No. 23-954

IN THE

Supreme Court of the United States

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

v.

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

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, looking to the factors identified in this Court's case law and recognized by other courts of appeals, the Third Circuit correctly held that whether Respondents' changing into protective gear was "integral and indispensable" to productive work, and thus compensable under the Fair Labor Standards Act, depends on the resolution of disputed facts, precluding summary judgment.

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INTRODUCTION

Respondents Rodney Tyger and Shawn Wadsworth work in dangerous conditions on gas and oil drilling platforms. To reduce the risk of a range of injuries, including toxic chemical exposure, burns, and injuries from falling objects, they are required by law and under their employers' policies to wear a variety of protective gear while performing this work. Their employers, Petitioners here, do not pay them for the time needed to change into and out of this gear at on-site facilities.

The parties agree that the question whether, under the Fair Labor Standards Act and Portal-to-Portal Act, Petitioners are required to pay Respondents for the time spent donning and doffing the protective gear turns on whether doing so is "integral and indispensable" to Respondents' principal work activities. In this case, the Third Circuit, looking to the factors that this Court, the Department of Labor (DOL), and other courts of appeals have identified as relevant to that inquiry, concluded that factual disputes precluded summary judgment on the question whether the donning and doffing at issue meets the integral and indispensable standard. The Third Circuit thus remanded the case to the district court for resolution of the factual disputes.

Nothing about the Third Circuit's interlocutory decision warrants review. The factors that the Third Circuit gleaned from this Court's precedent are the same factors that courts of appeals across the country have looked to in the few donning and doffing cases that have arisen since 2014, when this Court last addressed the "integral and indispensable" standard. That, on the facts of individual cases, application of

these factors has yielded different conclusions is not evidence of a disagreement among the lower courts necessitating this Court's review.

Petitioners argue that the Third Circuit should have focused solely on whether the protective gear at issue is designed to combat risks associated with a particular job that "transcend ordinary risks." Such a test has no connection to the statutory language or this Court's precedent addressing the integral and indispensable standard. And to the extent that the Second Circuit in one decision announced such a test and suggested a bright-line rule, that court has since taken a more flexible, fact-intensive, multifactor approach that does not substantially differ from that of the other circuits, including the Third Circuit in this case. Applied in this case, that approach would yield the same outcome as the decision below.

Petitioners suggest that the Third Circuit's decision will lead to all protective gear being deemed integral and indispensable. Nothing in the decision below supports that suggestion, however. In fact, the Third Circuit did not even find the protective gear at issue in *this* case integral and indispensable, but rather found that outstanding disputed factual issues were relevant to that question. That the contested record here means that the case goes to a factfinder does not present a reason for further review at this interlocutory stage. To the contrary, the presence of factual disputes on which Petitioners' may prevail at trial is a reason to deny certiorari.

STATEMENT OF THE CASE

Statutory background

In 1938, Congress enacted the Fair Labor Standards Act (FLSA), which requires employers to

pay a minimum hourly wage and overtime compensation for certain work. 29 U.S.C. §§ 206, 207. In 1947, Congress enacted the Portal-to-Portal Act (PTPA), which specifies that employers are not required to pay workers for two categories of 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,
>
> 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).

Since then, this Court 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 Sols., Inc. v. Busk*, 574 U.S. 27, 33 (2014) (cleaned up) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29–30 (2005) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 252–53 (1956))). Most recently, the Court explained that an activity is "integral and indispensable to the principal activities that an employee is employed to perform," and thus compensable under the FLSA, "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.* This Court has "identified several activities that satisfy this test," including time spent showering and

changing clothes due to exposure to toxic chemicals, and time spent sharpening knives to avoid accidents. *Id.* at 34 (citing *Steiner*, 350 U.S. at 249, 251; *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956)).

Factual background

Respondents, along with approximately 1,000 opt-in plaintiffs, are current and former rig hands who worked for Petitioners on oil and gas drilling platforms. This work is dangerous, exposing the workers to several risks. First, they face "mechanical risks," including damage to their eyes from exposure to metal, dirt, and dust; to their hands from burns, blisters, bruising, scratching, and pinching; to their hearing from workplace noise; and to their skulls, brains, and other body parts due to falling objects, including drill pipes weighing approximately 500 pounds per joint, and drill collars weighing from 2,700 to 5,000 pounds. 3d Cir. App. 153–54, 521. Second, there are "fire and burn risks," which can arise from blowouts, flash fires, and the cementing process. *Id.* 154–56. Third, there are risks associated with Respondents' "exposure to drilling fluids and hazardous materials," which can cause significant damage to the skin, lungs, eyes, and other organ systems. *Id.* 156–64.

