No. 24-1309

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

BRIEF OF *AMICI CURIAE* MEAT INSTITUTE AND NATIONAL CHICKEN COUNCIL IN SUPPORT OF PETITIONER

ADRIANA S. KOSOVYCH
EPSTEIN, BECKER & GREEN, P.C.
875 Third Avenue
New York, NY 10022

PAUL DECAMP
Counsel of Record
KATHLEEN BARRETT
EPSTEIN, BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, DC 20037
(202) 861-1819
PDeCamp@ebglaw.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. Its more than 350 member companies account for more than 95 percent of the United States output of meat and poultry products. The Meat Institute advocates on behalf of its members in connection with legislation and regulation affecting the meat industry, including participating as a party and as an *amicus* in the courts.

The National Chicken Council is the national, non-profit trade association whose primary purpose is to serve as the advocate and voice for the U.S. broiler chicken industry in Washington, D.C. The Council's mission is to influence important legislative and regulatory policies and government programs that affect chicken; to communicate with Washington policymakers and the media about chicken production, processing, and products; to affect domestic and international trade policy to maintain and expand foreign markets for U.S. chicken; and to promote and to protect the image and reputation of the industry. Member companies account for approximately 95 percent of the chickens produced in the United States.

The issues before the Court—whether certain preliminary and postliminary activities constitute

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* timely notified the parties' counsel of record of the intent to file this brief.

compensable work under the Fair Labor Standards Act (the "FLSA") and, if so, how to measure the time spent on those activities—directly affect the entire meat and poultry processing industry. The Court is familiar with the topic of donning and doffing protective gear in these workplaces. *See, e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 577 U.S. 442 (2016) (considering sufficiency of expert evidence regarding average time spent on donning and doffing protective gear in a pork processing facility to establish predominance of common questions under Rule 23(b)(3) of the Federal Rules of Civil Procedure); *IBP, Inc.* v. *Alvarez*, 546 U.S. 21 (2005) (considering compensability of waiting and walking time before and after donning and doffing protective gear in beef, pork, and poultry processing facilities).

Whether and how to pay for donning and doffing are matters of great financial and operational significance for the members of *amici*. With typical plants employing hundreds or thousands of hourly workers, the impact of treating several minutes per day as compensable, or not, can easily reach the millions of dollars at a single site. Class and collective actions, as well as Department of Labor investigations, relating to this activity are an ongoing threat.

Employers struggle with a constant lack of certainty and potentially substantial financial exposure. The open-ended nature of the prevailing judicial gloss on the FLSA's otherwise plain language addressing whether ancillary activities are compensable under the FLSA places members of the *amici*—indeed all employers—at continual risk of private lawsuits or investigations by regulatory agencies second-guessing longstanding practices or expanding regulatory

interpretations. Employers face almost no certainty in an area where disagreements over mere minutes can result in millions of dollars of liabilities.

Moreover, how an employer goes about measuring this time and managing employee behavior, which bookends what is normally a long and demanding day of physical work, affects not only profitability but also employee morale. The judgment below exerts pressure on employers to rush their workers through their pre-shift and post-shift changing at a time when workers least want to deal with supervisors telling them to move faster. In the event that the Court declines to overrule *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), there are better ways to handle compensating workers for donning and doffing, in line with the approach adopted by the First, Ninth, and Tenth Circuits.

Amici respectfully urge the Court to grant the petition and to reverse.

SUMMARY OF ARGUMENT

Whether the Court overrules *Steiner* is a matter of major significance to industry and workers alike. Within the meat and poultry processing industry, hundreds of thousands of workers engage in daily donning and doffing of protective equipment. If that activity is compensable under the FLSA, then it translates to hundreds of millions of dollars each year in wage obligations for employers. Other industries, including many types of manufacturing, likewise involve donning and doffing.

Among the competing approaches the courts have developed to measure and to compensate for donning and doffing, the method that best accords with worker

preferences and well-being, while also reducing the supervisory and record-keeping burden for employers, is to allow employers to use a "reasonable" amount of time for the donning and doffing activity. *See, e.g.*, *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274, 283 & n.7 (1st Cir. 2004), *aff'd in part*, 546 U.S. 21 (2005); *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 914-15 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005); *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994). That approach is far superior to requiring payment for the time actually spent on the activity. *See, e.g.*, *Holzapfel* v. *Town of Newburgh*, 145 F.3d 516, 523 (2d Cir. 1998); *Sec'y, United States Dep't of Labor* v. *East Penn Mfg. Co.*, 123 F.4th 643, 648-50 (3d Cir. 2024); *Perez* v. *Mountaire Farms, Inc.*, 650 F.3d 350, 372 (4th Cir. 2011); *Brock* v. *City of Cincinnati*, 236 F.3d 793, 802-03 (6th Cir. 2001). This is because the reasonable time method permits employers to allow workers to proceed at their own preferred pace at the start and end of the day rather than pressuring the workers to put on and to take off their equipment quickly in order to reduce labor costs.

