No. 09-1917

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LUISA PEREZ, *et al.*,

PLAINTIFFS-APPELLEES,

v.

MOUNTAIRE FARMS, INC., and
MOUNTAIRE FARMS OF DELAWARE, INC.,

DEFENDANTS-APPELLANTS.

On APPEAL from the UNITED STATES DISTRICT COURT
for the DISTRICT OF MARYLAND

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

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellees in this Fair Labor Standards Act ("FLSA" or "the Act") "donning and doffing" case.

INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in this case because she administers and enforces the FLSA as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251, *et seq.* ("Portal Act"). *See* 29 U.S.C. 204, 211, 216(c), 217. Consistent with that responsibility, the Department of Labor ("Department") has

issued interpretive regulations addressing the compensability of "hours worked" under the FLSA, *see* 29 C.F.R. Part 785, and the Portal Act, *see* 29 C.F.R. Part 790. The Department also has issued formal guidance on the compensability of donning and doffing activities under the FLSA after the Supreme Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) (in which the United States participated as *amicus curiae*). *See* Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006) ("Advisory Memo. 2006-2"), *available at* http://www.dol.gov/whd/FieldBulletins/AdvisoryMemo2006_2.pdf. Moreover, the Secretary is engaged in litigation on the issue of the compensability of donning and doffing sanitary and protective equipment in a poultry processing plant against Tyson Foods and is currently seeking a corporate-wide prospective injunction, requiring that Tyson Foods compensate employees for the continuous workday, starting with the first principal activity of donning and ending with the last principal activity of doffing. *Solis v. Tyson Foods, Inc.*, No. 2:02-cv-01174 (N.D. Ala. filed May 9, 2002) (jury verdict in favor of the Secretary on November 5, 2009). This Court has not spoken directly on the application of the Portal Act on the donning and doffing of sanitary and protective equipment in food processing facilities.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the donning and doffing of sanitary and protective equipment is integral and indispensable to the employees' principal activities at the Millsboro poultry facility, and thus was not excluded from compensable time under the Portal Act, as preliminary and postliminary activities.

2. Whether the district court correctly held that the time spent by employees donning, doffing, and washing their sanitary and protective equipment at the beginning and end of the employer-established meal period was compensable.

3. Whether the district court correctly held that the aggregate amount of time spent by employees donning, doffing, and washing their sanitary and protective equipment is not excludable from compensable time under the de minimis exception.

ARGUMENT

I. DONNING AND DOFFING SANITARY AND PROTECTIVE EQUIPMENT IS INTEGRAL AND INDISPENSABLE TO THE EMPLOYEES' PRINCIPAL ACTIVITIES IN PROCESSING POULTRY AND, THEREFORE, THOSE ACTIVITIES ARE THEMSELVES PRINCIPLE ACTIVITIES THAT START AND END THE COMPENSABLE CONTINUOUS WORKDAY

1. The FLSA generally requires employers to compensate covered employees at one and one-half times their regular rate of pay for all hours worked in excess of 40 hours in a workweek.

See 29 U.S.C. 207(a)(1).[1] The Portal Act creates a limited exception to the FLSA's general rule that an employer must compensate its employees for all hours worked. Section 4 of the Portal Act, 29 U.S.C. 254, relieves an employer of responsibility for compensating employees for travel to and from the location of the employee's "principal activity," and for activities that are "preliminary or postliminary" to that principal activity, "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). The Portal Act excludes traveling and other preliminary and postliminary activities only when they occur outside the workday, which is defined as "the period between the commencement and completion on the same workday of an employee's

[1] Mountaire does not challenge the ruling below that, in light of *Tennessee Coal, Iron & R.R. v. Muscoda Local 123*, 321 U.S. 590, 598 (1944), the donning and doffing of sanitary and protective equipment is "work" because these activities require physical and mental exertion controlled and required by the employer and are primarily for the benefit of the employer. *See Perez v. Mountaire Farms, Inc*., 601 F. Supp. 2d 670, 677 (D. Md. March 9, 2009) (order on the summary judgment motion); *Perez*, 610 F. Supp. 2d 499, 516, 518 (D. Md. April 17, 2009) (order on the bench trial); *see also De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 373 (3d Cir. 2007) (exertion is not required for an activity to constitute work), *cert. denied*, 128 S. Ct. 2902 (2008).

principal activity or activities." 29 C.F.R. 790.6(b).[2] This principle, known as the "continuous workday" rule, requires an employer to pay an employee for any activity that occurs between the first and last principal activities of the employee's workday. *See Alvarez*, 546 U.S. at 28 ("'[T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [§ 4] have no application.'") (quoting 29 C.F.R. 790.6(a)).