Pursuant to both federal Occupational Safety and Health Administration regulations and Petitioners' own policies, Respondents are required to wear various forms of employer-provided protective gear while working on the rigs, including flame-retardant coveralls, steel-toed boots, gloves, goggles, hardhats, and earplugs. *Tyger v. Precision Drilling Corp.*, 832 F. App'x 108, 110 (3d Cir. 2020). This gear reduces risks from "electrical shock, falling objects, flying debris,

slippery surfaces, and chemical exposure." *Id.* While Respondents work, their protective gear "becomes covered with drilling mud, grease, lubricants, and caustic chemicals"; by covering the workers' skin, the gear reduces Respondents' "risk of exposure to those substances." *Id.*; *see also* 3d Cir. App. 526.

Respondents don this gear at a change house on the rig at the start of each twelve-hour shift. Pet. 8.[1] They must remove this gear at the end of their shift, because they are prohibited from bringing dirty gear home. 3d Cir. App. 165–70. Petitioners generally do not pay Respondents for the time spent donning and doffing this protective gear, or for the associated time spent "walking back and forth between where they change and where they work." Pet. 34a.

Proceedings below

Respondents filed this action in 2011, and the district court certified it as a FLSA collective action in 2013. In 2019, the court granted summary judgment to Petitioners. The court held that, because Respondents had failed to produce admissible expert testimony to establish that the gear was specifically designed to guard against workplace dangers that "transcend ordinary risks," they had not established the donning and doffing activities were integral and indispensable. *See Tyger*, 832 F. App'x at 111, 114.

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[1] Petitioners present an alternate version of the facts, Pet. 8–9, but the Third Circuit explicitly found a genuine dispute as to "how many rig hands change at work and why." Pet. 12a. Given the procedural posture, that (and every other) factual dispute is to be resolved in Respondents' favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

On appeal, the Third Circuit vacated the grant of summary judgment. The court of appeals explained that whether a given activity is integral and indispensable to an employee's principal activity "across various work settings is inherently flexible and context-specific." *Id.* at 114. Further, it held that "the FLSA integral and indispensable inquiry does not require that Plaintiffs establish a causal link between occupational hazards and medical harm," and thus does not require expert testimony. *Id.* Rather, "a plaintiff may attempt to satisfy the integral and indispensable requirement with lay witness testimony and documentary evidence concerning worksite safety risks and the nature of the job and PPE [(personal protective equipment)] at issue—evidence which [Respondents] have produced in this case." *Id.*

On remand, the district court, reading the court of appeals' opinion to endorse its use of a "transcendent risk" test, again granted summary judgment to Petitioners. Pet. 14a, 60a, 62a. Despite competing evidence as to the nature of the hazards faced by rig hands, the court concluded that these risks were "ordinary, hypothetical, or isolated," and that the protection the gear provided against these risks was "so-so." *Id.* 84a–85a. Therefore, it held that changing into and out of that gear was noncompensable. *Id.* 85a.

Respondents again appealed. The Secretary of Labor filed a brief as amicus curiae in support of reversal, arguing both that the district court was wrong to adopt a transcendent-risk test and that, even if the test were correct, the court had applied it incorrectly based on the record in the case. *See* 3d Cir. Dkt. 19. The Third Circuit again unanimously reversed. In its opinion, the Court reaffirmed that the inquiry as to whether changing into and out of

particular gear is integral and indispensable "is fact-intensive and not amenable to bright-line rules." Pet. 7a (quoting *Llorca v. Sheriff,* 893 F.3d 1319, 1324 (11th Cir. 2018)). It nonetheless identified "several guideposts from the statutes and caselaw that should guide trial courts." *Id.*

First, the court recognized that "statutory text and precedent give us three key factors to consider" in determining whether "changing gear is integral." *Id.* One such factor is location—the recognition that "[i]t matters where workers change." *Id.* Where workers do not "have a 'meaningful option' to change at home," "changing is more likely to be integral to the work." *Id.* 8a (quoting *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 368 (4th Cir. 2011)). In support of this conclusion, the court pointed to the etymology of the statutory terms "preliminary" and "postliminary," as well as to Justice Sotomayor's concurrence in *Busk*; decisions from the Second, Fourth, Ninth, and Eleventh Circuits; and a DOL interpretive rule. Pet. 7a–8a (citing, among others, *Busk*, 574 U.S. at 38 (Sotomayor, J., concurring); *Llorca*, 893 F.3d at 1325–26 & n.5; *Perez v. City of New York*, 832 F.3d 120, 125 (2d Cir. 2016); *Mountaire Farms*, 650 F.3d at 368; *Bamonte v. City of Mesa*, 598 F.3d 1217, 1225–33 (9th Cir. 2010); and 29 C.F.R. § 790.8(c) n.65).

Next, citing *Steiner* and DOL interpretations, the court explained that "regulations, especially specific regulations, suggest that gear is integral." *Id.* 8a–9a (discussing 350 U.S. at 250–51 and 29 C.F.R. § 790.8(c) n.65).

