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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate-disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

This case offers an opportunity to finally leave behind "a relic from a bygone era of statutory construction" that continues to confound courts and wreak economic chaos.[1] *Steiner* v. *Mitchell* ignored relevant statutory text for ambiguous legislative history, yielding a result that is not just wrong, but logically incoherent. And it departed so far from the statutory language that this Court has resorted to applying dictionary definitions not to what *Congress* said, but to *this Court's* own invented phrases.[2] This Court should return the law to what Congress actually enacted.

The Secretary's opposition confirms that certiorari is warranted on both questions presented. On the first, the Secretary cannot reconcile the circuit split, nor can she escape *Anderson*'s holding that preliminary or postliminary activities deemed compensable are measured using reasonable time.[3] If anything, the Secretary's arguments highlight fundamental problems with *Steiner* that warrant overruling it altogether.

As for overruling *Steiner*, the Secretary offers hardly any merits defense of the case at all. She doesn't try to justify *Steiner*'s failure to engage with

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[1] *Food Mktg. Inst.* v. *Argus Leader Media*, 588 U.S. 427, 437 (2019).

[2] *Integrity Staffing Sols., Inc.* v. *Busk*, 574 U.S. 27, 33 (2014).

[3] *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 692 (1946)

the operative text or its reliance on legislative history. Instead, she introduces new dictionary definitions that *Steiner* never mentioned and which don't support *Steiner* anyway. She then parrots some of *Steiner*'s contextual points without responding to any of East Penn's rebuttals.

The Secretary also relies heavily on congressional acquiescence—which is telling, since that is a shaky foundation even in the best case. It certainly shouldn't apply here, where the Secretary can point only to isolated amendments, none of which mention *Steiner* or "integral and indispensable" activities.

Unable to defend *Steiner*'s holding, the Secretary predictably retreats to other *stare decisis* factors. But *Steiner* is not a stable background rule that warrants retention despite being obviously wrong. Instead, it continues to spawn conflicts on fundamental questions, causing far more than the "shallow circuit variation" the Secretary claims. And her unsupported assertion of reliance interests fails even to acknowledge the many other ways employees are protected under the law as actually written. There is no good reason to leave *Steiner* on the books.

This Court should grant the petition.

ARGUMENT

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

At minimum, this Court should resolve the circuit split over how to measure time spent on "integral and indispensable" activities.

A. The circuits are divided on this important question.

The circuits are divided. Three allow time spent on "integral and indispensable" activities to be measured using reasonable time. Pet. 13-14. Four others require actual time. *Id.* at 14-16. Multiple circuits and commentators have acknowledged the split. *Id.* at 16 & n.3.

Denying this acknowledged split, the Secretary first attacks a strawman, arguing that *no* circuit allows employers to "unilaterally" decide what constitutes a reasonable amount of time to spend on "integral and indispensable" activities. Opp. 12. But East Penn never said otherwise. The amount of reasonable time is determined by a jury or a court, not "unilaterally" by the employer. *See Tum* v. *Barber Foods, Inc.,* 360 F.3d 274 (1st Cir. 2004)*, aff'd in part*, 546 U.S. 21 (2005)); *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 914 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005); *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994).

The Secretary then claims the split is illusory because, as she reads the cases, one camp addresses liability and the other addresses damages. Opp. 12-

13. But she doesn't dispute that the Second, Sixth, and Eighth Circuits acknowledge this split without any such qualification. Pet. 16.

In any event, this distinction doesn't reconcile the split. The Secretary suggests that *all* circuits would allow reasonable time for damages, since in that context reasonable time is just an "estimate[]" or approximation of actual time. Opp. 12-13. But "approximated time and reasonable time are *not* synonymous." *Alvarez*, 339 F.3d at 915 (emphasis added). Approximated time can include time that wasn't reasonable, such as lollygagging or detours. Reasonable time cannot. *See Anderson,* 328 U.S. at 692 (holding that time spent making "roundabout journeys," or making stops "en route for purely personal reasons," is not compensable). Correctly understood, reasonable time is never okay in actual-time circuits, contrary to the Secretary's suggestion. Pet. 14-15.

The Secretary also argues that in *Tum*, "no party challenged" the reasonable-time portion of the jury instruction. Opp. 12. But *Tum* addressed the instruction in its "entirety" and found "no error." 360 F.3d at 283.

