No. 15-0315-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HENRY PEREZ, On behalf of themselves and others similarly situated, BASELICE RALPH, On behalf of themselves and others similarly situated, JUAN BAYRON, On behalf of themselves and others similarly situated, JERRY CORDERO, On behalf of themselves and others similarly situated, RONALD EASON, On behalf of themselves and others similarly situated, DONALD KOONCE, On behalf of themselves and others similarly situated, JOSEPH ORO, On behalf of themselves and others similarly situated, RUBEN RIOS, JR., On behalf of themselves and others

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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similarly situated, PEDRO ROSADO, On behalf of themselves and others similarly situated, DEREK G. WALTHER, On behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

ELIZABETH KAY BESOM,

Plaintiff,

v.

THE CITY OF NEW YORK, MAYOR BILL DE BLASIO, THE NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, and MITCHELL J. SILVER, in official capacity as Commissioner of the Department of Parks and Recreation,

Defendants-Appellees.

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the employees in this case arising under the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. 201 *et seq.* For the reasons set forth below, the district court erred in concluding that the time spent by New York City Associate Urban Park Rangers ("Park Rangers") donning and doffing their uniforms and security equipment at the beginning and end of each workday is not compensable.

STATEMENT OF INTEREST

The Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he administers and enforces the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217. The FLSA generally requires employers to compensate employees for all "hours worked," which is defined to include all hours spent between an employee's first and last "principal activities" of the day. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005). The Portal-to-Portal Act ("Portal Act") excludes from compensable time activities that are "preliminary to or postliminary to" an employee's principal work activities. 29 U.S.C. 254(a). Activities that are integral and indispensable to a principal activity are, however, themselves compensable principal activities that define the limits of the workday. *See Alvarez*, 546 U.S. at 37. The Secretary has a compelling interest in defending the U.S. Department of Labor's ("the Department" or "DOL") interpretation of

these "hours worked" principles of the FLSA and in ensuring that employees are properly compensated for all hours worked.

STATEMENT OF THE ISSUE

Whether the district court erred in holding that the time spent by Park Rangers donning and doffing their uniforms and security equipment at the beginning and end of each workday is not compensable under the FLSA, as amended by the Portal Act, because such donning and doffing activities are not integral and indispensable to the Park Rangers' principal work activities.

STATEMENT OF THE CASE

1. Park Rangers employed by the New York City Department of Parks and Recreation ("DPR") are responsible for a variety of work duties, including "providing assistance to the public in New York City parks and pools, giving aid to those persons who may have suffered an injury or been victimized by a crime, advising persons of their legal obligations, and, if need be, making arrests." *Perez v. City of New York*, No. 12-civ-4914, 2015 WL 424394, at *3 (S.D.N.Y. Jan. 15, 2015) (internal quotation marks omitted). DPR requires all Park Rangers to be in full uniform at the start of their tour of duty and to remain in uniform throughout the performance of their job duties until the end of their tour. *Id*. at *1; *see* DPR Operations Manual, A-212.[1] The Park Rangers are required to wear a uniform and

[1] Citations to pages in the Appendix are designated as "A-X."

security equipment, including a bullet proof vest and utility belt, as well as items that must be attached to the belt such as mace and handcuffs. *See Perez*, 2015 WL 424394, at *1; DPR Operations Manual, A-212-16. The Park Rangers estimate that they spend an average of five to twenty minutes each day donning and doffing these items. *See Perez*, 2015 WL 424394, at *1.

2. On June 22, 2012, Plaintiffs filed suit against DPR, the City of New York, the Mayor, and the DPR Parks Commissioner (collectively, "Defendants") on behalf of themselves and other similarly situated Park Rangers currently and formerly employed by DPR, alleging that Defendants had committed several violations of the FLSA, including a failure to compensate for pre- and post-shift donning and doffing of required uniforms and equipment. *See Perez*, 2015 WL 424394, at *1; Compl., A-50-57.

3. On April 3, 2014, Defendants moved for partial summary judgment, arguing in relevant part that the donning and doffing of the uniforms and security equipment are noncompensable preliminary or postliminary activities under the Portal Act because they are not integral and indispensable to Plaintiffs' principal work activities. *See Perez*, 2015 WL 424394, at *1.

