1 ¶ 88(b). So, if an employee dons his uniform prior to the start of his shift—an activity that East Penn does not dispute is compensable work—East Penn admittedly does not compensate for that time.

East Penn responds that not all employees don uniforms and PPE prior to the start of their shift, opting instead to use the grace period, nor are they required to. But it undisputed that East Penn's Time Clock and Pay Procedures require that each employee be at his workstation at shift starting time. East Penn does not square this seeming inconsistency. Rather, it relies on employee declarations that acknowledge the existence of the grace period and their use of it. Because the correct legal standard is payment for "actual" work, the existence of the five-minute grace period—whether illusory as the Secretary contends or fully in effect as East Penn urges—does not change the analysis. If an employee acquires and dons his uniform prior to the start of his shift, that employee has "suffered" work and is legally entitled to compensation.

Second, the Secretary points to the roughly 650 declarations from East Penn employees that the company gathered and submitted as evidence that its employees routinely used more than five minutes for donning activities. East Penn does not dispute the authenticity or contents of the hundreds of these declarations.

A cautionary note about these declarations is in order. The Court has previously considered—and

rejected—the Secretary's motion to prevent East Penn from relying on the declarations at either the summary judgment stage or at trial. *Scalia v. E. Penn Mfg. Co.,* No. CV 18-1194, 2020 WL 3186213, at *1 (E.D. Pa. June 13, 2020) (rejecting the Secretary's request for a protective order and injunction). The Court found that the Secretary failed to present evidence to show that the method by which East Penn gathered its declarations was coercive, and the Secretary failed to present any evidence of retaliatory conduct taken by East Penn. *Id.* at *6-7.

Although the Secretary previously sought to exclude the declarations, he now maintains that overtime violations appear on the face of the declarations that East Penn produced. Certain employee declarants attest to the grace period but take more than the allotted five minutes. *See, e.g.,* Doc. No. 176-4 at 239 ¶¶ 7-8 (six minutes to don and walk to workstation and "sometimes" uses grace period); *id.* at 248 ¶¶ 7-8 (eight minutes to don and walk to workstation but "usually" uses grace period). Still others do not acknowledge the grace period but estimate needing more than five minutes for pre-shift work. *See, e.g.,* Doc. No. 176-4 at 451 ¶ 7 (eight to nine minutes to don and walk to workstation); *id.* at 971 ¶ 7 (seven to eight minutes to change and walk to workstation).

East Penn responds that the declarants also state that they "believe that [they] have been properly and fully compensated for all straight time and overtime hours associated with [their] regular production work as well as [their] donning/doffing activities before and after [their] regularly scheduled shift time." So, East Penn maintains, the employees themselves undermine the Secretary's case. The Court is not so convinced for two reasons. First, to the extent East Penn

questions the reliability of the time estimates, such a challenge does not raise a genuine dispute of material fact. That is because East Penn does not dispute the fact the employees have stated that they don their uniforms and PPE *prior* to the start of their shift. It is this admission of work performed outside of the compensable eight-hour shift that the Secretary relies on to establish liability.

Second, at summary judgment, the Court avoids credibility determinations as to the declarants' beliefs. To the extent the declarations contain evidence that is unfavorable to East Penn's case, that evidence can nevertheless be construed against East Penn. That is because East Penn is the party proponent of the evidence and because it is clear that the formats of the declarations, which each follow the same format, were prepared by counsel.

On the basis of East Penn's admissions and its own declarations—the contents of which East Penn does not dispute—the Court finds that the Secretary has established that East Penn's pay practices violate the FLSA's overtime provisions as to its uniformed non-continuous operations employees.[20] Although the Court finds East Penn has admitted liability as to this subgroup of employees, that is not the end of the inquiry. Rather, this ruling is separate and distinct from determining whether East Penn can assert a

[20] The Secretary moves for summary judgment as to uniformed employees. As the Court explains in detail below, *see* Section III.B, *infra*, continuous operations employees are subject to different pay policies, although some are required to wear a uniform. They receive ten minutes of paid donning time at the start of their shift and 20 minutes at the end of their shift. Doc. No. 176-1 ¶¶ 9(b); 96(b). Dr. Radwin did not include continuous operations employees as part of his time study.

de minimis defense that may reduce or eliminate any damages. *See* Section II.F, *infra.*

The Secretary also offers Dr. Radwin's time study as representative evidence to establish that employees donned, doffed, and showered outside of their paid shift times. As for end-of-shift activities, Dr. Radwin calculated that, for the 125 uniformed employees he studied, 11 minutes passed between leaving the production floor and completing their last activity. Doc. No. 176-1 ¶ 116. East Penn does not dispute that he reported an 11-minute average, to the extent he documented his observations. But it notes that this figure does not account for the ten minutes of paid time (and 20 minutes for continuous operations employees) that its employees are allotted at the end of a shift. Doc. No. 176 at 42. Indeed, Dr. Radwin testified that he did not calculate a measure of uncompensated time and acknowledged that some number of his subjects were compensated—in whole or in part—for those activities measured. Doc. No. 176-1 ¶ 114(b) (collecting from Radwin Depo. Tr.).

As to pre-shift activities, of the 370 uniformed employees he chose to study, Dr. Radwin estimated that, on average, they began their workday roughly 16 minutes before shift started. Doc. No. 176-1 ¶ 111-14. East Penn does not dispute that this is the figure Dr. Radwin reported. But it again criticizes the reliability of this assertion, including whether the employees' activity actually is "integral and indispensable"—hence, compensable—so as to start the continuous workday.

East Penn has launched numerous challenges to Dr. Radwin's methodology and calculations, including his admitted extrapolating the estimated one-plant average to all plants and employees, the reliability of

his methodology. The Court has already found that these attacks go to the weight of his testimony—"vulnerable as it may very well be"—and not to its admissibility. *Scalia v. E. Penn Mfg. Co.,* No. CV 18-1194, 2020 WL 5409164, at *8 (E.D. Pa. Sept. 9, 2020).

The Court already found that the task of evaluating Dr. Radwin's methodology and the import of his findings should go to the jury. Indeed, a reasonable jury could very well discredit or give little weight to this expert's sampling testimony, including whether it is "representative," and whether it measured compensable activities. The Court declines to step into the jury's shoes and conduct the weighting itself as a matter of law on the papers. Moreover, the Court finds that Dr. Radwin's estimations arguably go to any damages determination at trial.

E. East Penn's Time Clock Records as Minimum Amount of Uncompensated Time

The Secretary also moves for summary judgment on a finding that East Penn's swipe in and out time clock records constitute the "indisputable" minimum measure of overtime hours worked. According to the Secretary, the amount of time between punch time and shift time is time that East Penn knowingly "shaved off." So doing, the Secretary seeks to use these records as a proxy for uncompensated time.

The parties dispute whether the punch records are probative of anything that would establish liability. East Penn contends that its "14-minute rule" serves only as an attendance policy and is common throughout the manufacturing industry, including being used by the employer in *Mt. Clemens.* The Supreme Court found there that "the time clocks do not necessarily record the actual time worked by employees." *Mt.*

Clemens, 328 U.S. at 690. Nor are time clocks controlling when "the employee is required to be on the premises or on duty at a different time or where the payroll or other facts indicate that work starts at an earlier or later period." *Id.*

The Secretary argues that the time clock data is the best evidence of the minimum amount of uncompensated time that East Penn owes its uniformed employees. He bases this claim on certain of East Penn's own employees' declarations that describe performing their donning and doffing activities contemporaneous with clocking in and out. *See* Doc. Nos. 176-4, 176-5 (East Penn employee declarations), as well as Dr. Radwin's observations that, on average, employees in his time study swiped in after their first donning activity.

The fundamental problem with the Secretary's hopscotch to damages, as East Penn notes, is that the Secretary has not carried his burden yet to establish liability as to the 10,000-some employees he purports to represent. Although the Court finds that the Secretary has established that he succeeds on liability as to non-continuous operations uniformed employees, *see* Section II.D, *supra,* he seeks overtime damages for many other categories of employees for which he has certainly not adduced representative evidence. *See* Section III, *infra.*

Moreover, the Secretary's argument presupposes that employees contemporaneously clock-in with performing their first and last principal activity. East Penn does not admit this fact. Although the Secretary cites to certain employee declarations attesting to this fact, other declarants state that they clock in, attend to non-compensable work, then retrieve and don their uniform. *See, e.g.,* Doc. No. 176-4 at 131 ¶ 6

(clocks in, puts lunchbox away, then dons uniform); *id.* at 146 ¶ 7(clocks in, reads in cafeteria, then goes to workstation); *id.* at 185 ¶ 6 (clocks in, takes clothing, goes to lunchroom, drops off lunch box, gets coffee); *id.* at 205 ¶ 6 (clocks in, goes to breakroom then locker room); *id.* at 216 ¶ 6 (clocks in, eats, then changes into work clothes). East Penn has raised at least a factual issue to show that it does not have to compensate for all "recorded" time between the punches because employees began their compensable workday after clocking in.

The Secretary's claim is also complicated by the findings of its own time study expert. Dr. Radwin estimated that, on average, the employees he studied swiped their timecard 1.2 minutes *after* they had completed their last clothes-changing activity. Even accepting the Secretary's premise that the time swipes are any sort of proxy, it is undisputed that the time swipe records on average overestimate the amount of compensable work for post-shift activities. Accordingly, the Court cannot find that the record "indisputably" establishes that the actual clock swipe records are the minimum amount of time worked for purposes of establishing damages.

To be sure, the Court's decision on this point does not preclude, nor should it be taken as precluding or otherwise limiting, the Secretary from submitting the actual clock records at trial to try to establish his claim for damages.

F. East Penn's de minimis Defense

Preliminary and postliminary activities that are deemed integral and indispensable are theoretically compensable although they may not be automatically so. The de minimis doctrine provides a "limiting prin-

ciple to compensation for trivial calculable quantities of work." *De Asencio v. Tyson Foods, Inc.,* 500 F.3d 361, 373 (3d Cir. 2007). The Secretary moves for summary judgment to foreclose East Penn from presenting a de minimis defense at trial. According to the Secretary, East Penn has failed to establish that it satisfies the requirements of 29 C.F.R. § 785.47. At summary judgment, the Secretary must show that no reasonable jury could find that the amount of compensation is not de minimis.

In evaluating a de minimis defense, the Third Circuit Court of Appeals has held the following factors be considered: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Id.* at 374. The line between compensable and de minimis time is fact-specific and the defense necessarily applies on a case-by-case basis. Indeed, the Court is not aware of any court within this Circuit that has granted summary judgment to an FLSA plaintiff to prevent a defendant from asserting a de minimis defense at trial. (The Secretary, to his advocate-nature credit, located two out-of-circuit decisions.)

As a threshold matter, there is no genuine dispute of fact that East Penn's employees regularly don, doff, and shower as part of their work. East Penn required all employees to wear PPE and required its uniformed employees to be fully dressed in their uniform and boots prior to entering the production floor. Doc. No. 176-1 ¶ 48. East Penn points out that its employees may perform their donning and doffing activities differently each day. But the order in which an employee opts to don his uniform and PPE on a particular day does not rebut a finding that the

activities are performed on a regular basis. *See Chao v. Tyson Foods, Inc.,* 568 F. Supp. 2d 1300, 1321 (N.D. Ala. 2008).

The Secretary submits that whatever practical administrative challenges inherent in measuring the time worked are minimized by the fact that East Penn already uses time clocks and requires employees to swipe in and out. The mere existence of the time clocks, according to the Secretary, establishes that East Penn could—but chooses not to—promulgate a policy that pays based on actual swipe times.

According to East Penn, the Secretary's proposal that East Penn simply install more time clocks and implement new policies governing clocking in and out cannot be considered at summary judgment because it derives from the Secretary's descriptions of other battery manufacturing plants. Although these third-party practices are not in evidence in this case, the Court rejects that East Penn's claim that it cannot consider whether East Penn can theoretically add more clocks to its production floors. East Penn controls how and where it places time clocks as well as the policies governing swiping in and out. Moreover, East Penn's timekeeping system permits it to accurately record increments of time to the minute. So, the system that East Penn already has in place rebuts the notion of administrative difficulties it may face in accurately tracking the actual amount of time spent on pre- and post-shift compensable work.

But East Penn's more compelling argument is that the focus of this factor is not on the employer's theoretical technological capability. Rather, the proper inquiry is whether there is wide variation in the amount of time spent on pre- and post-shift activities among East Penn's uniformed and PPE-

wearing employees. *See, e.g., Lindow v. United States,* 738 F.2d 1057, 1063 (9th Cir. 1984) (holding uncompensated time was de minimis in part based on the "wide variance in the amount of pre-shift time spent on compensable activities as opposed to social activities"). The fact of variation is corroborated by Dr. Radwin's measurements. For example, he reported a range of zero minutes to greater than 51 minutes reflecting the time between the employees starting their pre-shift activities and their shift. Doc. No. 160-12 at 11. Neither party expressly addresses how much of this pre-shift time was spent on actual compensable work. And despite the breathtaking volumes of briefing and exhibits, "the court is not obliged to scour the record to find evidence that will support a party's claims." *Perkins v. City of Elizabeth,* 412 F. App'x 554, 555 (3d Cir. 2011).

That said, the Court has reviewed the contents of employee declarations that include estimates of the amount of time to don a uniform and walk to their workstations. Without weighing the credibility of these declarants, the Court notes a pattern among employees who attest to spending between three and nine minutes on these activities. So, within Dr. Radwin's own limited study, there are swaths of time spent on non-compensable activities (i.e., time spent in the break room, cafeteria, or "smoke shack"). At a minimum, East Penn has raised a genuine issue of fact as to the practical feasibility of precisely recording time for purposes of payroll that separates out compensable from social and non-compensable activities.

As for the aggregate amount of compensable time involved, the Court finds that genuine disputes preclude granting summary judgment to the Secretary. As a

threshold matter, the amount of time that employees don, doff, and shower each day is a disputed issue. The parties' time-study experts employed different methodologies to calculate the amount of time employees spent performing their pre and post-shift activities. And the Court has permitted each party to introduce evidence of both methodologies and findings. Even crediting the results of Dr. Radwin's study, East Penn submits that the results support a finding that any left-over uncompensated time for post-shift work is de minimis.

In particular, Dr. Radwin estimated an average of 11 minutes and a median 10.8 minutes for end-of-shift clothes changing and showering. It is undisputed that East Penn's policy (since 2016) provides for ten minutes of paid time for these activities. Accepting the validity of Dr. Radwin's calculations—which East Penn does not—a rational trier of fact could find that the remainder of uncompensated time according to Dr. Radwin at the end of the shift is on average a single minute. Although the Secretary may dispute whether employees are actually afforded the full ten minutes (i.e., if they are not timely released from their workstations), that dispute also supports the Court's finding that summary judgment is inappropriate. As for the 15.6 minutes that Dr. Radwin estimated for pre-shift activities, East Penn contests the validity of this finding. And because the Court has already determined that East Penn can make its arguments challenging the time study, it is inappropriate to treat these figures as established, particularly when it is the Secretary's burden here on summary judgment.

Notwithstanding the Court's finding that regularity of the work has been established, factual issues

prevent the Court from granting summary judgment as to this claim. The Court finds a genuine issue of material fact remains as to the size of the aggregate claim as well as whether East Penn can practically record the time spent, given the variation of time needed in the record. The Court finds that East Penn may present a de minimis defense at trial, which will be a critical factual issue for the jury to resolve. *See Lugo v. Farmer's Pride Inc.,* 802 F. Supp. 2d 598, 612 (E.D. Pa. 2011); *Albanese v. Bergen Cty., N.J.,* 991 F. Supp. 410, 422 (D.N.J. 1997).

III. East Penn's Motion for Partial Summary Judgment as to Scope of Employees

East Penn moves for summary judgment on the issue of *which* employees are properly part of any eligible recovery class. Doc. No. 156. East Penn contends that there are several categories of employees who fall outside of the Secretary's investigation and for whom the Secretary has not adduced evidence to establish violations of the FLSA. The Court agrees with some but not all of East Penn's arguments to carve out of the Secretary's claims certain employees. So, it grants East Penn's motion in part, as explained below.

When an employer does not maintain proper records, "the remedial nature of [the FLSA] and the great public policy which it embodies . . . militate against making the burden of proving uncompensated work an impossible hurdle for the employee." *Tyson Foods, Inc. v. Bouaphakeo,* 136 S. Ct. 1036, 1047 (2016) (citing *Mt Clemens,* 328 U.S. at 687). The Secretary's burden is somewhat lessened because East Penn does not have actual records of the amount of time necessary for the uniformed employees to don/doff/shower. *See* Section II.D, *supra.* However,

the burden is not wiped away entirely. Here, the Secretary's evidence consists of the time clock records (which he maintains are a proxy for the minimum amount of uncompensated time), the time study conducted by Dr. Radwin, and a handful of declarations from current and former East Penn employees at certain—but not all—facilities.

In light of the less onerous evidentiary burden, the Secretary may use a "representative sample to fill [the] evidentiary gap." *Bouaphakeo,* 136 S. Ct. at 1047. But, in order to satisfy the Secretary's evidentiary burden, the proffered employees must actually be representative. A sample is representative when "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* at 1046. The Court does not find that this burden is met for certain of the employees to which the Secretary broadly seeks to extrapolate his evidence. Indeed, in certain cases the Secretary seeks back wages for employees for whom he presents no representative evidence whatsoever.[21] This stretches beyond the permissible bounds for what the Secretary may do, even with the benefit of East Penn's lack of precise records.

A. Employees Who Work Outside of Pennsylvania

The Court will grant summary judgment in East Penn's favor for all out-of-state employees. The Secretary conceded at oral argument that he is not seeking back wages for these employees.

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[21] Following oral argument, the Secretary submitted a revised Schedule A to his complaint, listing additional employees at East Penn. Doc. No. 250. East Penn moves to strike. The Court considers the merits of East Penn's motion in Section VI, *infra.*

B. Continuous Operations Employees

East Penn requests the Court grant summary judgment as to the continuous operations employees in its Metals Divisions, which includes employees in the Smelter, and Oxide 1 and 2 plants. East Penn has implemented different pay practices for these employees given that the work is substantially different from that of other locations. As a threshold matter, Dr. Radwin did not include any continuous operations employees in his study. But even accepting the validity of Dr. Radwin's average of 26.6 minutes to complete pre- and post-shift activities and assuming it is proper to extrapolate this result, it is undisputed that the continuous operations employees already receive 30 minutes of paid time for that work.[22]

First, the Secretary contends that there is a dispute as to whether casting employees are considered continuous operations. The Secretary relies on deposition testimony from East Penn's Vice President for the Metals Division, Richard Leiby, who was presented with an unauthored document which grouped the "casting crew" with non-continuous operations departments. East Penn responds that the Secretary has stretched the testimony. Mr. Leiby was not asked to confirm the veracity of the contents of the exhibit; counsel read from the document and asked Mr. Leiby to confirm that he had read the document correctly. Moreover, East Penn maintains this is a non-issue because the company's Rule 30(b)(6) representative

[22] These employees are paid for the ten minutes prior to their official shift. Doc. No. 174-1 (Response to SUMF) ¶ 102 (admitted that an employee whose shift time begins at 7:55 a.m. is paid starting at 7:45 a.m.). Similarly, those employees are paid to the quarter hour following their shift end time, thus paying out an additional 20 minutes. *Id*. ¶ 103.

testified that casting employees are indeed part of continuous operations and subject to 30-minute pay policy. Doc. No. 156-24 (Hauser Rule 30(b)(6) Depo. Tr.) at 142:5-10.

