

1 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf
2 of the Respondents in 03-1238 and the Petitioners in
3 04-66.

4 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
5 General, Department of Justice, Washington, D.C.; on
6 behalf of the United States, as amicus curiae,
7 supporting the Respondents in 03-1238 and the
8 Petitioners in 04-66.

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ. On behalf of the Petitioner in 03-1238 and the Respondent in 04-66	4
ORAL ARGUMENT OF THOMAS C. GOLDSTEIN, ESQ. On behalf of the Respondents in 03-1238 and the Petitioners in 04-66	29
ORAL ARGUMENT OF IRVING L. GORNSTEIN, ESQ. On behalf of the United States, as amicus curiae, supporting Respondents in 03-1238 and the Petitioners in 04-66	46
REBUTTAL ARGUMENT OF CARTER G. PHILLIPS, ESQ. On behalf of the Petitioner	55

CHIEF JUSTICE ROBERTS: The Court will now hear argument in *IBP, Inc. vs. Alvarez and Tum vs. Barber Foods, Inc.*

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

There are two issues in this case. One concerns walking time, and the other concerns waiting time. And unless the Court has a different order, I'd propose to start with the walking time.

Section 4(a)(1)'s language, which comes from the Portal-to-Portal Act, which was enacted in 1947, by its plain terms clearly covers the walking that's involved in these two cases. The statute, which is reproduced at the appendix of the petition, at 88(a), says that there is no mandatory compensation for, quote, "walking to and from the actual place of performance of the principal activity or activities which such employee is employed to perform."

It's difficult for me to imagine language that could more directly cover what we're dealing with in this particular case, because the Plaintiffs here are -- for

1 IBP -- are employed to slaughter and to process beef. The
2 employees at Barber Foods are employed to process chicken.
3 And thus, the actual place where they perform those
4 services are obviously on the lines where the processing
5 takes place.

6 JUSTICE SCALIA: I would have thought that, but
7 we've held otherwise.

8 MR. PHILLIPS: Well, I don't know that we've --
9 I don't know of any case where this Court has held
10 otherwise.

11 JUSTICE SCALIA: Well, we've held that they're
12 -- that the principal activity consists of doffing --
13 donning and doffing the clothes required, haven't we?

14 MR. PHILLIPS: Well, this Court said that
15 donning and doffing was a principal activity in
16 contradistinction to a preliminary or postliminary
17 activity for purposes of section 4(a)(2), but the Court
18 specifically said, in Steiner, that that holding does not
19 apply to matters that are specifically excluded under
20 section 4(a)(1), which deals with walking time, Justice
21 Scalia.

22 JUSTICE KENNEDY: So, you think Steiner is
23 irrelevant?

24 MR. PHILLIPS: For -- no, I don't think it's
25 irrelevant to the workplace. I think it is irrelevant to

1 the proper disposition of this case, yes.

2 JUSTICE SOUTER: Well, it is if we don't accept
3 the continuous workday rule. If we do accept the
4 continuous workday rule, why isn't it, in effect, the
5 premise from which the conclusion for the other side
6 falls?

7 MR. PHILLIPS: Well, we don't have any quarrel
8 with the continuous workday rule. The question is, When
9 does the workday begin? And our assessment of the
10 workday, as defined in section 4(a)(1), which controls,
11 specifically, the walking time in this particular case,
12 begins when you arrive at the actual place where you're
13 going to perform the services --

14 JUSTICE SOUTER: No, but your argument --

15 MR. PHILLIPS: -- or primary activities.

16 JUSTICE SOUTER: -- assumes that there is only
17 one actual place. And their argument, which is consistent
18 with the text of the statute, is that there may be more
19 than one principal activity, and hence, more than one
20 place. And if the -- if the place of donning and doffing
21 is such a place, then wouldn't it be at least
22 administratively odd to apply the continuous workday rule
23 immediately to exclude some walking time that follows
24 that?

25 MR. PHILLIPS: No, I don't think so. I think it

1 is perfectly sensible and a clear bright-line rule,
2 Justice Souter, to say that when you arrive at the actual
3 place where you perform, not just any activities, and not
4 just the activities that are integral and indispensable to
5 your working activities, but to the principal activities
6 for which you're hired -- and, admittedly, there can be
7 more than one of those, but that doesn't -- you know,
8 donning and doffing is not a principal activity --

9 JUSTICE SOUTER: So, you're saying that --

10 MR. PHILLIPS: -- of anyone who's cutting beef.

11 JUSTICE SOUTER: -- so-called "integral
12 activities" are not principal activities.

13 MR. PHILLIPS: Right. They don't have to
14 principal activities. They're better understood as --

15 JUSTICE SCALIA: They felt otherwise.

16 JUSTICE O'CONNOR: Mr. Phillips, I -- the
17 Steiner opinion explicitly agreed with the lower court in
18 that case, which said that the term "principal activity or
19 activities" embraces all activities that are integral and
20 indispensable.

21 MR. PHILLIPS: Right.

22 JUSTICE O'CONNOR: And if -- if you think that
23 putting on the clothes fall within that, then that covers
24 walking, too --

25 MR. PHILLIPS: It --

1 JUSTICE O'CONNOR: -- after that.

2 MR. PHILLIPS: The problem with that analysis is
3 that the court was only analyzing section 4(a)(2) for
4 these purposes. And what it was saying is, "We are
5 prepared to accept that there are certain activities that
6 are either preliminary or postliminary, and then there are
7 others that are primary activities. And if you are
8 integral and indispensable to a primary activity, it is a
9 compensable event."

10 Recognizing that Steiner is probably the most
11 extraordinarily extreme facts that you could imagine,
12 because we're talking about clothings that had -- clothing
13 that had to be changed in order to protect the public --

14 JUSTICE GINSBURG: But, Mr. Phillips --

15 MR. PHILLIPS: -- health and safety.

16 JUSTICE GINSBURG: -- you're asking us to
17 interpret the same words, "principal activity or
18 activities," differently in sub (2) that was at issue in
19 Steiner, and in sub (1), and then the clause that follows
20 both of those. The same phrase is used. So if "principal
21 activity" includes donning or doffing, under sub (2), why
22 wouldn't the same follow for sub (1) and the following
23 clauses?

24 MR. PHILLIPS: Because you have to read the
25 language "principal activity or activities" in (a)(1)

1 within the context of what Congress was trying to achieve
2 by the Portal-to-Portal Act, which was to absolutely and
3 categorically exclude walking time from being part of
4 mandatorily compensated activities of a particular
5 employee.

6 JUSTICE GINSBURG: But it is included if it's --
7 once the workday begins, if there's a rotation, you walk
8 from one station to the other. That walking time, I think
9 it's conceded, would be included.

10 MR. PHILLIPS: Right. But that --

11 JUSTICE GINSBURG: So, if your date -- if the
12 principal activity is donning and doffing, then the
13 walking time thereafter would also be included.

14 MR. PHILLIPS: But, Justice Ginsburg, if you
15 step back and think about this language in the context of
16 the words that are written here, it says, "walking to and
17 from the actual place of performance of the principal
18 activity." No one would think that that --

19 JUSTICE SOUTER: "Or activities."

20 MR. PHILLIPS: Or activities. But, again,
21 Justice Souter, all that suggests is that there are times
22 when somebody who's working in a clothing operation may --
23 you know, may spend time distributing the cloth or may
24 spend time actually sewing the cloth. Those are two
25 separate activities. They're different activities. But

1 it doesn't mean -- and it certainly doesn't convert
2 anything that had -- can be described as "integral and
3 indispensable" into a primary activity which such employee
4 is employed to perform. No employee, in these cases, was
5 employed to perform the act of putting on clothes or the
6 act of picking up equipment.

7 JUSTICE BREYER: What do you think about the
8 possibility, "it depends on the clothes and depends on the
9 equipment," so that, in Steiner and here, it's a lot of
10 protective gear, it's really quite part of the job and
11 special and unusual. In Mt. Clemens, it's a kind of
12 uniform. It's just washing your hands up, putting on an
13 apron. So, where it's minor putting on clothes, as
14 someone might in his house, doesn't come in substantial,
15 doesn't come in integral and indispensable; but where it's
16 quite a big deal, it does. And who decides? The agency.

