No. 04-66

In the
Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EMPLOYMENT LAW CENTER, AND THE NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PETITIONER

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Brief *Amici Curiae* of National Employment Lawyers Association, Legal Aid Society-Employment Law Center, and National Employment Law Project in Support of Petitioner

The National Employment Lawyers Association ("NELA"), the Legal Aid Society-Employment Law Center ("LAS-ELC"), and the National Employment Law Project ("NELP") file this Brief as *Amici Curiae* in support of the Petitioner. NELA, LAS-ELC, and NELP request reversal of the First Circuit's decision. Travel time after donning of necessary safety equipment, as well as time spent waiting at required safety distribution stations, should be compensable under 29 U.S.C. §§ 206, 207 of the Fair Labor Standards Act ("FLSA"), as amended by 29 U.S.C. § 254 of the Portal-to-Portal Act ("Portal Act").

INTEREST OF *AMICI CURIAE*

NELA, LAS-ELC, and NELP file this *amicus curiae* brief with the consent of all parties.[1]

NELA was founded in 1985 and is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients and regularly

[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* NELA, LAS-ELC, and NELP state that no counsel for either party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

LAS-ELC is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor, and specializes in, among other areas of the law, wage and hour rights.

NELP is a non-profit legal organization with over 30 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, regardless of an individual's status as an immigrant, or as a worker in a nonstandard relationship such as part-time, temporary, or subcontracted work. NELP's area of expertise includes the workplace rights of documented and undocumented immigrant workers under federal employment and labor laws, with an emphasis on wage and hour and health and safety rights. NELP has litigated directly and participated as *amicus* in numerous cases addressing the rights of immigrant workers under the FLSA and the National Labor Relations Act. NELP also provides legal assistance to labor unions and immigrant worker organizations regarding the rights of immigrant workers. This case is important to NELP and its constituents because it has the potential to affect many low-income workers, including day laborers, poultry and meatpacking workers, and construction workers.

Based on their extensive experience and expertise in litigating employment cases, including cases brought under the FLSA, NELA, LAS-ELC, and NELP believe that to achieve the goals of the FLSA, employees must be paid for all work performed between their first and last principal activities of the day, including walk and wait time. Allowing employers to impose the costs of non-Portal Act pre-shift and post-shift walk and wait time on employees when the amount of that time is entirely within the control of the employer violates the fundamental purposes of the FLSA by increasing the time-burdens facing workers and their families in numerous sectors of the economy and negatively impacting their health, efficiency, and general welfare. Requiring compensation for this time will eliminate such abuses and place the cost of workplace rules and business decisions where it belongs—on employers— and will thereby serve the goals of the FLSA.

SUMMARY OF ARGUMENT

Congress passed the Fair Labor Standards Act of 1938 ("FLSA") in order to eliminate abusive and exploitative labor conditions that adversely impacted "the health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The Portal-to-Portal Act reaffirmed this goal by eliminating liability for certain pre- and post-shift activities, and clearly establishing that employees must be paid for all hours of work performed during the workday. The Portal-to-Portal Act plainly defined the workday to include all hours between an employee's first and last principal activities. 29 U.S.C. § 254(a).

Under the Portal-to-Portal Act's first principal activity rule, once the factual issue as to whether an activity is a principal activity or is integral and indispensable to a principal activity has been answered, any subsequent walk or travel time is compensable. There is no need, nor any

legal basis, for making a further determination that the activity starts or does not start the workday. Similarly with respect to wait time, once the factual issue as to whether an employee is "engaged to wait" incident to performing his or her first principal activity, there is no basis for concluding that the wait-time is nevertheless excluded from compensability by the Portal-to-Portal Act.