Finally, the court identified as relevant "what kind of gear is required," reasoning that "the more specialized the gear, the more likely it is integral." *Id.* 9a

(citing *Perez*, 832 F.3d at 127). It explained, though, that "even generic gear can be intrinsic," citing *Steiner* and the decisions of other courts of appeals, including the Second Circuit, which have disavowed any contrary bright-line rule. *Id.* (citing *Steiner*, 350 U.S. at 251, 256; *Perez*, 832 F.3d at 127; *Mountaire Farms*, 650 F.3d at 366; and *Reich v. IBP, Inc.*, 38 F.3d 1123, 1125 (10th Cir. 1994)).

Turning to the question what makes an activity "indispensable" to a principal activity, the Third Circuit recognized this Court's previous holdings that an activity "need not be strictly necessary, just reasonably so." *Id.* 10a (discussing *Steiner*, 350 U.S. at 249–50; *King Packing Co.*, 350 U.S. at 262). As such, it adopted the definition contained in Justice Sotomayor's *Busk* concurrence: "[a]n activity is 'indispensable … only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively.'" *Id.* 10a (quoting 574 U.S. at 37–38).

This "multifactor approach," the court explained, "mirrors those of most of [its] sister circuits." *Id.* 10a–11a (citing *Franklin v. Kellogg Co.*, 619 F.3d 604, 619–20 (6th Cir. 2010) (collecting cases)). Nonetheless, the court recognized Second Circuit case law relied upon by the district court that "focuses on whether protective gear guards against risks that 'transcend ordinary' ones," but explained that such an "extraordinary-risk test" was "far afield from the statutory terms 'preliminary' and 'postliminary' as well as the Supreme Court's terms 'integral' and 'indispensable,'" all of which "involve more than just specialized risks." *Id.* 11a (quoting *Perez*, 832 F.3d at 127). The court also rejected Petitioners' argument that the multifactor approach would "require paying

all industrial workers for changing into *any* safety gear," particularly given this Court's *de minimis* doctrine. *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692–93 (1946)).

Applying the multifactor approach to the record in this case, the Court found "genuine factual disputes" precluded summary judgment for either party, including (1) "how many rig hands change at work and why"; (2) whether changing on the rig is "required by law, by [Petitioners'] rules …, or by the nature of the work," or is "merely a convenience to the employee"; (3) whether it is "industry custom for rig hands to change onsite"; and (4) whether any time spent changing was *de minimis*. Pet. 12a. The court thus vacated the district court's judgment and remanded for trial.

REASONS FOR DENYING THE WRIT

I. The courts of appeals all consider similar factors when applying the "integral and indispensable" standard to donning and doffing.

The courts of appeals, DOL, and the parties all agree that whether time spent donning and doffing is compensable under the FLSA turns on whether that activity was integral and indispensable. Petitioners do not ask the Court to reconsider *Busk*, *Steiner*, or any of the other cases that make that proposition clear.

Rather, Petitioners ask the Court to determine whether the sole factor in determining whether donning and doffing protective gear satisfies the integral and indispensable standard is whether the gear at issue protects against "job-specific hazards that transcend ordinary risks." Pet i; *see also id.* at 1. In the few post-*Busk* cases involving doffing and

donning, however, the courts of appeals have consistently recognized that whether donning and doffing particular gear is integral and indispensable is not well-suited to bright-line rules, and is to be assessed based upon a variety of factors, including the factors identified by the Third Circuit in this case. The only court of appeals to incorporate the concept of "transcendent risk" in its analysis has, in its sole post-*Busk* decision, stepped back from its earlier approach and applied a multi-factor inquiry. As such, the result in this case would be the same in any circuit.

A. There is no meaningful conflict between the Second Circuit's approach and the approach of the Third Circuit here.

Petitioners argue that the Third Circuit should have adopted the "bright-line test" adopted by the Second Circuit. Pet. 11. The Second Circuit, however, does not apply a bright-line test. To the contrary, in its sole post-*Busk* donning and doffing decision, the Second Circuit held that the inquiry is "markedly fact-dependent" and turns on consideration of "several" factors similar to those relied on by the Third Circuit in this case. *Perez*, 832 F.3d at 124 (quotation marks omitted). And like the Third Circuit in this case, the Second Circuit determined that the application of that inquiry to protective gear entailed factual disputes to be resolved by a factfinder. *Id.* at 125–27.

1. The notion that only gear that protects against "transcendent risk" can be integral and indispensable derives from a pre-*Busk* decision, *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007). There, the Second Circuit considered whether various tasks performed by nuclear plant employees were integral and indispensable to their work. The court

stated that *Steiner* stood for the narrow proposition "that when work is done in a lethal atmosphere, the measures that allow entry and immersion into the destructive element may be integral to all work done there." *Id.* at 593. The court then summarily concluded that time spent changing into and out of "helmet[s], safety glasses, and steel-toed boots" was not integral to the plaintiffs' tasks as it was "not different in kind" from "changing clothes and showering under normal conditions," and was "relatively effortless." *Id.* at 594. The court did not discuss the risks that the gear was designed to protect against.