4. On January 15, 2015, the district court granted Defendants' motion. *See Perez*, 2015 WL 424394, at *1. The court stated that, because it agreed that the time spent donning and doffing uniforms and security equipment was not integral

and indispensable to Plaintiffs' work activities, such activities qualified as noncompensable preliminary and/or postliminary activities under the Portal Act. *Id*. Specifically, the court observed that *Steiner v. Mitchell*, 350 U.S. 247 (1956), stands for the proposition that donning and doffing protective gear designed to mitigate the unique safety hazards of a job environment is compensable under the FLSA, but that changing clothes in "not uniquely hazardous" conditions is not. *Perez*, 2015 WL 424394, at *2. It stated that, against this backdrop, this Court in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) concluded that the donning and doffing of "'*generic* protective gear'" – which, in that case, referred to helmets, safety glasses, and steel-toed boots – is equivalent to changing clothes under "'normal conditions'" and thus noncompensable pursuant to *Steiner*. *Perez*, 2015 WL 424394, at *2 (quoting *Gorman*, 488 F.3d at 594) (emphasis added by district court).

The court acknowledged that, according to Plaintiffs, the Park Rangers' responsibilities include law enforcement and public assistance duties. *See Perez*, 2015 WL 424394, at *3. Relying on *Haight v. Wackenhut Corp.*, 692 F. Supp. 2d 339 (S.D.N.Y. 2010), and *Edwards v. City of New York*, No. 08-civ-3134, 2011 WL 3837130 (S.D.N.Y. Aug. 29, 2011), however, the court summarily concluded that the "donning and doffing of uniforms and security equipment is not integral to any of these tasks." *Perez*, 2015 WL 424394, at *3. The court recognized that

making arrests "plausibly bears an integral relationship to security equipment," but dismissed such a relationship as "unavailing." *Id*. Even if Defendants required the donning and doffing to be performed exclusively at work, the court concluded that such a fact was irrelevant in assessing whether the activity is integral to employment. *Id*. at *1 n.5, 3-5.[2] Accordingly, the district court granted summary judgment to Defendants. *Id*. at *5.

5. On February 3, 2015, Plaintiffs timely appealed the court's decision.

SUMMARY OF THE ARGUMENT

The Park Rangers' donning and doffing of their required uniforms and security equipment, such as bullet proof vests and handcuffs, constitutes compensable principal activities that begin and end the continuous workday because the donning and doffing activities are integral and indispensable to the Park Rangers' principal work activities, which include making arrests and assisting the public in emergencies. This Court's ruling regarding the compensability of donning and doffing time in *Gorman*, 488 F.3d 586, a case upon which the district court heavily relied, should be narrowly construed in a manner that is consistent with well-established Supreme Court authority regarding the FLSA's "integral and indispensable" test. Contrary to the interpretation of the district court here and other courts, *Gorman* does not stand for the sweeping proposition that the donning

[2] The court did not resolve the parties' dispute as to whether DPR allows the Park Rangers to change into their gear at home. *See Perez*, 2015 WL 424394, at *1 n.5.

and doffing of "generic" protective gear is not compensable under the Act nor does it broadly hold that donning and doffing is only compensable when an employee's principal work activities are performed in a lethal work environment. If *Gorman* were read broadly in this way, the decision would be fundamentally at odds with decades of Supreme Court precedent.

Even if the district court were deemed to have correctly viewed *Gorman* in a broad light, that decision is distinguishable from the instant case. The district court erred in several significant and reversible ways, such as by concluding that the donning and doffing time is not compensable under the FLSA without conducting a fact-specific analysis of whether such activities are integral and indispensable to the particular work duties that the Park Rangers are employed to perform.

ARGUMENT

I. THIS COURT'S DECISION IN *GORMAN* REGARDING THE COMPENSABILITY OF DONNING AND DOFFING TIME SHOULD BE NARROWLY CONSTRUED IN A MANNER THAT IS CONSISTENT WITH SUPREME COURT PRECEDENT

A. The FLSA's Principal Activity/Integral and Indispensable Requirement

1. The FLSA was enacted in 1938 and generally requires employers to compensate employees for all "hours worked." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003) (internal quotation marks omitted). In 1946, the Supreme Court held that "the statutory workweek" under the FLSA includes "all time during which an employee is necessarily required to be on the employer's premises, on

duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946). As a result, the Court concluded that time spent engaging in "preliminary activities" after arriving at the workplace, including "putting on aprons and overalls, removing shirts, taping or greasing arms, [and] putting on finger cots," constitutes compensable work time. *Id.* at 692-93.

2. Congress viewed the Supreme Court's *Mt. Clemens* decision as "creating wholly unexpected liabilities, immense in amount and retroactive in operation," 29 U.S.C. 251(a), and it enacted the Portal Act the following year to address that "emergency." 29 U.S.C. 251(b); *see* Pub. L. No. 80-49, 61 Stat. 84 (May 14, 1947). For claims arising on or after May 14, 1947, Congress established that employers would not be required to pay their employees for "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" or for "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." 29 U.S.C. 254(a).