Steiner and its progeny are in tension with the Portal-to-Portal Act of 1947, which excludes from compensable time under the FLSA tasks that are "preliminary to or postliminary to" an employee's principal work activity or activities. *See* 29 U.S.C. § 254(a). If the Court overrules or curtails *Steiner*, the effects of that ruling would extend well beyond the immediate donning and doffing scenario presented in this case. *See, e.g.*, *Cadena* v. *Customer Connexx LLC*, 107 F.4th 902 (9th Cir. 2024) (allowing claims by call center employees based on computer boot-up, log-in, and shut-down); *Peterson* v. *Nelnet Diversified Sols., LLC*, 15

F.4th 1033 (10th Cir. 2021) (same); *Boone* v. *Amazon.com Servs., LLC*, 562 F. Supp. 2d 1103 (E.D. Cal. 2022) (denying motion to dismiss claims seeking compensation for time spent in COVID screening). Indeed, the compensability of a variety of other activities is currently in doubt. Withdrawing from the interventionist judicial posture of *Steiner* would allow the plain language of the FLSA as amended by the Portal-to-Portal Act to govern once more. Far from removing protections, this approach as originally called for by Congress would remove uncertainty and let local labor markets and competitive pressures, not fear of ever-shifting regulatory approaches, drive wages. This case presents an appropriate vehicle to provide clarity in this murky area of the law.

ARGUMENT

I. WHETHER DONNING AND DOFFING ARE COMPENSABLE HAS SIGNIFICANT IMPLICATIONS FOR MANY WORKPLACES AND A LARGE NUMBER OF WORKERS.

According to the Bureau of Labor Statistics, the meat and poultry processing industry employs 324,560 production workers in the United States, with a mean hourly wage of $19.34.[2] These workers typically wear an array of personal protective equipment tailored to their specific roles. In *IBP*, for example, the Court considered a beef and pork facility where workers wear "outer garments, hardhats, hairnets,

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[2] *See* U.S. Bureau of Labor Statistics, *May 2023 National Industry-Specific Occupational Employment and Wage Estimates* (April 2024) (NAICS code 311600, occupation code 51-0000), available at bls.gov/oes/2023/may/naics4_311600.htm#51-0000.

earplugs, gloves, sleeves, aprons, leggings, and boots[,]" with some "also wear[ing] a variety of protective equipment for their hands, arms torsos, and legs; this gear includes chain link metal aprons, vests, plexiglass armguards, and special gloves." 546 U.S. at 31. The companion case involved a poultry processing plant in which "employees operate six production lines and perform a variety of tasks that require different combinations of protective clothing." *Id.* at 37. *See also Tyson Foods*, 577 U.S. at 447 ("The exact composition of the gear depends on the tasks a worker performs on a given day" at the pork processing facility).

The amount of time employees spend on these donning and doffing activities will vary based on which items they are using, as well as their individual pace and any pertinent employer practices. But the record in *Tyson Foods* is not atypical for the industry. In that case, the jury heard evidence from the plaintiffs' expert witness indicating that each day, workers in certain departments spent 18 minutes engaging in donning and doffing, whereas workers in a different department averaged 21.25 minutes. While circumstances may vary considerably from department to department and from employer to employer, the figures from *Tyson Foods* provide a helpful basis for extrapolating.

As a rough approximation, if 324,560 workers spend 18 minutes per day, five days per week, on donning and doffing, the result is 486,840 hours of donning and doffing time per week across the industry. Over the course of a year, and subtracting two weeks for holidays, this amounts to 24,342,000 hours of donning and doffing industry-wide. At overtime rates, this volume of activity translates to more than $706

million in wage cost each year if the time is compensable. If one assumes 21.25 minutes per day instead of 18 minutes, the valuation for this work increases to more than $833 million per year.[3] For an individual meat processing plant with 500 production workers, these numbers translate to roughly an additional $21,000 to $26,000 per week relating to donning and doffing at that one facility, or more than $1,000,000 each year.