17 MR. PHILLIPS: Well, there are two parts about
18 that that are worth focusing on. One is, I don't think
19 you can lump the two cases together, because the clothing
20 or the equipment that has to be put on with respect to the
21 Barber Foods company is barely -- is quite minimal and,
22 indeed, was deemed to be diminimus. So, I'm not -- I'm not
23 sure you can lump the two cases together in that way.

24 But also, in terms of where the Secretary comes
25 out on this, let's not forget 79.7(g), footnote 49, which

1 is, candidly, the clearest statement from the Secretary
2 with respect to, What do you do when you have donning and
3 doffing that is followed by walking time? And what does
4 the -- and what does the regulation specifically say? And
5 that's on, I think, 92 and 93 of the appendix to our
6 petition. It specifically says that that walking time is
7 not excluded, not necessarily --

8 JUSTICE SCALIA: Not necessarily excluded. It's
9 really noncommittal on the point.

10 MR. PHILLIPS: Well, except that, under their
11 theory of this case, it is always excluded. Always. So
12 that whatever else you can say about the meaning of that
13 particular language, the interpretation the Secretary
14 offers to you today flatly rejects --

15 JUSTICE BREYER: But "in certain" --

16 MR. PHILLIPS: -- that language.

17 JUSTICE BREYER: -- that footnote -- that's
18 where I actually got the idea -- it says, "We reserve, in
19 certain situations." To me, that meant sometimes it can
20 be a major big deal to don clothing -- protective gear;
21 sometimes it isn't -- an apron. And whose job is it? Now
22 I'm repeating myself.

23 MR. PHILLIPS: Right.

24 JUSTICE BREYER: The Secretary's.

25 MR. PHILLIPS: No, but -- and if we were talking

1 about that in the context of other kinds of activities --
2 if you're back in the (a) (2) world of looking at whether
3 something's preliminary or postliminary, I have less of a
4 problem with dealing with that. The problem is, here
5 we're talking about (a) (1) activities, the core of what
6 Congress enacted the Portal-to-Portal Act to protect
7 employers for.

8 The Portal-to-Portal Act is not a statute that
9 remotely provides protections for the employees. This is
10 a statute that was designed to protect employers from
11 billions of dollars of liability. And so, when you're
12 talking about, "Under what circumstances can you ignore
13 the flat prohibition on requiring walking time to be
14 regarded as a mandatory subject of compensation?" then it
15 seems to me the distinction you're proposing doesn't work.

16 And it's also, Justice Breyer, again, flatly
17 inconsistent. Their -- that's not their theory of the
18 case. Their theory of the case is, "If we can describe it
19 as in any way integral and indispensable to some other
20 activity, that makes it a primary activity, that starts
21 the workday, and everything after that then becomes
22 compensable."

23 JUSTICE SCALIA: Mr. Phillips, can I call your
24 attention to the text of Section 254(a)? It's in the red
25 brief in the Alvarez case, at App. 1. What it -- what it

1 says is that you don't have to pay overtime compensation
2 or minimum wages for and on account of any of the following
3 activities: (1) "walking, riding," blah, blah, blah. This
4 is (1).

5 MR. PHILLIPS: Yes.

6 JUSTICE SCALIA: -- for the "place of
7 performance of the principal activity or activities which
8 such employee is employed to perform."

9 MR. PHILLIPS: Now you skipped over "actual
10 place," there --

11 JUSTICE SCALIA: Right. Okay.

12 MR. PHILLIPS: -- Justice Scalia, but -- which I
13 think is an important --

14 JUSTICE SCALIA: Okay.

15 MR. PHILLIPS: -- word.

16 JUSTICE SCALIA: (2) "activities which are
17 preliminary to or postliminary to said principal activity
18 or activities."

19 You're trying to sever (1) and (2), when the
20 text itself joins them. The activities referred to in (2)
21 are "said principal activity or activities." The "said"
22 refers to the ones that are in (1).

23 MR. PHILLIPS: Right. But that --

24 JUSTICE SCALIA: How can we possibly sever (1)
25 and (2) and say that for purposes of one, it means one

1 thing; for purposes of two, it means something else?

2 MR. PHILLIPS: Because when the court was
3 interpreting (a) (2) in Steiner, it wasn't interpreting
4 (a) (2) to determine whether something was a postliminary
5 activity in connection with "said preliminary
6 -- primary activities." What it was saying is, these are
7 not preliminary and postliminary activities, that they are
8 excluded from that. And so, the court's really coming up
9 with what is a third category of cases, which deals with
10 integral and indispensable activities to a primary
11 activity. They didn't have to analyze it as a primary
12 activity. All they had to say was, it's not -- that the
13 preliminary and postliminary activities are not simply
14 temporal, that there is a substantive component to it.

15 And that is essentially the holding of the court
16 in Steiner. It says there's a substantive component; and,
17 therefore, we're not going to just simply look in -- time-
18 wise, whether it comes before or after principal
19 activities. We're going to decide that there are some --
20 there are some situations that are so important that they
21 need to be compensated under (a) (2), because they don't
22 fall within preliminary or postliminary language.

23 JUSTICE GINSBURG: But, Mr. Phillips, it says it
24 -- either something is before, preliminary; or after,
25 postliminary. And if it's neither of those, then, it

1 seems to me, it fits -- it's not before the principal
2 activity, and it's not after the principal activity, so
3 what else is it, other than the --

4 MR. PHILLIPS: It's work --

5 JUSTICE GINSBURG: -- principal activity?

6 MR. PHILLIPS: -- that's mandatorily compensable
7 under the Fair Labor Standards Act. Remember, the Fair
8 Labor Standards Act, under this Court's interpretations
9 from Mt. Clemens Pottery and the cases that preceded it, I
10 mean, it -- you know, it had a very sweeping definition of
11 what is work within the meaning -- within the meaning of
12 what is compensable as minimum wages and as overtime. And
13 that's in place.

14 And now Congress has stepped in and said, "Well,
15 wait a second. When we did it -- when that got
16 interpreted that broadly, we're talking about \$6 billion
17 in liability." So, it's very important, given that we're
18 talking about fairly minimal activities on the -- on the
19 -- that are involved here, triggering potentially massive
20 liabilities. And so, what we've done is, we've excluded
21 from those massive liabilities the walking, riding, and
22 traveling time, because that's the basis on which you end
23 up with big numbers.

24 CHIEF JUSTICE ROBERTS: So, your approach
25 introduces, really, a third concept. You have the

1 principal activities and you have -- either preliminary or
2 postliminary -- and now you've got a third concept:
3 integral. But the statute -- that's nowhere in the
4 statute.

5 MR. PHILLIPS: Right. Well, I mean, that -- but
6 that's -- this Court's decision in Steiner was the one
7 that reached out to decide that "integral and
8 indispensable" was a category of activities that were
9 going to be compensable, even though, on the face of them,
10 they may have appeared to be --

11 CHIEF JUSTICE ROBERTS: Well, unless they were
12 saying those activities were, in fact, principal
13 activities. If it's integral, if it's embraced by the
14 principal activity, it is a principal activity, and that
15 at least is more consistent with the statute in keeping it
16 in two categories rather than inventing a third.

17 MR. PHILLIPS: Well, I don't think that creates
18 any particular problem, but what you end up doing, Mr.
19 Chief Justice, under those circumstances, is, you
20 completely eliminate the protection that Congress meant to
21 provide here for walking, riding, and traveling time,
22 which is -- which is a vital consideration --

23 CHIEF JUSTICE ROBERTS: Well, how does -- how
24 does your analysis apply? Let's say these employees had
25 to change their equipment several times during the course

1 of the day.