The Portal Act thus narrowly excludes certain activities from compensation under the FLSA, but *only* when such activities occur outside the workday, 29 U.S.C. 254(a), which is defined as "the period between the commencement and

completion on the same workday of an employee's principal activity or activities," 29 C.F.R. 790.6(b). This governing principle, known as the "continuous workday" rule, requires employers to compensate employees for *any* activities (except for bona fide meal breaks) that occur between the first and last principal activities of the workday. *See Alvarez*, 546 U.S. at 28. The scope of the Portal Act exclusion therefore depends on the meaning of the term "principal activity."

The Supreme Court has concluded that the term "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." *Steiner*, 350 U.S. at 252-53 (citation omitted); *see Alvarez*, 546 U.S. at 37 ("[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'"). Thus, if the pre- or post-shift donning and doffing of items is integral and indispensable to an employee's principal work activities, then the donning and doffing activities themselves are principal activities that mark the start and the end of the continuous workday. *See Alvarez*, 546 U.S. at 37.

3. In 1947, shortly after the passage of the Portal Act, the Department issued an interpretive bulletin setting forth its views on the proper interpretation of that statute. *See* U.S. Dep't of Labor, *General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, 12 Fed. Reg. 7655

(Nov. 18, 1947).[3] The regulations state that the "'principal' activities referred to in the statute are activities which the employee is 'employed to perform.'" 29 C.F.R. 790.8(a). The plural "activities" is used in the regulations because an employee may "be engaged in several 'principal' activities during the workday," and "[t]he legislative history further indicates that Congress intended the words 'principal activities' to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed." *Id.* Thus, the regulations emphasize that the term "activities" is broad enough to embrace activities that "are indispensable to the performance of productive work," *id.*, and "includes all activities which are an integral part of a principal activity," 29 C.F.R. 790.8(b).

The Department's regulations provide that "changing clothes" may be performed outside the workday and thus may be generally considered a noncompensable "preliminary" or "postliminary" activity. 29 C.F.R. 790.7(g). However, changing clothes "may in certain situations be so directly related to the

[3] This interpretive bulletin, set forth at 29 C.F.R. Part 790, was ratified by Congress in 1949. *See Steiner*, 350 U.S. at 255 n.8. These contemporaneous and longstanding interpretations are entitled to deference because they reflect the considered views of the agency charged with enforcing the FLSA and the Portal Act, and they have been left undisturbed by Congress in its numerous subsequent reexaminations of the FLSA. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *see also Jacobs v. New York Foundling Hosp.*, 577 F.3d 93, 99-100 (2d Cir. 2009).

specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity"' and thus compensable. 29 C.F.R. 790.7(g) n.49. If an employee in a chemical plant could not perform his principal activities without wearing certain clothes, for example, then "changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c) (citing 93 Cong. Rec. 2297-98 (Mar. 20, 1947)). The regulations clarify, however, that if changing clothes "is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c).

4. The Supreme Court's 1956 decision in *Steiner* was based in part on the Department's regulations. *See* 350 U.S. at 255 n.9. In *Steiner*, the Court concluded that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Id*. at 256. The Court in *Steiner* examined the situation of employees working at a battery plant where the chemicals used gave off dangerous toxic fumes, with exposure potentially resulting

in lead poisoning. *Id*. at 249-50. The employer required the workers to change clothes and shower at the end of the shift "to make their plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation." *Id*. at 251. The Supreme Court stated 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." *Id*. at 256. It therefore held that changing into "*old but clean work clothes*" on the employer's premises by the battery plant employees was integral and indispensable to their principal activities and thus the workers should be compensated for such time. *Id.* at 251, 253-56 (emphasis added).

5. In 2005, the Supreme Court reaffirmed this precedent in the context of donning and doffing protective and sanitary equipment in the meat and poultry processing industries. *See Alvarez*, 546 U.S. 21. Although *Alvarez* involved whether the Portal Act excluded the time that employees spent walking to the production area after donning equipment and the time they spent waiting to don and doff such equipment, *id.* at 24, the Court necessarily approved of the Ninth Circuit's conclusion that donning and doffing employer-required gear is integral and indispensable to the employees' principal work activities by concluding that any walking and waiting time that occurs after such donning and before such doffing is compensable, *id.* at 37, 39-40. *See Sandifer v. U.S. Steel Corp.*, 134 S.

Ct. 870, 876 (2014) (explaining that in *Alvarez* "we applied *Steiner* to treat as compensable the donning and doffing of protective gear").