In the nearly seventeen years since the case was decided, the Second Circuit has applied *Gorman*'s protective-gear holding only once. In that case, *Perez*, 832 F.3d 120, the Second Circuit substantially "walked [] back" the *Gorman* decision. Pet. 64a. *Perez* addressed whether the plaintiffs' donning and doffing of uniforms was integral and indispensable to their principal activities as park rangers. The Second Circuit began by identifying "several considerations that may serve as useful guideposts for … application" of the "markedly fact-dependent" integral and indispensable standard. *Id.* at 124 (quotation marks omitted). Those factors included whether the activity is undertaken for the employer's benefit, whether employees have a choice in the matter, and whether the employer "require[s] that that pre- or post-shift activities take place at the workplace." *Id.* The court also noted that "pre- and post-shift efforts to protect against heightened workplace dangers can qualify as integral and indispensable," citing *Steiner*, *Gorman*, and *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), which held that the donning and doffing of hard hats

and safety goggles was integral and indispensable to butchers' work. *Id.* at 124–25.

In adopting this multi-factor analysis, the Second Circuit held that the district court had "misconstrued *Gorman*" as establishing a "categorical rule" that "generic protective gear" never satisfied the integral and indispensable standard. *Id.* at 127. The generic nature of the gear at issue in *Gorman*, the court explained, was probative to the "ultimate conclusion" but "did not *establish* [it], as a matter of law." *Id.* Noting that *Steiner* itself "demonstrates [that] items as generic as a shower and a change of clothes" can be integral and indispensable, the Second Circuit clarified that the determination whether gear guards against dangers that "'transcend ordinary risks'" requires a "fact-intensive examination of the gear at issue, the employee's principal activities, and the relationship between them." *Id.* (quoting *Gorman*, 488 F.3d at 593).

Applying these principles to the case before it, the Second Circuit vacated the district court's grant of summary judgment and held that it was for a factfinder to determine whether the plaintiffs' donning and doffing of a bulletproof vest was integral and indispensable. *Id.* at 125. In so doing, the court noted that the risk of sustaining gunfire was not an "ordinary risk of employment," but it did not suggest that how pervasive that risk was in the plaintiffs' work, or how effective the vests were in ameliorating the risk, was relevant to what a jury would need to consider at trial. *Id.*

2. As *Perez* makes clear, the approaches of the Second and Third Circuit do not actually conflict. Both circuits require the consideration of similar factors in

assessing the question whether protective gear is integral and indispensable to an employee's job. *Compare* Pet. 7a–9a (requiring consideration of where workers change, whether workers are required to wear the gear, and the type of gear involved), *with Perez*, 832 F.3d at 124–25, 127 (requiring consideration of where workers change, whether workers may choose not to wear the gear, and the type of gear involved).[2] The Second Circuit considers "the relationship between" the gear and a plaintiff's job duties to determine whether the gear protects against more than the "ordinary risk[s] of unemployment." *Perez*, 832 F.3d at 125, 127. The Third Circuit considers similar concepts, directing district courts to consider evidence that "link[s] that gear to the work being done" and whether the gear is "reasonably necessary for doing the work safely and well." Pet. 9a–10a, 12a. Consideration of these factors will rarely, if ever, allow workers to obtain compensation for donning clothing that protects against the incidental, routine risks associated with holding any job, which is all that *Perez* forbids. Both courts properly focus on how the gear enables an employee to perform his work.

3. Given the overlap of the factors applied by the Second and Third Circuits, it is unsurprising that Respondents' claims would survive summary judgment under both the decision below and *Perez*. The Second Circuit requires that the gear protect against

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[2] The decisions that the Third Circuit cited, at Pet. 11a, for the proposition that other circuits had rejected the Second Circuit's "extraordinary-risk test" as too "narrow" all pre-dated *Perez*.

hazards more serious than the "routine" risks that are "commonplace" in employment generally. *Perez*, 832 F.3d at 127. The record easily creates a genuine dispute of material fact on this question. As the court of appeals noted, respondents "face risks of fire, crushed toes, flying debris, electric shock, and chemical exposure." Pet. 4a; *see also supra* pp. 4–5 (further detailing the risks that respondents face). And the protective gear respondents are required to wear provides at least some protection against these risks. Pet. 79a–81a, 83a. The record precludes a finding that the risks are "ordinary" as a matter of law.

The district court, purporting to apply the Second Circuit's test, ruled otherwise. However, its decision was based on both a misinterpretation of that test, and a misapplication of the summary judgment standard, as DOL explained in detail in its Third Circuit amicus brief. *See* 3d Cir. Dkt. 19 at 23–29.[3] The district court not only resolved disputed facts; it held that plaintiffs were required to show that they actually suffered harm on a sufficiently frequent and widespread basis in the past *and* that the gear they wore eliminated all such risk. *See, e.g.*, Pet. 76a (faulting plaintiffs for failing to demonstrate that "workers across-the-board experienced deafness"); 83a (finding that donning and doffing of head-to-toe coveralls was not integral and indispensable because coveralls "reduce" but do not eliminate risk of chemical exposure). The Second Circuit has not required

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[3] Petitioners assert that "the Third Circuit did not dispute that dismissal would be appropriate" under the transcendent-risk standard. Pet. 20. A more accurate statement is that the Third Circuit did not address that question at all.

evidence of this character to survive summary judgment. To the contrary, *Perez* held that a protective-gear claim survived summary judgment without considering *any* evidence of risk, let alone evidence of how many park rangers had been previously injured by gunfire. 832 F.3d at 125.