Viewing the evidence in the light most favorable to the Secretary on this issue, the Court agrees that there is a dispute as to the classification of casting employees. Moreover, East Penn has not come to grips with its own conflicting testimony, leaving the Court to uncover it on its own. The evidence from East Penn's own Rule 30(b)(6) witness establishes that, at one point, casting employees were considered non-continuous employees. *See* Hauser Depo. Tr. at 144:12-14 ("You asked as of today what jobs are continuous; casting has been changed."). Mr. Hauser then testified that casting employees' shift times were adjusted in "April 2019, I believe," but he was unable to recall with specificity when the change was made. Hauser Depo. Tr. at 166:14-20.

The Secretary is seeking back wages for the period between October 20, 2014 and September 30, 2017, noting that he may also seek damages for violations that continued after. Doc. No. 1 (Compl.) at 4. So, during the time period contemplated by the Complaint, casting employees were classified both as non-continuous and continuous operations. East Penn gathered its employee declarations in March and April 2019. *See* Doc. Nos. 176-4, 176-5. Crediting the corporate representative's testimony that the change was implemented in April 2019, certain employee declarants in the casting department were governed by the five-minute grace period and ten-minute post-shift pay practices at the time they provided their declaration. *See, e.g.,* Doc. No.176-5 (Decl. of Beth

Ann Wertman, Automatic Parts Casting at Smelter Annex Plant).

The Court must then consider the material effect—if any—of this information. The Court has previously found that the Secretary established that East Penn was liable for overtime violations as to its uniformed non-continuous operations employees. *See* Section II.D, *supra*. To the extent that certain casting employees were then classified as non-continuous operations employees and donned uniforms and PPE prior to the start of their shift, the Court has already found the Secretary marshalled sufficient representative evidence to meet his burden. But as for whether casting employees post-April 2019, as well as other continuous employees throughout the time period contemplated by the Complaint have not been compensated for their work, the Court finds that the Secretary has not met his burden.

Absent any time study conducted on continuous operations plants, the remaining evidence adduced by the Secretary does not create a material dispute. In support of its motion, East Penn relies on 33 declarations from continuous operations employees, all attesting that they were paid fully for their pre- and post-shift activities. In response, the Secretary relies on two employee declarations from Eduardo Perez and Steven Graczyk to argue otherwise. The Court declines to find, as the Secretary hopes it will, that a material dispute is established here. That is because neither declaration appears to satisfy the "representation" requirement.

As a threshold matter, one of the Secretary's proffered declarants, Mr. Graczyk, does not appear to have been employed as a continuous operations employee, although he was employed in the Smelter.

Mr. Hauser testified that the shift times for continuous employees begin at 7:55 a.m., 3:55 p.m., and 11:55 p.m. Mr. Graczyk declared that his shift began at 8:00 a.m., which is the first scheduled shift for non-continuous employees in the Smelter. So, Mr. Graczyk's declaration cannot be evidence of pay practices as regards continuous operations employees.

This leaves Mr. Perez's declaration as the sole piece of evidence offered by the Secretary on this issue. Although the Court does not make credibility determinations at this stage, it notes that Mr. Perez states he worked in a smelter plant that does not exist. Even assuming that Mr. Perez did work at the Smelter, was a continuous operations employee and crediting his estimations as to his pre- and post-shift work, a single declaration does not come close to suggesting a representative sampling of the entirety of East Penn's continuous operations outfit, which indisputably covers multiple plants.[23]

The Court, having conducted its own independent review of the declarations, found only one other continuous operations employee who acknowledged the ten-minute grace period at the start of his shift and estimated needing ten to 15 minutes of pre-shift time. Doc. No. 176-4 (Decl. of Gregory Arnold, Reverb Furnace Operator at Smelter Plant). But even this additional declaration—assuming the reliability of the employee's estimate—does not satisfy the Secretary's burden of proof.

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[23] There are 248 uniformed employees across the Smelter Plant, Smelter Annex Plant, Oxide 1 Plant, and Oxide 2 Plant. However, it is not clear from the record as to how many of those are considered continuous operations employees. *See* Doc. No. 157 (SUF) ¶ 5; Doc. No. 158-20 (Leiby Depo Tr.) at 52:1-20).

Not only is this evidence insufficient in terms of the percentage of "representative" employees, the Secretary has not produced declarations that represent any of the plants other than the Smelter that employ continuous operations employees. *See Reich v. S. Maryland Hosp., Inc.,* 43 F.3d 949, 952 (4th Cir. 1995) (holding that Secretary did not meet the "fairly representational" requirement because there "were several departments for which no employee testimony was produced by the Secretary").

In opposing a motion for summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matshushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Absent any time-study data from the continuous operations plants or declarations from such employees that are actually representative, the Court cannot and, hence, will not, find that there is evidence that continuous operations employees were not appropriately compensated.

Accordingly, the Court grants East Penn's request for summary judgment as to continuous operations employees with the narrow caveat that it denies East Penn's request for summary judgment as to those employees within the casting crew prior to the 2019 re-classification as continuous operations employees.

C. Employees Who Do Not Wear a Uniform and Shower

East Penn moves to foreclose liability as to those employees who do not wear a uniform and/or take showers after their workday concludes, including those employees who work at the eight plants that Dr. Radwin studied. It contends summary judgment is warranted because the Secretary has not put forth

any evidence that employees who do not wear a uniform are not compensated for their work.

East Penn primarily relies on Dr. Radwin's admission that "all the employees that [he] studied and observed wore uniforms." Radwin Depo. Tr. at 114:14-18. Dr. Radwin also conceded that his conclusions were "applicable only to employees who were [sic] uniforms." *Id.* at 115:22-24; 579:21-23; 583:14-19. So, whatever measurements from the time study are, they are not representative of time spent by employees who do not wear uniforms, including, for example, those in the payroll department, personnel offices, and medical buildings.

In moving for summary judgment, East Penn must establish that no rational trier of fact could find that the Secretary has adduced representative testimony for those employees who are not required to wear uniforms and shower. The Secretary first asserts there are disputed facts as to *which* employees are required to wear a uniform and shower. But, as East Penn notes, whether certain employees wear a uniform—optional or not—is a separate and distinct inquiry from whether employees who do not wear a uniform were properly compensated. It is the latter that the Court must consider here in determining whether no reasonable juror could find that non-uniformed employees were not fully compensated.

East Penn contends that the scope of the Secretary's case has been a "moving target." The Court understands, but cannot agree with, this frustration. Although the Secretary is seeking back wages for those East Penn employees who must wear a uniform and shower, he is likewise seeking those damages for employees who spend time "putting on and removing

. . . protective gear before and after their scheduled shifts." Compl.¶ 7.

Regardless of whether East Penn requires certain employees to don a uniform and to shower, it is undisputed that East Penn's policy is that all employees must wear personal protective equipment. This policy is in effect regardless of the risk of exposure to chemicals and other hazards. It is a company-created and mandated policy to provide additional protections and is done primarily for the benefit of the employer (although there is a benefit to the employee). Although neither party here has discussed the import of the universal PPE requirement, East Penn, by its own conduct, has also made the act of donning PPE integral and indispensable to the job. 29 C.F.R. § 790.8(c) n.65; *accord Ballaris v. Wacker Siltronic Corp.,* 370 F.3d 901, 912 (9th Cir. 2004).

Again, the Secretary relies on the employee declarations that East Penn submitted to satisfy his burden of representative testimony. As a threshold matter, the declarations are silent as to when each employee's shift time started. Because they do tend to include the time for which the employee is permitted to leave the floor, it is possible to calculate the shift start time from the undisputed premise that each employee works an eight-hour shift. The Secretary highlights several of non-uniformed employee declarations, which each discuss the amount of time needed to gather personal protective equipment and to walk to their workstations.[24]

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[24] For example, both Luz Agramonte and Vedmarliz Morales, case line operators at an injection molding plant, work the 3 p.m. to 11 p.m. shift. Although Ms. Morales usually arrives

Some of the non-uniformed employees refer to the grace period without stating whether they use it. *See, e.g.,* Doc. Nos. 156-36; 156-48; 156-112; 156-147. Still others admit to using it only occasionally. *See, e.g.,* Doc. No. 136-41. But many of these declarants do state that they acquire and don at least some of their PPE prior to the start of their shift. *See, e.g.,* Doc. Nos. 156-42; 156-45 (four minutes to gather PPE and two minutes to walk to workstation); 156-79 (five to six minutes to put on protective gear and walk to workstation). As the Court has previously explained, it does not judge the credibility of the makers of these statements. But it is mindful that this is evidence that *East Penn* has adduced, ostensibly to satisfy its burden that no reasonable jury could find that non-uniformed employees performed compensable work for which they were not compensated.

In denying East Penn's motion for summary judgment as to non-uniform employees, the Court finds there is a genuine issue as to whether these employees were compensated for the time spent donning and doffing their company-mandated PPE. But it likewise remains an open issue as to whether that time is de minimis. At trial, East Penn may

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ten minutes before the start of her shift, she estimates it takes her roughly two minutes to gather her personal protective equipment and another two minutes to walk to her workstation. Doc. No. 156-99. Similarly, Ms. Agramonte arrives about 15 minutes prior to 3 p.m. but estimates it takes her five minutes total to gather PPE and walk to her station. Doc. No. 156-37. Both stop working at 10:55 p.m. to change out of work gear and clock out. The third declarant, Paul Adams, also stated that it takes him roughly five minutes to obtain his PPE and arrive at his workstation. Mr. Adams acknowledged the five-minute grace period at the start of his shift, although it is unclear whether he took advantage of it. Doc. No. 156-36.

present argument and evidence as to its de minimis defense to the jury.

D. Uniformed Employees Not at the Eight Facilities Studied

Finally, East Penn moves for summary judgment as to the employees working at plants other than the eight that Dr. Radwin studied. East Penn contends that Dr. Radwin cannot extrapolate his findings to plants not included in his time study. And, because there is no significant employee testimony from uniformed employees at plants not studied, East Penn argues that the Secretary has not adduced representational testimony.

To be sure, representative evidence based on an expert witness's estimation is a permissible means to establish uncompensated time. In many cases, "a representative sample is 'the only practicable means to collect and present relevant data' establishing a defendant's liability." *Bouaphakeo,* 136 S. Ct. at 1046 (citing Manual of Complex Litigation § 11.493 at 102 (4th ed. 2004)); *Martin v. Citizens Fin. Grp., Inc.,* No. CIV.A. 10-260, 2013 WL 1234081, at *7 (E.D. Pa. Mar. 27, 2013) ("Testimony of a representative sampling of Plaintiffs is a procedure often used in FLSA actions, within this Circuit and elsewhere.").

At summary judgment, East Penn is essentially asking the Court to find that no reasonable juror could find that uniformed employees outside of the eight facilities studied are theoretically entitled to damages. That is, East Penn's position is that there is insufficient evidence as to these employees.

As an initial matter, the parties dispute whether the time study results can be extrapolated to other plants with uniformed employees. East Penn has

previously challenged Dr. Radwin's average that he seeks to apply to other plants in its *Daubert* motion. *Scalia v. E. Penn Mfg. Co.,* No. CV 18-1194, 2020 WL 5409164, at *4 (E.D. Pa. Sept. 9, 2020). As the Court previously found, East Penn's arguments went to the weight of Dr. Radwin's testimony, not to its admissibility—which is not a proper issue at summary judgment to resolve. Notably here, the parties dispute whether the differences among the eight plants Dr. Radwin selected and the remainder of the Lyon Station campus facilities are "superficial."

East Penn submits that there are "myriad differences" among facilities that could affect the time study results. It emphasizes that each of the battery facilities have different functions, differ in terms of their size, products manufactured, number of employees, and the amount and type of PPE worn by employees. East Penn concedes that the Secretary is permitted to rely on a subset of employees to represent the interest of a larger number. But it maintains that, in such circumstances, "the representative employee performed substantially similar, if not identical, work to the non-testifying employees." *Reich v. S. Maryland Hosp., Inc.,* 43 F.3d 949, 951 (4th Cir. 1995) (collecting cases).

The Secretary disputes East Penn's efforts to undermine the representativeness of the study. The Secretary counters that Dr. Radwin visited all 29 facilities, and supposedly studied their layouts and observed the actual flow of employees in each, before selecting the eight plants for his study. Dr. Radwin concluded that the plants were overall "very similar" and opined that any differences did not significantly affect his measurements. Moreover, the Secretary emphasizes that, even if the workers performed

different tasks between shifts, these uniformed employees are subject to the same policies and procedures regarding donning, doffing, showering, and recording their time. On this basis, the Secretary contends he has pulled together sufficient "fairly representational" testimony of uniformed employees. *S. Maryland Hosp., Inc.,* 43 F.3d at 951. At the summary judgment stage, the Court agrees that the Secretary has at least raised something of a genuine factual dispute as to whether Dr. Radwin's results can be extrapolated to other *uniformed* employees in the Lyon Station complex, so that they may be included in any theoretical recovery class. East Penn will presumably vociferously challenge the extrapolation effort.

To the extent the parties also dispute the percentage of uniformed employees studied, there is no bright-line threshold below which the evidence fails to be sufficiently representative. East Penn relies exclusively on out-of-circuit case law, particularly the Fourth Circuit's opinion in *Southern Maryland Hosp., Inc.* where the court held that 1.6% of the employees was insufficiently representative. 43 F.3d at 951. It is unclear the percentage of uniformed employees Dr. Radwin's time study captures. East Penn admits it employs over ten thousand workers—although it does not give the breakdown between uniformed and non-uniformed employees. Even assuming *all* employees—thereby diluting the representativeness of uniformed employees—Dr. Radwin's study captured roughly 3.6% and 1.3%, of East Penn's workforce for pre- and post-shift work, respectively. Viewing the evidence in the Secretary's favor as the non-movant, the study sits on the edge of what at least one appellate court has deemed acceptable. It is not so woefully deficient that the

Court can find, as a matter of law, that the remainder of uniformed employees outside of the eight plants be excluded given the similarities in policies across plants.

Because the Court finds a factual issue as to the representativeness of the time study that precludes summary judgment, it need only briefly address the handful of employee declarations the Secretary submitted from uniformed employees in the plants not studied.[25] "Drawing liability conclusions about a large group based upon a small portion of statements can be problematic, especially when testimony among the representatives themselves is disparate." *Martin v. Citizens Fin. Grp., Inc.,* No. CIV.A. 10-260, 2013 WL 1234081, at *7 (E.D. Pa. Mar. 27, 2013) (citing *Prise v. Alderwoods Grp., Inc.,* 817 F. Supp. 2d 651, 677 n.20 (W.D. Pa. 2011)). Here, the 12 declarations offered for the remaining plants outside of the eight studied—absent the overlay of the time study—would be insufficient to constitute "representative" testimony.

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[25] At oral argument, East Penn submitted that the Secretary did not submit any testimony from employees at the following plants: Auto Admin (Plant 07), DC (Topton) (Plant 08), Fleetwood Warehouse (Plant 10) Industrial Engineering (Plant 12), Industrial Service/Sales (Plant 14), Specialty Plan/ENG S1 (Plant 18), Injection Molding Plant 1 (Plant 31), Waste Treatment (Plant 44), Garage (Plant 51), Transportation (Plant 52), Innovation (Plant 53), Special Project/Engineering (Plant 70), Continuous Improvement (Plant 76), ITS (Plant 83), Mfg. Service (Plant 84), Medical (Plant 85), Tech Center (Plant 86), Personnel (Plant 87), Administrative Building (Plant 88).

In addition, East Penn moves for summary judgment as to Industrial Plant (Plant 11), Wire/Cable (Plant 21), DC (Alburtis) (Plant 22), Injection Molding Plant 2 (Plant 32), and Smelter (41). But for this set of five plants, the Secretary has produced 12 employee declarations.

As for the plants that are in Pennsylvania but not within the Lyon Station complex, Dr. Radwin admitted that he had not visited them.[26] Moreover, he testified that, because he had not been to those facilities, he lacked the information to extrapolate his study results to those locations. Radwin Depo. Tr. at 113:7-22. Because there is no representative evidence to meet the burden set forth by *Mt. Clemens,* the Court grants summary judgment for East Penn as to the Pennsylvania plants that are *outside* of the Lyon Station campus.

IV. Damages

The parties have also filed cross motions for summary judgment as to the scope of applicable and appropriate damages. The Secretary moves for liquidated damages and a finding that East Penn willfully violated the FLSA. East Penn moves for summary judgment on its good faith defense to liquidated damages and to foreclose a finding that any violations were willful. Before considering each of these motions, the Court sets forth relevant background as to East Penn's knowledge of its obligations under the FLSA.

A. Background on DOL Investigations and East Penn's Policies

i. The 2003 Uniform Policy

For at least 20 years, East Penn has retained outside counsel to advise it on labor and employment issues. In April 2003, Gary Melchionni, Esq. of Stevens and Lee authored a memorandum for East Penn regarding "Changing Clothes at Work as

[26] This includes Alburtis, Topton, and Kutztown Wire & Cable locations.

Compensable Time under the Fair Labor Standards Act." Doc. No. 155-42. The memorandum summarized two then recent DOL Wage and Hour Division investigations in which manufacturers owed back wages for failing to compensate their workers for donning time.

In preparing the memorandum, Mr. Melchionni reached out to the Regional Director of DOL's Wage and Hour Division, Joseph Dietrich, for guidance applying the recent Wage and Hour investigations to East Penn's situation.

> It was [Mr. Dietrich's] strong opinion that East Penn is violating the FLSA by not compensating its employees for time spent donning work clothes prior to the start of their shifts. His opinion is consistent with the position taken by his counterpart in Alabama involving the same issue. Thus, it seems likely that if challenged by the DOL or the employees themselves in a class action lawsuit, at the very least East Penn would be engaged in lengthy, time consuming and costly litigation in federal court. In addition, if East Penn was to settle or lose, damages likely would be measured in the millions of dollars.

Doc. No. 155-42.

At the time, East Penn did not have a formal written policy that addressed donning and doffing. East Penn represents that the five-minute grace period was an informal policy, a characterization that the Secretary disputes. As for end-of-shift work, the memorandum stated that East Penn already counted it "as work time," so it would appear to "not be an issue" for the company. In so stating, Mr. Melchionni

did not personally investigate East Penn's actual practices then in place or interview any employees. Doc. No. 155-37 (Melchionni Depo. Tr.) at 219-20. Mr. Melchionni did caution that "to the extent that the amount of work time allotted to shower and change clothes at the end of the shift is inadequate to reasonably cover the time needed to perform these activities, an FLSA violation may be occurring." Doc. No. 155-42 at 8. Based on the recent investigations, case law, and litigation risk, Mr. Melchionni suggest the "simplest solution" would be to "include the clothes changing time as compensable work during each shift." *Id.* at 9.

A few months after Mr. Melchionni transmitted his memorandum, East Penn management drafted a Uniform and Shower Time policy. Doc. No. 155-56. The 2003 policy provides:

If an employee works in an area that **requires a uniform and shower due to lead exposure**, the following standards apply:

1. Employees will be expected to be at their designated workstations with their uniform and other PPE (Personal Protection Equipment) on at the start of their shift. For pay purposes, employees will be allowed a five-minute grace period after the start of the shift to report to their workstation.

2. Employees will be given a 5-minute workstation clean-up **starting 10 minutes before the designated end of his/her shift**. (Some departments or circumstances such as a customer visit, ma [sic] require a longer clean-up time when

approved by the Plant Manager of Supervisor.

3. Then employees will be dismissed from their workstation **5 minutes prior to the designated end of his/her shift** to doff their uniform, place it in the appropriate laundry bin and shower.

Doc. No. 155-52 (emphasis in original). East Penn did not conduct any study (or equivalent) to determine whether the amount of time provided in the policies were sufficient. Doc. No. 155-2 ¶¶ 149-50; Doc. No. 176-1 ¶¶ 149-50. Rather, it states that it relied on the approval of its counsel, Stevens & Lee. Doc. No. 175-1 ¶ 106 (An internal East Penn memorandum prepared contemporaneously with the draft uniform policy states that the policy was reviewed by outside counsel).