This bright-line definition of the workday has been applied throughout the economy in analyzing the compensability of travel and walk time occurring prior to the established shift, but after an employee's first principal activity or subsequent to the established shift but prior to an employee's last principal activity. Similarly, where for reasons beyond their control, such as workplace rules or the realities of the industrial context, employees are required to wait before they can perform their first principal activity, they are engaged to wait and must be compensated. Construing the FLSA and the Portal-to-Portal Act to permit such walk and wait time to go uncompensated in some instances, such as where the first principal activity involves the donning and doffing of required safety equipment, will upset the established law in other contexts, heightening litigation risks and leading to uncertainty in many industries where expectations concerning walk, travel, and wait time have long been settled. The absence of any principle guiding the determination of which compensable activities begin the work day and which do not will further aggravate these problems.

The first principal activity rule provides a bright-line test which simplifies compliance and enforcement, decreases uncertainty, and reduces litigation risks and costs. At the same time, this rule conforms with the plain language of the Portal-to-Portal Act, and is consistent with established law and regulations. Unlike the alternative rule proposed by the *Tum* concurrence, *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 284 (1st Cir. 2004) (Boudin, J., concurring), this

bright-line test serves the interests of both employers and employees, as well as the larger economic and societal interests of encouraging compliance with the law and promoting economic efficiency and productivity in business planning and decision-making, interests which are among the most important goals of the FLSA and the Portal-to-Portal Act.

ARGUMENT

I. THE FAIR-LABOR STANDARDS ACT AND THE PORTAL-TO-PORTAL ACT ESTABLISH A FIRST PRINCIPAL ACTIVITY RULE GOVERNING THE COMPENSABILITY OF WALK AND WAIT TIME.

The FLSA was passed in 1938 to eliminate labor conditions "detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The Portal to Portal Act of 1947 ("Portal Act"), while creating certain exceptions to the FLSA, made no change to this fundamental policy. 29 C.F.R. § 790.2. The two acts carry out this national policy by guaranteeing that employees are paid for all "hours worked" within the workday.

A. *The First Principal Activity Rule Requires Compensation for Walk and Travel Time Subsequent to an Employee's First Principal Activity and Prior to the Last Principal Activity of the Day.*

Section 4 of the Portal Act relieves the employer of the obligation to pay employees for travel time, but only where the travel time occurs "either prior to the time on any particular workday at which [the] employee commences, or subsequent to the time on any particular workday at which he ceases [his or her] principal activity or activities." 29 U.S.C. § 254(a). The Portal Act does not affect the compen-

sability of activities performed within the "workday," and does not change the rule that travel "all in a day's work," that is, travel time within the workday, is compensable as "hours worked." *See* 29 C.F.R. § 785.38; *see also* 29 C.F.R. § 790.6 (The Portal Act "[has] nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by the employee during [the workday]."). The Portal Act thus establishes a bright line rule that the workday begins with the start of an employee's first principal activity and ends with the completion of the employee's last principal activity. *See* 29 C.F.R. §§ 790.6(a), (b) (defining workday for purposes of the Portal Act). Any travel time occurring after the first principal activity and prior to the last principal activity is compensable under the FLSA and remains so under the Portal Act.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), this Court held that "the term 'principal activity or activities' in Section 4 [of the Portal Act] embraces all activities which are an integral and indispensable part of the principal activities." *Id.* at 252-53 (internal quotation marks omitted). Under *Steiner*, the donning and doffing of necessary protective gear is an integral and indispensable part of an employee's principal activities. Thus, when the donning or doffing of necessary protective gear is the first or last activity in which the employee engages, this serves to begin or end the workday, and thereby limits the applicability of Section 4 of the Portal Act. Consequently, any travel or walk time that occurs after one of these activities is "all in a day's work," and is compensable under the FLSA as amended by the Portal Act.