B. The decision below is consistent with the decisions of the other courts of appeals.

No court of appeals has adopted Petitioners' proposed test. Rather, the other courts of appeals, like the Third Circuit here, have emphasized the fact-specific nature of the inquiry. And the other courts of appeals, like the Third Circuit, reject bright-line requirements in favor of an inquiry that examines the location where donning and doffing occurs, whether the gear was required by law to perform the principal activity, and the type or nature of the gear at issue.

1. Other than the Second Circuit's decision in *Perez*, only two other courts of appeals decisions since *Busk* have addressed whether donning and doffing was integral and indispensable. Neither of those cases conflicts with the Third Circuit's decision.

First, in *Llorca*, the Eleventh Circuit held that donning and doffing of certain gear *at home* was a preliminary activity and thus noncompensable. 893 F.3d at 1326. The Eleventh Circuit did not adopt, or even discuss, a transcendent-risk test like that advocated by Petitioners. Rather, it expressly held that the integral and indispensable inquiry is "fact-intensive and not amenable to bright-line rules." *Id.* at 1324. Examining the facts at issue and pointing to the same DOL regulations that the Third Circuit found persuasive, the court focused on the location where the donning and doffing occurred. *Id.* at 1325–

26. Unlike Respondents, the *Llorca* plaintiffs "were allowed to don and doff their protective gear at home and actually did so," weighing against compensability. *Id.* at 1326; *see also id.* at 1326 n.5 (distinguishing *Perez* on the ground that, there, the workers "were required to don and doff their uniforms and protective gear at the workplace"). In distinguishing the facts of *Steiner*, the Eleventh Circuit noted that the donning and doffing in that case was required under state law, *id.* at 1326—the same aspect of *Steiner* that the Third Circuit referred to as the "regulations" factor, Pet.8a–9a. Nothing in the Eleventh Circuit's analysis conflicts with the decision below.

Second, the Fifth Circuit addressed the donning and doffing of protective gear post-*Busk* in an unpublished decision, *Stuntz v. Lion Elastomers, L.L.C.*, 826 F. App'x 391 (5th Cir. 2020). There, the district court had ruled that the donning and doffing of "steeltoe boots, fire-retardant clothing, gloves, hard hats, and safety glasses" was noncompensable for multiple reasons. *Id.* at 400–01. In agreeing that the donning and doffing of the gear was not integral and indispensable to the employees' work, the Fifth Circuit highlighted both that "employees admitted their option of either taking the PPE home or leaving them at the facility" and the plaintiffs' apparent concession that "changing generic protection gear" was not compensable. *Id.* at 401–02. These two factors—only briefly discussed in the court's nonprecedential opinion—overlap with the "location" and "type of gear" factors identified by the Third Circuit in this case.

Moreover, neither *Stuntz* nor the pre-*Busk* opinion cited by Petitioners, *Von Friewalde v. Boeing Aerospace Operations, Inc.*, 339 F. App'x 448 (5th Cir.

2009), suggests that the relative riskiness of the plaintiffs' work was relevant to the inquiry. In *Von Friewalde*, after holding that "donning and doffing generic safety gear (*e.g.*, hearing and eye protection) involved a *de minimis* amount of time and therefore were non-compensable activities under the FLSA," the court noted its agreement with *Gorman* that donning and doffing of such gear was "in any event" noncompensable, without further explanation. *Id.* at 454. This unexplained statement in an unpublished, pre-*Busk* opinion does not evidence a need for this Court's review.[4]

Petitioners cite a post-*Busk* case from the Tenth Circuit, *Aguilar v. Management & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020). That case did not concern donning and doffing, but rather other preshift activities such as checking equipment in and out of a prison's inventory-control systems. In the portion of the opinion cited by Petitioners, the Tenth Circuit held that checking out the equipment *was* "integral and indispensable to the officers' principal activities of maintaining custody and discipline of the inmates and providing security." *Id.* at 1283. In so doing, it observed the difference between those keys and other equipment potentially necessary to perform the officers' jobs, such as "[g]eneric tools and equipment like screwdrivers and paperwork." *Id.* This case does not concern checking out equipment like screwdrivers

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[4] Petitioners also cite the Fifth Circuit's decision in *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222, 225–28 (5th Cir. 2017). *See* Pet. 19. That decision addresses the compensability of preshift waiting time, not donning and doffing time; it does not address the question presented in the petition.

and paperwork; Petitioners' isolation of the phrase "generic tools and equipment" from its context does not evidence a disagreement among the courts of appeals as to the question presented.