The Supreme Court has held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself

[2] The interpretive regulations at 29 C.F.R. Part 790, which the Department promulgated in 1947, 12 Fed. Reg. 7655 (Nov. 18, 1947), were ratified by Congress in 1949 when former section 16(c) of the FLSA was enacted. *See Steiner v. Mitchell*, 350 U.S. 247, 255 n.8 (1956). In any event, the Department's longstanding regulations on the effect of the Portal Act, 29 C.F.R. Part 790, are, at minimum, entitled to substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). *See Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *cf. Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), is appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

a 'principal activity' under § 4(a) of the Portal-to-Portal Act," and therefore is compensable under the FLSA. *Alvarez*, 546 U.S. at 37 (relying on *Steiner*, 350 U.S. at 256). Such an activity commences and ends the continuous workday, and marks the beginning and end of compensable time. *See Alvarez*, 546 U.S. at 37; *see also* Advisory Memo. 2006-2, at 2. Thus, if the donning and doffing of sanitary and protective equipment is integral and indispensable to the employees' principal activities, then the donning and doffing themselves are principal activities that mark the beginning and the end of the continuous workday, such that the employees are entitled to compensation for those activities and any other activities, including any walking, waiting, and washing that occur between the first and last principal activities. *See Alvarez*, 546 U.S. at 37.[3]

2. The Supreme Court in *Steiner* concluded that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." 350 U.S. at

[3] The Department's position is that donning includes the obtaining of equipment. *See* Advisory Memo. 2006-2, at 1 n.1 (citing *Tum v. Barber Foods*, 331 F.3d 1, 9 (1st Cir. 2004)).

256. The Court held that changing into old clean work clothes and showering on the employer's premises by battery plant workers were integral and indispensable to the employees' principal activities, and thus employees should be compensated for time spent donning and doffing and showering. *See* 350 U.S. at 249, 254-58. In reaching that conclusion, the Court found persuasive Senator Cooper's statement during debate on the Portal Act that "if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable." *Id.* at 258 (internal quotations omitted).

Steiner's holding was also based in part on the Department's regulations interpreting the Portal Act. *See* 350 U.S. at 255 n.9 (relying on 29 C.F.R. 790.8). These regulations, which were promulgated shortly after the Portal Act was passed, state that if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c). The regulations explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer or by the nature of the work." 29 C.F.R. 790.8(c) n.65. By contrast, "if changing clothes is merely a

convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c). The Department's longstanding position is that "if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." Advisory Memo. 2006-2, at 3 (emphasis added).

More recently, in *Alvarez*, the Supreme Court reaffirmed this precedent in the context of donning and doffing sanitary and protective equipment in poultry and meat processing plants. While the questions presented in *Alvarez* were whether the Portal Act excluded the time employees spent (1) walking to the production area after employees donned and doffed sanitary and protective equipment, and (2) waiting to don sanitary and protective equipment, *see* 546 U.S. at 24, the Court necessarily accepted the Ninth Circuit's determination that donning and doffing required sanitary and protective equipment is integral and indispensable to the employees' principal work activities when it concluded that any walking and waiting time that occurs after such donning and doffing is compensable. *See Alvarez*, 546 U.S. at 37, 39-40; *see also* Advisory Memo. 2006-2, at 1 ("The Court determined that donning and doffing gear is a 'principal activity' under the Portal to Portal Act.").

3. The district court relied on the two-part test adopted in the Ninth Circuit's decision in *Alvarez v. IBP, Inc.,* 339 F.3d 894, 902-03 (9th Cir. 2003). *See* Dec. at 28.[4] The Ninth Circuit applied *Steiner*'s integral and indispensable doctrine in determining that donning and doffing required sanitary and protective equipment was integral and indispensable to the employees' principal work activities. *See Alvarez*, 339 F.3d at 902-03. The court in turn ruled that an activity is integral and indispensable if it is (1) necessary to the principal work performed and (2) done for the benefit of the employer. *Id.* at 902-03. Relying upon the Department's regulation 29 C.F.R. 790.8(c) n.65, the Ninth Circuit concluded that the donning and doffing in a meat processing plant was "necessary to the principal work performed," because the donning and doffing of the equipment on plant premises was required by law, by the rules of the employer, and by the nature of the work. *Id.* at 903. Moreover, the court concluded that the donning and doffing of this equipment "is, at both broad and basic levels, done for the benefit of [the employer]" when the performed activities allow the employer to satisfy its requirements under the law, and prevent unnecessary workplace injury and contamination. *Id.* at 903.