2 MR. PHILLIPS: You mean after they've --

3 CHIEF JUSTICE ROBERTS: Yes, I mean, the --

4 MR. PHILLIPS: -- arrived at the actual place --

5 CHIEF JUSTICE ROBERTS: -- the equipment is only
6 good for, you know, an hour, two hours, then they have to
7 get new ones. They have to walk back to the place --

8 MR. PHILLIPS: Right.

9 CHIEF JUSTICE ROBERTS: -- they have to doff the
10 other equipment, don new equipment, and walk back.

11 Wouldn't your analysis say that that walking time is
12 excluded?

13 MR. PHILLIPS: No. No. Once you --

14 CHIEF JUSTICE ROBERTS: Why not?

15 MR. PHILLIPS: We don't have any quarrel with
16 the argument that once you, for the first time, arrive at
17 your actual place of performing the principal activity for
18 which you were hired, which is cutting beef or whatever it
19 happens to be in your hypothetical -- once you arrive
20 there, that does begin the workday. That's the definition
21 of what starts the workday, which is why I -- to our mind,
22 this is a much clearer and brighter-line rule. We can
23 tell you precisely when you start the workday. It's when
24 you get to the place where you got hired to work, and
25 start to do that work.

1 JUSTICE KENNEDY: But do you have compensated
2 activities that do not begin the workday?

3 MR. PHILLIPS: Yes, you do have compensated --
4 and that's true for lots of different situations, Justice
5 Kennedy. You could have a situation where you go home,
6 and you get called back in on an emergency, and nobody
7 disputes that that's clearly compensable time, and nobody
8 has ever seriously argued that you ought to extend the
9 workday --

10 JUSTICE KENNEDY: What happens with the
11 microchip or a laboratory with highly contagious viruses
12 where there's got to be two hours of scrubbing and then
13 there's a walk? What do you do with that?

14 MR. PHILLIPS: If the --

15 JUSTICE KENNEDY: Two hours of scrubbing --

16 MR. PHILLIPS: You know, it's -- it's very
17 possible that the scrubbing will be regarded as an
18 integral and indispensable part of the -- of the -- of the
19 employment, and --

20 JUSTICE KENNEDY: But then there's -- but then
21 there's --

22 MR. PHILLIPS: -- therefore, it's compensable.

23 JUSTICE KENNEDY: -- but then there's a walk.
24 What about the walk?

25 MR. PHILLIPS: The walk is not compensable,

1 because Congress didn't want you to have walking until you
2 got to the actual place where you would perform the
3 services. And nobody's principal activity as an employee
4 is to go take a shower or to go and pick up certain types
5 of clothing. That's not --

6 JUSTICE O'CONNOR: But the problem --

7 MR. PHILLIPS: -- the understanding of
8 "principal activity."

9 JUSTICE O'CONNOR: Mr. Phillips, the problem I
10 continue to have is that I thought Steiner embraced,
11 explicitly, the notion that principal activity embraces
12 all activities that are integral and indispensable. You
13 take issue with that, but do you want us to overrule
14 Steiner --

15 MR. PHILLIPS: No.

16 JUSTICE O'CONNOR: -- or make some changes in
17 it? I just don't understand.

18 MR. PHILLIPS: I want you to limit Steiner to
19 the very unusual facts that arose in that particular
20 context. I -- we don't have any quarrel with the
21 "indispensable and integral" test as a reason for
22 beginning -- as a reason for compensating certain
23 activities.

24 CHIEF JUSTICE ROBERTS: What was --

25 MR. PHILLIPS: What we do --

1 CHIEF JUSTICE ROBERTS: -- so unusual about the
2 facts --

3 MR. PHILLIPS: I'm sorry?

4 CHIEF JUSTICE ROBERTS: What was so unusual
5 about the facts in Steiner? They're pretty common.

6 MR. PHILLIPS: Well, no, I -- the notion that if
7 you didn't shower and change, you would expose not only
8 yourself, but your family and everybody else to the risks
9 of lead poisoning is a pretty extraordinary --

10 CHIEF JUSTICE ROBERTS: No, but the --

11 MR. PHILLIPS: -- circumstance.

12 CHIEF JUSTICE ROBERTS: -- the routine where you
13 have to don, you know, safety equipment, and you have to
14 shower when you're done, whether it's being -- the
15 meatpacking or the stuff at Steiner -- that's a pretty
16 common occurrence.

17 MR. PHILLIPS: Right, well, I would -- I would
18 argue that you could make a -- you could make a claim that
19 none of that donning and doffing ought to be compensable.
20 And, candidly, we've made that argument. But,
21 unfortunately, the court didn't grant the petition on that
22 particular -- on that particular question. So, we have to
23 take it as a given. But I don't -- I don't -- I -- for
24 exactly the reason you identify, Mr. Chief Justice, that
25 does create a problem. I mean, part of this problem is a

1 bit contrived. I don't think that the ordinary donning
2 and doffing ought to trigger the beginning of the workday.
3 But, assuming that it does --

4 JUSTICE SOUTER: But you're saying --

5 MR. PHILLIPS: -- I still don't think -- I'm
6 sorry, Justice Souter.

7 JUSTICE SOUTER: No, no, I didn't mean --
8 finish.

9 MR. PHILLIPS: But I still don't think that,
10 even if you accept that that is compensable conduct within
11 the meaning of Steiner, which I -- that's what it's
12 talking about -- but Steiner, Justice O'Connor, doesn't
13 say anything about the fact that there was going to have
14 to be walking or traveling, or the workday. The court, in
15 Steiner, clearly had in mind the workplace, where you're
16 producing batteries. There's a lot of language in that
17 opinion that says, "This is where you really do the work.
18 That's your battery, and here's where you're going to get
19 -- engage in activities that we think you need to be
20 compensated." But the court never remotely suggested that
21 you were entitled to the walking time between those two.

22 And, if you go back to 790.7(g), that language
23 specifically told every employer that simply because you
24 have to pay for certain kinds of activities at the outset,
25 because they're integral and indispensable, as decided by

1 a court, that doesn't necessarily mean you have to pay for
2 all the walking time. And so, you've got to come up with
3 --

4 JUSTICE SCALIA: You would say that's --

5 MR. PHILLIPS: -- a theory that supports that.

6 JUSTICE SCALIA: -- so for all activities that
7 are -- that are integral and indispensable? What about
8 sharpening tools?

9 MR. PHILLIPS: Well, sharpening tools is the
10 easiest one, because you do that right on your workplace.
11 I mean, that's exactly what Congress had in mind in its
12 legislative history --

13 JUSTICE KENNEDY: No, no, no.

14 JUSTICE SCALIA: But your --

15 JUSTICE KENNEDY: But that's -- but suppose --

16 JUSTICE SCALIA: -- but your time shouldn't
17 start from then.

18 JUSTICE KENNEDY: -- that's not the
19 hypothetical. Suppose you sharpen the tools outside, by
20 your locker, and then you -- then you go for a 10-minute
21 walk to get to the -- and you carry the sharpened tool?

22 MR. PHILLIPS: Well, again, if the Court decided
23 that sharpening the tools, even though it's done not at
24 the same time, which is what Congress had in mind when it
25 -- when it identified that hypothetical -- but, even if

1 you assume that, that that's integral and indispensable,
2 it still isn't what triggers the time for starting the
3 actual employment.

4 JUSTICE SOUTER: No, but isn't your -- in the
5 answer that you just gave, and an answer which you have,
6 in fact, consistently repeated, inconsistent with Steiner
7 -- Steiner didn't say there is a separate category of
8 integral activities. Steiner said that activities which
9 are integral are part of the principal activity. And
10 isn't your argument premised on denying that identity?

11 MR. PHILLIPS: No, I can accept that identity
12 for purposes of distinguishing between what's preliminary
13 and postliminary activity. What I cannot do is to -- is
14 embrace that for purposes of deciding when walking
15 time/traveling time ought to be included. Congress was as
16 plain as it could humanly be in saying that, "We're not
17 going to allow walking and traveling time to be included
18 in an unexpected fashion." And that is precisely -- as
19 the Chamber of Commerce brief says, that is precisely what
20 we're talking about here.

21 And, candidly, as Judge Boudin said in his
22 concurring opinion, the circumstances arising in this
23 context bear a very eery resemblance to the situation that
24 gave rise to the Portal-to-Portal Act in the first place.
25 And so -- and I think it's important to put this into

1 context. You know, the language of the statute, as I read
2 it, clearly is in our favor. The purpose of the statute
3 is clearly in our favor. And then the question is, Did
4 this Court, in a decision that dealt solely with 4(a)(2),
5 mean to vastly change the scope of 4(a)(1) in a way that
6 would dramatically expose employers to liability --

7 JUSTICE GINSBURG: Why is it --

8 MR. PHILLIPS: -- and --

9 JUSTICE GINSBURG: -- why is it so dramatic, if
10 we recognize that nothing begins until the donning and
11 doffing -- that is, the travel to wherever you don and
12 doff?