6. More recently, in *Sandifer*, the Supreme Court considered the proper interpretation of the phrase "changing clothes" in FLSA section 3(o). *See* 134 S. Ct. 870.[4] The unionized steelworkers in *Sandifer* donned and doffed protective gear, including a flame-retardant jacket, pants, hood, hard hat, a snood, wristlets, work gloves, leggings, metatarsal boots, safety glasses, earplugs, and a respirator. *Id*. at 874. The Court determined that most of the steelworkers' items qualified as "clothes" for purposes of section 3(o), but that the steelworkers' safety glasses, earplugs, and respirators did not. *Id*. at 879-80. In any event, the Court concluded that the donning and doffing in that case was not compensable pursuant to section 3(o) because the vast majority of the time was spent putting on and taking off "clothes" as the Court defined that term, and the applicable CBA treated such time as noncompensable. *Id*. at 876-81. In reaching this conclusion, the Court explained that the section 3(o) exception applies only to activities that are otherwise compensable because they are integral and indispensable to the employees' principal work activities. *Id*. at 877.

[4] FLSA section 3(o) provides that employers and employees may agree to exclude from compensation any time spent "changing clothes or washing at the beginning or end of each workday" pursuant to the express terms of, or by custom or practice under, a bona fide collective bargaining agreement ("CBA"). 29 U.S.C. 203(o).

7. Finally, this past December, the Supreme Court reaffirmed that it "has consistently interpreted the term 'principal activity or activities' to embrace all activities which are an integral and indispensable part of the principal activities." *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 517 (2014) (internal quotation marks omitted). In that case, the Court examined whether warehouse workers were entitled to compensation for the time that they spent waiting for and undergoing employer-required security screenings at the end of each workday. *Id.* at 515. The Court stated that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities." *Id.* at 517. Pursuant to this interpretation, the Court concluded that the security screenings at issue were noncompensable postliminary activities because they were not integral and indispensable to the workers' principal activities. *Id.* at 518-19. It explained that the fact that the employer required the security screenings alone was insufficient to render such activity compensable. The Supreme Court emphasized that the "integral and indispensable test is tied to the productive work that the employee is *employed to perform*." *Id.* at 519. The Court thus concluded that the security screenings were not an intrinsic element of the workers' principal activities of retrieving products from warehouse shelves and packaging them for shipment and that the employer

could in fact have eliminated the screenings entirely without impairing the employees' ability to complete their work. *Id.* at 518.

B. This Court's Decision in *Gorman* That Pre- and Post-Shift Donning and Doffing Time Was Noncompensable Has Been Broadly and Incorrectly Construed to Conflict with Decades of Supreme Court Precedent.

The district court in this case relied heavily upon this Court's decision in *Gorman*, 488 F.3d 586, in support of its conclusion that the Park Rangers were not entitled to compensation for their donning and doffing time. *See Perez*, 2015 WL 424394, at *2-5. As discussed above, in *Gorman*, this Court held that nuclear power station workers were not entitled to be paid for the time that they spent putting on and taking off helmets, safety glasses, and steel-toed boots because the donning and doffing activities were not integral and indispensable to the workers' principal activities in chemical applications, radiology, maintenance, and the control room. *See* 488 F.3d at 592-95.[5] The district court here and many other courts have broadly construed *Gorman* as standing for the sweeping propositions that (1) donning and doffing is only compensable if the employee's principal work activities occur in a "lethal" work environment, and (2) donning and doffing of "generic" protective gear is per se noncompensable under the FLSA. For the reasons explained below, this broad reading of *Gorman* is incorrect and wholly

[5] *Gorman* also concluded that the time spent by the employees completing ingress and egress security procedures was noncompensable. *See* 488 F.3d at 593-94.

inconsistent with well-established Supreme Court precedent.[6] Accordingly, this Court should clarify that *Gorman* does not stand for such broad propositions and that its holding regarding the compensability of the nuclear plant workers' donning and doffing time is to be narrowly construed in light of the specific facts presented therein.

1. The district court erroneously viewed *Gorman* as holding that donning and doffing time is compensable only if employees' principal work activities occur in "uniquely hazardous" conditions. *Perez*, 2015 WL 424394, at *2.[7] In *Gorman*, this Court explained that *Steiner* supports the view that "when work is done in a lethal atmosphere, the measures that allow entry and immersion into the

[6] The Secretary has previously argued that *Gorman*, if broadly construed, is flatly at odds with decades of Supreme Court decisions. *See* Br. of Sec'y of Labor as Amicus Curiae Supporting Pls. at 13-17, *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350 (4th Cir. 2011) (No. 09-1917), 2010 WL 1130344, at *13-17; Br. of Sec'y of Labor as Amicus Curiae Supporting Defs. Pet. for Panel Reh'g at 3-10, *Pirant v. U.S. Postal Service*, 542 F.3d 202 (7th Cir. 2008) (No. 07-1055). The Secretary's position in this case should not be interpreted as endorsing *Gorman*, but as explained herein, the Secretary believes that *Gorman* can be plausibly and narrowly construed in a way that is generally consistent with Supreme Court authority and the Department's regulations regarding the "integral and indispensable" test.