[4] The district court's "Memorandum Opinion Setting Forth Findings of Fact and Conclusions of Law Pursuant to Fed. R. Civ. P. 52" will be referred to as "Dec." followed by the page number.

4. The donning and doffing activities that must take place on Mountaire's premises are integral and indispensable to the employees' principal activities of poultry processing under Supreme Court precedent, the Department's regulations, and the test set forth by the Ninth Circuit in *Alvarez*.[5] Mountaire's employees cannot process poultry on the production line without

[5] From October 4, 2004 to July 17, 2006, employees were allowed to take home their hair nets, ear plugs, bump caps, gloves, rubber boots, and aprons and put those items on at home, but were prohibited from taking their smocks home. Dec. at 6. Mountaire changed its policy, as a result of the Department's Advisory Memorandum, on July 17, 2006, subsequently allowing employees to take their smocks home as well. Dec. at 6, 34. However, in Mountaire's Standard Operating Procedure, amended July 10, 2006, "employees are encouraged to remove their coats [also known as smocks] when exiting the plant." Defendant's Ex. 4. Thus, there are conflicting policies on whether employees are in fact allowed to change into their smocks at home. Moreover, an employee testified that he was told by his supervisor not to take the smock home, because of the risk of contamination. Tr. (3/23/09) 42:18-43:8. The Secretary does not opine on whether the facts support the district court's conclusion that employees did not have a meaningful option and ability to change into the smocks at home after Mountaire changed its policy on July 17, 2006. To the extent it is undisputed that before July 17, 2006 employees were required to pick up and don the smock at the plant premises, the Department's position is that the donning and doffing of the smock, as the first piece of required sanitary equipment typically donned by employees, was a principal activity that started the continuous workday. For the disputed time period, the Department's position is that the donning and doffing of the smock is a principal activity if, for example, employees were informed by their supervisors or through some contrary policy that they should not wear the smocks outside or put on their smocks at home. Such communications would be sufficient to show that employees did not, as a practical matter, have a meaningful "option and the ability to change" into the smocks at home, a prerequisite to concluding that the activity is not compensable. *See* Advisory Memo. 2006-2, at 3.

putting on certain required equipment, such as ear plugs, bump caps, smocks, hair and beard nets, and steel-toed rubber boots. *See* 29 C.F.R. 790.8(c) (clothes changing is a principal activity if employees cannot perform their work otherwise); *see also* Dec. at 2-3. Mountaire admits that all employees must don their sanitary and protective equipment before starting work on the production line. *See* Dec. at 7, 29-30. It is undisputed that the sanitary and protective equipment is not only required by United States Department of Agriculture sanitary requirements and the Occupational Safety and Health Administration safety regulations, but also by Mountaire's corporate policies. *See* 29 C.F.R. 790.8(c) n.65 (clothes changing is a principal activity if it is required by law, the employer, or the nature of the work); *see also* Dec. at 3, 29. Mountaire acknowledges that employees can be disciplined or fired for failing to comply with its policy regarding donning and doffing of required sanitary and protective equipment. Dec. at 7. Moreover, as the court concluded, the employees' donning and doffing is done for the primary benefit of Mountaire, because it protects employees from workplace hazards, protects the product from contamination, keeps workers compensation payments down, keeps missed time to a minimum, and shields the company from pain and suffering payments. Dec. at 31.

These facts establish that the donning and doffing of sanitary and protective equipment that must take place on Mountaire's premises is integral and indispensable to the employees' principal activities at the Millsboro poultry facility. Because the donning and doffing here is integral and indispensable to poultry processing, such activities are principal activities that start and end the continuous workday. Thus, as properly concluded by the district court, the employees must be paid for all activities, including any walking, waiting, and washing (but excluding bona fide meal periods), that occur between their first activity of donning and the last activity of doffing. *See Alvarez*, 546 U.S. at 37. Mountaire's failure to pay for time spent in the continuous workday that occurs before and after paid "line time" violates the FLSA.[6]