13 MR. PHILLIPS: Well --

14 JUSTICE GINSBURG: None of that is included,
15 even from the plant gate to the place where you don and
16 doff.

17 MR. PHILLIPS: But the -- well, in part, because
18 plants are not -- have never been designed -- remember,
19 we've got 79.6 -- the Secretary of Labor told employers
20 for 50 years, "You can set up your plant without fearing
21 that you're going to suddenly be hit with walking time
22 after somebody engages in donning and doffing, even if it
23 turns out to be integral and indispensable." For 50
24 years, they followed that advice. They set up all of
25 their plants with that expectation. And now this Court,

1 if it follows the ninth circuit's lead, will suddenly say,
2 "Okay, what you need to go out and find is all of the
3 integral and indispensable activities" -- not just donning
4 and doffing -- any integral and indispensable activity
5 that you can get a court to buy into, that will start this
6 ever-expanding workday, such that any walking that goes on
7 after that and before you get done with all of these ever-
8 expanding post-doffing activities. Then you have the --
9 that's -- you know, so you have this broad -- and that's
10 why you're going to have these -- substantially greater
11 and totally unexpected liabilities on the workplace.

12 JUSTICE SCALIA: Where is that advice contained,
13 that you say was given to --

14 MR. PHILLIPS: 790.7(g), footnote 49, and it
15 says, as --

16 JUSTICE SCALIA: Not --

17 MR. PHILLIPS: -- plain as day --

18 JUSTICE SCALIA: -- not necessarily.

19 MR. PHILLIPS: Right, but -- there -- there, it
20 means always. Always.

21 JUSTICE SCALIA: And you say that they operated
22 on the assumption that it meant never.

23 MR. PHILLIPS: No, I'm prepared to --

24 JUSTICE SCALIA: It seems to me they were on
25 notice that, although it did not, necessarily, it might.

1 I think you're --

2 MR. PHILLIPS: It might, and -- but --

3 JUSTICE SCALIA: -- you're exaggerating the
4 effect of that statement.

5 MR. PHILLIPS: But, Justice Scalia--

6 CHIEF JUSTICE ROBERTS: That's right, they don't
7 say -- I mean, they exclude, for example, the canine cases,
8 where you have to walk and feed the dog in the morning before
9 you show up at work. So --

10 MR. PHILLIPS: Well, the --

11 CHIEF JUSTICE ROBERTS: -- they're not saying
12 only --

13 MR. PHILLIPS: -- the Secretary does. I don't
14 know whether the plaintiffs necessarily do. And certainly
15 the plaintiffs in those cases didn't. They took the
16 position that the workday started as soon as you engaged
17 in protecting the canines, just as in -- insurance
18 industry, they -- the insurance adjusters are all taking
19 the position that as soon as they have to get on the
20 computer, that's an integral and indispensable part of
21 their day, and everything after that, including traveling
22 and movement, are all part and parcel of what gets added
23 in there.

24 What I'm suggesting to you is that once you go
25 down this path and you say, "Okay, we're going to define

1 the workday by reference to whatever somebody determines
2 is integral and indispensable," you are going to have an
3 expandable workday, and that if you are really looking for
4 a fairly clear rule, you sit -- you stick with what the
5 language of the statute says, which is, the actual place
6 of the performance of the activity for which you were
7 hired. Once you've got that in place -- that's not to say
8 that's the full length of when you get compensated. You
9 can be compensated for activities outside of that workday.
10 Happens every day, when you have to come in for an
11 emergency or if you have to come in --

12 JUSTICE KENNEDY: My problem with your argument
13 is Steiner.

14 MR. PHILLIPS: I understand the problem with
15 Steiner, Justice Kennedy, but I think it is inappropriate
16 to read Steiner, which says, point-blank, "Our holding
17 does not deal with conduct that is specifically excluded
18 by 4(a)(1)," and then -- and ignore that. That whole --
19 that statement of the holding of the court seems to me to
20 say, "All we're telling you the answer to" --

21 JUSTICE SCALIA: No, it doesn't.

22 MR. PHILLIPS: -- "is 4(a)(2)."

23 JUSTICE SCALIA: The only thing specifically
24 included in (a)(1) is walking, riding, or traveling to and
25 from the actual place of performance of the principal

1 activity or activities. And once you assume that
2 "principal activity or activities" includes everything
3 that's integral and essential to principal activities,
4 (a) (1) doesn't cover it.

5 MR. PHILLIPS: No, you can get to the logic of
6 that. The question is, Is it appropriate to apply the
7 "integral and indispensable" test, which is an atextual
8 standard, in a way that essentially guts 4(a) (1) and the
9 fundamentally important values that it was designed to
10 serve? And what I'm suggesting to you is, that's a
11 mistake. And we know that, because the regs protected us
12 against this precise event. It is exactly what the
13 Portal-to-Portal Act was designed to accomplish, and it's
14 the better interpretation of this particular statute.

15 JUSTICE GINSBURG: Mr. Phillips, may I just ask
16 you a preliminary question about the IBM case -- IP -- IBP
17 --

18 MR. PHILLIPS: IBP.

19 JUSTICE GINSBURG: -- IBP case? As I understand
20 it, whatever we do here is irrelevant to what the bottom
21 line is going to be in that case, because the
22 determination is going to be made only under State law.
23 The court below said that's what it was going to do. And
24 the employees are not objecting. So, it seems that that
25 case, as distinguished from Tum, is really not anything

1 that this Court should decide, because it would be
2 academic.

3 MR. PHILLIPS: Well, they don't argue that it's
4 moot. And it's not purely academic. There are collateral
5 consequences to deciding what the Federal law issue is in
6 this particular context. We briefed this issue at the cert
7 stage at some length, and the court granted cert, so I'm
8 assuming that, in some respects, you, sort of, pass by
9 that particular problem.

10 There are collateral consequences. And the
11 other side, again, doesn't say it's -- that it has mooted
12 this case; it simply says that there's this serious issue
13 on remand as to precisely how it'll all play out.

14 JUSTICE SOUTER: Could you give us a collateral
15 consequence? I mean that is --

16 MR. PHILLIPS: Yes, because it -- reas judicata
17 collateral estoppel effects from the ruling that we've --
18 that we have violated federal law, both that might be
19 available to the Secretary of Labor and otherwise.

20 If there are no further questions, I'll reserve
21 the --

22 CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

23 MR. PHILLIPS: -- balance of my minutes.

24 CHIEF JUSTICE ROBERTS: Mr. Goldstein.

25 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

1 donning at the beginning of the day. That's part of the
2 principal activities --

3 JUSTICE SCALIA: No, no, but if -- once you
4 accept the theory that the principal activity includes
5 those things that are integral, you can say walking from
6 the gate of the plant to the assembly line is part of the
7 principal activity. Now, walking to the gate may not be
8 part of the -- may not be part of the principal activity,
9 but -- I --

10 MR. GOLDSTEIN: Two reasons, Justice Scalia.
11 The first is the one that I gave, and that is, the Steiner
12 Court concluded that -- and that was the end of the
13 sentence, where it said, "except as excluded by 4(a)(1),"
14 that Congress made clear in 4(a)(1) -- that the initial
15 walk wouldn't be the first principal activity. Second,
16 the walk won't be integral and indispensable. The test
17 for whether or not something is integral and indispensable
18 is whether it's work that's required and closely related
19 to the productive activities. And simply walking to the
20 donning station is not. That's in contradistinction to
21 putting on the clothes that are required here, required as
22 a matter of law in order to do your job. That's the line
23 that the statute draws.