2. Earlier courts of appeals' decisions are also consistent with the decision below. Other courts of appeals have emphasized the fact-specific nature of the inquiry, looking to the same factors identified by the Third Circuit. *See, e.g.*, *Guyton v. Tyson Foods, Inc.*, 767 F.3d 754, 761 (8th Cir. 2014) (finding that the evidence concerning where workers change and whether wearing the gear was required supported the finding that donning and doffing was not integral and indispensable); *Mountaire Farms*, 650 F.3d at 365–68 (considering location and regulation factors, and holding that "the *Steiner* test is not confined to the narrow factual circumstances of a lethal manufacturing environment"); *Bamonte*, 598 F.3d at 1225–32 (focusing on location and regulations as part of a "context-specific" inquiry as to whether donning and doffing of generic gear was compensable); *Franklin*, 619 F.3d at 619–20 (declining to adopt a rule limiting compensability to situations where "a lethal environment is [] present and the gear is [] literally required for entry into the plant").

Petitioners point to two pre-*Busk* Seventh Circuit decisions holding that specific donning and donning activities were not integral and indispensable, but neither did so based on a bright-line test or assessment of comparative risk. In *Musch v. Domtar Industries, Inc.*, 587 F.3d 857 (7th Cir. 2009), the Seventh Circuit considered a record showing that, unlike here, anytime that the plaintiffs were exposed to "hazardous chemicals," they were compensated for showering and changing clothes. *Id.* at 859. The court

found that showering and changing clothes at *other* times was not integral and indispensable to the employees' work based on a variety of factors, including that the plaintiffs "bring their work clothes home to launder them," *id.* at 860—a consideration that echoes the Third Circuit's "location" factor. Petitioners seize on the court's observation that chemical exposure was not "pervasive" to suggest a transcendent-risk-like analysis. *Id.* Read in context, however, that comment was simply a recognition that the fact that changing clothes was *sometimes* integral and indispensable did not mean that clothes changing was *always* integral and indispensable to the jobs of those workers.

Pirant v. U.S. Postal Service, 542 F.3d 202 (7th Cir. 2008), similarly does not demonstrate disagreement between the courts of appeals. There, the court held that the "three to five minutes" that the plaintiff mail handler "spent each workday putting on and removing her gloves, shoes, and work shirt" was not compensable. *Id.* at 208. In a brief discussion, the Seventh Circuit relied on the fact that the plaintiff "was not required to wear extensive and unique protective equipment," unlike the workers in *Steiner*. *Id.* at 208–09. The discussion is fully consistent with the Third Circuit's opinion in this case, which looks to "what kind of gear is required" as part of the integral inquiry, Pet. 9a, and expressly left open the question of whether any changing time was *de minimis* and thus noncompensable, *id.* 12a.

In short, the decision below does not conflict with decisions of other courts of appeals. Review is not warranted to consider the courts' consistent approach to the issue.

II. The decision below is consistent with this Court's precedent and the statute.

A. This Court has repeatedly recognized that donning and doffing protective gear can be integral and indispensable to employees' primary activities, without ever suggesting that the inquiry turns on whether the gear can be described as "generic" or whether the workplace risks can be described as extraordinary. Rather, the Court has looked only to whether the donning and doffing "is an intrinsic element of [the employee's principal] activities and one with which the employee cannot dispense if he is to perform his principal activities." *Busk*, 574 U.S. at 37.

For instance, in *Steiner*, which first articulated the "integral and indispensable" standard, the Court held that time spent by battery plant employees changing into and out of "old but clean work clothes" satisfied that standard. 350 U.S. at 251, 256. The opinion does not suggest this was tied to the degree of risk faced by the employees or whether their work clothes were specifically designed for their job. Likewise, in *Busk*, the Court affirmed *Steiner*'s holding as to clothes-changing and showering activities, without addressing the degree of risk or a "specialized" gear requirement. 574 U.S. at 34. To the contrary, the Court approvingly cited DOL's interpretive regulations, which reflect other considerations, including the location where clothes-changing occurs. *Id.* at 34–35 (discussing 29 C.F.R. § 790.8(b), (c)); *see also Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 229 (2014) (recognizing that "protective gear is the *only* clothing that is integral and indispensable to the work of factory workers, butchers, longshoremen, and a host of other occupations," without discussing transcend-

ent risks involved in such occupations); *IBP*, 546 U.S. at 30–31 (holding that time spent by slaughterhouse workers walking from the locker room to the work floor postdonning and predoffing protective gear including aprons, gloves, hardhats, hairnets, earplugs, and boots was compensable under the FLSA, without assessing relative risk).