[6] Mountaire asserts that the Supreme Court did not endorse the Ninth Circuit's two-part test for analyzing whether an activity is integral and indispensable (and thus it was error for the district court to do so) because the Supreme Court observed that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under Steiner." *See* Br. of Appellant, at 27-28 (citing *Alvarez*, 546 U.S. at 40-41). It is true that the Supreme Court noted that certain preliminary activity may be necessary, such as pre-donning waiting time, but not integral and indispensable. The Supreme Court, however, was addressing a particular and limited circumstance (time spent waiting to don) which is not at issue here. The Court emphasized that "unlike the donning of certain types of protective gear, which is *always* essential if the worker is to do his job, the waiting may or may not be necessary in particular situations or for every employee. It is certainly not 'integral and indispensable' in the same

5. Mountaire argues that the Fourth Circuit should follow the interpretation of *Steiner* set out in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 594-95 (2007), *cert. denied*, 128 S. Ct. 2902 (2008), when analyzing the application of the Portal Act to so-called preliminary and postliminary activities. *See* Br. of Appellant, at 30-33. The Second Circuit's decision in *Gorman*, which concluded that nuclear power plant employees' donning and doffing of "generic" protective equipment, including a helmet, safety glasses, and steel-toed boots, is not integral to the employees' principal activities, should not be relied upon by the Fourth Circuit because that decision did not apply the correct criteria to determine whether donning and doffing is compensable under the FLSA.

First, the Second Circuit considered only selected regulatory language stating that clothes changing, "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities," 29 C.F.R. 790.7(g), and thus noncompensable under the Portal Act. *See Gorman*, 488 F.3d at 594. The court inexplicably ignored a footnote to that regulation, which states, "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is

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sense that the donning is. It does, however, always comfortably qualify as a 'preliminary' activity." *Alvarez*, 546 U.S. at 40.

employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'" 29 C.F.R. 790.7(g) n.49. The court also did not consider 29 C.F.R. 790.8(c), relied upon by the Supreme Court in *Steiner* and the Ninth Circuit in *Alvarez*, explaining that clothes changing is compensable if an employee "cannot perform his principal activities without putting on certain clothes." *See supra*.

Second, *Gorman* incorrectly emphasized the "generic" nature of the clothing worn by the employees to support its conclusion that clothes changing is not compensable. *See* 488 F.3d at 594. Such emphasis is misplaced under Supreme Court precedent that suggests that this factor is not dispositive in determining whether donning and doffing is compensable. *See Alvarez*, 546 U.S. at 32 (noting that although the Ninth Circuit had endorsed a distinction between donning and doffing elaborate protective equipment and donning and doffing nonunique equipment, it did so "not because donning and doffing nonunique gear are categorically excluded from being 'principal activities' as defined by the Portal-to-Portal Act, but rather because, in the context of this case, the time employees spent donning and doffing nonunique protective gear was 'de minimis as a matter of law'"); *see also Alvarez*, 339 F.3d at 903 (holding that the "'integral and indispensable' conclusion extends to donning, doffing, and cleaning of non-unique gear (e.g., hardhats) and

unique gear (e.g., Kevlar gloves) alike"). Indeed, the Supreme Court in *Steiner* ruled compensable the donning and doffing of "non-unique" equipment -- namely "old but clean work clothes" -- because they were integral and indispensable to the employees' principal activities. *See Steiner*, 350 U.S. at 251, 256. As the district court in the present case stated, the old work clothes in *Steiner* "were provided simply because '[t]he cost of providing their own work clothing would be prohibitive for the employees, since the [battery] acid causes such rapid deterioration that the clothes sometimes last only a few days.'" 601 F. Supp. 2d at 678 (quoting *Steiner*, 350 U.S. at 251).[7] As

[7] The district court correctly rejected Mountaire's contentions that it should adopt *Gorman's* reading of *Steiner* as permitting compensation only when donning and doffing "is done in a lethal atmosphere." While the Second Circuit distinguished *Steiner* based on a narrow interpretation that clothes changing is an integral and indispensable part of employees' principal activities only when it protects employees from a lethal atmosphere, there is no evidence that the Supreme Court intended to limit its holding to lethal work environments. *See* 29 C.F.R. 790.7(g) n.49. Clearly, an activity may be integral and indispensable to employees' principal activity without being necessitated by lethal circumstances. *See, e.g.*, *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004) (holding that donning and doffing cleanroom "bunny suits" was integral and indispensable to employees' principal activities when there was evidence that the employer had rules requiring employees to wear the suits and the suits limited potential contamination, thereby assisting the employer in ensuring the quality of the silicon chips manufactured at the plant); *Chao v. Tyson Foods, Inc.*, 568 F. Supp. 2d 1300, 1312 (N.D. Ala. 2008) (agreeing with the Secretary's argument that *Steiner* cannot be read so narrowly, and ruling that the Eleventh Circuit would more likely agree with the position taken in *Alvarez*).

the Department has made clear, whether equipment is "unique" or "non-unique" is not dispositive in determining whether donning and doffing the equipment is compensable. Advisory Memo. 2006-2, at 3.