24 JUSTICE KENNEDY: Well, what about the dog
25 grooming cases?

1 MR. GOLDSTEIN: The dog cases, Justice Kennedy
2 -- and I -- let me make sure we're -- I have your
3 hypothetical, and that is, the police officer at home
4 grooms the dog --

5 JUSTICE KENNEDY: Yes.

6 MR. GOLDSTEIN: -- then comes into the office.
7 That is part of their principal activities. The
8 subsequent commute is not compensable, on the ground that
9 it is a break and a commute. That's covered by the Fair
10 Labor Standards Act. The Portal Act is concerned with
11 something else -- that is, before the beginning and after
12 the end of your day. The dog cases are, of course, also
13 entirely different from this one. You have -- you have
14 arrived at the place of the performance of your principal
15 activity. Steiner said that occurred, quote/unquote, "on
16 or off the production floor." And so, you're at the
17 plant, and your workday has started.

18 Justice Scalia, you made the point, and I simply
19 want to reinforce it, that the reference in -- to
20 "principal activities" in 4(a)(2) is the same as the
21 reference to "principal activities" in 4(a)(1), but it's
22 also the reference to principal activities in the
23 concluding clause of section 4.

24 If I could just take the Court to that. The
25 statute is obviously reproduced in a variety of places,

1 but it's also at page 3 of our brief.

2 And so, after 4(a)(1) and 4(a)(2), there's this
3 concluding clause, and the text frames the workday. And
4 it says that the Portal Act, 4(a)(1) and (2), will apply
5 to activities which occur -- I'm quoting now -- "which
6 occur either prior to the time on any particular workday
7 at which such employee commences, or subsequent to the
8 time on any particular workday at which he ceases, such
9 principal activity or activities." And it simply follows,
10 as a matter of the plain text, that when Steiner held that
11 those activities, "such principal activities," include the
12 donning and the doffing, that everything that happens
13 between those two events is not encompassed by the Portal
14 Act.

15 CHIEF JUSTICE ROBERTS: Your --

16 JUSTICE SCALIA: What if -- what if --

17 CHIEF JUSTICE ROBERTS: -- answer to Justice
18 Kennedy said that the dog cases were distinguishable
19 because there was a break in the principal activity. So,
20 if we were to rule in your favor, all the employer has to
21 do is make sure that the donning and doffing station's far
22 enough away from the production line so that there will be
23 a sufficient break between the two activities.

24 MR. GOLDSTEIN: Well, the -- both the donning
25 and the doffing and the walking in between and the wait

1 for the equipment, which is the bulk of the time in all
2 these cases, would be compensable. The Department of
3 Labor has regulations --

4 CHIEF JUSTICE ROBERTS: What do you mean "it
5 would be" -- that's my question.

6 MR. GOLDSTEIN: Yes. I'm sorry, Mr. Chief
7 Justice. There -- the donning and doffing in the Alvarez
8 case, by and large, happens in one place: in a locker
9 room. In the Tum case, by contrast, the employees show up
10 at a cage, they wait for things, they walk, they pick up
11 something else, they wait, they pick up something else.
12 And so, there's a body of time that I refer to as the
13 donning and doffing process. All of that would clearly be
14 compensable, even in your hypothetical. Your hypothetical
15 would address the final piece of time, and that is, you
16 get your last piece of clothing on, and you have to go to
17 the floor, and the employer could say, "Take a 15 minute
18 break," in there. I suppose that's hypothetically
19 possible. I think the reason it doesn't happen in these
20 cases and in the other cases I've studied is that the
21 employer has an incentive, when they're forced to
22 compensate, to do things efficiently.

23 What happens is, the employer will say, "All
24 right, your shift is going to start at 6:30 in the
25 morning; therefore, you can clock in and start donning at

1 6:23." That's a 7-minute window, and that forces the
2 employees to do everything efficiently. They don't insert
3 artificial breaks.

4 JUSTICE SCALIA: Yes, but why -- if you're
5 talking about efficiency, it may well be that the
6 employees, instead of imposing upon the employer the costs
7 of moving the donning and doffing location closer to the
8 -- to the place where the real work is being done, they
9 might prefer, instead, to get a slight salary increase per
10 hour. But -- and that is -- that is possible, under the
11 petitioner's scheme, because it is left to private
12 negotiation; whereas, what you say is that they must pay
13 for that. They must pay for that walk from the donning
14 and doffing. They cannot negotiate out of it, because if
15 it's in the Fair Labor Standards Act, it is mandatory.

16 So I -- don't talk to us about efficiency. It
17 seems to me that the efficiency arguments are on the other
18 side. Leave it to the private sector. The employers --
19 the employees can decide what they care more about.

20 MR. GOLDSTEIN: Well, Justice Scalia, I -- all I
21 have in -- before me that I can rely on is the statute
22 that Congress enacted. Your point would cover, of course,
23 equally, the donning and doffing in Steiner itself.
24 Congress made some choices about things that were going to
25 be compensable. It's worth noting that Congress drew a

1 line about whether -- in terms of whether there was a
2 collective bargaining agreement involved, because under
3 section 203(o) of the statute, in workplaces covered by a
4 collective bargaining agreement, you can negotiate out of
5 at least clothes changing.

6 But I think within the framework of the statute
7 that we do have, I am actually quite correct, and that is,
8 right now, today, the employers have no incentive to adopt
9 an efficient scheme for arranging donning and doffing.
10 They can put things in different buildings if they like.
11 The employees here are required to spend 10 or 20 minutes
12 waiting for different clothing at different times,
13 depending on how long the lines are. It is a workable
14 scheme that Congress designed that said, "We're going to
15 have a workday." And the employer is in charge of
16 deciding when the workday begins or ends, but, during that
17 workday, they're going to have to pay.

18 I did want to --

19 JUSTICE GINSBURG: Mr. Goldstein, I just wanted
20 to have a clear answer to the question Justice Scalia
21 asked you. Is it so that collective bargaining could not
22 trade off the compensation for the walking and the donning
23 and doffing for some other benefit that the employees
24 might prefer?

25 MR. GOLDSTEIN: Justice Ginsburg, it is an

1 unsettled question, is the answer. I will give you the
2 best answer I can. 203(o) allows for the negotiation away
3 of clothes changing time. The question whether clothes-
4 changing time includes safety equipment is a matter in
5 dispute. The ninth circuit held that it didn't. This
6 Court denied certiorari on that question.

7 The further question, if you did negotiate away
8 the clothes changing time, whether that would negotiate
9 away the walking and waiting time has not been confronted
10 by a court, so far as I am aware. It might be said to
11 logically follow, but it hasn't been decided. It's not
12 presented by this case, because cert was denied. And so,
13 I haven't thought very much --

14 JUSTICE GINSBURG: So, you say it's an open
15 question.

16 MR. GOLDSTEIN: It is. I'm confident it's an
17 open question.

18 JUSTICE GINSBURG: What --

19 MR. GOLDSTEIN: Could --

20 JUSTICE GINSBURG: -- about what gear qualifies?
21 That is, here we have no dispute that this is protective
22 gear. But it's not any changing that counts. So, how do
23 we know whether this is the kind of donning and doffing
24 that's compensated in -- or the kind that isn't?

25 MR. GOLDSTEIN: The line that has been drawn by

1 the Department of Labor, is where I will start, and the
2 Department of Labor -- and let me give you some citations
3 -- says that the line is between whether the employer
4 requires you to do the donning and doffing on the plant or
5 not. The citations for that are section 785.24(c) of the
6 regulations, 790, note 65. And then it contrasts clothes-
7 changing that's by your own choice, in 790.7(g). I think
8 that's a sensible line, but it's not presented by this
9 case.

10 Justice Breyer, it goes to your characterization
11 of the final sentence of footnote 49, and that is:
12 sometimes.

13 The reason I think it's sensible to draw the
14 line that the Department has in required clothes changing
15 is that the employer will only require you to do it onsite
16 if it is truly integral and indispensable to your job;
17 otherwise, it'll be optional, or they'll let you do it at
18 --

19 JUSTICE BREYER: Can I ask you about a -- the
20 other part of the case? I mean, I think, as I've
21 suggested, most of these things are up to the agency.
22 They're minor things in law, so -- but it seems well
23 established in the agency reg, as well as in Skidmore, the
24 famous line about waiting being, "Are you waiting to be
25 engaged, or are you engaged to wait?" So, assuming that

1 this is just putting on and off clothes that are essential
2 -- so, assume you win on that part -- when they wait to
3 put on the clothes, you would think -- if it's like an
4 airport, sometimes you wait; if you're lucky, you don't.
5 Well, under those circumstances, you wouldn't be engaged
6 to wait. You're waiting to put on the clothes, not -- you
7 know, etcetera -- so, why would you win on that part?