East Penn's Vice President of Environmental Safety, Health and Regulatory Affairs, Troy Greiss, testified that he also reviewed a 1981 OSHA opinion letter while drafting the 2003 policy. The Secretary argues that there is no evidence other than East Penn's self-serving testimony that it did review the letter. But even if East Penn did review the letter in 2003, the Secretary maintains that East Penn would have been on notice from the text of the letter that it was to direct all FLSA compliance questions to the Wage and Hour division, not to OSHA. East Penn's Assistant Vice President of Personnel was unable to recall whether it ever requested that Wage and Hour Division review the company policies. Doc. No. 155-35 (Snyder Depo. Tr. at 241:11-242:5).

ii. Pre-2016 OSHA Investigations

The Occupational Safety and Health Administration (OSHA) is part of the Department of Labor (DOL).

Doc. No. 155-2 ¶ 9; Doc. No. 175-1 ¶ 9(a). OSHA has visited and investigated East Penn's Lyon Station facility on several occasions. Doc. No. 155-2 ¶ 24; Doc. No. 175-1 ¶ 24(a). In 2003, OSHA conducted a multi-day site visit to only East Penn's Smelter and Oxide plants as part of the recertification of East Penn's participation in OSHA's Voluntary Protection Program (VPP). Doc. No. 155-2 ¶ 25; Doc. No. 175-1 ¶ 25(a). The parties dispute the depth to which OSHA conducted its study and whether OSHA reviewed East Penn's shower and clothes-changing policies at that time. Doc. No. 155-2 ¶¶ 26-27; Doc. No. 175-1 ¶¶ 26-27.

It is clear that OSHA did not tour the other plants in the Lyon Station campus. Likewise, it is undisputed that OSHA included the issue of paid shower on time on its "90-day items" list, i.e., open issues for East Penn to address before OSHA would re-certify the company. Specifically, OSHA flagged that "Employees exposed to lead should be permitted to shower on company time at the end of the work shift." Doc. No. 155-2 ¶¶ 29-30; Doc. No. 175-1 ¶¶ 29-30. East Penn represented to OSHA that it was "currently evaluating our corporate policy with respect to company provided uniforms and associated paid time for donning, doffing, and showers." Doc. No. 155-2 ¶¶ 34; Doc. No. 175-1 ¶¶ 34(a). During the next month East Penn notified OSHA that "[a]s we discussed on July 10, 2003, Metals division are compensated for shower time. Completed." Doc. No. 155-2 ¶¶ 37; Doc. No. 175-1 ¶¶ 37(a).

OSHA did not independently verify East Penn's new uniform policy, including by conducting a subsequent site visit. Doc. No. 155-2 ¶¶ 39; Doc. No. 175-1 ¶¶ 39(b). OSHA's representative testified that

for purposes of a VPP evaluation as distinct from an enforcement action—the agency accepts "what the company is in good faith telling" the government. Doc. No. 155-11 (Komis Depo. Tr.) at 99:8-101:9.

iii. The 2016 OSHA Complaint

In February 2016, OSHA received a complaint from an employee in the S-1 plant that employees were not receiving enough compensable time to shower. Doc. No. 155-17. OSHA notified East Penn of the complaint on February 18, 2016 and requested that East Penn respond explaining either what action was taken in response or why East Penn believed that no hazard existed. Doc. No. 155-2 ¶ 119; Doc. No. 175-2 ¶ 119(a).

East Penn responded to OSHA that it did pay for shower time. Doc. No. 155-2 ¶ 120; Doc. No. 175-2 ¶ 120(a). That same day, OSHA forwarded East Penn's response to the Wage and Hour Division, because it determined that the concerns were "not well covered by OSHA regulations." Doc. No. 155-62. OSHA explained that the employee's complaint had less to do with compliance with the agency's lead standard and more to do with East Penn's requirement that employees shower and failure to compensate adequately for that time. *Id.* The OSHA representative stated that he had spoken with East Penn representatives who had confirmed the five-minute shower time policy, that East Penn's senior management would meet to "re-address" the issue, and that "[East Penn] want to be sure they are following the regulations." Doc. No. 155-2 ¶¶ 129-32.

As a result of the employee complaint, East Penn's policy committee determined that the showering pay for S-1 and the Industrial plants should be increased

from five to ten minutes. East Penn requested that Mr. Melchionni review the proposed revised policy. Doc. No. 155-2 ¶ 135. East Penn contends that, in relying on Mr. Melchionni's advice, the revised policy went into effect on June 27, 2016. Doc. No. 155-2 ¶ 136.

The Secretary disputes this entire series of events, including whether Mr. Melchionni approved of the new policy and whether it complied with the FLSA. Doc. No. 175-2 ¶¶ 135(b), 136(b).

iv. Wage and Hour Division Investigations

Prior to the 2016 complaint prompting this suit, the Wage and Hour Division had not investigated East Penn regarding its compliance with the FLSA. Doc. No. 155-2 ¶ 41; Doc. No. 175-1 ¶ 41(b). The Wage and Hour Division has conducted at least four investigations at the Lyon Station facility regarding compliance with the Family Medical Leave Act, 29 U.S.C. §§ 2601 *et seq*. Doc. No. 155-2 ¶ 42; Doc. No. 175-1 ¶ 42(a). In conjunction with two of these FMLA investigations, investigators previously noted that East Penn kept time records. Doc. No. 155-2 ¶ 43; Doc. No. 175-1 ¶ 43(a). The Secretary contends that this does not demonstrate that the investigators verified that East Penn was keeping time records in compliance with the FLSA.

At the end of the FLMA investigation, the DOL provided East Penn with a "Handy Reference Guide" and DOL' s Fact Sheet #44. Doc. No. 176-1 ¶ 45. The Handy Reference Guide states that "[t]he records do not have to be kept in any particular form and time clocks need not be used." Doc. No. 176-1 ¶ 48. But the guide defines "hours worked" to include "all time an employee must be on duty, or on the employer's

premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal work activity of the workday." Doc. No. 155-31 at 11. Fact Sheet #44 provides that, if FLSA violations have occurred, the Wage and Hour investigator will tell the employer "whether violations have occurred and, if so, what they are and how to correct them." Doc. No. 176-1 ¶ 51(a).

After OSHA forwarded the 2016 complaint, the Wage and Hour Division opened an investigation. The FLSA narrative following the 2016 complaint and investigation states that the investigators communicated to East Penn that was in violation of the recordkeeping and overtime provisions of the FLSA. Doc. No. 176-1 ¶ 51(b); Doc. No. 175-9 (FLSA Narrative).

B. Liquidated Damages

The parties have cross-moved for summary judgment on the Secretary's claim for liquidated damages. When an employer violates the overtime provisions of the FLSA, Section 216(b) provides for payment of both unpaid wages and the equivalent amount in "mandatory" liquidated damages. 29 U.S.C. § 216(b); *Martin v. Cooper Elec. Supply Co.,* 940 F.2d 896, 907 (3d Cir. 1991). The Third Circuit Court of Appeals has held that the Secretary "need not establish an intentional violation of the Act to recover liquidated damages." *Williams v. Tri-Cty. Growers, Inc.,* 747 F.2d 121, 129 (3d Cir. 1984). Rather, liquidated damages are compensatory and the norm in FLSA actions. *Martin,* 940 F.2d at 907.

Notwithstanding the mandatory language of the FLSA, Section 11 of the Portal-to-Portal Act provides

a defense to liquidated damages: the employer must "show to the satisfaction of the court that the act or omission giving rise to [an] action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. Section 260 requires a subjective showing of good faith—the employer had "an honest intention to ascertain and follow the dictates of the FLSA"—and an objective showing of reasonableness—that it "act[ed] as a reasonably prudent man would have acted under the same circumstances." *Brooks v. Nil. of Ridgefield Park,* 185 F.3d 130, 137 (3d Cir. 1999). To be clear, not surprisingly, the employer bears the "plain and substantial" burden of establishing it is entitled to this discretionary relief; otherwise, the Court must grant liquidated damages. *Martin,* 940 F.2d at 907-08.

i. The Secretary's Motion

The Secretary argues that East Penn should be required to pay liquidated damages because it fails to produce "plain and substantial evidence" that it both acted in good faith and had reasonable grounds for believing it complied with the FLSA. The Secretary has not moved for a ruling that East Penn is liable for a sum certain.

The Secretary maintains that his entitlement to liquidated damages is clear. He argues that East Penn misrepresented to its outside counsel that employees completed their end of shift activities on paid time and that East Penn failed to independently investigate how much time its employees actually needed. Moreover, the Secretary emphasizes that East Penn's "belief' that it could pay only for reasonable time is not objectively reasonable. To that end, the Secretary argues that East Penn's "grace

period" is an illusory policy, about which that East Penn took no steps to inform its employees or management. Finally, the Secretary argues that East Penn cannot rely on DOL guidance or other publication when there is no evidence that it actually reviewed such information when formulating and implementing its policies.

ii. East Penn's Motion

East Penn opposes the Secretary's request for liquidated damages. In moving for summary judgment as to its entitlement to a good faith defense, East Penn bears the burden of demonstrating it had "an honest intention to ascertain and follow the dictates of the Act." *Tri-County Growers,* 747 F.2d at 129.

To meet that burden, East Penn must affirmatively establish that it made a subjective good faith effort to comply with the FLSA and had objectively reasonable grounds to believe it complied with applicable law. *Lugo,* 802 F. Supp. 2d at 617. "Whether an employer's conduct under the FLSA was in good faith and reasonable is a mixed question of law and fact." *Id.* at 616 (citing *Chao v. Hotel Oasis, Inc.,* 493 F.3d 26, 35 (1st Cir. 2007)). East Penn asserts that its review of the FLSA and its implementing regulations, reliance on the advice of outside counsel, and the DOL's decision not to bring an FLSA enforcement action prior to this suit demonstrate that it is entitled to a good faith defense.

First, East Penn argues that, even if it is ultimately incorrect in using reasonable time to calculate time worked, the split in the case law and the DOL's own regulations and internal guidance documents shows that East Penn's belief is objectively reasonable. *Brock v. Claridge Hotel & Casino,* 846 F.2d 180,

187 (3d Cir. 1988) (holding that "ambiguity of the regulation" and the "closeness of the question" constituted sufficient evidence on both sides of legal issue for employer to avoid liquidated damages); *Adeva v. Intertek USA, Inc.,* No. CIV.A. 09-1096 (SRC), 2010 WL 97991, at *3 (D.N.J. Jan. 11, 2010) (finding liquidated damages inappropriate "given the lack of controlling authority in this Circuit"). The Court must agree.

Although the Court concludes that East Penn's policy of paying a reasonable amount of time does not comply with the FLSA, *see* Section II.B, *supra,* that conclusion alone does not operate to bar a good faith defense. The Secretary's response reiterates his substantive arguments that East Penn violated the FLSA. But whether East Penn is liable for FLSA violations is a separate analysis from whether East Penn has carried its burden to show that it is entitled to a good faith defense.

Second, East Penn argues that, despite the lack of clarity surrounding the appropriate measure of compensation, it took proactive steps to ensure its compliance with the FLSA. East Penn submits that its management are members of the Society of Human Resource Managers, a professional society that discusses FLSA coverage. East Penn also engaged its outside labor and employment counsel to advise the company on compliance with the FLSA, and that it acted in reliance on counsel's advice. The parties do not dispute East Penn's membership in professional organizations that focus on compliance or that East Penn had conversations with Mr. Melchionni about its compliance with the FLSA generally. Rather, the Secretary contends that East Penn's inquiries about its pay practices at issue here

are insufficient as a matter of law to sustain a good faith defense to liquidated damages.

Although it is not a complete defense, East Penn has asserted an advice of counsel defense. As the Third Circuit Court of Appeals has made clear, the defense is "available only to those who, after full and honest disclosure of the material facts surrounding a possible course of action, seek and obtain the advice of counsel on the potential legality of their actions." *Impala Platinum Holdings Ltd, v. A-1 Specialized Servs. & Supplies, Inc.,* No. CV 16-1343, 2017 WL 960941, at *1 (E.D. Pa. Mar. 10, 2017) (citing *United States v. Traitz,* 871 F.2d 368, 382-83 (3d Cir. 1989)); *see also United States v. Park,* 505 F. App'x 186, 189 (3d Cir. 2012). In support of its position, East Penn relies primarily on deposition testimony from Mr. Melchionni, including his statement that he approved the 2003 Company Uniform Policy, as well as subsequent policy changes, which East Penn represents were adopted in response to the memorandum. The Court considers the evidence supporting the advice of counsel defense, which is either undisputed or viewed in the light most favorable to the Secretary.

The Secretary first claims that East Penn is not entitled to the defense because it did not seek out the advice. East Penn faults the Secretary for relying on out of Circuit case law and engaging in unnecessary "hairsplitting." Doc. No. 190 at 4. Although perhaps indicative of a research oversight, the Third Circuit Court of Appeals does limit the defense to a party who "seek[s] and obtain[s] advice. *See Traitz,* 871 F.2d at 382-83. It is unclear from the record whether Mr. Melchionni acted on a specific question from East Penn as to whether its then-current pay practices were compliant or whether, as part of his longstand-

ing relationship with East Penn, supplying the company with legal updates fell within a general mandate to keep it abreast of any developments.

The parties next dispute whether East Penn actually acted on Mr. Melchionni's advice regarding pre-shift donning. The memorandum includes a statement from the Department of Labor's regional office that it was its "strong opinion that East Penn is violating the FSLA by not compensating its employees" for pre-shift donning. In light of the DOL's position, Mr. Melchionni suggested that East Penn "include the clothes changing time as compensable work time during each shift." Doc. No. 155-42. The memorandum offers arguments for why donning activities might not be compensable before adding these defenses "may likely be outweighed" by case law, DOL litigation and guidance. East Penn submits that it formalized the five-minute "grace period" in response to the memorandum—even though it represents that the policy informally existed prior to 2003.

In light of counsel's advice, namely that it appeared more likely than not that East Penn was required to compensate for donning activities, a rational trier of fact could find it reasonable for East Penn to take steps to further clarify its obligations. There is no evidence that East Penn initiated contact with the Department of Labor, for example, to inquire as to whether a "grace period" was sufficient.

Likewise, a rational trier of fact could find that East Penn did not disclose to counsel all material underlying facts. Despite indicating that the pre-shift activities at issue were likely compensable in the memorandum, Mr. Melchionni was unable to recall whether he advised East Penn that the grace period complied with the FLSA, whether he followed up to

ensure that East Penn had followed his advice, or how the grace period was implemented, especially given the interplay with East Penn's long-standing requirement that employees arrive at their workstation at the start of their shift. This gap in the evidence could also lead the trier of fact to find that East Penn did not follow counsel's advice when counsel had not actually advised that East Penn's policies were compliant.

The parties also dispute whether Mr. Melchionni's advice provides any cover for East Penn's adoption of the reasonable time standard. Mr. Melchionni advised East Penn in the memorandum that an FLSA violation may be occurring if the amount of time allotted for end of shift activities "is inadequate to reasonably cover the time needed to perform" them. Doc. No. 155-42. East Penn relies on this language as endorsing reasonableness as the appropriate measure of compensation. Other than this passing reference, East Penn offers no evidence that it relied on the word "reasonably" in the memorandum or that it otherwise sought advice on this legal issue from Mr. Melchionni. Indeed, Mr. Melchionni appeared to contradict or at least misstate East Penn's own payment policies when he testified that he "know[s] that East Penn employees are paid for the actual time worked." Melchionni Depo. Tr. at 332:3-4.

The Court will not make a definitive ruling at this time as to whether East Penn is effectively insulated by the advice of its counsel. That is because there are disputed facts regarding whether East Penn fully disclosed to Mr. Melchionni all of the relevant underlying facts, which is a predicate to asserting the defense.

Third, East Penn submits evidence that the Department of Labor was aware of the East Penn pay practices through prior investigations but did not challenge them. East Penn claims that it relied on the fact that representatives from OSHA and Wage and Hour investigated East Penn on several occasions and that no adverse actions were taken—until this litigation. An employer may be found to have acted in good faith when it relies on representations made by the DOL. To that end, East Penn relies heavily on representations made by OSHA during its 2003 recertification inspection. It highlights OSHA's awareness that East Penn compensated for shower time and East Penn's post-visit representation that it was "currently evaluating [its] corporate policy" for paid time for donning, doffing, and showers. But the Court does not find the evidence to conclusively establish East Penn's good faith.

Although compensating for these activities may have been discussed, a rational trier of fact might understand them to place OSHA only on notice that East Penn had a policy. OSHA did not make any specific findings during its investigation that East Penn was compliant with the FLSA, for example, nor does East Penn point to such evidence. Nor does East Penn state that OSHA was aware of the "grace period" because it appears that only post-shift showering was discussed in any detail.[27] Moreover,

[27] Among other things, East Penn submits testimony that it relied on a 1981 OSHA opinion letter when formulating its pay policies in 2003 and 2016. The parties dispute the import of this 1980s opinion letter. The letter does not address how much time should be paid or how time should be tracked. It was issued in response to another battery manufacturer's question as to whether its ten minutes of paid shower time complied with the OSHA lead standard. The letter does not discuss compliance

the Secretary raises a genuine dispute as to whether it was reasonable to rely on guidance from OSHA, when it does not have authority to enforce the FLSA.

There is no evidence that East Penn corresponded with the Department of Labor regarding the pay practices at issue.[28] *Cf. Lugo,* 802 F. Supp. 2d at 617 (finding employer produced evidence of its good faith based in part on its ongoing communications with DOL about its pay practices). In some respects, East Penn's line of argument seeks to shift the burden of compliance with the FLSA to the government. But it does not absolve East Penn of its affirmative duty to

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with the FLSA and instead refers questions regarding FLSA compliance to the Wage and Hour division, not OSHA. For these reasons, the Secretary responds that the mere existence of this letter does not establish East Penn's ten-minute paid shower time was compliant with the FLSA because the agency to which the question was posed could not address the propriety of the policy.

Moreover, the only evidence East Penn produced to establish its reliance on this letter prior to this litigation is deposition testimony from Mr. Greiss that he reviewed the letter in 2003. *Irving v. Chester Water Auth.,* 439 F. App'x 125, 127 (3d Cir. 2011) (holding that self-serving deposition testimony is insufficient to withstand a motion for summary judgment).

[28] East Penn relies on 53a01(a)(2) of the Wage and Hour's Field Operations Handbook which provides that an employer's noncompliance may be the result of "a failure by the Wage Hour Investigator, during a prior investigation, to recognize or to bring to the employer's attention violative pay practices . . . ." East Penn, however, excises the rest of the provision which qualifies *when* an employer may avail itself of this excuse: the prior investigation must have "involved the *same* circumstances in the current investigation." FOH 53a01(a)(2). It is undisputed that East Penn's compensation practices for its pre- and post-shift activities were not the focus of any prior investigations. Prior Wage and Hour investigations were focused on East Penn's compliance with the Family Medical Leave Act.

determine its obligations under the FLSA. Nor does this analysis reward an "ostrich" for burying its head in the sand.

The Court finds that, although East Penn has attempted to adduce "plain and substantial evidence" as is its burden, material issues of fact remain before the Court can exercise its discretion. Among other things, the parties dispute East Penn's entitlement to an advice of counsel defense. Although the 2003 memorandum indicates that East Penn was likely required to compensate its employees for pre-shift donning activities, the record is sparse as to Mr. Melchionni's actual advice regarding the "grace period." Given that East Penn has placed Mr. Melchionni's credibility at issue, the Court finds that additional testimony necessary before deciding whether East Penn acted in good faith.

Neither the Secretary nor East Penn is entitled to summary judgment on the issue of liquidated damages.