Third, *Gorman* inappropriately emphasizes the "minimal" nature of the equipment in concluding that time spent donning and doffing was not compensable. *See Gorman*, 488 F.3d at 594. The amount of sanitary and protective equipment worn, and the amount of effort involved in putting on or taking off this equipment, does not render donning and doffing the equipment non-compensable under the Portal Act if it would otherwise qualify as integral and indispensible under *Steiner* and relevant DOL regulations. *See Alvarez*, 339 F.3d at 903 ("[E]ase of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable' as that term is defined in *Steiner*.").

A number of courts have explicitly disagreed with *Gorman* because of the flaws in its analysis. *See Tyson Foods, Inc.*, 568 F. Supp. 2d at 1312 (declining to rely on *Gorman*); *Jordan v. IBP, Inc.*, 547 F. Supp. 2d 790, 808-09 (M.D. Tenn. 2008) ("[T]he Gorman Court did not explicitly consider whether the activities at issue there were required and necessary and whether they primarily benefitted the employer, and concluded, somewhat inexplicably and in reliance on *Reich [v. IBP, Inc.*, 38 F.3d

1123 (10th Cir. 1994)], that an activity is not necessarily integral just because it was 'required by the employer or by government regulation.'") (quoting *Gorman*, 488 F.3d at 594); *Helmert v. Butterball, LLC*, No. 4:08-cv-00342, 2009 WL 5066759, *11-12 (E.D. Ark. 2009) (rejecting reliance on *Gorman*'s interpretation that the donning and doffing of non-unique equipment is not compensable); *Lemmon v. City of San Leandro*, 538 F. Supp. 2d 1200, 1204 n.3 (N.D. Cal. 2007) (rejecting reliance on *Gorman*'s interpretation of the "integral and indispensable" standard); *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 864-65 (W.D. Wis. 2007) (noting *Gorman*'s interpretation of *Steiner* is "truly bizarre").

II. THE TIME SPENT BY EMPLOYEES DONNING, DOFFING, AND WASHING THEIR SANITARY AND PROTECTIVE EQUIPMENT AT THE BEGINNING AND END OF THE EMPLOYER-ESTABLISHED MEAL PERIOD IS COMPENSABLE WORKTIME

The Department's "hours worked" regulations exclude from compensable time during the continuous workday "bona fide meal periods." 29 C.F.R. 785.19. The bona fide meal period exception from the continuous workday, however, clearly is not applicable until the employee ceases performing work before the start of the meal break; similarly, it is not applicable once he resumes work after the actual meal period. *See* 29 C.F.R. 785.19

("Bona fide meal periods are not worktime.").[8] Here, it is undisputed that Mountaire's employees are performing "work" when they engage in donning and doffing and washing of sanitary and protective equipment. Indeed, Mountaire does not challenge the district court's ruling that, in light of *Tennessee Coal*, 321 U.S. at 598, the donning and doffing of sanitary and protective equipment is "work" because these activities require physical and mental exertion controlled and required by the employer and are performed primarily for the benefit of employer. *See* 601 F. Supp. 2d at 677; 610 F. Supp. 2d at 516, 518; *see also De Asencio*, 500 F.3d at 373 (exertion is not required for an activity to constitute work); 29 C.F.R. 785.7. Mountaire's employees are thus performing "work" until they complete doffing and washing, and therefore must be compensated for the time spent performing those activities as part of the continuous workday. Not until the completion of these work activities can it be said that the bona fide meal period has begun, irrespective of any claims by an employer that the meal break

[8] We thus argue for affirmance on slightly different grounds than those relied on by the district court. *See Bryan v. BellSouth Communications, Inc.*, 492 F.3d 231, 241-42 (4th Cir. 2007), *cert. denied*, 552 U.S. 1097 (2008). The district court accepted the 36-minute period as a meal period, and then parsed out the time spent by employees donning, doffing, and sanitizing their sanitary and protective equipment. We, on the other hand, are arguing that the bona fide meal period did not actually begin until the employees' work activities ceased, and ended when those activities began again. The result is the same under either analysis.