8 MR. GOLDSTEIN: Can I, again, make sure I have
9 the hypothetical in terms -- we are, in a sense, talking
10 about the first wait. You show up at the first --

11 JUSTICE BREYER: The -- what happens -- you win
12 on the --

13 MR. GOLDSTEIN: Yes.

14 JUSTICE BREYER: -- clothes. They're protected
15 gear. That's the assumption. That's part of the job.
16 The workday begins. But you have to get there, and you
17 wait to get the clothes. On that --

18 MR. GOLDSTEIN: But --

19 JUSTICE BREYER: -- one, why not Skidmore? Why
20 not the reg? And, if so, why don't you lose on that one?

21 MR. GOLDSTEIN: You are -- in that situation,
22 you're waiting for the very first piece of equipment. In
23 the Tum case, you show up at the cage at the beginning of
24 the day. You are engaged to wait. The regulatory
25 citations are two: 790.6(b) and 790.7(h). There's also a

1 case that's confronted this, which is the Metzler case,
2 127 F.3d 959. All those authorities make clear that if
3 the employer tells you, "Show up to do something, show up
4 here to put on your clothes," and, because of the way the
5 employer has designed the system, you have to wait,
6 through no fault of your own --

7 JUSTICE BREYER: But suppose sometimes you have
8 to wait? Sometimes it's a minute, sometimes it's nothing.
9 Is it like an airport? Or does the employer here say,
10 "You must show up seven minutes early, because there'll be
11 a wait"?

12 MR. GOLDSTEIN: It's the -- it would be the same
13 result whether the employer puts a time on it or not. The
14 employer says -- I'll give you an example we could agree
15 on, when it's a time --

16 JUSTICE BREYER: Is that what the reg says?

17 MR. GOLDSTEIN: The reg doesn't --

18 JUSTICE BREYER: It's surprising I didn't see
19 that in the reg, if it says that.

20 MR. GOLDSTEIN: The regulation gives this
21 example, which I think is on point, and that is, if you
22 are told to show up for when the production begins -- the
23 meat's going to come across -- and the machine breaks down
24 or they simply don't start sending the meat until five
25 minutes later, the fact is that you get compensated,

1 because you're supposed to be there. The fact that they
2 tell you, "Be there for the" --

3 JUSTICE BREYER: Where it's first in the day.

4 MR. GOLDSTEIN: Yes.

5 JUSTICE BREYER: First thing --

6 MR. GOLDSTEIN: Yes.

7 JUSTICE BREYER: -- in the day.

8 MR. GOLDSTEIN: Yes. Unquestionably.

9 JUSTICE SCALIA: I thought you would say that
10 the whole principle of, you know, "Are you engaged to
11 wait, or waiting to be engaged?" just contradicts the
12 principle that was adopted in Steiner. I mean, are you
13 putting -- are you employed to put on your -- to put on
14 your clothes, or are you putting on your clothes to do
15 your work? And Steiner essentially repudiates that. So,
16 you know, let's forget about Skidmore.

17 MR. GOLDSTEIN: Well, Justice Scalia, I think
18 Justice Breyer is testing a very particular piece of time.

19 JUSTICE SCALIA: No, I understand.

20 MR. GOLDSTEIN: He's trying to say, What is --
21 let me take you to the text of the statute --

22 JUSTICE SCALIA: No, I --

23 MR. GOLDSTEIN: The -- he's trying to figure out
24 when the -- the final clause of 4(a) talks about
25 commencement -- he want to know when it commences. Does

1 it commence when you get in line or when you --

2 JUSTICE SCALIA: Right.

3 MR. GOLDSTEIN: -- first get the piece of
4 clothes? It's a fair question. The other side hasn't
5 made any argument that it doesn't include the first wait,
6 I think, because you're told that you have to don, it's
7 part of your principal activity.

8 Let me also say, this, I think, is a somewhat
9 academic question when it comes to -- and nothing against
10 academics, but the -- it's a somewhat academic question
11 when it comes to actual workplaces, because what happens
12 is what I described before, the employers, under employers
13 that are following our rule, do set up a time clock, and
14 they say, "Show up at 6:23, and that's when you can clock
15 in." They have computerized swipe cards, and the computer
16 won't recognize them until 6:23. And it's the time after
17 that that will be compensable. So, if the Court were to
18 say the donning and doffing process starts and ends the
19 workday for purposes of the Portal Act, everyone will
20 understand what the --

21 JUSTICE GINSBURG: That wasn't decided below,
22 was it? It was just a question of walking and waiting,
23 and they weren't specific about whether that included
24 waiting or walking, predonning.

25 MR. GOLDSTEIN: That's right. The reason for

1 that is, there isn't a predonning wait in the Alvarez
2 case, where the plaintiffs won, and the Tum plaintiffs
3 lost on an unrelated theory that the actual donning and
4 doffing couldn't start the workday.

5 JUSTICE GINSBURG: So, perhaps we shouldn't
6 reach a question that hasn't been aired and decided below.

7 MR. GOLDSTEIN: And my formulation, which is
8 simply the donning and doffing process, would, in fact,
9 leave the -- to the lower courts the question of precisely
10 when donning begins and doffing ends. That's a fair point.

11 JUSTICE SCALIA: Mr. Goldstein, since you
12 display such respect for the agency here --

13 [Laughter.]

14 JUSTICE SCALIA: -- what do you do about the
15 agency's footnote that flatly contradicts your theory of
16 the case, and which says that the mere fact that donning
17 and doffing may require compensation does not necessarily
18 mean that travel between the clothes changing place and
19 the actual place of performance would be excluded?

20 MR. GOLDSTEIN: Justice Scalia, my answer, I
21 think, is that -- you had it right in the first half hour,
22 and that is, that phrase --

23 [Laughter.]

24 MR. GOLDSTEIN: -- "not necessarily," can mean
25 one of two things; i.e., we're denying that it follows a

1 fortiori, or we're simply not deciding the question.

2 The agency itself, which -- the Secretary wrote
3 this guidance -- the agency explains that it meant that
4 we're simply not deciding it. That's actually perfectly
5 intelligible and a correct understanding of the history.
6 Remember, the Portal Act gets enacted, and, right
7 afterwards, the Secretary issues this guidance that then
8 gets put in the CFR. This was their first reaction to the
9 Act. Subsequently, after several years, these are -- what
10 you're referring to is something in the -- what are known
11 as the Part 790 guidance. Later on, the Secretary issued
12 what's called the Part 785 guidance. And, in 785.3, it
13 said, anything that, in 785, contradicts 790, controls.
14 And 785.38 is the relevant citation. And there they say,
15 "If you show up at the beginning of the day and you're
16 given instructions, or you show up at the beginning of the
17 day and you get a set of tools, what follows after that,
18 in terms of travel time, is compensable."

19 Can I answer two -- make two other very quick
20 points? Justice Ginsburg, you asked about mootness. I
21 would refer you to the Deposit Guarantee case, 445 U.S.
22 326, which talks about collateral estoppel effects. There
23 is ongoing litigation against this defendant on this
24 question, a case called Chavez, in the district court.
25 The citation for the proposition that it will collaterally

1 estop them is the restatement section of judgments,
2 section --

3 JUSTICE GINSBURG: I wasn't questioning that, so
4 much as it is -- it is extraordinary for this Court to
5 take a case when the bottom line is going to be the same.
6 And, since we have the identical issues, with no such
7 preliminary question in Tum, if we decide in your favor in
8 the Tum case, then the other case is taken care of.

9 MR. GOLDSTEIN: It's true, you could dig the
10 case. My only point is that it is not moot. And perhaps
11 the variety of workplaces shown in the two cases would
12 illustrate things for the lower courts. I suspect that
13 may have been why the Court granted cert.