C. Whether East Penn's Violations Were Willful

The parties also filed cross-motions for summary judgment on the Secretary's claim that East Penn willfully violated the FLSA. If the Secretary establishes that the alleged FLSA violations were "willful," the statute of limitations expands from the standard two years to three. 29 U.S.C. § 255(a). To establish willfulness, the Secretary must prove that East Penn either knew it was violating the law or acted in reckless disregard of the FLSA's overtime requirements. Merely establishing an FLSA violation is not enough, *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 132-33 (1988), although the Secretary need not show that East Penn's conduct was egregious, *Stone*

v. Troy Construction, LLC, 935 F.3d 141, 148 (3d Cir. 2019). East Penn cross-moves to foreclose the Secretary's claim that its alleged violations were willful.

The Third Circuit Court of Appeals has not definitively held that willfulness is a question of law or fact. However, to the extent the Court finds the reasoning used in the appellate court's recent cases more persuasive, willfulness is treated as a factual inquiry. *Compare Souryavong v. Lackawanna Cty.,* 872 F.3d 122, 126 (3d Cir. 2017) ("willfulness is a 'question of fact") *and Pignataro v. Port Auth. of New York & New Jersey,* 593 F.3d 265, 273 (3d Cir. 2010) (same) *with Martin v. Selker Bros.,* 949 F.2d 1286, 1292 (3d Cir. 1991) (willfulness is a question of law).

i. The Secretary's Motion

The Secretary relies on three "buckets" of evidence to justify its request to expand the potential damages limitation period. First, the internal timekeeping and payroll system suggests knowledge that East Penn would pay only the shift time, not time clock swipes. Second, East Penn has not taken "affirmative steps to ensure compliance" with the FLSA, including failing to conduct a time study and failing to publicize its policies to uniformed employees. Third, East Penn ignored the advice of outside counsel as early as 2003 that it might be violating the FLSA.

As for East Penn's record-keeping policies, the Court has found that they do violate the FLSA because they do not record the actual amount of time worked. *See* Section II.C, *supra.* But this violation alone does not support a finding that East Penn intentionally violated the FLSA or that it was reckless in adopting such a policy. Here, the Secretary has no evidence that East Penn destroyed or sought

to conceal any of the records it does maintain. To the contrary, East Penn produced volumes of records reflecting both swipe and shift times, upon which the Secretary's experts then relied. This is not the sort of case in which an employer's recordkeeping violation was done in an effort to disguise a failure to compensate employees. *Cf. Chao v. Hotel Oasis, Inc.,* 493 F.3d 26, 35 (1st Cir. 2007) (affirming finding of willfulness based upon employer's "intentional manipulation of the records").

As to the Secretary's contention that East Penn knew that employees perform compensable activities outside of shift time, East Penn disputes the premise of the claim. Although the Court found it indisputable that East Penn has not fully compensated certain of its uniformed non-continuous operations employees—based on East Penn's own admissions—East Penn will still be permitted to present a de minimis defense at trial. *See* Sections II.D and II.F, *supra.*

The Court does not find that the record conclusively establishes that East Penn failed to inform its employees about its pay policies or that its employees did not avail themselves of those policies. At a minimum, East Penn adduces sufficient evidence to counter the Secretary's claim that it failed to publicize its 2016 policy. East Penn cites to deposition testimony describing employee meetings to explain the changes to uniform, PPE, and shower policies, and produced the script used in these meetings. Employee declarations relied on by *both* the Secretary and East Penn attest that employees were aware of the changes to pay practices. As to whether East Penn was either unaware of or inattentive to employee complaints as the Secretary

maintains, East Penn offers testimony that the 2016 pay policy change was enacted in response to an employee complaint.

Similarly, East Penn produced testimony that management discussed the "grace period" with employees and the Secretary's own expert Dr. Radwin found that some of the employees within his study made use of that time window for pre-shift activities. With this evidence, East Penn has created a dispute of material fact as to whether it informed those employees who were affected. East Penn's evidence at least calls into doubt whether it intentionally or recklessly violated the FLSA by implementing "illusory" policies—as the Secretary contends. *Tyger v. Precision Drilling Corp.,* 832 F. App'x 108, 116 (3d Cir. 2020) (affirming denial of plaintiffs' willfulness claim).

Moreover, the Secretary overstates his case that East Penn clearly acted willfully by focusing on East Penn's failure to compensate for actual time spent donning, doffing, and showering. It is the Secretary's burden to prove willfulness. But willfulness is distinct from the dispute of law arising from the actual versus reasonable time debate. East Penn sought out and relied on legal advice regarding the FLSA's requirements. Reliance on that advice—even if mistaken—does not render East Penn's alleged violation unreasonable, let alone a willful act. *See, e.g., Pignataro,* 593 F.3d at 273 (violation was not willful where Port Authority relied on discussions and extensive research by its law department and there was legal authority supporting its conclusion at the time); *Brusstar v. Se. Pa. Transp. Auth.,* No. CIV.A. 85-3773, 1988 WL 85657, at *8 (E.D. Pa. Aug. 17, 1988) (finding conduct was not willful where

"SEPTA acted upon the advice of counsel and vigilantly followed the developments in the area").

The Secretary does present evidence to support his position that East Penn was unresponsive to outside counsel's admonitions of possible FLSA violations. East Penn's outside counsel alerted its client to the risk of a violation if it failed to compensate employees for time spent donning work clothes before shift start. With that knowledge, the pre-shift polices that East Penn adopted appear contradictory: an employee is required to be at his or her workstation at the start of his or her shift, but that same employee may arrive up to five minutes late in order to use that time to don a uniform. East Penn does not contend with its policies other than self-serving deposition testimony from management that it seldom disciplined employees for arriving late. But standing alone, the Court does not find that this evidence satisfies the Secretary's burden to prove willfulness.

Moreover, the Court is aware that this particular case presents a question of first impression within this Circuit as to the correct measurement of time for pre- and post-shift activities. Although the Court concludes the Secretary's position correctly aligns with the statute's text and purposes, it likewise finds that East Penn did not reach its opposite conclusion with an intention to "thwart" the FLSA. *Reich v. Gateway Press, Inc.,* 13 F.3d 685, 702-03 (3d Cir. 1994).

Finally, East Penn correctly notes that it is not required to conduct a time study *ex ante* to avoid a finding of willfulness. The Court is not aware of any such requirement, nor has the Secretary brought such authority to the Court's attention.

To grant summary judgment on the willfulness claim, the Secretary "implicitly argues that no reasonable jury could conclude that Defendant[] had not acted willfully." *Acosta v. Osaka Japan Rest., Inc.,* No. CV 17-1018, 2018 WL 3397337, at *11 (E.D. Pa. July 12, 2018). Based on its careful review of the record here, the Court cannot agree. The absence of a clear standard for compensating based on actual or reasonable time, including inconsistent approaches adopted by other courts and lack of binding precedent from the Third Circuit Court of Appeals, and disputed facts regarding East Penn's publication of its pay policies s prevent a conclusive finding that East Penn "deliberate[ly]" or "intentional[ly]" violated the FLSA. *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133 (1988).

The Court is mindful that there is scant FLSA case law in the Third Circuit in which the appellate court has upheld the granting of a plaintiff's motion for summary judgment on a willfulness claim. *See Osaka Japan Rest., Inc.,* 2018 WL 3397337, at *11 (collecting cases). On the record before it, the Court cannot say that no reasonable jury could find that East Penn's actions were not willful. To the contrary, a reasonable jury may well find that East Penn was negligent or assumed incorrectly that it complied with its obligations under the FLSA. But even such a finding is insufficient to constitute willfulness. *McLaughlin,* 486 U.S. at 132.

Although the Court declines to rule in the Secretary's favor as to East Penn's willfulness, the Secretary is not foreclosed from presenting this argument at trial.

ii. East Penn's Motion

Although the Court declines to grant the Secretary's motion, it does not then grant East Penn's motion to foreclose the Secretary's willfulness claim. As it notes above, East Penn does not address the seeming inconsistency between permitting workers to arrive late in order to don on paid time while maintaining a disciplinary infraction system that penalizes workers should they not arrive at their workstation at the start of their shift. Based on the undisputed pay practices, a rational trier of fact could not only reject East Penn's argument that it implemented its policies to comply with the FLSA (regardless of whether an actual or reasonable time standard is the law) but also find that the "grace period" was an administrative fig leaf designed to skirt the actual dictates of the FLSA.

As for relying on the advice of outside counsel, East Penn's consultation with Mr. Melchionni is certainly evidence that can argue with some credibility against a claim of willful conduct. But consultation with a lawyer by itself is insufficient to find in favor for East Penn at summary judgment. The Court's focus is whether the employer was diligent given its statutory obligations, not whether it was aware of the relevant law. *McLaughlin,* 486 U.S. at 134-35.

Viewing this evidence in the light most favorable to the Secretary, as the Court must on East Penn's cross-motion, the evidence is sufficient for the issue to proceed to trial. Accordingly, the Court denies both cross-motions as to the willfulness claim.

D. Injunctive Relief

Based on the summary judgment record, the Secretary requests a prospective injunction to prevent East Penn from further violating the FLSA. Whether to grant such relief rests within the Court's sound discretion. 29 U.S.C. § 217; *Sec'y United States Dep't of Labor v. Am. Future Sys, Inc.,* 873 F.3d 420, 424 (3d Cir. 2017). In exercising its discretion, the Court considers the previous conduct of the employer, the current conduct of the employer, and the dependability of the employer's promises for future compliance. *Acosta v. Cent. Laundry, Inc.,* No. CV 18-190, 2019 WL 3413514, at *15 (E.D. Pa. July 29, 2019).

The Court is unaware of a case in which such relief was granted at this stage of the litigation, nor has the Secretary cited to any authority in which a court within the Third Circuit has done so. *See Acosta v. Heart II Heart, LLC,* No. 2:17-CV-1242, 2019 WL 5197329, at *9 (W.D. Pa. Oct. 15, 2019) (denying injunctive relief without a hearing). When courts have ordered such relief, it is on a record with an employer's demonstrated history of disregard of the FLSA's requirements. *See Cent. Laundry, Inc.,* 2019 WL 3413514 (ED. Pa. July 29, 2019) (granting permanent injunction after court had already issued an injunction in a related case and recently issued a preliminary injunction to which defendants failed to object); *Acosta v. Las Margaritas, Inc.,* No. CV 16-1390, 2018 WL 6812370 (E.D. Pa. Dec. 27, 2018) (entering permanent injunction following a five-day bench trial).

Even crediting the facts put forth by the Secretary, it is not clear whether a permanent injunction would be a valid remedy at this stage. This is the first time East Penn was investigated by Wage and Hour in

conjunction with a potential FLSA violation. East Penn has not previously been subject to private FLSA suits. One complaint does not establish a "pattern" for the court to grant permanent injunctive relief. And, East Penn has put forth evidence that it responded to the 2016 OSHA complaint by amending its shower policy to increase the amount of paid time.

Accordingly, the Court denies the request to issue a permanent injunction, without prejudice to considering the propriety of such relief following trial.

V. The Secretary's Motions to Strike

In response to East Penn's supporting documentation filed with its motions for summary judgment, the Secretary moves to strike two exhibits submitted by East Penn, Doc. No. 198, and, separately, East Penn's Notice of Supplemental Authority, Doc. No. 231. It is clear to the Court that the parties have used motion practice following the summary judg-ment briefing to shoehorn evidence or nitpick against evidence and arguments relating to the actual versus reasonable time standard dispute.

The Court denies the first motion as moot and the second motion on its merits.

A. The Secretary's Motion to Strike East Penn's Exhibits

The Secretary moves to strike two exhibits submitted by East Penn: Exhibit 65 attached to East Penn's motion for partial summary judgment on its good faith defense, Doc. No. 155, and Exhibit 1007 attached to its opposition to the Secretary's motion for partial summary judgment, Doc. No. 193. The exhibits in question are the jury instructions (Ex. 65) and the jury verdict form (Ex. 1007) from *Solis v.*

Tyson Foods, Inc., No. 2-1174, 2009 WL 4959741 (N.D. Ala. Oct. 14, 2009). The Secretary argues the exhibits are irrelevant, unduly prejudicial, and would be inadmissible at trial.

As a threshold matter, East Penn contends it is not appropriate to use a motion to strike to attack the admissibility of summary judgment evidence. *Ankney v. Wakefield,* No. 10-1290, 2012 WL 1633803, at *1 (W.D. Pa. May 8, 2012) (citing *Smith v. Interim Healthcare of Cincinnati, Inc.,* No. 10-582, 2011 WL 6012971, at *4 (S.D. Ohio Dec. 2, 2011); *Cutting Underwater Techs. USA, Inc. v. ConDive, LLC,* No. 09-387, 2011 WL 1103679, at *3 (E.D. La. Mar. 22, 2011)). However, courts have dealt with improper motions to strike as construing them as objections under Rule 56(c)(2).[29] *Id.* (citing *Cutting Underwater Techs.,* 2011 WL 1103679, at *3).

East Penn also argues that the Court should not consider the Secretary's challenges because they are untimely. The Secretary moved to strike the exhibits on March 25, 2020. East Penn argues that the Secretary should have raised his challenge to Exhibit 65 in opposition to East Penn's summary judgment motion (i.e., by February 19, 2020) and his challenge to Exhibit 1007 in his reply in support of his motion for summary judgment (i.e., by March 11, 2020). A party should raise its challenges to summary judgment exhibits in a conspicuous manner and in a timely fashion. That said, no rule definitively says what should be considered "timely." And this Court is unaware of case law interpreting the timeliness

[29] "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2).

requirement. Indeed, the Federal Rules of Civil Procedure do not specify a deadline for filing a Rule 56(c)(2) objection. The Court thus exercises its discretion to treat the Secretary's arguments as objections under Rule 56(c)(2).[30]

In reaching its decisions on the motions for summary judgment, the Court did not rely on either exhibit. So, the Court will not reach the evidentiary issues raised in the Secretary's motion to strike.[31] The Court thus denies the motion as moot.

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[30] At the February 21, 2020 hearing on the motion for sanctions, counsel for East Penn noted both parties had difficulty in "keeping up" with the briefing. In the light of the copious amount of briefing in this case and East Penn's prior requests for extensions, the Court is disinclined to deny a motion to strike on a procedural ground.

However, the Court is compelled to note that, since that hearing, the parties have not heeded their own concerns about inundating the Court and each other with reams of paper. This should serve as a reminder to parties who choose to engage in protracted motion practice.

[31] The Secretary argues that the exhibits at issue would be inadmissible at trial because they are irrelevant. *Robinson v. Hartzell Propeller Inc.,* 326 F. Supp. 2d 631, 645 (E.D. Pa. 2004) (noting that the Court should only consider evidence "capable of being admissible at trial" when ruling on a motion for summary judgment). The Secretary argues that what a jury was instructed and ultimately decided in another FLSA trial has no bearing on the facts at issue in this case. Doc. No. 198 at 2. East Penn contends that the exhibits are relevant to the objective reasonableness of East Penn's pay practices and East Penn's lack of willfulness[.]" Doc. No. 202 at 3.

It is clear to the Court that East Penn is only using these exhibits to support its legal argument that the compensable time at issue should be measured based on "reasonable time"—as opposed to "actual time"—and not to support any factual determination. If East Penn is truly using these jury instruc-

B. The Secretary's Motion to Strike East Penn's "Notice of Supplemental Authority"

The Secretary also moves to strike the supplemental exhibits and briefing East Penn submitted in support of its summary judgment filings. Doc. No. 231. Much of the documents East Penn seeks to introduce were produced pursuant to a third-party FOIA request in May 2020 regarding the Department of Labor's positions on time-keeping practices. The Secretary argues that the "Notice" is untimely, lacks any new authorities or new arguments, and is a pretext to justify filing a supplemental reply brief.

First, the parties dispute the propriety of using the third-party FOIA request as a supplemental discovery tool. It is undisputed that the new documents were produced following the close of summary judgment briefing. East Penn maintains that it was diligent in pursuing production, so its supplement should be treated as timely. It accuses the Secretary of delaying its production of FOIA files and interfering with the FOIA process.

The record indicates that East Penn was diligent, although it does not support East Penn's speculative accusations as to the Secretary's alleged malfeasance. A non-party to this litigation, the law firm of Wiley

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tions and verdict form to demonstrate objective reasonableness and lack of willfulness, then it should have put forth some evidence suggesting that East Penn relied on these jury materials in implementing and maintaining the policies at issue.

Any such evidence is absent here. Notably, East Penn does not rely on Exhibit 65 in its statement of undisputed facts. It is cited once in its brief in support of its motion for summary judgment to support its legal argument. East Penn does not cite Ex. 1007 in its response to the Secretary's statement of undisputed facts to his motion for summary judgment.

Rein LLP, initially filed the FOIA request.[32] Wiley Rein made repeated inquiries to the FOIA office for the status of the documents. Roughly two months before the summary judgment deadline, in November 2019, Wiley Rein was notified that the documents were in secondary review prior to production. A week before the briefing deadline, with the production still outstanding, Wiley Rein again inquired as to the status of production. The firm made subsequent requests for production during the briefing period in February 2020. When East Penn's reply brief was due and the production remained outstanding, Wiley Rein filed its FOIA complaint. East Penn received the requested documents roughly three months after briefing closed.[33]

As to the accusation of willful interference, East Penn does not have any evidence that the Secretary has inappropriately delayed the FOIA production other than to note the "Solicitor's office had a hand in the document review and delay." Doc. No. 231-1 at 2. Without more, this alleged interference is speculative at best. Wiley Rein's correspondence with the Department of Labor does not reveal that it is acting on behalf of East Penn, that summary

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[32] Per the 2019 FOIA Summons and Complaint, the firm identified its client as "the U.S. battery manufacturing industry," rather than identifying East Penn by name.

[33] Among other things, Wiley Rein requested "all materials pertaining to any investigations of East Penn" from 2016 to 2018. Doc. No. 223-1. Wiley Rein later narrowed the scope of its requests regarding East Penn to only compliance action reports and case narratives. *Id.* East Penn later appears to have sought those previously excluded document categories, including enforcement guidance. So, at least as to these documents, the Secretary was not purposefully delaying production of certain documents.

judgment deadlines were imminent in this case, or even that the documents were requested for inclusion as part of ongoing litigation. Doc. No. 233-1. Although the Department of Labor could theoretically connect the dots to infer the requested documents were for use in this suit, absent more, the Court will not endorse East Penn's claim that the Secretary maliciously interfered to cover up certain documents.

The mere fact of a delay in processing a request alone does not establish bad faith. *Cozen O'Connor v. U.S. Dep't of Treasury,* 570 F. Supp. 2d 749, 768-69 (E.D. Pa. 2008) (finding no evidence of bad faith given the number of agencies involved, the nature of information sought, the volume of documents to be searched and reviewed, and sensitivity of documents requested). Here, there is no other compelling evidence of bad faith. In light of East Penn's request for documents dating back to the 1950s, the length of time and resources needed to locate that information does not establish some underhanded action on the part of the Department of Labor. Moreover, the request itself was not denied and the documents were produced.

Second, the Secretary argues that the "Notice" functions as a reply brief and is thus untimely. The Secretary correctly states the rule in this district and in this Court that reply and surreply briefs are not permitted as of right; the parties are not permitted to file supplemental briefing absent the Court's leave. General Pretrial and Trial Procedures, Civil Cases § III.C.; E.D. Pa. R. Civ. P. 7.1(c). But the Secretary makes this point before launching into a recitation of his own arguments. So, the Court now is functionally presented with a reply and a sur-reply brief—neither of which was invited or directed by the Court.

Moreover, as the docket reflects, both parties were equal offenders who embraced the transparent technique of filing "Notices" after the close of briefing.

To the extent the exhibits are helpful to resolving the issues on summary judgment, the Court exercises its discretion to consider the arguments raised—and re-raised by the parties in the Notice and motion to strike. *Marchbanks Truck Serv., Inc. v. Comdata Network, Inc.,* No. 07-CV-01078, 2011 WL 11559549, at *18 (E.D. Pa. Mar. 24, 2011) (considering a reply brief filed without permission where it is helpful to determination of the issues). Because the Secretary likewise employs motion practice to again dispute the relevance—or lack thereof—of the supplemental authority, the Court finds that both parties have been afforded a more than sufficient—if not undeniably and ultimately pointless—opportunity to be heard.