period starts before then. Similarly, the employees' bona fide meal period ends once they again are required to engage in "work" activities, such as re-donning and/or washing their sanitary and protective equipment in order to return to the production line. *See* Wage and Hour Opinion Letter, 2007 WL 5130264 (May 14, 2007) ("If the employee commences work before the full 30-minute lunch period has ended, the employee must be compensated for this work time."); Wage and Hour Opinion Letter, 2001 WL 58864 (Jan. 15, 2001) ("[T]he meal period may not include any time performing "work," and such time spent donning and doffing of personal protective equipment, clothing or gear before or after the meal period is compensable.") (opinion on the 3(o) issue, 29 U.S.C. 203(o), later withdrawn); Wage and Hour Poultry Processing Compliance Survey Fact Sheet (January 2001) (noting that time spent in donning and doffing and washing at the beginning and end of meal periods is compensable under the FLSA). The bona fide meal period exception simply does not apply to a situation where the employer requires its employees to engage in a few minutes of work at the beginning and end of each and every employer-established meal period without compensation.[9]

[9] In a very recent decision, in a footnote without any analysis and relying incorrectly on the Department's regulation at 29 C.F.R. 785.19, the Fourth Circuit noted that the time employees spend during their lunch breaks donning and doffing, washing,

III. THE AGGREGATE AMOUNT OF TIME SPENT BY EMPLOYEES DONNING, DOFFING, AND WASHING THEIR SANTIARY AND PROTECTIVE EQUIPMENT IS NOT EXCLUDABLE FROM COMPENSABLE TIME UNDER THE DE MINIMIS EXCEPTION

1. The Supreme Court in *Anderson v. Mt. Clemens*, 328 U.S. 680 (1946), recognized that employers do not need to pay employees for otherwise compensable time if that time is de minimis. *Id.* at 692 ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."). Pursuant to the Department's implementing regulations, the "de minimis" exception "applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." 29 C.F.R. 785.47 (emphasis added). The Department's regulation makes

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and walking to and from the cafeteria is not compensable because it is part of a bona fide meal period. *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n.4 (4th Cir. 2009)(addressing applicability of section 3(o) -- changing clothes or washing at the beginning and end of the workday may be excluded from compensable time by the terms of a collective bargaining agreement). The Secretary's position, however, as set out *supra*, is that time spent in these activities is compensable because it is work separate from, i.e., occurring prior to and subsequent to the bona fide meal period (which is excluded from compensable time). In fact, the Secretary recently sought compensation under the FLSA for donning and doffing sanitary and protective equipment at the beginning and end of meal breaks against the employer in *Tyson Foods, Inc.*, No. 2:02-cv-01174. In light of the cursory nature of the Fourth Circuit's treatment of this question in *Sepulveda*, without the benefit of the Secretary's views, this Court should take the opportunity to analyze the issue in greater depth.

clear that if it is feasible for the employer to record the time, then the employer cannot escape liability for paying its employees for this time by relying on the de minimis exception. *See* 29 C.F.R. 785.47 ("An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him."); *see also* Wage and Hour Opinion Letter, 1993 WL 901156 (Mar. 19, 1993) ("Even if the time so spent is not great, but can be ascertained, it must be considered hours worked for purposes of the FLSA."). Thus, the Department's longstanding position is that employers must compensate employees for even small amounts of daily time unless that time is so miniscule that it cannot, as an administrative matter, be recorded for payroll purposes.

The Department's de minimis regulation is designed to prohibit an employer from relying on the de minimis defense where it has decided not to pay its employees for, as an example, 17 minutes of regularly scheduled work every day (as found in this case). *See* Dec. at 42. The Department has consistently stated in opinion letters that an employer cannot rely on a de minimis defense if an activity is performed pursuant to the work rules of the employer, is done during practically ascertainable periods of time, and constitutes a

duty which the employee is regularly required to perform. *See, e.g.*, Wage and Hour Opinion Letter dated June 21, 1993 (time spent changing shoes not de minimis); Wage and Hour Opinion Letter dated July 12, 1973 (daily clothes changing not de minimis).