B. The decision below is fully consistent with these precedents and the statutory scheme. The Third Circuit explained that the donning of protective gear is compensable only if "it is both integral and indispensable" to an employee's principal activities, which requires a showing that the gear is "intrinsic" to those activities and that the worker "cannot dispense" with donning the gear if he is to perform his work. Pet. 4a (citing *Busk*, 574 U.S. at 33). And it identified several factors that have long been relied on by this Court, DOL, and other courts of appeals to make the fact-intensive determination of whether gear is integral. [5]

To begin with, the Third Circuit explained, the statutory words "preliminary" and "postliminary" have a locational element—referring to activities before entering and after exiting a "threshold." Pet. 7a (citing dictionary definitions and Justice Sotomayor's concurrence in *Busk*). Thus, activities that occur after a worker has passed through the threshold, *i.e.*, on the worksite, are more likely to be integral, not preliminary or postliminary, to productive work tasks.

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[5] Petitioners do not appear to challenge the Third Circuit's decision as to what makes donning and doffing activity indispensable. *See* Pet. 20–21 (arguing that the Third Circuit has "effectively nullifie[d] the 'integral' element").

Similarly, *Steiner* recognized the relevance of the fact that most of the employees at issue in that case changed and showered on the employer's premises. 350 U.S. at 251 & n.1. And in *Busk*, the Court discussed approvingly DOL's interpretative regulations, 574 U.S. at 34–35—regulations that have for decades identified location as a relevant factor. *See* 29 C.F.R. § 790.8(c); Wage & Hour Advisory Mem. No. 2006-2 (May 31, 2006) (noting the agency's "long-standing position" that donning and doffing is compensable "only when the employer or the nature of the job mandates that it take place on the employer's premises").[6]

Furthermore, the Third Circuit's "regulations" factor is a straightforward application of *Busk*'s recognition that an activity that is "specifically necessary" to the performance of principal activities is integral to those activities. 574 U.S. at 33 (cleaned up). If the law requires an employee to put on certain gear to perform his or her principal work activity, doing so is specifically necessary to perform that principal work activity. *Steiner* also noted the relevance of this factor, pointing out that facilities for the donning and doffing at issue there were required by state law. 350 U.S. at 250. And again, the DOL regulations cited approvingly by the Court in *Busk* incorporate this factor as well. *See* 29 C.F.R. § 790.8(c) n.65.

Petitioners make no argument that consideration of the Third Circuit's final factor, "type of gear," is contrary to precedent or the statute. They, however, would elevate that factor, and focus on the "unique-

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[6] https://www.dol.gov/agencies/whd/field-assistance-bulletins/2006-2.

ness" of the gear. As the Third Circuit explained though, gear can be integral to an activity without being unique to it; "balls are common to many sports but are still integral to them." Pet. 9a. By the same logic, gear like flame-retardant head-to-toe coveralls may be integral to the performance of specific jobs, even if it is not specifically designed for those jobs, and even if it may be used in *other* jobs where it is not integral. The Court's decisions in *Steiner* and *Sandifer* are in accord.

Petitioners wrongly contend that *Busk* holds that "employer or regulatory requirements" are irrelevant to the question whether an activity is integral and indispensable. Pet. 21. Rather, *Busk* recognizes that the test cannot be satisfied "merely by the fact that an employer required an activity." 574 U.S. at 36. And the Third Circuit did not say otherwise. Rather, consistent with *Busk*'s emphasis on whether a particular activity is "tied to the productive work that the employee is *employed to perform*," *id.*, the Third Circuit recognized that employer and regulatory requirements relating to gear are relevant to the extent they "link that gear to the work being done." Pet. 10a.

Petitioners are also incorrect to suggest that *Busk* addresses the considerations that "go to the 'indispensable' element," as opposed to "the 'integral' one.'" Pet. 16. Rather, *Busk* discusses the test as a whole and approvingly quotes DOL regulations stating that "[a]mong the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance." 574 U.S. at 36 (emphasis omitted) (quoting 29 C.F.R. § 790.8(c)). The opinion also notes that precedent used the words "in their ordinary sense," which reflects the

related concepts of necessity and obligation. *Id.* at 33 (citing definitions).

Thus, the central inquiry under the PTPA is whether an activity is necessary and obligatory to perform the employee's work. The factors identified by the Third Circuit go to that inquiry. Petitioners, on the other hand, seek to focus on the relationship between donning and doffing and a unique risk of fatal or near-fatal injury, rather than on the relationship between donning and doffing and the work to be performed. Petitioners' suggestion lacks support in *Busk*, as well as in the earlier donning and doffing cases reaffirmed in *Busk*.

In any event, Petitioners approach does not aid them here because the Third Circuit addressed "integral" and "indispensable" separately in part II of its opinion. *See* Pet. 7a ("B. When changing gear is integral."); 10a ("C. When changing gear is indispensable."). Petitioners' disagreement with the "key factors" that the Third Circuit identified as relevant to the "integral" inquiry does not mean the Court failed to conduct that inquiry.

C. In arguing that the decision below conflicts with this Court's precedent, Petitioners also assert that the Third Circuit's factors are "substantively indistinguishable from those" applied by the Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), and overruled by the enactment of the PTPA. Pet. 22. But the relevant holding of *Anderson* was that all "preliminary activities" that fall under the definition of "work," i.e., that "involve exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit," are compensable. 328 U.S. at

692–93. The Third Circuit's decision in no way restores that standard.