Accordingly, the Court denies the motion to strike to the extent it seeks to strike the contents of the documents produced from the FOIA request.

VI. East Penn's Motion to Strike

While the parties' various motions for summary judgment were pending, the Secretary filed a notice to revise Schedule A to the Complaint. Doc. No. 250. Schedule A lists the employees identified during this litigation as allegedly due back wages. The revised version adds roughly 2,300 claimants. It does not alter the allegations in the Complaint itself. In response to the notice and revised Schedule A, East Penn filed a motion to strike. Doc. No. 251. East Penn raises a procedural and substantive challenge to the Secretary's efforts to amend Schedule A.

First, East Penn objects to expanding the scope of Schedule A in light of its motion challenging the Secretary's "representative" group of employees. As East Penn notes, approximately half of the names the Secretary seeks to add are employees working outside of the Lyon Station campus and the eight plants that Dr. Radwin studied. In light of the Court's grant of East Penn's motion for partial summary judgment, certain of these employees in the revised Schedule A are not eligible for recovery in any case. For this reason, the Court grants East Penn's motion to strike.

Second, East Penn objects to the Secretary's method of filing. The Secretary submitted a "notice" instead of moving to amend the schedule. Given the procedural posture of the case—the parties have briefed summary judgment—East Penn maintains that the Secretary should articulate his reasons why significantly expanding the number of claimants complies with Rules 15 and 16. Fed. R. Civ. P. 15, 16. The Court notes that the Secretary has, on other occasions, engaged in formal motion practice when he has sought to revise a Schedule A. *See, e.g., Acosta v. Holland Acquisitions, Inc.,* No. 2:15-cv-1094, 2017 WL 4685304 (W.D. Pa. Oct. 18, 2017); *Acosta v. Five Star Automatic Fire Prot., LLC,* No. EP-16-CV-282-PRM, 2017 WL 3139835 (W.D. Tex. July 24, 2017); *Chao v. Westside Drywall, Inc.,* 709 F. Supp. 2d 1037 (D. Or. 2010), *as amended* (May 13, 2010). So, the Court is not concerned that the Secretary was unable to do so here. Moreover, it is this Court's stated

existing practice and preference that parties submit substantive requests via motion.[34]

The Court grants the motion to strike without prejudice. The Secretary may file a motion for leave to submit a second revised Schedule A that takes into consideration the limits placed by the Court's decision on East Penn's motion for summary judgment. *See supra* Section III. East Penn may, of course, formally oppose such a motion.

CONCLUSION

For the reasons set out in this Memorandum, the Court grants in part and denies in part the Secretary's motion for partial summary judgment. Summary judgment is granted as to East Penn's status as a covered enterprise under the FLSA; a finding that the uniformed employees' clothes-changing and showering are "integral and indispensable" activities that are compensable under the FLSA; East Penn's violations of the FLSA's recordkeeping provisions; that the appropriate standard of compensation for clothes-changing and showering is the actual time spent on such tasks; and East Penn's violations of the FLSA's overtime provisions as to its uniformed non-continuous operations employees.

Summary judgment is denied the Secretary as to a finding that East Penn's time clock records are indisputably the minimum measure of number of overtime hours worked; to foreclose East Penn from presenting a de minimis defense; the willfulness of East Penn's alleged violations of the FLSA; the

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[34] *See* Judge Pratter's General Pretrial and Trial Procedures, available at https://www.paed.uscourts.gov/documents/procedures/prapol2.pdf.

Secretary's entitlement to liquidated damages; and the Secretary's request for a permanent injunction.

The Court grants in part and denies in part East Penn's motion for partial summary judgment as to the scope of employees at issue. Summary judgment is granted to exclude from the case East Penn employees who work outside of Pennsylvania; East Penn employees who are "continuous operations" employees in the Metals Division (excluding "casting crew" prior their reclassification); and East Penn uniformed employees outside of the Lyon Station campus. Summary judgment is denied as to East Penn's motion to exclude from the case East Penn employees who do not wear uniforms and do not shower but who must wear PPE; casting crew employees prior to their reclassification as continuous operations employees; and uniformed employees at plants in the Lyon Station campus that were outside of the eight plants Dr. Radwin studied.

The Court denies East Penn's motion for summary judgment on its good faith defense to liquidated damages and to foreclose the Secretary's willfulness claim. These issues remain for trial.

The Court denies the Secretary's motion to strike East Penn's exhibits as moot and denies the Secretary's motion to strike East Penn's Notice of Supplemental Authority. The Court grants East Penn's motion to strike the Secretary's notice of filing a second revised Schedule A.

An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter____
GENE E.K. PRATTER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 18-1194

MARTIN J. WALSH, Secretary of Labor,[1]

Plaintiff

v.

EAST PENN MANUFACTURING CO., INC.,

Defendant

MEMORANDUM

PRATTER, J. SEPTEMBER 15, 2021

The Secretary of Labor sued East Penn Manufacturing Company, claiming it violated the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 *et seq.,* because it did not pay its employees for all the time required to change into and out of their uniforms. Both sides moved for summary judgment, and the Court granted their motions in part. Discontent, East Penn now moves for reconsideration of parts of that decision. But East Penn has not shown that the Court erred. Thus, the Court denies its motion.

DISCUSSION[2]

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[1] The latest Secretary of Labor, Martin J. Walsh, is substituted for Eugene Scalia as the plaintiff in this action. Fed. R. Civ. P. 25(d).

[2] Because the Court thoroughly detailed the applicable law and facts in its prior Memorandum Opinion on the parties' motions for summary judgment, the Court limits its discussion here to the challenged portions.

To prevail on its motion for reconsideration, East Penn must "show (1) an intervening change in the controlling law; (2) new evidence that was not available when the court issued its order, or (3) the need to correct a clear error of law or prevent manifest injustice." *Gibson v. State Farm Mut. Auto. Ins. Co.,* 994 F.3d 182, 190 (3d Cir. 2021). East Penn identifies what it considers to be three clear errors of law: First, the Court found East Penn liable for underpaying uniformed employees before deciding if that unpaid time was de minimis. Likewise, the Court found East Penn liable for failing to keep accurate records before deciding if the unrecorded time was de minimis. Third, East Penn asserts, the Court found that non-uniformed employees' donning and doffing personal protective equipment counted as compensable activities. But the first two are not errors, much less clear errors. With the third, East Penn simply misreads the Court's prior ruling.

I. East Penn Violated the FLSA's Overtime Provision

The FLSA requires that employees be paid for the actual time spent on essential work activities. Doc. No. 273, Op. at 15. But, as East Penn admitted, it paid its uniformed employees for only the "time reasonably spent donning, doffing, and showering." *Id.* Based on that, the Court held that East Penn underpaid its uniformed employees. Op. at 29. That admission of liability did not end the issue, however. At trial, East Penn could still raise "a de minimis defense that may reduce or eliminate any damages" for that unpaid time. *Id.*

East Penn now insists that it did *not* admit to an overtime violation. East Penn has consistently maintained that the unpaid time at issue is de minimis,

and, to it, the de minimis doctrine is not a defense to an overtime violation but an element of the violation. For support, East Penn points to a pair of cases. The first, *Anderson v. Mt. Clemens Pottery Co.,* explains that unpaid time is "compensable" only "when an employee is required to give up a substantial measure of his time and effort." 328 U.S. 680, 692 (1946). The second, *De Asencio v. Tyson Foods, Inc.,* similarly situates "the de minimis doctrine" as "a limiting principle to compensation for trivial calculable quantities of work." 500 F.3d 361, 374 (3d Cir. 2007). Resting on these cases, East Penn equates compensation for a violation with the violation itself.

But the two are not the same. East Penn can be found to have underpaid its employees but not necessarily have to compensate them for this extra time. The de minimis doctrine decides whether this "otherwise compensable time" must be actually compensated—that is, whether the employer must "make proper payment to" the underpaid employees. *De Ascencio,* 500 F.3d at 374 (quoting *Lindow v. United States,* 738 F.2d 1057, 1063 (9th Cir. 1984)); *Compensate* (def. 2), *Merriam Webster Unabridged Dictionary* (2021). That is why the Supreme Court in *Anderson* instructed the district court to tally the actual time spent on pre-shift activities, "giving due consideration to the de minimis doctrine and *calculating the resulting damages* under the Act." 328 U.S. at 694 (emphasis added). Put simply, the de minimis doctrine is a limit on recovery. Though a "violation" might be "'technical,' 'harmless,' or '*de minimis,*'" and so warrant no damages, it is a "violation" nonetheless. *Alabama v. Bozeman,* 533 U.S. 146, 153 (2001). The law does not concern itself with trifles not because the law has not been broken

but because the damages are not worth the cost of adjudication.

Thus, the Court finds that it did not err in holding that East Penn underpaid its uniformed employees. For time violations under the FLSA, the de minimis doctrine is "a defense," for which the employer "bears the burden" of proof. *Kellar v. Summit Seating Inc.,* 664 F.3d 169, 176 (7th Cir. 2011). If an employer has been found to have underpaid for compensable work, it can then turn to this defense to "preclude[] employees from recovering for" miniscule amounts of that work. *Perez v. Mountaire Farms, Inc.,* 650 F.3d 350, 372 (4th Cir. 2011). East Penn admitted that it underpaid its employees. It must now be content with putting on its de minimis defense at trial.

II. East Penn Violated the FLSA's Recordkeeping Provision

East Penn conceded that it recorded employees' shift times, not the "actual time" spent on work. Op. at 22. Based on that, the Court found that East Penn violated the FLSA's recordkeeping requirement. Op. at 22-25. East Penn now insists that was error, because the Court did not first decide if the unrecorded time was de minimis.

To show that unrecorded time must be substantial to count as a violation, East Penn points to the Department of Labor's de minimis recordkeeping regulation, which provides that employers need not record "insubstantial or insignificant periods of time beyond the scheduled working hours." 29 C.F.R. § 785.47. Yet East Penn ignores the limitation that immediately follows: "This rule applies only where" the employer fails to record occasional extra time worked, not where the employer consistently fails

to record small but "regular" work periods. *Id.* For example, if a cashier shows up for work two minutes early one day, the store need not clock those extra minutes, but if the cashier regularly shows up early to put on her mandated apron and hat, the store must. Because East Penn falls into this second category, the regulation does not help it. So the Court finds that it did not err in holding that East Penn failed to keep proper records.

III. The Court Did Not Rule That East Penn Underpaid Its Non-Uniformed Employees

East Penn sought summary judgment on non-uniformed employees, asserting that "no reasonable juror could find that non-uniformed employees were not fully compensated" because, it claimed, the Secretary provided no evidence on non-uniformed employees. Op. at 42. The Court denied that request. Despite this context, East Penn now complains that the Court went a step further and found "sua sponte" that East Penn *had* underpaid non-uniformed employees. Pl.'s Br. at 6.

Not so. The Secretary put on evidence that East Penn had required the non-uniformed employees to wear personal protective equipment and that it took some of those employees extra time to don and doff that equipment. Op. at 43. Given that, the Court held that the Secretary had carried his burden to show that "a reasonable juror could find that non-uniformed employees were not fully compensated." Op. at 42. In other words, the Court denied East Penn's motion to foreclose liability; it did not decide that East Penn *was* liable. Instead, a jury must decide "whether these [non-uniformed] employees were compensated for the time spent donning and doffing their company-mandated PPE." Op. at 44.

At trial, both sides may submit evidence on whether that equipment was integral and indispensable to the job and, if so, whether East Penn compensated non-uniformed employees for that time.

CONCLUSION

For these reasons, the Court denies East Penn's motion for reconsideration. An appropriate order follows.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JULIE SU,[1]
Acting Secretary of Labor,

Plaintiff

v.

EAST PENN MANUFACTURING CO., INC.,

Defendant

MEMORANDUM

PRATTER, J. NOVEMBER 7, 2023

The Secretary of Labor initiated this action against East Penn Manufacturing Co., Inc., a battery manufacturer, alleging that East Penn failed to pay many of its employees for the time they spend on clothes-changing and showering at a number of the facilities at East Penn's Lyon Station campus. After years and years of pre-trial free-wheeling accusations, recriminations, challenges, combative and costly discovery, and legal head-butting leading to Proustian piles of paper and a two-month trial, the jury returned a unanimous verdict against East Penn, awarding a portion of the amount of back-pay sought by the Secretary. East Penn successfully defeated the Government's effort to secure $22,253,087.56 in liqui-

[1] Throughout the life of this case, the Department of Labor has been led by a number of Secretaries or Acting Secretaries. Julia Su is the latest. Accordingly, case citations for this litigation will include different plaintiff names.

dated damages. Nonetheless, East Penn is determined to reanimate this dispute. Through its Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, or Remittitur (Doc. No. 638), East Penn tries to spark some life back into its claim that it is in fact not liable for any damages at all. In this, East Penn is unsuccessful. The Court will deny East Penn's motion and leave the jury's verdict intact.

BACKGROUND

The background of this case has been extensively recounted elsewhere. East Penn Manufacturing Company is a large manufacturer of lead acid batteries, battery accessories, wires, cables, and related components. Because lead exposure is an associated hazard of battery manufacturing, East Penn requires most of its hourly employees to wear uniforms. Apr. 10, 2023 Trial Tr. at 157:22-24. The time that uniformed employees spend donning, doffing, and showering is compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203 *et seq*. *See Walsh v. E. Penn Mfg. Co.*, 555 F. Supp. 3d 89, 102 (E.D. Pa. 2021).

Prior to 2003, East Penn's Time Clock and Pay Procedures required each employee to be at his or her workstation at shift starting time. Doc. No. 157 ¶ 71; Doc. No. 176-1 ¶ 71(a). East Penn operated multiple shifts each day, often staggered among its many buildings at its campus in Lyon Station, Pennsylvania. Doc. No. 157 ¶¶ 2, 19; Doc. No. 176 ¶ 19(a). In 2003, on the advice of its outside labor and employment counsel, East Penn implemented a formal five-minute "grace period" during which employees could don their uniforms prior to reporting to their workstations. Doc. No. 155-56, at 2, Apr. 19, 2023 Trial Tr. 226:13-20. This 2003 Uniform Policy also allotted five

minutes in which East Penn employees could doff their uniforms and shower post-shift. Doc. No. 155-56, at 2. East Penn did not conduct a formal, data-driven investigation into the amount of time East Penn employees actually needed to don, doff, and shower. Apr. 24, 2023 Trial Tr. at 161:14-25, 257:19-25. Instead, the company determined—based on management's collective anecdotal surmising and experience—that five minutes on each side of the shift was a reasonable amount of time in which employees could complete their donning, doffing, and showering activities on the actual East Penn premises. *See* Snyder July 16, 2019 Dep. Tr. 124:10-21, 146:21-147:6; Apr. 19, 2023 Trial Tr. at 215:12-17. Moreover, it appears that some number of East Penn's employees continued to arrive to their workstations, in uniform, at the start of their scheduled shifts, even after the 2003 Uniform Policy went into effect on July 21, 2003. March 14, 2023 Trial Tr. at 54:19-55:3; May 3, 2023 Trial Tr. at 154:2-8.

In 2016, East Penn doubled the amount of paid time allotted post-shift for doffing and showering from five minutes to ten minutes. PX-8; *see also* DX-4; Apr. 19, 2023 Trial Tr. at 255:5-16. The amount of paid time for pre-shift activities—like donning uniforms—did not change. *See* DX-4. Shortly thereafter, the DOL Wage and Hour Division commenced the two-year investigation into East Penn that ultimately ended with the filing of this lawsuit. Apr. 19, 2023 Trial Tr. at 248:19-249:1; Apr. 25, 2023 Trial Tr. at 241:3-5; *see also* Complaint, Doc. No. 1.

The docket hints at the pre-trial dynamics of this case. Eventually, this case proceeded to a jury trial. The issues for the jury were: (1) whether East Penn failed to pay its *uniformed* employees the overtime

compensation required by law in 24 of its facilities; (2) whether that unpaid-for time was *de minimis*; (3) what sum of money would fairly compensate the uniformed employees for damages; (4) whether *nonuniformed* employees' donning and doffing of Personally Protective Equipment (PPE) was compensable; (5) whether East Penn had failed to pay those non-uniformed employees their overtime pay; (6) whether such time was *de minimis*; (7) what sum of money would fairly compensate those non-uniformed employees; (8) whether East Penn had acted willfully to violate the FLSA; and (9) if the Government had proved by a preponderance of the evidence that certain employees even came within the scope of the litigation, *See* Verdict Form, Doc. No. 589. During the two-month trial,[2] approximately 60 witnesses appeared, and over 400 exhibits were offered and admitted. The Secretary made her case using several "buckets" [3] of evidence, including employee testimony and declarations, security camera footage, East Penn's relevant policies and procedures, and the testimony of Dr. Robert Radwin, an avowed expert witness for the Government who had conducted what he called a "time-study" to determine the amount of time East Penn's employees spent on pre- and post-shift activities.

The jury found that East Penn had violated the FLSA as to its 11,780 hourly uniformed employees,

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[2] During several pre-trial case management conferences, counsel for both parties were adamant that the case could not be tried in less than four months, during which some 700 witnesses were supposedly expected to appear. Counsel were repeatedly disabused by the Court of the likelihood of such a spectacle.

[3] *See* May 3, 2023 Trial Tr. at 98:18-99:8 (counsel for the Secretary describing different "buckets" of evidence).

that the violations were not *de miniminis*, that East Penn had not acted willfully, and that it owed back wages in the amount of $22,253,087.56. *See* Verdict Form, Doc. No. 589. The jury also found in favor of East Penn that the time non-uniformed employees spent donning and doffing PPE was non-compensable under the FLSA, and likewise found that the Secretary had also failed to prove that any of the 33 named employee individuals on the verdict sheet belonged in the litigation. *Id.*

East Penn timely filed its Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, or Remittitur, seeking various forms of relief from the verdict under Federal Rules of Civil Procedure 50(b) and 59(a) and (e). Doc. No. 638.[4] The issues presented in this Motion are not outside the ambit of preserved challenges, objections, and other rulings adverse to East Penn and disputed during the case. Hence, they merit consideration in substance.

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[4] East Penn moved for judgment as a matter of law after the Secretary's case-in-chief, *see* Apr. 13, 2023 Trial Tr. 90:18-20, and filed its written motion and accompanying memorandum on April 17, 2023. Doc. No. 562. East Penn renewed its motion under Rule 50(a), *see* May 2, 2023 Charge Conf. Tr. 4:2-8, and again moved for judgment as a matter of law after the Secretary's rebuttal case and close of record. *See* May 3, 2023 Trial Tr. 71:11-14. East Penn filed its written motion on May 10, 2023. Doc. No. 586. The jury issued its verdict on May 11, 2023, *see* Doc. No. 589, and the Court entered judgment in favor of the Secretary and against East Penn in accordance with that verdict on May 31, 2023. Doc. No. 591. East Penn filed this Motion, seeking relief under Rules 50(b) and 59(a) and (e), on June 28, 2023. Doc. No. 638.

DISCUSSION

I. Judgment as a Matter of Law Under Fed. R. Civ. P. 50(b)

"A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." Fed. R. Civ. P. 50(a)(2). If the court does not grant a Rule 50(a) motion, "[n]o later than 28 days after the entry of judgment . . . the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50(b). A Rule 50(b) motion "should only be granted if the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Raiczyk v. Ocean Cnty. Veterinary Hosp.*, 377 F.3d 266, 269 (3d Cir. 2004) (internal citations omitted). In considering

> whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party.