In short, the compensability or not of donning and doffing affects roughly a third of a million American workers in the meat and poultry processing industry, involving potential labor costs approaching a billion dollars a year. And this issue plainly exists in other industries as well. *See, e.g.*, *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220 (2014) (addressing

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[3] For the 18-minute scenario, the math is *18 minutes/day * 5 days/week = 90 minutes/week = 1.5 hours/week* for each worker, multiplied by 50 weeks to yield 75 hours per worker per year, multiplied by 324,560 workers to yield 24,342,000 hours for the year, multiplied by the overtime rate (*1.5 * $19.34/hour = $29.01/hour)* to yield a total annual labor cost exposure of $706,161,420. Under the 21.25-minute scenario, it is the same calculation, but using 21.25 instead of 18. The annual value of the activity, if compensable, is *$706,161,420 * (21.25/18) = $833,662,787.50.* Many variables can affect the actual time and cost valuation. For example, not every worker works a full-time schedule, and under the FLSA an employee has no statutory right to additional straight-time wages in non-overtime weeks so long as the employee's total earnings divided by the number of hours worked equal or exceed minimum wage. *See United States* v. *Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490-91 (2d Cir. 1961). And some workers may work six or even seven days a week. The purpose of these calculations is to convey a sense of the approximate magnitude of the financial impact of donning and doffing on the industry and its workers, no more and no less.

compensability of donning and doffing at steel manufacturing plant in light of statutory exclusion for "changing clothes" pursuant to a collective bargaining agreement); *Ballaris* v. *Wacker Siltronic Corp.*, 370 F.3d 901, 910-11 (9th Cir. 2004) (addressing compensability of donning and doffing "bunny suits" in a silicon wafer fabrication facility).

Compounding these direct costs, the approach under *Steiner* subjects employers to substantial and ongoing uncertainty as to what activity might be considered compensable under the FLSA in the first place. This uncertainty extends to donning and doffing as well as many other preliminary or postliminary activities. By creating a judicial exception to and in seeming contradiction with the otherwise plain language of the Portal-to-Portal Act's amendments to the FLSA, *Steiner* bestows on regulatory agencies and private litigants the ability to apply their own views as to what activities the FLSA ought to reach. In so overriding the plain language of the FLSA, *Steiner* places employers in the untenable position of never knowing whether they have properly identified all compensable activities. They do know, however, that an agency's or plaintiff's view of what activities are "integral and indispensable" could change at any time. *Steiner* therefore forces employers to bear the continual risk that at any time, a changing application of the FLSA could subject them to millions of dollars of liabilities, even for longstanding practices that had long operated without dispute. In fact, longstanding practices may present the greatest risk because of the extent to which damages would accrue over time. *Steiner* thus injects considerable uncertainty and friction into businesses across the country.

By any measure, this issue is important.

II. THE METHOD OF COMPENSATING FOR DONNING AND DOFFING HAS MEANINGFUL CONSEQUENCES FOR BOTH WORKFORCE MANAGEMENT AND EMPLOYEE MORALE.

If *Steiner* persists as the law of the land, then the issue remains *how* to measure and to compensate for time spent donning and doffing. The courts have developed two main approaches. The first approach, followed by the First, Ninth, and Tenth Circuits, allows employers to compensate workers for a "reasonable" amount of time. *See, e.g.*, *Tum*, 360 F.3d at 283 & n.7; *Alvarez*, 339 F.3d at 914-15; *IBP*, 38 F.3d at 1127. The second approach, followed by the Second, Third, Fourth, and Sixth Circuits, requires employers to pay for the "actual" time each employee takes to perform these activities, which may vary from worker to worker and from day to day. *See, e.g.*, *Holzapfel*, 145 F.3d at 523; *East Penn*, 123 F.4th at 648-50; *Mountaire Farms*, 650 F.3d at 372; *Brock*, 236 F.3d at 802-03.

Amici fully agree with the petitioner's legal analysis of the circuit split and the argument for the reasonable time standard set forth in the petition. *See* Pet. 13-18. *Amici* write separately to examine the practical implications that these two approaches have in the workplace.

The differences between workplaces using reasonable time as compared to actual time for donning and doffing could not be more stark. Under a reasonable time system, an employer will ordinarily conduct an observational study or a worker survey to develop

data regarding how long, on average, it takes workers to complete the tasks involved in donning and doffing. The end result of that process will be that the workers receive a set amount of time each day to account for their donning and doffing, irrespective of whether on any given day a particular worker spends more or less time on those activities. Responsible employers will periodically validate those figures, and perhaps refine them to differentiate between different types of work that may involve more or less extensive protective gear.

The reasonable time approach accomplishes at least two key objectives. First, it removes the employer's concern that workers may be moving too slowly and milking the process, which would otherwise create pressure for an employer to manage this activity more closely to drive efficiency. Second, it frees the workers from the pressure of moving quickly under the watchful eye of management.