The time spent by Mountaire employees in all compensable activities, including any walking, waiting, and washing that occurs between their first activity of donning and the last activity of doffing is not de minimis under the Department's regulations. Here, employees are required to engage in daily donning and doffing and washing of their sanitary and protective equipment and they perform these activities at least four times throughout the day. The activities do not involve "uncertain or indefinite periods of time," as demonstrated by the fact that both experts in this case were able to calculate the amount of time spent donning and doffing and walking. *See* Dec. at 42-43. Based upon the experts' conclusions, the time involved consists of more than a few seconds or minutes of duration and are clearly recordable.[10]

[10] The reason for the disparities between the findings of Dr. Radwin and Dr. Davis is based on the different methodology and approaches used by the experts, rather than some administrative difficulty in recording the time employees spend in these activities. Mountaire's assertions that it is administratively difficult to record the time employees spend donning and doffing four times a day because, as Dr. Radwin's methodology showed, it could consume anywhere from 5½ minutes to more than 55 minutes

Moreover, it is undisputed that Mountaire's timekeeping system records the time its employees clock in and clock out each day, *see* Dec. at 2-3, and there is no evidence that Mountaire could not use such a timekeeping system to record the time its employees begin donning and finish doffing each day. Further, several of Mountaire's competitors in the poultry processing industry, such as Perdue Farms and George's Processing, have entered into settlement agreements with the Department whereby they each agreed to record and pay for all time their employees spend donning, doffing, sanitizing, and walking. And, Sanderson's Farms also agreed to come into

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per day, is unavailing. *See* Br. of Appellant, at 53-54. Any differences in the time spent donning and doffing by the employees does not affect the time's recordability. Rather, as the employer, Mountaire has a responsibility to control when work is performed. *See Reich v. Dep't of Conservation & Natural Res.*, 28 F.3d 1076, 1081-82 (11th Cir. 1994) (an employer who does not want work to be performed has an obligation to exercise its control over the workforce to prevent the work from occurring); *United States Dep't of Labor v. Cole Enters., Inc.*, 62 F.3d 775, 779-80 (6th Cir. 1995) ("[I]t is the responsibility of management to see that work is not performed if it does not want it to be performed. The management 'cannot sit back and accept the benefits without compensating for them.'") (quoting 29 C.F.R. 785.13); *see generally Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287-91 (2d Cir. 2008). Thus, it is Mountaire's responsibility to control the amount of time that employees spend in these activities, and if it does not want its employees spending an additional 55 minutes engaged in donning and doffing, then it can structure its operations in such a manner as to limit the amount of time involved. There is simply no evidence that such a structural change would be administratively difficult or require "draconian steps" as alleged by Mountaire. *See* Br. of Appellant, at 54.

compliance with the FLSA's overtime and recordkeeping provisions based on the "continuous workday" principles in a private 16(b) FLSA case. Thus, Mountaire cannot rely on a de minimis defense, because it is feasible for it to record the time. *See Fast v. Applebee's Int'l Inc.*, 502 F. Supp. 2d 996, 1006 (W.D. Mo. May 3, 2007).

2. Consistent with the Department's regulations, courts generally consider three factors to determine whether a claim for uncompensated time is de minimis: "'1) the practical administrative difficulty in recording the additional time; 2) the size of the claim in the aggregate; and 3) whether the claimants performed the work on a regular basis.'" *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001) (quoting *Lindow v. United States*, 738 F.2d 1057, 1062-63 (9th Cir. 1984)).

As explained *supra*, Mountaire's failure to accurately record all time within the continuous workday is not due to administrative difficulties; Mountaire has a timekeeping system that could record the time employees spend in donning and doffing and other related activities, and the fact that such time is recordable is evidenced by the findings of both experts. While the *Lindow* court did not state definitely what it meant by its second factor, the size of the aggregate claim, it cited to cases where time has been aggregated beyond a daily basis

(ranging up to three years), 738 F.2d at 1063, and pointed to cases where time was aggregated "in relation to the total sum or claim involved in the litigation." *Id.*; *see Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998) (post-*Lindow* case where court stated that "[i]t is also appropriate to consider an aggregate based on the total number of workers"). Here, the size of the employees' aggregate claim, which involves daily donning and doffing activities taking 17 minutes over a six-year period for over 280 current and former employees at the Millsboro plant, is sufficiently large and cannot be considered de minimis. *See* Dec. at 42-43.[11]

Lastly, under *Lindow's* third factor, the time Mountaire's employees spend donning and doffing each day cannot be deemed de minimis, because these activities occur regularly each work day. *See, e.g., Kosakow v. New Rochelle Radiology Assoc., P.C.*, 274 F.3d 706, 719 (2d Cir. 2001) (work not de minimis because it occurred every day); *Tyson Foods, Inc.*, 568 F. Supp. 2d at 1321 (regularity established when there is evidence that the activities are performed at the beginning and end of every work