Petitioners' argument that the decision below "would effectively reinstate" *Anderson*, Pet. 22, thus fares no better than the similar arguments rejected by this Court in both *Steiner* and *IBP*. That the PTPA intended to eliminate compensation requirements for *some* donning and doffing and related activities is undisputed. But, as *Steiner* explained after examining the text, structure, and history of the PTPA, Congress did not intend to make *all* such activities noncompensable. 350 U.S. at 254–56. And in the seven decades since *Steiner* held that changing work clothes and showering remain within the protection of the FLSA whenever they are integral and indispensable to a principal activity, and without imposing the narrowing requirements proffered by Petitioners, Congress has not seen fit to disturb that interpretation. *Cf. IBP*, 546 U.S. at 34–35 (rejecting the argument that "Congress' forceful repudiation of" *Anderson*" meant that post-donning or pre-doffing walking time was noncompensable).

III. Petitioners vastly overstate the consequences of the decision.

Petitioners' claim that this Court's review is necessary to avoid "enormous financial implications," Pet. 3, is based on a series of assertions disconnected from what the Third Circuit actually held in this case. As explained above, the Third Circuit's multi-factor approach is substantially the same as that taken by DOL and other circuits for decades. Given that every circuit has recognized the fact-intensive nature of the inquiry, the lack of a bright-line test in the Third Circuit does not "create uncertainty," Pet. 23—it

maintains consistency. Indeed, this Court's decisions in *Sandifer* and *IBP*, decided more than a decade ago, reflect a common understanding that the donning and doffing of generic protective gear, such as that used by bakers and butchers, could be integral and indispensable, without reference to risk levels.

Petitioners are also wrong that the Third Circuit held that whether changing gear is integral and dispensable is a question that will *always* be an issue for the jury to decide. *See* Pet. 2, 3. The Third Circuit held that *this record* presents disputed factual issues that must be decided by a factfinder. That juries will have to resolve factual disputes as part of the integral and indispensable inquiry is not new or unique to the Third Circuit. *See*, *e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 451–52 (2016) (reviewing case in which jury determined "that time spent in donning and doffing protective gear at the beginning and end of the day was compensable work"); *Guyton*, 767 F.3d at 760–61 (affirming a jury determination that certain disputed activities were not integral and indispensable); *Baker v. Barnard Constr. Co.*, 146 F.3d 1214, 1219 (10th Cir. 1998) (holding that, in light of disputed facts, the question whether activities were integral and indispensable was to be resolved by a jury). The Third Circuit's application of Rule 56(a) to this record is not a basis for the Court's review.

Finally, that the Third Circuit includes Delaware, where many businesses are incorporated, does not provide a basis for review. *See* Pet. 26. That argument could be invoked as to nearly any Third Circuit precedential decision adverse to a corporation and involving federal law. Yet Petitioners identify no case in which the Court has suggested that the prominence of Delaware puts a thumb on the scale in favor of review

of Third Circuit decisions. Moreover, there is no indication that FLSA cases are more likely to be filed in the District of Delaware than in other states. In 2023, only 44 private "labor" civil actions (a category that includes actions brought under an array of statutes) were commenced in the District of Delaware, out of 12,975 nationwide.[7]

IV. The interlocutory nature and outstanding factual issues make this case a poor vehicle to address the question presented.

This case does not warrant review because the circuits are in agreement and because the decision below is consistent with this Court's precedent and correct. In addition, this case is not a good vehicle to address the question presented because it comes to this Court in an interlocutory posture. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari), and there are two reasons why that approach is especially prudent here.

First, there are outstanding factual disputes relevant to the question presented. The question presented assumes that the protective gear at issue "does not protect against job-specific hazards that transcend ordinary risks." Pet. i. That assumption, however, assumes the answer to disputed facts. In granting summary judgment, the district court improperly weighed competing evidence about the

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[7] Administrative Office of the U.S. Courts, Table C-3—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (Dec. 31, 2023), https://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2023/12/31.

existence of job-specific hazards that transcend ordinary risks. Pet. 75a–84a; *see also* 3d Cir. Dkt. 14 (Appellants' Br.) at 42–52. Having rejected Petitioners' proposed test, the Third Circuit did not address this dispute. If this Court took up the case and adopted a new test, however, the Third Circuit on remand would likely then issue an opinion with the same outcome as before: a remand for trial so that a factfinder could weigh the competing evidence.

Second, Petitioners may still prevail at trial—either on the question whether Respondents' protective gear is integral and indispensable to their job duties, or on the question whether any time spent changing is *de minimis*. *See* Pet. 12a. Winning on either ground would result in judgment for Petitioners, making review unnecessary.

Particularly in light of the agreement among the circuits, the paucity of post-*Busk* cases, and the consistency of the decision below with this Court's precedent, interlocutory review of this case is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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