14 I also wanted to respond to the suggestion that
15 this is a surprise to industry, with just a couple of
16 citations. Walking and waiting time has been held
17 compensable since at least 1961. The Mitchell case, 286
18 F.2d 721, the Barrentine case, 750 F.2d 47. There was a
19 meatpacking plant at least seven years ago, 127 F.3d 959.
20 And this has been the agency's enforcement position at
21 least since the late 1980s. It's sufficiently settled
22 that the court of appeals here held that IBP's failure to
23 pay for this time was a willful violation of the statute.

24 If there are no further questions.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Goldstein.

2 Mr. Gornstein.

3 ORAL ARGUMENT OF IRVING L. GORNSTEIN

4 ON BEHALF OF THE UNITED STATES

5 MR. GORNSTEIN: Mr. Chief Justice, and may it
6 please the Court:

7 The Portal Act excludes walking time from
8 compensation only when it occurs outside the workday,
9 before an employee commences, or after he ceases, his
10 principal activities. And Steiner held that the term
11 "principal activities" includes activities that are an
12 integral and indispensable part of the principal
13 activities. It follows that when donning and doffing are
14 integral and indispensable parts of the principal
15 activities of the employees, then walking that occurs
16 after donning, and before doffing, occurs within the
17 workday, and it is not excluded from compensation by the
18 Portal Act.

19 Now, the employers in these cases have argued
20 that the term "principal activities" does not encompass
21 activities that are integral and indispensable parts
22 thereof, and that Steiner did not so hold. But, at the
23 very outset of its opinion, the Court, in Steiner, posed
24 the question presented as whether changing clothes and
25 showering are compensable as part of the employee's

1 principal activities, and had answered that question
2 several pages later by stating that it agreed with the
3 conclusion of the court of appeals in that case that the
4 term "principal activities" includes activities that are
5 an integral and indispensable part of the principal
6 activities, and that the activities in question in that
7 case fit within that description.

8 Now, that was the only textual basis on which
9 the Court could have reached the conclusion that it did,
10 because, if the only principal activities in that case had
11 occurred on the production floor, then the changing of
12 clothes at the beginning of the day, and the showering at
13 the end of the day, necessarily would have been
14 preliminary to and postliminary to said principal
15 activities, and thereby expressly excluded from
16 compensation.

17 JUSTICE SCALIA: What if I think that opinion
18 was just flatly wrong, that Congress, when it referred to
19 the "principal activity or activities," was talking about
20 the cutting of the meat or whatever the employer hired the
21 person to do? He didn't hire him to put on clothes. What
22 if I think that? Why do I have to extend what I think to
23 be an erroneous decision beyond its narrow holding?

24 MR. GORNSTEIN: Justice Scalia, we are not
25 asking for an extension of what you would regard as an

1 erroneous holding. All we're saying is that you read the
2 term "principal activities" as the Court interpreted it in
3 Steiner. Once you do that, and you plug it into the
4 statute, the plain language of the statute takes over,
5 because it says that walking is only excluded when it
6 comes before the employee commences, or after he ceases,
7 the principal activities. Once you plug "integral and
8 indispensable" into that sentence, as Steiner requires,
9 then you are -- the plain language of the statute tells
10 you that that time is not -- is compensable when it occurs
11 after donning and before doffing.

12 JUSTICE SCALIA: Why can't I say that Steiner
13 requires that interpretation of what constitutes a
14 "principal activity" only for purposes of determining what
15 is compensable, and that when we -- when we come to
16 examine the separate question, of when the workday begins,
17 we can -- we can apply, as far as precedent is concerned,
18 a different interpretation of what is a "principal
19 activity"?

20 MR. GORNSTEIN: Because the term "principal
21 activity," I believe, as, you yourself, pointed out, is
22 listed in the first -- at (a)(1). That's the first place
23 it appears. Everywhere else it appears, including in
24 (a)(2) and in the concluding sentence, it says "said
25 principal activities." So, the statute itself tells you

1 that the term "principal activities" has to mean the same
2 thing everywhere it appears. And since you have already
3 interpreted that term, in Steiner, to include "integral
4 and indispensable activities," that terminology has to
5 appear everywhere in the statute.

6 CHIEF JUSTICE ROBERTS: Mr. Gornstein, do you
7 agree that just because it's a compensable activity
8 doesn't necessarily mean that there isn't going to be a
9 break in the workday? People have talked about the dog
10 example, and there are others. I mean, and -- so, all
11 you're talking about is the determination that this is a
12 principal activity. It seems that there's a separate --
13 second question, which is, How do we tell if the space in
14 time between two different principal activities, and
15 they're two very different types of activities, is a break
16 or part of the continuous workday?

17 MR. GORNSTEIN: Well, first of all, that
18 question arises not under the Portal Act, which only
19 applies before the principal activities begin and after
20 they end, but under the Fair Labor Standards Act, itself.
21 And that question would be governed by the Court's prior
22 decisions on what constitutes hours worked, together with
23 the Department of Labor's regulations that address what
24 constitute hours worked. And -- within the workday -- and
25 what the Department of Labor has said is, generally,

1 everything within the workday is compensable, except for a
2 meal period and except for a time period where there is a
3 break that is so substantial that the employees can
4 effectively use that time for their own purposes. And so,
5 it says things like 5- to 20-minute breaks are not periods
6 where the employee is not working, but they are resting
7 for the further work. That is common in the industry.
8 And so, that would be an issue that would arise when you
9 had a break that was much longer than that, probably at
10 least a half hour, where you can actually effectively use
11 that time for your own purposes and are not required,
12 essentially, to stay around on the employer's premises and
13 to wait or rest to begin your work anew. So --

14 JUSTICE SOUTER: I take it you then agree that
15 the answer for which you argue here follows not merely
16 from the text of 4(a), but the text of 4(a) plus a
17 continuous -- some variety of a continuous workday rule.

18 MR. GORNSTEIN: That's correct.

19 JUSTICE SOUTER: You've got to have both.

20 MR. GORNSTEIN: That you -- that you have to
21 have a work under the Fair Labor Standards Act, and
22 then you have to have the exclusion from that not apply.

23 JUSTICE SOUTER: Yes.

24 MR. GORNSTEIN: The issue here, the exclusion
25 doesn't apply, and nobody has raised the question about

1 whether this is hours worked under the Fair Labor
2 Standards Act. But clearly it is, under the Court's
3 decisions.

4 JUSTICE SOUTER: But you don't -- but you don't
5 get the answer from simply the text itself.

6 MR. GORNSTEIN: That's correct.

7 JUSTICE BREYER: Did you say --

8 JUSTICE O'CONNOR: Mr. Gornstein, what about in
9 the Tum case, the walking and waiting before the donning
10 of the clothes?

11 MR. GORNSTEIN: Yes. On the -- on the waiting
12 before the clothes, there's -- there are two series of
13 waits: the first wait and then later waits. As to the
14 later waits, once you decide that the donning begins the
15 process of principal activities --

16 JUSTICE O'CONNOR: I'm talking about the --

17 MR. GORNSTEIN: The initial wait.

18 JUSTICE O'CONNOR: -- these. The initial.

19 MR. GORNSTEIN: The initial wait --

20 JUSTICE O'CONNOR: You don't think that's
21 covered.

22 MR. GORNSTEIN: We do think that's covered. And
23 under -- the Department of Labor's approach is to treat a
24 required wait for an activity as an integral part of that
25 activity. So, if that activity is, itself, compensable as

1 a principal activity, then the required wait for that
2 would also be --

3 JUSTICE BREYER: But the word --

4 MR. GORNSTEIN: -- compensable as part of that.

5 JUSTICE BREYER: -- "required" is what I didn't
6 understand in that. My airline example, what's required?

7 MR. GORNSTEIN: What the -- the Department
8 distinguishes --

9 JUSTICE BREYER: "Required" is -- sometimes
10 there's a wait, sometimes there's not a wait. Is that
11 required?

12 MR. GORNSTEIN: Well, if the employee is simply
13 voluntarily arriving earlier than --

14 JUSTICE BREYER: He has to --

15 MR. GORNSTEIN: -- he has to and wait --

16 JUSTICE BREYER: -- put on his uniform. And
17 sometimes there's a wait, sometimes there's --

18 MR. GORNSTEIN: When --

19 JUSTICE BREYER: -- not a wait.

20 MR. GORNSTEIN: If --

21 JUSTICE BREYER: Is that a required -- or not?
22 And, if it is, where does it say that in the regs?

23 MR. GORNSTEIN: It's a required wait anytime, in
24 order to get to the production floor on time, the employee
25 has to be at the donning station in a sufficient period of

1 time to get there, and if there's a wait at that time,
2 then he's being required to wait.