Kars 4 Kids Inc. v. America Can!, 8 F.4th 209, 218 n.8 (3d Cir. 2021) (internal citation and quotation marks omitted); *see also Monroe v. FTS USA, LLC*, 860 F.3d 389, 401 (6th Cir. 2017). ("[W]hen assessing the sufficiency of the evidence, 'the only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circum-

stantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict.'" (quotation omitted)).

East Penn argues it is entitled to judgment as a matter of law on two grounds. First, consistent with the persistent presence of this issue throughout the case, East Penn asserts that the Secretary "failed to establish representative evidence of 5 ½ minutes of unpaid overtime for all uniformed employees at all 24 plants." Doc. No. 638-1, at 9. According to East Penn, the Secretary did not provide sufficient representative testimony and evidence, largely because only a statistically insignificant number of employees testified at trial. *See id.* at 5. Moreover, these employees arguably offered varied testimony, further undermining, according to East Penn, the Secretary's position that this testimony is representative of all the relevant employees.

East Penn also argues that Dr. Radwin's study—which underlies the damages calculation submitted to the jury—is not a valid additional source of representative evidence because Dr. Radwin studied only a subset of the plants at issue. *See id.* at 20. Therefore, to the extent the verdict was based on Dr. Radwin's study, East Penn contends that it cannot stand. *Id.* East Penn further asserts that the Secretary cannot rely on the 756 pre-trial employee-written declarations offered at trial as additional representative evidence because none of those declarations addressed the amount of paid or unpaid time. *Id.* at 22. Finally, East Penn asserts that neither its pay policies nor its time records constitute representative evidence of unpaid time at all 24 plants.

Second, East Penn argues it is entitled to judgment as a matter of law because there is substantial evidence to show that any unpaid overtime was legally *de minimis*, especially "given the jury's finding of 5 ½ minutes [] and the lack of substantial evidence of any practical way for East Penn to administratively track that time." Doc. No. 638-1, at 1-2.

The Secretary counters East Penn's first argument for judgment as a matter of law by pointing out that because East Penn failed to keep adequate records, the Secretary's burden of proof is low. According to the Secretary, she offered sufficient evidence to satisfy that burden, including the collection of representative employee testimony and evidence, East Penn's policies and time records, and Dr. Radwin's time study. Doc. No. 643 at 8. The Secretary also points out that such evidence and testimony are sufficiently "representative" if they show that employees perform substantially similar unpaid work, so, argues the Government, East Penn's nitpicking about the minor variations in employee routines makes mountains out of mole hills. *See* Doc. No. 643, at 6-7. In sum, the Secretary asserts that she produced more than enough evidence—representative and/or otherwise—to support the jury's verdict.

The Secretary also disagrees that there is substantial evidence that any uncompensated time was *de minimis* as a matter of law because (1) the *de minimis* defense is a balancing test and any one factor could be determinative, so the regularity of the unpaid work at issue here could alone support the jury's finding that the time was not *de minimis*; (2) East Penn could in fact have tracked the work at issue; and (3) the aggregate amount of unpaid work (*i.e.*, even a small one-off amount of time, when mul-

tiplied by the number of days, weeks, months, and years at issue and further multiplied by the number of employees) was undeniably substantial.

A. The Secretary Presented Sufficient Evidence of the Unpaid Work for Rule 50(b) Purposes

Considering the whole of the trial, there is sufficient evidence in the record upon which the jury could properly reach a verdict for the Secretary. Due to East Penn's failure to keep adequate records,[5] the Secretary is only required to produce evidence sufficient to show the amount and extent of uncompensated work "as a matter of just and reasonable inference." *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88; *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1297-98 (3d Cir. 1991). To make her prima facie case, the Secretary does not have to bring every employee seeking back wages to court to testify. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701 (3d Cir. 1994) ("Courts commonly allow representative employees to prove violations with respect to all employees."). There is no precise do-or-die percentage of the workforce that must appear. Rather, the law merely provides that the Secretary can rely on representative evidence and testimony and any existing records or documentary evidence to establish a pattern of violations affecting non-testifying employees. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 441, 455-59 (2016); *Selker Bros*, 949 F.2d at 1298. East Penn must then "rebut the existence of the violations . . . or prove that individual employees are excepted

[5] *See E. Penn Mfg. Co.*, 555 F. Supp. 3d at 113 (granting summary judgment in favor of the Secretary regarding East Penn's failure to keep adequate records).

from the pattern or practice." *Gateway* Press, 13 F.3d at 702 (internal citation omitted); *see Mt. Clemens Pottery*, 328 U.S. at 687-88 (Employer must counter with "evidence *of the precise amount of work performed* or with evidence to negative the reasonableness of the inference to be drawn from the employees evidence.") (emphasis added). If East Penn fails to do so, the jury may then award damages to all injured employees, "even though the result *may be only approximate*." *Mt. Clemens Pottery*, 328 U.S. at 688; *see Selker Bros.*, 949 F.2d at 197-98 (emphasis added).

East Penn did not produce evidence of the precise amount of work performed[6] or prove that any individual employees awarded back pay are excepted from the violations—after all, East Penn maintained throughout the trial that it did not owe *any* back wages because *none* of the hourly, uniformed employees (testifying and non-testifying) completed unpaid compensable work.[7] Thus, judgment as a matter of law could only be appropriate if East Penn can show that, even considering the Secretary's low burden of proof, the trial record is so deficient that the jury's determination as to the amount and extent of

[6] It would be surprising for East Penn to argue otherwise, considering that East Penn's *de minimis* argument rests almost entirely on its claim that it cannot possibly have reliably tracked the amount of time employees spent donning, doffing, and showering.

[7] East Penn did not submit its own damages calculation, choosing instead to double-down on its arguments that the short amount of time any individual employee spends donning, doffing, and showering is well within the grace-periods allotted for those activities and, to the extent those activities take longer than five to ten minutes, that unpaid time is *de minimis*. *See* May 3, 2023 Trial Tr. at 203:18-213:20.

unpaid work could not be based on "just and reasonable inference[s]."

East Penn's attempt to dispose of each "bucket" of evidence in isolated, piecemeal fashion is unsuccessful. Like the jury, the Court now considers the evidence all together. When viewed as a whole, the evidence presented at trial addressed all 24 plants and provided sufficient grounds for the jury to award a verdict in favor of the 11,780 uniformed employees.[8]

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[8] The trial record contains sufficient evidence from which the jury could reasonably and justly infer how long employees took at each plant to complete clothes-changing and showering activities, and the extent to which those activities occurred on paid or unpaid time. Every single plant is represented by (1) employee testimony at trial; (2) Dr. Radwin's time study; (3) the 756 employee declarations; and/or (4) security footage. Additionally, the Secretary presented East Penn's relevant policies and procedures, which applied to uniformed employees at all 24 plants. East Penn challenges several of these "buckets" of evidence by arguing something to the effect of: "this evidence does not address specifically the issue of 'paid or unpaid time,' and therefore it cannot have assisted the jury in reaching its verdict." *See e.g.*, Doc. No. 638-1, at 22-23. But just because the words "paid or unpaid time" do not appear in, for example, the 756 employee declarations, does not mean such evidence is irrelevant to the jury's verdict. The 756 employee declarations conceivably could have provided the jury with a reasonable basis to infer that uniformed employees spent generally the same amount of time donning, doffing, and showering, supporting its decision to issue a lump-sum award to uniformed employees at all the plants. *See* PX-2; *see also East Penn Mfg.*, 555 F. Supp. 3d at 118 ("[T]he Court has reviewed the contents of employee declarations that include estimates of the amount of time to don a uniform and walk to their workstations. Without weighing the credibility of these declarants, the Court notes a pattern among employees who attest to spending between three and nine minutes on these activities."). Likewise, recognizing that Dr. Radwin may be unimpressive to some, that does not mean the jury could not have overlooked his less compelling style,

East Penn first attacks the Secretary's "representtative employee evidence," arguing the employee testimony offered at trial was numerically and substantively insufficient to "fairly represent" the nontestifying employees. According to East Penn, the Secretary did not "achieve a representative sample" of hourly, uniformed employees because the Secretary called only 39 employees—0.33% of the relevant workforce—to testify.[9] Doc. No. 638-1, at 5-6. This low percentage is allegedly insufficient because "[w]hile there is no bright-line test of what percentage of employees is necessary . . . the Secretary has admitted that she has to meet the 2.7% blessed in *Mt. Clemens Pottery*." Doc. No. 638-1, at 5 (quoting Apr. 5, 2023 Trial Tr. at 120:21-121:1 (Mr. Hampton)). But with this, East Penn gives away the game: *there is no bright-line test requiring a certain percentage of employees to testify*.[10] And counsel's

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commentary, and characteristics and accepted features of his conclusions.

[9] East Penn is dismissive of the fact that some of these testifying employees were team-leaders who testified not only about their own donning, doffing, and showering activities, but also about what they observed their team-members do. *See e.g.*, March 14, 2023 Trial Tr. PM Test. at 94:4-95:1 (testimony of Mr. Seyfried, supervisor of 30-40 employees, about observing employees in three plants clocking in and out in full uniform).

[10] *See e.g.*, *Dole v. Solid Waste Servs., Inc.*, 733 F. Supp. 895, 926 n. 20 (E.D. Pa. 1989), *aff'd*, 897 F.2d 521 (3d Cir. 1990), and *aff'd sub nom*, *Appeal of Solid Waste Servs., Inc.*, 897 F.2d 524 (3d Cir. 1990); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997) (2.5% of employees testified); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982) (2.4% of employees testified); *Morgan v. Family. Dollar Stores, Inc.*, 551 F.3d 1233, 127677 (less than 1% of employees testified).

statements at trial cannot create a statutory or judicially declared rule that does not otherwise exist.[11] While certainly not endorsing a .33% measurement for use in other cases, in this particular case the quantity of the workforce-witnesses, given the quality of the testimony, is sufficiently representative.

East Penn's substantive challenge to the employee testimony is also unsuccessful. Making what is an entirely appropriate, quintessentially jury argument for a closing, East Penn asserts to the Court now that the small number of employees who did testify gave testimony that "varied widely," thus undermining their status as "representative witnesses" of the alleged overtime violations. *See* Doc. No. 638-1, at 8. To illustrate the allegedly problematic variations, East Penn offers a chart, spanning multiple pages of its brief, tracking each employee's testimony about how long it takes for him or her to don, doff, and

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East Penn also relies on a quote from *Bouaphakeo:* "'[r]presentative evidence that is statistically inadequate … could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked.'" *See* Doc. No. 638-1, at 4 (quoting *Bouaphakeo*, 577 U.S. at 459. But this statement about statistical adequacy "was made in the context of the *admissibility* of representative evidence." *Monroe v. FTS USA*, *LLC*, 860 F.3d 389, 401 (6th Cir. 2017) (emphasis added) (citing *Bouaphakeo*, 577 U.S. at 1049 (citing *Daubert v. Merrell Dow*, *Pharm.*, *Inc.*, 509 U.S, 579 (1993))). East Penn is not challenging the admissibility of the employee testimony, but rather its sufficiency as representative evidence once admitted into the record.

[11] Counsel's alleged intemperate or arguably bombastic invocation of this "2.7% threshold" can be seen as irrelevant to the resolution of this Motion because counsel mentioned the Secretary's "obligation" after the jury had been excused. *See* Apr. 5, 2023 Trial Tr. at 112:5-9, 116:22-23, 138:13-16.

shower. *See* Doc. No. 638-1, at 12-19. As impressive as this chart looks at first glance, it can be more harmful to East Penn's argument than helpful: it shows alleged variances in donning, doffing, and showering times "roughly consistent" with the degree of variation permitted in *Bouaphakeo* and *Mt. Clemens*. *See Bouaphakeo*, 577 U.S. at 456 (citing *Mt. Clemens*, 328 U.S., at 685) ("The variance in walking time among workers [in *Mt. Clemens*] was alleged to be upwards of 10 minutes a day, which is roughly consistent with the variances in donning and doffing times here."); *see also Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1064 (6th Cir. 2019) (holding that, although employee witnesses offered inconsistent accounts of the exacts days and hours of overtime, the Secretary established "as a matter of just and reasonable inference" the amount of uncompensated overtime.).[12] The variances are not

[12] East Penn asserts that "because each employee's routine is different day-to-day and different from one another, the small fraction of testimonial evidence presented in this trial cannot be extrapolated to 24 different plants and 11,780 different employees." Doc. No. 638-1, at 9-10. This is so because, according to East Penn, "some employees chose to arrive an hour or more earlier" or "spen[d] this extra time on personal activities such as sitting in the cafeteria," or that "some days employees chose to change into their uniform and clock in later, whereas other days they chose to clock in first and change afterwards." *Id.* at 9. But a close read of *Bouphakeo* and *Mt. Clemens* reveals that the question is whether the work *at issue* varies significantly from employee to employee. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 456 (2016) (citing *Mt. Clemens*, 328 U.S., at 685) ("The variance in *walking time* among workers [in *Mt. Clemens*] was alleged to be upwards of 10 minutes a day, which is roughly consistent with *the variances in donning and doffing times here.*") (emphasis added). Here, the Secretary sought damages for unpaid donning, doffing, and showering activities not time spent reading the newspaper

significant enough to disqualify the employee testimony from being considered as representative evidence; the jury was free to rely, to whatever extent it did, on this testimony in reaching its verdict.[13]

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or sitting in the parking lot before shift. The employees who testified at trial reported that they spent around 2-10 minutes changing into their uniforms (except for one employee, who claimed he needed 20-25 minutes) and 2-15 minutes doffing and showering. Doc. No. 638-1, at 12-19. In other words, as demonstrated by East Penn's own chart, the apparent variance in time spent donning, doffing, and showering in this case is "roughly consistent" with the variances allowed in *Mt. Clemens* and *Bouaphakeo*. A restricted range, much less precise identity, either person-to-person or in a single person's day-to-day behavior, is not required or reasonable to expect. Clearly, the jury did not demand any such thing.

[13] East Penn's arguments on this point are inconsistent. On the one hand, East Penn asserts that the verdict cannot stand because the employees testified that they exercised personal choice as to their routines and sometimes donned, doffed, and showered on paid time. But with the same breath, East Penn acknowledges that the lesser verdict award (as compared to what the Government sought) would seem to reflect that the jury agreed with East Penn that some of the activities at issue were in fact completed on paid time. *See* Doc. No. 645 at 24. In this regard, it seems that East Penn really takes issue with the Secretary's *characterization* or *interpretation* of the verdict, not the verdict itself. *See* Doc. No. 645 at 24-25 ("[T]he jury appeared to largely agree with East Penn's position, awarding only approximately 5 ½ minutes per day of unpaid time. The Secretary seems to take the verdict as a sign that the jury imposed damages for the grace period. However, any such interpretation of the verdict is inconsistent with all of the employee testimony that they *used* the grace period."). Or, rather, East Penn is unhappy with the idea of a verdict that seems to have bought into the Secretary's damages model, but such an argument is very much cherry-picking by East Penn. On the face of East Penn's own arguments in favor of judgment as a matter of law, it would appear that the verdict is not wholly

East Penn next attacks the jury's verdict to the extent it was based on Dr. Radwin's time-study because, according to East Penn, that study is not an additional source of representative evidence because Dr. Radwin studied "only eight plants." Many of East Penn's challenges to Dr. Radwin and his study boil down to understandable arguments about credibility and weight, but because the Court already determined that Dr. Radwin's study is admissible,[14] "its persuasiveness is, in general, a matter for the jury." *Bouaphakeo*, 577 U.S. at 459. That East Penn is again challenging the persuasiveness of Dr. Radwin's testimony is underscored by East Penn's references to the testimony of its own expert witness, Dr. Fernandez, who also examined the subjects stud-

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unmoored from the evidenced adduced at trial, but is instead the product of just and reasonable inference.

[14] The Court denied East Penn's *"Daubert"* motion, Doc. No. 171, which sought to exclude Dr. Radwin's expert opinion testimony. *See* Doc. No. 239. In that motion, East Penn challenged the admissibility of Dr. Radwin's testimony and report for many of the same reasons it takes issue with the "sufficiency" of that study at this juncture. Specifically, both in this Motion and in East Penn's *Daubert* motion, East Penn faults Dr. Radwin for calculating one average, to then be extrapolated to other plants, based on data purportedly collected from a subset of the plants. *Compare* Doc. No. 638-1, at 20 *with* Doc. No. 171-1, at 29-33. But, as this Court noted in denying the *Daubert* motion, this criticism goes toward the *weight* of Dr. Radwin's testimony. Of course, "[r]easonable minds may differ as to whether the average time [Dr. Radwin] calculated is probative of the time actually worked by each employee. Resolving that question, however, is the *near-exclusive* province of the jury." *See Bouaphakeo*, 577 U.S. at 459 (emphasis added). In that regard, it appears that the jury may have accepted some aspect of the Radwin material. The Court offers no commentary on whether the newly amended Federal Rule of Evidence 702 might raise the bar for a future matter of a similar nature.

ied by Dr. Radwin. *See* Doc. No. 638-1, at 21. According to East Penn, Dr. Fernandez's "unrebutted testimony" "established that Dr. Radwin's eight-plant average cannot be applied to any particular plant." *Id.* The jury was presented with the testimony of both experts and apparently made some determination about the credibility and/or persuasiveness of those experts—whether agreeing or not with any given assessment of the experts, the Court may not now "weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." *Ambrose v. Township of Robinson, Pa.*, 303 F.3d 488, 492 (3d Cir. 2002).

East Penn also argues that, because the damages model submitted to the jury "relied entirely on Dr. Radwin's study," the jury "had no substantial basis in evidence to make its damages award." Doc. No. 638-1, at 21-22. [15] This argument is unsuccessful for several reasons. First, East Penn misstates the test by a rather significant measure: to survive a Rule 50(b) motion, the damages award need not have a "*substantial basis* in evidence." The question is whether the record is "critically deficient of that *minimum quantum of evidence* from which a jury might *reasonably* afford relief." *Patzig v. O'Neil*, 577 F.2d 84, 846 (3d Cir. 1978) (quoting *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969)) (emphasis added). And the record here is not so critically deficient: the Secretary presented several different "buckets" of representa-

[15] Although a bit beside the point, the Court notes that in attacking the verdict in this manner, East Penn is attempting to have its cake and eat it too because East Penn did not submit its own damages model. The Court will not grant a Rule 50(b) motion based on an alleged issue with the verdict traceable to the movant's own trial strategy.

tive evidence, including (but not limited to) Dr. Radwin's testimony, from which the jury could reasonably approximate the amount of unpaid work occurring across all 24 plants and then calculate damages commensurate with that approximation. *Cf. Mt. Clemens Potter*, 328 U.S. at 687-88.

Second, East Penn's description of Dr. Radwin's study may be somewhat unfairly reductive because although he only studied eight plants, the sample of employees studied in those plants covered 80% of *all* uniformed workers on the Lyon Station campus. March 27, 2023 Trial Tr. at 190:7-23. And Dr. Radwin testified that his study was designed to be representative of the entire uniformed employee population. *Id.* at 187:20-190:23. Considering that Dr. Radwin's study relied on a sample encompassing most of the uniformed employees, it is not inherently unreasonable or unjust for the jury to credit Dr. Radwin's study as sufficiently representative and reference it (to whatever extent it did) in calculating damages. *Cf. Tyson Foods*, *Inc.*, 577 U.S. at 456-57 (juries may reasonably infer hours worked from a study similar to Dr. Radwin's so long as the court determined it is admissible and did not conclude that "no reasonable juror could have believed that the employees spent roughly equal time donning and doffing.").