It bears noting that most donning and doffing activity relevant to this case and so many like it occurs at the very start of the workday and at the very end. These are times when the workers may have a strong preference to ease into the day as they transition from sleep and home to a full shift in a meat or poultry processing plant, or a desire to relax a bit at the end of a long workday before they head home. Many workers like to arrive early at the facility, begin changing into their work clothing, have a cup of coffee, maybe read the newspaper, and chat with their friends and coworkers while they simultaneously put the morning commute out of their mind and prepare mentally for the day ahead. And after the shift, many workers prefer to sit down for a few minutes, socialize, and

generally decompress before they complete their doffing and leave for the day.

Not everyone has that preference, of course. Some workers would rather show up shortly before the shift begins, change quickly, and get to work. By the same token, some workers want to get out of the plant as rapidly as possible at the end of the shift, changing very quickly and making a beeline for the door.

A workplace that uses a reasonable time approach can accommodate these various worker preferences, thereby maximizing worker satisfaction.

Contrast that system with a plant that tracks actual time. When every minute an employee spends on donning and doffing is another minute on the clock, counting toward wages and overtime, the inevitable result is that the employer will face heavy financial pressure to ensure that workers do not dawdle. Instead of giving workers a set amount of time—and thus pay—to cover donning and doffing and then leaving them to their own preferences for how to transition into and out of their workday, employers tracking actual time will find themselves acting like drill sergeants, pressuring workers to change faster and not to waste time, at precisely the two points in the workday when workers least want to have that type of interaction. In addition, employers in this scenario incur further costs relating to paying supervisors and managers to oversee the pace and efficiency of the donning and doffing.

From the workers' standpoint, the options are either (1) being treated like an adult, with respect, and given the dignity of handling the preliminary and

postliminary matters at one's own preferred pace; or (2) facing a bullhorn and a stopwatch, either figuratively or literally, at the start and conclusion of the day. Workers do not want to experience the latter sort of treatment, nor do employers want to have to interact with their people in that manner.

Amici respectfully suggest that, given the choice, the Court should construe the FLSA in a manner that allows employers to treat their workers with a measure of grace and humanity when they first show up for the day and as they prepare to go home.

III. THE SCOPE OF THE PHRASE "PRELIMINARY TO OR POSTLIMINARY TO SAID PRINCIPAL ACTIVITY OR ACTIVITIES" IN THE PORTAL-TO-PORTAL ACT AFFECTS MATTERS WELL BEYOND DONNING AND DOFFING.

Congress enacted the Portal-to-Portal Act of 1947 as a response to what it viewed as erroneous judicial constructions of the FLSA relating to activities at the beginning and end of the workday. *See* 29 U.S.C. § 251(a). Section 4(a) of the statute excludes from the scope of compensable activity under the FLSA the following activities:

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

29 U.S.C. § 254(a) (emphasis added).

Although this case arises in the context of claims for donning, doffing, and showering at a battery manufacturing and recycling plant, the tension between *Steiner* and the Portal-to-Portal Act's exclusion of preliminary and postliminary activities persists in a wide and ever-evolving range of scenarios that go well beyond donning and doffing protective gear.

For example, the Ninth and Tenth Circuits have recently held that time call center employees spend turning on and booting up their computers at the beginning of a shift, as well as shutting them down at the end of a shift, can be compensable under the FLSA. *See Cadena*, 107 F.4th at 916-18; *Peterson*, 15 F.4th at 1037-42. The Eastern District of California has denied a motion to dismiss claims seeking compensation for time spent in COVID screening. *See Boone*, 562 F. Supp. 2d 1103.[4] And after *Integrity Staffing Solutions, Inc.* v. *Busk*, 574 U.S. 27 (2014), the status of common activities such as retrieving tools and other equipment in preparation for a shift, returning equipment to a storage area after a shift, and tidying up a work station at the end of the day remains unsettled.

Revisiting *Steiner* would allow the Court to provide clarity regarding the compensability of a broad range of activities in addition to donning and doffing.

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[4] Predictably, this matter ended up settling, with the employer agreeing to pay $5.5 million on the FLSA and parallel state-law claims. *See Boone* v. *Amazon.com Servs., LLC*, No. 1:21-cv-002410KES-BAM, 2024 WL 4712426 (E.D. Cal. Nov. 7, 2024).

In providing this clarity, the Court would remove the artificial constructs created by *Steiner* and instead allow economic conditions, such as competitive pressures, collective bargaining agreements, and other economic factors, to dictate how employers approach these activities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ADRIANA S. KOSOVYCH
EPSTEIN, BECKER & GREEN, P.C.
875 Third Avenue
New York, NY 10022

PAUL DECAMP
Counsel of Record
KATHLEEN BARRETT
EPSTEIN, BECKER & GREEN, P.C.
1227 25th Street, N.W.
Suite 700
Washington, DC 20037
(202) 861-1819
PDeCamp@ebglaw.com

Counsel for Amici Curiae

July 24, 2025