[7] Many other courts have similarly viewed *Gorman* as interpreting *Steiner* to apply only to donning and doffing in lethal work environments. *See, e.g.*, *Mountaire*, 650 F.3d at 365 (rejecting *Gorman*'s interpretation and concluding that the "*Steiner* test is not confined to the narrow factual circumstances of a lethal manufacturing environment"); *Franklin v. Kellogg Co.*, 619 F.3d 604, 619-20 (6th Cir. 2010) ("The Second Circuit's position appears to be unique."); *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 864 (W.D. Wis. 2007) (*Gorman*'s view of *Steiner* "is truly bizarre").

destructive element may be integral to all work done there." 488 F.3d at 593. *Gorman* did not, however, hold that donning and doffing is compensable *only* when the workers' principal activities occur in a highly hazardous work environment. Such a conclusion would be unsupported by *Steiner* because the Supreme Court gave no indication that it intended to limit its holding to lethal environments. Moreover, such an interpretation would be in tension with the Court's recent decision in *Integrity Staffing*.

In *Integrity Staffing*, the Supreme Court cited with approval its prior holding in *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956), in which the Court held that the pre- and post-shift time that meatpackers spent sharpening their knives was integral and indispensable to their principal butchering activities "because dull knives would slow down production on the assembly line, affect the appearance of the meat as well as the quality of the hides, cause waste, and lead to accidents." *Integrity Staffing*, 135 S. Ct. at 518 (internal quotation marks omitted). Notably, the Court in *Integrity Staffing* did not consider whether the warehouse was a lethal work environment in analyzing whether the post-shift security screenings were compensable. *Id.* at 518-19. Although *Integrity Staffing* and *King Packing* were not donning and doffing cases (and did not specifically address lethality), there is no reason to believe that a heightened "lethal workplace" standard should apply to

the analysis of whether pre- and post-shift activities are integral and indispensable to workers' principal activities.

The hazardous nature of employees' work duties may certainly be relevant in evaluating whether particular pre- or post-shift activities are necessary to performing such duties safely and effectively, but the integral and indispensable analysis does not require a workplace to be uniquely dangerous for such activities to be compensable. Indeed, this Court itself has recognized in other contexts that pre- and post-shift activities are compensable when integral and indispensable to principal work activities even when such activities do not occur in a highly dangerous work environment. *See, e.g., Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 715-19 (2d Cir. 2001) (pre-shift activities of powering up and testing an x-ray processing machine integral and indispensable to principal activities of a radiologist technician); *Reich v. New York City Transit Authority*, 45 F.3d 646, 648-52 (2d Cir. 1995) (pre- and post-shift feeding, training, walking, and cleaning up after K-9 dogs integral and indispensable to principal activities of police canine unit handlers).

2. The *Gorman* decision has also been erroneously construed as standing for the broad proposition that the donning and doffing of "generic" protective gear is not compensable. *See, e.g.*, *Perez*, 2015 WL 424394, at *2-3; *Edwards*, 2011 WL 3837130, at *7; *Haight*, 692 F. Supp. 2d at 344-45. In *Gorman*, this Court used the

term "generic" to describe the workers' helmets, glasses, and steel-toed boots. 488 F.3d at 594.[8] This Court in *Gorman* stated that the "donning and doffing of such generic protective gear is not different in kind from 'changing clothes and showering under normal conditions,' which, under *Steiner*, are not covered by the FLSA." *Gorman*, 488 F.3d at 594 (quoting *Steiner*, 350 U.S. at 249). *Gorman* further noted that the donning and doffing of generic protective gear is "not rendered integral by being required by the employer or by government regulation." *Id*.

Gorman thus concluded that generic protective gear worn by workers is not compensable if it is donned and doffed in normal conditions. In discussing the meaning of "normal conditions," *Gorman* relied upon *Steiner* and the Department's regulations at 29 C.F.R. 790.7(g). *See Gorman*, 488 F.3d at 594. The regulations at 29 C.F.R. 790.7(g) acknowledge that clothes changing, "when performed under the conditions normally present," would be a noncompensable preliminary or postliminary activity under the Portal Act. The Department's regulations thus make clear that under "normal conditions" the pre- or post-shift activity of donning and doffing is not integral and indispensable to the worker's principal activities. The regulations further note, however, that changing clothes "may in certain situations be so directly related to the specific work the employee

[8] *Gorman* used the term "generic" twice in dicta, 488 F.3d at 594, but did not opine on the meaning or relevance of that term.

is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'" 29 C.F.R. 790.7(g) n.49.