Finally, East Penn's arguments that a verdict based on Dr. Radwin's study would be improper are belied by the actual verdict awarded. The jury awarded only a modest portion of the damages sought by the Secretary based on Dr. Radwin's calculations, so the jury did not simply rubber-stamp the Sec-

retary's damages model[16] or take at face-value Dr. Radwin's conclusions. In other words, the Court cannot overturn the jury's verdict awarding $22.2 million in damages "to the extent it was based on Dr. Radwin's study" because it is not clear that the jury relied substantially, if at all, on Dr. Radwin's calculations in awarding that amount. The Court has neither a time-machine nor a scrivener's mirror, and thus cannot determine with any certainty how, if at all, Dr. Radwin influenced the jury's award. Nor would it be of any help to East Penn if the Court could indeed divine the jury's thought process, as long as it does not present itself as patently unreasonable or irrational. For the reasons described above, Dr. Radwin's testimony and study constitute admissible representative evidence and it would not be unreasonable or unjust for the jury to infer from Dr. Radwin's study (and the rest of the record) $22.2 million in unpaid work across all 24 plants for the time period at issue in the trial.

In sum, none of the "issues" identified by East Penn with each "bucket" of evidence are enough to counteract the resonance among the witnesses and the evidence that hourly, uniformed employees at all 24 plants were subject to the same pay practices. This resonance is further reinforced by the fact that the testifying and non-testifying employees were all subject to the same pay and uniform policies that

[16] Paradoxically, East Penn takes issue with the jury's decision to award less than the Secretary's back wage computation. But, as the Secretary points out, there is no case law to support East Penn's argument that a jury is not allowed to award less than the Secretary's proffered back wage computation. *Cf. Bouaphakeo*, 577 U.S. at 451-52 (leaving undisturbed verdict of less than half of the damages requested, despite employer challenge).

provided insufficient time to complete clothes-changing and showering activities on East Penn's campus. The core of East Penn's argument for overturning the verdict is really that the Secretary did not prove with precision the *exact* amount of unpaid work that occurred. The Court must remind East Penn of its own failure to have the records that would have allowed for greater precision or exactitude. East Penn can hardly expect to succeed with an audacious argument that it should benefit from its own poor recordkeeping. An approximate award is not only appropriate in the absence of accurate records, *see Mt. Clemens Potter*, 328 U.S. at 687-88, but necessary to ensure that employees are not further harmed by their employer's inadequate recordkeeping practices by making proving damages an "impossible hurdle." *See id.* This is why the burden was on East Penn, not the Secretary, to present "evidence of the precise amount of work performed or [counter] with evidence to negative the reasonableness of the inference to be drawn from the employees evidence." *See Mt. Clemens Potter*, 328 U.S. at 687-88. The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the [Act]." *Id.* at 688.

For the reasons discussed above, East Penn's unsuccessful, piecemeal attack of each "bucket" of evidence does not negate the reasonableness of the jury's verdict.

B. The Evidence Supports the Jury's Determination that the Unpaid Overtime Was Not *De Minimis*

East Penn also seeks to overturn the jury's verdict on the ground that there is substantial evidence that

any unpaid work that occurred was *de minimis* as a matter of law. If *de minimis*, then the employer can avoid liability.

The three factors for determining if otherwise compensable time is *de minimis* are: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *De Asencio v. Tyson Foods*, *Inc.*, 500 F.3d 361, 374 (3d Cir. 2007) (quoting *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984)). The *de minimis* doctrine applies "only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." *De Ascencio*, 500 F.3d at 374 (quoting 29 C.F.R. § 785.47). The Court ruled at the summary judgment phase of this case that the donning, doffing, and showering activities are indeed regular. *East Penn Mfg. Co.*, 55 F.Supp.3d at 119. East Penn asserts that, despite the Court's ruling on regularity, the time spent on these activities is *de minimis* as a matter of law because "the aggregate amount of unpaid compensable time is within 10 minutes" and "the only evidence adduced supports East Penn's position that accurately capturing the time at issue is not administratively practicable." Doc. No. 638-1, at 29.

As an initial matter, there is, of course, no bright line or even arbitrary rule that ten minutes a day is *de minimis.*[17] *See e.g.*, *Peterson v. Nelnet Diversified*

[17] The Court of Appeals for the Third Circuit has stated that courts should follow the letter of this prong and should actually consider the *aggregate* amount of unpaid time. *See De Asencio*, 500 F.3d at 375. Such an approach can be particularly appro-

Sols., *LLC*, 15 F.4th 1033, 1036, 1047 (10th Cir. 2021) (stating that two minutes, worth $0.48, per shift is not *de minimis* in the aggregate). Rather, the *de minimis* defense[18] involves balancing the three factors, only one of which deals with the aggregate amount of unpaid time. *Compare Peterson*, 15 F.4th at 1049 (two minutes per day was not *de minimis* because the regularity of the work and the employer's ability to track the time outweighed the relatively short time) *with Lindow*, 738 F.2d at 1064 (finding that although the aggregate amount of unpaid time was high, the practical administrative difficulty

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priate where, as here, the district court cannot determine with any certainty exactly how much unpaid time the jury found for each individual employee—East Penn appears quite certain that, based on the verdict, the jury determined an amount of 5 and a half minutes per employee, but as far as the Court can divine, that is only a reverse-engineered guess.

[18] East Penn takes issue with this characterization of the *de minimis* rule, arguing that it is not a defense to liability, but is instead an element of the Secretary's case and, therefore, her burden to prove that the unpaid time is not *de minimis.* The Court has already rejected this "on its head" argument. *See East Penn Mfg. Co.*, 2021 WL 4215503, at *2 (E.D. Pa. Sept. 16, 2021) (first citing *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011), then citing *Perez v. Mountaire Farms*, *Inc.*, 650 F.3d 350, 372 (4th Cir. 2011). Because neither the Court of Appeals for the Third Circuit nor the Supreme Court has decided whether the *de minimis* doctrine is a defense at all, the Court properly considered persuasive authority from the Seventh and Fourth Circuits on this issue. The Court of Appeals for the Tenth Circuit has since joined these courts in placing the burden on the employer, further bolstering the Court's acceptance that the doctrine is a defense and, as a defense, lines up as a defendant's burden. *Nelnet Diversified Solutions*, *LLC*, 15 F.4th at 1042-43 ("It is the employer's burden to show that the de minimis doctrine applies.") (citing *Kellar*, 664 F.3d at 176).

rendered that work *de minimis*); *see also Sec'y Dept. of Labor v. Mosluoglu*, *Inc.*, No. 22-2749, at 8 n.6 (3d. Cir. 2023) ("Depriving wage earners of thousands of dollars over a three-year period is not de minimis, and [the employer] does not support its contentions with any persuasive legal arguments."). Thus, seen through one lens, the Court's determination that the donning, doffing, and showering activities were regular (and, thus, mounting without interruption) could in of itself support the jury's finding that the unpaid work was not *de minimis* as a matter of law. *See Peterson*, 15 F.4th at 1048-49; Final Jury Instructions pp. 24-25, May 4, 2023 Trial Tr. at 28:14-22.

East Penn incorrectly asserts that, with respect to the administrative practicality factor, "the only evidence adduced supports East Penn's position that accurately capturing the time at issue was not administratively practicable." Doc. No. 638-1, at 29. On the contrary, the evidence presented at trial tracks closely with the evidence in *Mountaire Farms*, in which the Fourth Circuit Court of Appeals rejected the employer's claim of great administrative difficulty because "the time expended in [preshift and postshift donning and doffing] is not so miniscule that it would be difficult to measure" and the employer "already ha[d] a timekeeping system" that could be modified to track that time. 650 F.3d at 374-75; *see also* Doc. No. 638-1, at 29 (not disputing that East Penn uses time clocks that can record time down to the minute). Here, on this issue, it appears really to be a question of perspective: is not "administrative difficulty" really primarily a question of assessing the value and importance of an activity? For one side, it is easy to be dismissive because it would be too much trouble to do something. For the other side, the reward might well relieve some trouble in the recipient's life. No

court has yet definitively drawn a line at "too much trouble." While the Court does not suggest that the test is or should be "Is it possible at all?" nor does the Court see the factor as being so easily met as allowing an employer to engage in hyperbole when the matter is really one of undesirable inconvenience.

In any event, the jury here could have rejected East Penn's arguments—just like the Fourth Circuit Court of Appeals did in *Mountaire Farms*—that to track this time, the employer would be "compelled to 'micromanage' the amount of time employees spend donning and doffing to ensure that the employees are not wasting time during these activities." 650 F.3d at 374-75; *see also* Doc. No. 638-1 ("At the same time, the Secretary had no answer to the testimony of [East Penn's] witnesses . . . who explained the difficulties in enforcing a policy requiring employees to be in the locker room dressing and showering only at set, strictly enforced times, including difficulty in monitoring whole shifts of employees in the locker rooms."). Just like the employer in *Mountaire Farms*, East Penn was "free to set policies restricting the employees' nonessential conduct during the donning and doffing process." 650 F.3d at 375. The Court will not disturb the jury's finding that the amount of unpaid back wages was not *de minimis*.

II. New Trial Under Fed. R. Civ. P. 59(a)

"The court may, on motion, grant a new trial on all or some of the issues—and to any party after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). A new trial can be granted "purely on a question of law," "on a matter that initially rested within the discretion of the court, *e.g.*, evidentiary rulings or prejudicial statements

made by counsel," or because "the jury's decision is against the weight of the evidence." *Klein v. Hollings*, 992 F.2d 1285, 1289-90 (3d Cir. 1993) (internal citations omitted). "The authority to grant a new trial resides in the exercise of sound discretion by the trial court . . . ." *Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1017 (3d Cir. 1995). And that discretion is broad if the stated reason for a new trial is "a matter that initially rested within the discretion of the court." *Klein*, 992 F.2d at 1289-90.

East Penn argues that it is entitled to a new trial because: "(1) several of the Court's jury instructions constituted legal error that could have confused or misled the jury; (2) the Court erred by failing to bifurcate the trial by plants and including a lump sum damages question on the verdict form; and (3) statements made by Secretary's counsel throughout the trial were unduly prejudicial and constituted impermissible vouching for the Department of Labor's own employees who testified." Doc. No. 638-1, at 10. East Penn also asserts that it is entitled to a new trial because, for the reasons described in support of its Rule 50(b) Motion, the "great weight of the evidence is contrary to the jury's determination" regarding the issue of unpaid overtime for hourly, uniformed employees. [19] *Id.* at 31.

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[19] Following the lead of the parties, the Court will not focus a great deal of attention on this argument. Although a new trial may be granted even where the evidence is legally sufficient to support the verdict, *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735-36 (3d Cir. 1988), the Court of Appeals for the Third Circuit has cautioned that courts should grant a new trial on the basis that the verdict is contrary to the weight of the evidence "only where a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). "This stringent standard is necessary to

The Secretary counters by arguing that East Penn is not entitled to a new trial based on alleged errors in the jury instructions because (1) East Penn did not properly preserve its objections to these instructions[20] and (2) the instructions accurately and fairly set forth the current status of the law and properly apprised the jury of the issues.

A. The Jury Instructions Were Fair and Adequate

East Penn challenges three instructions. First, East Penn asserts that the Court erred by instructing the jury that "[t]he amount of damages is the difference between the amount you conclude that East Penn employees should have been paid and the amount they were paid, if that is less than the amount you conclude should have been paid." Doc.

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ensure that a district court does not substitute its judgment of the facts and the credibility of the witnesses for that of the jury.'" *Fineman v. Armstrong World Indus.*, *Inc.*, 980 F.2d 171, 211 (3d Cir. 1992) (quoting *Lind v. Schenley Indus. Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc). As discussed at length above, the Secretary was only required to prove the overtime violations as a matter of "just and reasonable inference." And the Secretary produced sufficient evidence to show by a preponderance of the evidence that hourly, uniformed employees at all 24 plants were subject to the same pay practices. East Penn has not pointed to any specific material evidence that it believes the jury ignored, and instead appears to stand on its argument that the Secretary simply did not make her case, at least to East Penn's satisfaction. The Court, however, is satisfied that the verdict was not "contrary to the weight of the evidence." *Williamson*, 926 F.2d at 1352.

[20] East Penn did properly preserve its objections by "stating distinctly the matter objected to and the grounds of objection" before the jury begins deliberations. *See* Fed. R. Civ. P. 51(e)(1); *see also* May 4, 2023 Trial Tr. at 48:25-49:10, 49:20-50:7.

No. 638-1, at 32. According to East Penn, this instruction is erroneous because it "failed to articulate the reasonable time standard for damages that the Court embraced at summary judgment. In particular, the instruction did not mention excluding time spent on personal activities." *Id.* At summary judgment, the Court did connect "reasonableness" with the calculation of damages: "To the extent that the concept of 'reasonableness' permeates this case, it is limited to the calculation of damages once liability is established." *East Penn Mfg. Co.*, 555 F. Supp. 3d at 11. But this sentence is by no means a "ruling" that the appropriate measure of damages is the reasonable *time* spent on the compensable activities at issue.[21] That East Penn hangs its hat on this *flexible* reading of dicta in the Court's summary judgment opinion is telling: East Penn cannot point to any cases that would require the Court to instruct the jury using East Penn's "reasonable time" standard for calculating damages. Moreover, the Court is not convinced that the jury required explicit instruction that East Penn did not have to pay for time spent on personal activities. For one thing, when read as a whole, the jury instructions draw a clear line between what might constitute compensable "work" and what would not. And the verdict itself reflects that the jury understood that only certain activities—even if performed on East Penn's premises—are compensable. *See* Verdict Form, Doc. No. 589 (finding that time spent donning and doffing PPE is not compensable).

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[21] Rather, the Court was alluding to the fact that, to support her claim for damages, the Secretary has the burden of producing evidence sufficient to show the amount and extent of uncompensated work "as a matter of just and *reasonable* inference." *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88 (emphasis added).

In sum, the instruction regarding the calculation of damages accurately and fairly sets forth the current status of the law and presents the issues of the case without confusing or misleading the jury.

East Penn next argues that the Court erred by instructing the jury that the *de minimis* doctrine is an affirmative defense for which East Penn had the burden of proof. According to East Penn, this is an error because "courts within the Third Circuit have explained that the *de minimis* concept is part of the plaintiff's burden of proof with respect to liability." Doc. No. 638-1, at 33. But, as discussed above, the Court is not bound by the decisions of other trial courts in the Third Circuit, and, in the absence of binding caselaw holding otherwise, the Court may turn to persuasive authority in other courts of appeals and properly determine that the *de minimis* doctrine is an affirmative defense. Thus, the challenged instruction is consistent with the law of the case, *see East Penn Mfg. Co.*, 2021 WL 4215503, at *2, and with recent decisions by the courts of appeals in the Seventh, Fourth, and Tenth Circuits. *See Kellar*, 664 F.3d at 176; *Mountaire Farms*, 650 F.3d at 372; *Nelnet Diversified Solutions*, 15 F.4th at 1042-43 ("It is the employer's burden to show that the de minis doctrine applies."). Consequently, the jury instruction used in this trial regarding the *de minimis* defense was not erroneous and certainly not a violation of any controlling authority.

Finally, East Penn takes issue with "the inclusion of 'documentary evidence' as a type of representative evidence" in the jury instruction regarding the Secretary's burden of proof. Doc. No. 638-1, at 35. East Penn asserts that by including "documentary evidence" within the definition of representative evi-

dence, the instruction "incorrectly implies that the Secretary could rely on these types of documents to shift her burden of proof under *Mt. Clemens*." *Id.* at 35-36. But in this situation, "documentary" vs. "representative" is a distinction without a difference: there is nothing in *Mt. Clemens*, or subsequent cases dealing with *Mt. Clemens* burden-shifting, to prevent the jury from considering any and all evidence properly admitted at trial, regardless of whether lawyers would label that evidence "representative" or "documentary." *Cf. Bouaphakeo*, 577 U.S. at 454-55 ("A representative or statistical sample, *like all evidence*, is a means to establish or defend against liability.") (emphasis added). In other words, to the extent the Court "erred" by including "documentary evidence" within the definition of representative evidence, that error was harmless. It was, after all, the advocates' jobs to present evidence to the jury or to explain such evidence as there was—that would assist the jury on each issue in dispute, including damages. Whether this jury had crystal clear or only opaque evidence to use in the final analysis is a matter that the jury answered by rendering a verdict that is certainly the product of a calculation by it.

B. The Court Properly Declined to Bifurcate the Trial

East Penn is also not entitled to a new trial due to the Court's decision not the bifurcate the trial into over 20 "mini-trials." The Court has broad case management discretion in deciding whether to bifurcate, and an abuse of that discretion may only be found where the "decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *In re Bayside*

Prison Litig., 157 F. Appx. 545, 547 (3d Cir. 2005) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527 (3d Cir. 2004)). East Penn argues that the Court should have bifurcated the trial by holding "mini-trials" for each individual plant because "the jury's verdict did not distinguish among plants in reaching" the damages figure.[22] *See* Doc. No. 638-1, at 36. The lump-sum award is a problem, according to East Penn, because Article III of the U.S. Constitution does not give federal courts power to award relief to uninjured persons, and some employees at some plants might not actually have engaged in unpaid work. *See* Doc. No 645 at 45 (citing *Bouaphakeo*, 577 U.S. at 463-64 (Roberts, C.J. concurring)). But this argument is premature, and is instead properly raised in "a challenge to the proposed method of allocation," not in a Rule 59(a) Motion. *Bouaphakeo*, 577 U.S. at 461 ("[T]he question whether uninjured class members may recover is one of great importance . . . It is not, however, a question yet fairly presented by this case, because the damages award has not yet been disbursed, nor does the record indicate how it will be disbursed.").

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[22] East Penn also argues that the Court erred in including Question 4A on the verdict form, which asks the jury for a unitary damages number for all plants if the jury determined there was unpaid compensable time at all 24 plants. *See* Doc. No. 638-1, at 37. But the verdict form explicitly presented the jury with the opportunity to find that the Secretary had failed to establish unpaid, compensable work as to some facilities but succeeded in others. *See* Doc. No. 589, at 1-5. And, had the jury found that unpaid compensable time occurred only at a subset of plants, it was instructed to designate what sum of money would fairly compensate the uniformed employees at each individual facility in the chart on Question 4B. *Id.* at 4-5. Thus, the verdict sheet did allow the jury to tailor the damages awarded to each plant if the jury deemed that to be appropriate.

Moreover, holding "mini-trials" for each plant here would not have been the least bit sensible, convenient, or expeditious. *See* Fed. R. Civ. P. 42(b) (instructing that a court may order a separate trial for, in part, convenience). Many, if not most, of the witnesses and experts would have been called to give duplicative testimony—perhaps over 20 times—and the Court would have expended judicial resources calling up to 24 different jury pools and proceeding through *voir dire* on each panel (or would have impressed into service the same jury to serve in two dozen different trials). The impracticality of either scenario is overwhelming. The Court properly exercised its discretion in declining to bifurcate the trial.[23]

C. Statements Made by the Secretary's Counsel Do Not Necessitate a New Trial

Conduct by counsel only justifies a new trial where "he or she engaged in 'argument injecting prejudicial extraneous evidence' . . . such that the 'improper statements . . . so pervade[d] the trial as to render the verdict a product of prejudice.'" *Leonard v. Stemtech Int'l*, *Inc.*, 834 F.3d 376, 399 (3d Cir. 2016) (first quoting *Fineman v. Armstrong World Indus.*, *Inc.*, 980 F.2d 171, 210 (3d Cir. 1992), then quoting *Draper v. Airco*, *Inc.*, 580 F.2d 91, 96 (3d Cir. 1978)). "[A]n isolated improper remark will not support the grant of a new trial." *Fineman*, 980 F.2d at 208. Rather, the "test is whether the improper assertions

[23] The Court also notes in passing that in spite of repeated invitations to counsel to propose alternative structures for trying this case, the lawyers did not ever demonstrate any interest or ability to work with each other or the Court to address economies or efficiencies in that regard.

have made it 'reasonably probable' that the verdict was influenced by prejudicial statements." *Id.* at 207.