3 JUSTICE GINSBURG: Mr. Goldstein acknowledged
4 that that issue, the predonning wait, was not decided
5 below.

6 MR. GORNSTEIN: I'm not sure I view that the --
7 the question as not having been decided below. And the
8 Court also did grant certiorari on waiting time.

9 JUSTICE GINSBURG: But it wasn't, obviously,
10 decided in the first circuit, because they ruled against
11 the employee's position.

12 MR. GORNSTEIN: But they said "a reasonable
13 period of time for waiting" is non-compensable. And that,
14 at least as a general rule, is not --

15 JUSTICE GINSBURG: But the -- but the question
16 of when -- what waiting are we talking about? Before the
17 principal activity or only after? That specific issue, as
18 I understand it, was not aired below.

19 MR. GORNSTEIN: Well, I'm -- my memory, at
20 least, of the court of appeals opinion, is that it was
21 saying that the wait before the donning was not
22 compensable, because it was a preliminary activity. But I
23 -- if you've read it differently, then that may be --

24 JUSTICE BREYER: Do we have to decide the second
25 question? I think it's actually quite difficult. I can

1 find a lot of authority that seems to me just --

2 MR. GORNSTEIN: The Court always has discretion
3 not to decide --

4 JUSTICE BREYER: No, no, no.

5 MR. GORNSTEIN: -- the question.

6 JUSTICE BREYER: I don't mean that.

7 MR. GORNSTEIN: It's --

8 JUSTICE BREYER: I mean, is there -- is there a
9 basis in this record -- will it make a difference? It's
10 not really well briefed, I don't think.

11 MR. GORNSTEIN: I -- the --

12 JUSTICE BREYER: It's not thoroughly briefed.

13 MR. GORNSTEIN: Justice Breyer, if you do not
14 want to decide that question, you don't have to decide it.

15 JUSTICE BREYER: I don't do things on the ground
16 --

17 MR. GORNSTEIN: The Court granted --

18 JUSTICE BREYER: -- I'd like it or not.

19 MR. GORNSTEIN: -- certiorari as an issue that
20 can be, and should be, resolved, in our view. But if the
21 Court doesn't want to resolve that issue, that's fine.

22 JUSTICE GINSBURG: Mr. Gornstein, one thing I'm
23 curious about. With all the trouble of various
24 interpretations and famous footnote 49 --

25 MR. GORNSTEIN: 49.

1 JUSTICE GINSBURG: -- why, in all these years,
2 hasn't the Department of Labor gotten rid of it?

3 [Laughter.]

4 MR. GORNSTEIN: It should have. Because even at
5 the time it was written, that reservation was in tension
6 or not in conflict with the plain language of the
7 regulations. And certainly by the time of Steiner, it was
8 clear that this kind of time was compensable.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr.
10 Gornstein.

11 Mr. Phillips, you have four minutes remaining.

12 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

13 ON BEHALF OF PETITIONER

14 MR. PHILLIPS: Thank you, Mr. Chief Justice. I
15 just have a couple of points I'd like to make.

16 First, Justice Breyer, I want to start with the
17 waiting times. I didn't actually have an opportunity to
18 spend much time talking about them. But I think the
19 answer that the Solicitor General's Office has offered
20 with respect to the waiting time simply illustrates the
21 expandable nature of the workday. Their position --
22 Justice Ginsburg -- or, no Justice O'Connor specifically asked
23 that question, "You're not saying that waiting time prior
24 to engaging in a primary activity, in fact, starts the
25 workday." And the answer is, absolutely, it does, because

1 they find that everything that is integral and
2 indispensable triggers the start of the workday. So, to put
3 it into fairly graphic terms. If you have to show up in
4 order to put on a coat in order to go onto the floor in
5 order to do your services, then the waiting time for that
6 coat counts. If, however, you also have to put in
7 earplugs in order to get to the place where you have to
8 get the coat, not only do putting in the earplugs count,
9 under that theory, but, if you have to wait, you have
10 that, and that extends the workday, and all of the walking
11 in between there.

12 So, if you're asking, "Is this going to become a
13 significant liability?" the answer is clearly yes. For
14 very significant compensable acts -- and, indeed, in this
15 context, some of those compensable acts were found by the
16 jury to be utterly diminimus -- you're going to end up
17 with significant waiting time, and you're going to end up
18 with significant walking time.

19 JUSTICE O'CONNOR: Was the predonning waiting
20 issue decided below?

21 MR. PHILLIPS: Yes, Justice O'Connor, they
22 specifically held that all of the waiting time is not --
23 it is to be excluded. And they did that on the basis of
24 790.7(g), before you get to the footnote -- because that's
25 the tag to the footnote -- as to what is -- what is the

1 ordinary meaning of wait -- of preliminary and
2 postliminary for waiting time? And the expectation is
3 that if you're waiting to get your check, and if you're
4 waiting to check in, the recognition is that those --
5 those are completely fortuitous, just as it is here.
6 There's nobody who structured this arrangement so that you
7 will end up spending time waiting. Indeed, the scheme is
8 designed to get people in as efficiently --

9 JUSTICE GINSBURG: They decided --

10 MR. PHILLIPS: -- as possible.

11 JUSTICE GINSBURG: -- no waiting time. They
12 didn't decide "if" waiting time -- "which" waiting time.
13 But they said no -- it's irrelevant whether it's before or
14 after, because waiting time isn't covered. So, I don't
15 see how they specifically decided, yes, waiting time is
16 covered, but not --.

17 MR. PHILLIPS: Well, I think, Justice Ginsburg,
18 if they specifically decide that there is no waiting time
19 that's covered here, and the plaintiffs have sought
20 compensation for both pre- and post-waiting time, then the
21 issue is squarely posed, and they've certainly posed it in
22 their petition, and the Court granted it. So, again,
23 obviously, you're free to decline to decide issues, but it
24 seems to me that one is posed.

25 I want to --

1 JUSTICE GINSBURG: Well, it seems the court
2 below said waiting time isn't covered, so we're not going
3 to engage in any debate about what -- if waiting time is -
4 - were covered, which waiting time?

5 MR. PHILLIPS: Right, but that just goes to the
6 question -- I think it disposes of the issue of, if you
7 have waiting time that otherwise looks to be fairly
8 ordinary preliminary/postliminary activity, it,
9 nevertheless, can be converted into primary activity under
10 their interpretation of the statute. And they clearly
11 suggest that the answer is yes. Our suggestion is, that's
12 inconsistent with the way waiting time is handled under
13 the regulations; and, therefore, the answer clearly should
14 be no. And, at a minimum, the Court ought to affirm that
15 part of the Tum decision.

16 With respect to the holding of Steiner -- I
17 mean, it's important to put in mind, Steiner -- one of the
18 things -- two things that Steiner focused on -- it focused
19 on section 3.0, and it recognized that there are going to
20 be situations where you're going to be able to bargain
21 away clothes changing. And so, now you're in a situation
22 where, for some -- for -- in some circumstances, because
23 you've bargained away compensation for clothes changing,
24 walking that takes place before or after that will never
25 be compensable; in other situations, it will be

1 compensable. That's an absurd outcome in a situation
2 where Congress clearly had one thing in mind that it
3 absolutely wanted to accomplish, and that was to ensure
4 that walking, riding, traveling to the place where you
5 actually perform the services for which you've been hired,
6 has been -- has -- is excluded from being mandatorily
7 compensated -- Steiner doesn't deal with 4(a)(1); the
8 language is as plain as it can be -- are not -- you know,
9 unless specifically excluded by section 4(a)(1).

10 Thank you, Your Honors.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

12 The case is submitted.

13 (Whereupon, at 11:32 a.m., the case in the
14 above-entitled matter was submitted.)

15

16

17

18

19

20

21

22

23

24

25