B. Reasonable time is the correct metric.

Reasonable time is the proper metric for integral and indispensable activities. Pet. 17-18. This Court held as much in *Anderson* when it said that only the "minimum time necessarily spent" was compensable

for a preliminary activity like walking to a work station. *Id.* at 17.

The Secretary's efforts to avoid *Anderson* fail. She first repeats the point—made by the Third Circuit below—that *Anderson* was addressing preliminary and postliminary activities "that Congress subsequently made noncompensable." Opp. 10. But again, those activities *were* compensable in *Anderson*. Pet. 18. And in deeming them compensable, *Anderson* required them to be measured using reasonable time. 328 U.S. at 692-93. *That* ruling (on the proper metric) survives the Portal-to-Portal Act, and applies equally to the preliminary and postliminary activities deemed compensable by *Steiner*.

Nor does it matter that the activities in *Anderson* had "fit uneasily within the category of 'work.'" Opp. 10-11. The fit is "uneasy" for "integral and indispensable" activities too. *See infra* Section II.A. That is why East Penn is also urging this Court to overrule *Steiner* and do away entirely with judge-made doctrines that deem certain preliminary and postliminary activities compensable.

Further, the Department of Labor has itself endorsed the use of reasonable time, as the Secretary concedes. Opp. 11 n.*. And while the Department later "clarified" that actual hours are correct, *id.*, its earlier, more "contemporaneous" position is entitled to more weight, *Loper Bright Enters.* v. *Raimondo,* 603 U.S. 369, 386 (2024). Moreover, this flip-flopping

highlights the confusion left by *Steiner* and provides yet another reason to overrule it.[4]

The Secretary's reliance on the terms "hours" and "hours worked" fares no better. Opp. 8-9. She asserts (without any support) that the "ordinary meaning" of these terms is "hours *actually* worked." *Ibid.* In reality, she is just adding that word to the statute. The statute could also mean "hours *reasonably* worked," which is what *Anderson* held when it limited compensation to "minimum time necessarily spent." 328 U.S. at 692.

And scattered references to hours "actually worked" in this Court's prior dicta don't settle the issue either. Opp. 9 (citing cases). It is well established that "the Court's dicta, even if repeated, does not constitute precedent." *Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 645 (2022). *See also Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) ("Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after?"). Only one decision has actually ruled

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[4] The Secretary also says the Department's 1996 Field Operations Handbook was "specific to collective-bargaining agreements," but fails to explain why that matters. Opp. 11-12 n.* (citing Pet. App. 41a). If reasonable time is appropriate when a collective bargaining agreement "governs but is silent" on the issue, Pet App. 41a, it should also be appropriate when there is no collective bargaining agreement at all. Further, the Secretary's argument that its *Alvarez* brief "supported reasonable time only as 'a remedial measure,'" Opp. 12 n*, misses the mark for reasons explained above, *supra* pp. 3-4.

on this issue, and it endorsed reasonable time. *Anderson*, 328 U.S. at 692.

The Secretary's arguments based on context and structure are also meritless. Opp. 9. First, the FLSA's references to "piece-rate" (production-based) compensation are beside the point. *Ibid.* Those references would be necessary regardless of how the statute measures time-based compensation—in either case, production-based compensation is different and requires different language.

Second, the Secretary claims reasonable time is incompatible with the FLSA's recordkeeping provision. *Ibid.* But the Department of Labor itself acknowledges that recorded time can differ from compensated time. *See* 29 C.F.R. § 785.48(a). And the Department has further acknowledged that employers can compensate for reasonable time, notwithstanding recordkeeping requirements. *See supra* pp. 5-6 & n.4.

Finally, the Secretary protests that "integral and indispensable" activities should not be an "intermediate category" of compensable work treated differently than other compensable work. Opp. 11 (quoting *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 33-34 (2005). East Penn agrees. But as explained, *Steiner* and *Alvarez* already did that—they created two tiers of compensable principal activities, treating "integral and indispensable" activities differently from "productive" ones. Pet. 22-23. This was a necessary consequence of *Steiner*'s incoherent result, *id.*, and

once again supports overruling *Steiner* entirely, *see infra* Section II.

C. This case squarely presents the issue.

The Secretary is wrong that East Penn "already received the benefit of [a reasonable-time] rule" in the jury instructions below. Opp. 13. As the decision below recognized, the district court relied on actual time when it "instructed the jury." Pet. App. 7a. The instruction the Secretary cites nowhere suggests that what "should have been paid" was reasonable time as opposed to actual time. Opp. 13. And the next instruction removes any doubt, requiring the jury to use "actual hours." 3d Cir. Doc. No. 24-1 at 200 (JA432).