East Penn asserts that it was unfairly prejudiced "by repeated comments by the Secretary's counsel that explicitly or implicitly suggested that East Penn acted in conformance with bad character." *See* Doc. No. 638-1, at 38. But as the Secretary points out, almost all of these statements allegedly implying "bad character" were related to the outstanding question of whether East Penn violated the FLSA willfully. *See e.g.*, March 14, 2023 AM Trial Tr. At 20:14-23; 25:4-7. Thus, these statements did not inject prejudicial extraneous evidence because they alluded to evidence probative of an issue still in dispute.[24] And, to the extent Secretary's counsel made "improper comments" not relevant to the question of willfulness, those remarks in the presence of the jury (without "counting" the countless comments during the long life of the case) were isolated and infrequent and not sufficient to support the grant of a new trial.[25]

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[24] The comments, while perhaps reflecting more on the speaker than on the opposing litigant, were not prejudicial—the jury found no willfulness.

[25] The Court will also note that one of the comments complained of—an "accusation" that East Penn was "spreading lead dust" into workers' homes and the community—is an example of East Penn perhaps engaging in over-sensitive reading of opposing counsel's remarks. *See* March 14, 2023 AM Trial Tr. At 23:10-15 ("And just like East Penn, to protect itself from legal liability of spreading lead dust back into the workers' home and in the community, that employer also furnished locker room facilities and showers and required the men to take a shower and put on their uniform."). Additionally, counsel's reference to the "recordkeeping part of [the] case" was not prejudicial to East Penn because the comment did not indicate

III. Remittitur of the Damages Award

Finally, East Penn argues the Court should enter an order of remittitur reducing the verdict to $16,960,487.97 because the damages award purportedly fails to reduce the back wages calculation consistent with the jury's finding of no willfulness and no liability as to non-uniformed employees. *See* Doc. No. 638-1 at 44-47. East Penn supports this argument by pointing out that the only damages number presented to the jury—$106,414,764.85—was calculated assuming the jury would find willfulness and therefore include an extra year in the limitations period. *See id.* at 44-45.

"The rationalization for, and use of, the remittitur is well established as a device employed when the trial judge finds that a decision of the jury is clearly unsupported and/or excessive." *Spence v. Bd. of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986). "Remittitur may be proper where the district

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to the jury how the recordkeeping issue was resolved. Finally, the Court also rejects as a reason for a new trial East Penn's argument that it is entitled to a new trial because, at closing, the Secretary's counsel "improperly vouched" for the witnesses who work or worked for the Department of Labor. *See* May 3, 2023 Trial Tr. at 133:18-24. Again, isolated comments like these do not warrant a new trial, especially considering that these comments are swamped by the *two months' worth of evidence* presented during the trial. In any event, the Court repeatedly gave appropriate and rather pointed instructions that counsel's opening and closing arguments and objections were not to be treated as evidence by the jury. *Vandenbraak v. Alfieri*, 209 F. App'x 185, 190 (3d Cir. 2006) ("[J]ury instructions can sufficiently negate any prejudice that might result from counsel's errant arguments to the jury.") (internal citations omitted). The Court is confident that by the end of the trial, the jurors were well-schooled in these advocates' techniques.

court concludes that the evidence was too speculative to support the damages awarded by the jury." *Paramount Fin. Commc'ns*, *Inc. v. Broadridge Inv. Commc'ns Sols.*, *Inc.*, No. 15-cv-405, 2023 WL 4755109, at *20 (E.D. Pa. July 26, 2023), But the Court may reduce the jury award "only if the verdict is so grossly excessive as to shock the judicial conscience." *Williams v. Martin Marietta Alumina*, *Inc.*, 817 F.2d 1030, 1038 (3d Cir. 1987) (internal citations omitted).

Here, the jury awarded $22,253,087.56, which is essentially 20% of the total amount of back wages sought by the Secretary. The award, therefore, is not "grossly excessive" in the most obvious sense. And despite East Penn's best efforts, *see* Doc. No. 638-1, at 45, neither party can truly determine formulaically how the jury actually reached its verdict—it is not particularly apparent mathematically from the record or the verdict itself that the jury award is clearly unsupported and/or excessive, and the Court will not reduce it simply because East Penn has submitted a series of its own, after-the-fact equations purporting to show that the jury *could* have awarded a lesser amount of back wages.[26]

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[26] As East Penn concedes, its own calculations do not clarify how the jury reached its number because there is a $250,034.67 difference between the award calculated using East Penn's interpretation of the jury's math and the actual amount awarded. *See* Doc. No. 638-1, at 45 n. 3. East Penn has not identified specific evidentiary deficiencies warranting remittitur, but is instead seeking to reduce the damages award based on its own, speculative calculations. The Court will also note that this is a matter of East Penn's own making. Initially, the parties proposed that the jury should decided the number of minutes, rather than the dollar amount of back wages owed, but at the Final Pre-Trial Conference, East Penn insisted that a monetary award was the

CONCLUSION

For the reasons set out in this Memorandum, the Court denies East Penn's Motion for Judgement as a Matter of Law Under Rule 50(b) or, in the Alternative, for a New Trial Under Rule 59(a) or Remittitur Under Rule 59(e) (Doc. No. 638). An appropriate order follows.

BY THE COURT:

/s/Gene E.K. Pratter
GENE E.K. PRATTER

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only way to vindicate its Seventh Amendment rights. *See* Feb. 14, 2023 Tr. at 74:22-75:18. East Penn will not now "profit from the difficulty it caused." *Bouaphakeo*, 577 U.S. at 461-62.

APPENDIX F

§ 203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States-

(i) as a civilian in the military departments (as defined in section 102 of title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the[1] Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by

[1] So in original. Probably should be preceded by "in".

the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if-

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to per-form for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g)[2] of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods,

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[2] See References in Text note below.

or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not

interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m)(1) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

(2)(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to-

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage

specified in clause (i) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary

school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s)(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that-

(A)(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary

school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political

subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

APPENDIX G

§ 251. Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and

employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated

damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts[1] and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.[1]

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

(May 14, 1947, ch. 52, §1, 61 Stat. 84.)

[1] See References in Text note below.

APPENDIX H

§ 252. Relief from certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Ba-con-Davis Act

(a) Liability of employer

No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.] the Walsh-Healey Act, or the Bacon-Davis Act[1] (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) Compensable activity

For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was

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[1] See References in Text note below.

engaged in during the portion of the day with respect to which it was so made compensable.

(c) Time of employment

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act,[1] in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) Jurisdiction

No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], under the Walsh-Healey Act, or under the Bacon-Davis Act,[1] to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) Assignment of actions

No cause of action based on unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as

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[1] See References in Text note below.

amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act,[1] which accrued prior to May 14, 1947, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

(May 14, 1947, ch. 52, §2, 61 Stat. 85.)

[1] See References in Text note below.

APPENDIX I

§ 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis. Act,[1] on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947-

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

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for

[1] See References in Text note below.

travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], of the

Walsh-Healey Act, or of the Bacon-Davis Act,[2] in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

[2] See References in Text note below.

APPENDIX J

Title 29. Labor

29 U.S.C. § 208 note (1952 ed.)

* * *

ORDERS, REGULATIONS,
INTERPRETATIONS OR AGREEMENTS
PRIOR TO 1949 AMENDMENTS

Section 16 (c) of act Oct. 28, 1949, provided that: "Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended [this chapter], on the effective date of this Act [ninety days from October 26, 1949], shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act [chapter 9 of this title], except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act [said section], or may from time to time be amended [this chapter [, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act [said sections]."

* * *

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Case No. 5:18-cv-01194-GEKP

EUGENE SCALIA, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,

Plaintiff,

v.

EAST PENN MANUFACTURING CO.,

Defendant.

Oral Argument Requested

EAST PENN'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

* * *

IV. East Penn Does Not Dispute In The District Court That The Activities At Issue Are Integral and Indispensable

Throughout the life of this case, East Penn has been clear that it does not dispute that under *Steiner v. Mitchell*, 350 U.S. 247 (1956), so long as it remains good law, the clothes-changing and showering activities at issue are compensable because they are "integral and indispensable" to the employee's work. However, East Penn also reserves the right to appeal on grounds that *Steiner* was wrongly decided as a matter of statutory construction because it represents a judicial re-write of the Portal Act to re-establish the

compensability of certain pre- and post-shift activities that the Portal Act had excluded from the purview of the FLSA.

* * *

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil No. 5:18-cv-01194-GEKP

JULIE A. SU, ACTING SECRETARY OF LABOR[1],
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

EAST PENN MANUFACTURING CO.,

Defendant.

PLAINTIFF'S TRIAL BRIEF IN SUPPORT OF
MURRAY SUMMARIES AND DEMONSTRATIVES

I. INTRODUCTION

East Penn faces no surprise or prejudice from the Secretary offering (or otherwise using) the summary and demonstrative exhibits created by the Secretary's summary witness, Mr. Michael Murray. The summary and demonstrative exhibits were prepared by Mr. Michael Murray, and – perhaps most significantly – all reflect nothing other than summary of **East Penn's own data** and the application of math to that data. Further, East Penn has had the summary and demonstrative exhibits for two months. There is no legitimate dispute about their accuracy or

[1] Ms. Su is hereby substituted as Plaintiff in this matter. Fed. R. Civ. P. 25(d).

the foundation. His summaries and demonstratives are directly relevant to what the jury will decide: (1) the amount of unpaid minutes per plant; (2) the amount of back wages the Secretary alleges East Penn owes; and (3) whether East Penn willfully violated the law. The Secretary requests that the Court permit her to proceed on her examination of Mr. Murray and show these documents to the jury during the course of that examination and admit those documents that are Rule 1006 summaries in evidence.

II. FACTUAL BACKGROUND

A. Issues before the Jury

The Court has already decided that East Penn failed to keep records of the work its employees performed. Dkt. 273 pp. 22-25. It has decided that for uniformed workers, the question before the jury is the amount of unpaid wages. Dkt. 273, p. 22. For workers that wear personal protective equipment—but not uniforms—if the jury determines that East Penn is liable, it must also determine the amount of unpaid wages.[2]

During the February 14, 2023, Pretrial Conference, the Court indicated that it would ask the jury to decide the amount of back wages on a plant-by-plant

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[2] At summary judgment the Court held that: "the Court's decision on this point does not preclude, nor should it be taken as precluding or otherwise limiting, the Secretary from submitting the actual clock records at trial to try to establish his claim for damages." *Id.* at p. 32. Further, despite motions from East Penn, the Court has declined to bifurcate this action. Thus, the Secretary is entitled to present evidence of the amount of back wages she alleges are due. *See*, *generally Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Chao v. Self Pride, Inc.*, Civ. No 03-3409, 2006 WL 469954, *3 (D. Md. Jan. 17, 2006); *Reich v. Cole Enterprises, Inc.*, 901 F. Supp. 255 (S.D. Ohio 1993).

basis. 2/14/23 Pretrial Conference 80:9-16. The Court also indicated that the jury would also have to decide the number of minutes owed on a plant-by-plant basis. *Id.* at 74:17-75:21. Both parties have requested that the jury decide on the verdict sheet the number of minutes owed—although East Penn also requested that the number of minutes be decided on a plant-by-plant basis. *See* Dkt. 478; 476. East Penn claims that there are 23 plants for which the jury must make this determination for. Dkt. 476.

As East Penn failed to keep records of the total amount of unpaid time, as the Court has already instructed the jury, the Secretary may establish his claim using a reasonable estimate. 3/13/23 Tr. 159:10-20 ("There are no specific records for the actual amount of time on these – spent on these activities. And the Secretary of Labor, the plaintiff, is permitted to establish the case using an estimate of the amount of time that's owed as a matter of – if it's a reasonable inference that – and that's what the law allows the Secretary to draw on and ask the jury to reach a reasonable inference based on information from which one can fairly and reasonably estimate the amount of wages that are owed, if any, based on what you conclude."). The jury has now heard the testimony of Dr. Robert Radwin and his measurement of 26.6 minutes for the time employees spend doing pre- and post-shift work. GEX 54. Mr. Murray's summary and demonstrative documents essentially demonstrate two things: 1) the calculation of back wages the Secretary alleges are owed when applying Dr. Radwin's number to East Penn's time and attendance data to determine the amount of overtime due; and 2) the difference between the amount of time East Penn paid and the amount of "actual" time reflected in East Penn's time records. As the Secretary has ar-

gued throughout this case, the evidence shows that the latter calculation provides a floor for the amount of unpaid time – a floor that lends support to Dr. Radwin's calculation, and provides the jury with another "bucket" of evidence regarding unpaid time that is in addition to Dr. Radwin's study and the employee testimony.[3] His documents go toward, *inter alia*, the Secretary's "reasonable estimate," which he is entitled to show. His calculations using HMI data will also show the jury that employees did not use the alleged "grace period" but instead arrived at their workstations at or before the start of their shifts.

B. Mr. Murray Summarized East Penn's Voluminous Data

Mr. Murray testified that East Penn's data is voluminous. The jury will not be able to sort through the data without his assistance through both testimony and the documents he prepared. At trial he testified:

- East Penn produced approximately 12.4 million time records. 4/4/23 Tr. 76:1-4.
- East Penn produced 2.4 million pay records. *Id.* at 76:5-7.
- East Penn produced HMI Data was produced in 20 separate files where "Some were very large,

[3] As the jury will ultimately be determining the amount of unpaid time based on the evidence provided, it could, for example, choose to accept Dr. Radwin's number. Alternatively, it could choose to accept the number shown by the time records. Or it could choose to award a different number based on a combination of Dr. Radwin's study, the time records, employee testimony, and admissions from East Penn. Each bucket of evidence is relevant to the jury's ultimate determination.

many megabytes, and they contained millions of records, and some were small." *Id.* at 82:16-22.

- East Penn produced EICS data that came in several files of data and was similar to East Penn's HMI data, and some contained millions of records. *Id.* at 83:10-16.

Mr. Murray used East Penn's data to perform several calculations.

* * *

APPENDIX M

Mr. J. R. Filachek, Esq.
Michael, Spohn, Best & Friedrich
110 West Wisconsin Avenue
Milwaukee 2, Wisconsin

April 20, 1956

Dear Mr. Filachek:

This is in reply to your letters of February 21 and 28, 1956, in which you pose certain questions relative to the compensability for clothes changing and wash-up time under the Fair Labor Standards Act.

Your specific questions are as follows:

(1) If practically all employees who change clothes in the morning, wash up before lunch and/or shower and change clothes in the afternoon perform these functions in five, three and sixteen minutes, respectively, and assuming that their work is such that the *Steiner* decision applies, would it be appropriate for the employer to use sums of five three and sixteen minutes respectively as determinative of the "time worked" (for overtime and minimum wage purposes) by all employees who perform these functions without keeping any more accurate or detailed records?

(2) If such a standard allowance is permissible, would the employer be permitted in the case of an incentive employee to translate the allowance into and incentive rate to fit within the incentive compensation plan?

(3) If the employer may set up a standard allowance for clothes changing, noon washing and showering may it agree with the employees upon a different rate than for production work

so long as the different rate meets both minimum and overtime standards under the Act?

(4) If an employee is on an incentive basis and a rate is established for his incentive work which rate includes a reasonable allowance for showering, clothes changing etc., and the employee receives this incentive rate for his production during his production hours and thereafter showers, changes clothes, etc., receiving no additional pay for these functions (except for the allowance in his incentive rate) is this manner of payment for showering, clothes changing, etc., satisfactory if the minimum and half time for overtime requirements for the law are met? Thus, if during production hours such employee earns $80.00 for 40 hours of production on the incentive basis, which $80.00 includes an allowance for showering, clothes changing, etc., and the employee has spent (either actually or by a reasonable allowance) 2 additional hours in showering, etc., during the week, could the total time that he has "worked" or 42 hours be tested as having been paid for an straight-time basis by his incentive pay so that he would be required to be paid only and additional half time for the 2 hours over 40, at the rate of 40/42

In answer to Question No. 1, we are of the opinion that an employer may set up a formula by which the employees are allowed given amounts of time to perform clothes changing and wash-up activities provided the time set is reasonable in relation to the actual time required to perform such activities. In considering what amount of time would be reasonable for such activities, we believe if a majority of the employees usually perform the activities in the time allowed that it would be considered reasonable.

Regarding Question No. 2, it is our opinion that where an employee is employed on a piece-rate basis, the employer may take the employee's average piece-rate earnings as a basis for cooperation of non-productive hours worked.

You are correct in your understanding in Question No. 3 that an employer may compensate an employee at different rates for different functions provided they are in conformity with Section 7(f) of the Act. There is no prohibition against an employer compensating employees at a different rate for non-productive hours so long as it is done pursuant to a prior agreement and the requirements of Sections 6 and 7 of the Act are set. The agreement must be a permanent agreement. In other words, an employer could not in a given week compensate the employees pursuant to an agreement established a different rate in non-productive hours and in the next week compensate his pursuant to his productive hourly rate, depending upon which method would result in the lesser payment to the employee.

With respect to Question No. 4, the method of compensation seems to be in compliance with the provisions of the Act (that is, the total amount received for piece work is divided by the total number of hours worked to get the average hourly rate plus an additional half-time for hours worked to get the average hourly rate plus an additional half-time for hours worked in excess of 40). I am of the opinion that, therefore, payment as described meets the requirements of the minimum wage and overtime provisions of the Act.

Very truly yours,

/s/ C. T. Lundquist
Deputy Administrator

SOL: WOMcDaniel(429)mg
4116 4/13/56

APPENDIX N

31b SLEEPING TIME AND CERTAIN OTHER ACTIVITIES

31b00 Less than 24 hours duty.

An employee who is required to be on duty for less than 24 hours is working even though permitted to sleep or engage in other personal activities when not busy. For example, a telephone operator who is required to be on duty for specified hours is working even though permitted to sleep when not answering calls. It makes no difference that facilities are furnished for sleeping. The employee's time is given to the employer. The employee is required to be on duty and the time is work time.

31b01 Clothes changing and washup time where collective bargaining agreement makes no mention of practice.

There are certain instances in which clothes changing and washup activities by employees on the premises of the employer are integral parts of the principal activities of the employees because the nature of the work makes the clothes changing and washing indispensable to the performance of productive work by the employees, but the collective bargaining agreement in effect in the establishment is silent as to whether this time should be included in, or excluded from, hours

worked. Where such clothes changing and washup activities are the only preshift and postshift activities performed by the employees on the premises of the employer, the time spent in these activities has never been paid for or counted as hours worked by the employer, and the employees have never opposed or resisted this policy in any manner although they have apparently been fully aware of it, there is a custom or practice under the collective bargaining agreement to exclude this time from the measured working time, and FLSA Sec. 3(o) applies to the time.

31b01a Clothes changing and washup time on a formula basis.

An employer may set up a formula by which employees are allowed given amounts of time to perform clothes changing and washup activities, provided the time set is reasonable in relation to the actual time required to perform such activities. The time allowed will be considered reasonable if a majority of the employees usually perform the activities within the given time.

31b02 Employees residing temporarily on employer's premises.

(a) There are certain circumstances (usually at locations such as hard-to-reach construction jobs, isolated dredging barges and offshore drilling sites) where practical considerations make it necessary for employees to remain temporarily on the employer's premises and to eat and sleep there during their stay. In such situations, the employees shall not be

considered as on "duty of 24 hours or more" if they have a regular schedule of hours and thereafter are relieved of duties except for extra work required by the exigencies of the job. Only the actual working time need be counted as hours worked.

(b) The rules governing "duty of 24 hours or more" (IB 785.22) are applicable where, from all the conditions of employment, including the understanding of the parties, it is clear that the employee is employed to wait rather than waiting to be employed. Among the factors which would support such a conclusion are:

(1) the employee has no regular schedule of hours, or a schedule in name only, and is required to perform work on a helter-skelter basis at any time during the day or night; or

(2) the employee has a regular schedule of hours but the unscheduled periods are so cut through with frequent work calls that this time is not his/her own.