[11] In determining the aggregate amount of uncompensated time, the question is not how fast the employees could have performed these activities but, rather, how long they actually spent in performing all activities that occur between the first and last principal activities of the employee's workday. Thus, it is irrelevant that employees could have performed their daily donning and doffing activities in 5.326 minutes as claimed by Mountaire. *See* Br. of Appellant, at 46.

shift). In this case, Mountaire requires its employees to don their sanitary and protective equipment, and wash their hands and equipment before entering the department's production area. Dec. at 3-4. These activities must be repeated each time the employee returns to the production area (e.g., after bathroom and meal breaks). Similarly, the employees must doff some of their equipment at the beginning of the employer-established meal period and at the end of their shift. Dec. at 7. The de minimis rule does not apply where the activities at issue are regular, recurring events that employees perform each and every day. Therefore, Mountaire cannot prove that the time is de minimis under *Lindow*.

3. In support of its argument that the district court erred, Mountaire relies on the incorrect application of the de minimis defense in *Alvarez*, 339 F.3d at 903-04, which held that the donning and doffing of "non-unique" equipment, while integral and indispensable to the employees' principal activities, were not compensable because they were "de minimis as a matter of law." *See* Br. of Appellant, at 52.[12] The Department's position, as previously articulated in the government's Supreme Court amicus brief in *Alvarez*, is that the

[12] This conclusion was referred to in dictum by the Fourth Circuit in *Sepulveda,* 591 F.3d at 216 n.2. For the reasons set forth in this brief, the Ninth Circuit's ruling on this issue was incorrect.

"de minimis rule applies to the aggregate amount of time for which an employee seeks compensation, not separately to each discrete activity, and particularly not to certain activities 'as a matter of law.'" Advisory Memo. 2006-2, at 3; s*ee Lindow*, 738 F.2d at 1063 (the de minimis rule does not apply separately to each particular activity viewed in isolation, but rather to the daily amount of time spent on additional work). This is because "independent de minimis determinations of each task would rarely result in findings of compensable time -- work can always be subdivided into small enough tasks to be considered de minimis." *Reich v. IBP, Inc.*, No. 88-2171, 1996 WL 137817, at *6 (D. Kan. 1996).

Mountaire's assertion that donning of "non-unique" equipment is de minimis and cannot begin the continuous workday is incorrect. *See* Br. of Appellant, at 52. The concept of de minimis is not relevant in determining the beginning and end of the workday. Rather, the continuous workday is based on the employee's first and last principal activities (defined in this case as the beginning of donning and the completion of doffing). *See* 29 U.S.C. 254(a); *see also* 29 C.F.R. 790.6(a), 790.6(b). Only after the continuous workday is fixed can a determination be made whether all the otherwise compensable time within that workday, for which employees were not compensated, should be

compensated based on the Department's regulation addressing the de minimis criteria.

Finally, Mountaire asserts that the Fourth Circuit has adopted a bright-line de minimis rule of 10 minutes in *Green v. Planters Nut & Chocolate Co*., 177 F.2d 187 (4th Cir. 1949). There is, however, no indication that the court adopted a bright-line rule in that case, and the district court correctly rejected any assertions that it did. The holding in *Planters Nut* is limited to the facts of that case -- where the employees may have been present at their work stations 10-minutes before the start of their shift, despite not being required to do so by the employer, such time was de minimis. *Id*. at 188. These facts are distinguishable from the circumstances present here, where it is undisputed that the employees are required by Mountaire to don their sanitary and protective equipment, and wash their hands and that equipment, before entering the department's production area and starting work, and are also required to doff some of their equipment at the beginning of meal breaks and end of the shift outside the department's production area. Moreover, while *Planters Nut* was cited in *Lindow*, the Ninth Circuit did not adopt a per se 10-minute de minimis rule in *Lindow*. As the court stated in *Lindow*, "[t]here is no precise amount of time that may be denied compensation as de minimis. No rigid rule can be applied with mathematical

certainty." 738 F.2d at 1062; *see Tyson Foods, Inc.*, 568 F. Supp. 2d at 1319-20 (following *Lindow* for this proposition).

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court affirm the District Court's Memorandum Opinion on the issues discussed above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)(B)

I certify that the foregoing brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief was prepared using Microsoft Office Word, 2003 edition.

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Dated: March 25, 2010

CERTIFICATE OF SERVICE

I certify on that on 25th of March, 2010, I electronically filed the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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