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

Rather than just resolve the circuit split above, this Court can and should address the root of this conflict, and many others, by overruling *Steiner*.

A. *Steiner* was wrongly decided.

Steiner is a prime example of how *not* to interpret statutes. After declaring (with no analysis) the relevant text "ambiguous," *Steiner* effectively gave controlling weight to select statements from "conflicting" legislative history. Pet. 19-21. And when *Steiner* finally turned to statutory text, it looked only at *other* provisions, and its cursory analysis was badly flawed. Pet. 23-25.

This yielded a result that is logically incoherent twice over. First, it forced this Court in *Alvarez* to conclude that "integral and indispensable" activities are both *related* to principal activities *and* principal activities themselves. Pet. 21-23. Second, this fallacy required a second atextual rule to prevent ever-expanding compensability. *Id.* at 22-23 (discussing *Alvarez*, 546 U.S. at 40-41).

The Secretary doesn't attempt to defend *Steiner*'s ignoring the operative statutory text for legislative history, or to make sense of its incoherent result. *See* Opp. 14-17. Instead, she first tries to rewrite it, citing dictionary definitions of the word "principal" that are supposedly "consistent with" and "buttress[]" *Steiner*'s ultimate result. Opp. 14. But *Steiner* didn't rely on these definitions, and in any event they miss the point. Whatever the definition of "principal," *Steiner* extended it to activities that are *not* principal, but merely *relate* to principal activities instead. The Secretary's definitions don't solve that problem.

As to other statutory text, the Secretary just parrots *Steiner*'s reasoning. Opp. 15-16. But as East Penn explained, that reasoning is wrong: Sections 2 and 4 were never *supposed* to be symmetrical, Section 3(o) can be justified as belt-and-suspenders, and Section 16(c) doesn't codify the regulation at issue. Pet. 23-25. The Secretary has no response to these points.

What is more, the Secretary also misreads two of these contextual statutory provisions. She first suggests that under Section 3(o), showering and

clothes-changing are excluded "*only if*" the parties agree under a collective-bargaining agreement. Opp. 15. That, again, simply adds words to the statute. *See* 29 U.S.C. § 203(o). And Section 16(c) left in place regulations that were consistent with the "Act"—i.e., the *entire* FLSA, not just the 1949 amendments as the Secretary suggests. *Compare* Opp. 16 *with* Pet. 25. *See also Mitchell* v. *Kentucky Fin. Co.*, 359 U.S. 290, 292 (1959) (holding that under Section 16(c), prior agency interpretations "should remain in effect unless inconsistent with *the statute as amended*.") (emphasis added).[5]

Finally, Congress has not "implicitly ratified" *Steiner*. Opp. 18-19. Congressional acquiescence is "treacherous" even in the best case. *Zuber* v. *Allen*, 396 U.S. 168, 185 n.21 (1969); Pet. 25-26. And where "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments," the Court has "spoken … bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001); *see also AMG Cap. Mgmt., LLC*

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[5] In any event, the Secretary ascribes too much importance to this provision. Opp. 16. Found under the heading "Miscellaneous and Effective Date," Section 16(c) states only that certain regulations, orders, and guidance would "remain in effect" following the 1949 amendments. *See* ch. 736, § 16(c), 63 Stat. 920. It didn't codify these agency documents. *See Whitman* v. *Am. Trucking Associations,* 531 U.S. 457, 468 (2001) (Congress doesn't "hide elephants in mouseholes")

v. *Fed. Trade Comm'n,* 593 U.S. 67, 81 (2021) (quoting *Sandoval*). That is the case here. Opp. 18-19.

Further, none of these isolated amendments endorses *Steiner*. All but one are wholly irrelevant—they exempt certain professions, remove certain income from overtime calculations, and bar certain compensation practices. *Id.* at 19. The last one excludes a specific set of commuting activities from "principal" activities. *Id.* at 18-19. None mentions, acknowledges, or adopts *Steiner*'s atextual rule.

In any event, the Court has never held that congressional acquiescence alone can save a decision that is blatantly wrong and fails every other *stare decisis* factor. "Congressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 186 (1994) (citation omitted).