Moreover, *Steiner* itself cannot be said to stand for the proposition that the donning and doffing of "generic" protective gear is not compensable because in that case the Supreme Court held that the time that battery plant workers spent donning and doffing their "old but clean work clothes" was integral and indispensable to their principal activities. 350 U.S. at 251, 256. It is difficult to imagine an item that would be considered more "generic" than old clean work clothes. Because *Gorman* explicitly relied upon both *Steiner* and the Department's regulations, that decision should be fairly interpreted in a manner that is consistent with such authorities.

Indeed, a broad construction of *Gorman* as holding that the donning and doffing of "generic" protective gear is per se noncompensable under the FLSA would also be flatly at odds with Supreme Court precedent subsequent to *Steiner*. The Supreme Court in *Alvarez* strongly suggested that the "generic" or "unique" nature of gear is not dispositive in determining whether donning and doffing time is compensable. *See* 546 U.S. at 32 (noting that, although the Ninth Circuit had endorsed a distinction between donning and doffing elaborate protective gear and "nonunique" gear such as hardhats and safety goggles, it did so "not because donning and doffing nonunique gear are categorically excluded from being

'principal activities' as defined by the Portal-to-Portal Act").[9] More recently, in *Sandifer*, the Supreme Court evaluated whether FLSA section 3(o) applied to the items worn by steelworkers, which included helmets, safety glasses, and steel-toed boots – the *precise* items described as "generic" in *Gorman*. *See Sandifer*, 134 S. Ct. at 874. Although the predicate issue of whether such items were integral and indispensable was not directly before the Court, the Court did note that "[b]ecause this donning-and-doffing time would otherwise be compensable under the Act, U.S. Steel's contention of noncompensability stands or falls upon the validity of a provision of its collective-bargaining agreement with petitioners' union, which says that this time is noncompensable." *Id.* at 874, 876. These cases suggest that *Gorman* cannot stand for the sweeping proposition that putting on and taking off "generic" protective gear is noncompensable as a matter of law.

3. Finally, to the extent that courts have relied upon *Gorman* for the conclusion that the "'relatively effortless'" nature of donning and doffing is a factor to be considered in evaluating whether such time is integral and

[9] The Department has thus consistently taken the position that the "generic" nature of gear worn by workers is wholly irrelevant to the analysis of whether such donning and doffing time is compensable. *See, e.g.*, Wage and Hour Advisory Memorandum No. 2006-2, at 3 (May 31, 2006) ("Advisory Memo 2006-2"), *available at* http://www.dol.gov/whd/FieldBulletins/AdvisoryMemo2006_2.pdf. Several courts of appeals have similarly rejected the relevance of the "generic" nature of items worn by workers. *See Mountaire*, 650 F.3d at 366; *Bamonte v. City of Mesa*, 598 F.3d 1217, 1232 (9th Cir. 2010); *Alvarez*, 339 F.3d at 903; *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994); *but see Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App'x 448, 454 (5th Cir. 2009).

indispensable, *Albrecht v. Wackenhut Corp.*, No. 07-cv-6162, 2009 WL 3078880, at *7 (W.D.N.Y. Sept. 24, 2009) (quoting *Gorman*, 488 F.3d at 594), such a view must be rejected as inconsistent with Supreme Court precedent.[10]

As evidenced by the Court's reasoning in both *Integrity Staffing* and *Sandifer*, neither the amount of gear worn nor the amount of effort involved in putting on or taking off such items renders donning and doffing noncompensable if it would otherwise qualify as integral and indispensable. In *Integrity Staffing*, the Court stated that the "fact that an employer could conceivably reduce the time spent by employees on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform." 135 S. Ct. at 519. The Court thus suggested that the amount of time it takes to perform a pre- or post-shift activity is not relevant to the determination of whether such time is integral and indispensable to the workers' principal activities. *Id*. Similarly, in *Sandifer*, the Supreme Court concluded that the "*de minimis* doctrine does not fit comfortably within the statute at issue here, which, it can fairly be said, is *all about* trifles—the relatively insignificant periods of time in which employees wash up and put on various items

[10] Although *Gorman* did note that the donning and doffing at issue in that case was "'relatively effortless,'" 488 F.3d at 594 (citation omitted), this Court does not appear to have addressed the relevance of the amount of time in its holding that the donning and doffing was not integral and indispensable.

of clothing needed for their jobs." 134 S. Ct. at 880. The Court determined that the "*de minimis non curat lex*" doctrine should not be applied to FLSA section 3(o) because that provision "requires courts to select among trifles" in evaluating the compensability of changing-clothes time. *Id.*[11] Because section 3(o) only applies to time that qualifies as integral and indispensable to the workers' principal activities, *id.* at 877, it follows that donning and doffing can be an "integral and indispensable" activity even when it may be deemed to be de minimis. In fact, *Gorman* itself seemed to recognize this principle in the context of its analysis of the compensability of time spent undergoing security procedures, explaining that "the text of the [Portal Act] does not depend on . . . how much time such preliminaries may consume." 488 F.3d at 593.

For these reasons, this Court should narrowly construe *Gorman* in a manner that is consistent with decades of Supreme Court precedent examining the FLSA's "integral and indispensable" test. However, as explained below, in the event that this Court agrees with the broad view of *Gorman* advanced by the district court and other courts, the instant case is distinguishable from that decision.

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[11] As noted by the Supreme Court, the Department has adopted a "stricter *de minimis* standard," *Sandifer*, 134 S. Ct. at 880 n.8, that allows employers to avoid paying for trivial amounts of otherwise compensable aggregated time in certain limited circumstances. *See* 29 C.F.R. 785.47. However, a determination as to whether an activity is integral and indispensable is a prerequisite to application of the de minimis doctrine.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TIME SPENT BY PARK RANGERS DONNING AND DOFFING THEIR UNIFORMS AND SAFETY EQUIPMENT WAS NOT "INTEGRAL AND INDISPENSABLE" TO THEIR PRINCIPAL WORK ACTIVITIES

In the instant case, the district court erred in two significant and reversible ways: (1) by incorrectly focusing on and determining that the items donned and doffed by the Park Rangers qualified as "generic protective gear," and (2) by failing to conduct a proper fact-specific analysis of whether the donning and doffing was integral and indispensable to the Park Rangers' principal work activities.

1. By relying on a broad view of *Gorman*, the district court erred in treating the non-statutory phrase "generic protective gear" as the governing standard for determining whether donning and doffing qualifies as an integral and indispensable part of the principal activities for which the employee is employed to perform. *Perez*, 2015 WL 424394, at *2-3. As discussed above, that view of *Gorman* is incorrect and the determination of whether an item qualifies as "generic" is wholly irrelevant to the integral and indispensable test. In any event, it is clear that the Park Rangers' uniforms and security equipment do *not* qualify as "generic" in nature.

The Park Rangers are required to wear a variety of very specific and unique items of clothing and equipment, including a DPR uniform, bullet proof vest, and utility belt holding items such as handcuffs and mace. Such clothing and

equipment are not commonly worn by workers in most industries; in fact, the uniforms are not even transferrable to other park ranger positions throughout the country due to their DPR-specific features. DPR itself highlights the special nature of the outfits on its website, where it informs the public, "You can spot a [Parks Enforcement Patrol] officer by their *distinct* all-green uniforms and *unique* special patrolmen shields (allowing them to issue summonses and make arrests when needed) as they patrol all five boroughs." DPR, Parks Enforcement Patrol, http://www.nycgovparks.org/about/urban-park-service/park-enforcement-patrol (last visited June 11, 2015) (emphases added). Accordingly, the items can be easily distinguished from the more ubiquitous and transferrable hard hats, boots, and glasses worn by the workers in *Gorman*.[12]

2. By focusing so heavily on the "generic" nature of the Park Rangers' gear, the district court further erred by failing to conduct a proper analysis of whether the time spent by the Park Rangers donning and doffing their uniforms and equipment was integral to, or an "'intrinsic element'" of, their work activities. *Perez*, 2015 WL 424394, at *1, 3 (quoting *Integrity Staffing*, 135 S. Ct. at 519). *Integrity Staffing* requires courts to determine the specific job duties that

[12] Moreover, as explained above, *Gorman* does not stand for the sweeping proposition that donning and doffing is compensable only in a lethal environment. Even if such a broad view of *Gorman* is affirmed by this Court, the Park Rangers arguably do work in a dangerous occupation as evidenced by the fact that they must wear protective items such as a bullet proof vest.

employees perform and then to evaluate whether the donning and doffing is an intrinsic element of such principal work activities. *See* 135 S. Ct. at 519 (the "integral and indispensable test is tied to the productive work that the employee is *employed to perform*"). However, in this case, the court simply cited two district court decisions holding that security workers were not entitled to compensation for donning and doffing time and summarily concluded that the items donned and doffed here were similarly not an intrinsic element of the Park Rangers' duties. *See Perez*, 2015 WL 424394, at *3. Such an analysis is wholly insufficient.