B. *Steiner* is not administrable.

Aside from being wrong, *Steiner* is "unworkable" in practice. *Loper Bright,* 603 U.S. at 407. In recent decades it has spawned numerous conflicts, forcing this Court to repeatedly intervene. Pet. 27-31.

The Secretary tries to minimize this chaos as "shallow circuit variation" in edge cases. Opp. 20-21. But that's not how courts and commentators have described it. *See, e.g.,* Pet. 7 ("no clear standards," "circular"); *id.* at 8 ("many questions unanswered," "continuous confusion," "a mush"); *id.* at 9 ("a confused state," "routinely interpreted differently"); *id.* at 28 ("abstract," "murk[y]," "fact-intensive," "not

amenable to bright-line rules").[6] Indeed, the disputed questions are fundamental, including:

- Who decides what activities are "integral and indispensable"? Pet. 30.
- What test should apply? *Id.* at 28-29.
- How should that test apply to protective equipment (worn by millions of workers)? *Id.* at 29-30. *See also* Meat Institute Am. Br. 4 (discussing prevalence of PPE in meat and poultry processing); IADC Am. Br. 2 (same for drilling contractors).[7]
- How should time be measured for "integral and indispensable" activities? Pet. 13-16.
- When deciding whether time is *de minimis*, should courts aggregate time across many thousands of employees? *Id.* at 30-31.

The Secretary claims that overruling *Steiner* will just trade this old chaos for new—by raising new questions about what constitutes a "principal activity or activities." Opp. 21. But under *Steiner*, courts *already* have to identify principal activities. *See Steiner*, 350 U.S. at 249 (identifying "the 'principal' activity" as "the production of batteries"). After

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[6] *See also* Meat Institute Am. Br. 3 ("Employers face almost no certainty in [this] area …."); IADC Am. Br. 12 ("intractable legal uncertainty").

[7] The Secretary erroneously characterizes this split as "variation" over the "donning and doffing of *non*-protective attire." Opp. 20-21 (emphasis added). The split includes donning and doffing of PPE. Pet. 28-29.

taking that initial step, courts must then *additionally* ask what activities are "integral and indispensable" to those principal activities. *Id.* at 256. Overruling *Steiner* would remove this second step and leave the first step unchanged, thereby simplifying the analysis as a whole.

Finally, the Secretary says *Steiner* doesn't "undermine" the "rule of law" like *Chevron* did, quoting *Loper Bright*. Opp. 19-20. But it does. Because what *Loper Bright* meant by this statement was that *Chevron* had "foster[ed] unwarranted instability in the law, leaving those attempting to plan … in an eternal fog of uncertainty." 603 U.S. at 411. That is equally true of *Steiner*. Pet. 26-31.

Indeed, the analogy to *Chevron* goes further still. Like *Chevron*, *Steiner* was "fundamentally misguided"; its flaws were "apparent from the start"; and it has proven "unworkable," requiring this Court to "clarify the doctrine again and again." *Loper Bright*, 603 U.S. at 409. Accordingly, as with *Chevron*, "the only way to ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" is "to leave [*Steiner*] behind." *Id.* at 411-12.

C. *Steiner* confers minimal reliance interests.

Unable to defend *Steiner* as correct or workable, the Secretary leans on the purported reliance interests at stake. Opp. 17-18. But these arguments are not convincing.

For starters, *Steiner* hasn't engendered reliance interests for "nearly 70 years." Opp. 17. The Secretary doesn't dispute that for most of that time, *Steiner* lay relatively dormant. Pet. 6-7. And since *Steiner* was thrust to the fore, it has proven to be nothing close to a "stable background rule that fosters meaningful reliance." *Loper Bright*, 603 U.S. at 410. *See also supra* Section II.B.

Further, the Secretary doesn't dispute that employees' interests would remain adequately protected if *Steiner* were overruled. Pet. 31-32. While plaintiffs' attorneys may suffer, the employees themselves would remain adequately protected by collective bargaining agreements, private contracts, custom and practice, and state law. *Ibid.* Indeed, the Secretary doesn't even acknowledge any of this.

Finally, the Secretary argues that overruling *Steiner* would also invalidate cases that later sought to clarify *Steiner*'s flawed legal framework. Opp. 18. But that was true of *Chevron* too. In both instances, the Court tried "again and again" to salvage a decision that was fundamentally unsound. *Loper Bright*, 603 U.S. at 409. These failed efforts are a reason to "leave [*Steiner*] behind," *id.* at 411-12, not to keep "tinkering" with it in vain, *id.* at 410.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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