The district court accepted that the Park Rangers' principal work activities include public assistance and law enforcement duties. *See Perez*, 2015 WL 424394, at *3. A recent DPR job posting for a Park Ranger position identifies several additional "major responsibilities" of the job, including "perform[ing] patrols of park facilities as part of a *highly visible uniformed division*." DPR, Citywide Job Vacancy Notice for Urban Park Ranger, *available at* http://www.nycgovparks.org/sub_opportunities/employment/pdf/2014/june/PEP_Officer_-_start_0714__28EXTERNAL_29.pdf (June 27, 2014) (emphasis added); *see* Decl. of Poelz-Giga, A-194 ("Parks Department supervisors frequently tell [Park Rangers] that our role is to be a highly visible uniformed presence in New York City").

The donning and doffing of the Park Rangers' uniforms is integral to these principal work activities because the uniforms are so closely linked to the Park Rangers' public assistance and law enforcement responsibilities that they are fairly deemed to be an intrinsic element of such duties. The Park Rangers' highly recognizable uniforms are an intrinsic element of their patrol duties because they create a publicly visible law enforcement presence that deters crime and places the Park Rangers in a position to be approached by citizens needing aid. *See Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1204 (N.D. Cal. 2007) ("The components of the police uniform trigger instant recognition of police officers. Along with this identification comes deference to the authority of police officers, which is essential to the efficient performance of police work.").

Similarly, the donning and doffing of the Park Rangers' security equipment is integral to the performance of their principal duties because it is closely related to the core purpose of their employment. Wearing a bullet proof vest and carrying handcuffs, for example, are intrinsic features of making arrests. Similarly, carrying mace is integrally linked to aiding individuals who are being victimized by crime or making arrests.

The donning and doffing here is thus akin to the integral and indispensable donning and doffing at issue in *Steiner* and *Alvarez* because the items worn by the Park Rangers are intrinsically related to their principal work activities. Moreover,

unlike in *Integrity Staffing* where the employer "could have eliminated the [security] screenings altogether without impairing the employees' ability to complete their work," 135 S. Ct. at 518, the donning and doffing activities here cannot be dispensed with if the Park Rangers are to perform their jobs effectively and safely, *see id.* at 520 (Sotomayor, J., concurring). The Park Rangers' donning and doffing thus qualify as compensable principal activities that begin and end the continuous workday. *See Lesane v. Winter*, 866 F. Supp. 2d 1, 6-7 (D.D.C. 2011) (the donning and doffing of police officers' gear, including a "duty belt," mace, handcuffs, and ballistics vest, is integral and indispensable to the officers' work duties "since it directly aids them in dealing with suspects, protecting [the worksite], and protecting the officers themselves").

3. Finally, the district court observed that, if donning and doffing is not integral and indispensable to a principal work activity, the fact that it must be conducted at the worksite does not render such time compensable. *See Perez*, 2015 WL 424394, at *3. The court accurately observed that the Department's regulations do not stand for the proposition that donning and doffing is always integral and indispensable if performed on the employer's worksite.[13] However,

[13] The court strongly criticized the Department's regulations as "flatly at odds with the logic of the relevant case law." *Perez*, 2015 WL 424394, at *4. However, those regulations were expressly and repeatedly affirmed in *Integrity Staffing* as "consistent with" the Supreme Court's interpretation of the integral and indispensable test. 135 S. Ct. at 517, 518.

the Department notes that the location of donning and doffing can be relevant when it *is* integral and indispensable to the worker's principal activities. The Department's longstanding position is that "if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." Advisory Memo 2006-2, at 3; *see* Wage and Hour Division Field Operations Handbook (1996) ¶ 31b13, *available at* http://www.dol.gov/whd/FOH/index.htm; *Bamonte*, 598 F.3d at 1228-33; *Adams v. Alcoa, Inc.*, 822 F. Supp. 2d 156, 163-64 (N.D.N.Y. 2011).[14]

[14] To be clear, the time spent donning and doffing is not compensable if the Park Rangers had the *meaningful* option and ability to don and doff at home. *See* Advisory Memo 2006-2, at 3. Even if DPR had a policy allowing such activities to occur at home, the workers would still not have a meaningful ability to don and doff at home where the record reflects that application of such policy was illusory or discouraged by management or where the nature of the work necessitated donning and doffing at the workplace. *See, e.g.*, *Mountaire*, 650 F.3d at 368.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

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Dated: June 15, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2015, I electronically filed the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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