B. *The First Principal Activity Rule Requires Compensation for Wait Time Incident to an Employee's First and Last Principal Activities of the Day.*

Similarly, Section 4 of the Portal Act excludes pre- or post-shift waiting time from compensability only where that time occurs prior to the first principal activity or subsequent to the last principal activity, but has no effect where the wait time is an integral part of the principal activities. 29 U.S.C. § 254(a); *see* 29 C.F.R. § 790.7(h) (wait time may be regarded as preliminary or postliminary, or may be "an integral part of the employee's principal activities" depending on circumstances); *id.* § 790.8(a) (Portal Act has no effect on compensability of principal activities). Thus, under the Portal Act's bright-line first principal activity test for determining the boundaries of the compensable workday, wait time which is integral and indispensable to an employee's first or last principal activity of the day is outside the scope of Section 4 and is compensable.

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944), this Court found wait time compensable under the FLSA where the employee was "engaged to wait" rather than "wai[ting] to be engaged." This distinction is currently codified in U.S. Department of Labor regulations concerning "on duty," "off duty" and "on call" time. *See* 29 C.F.R. §§ 785.15-785.17. Under these regulations, the determinative factor in whether an employee is "engaged to wait" is whether waiting is an "integral part" of a principal activity, such that the time spent waiting "belongs to and is controlled by the employer," *id.* § 785.15, and is consequently "beyond [the employee's] control." *Id.* § 790.7(h). In cases where donning necessary safety equipment qualifies as the first principal activity that starts the compensable work day, time spent waiting for that equipment at distribution stations is an integral part of donning it, is controlled by the employer, and cannot effectively be used for the employee's own purposes, and is therefore compensable under the

FLSA and the Portal Act.

C. *The First Principal Activity Test Is Not Limited by the De Minimis Rule.*

Pre-shift and post-shift activities that are integral and indispensable to an employee's principal activities serve to trigger the workday for purposes of Section 4, even where the time spent on each activity, viewed in isolation, is *de minimis*. The *de minimis* concept applies to relieve the employer of liability for otherwise compensable time which, in the aggregate, is negligible, and where, "in light of the realities of the industrial world," computation of the time is difficult or impossible. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). However, a discrete activity cannot be deemed *de minimis* in isolation. Rather, time can only be disregarded under this theory when it is *de minimis* in the aggregate. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). That is, the determination of whether the amount of compensable but uncompensated time is *de minimis* can be made only after it has been determined which time is compensable. Thus, the questions of whether (1) wait time that occurs in connection with compensable donning and doffing, and (2) travel or walk time which occurs subsequent to compensable donning are themselves compensable must be answered before the *de minimis* rule can be applied. For this reason, these questions cannot be answered by reference to the *de minimis* rule. To make a *de minimis* determination with respect to an isolated activity, and thereby to determine whether travel or wait time is compensable, as the court did in *Tum*, puts the cart before the horse.

II. THE FIRST PRINCIPAL ACTIVITY RULE HAS CONSISTENTLY BEEN APPLIED TO DETERMINE THE COMPENSABILITY OF TRAVEL, WALK, AND WAIT TIME, AND INFORMS PRACTICE AND EXPECTATIONS IN OTHER INDUSTRIAL CONTEXTS.

A bright line rule that donning and doffing necessary safety equipment (or, if applicable, waiting in line to do so) is the first principal activity and that all subsequent time and attendant wait time is compensable as part of the ordinary workday is consistent with settled law concerning travel and wait time in a wide variety of industrial contexts. Because the first principal activity test has been so consistently applied in nearly every case concerning travel and wait time, it informs the practice and expectations of employers and employees. Furthermore, because there is no principled basis for distinguishing these other contexts from the situation here, rejection of the first principal activity test in this case will upset these expectations and lead to great uncertainty concerning the rights and obligations of employers throughout the economy.

A. *Existing Law Makes Travel and Walking Time Compensable Where It Occurs Subsequent to the First Principal Activity*

Numerous cases outside the protective gear context address the question of when pre-shift travel time is compensable and when it can be excluded under Section 4 of the Portal Act. These cases consistently hold that where principal activities are performed prior to the start of an employee's shift, any subsequent travel time must be compensated.

In a recent line of cases concerning the construction industry, courts have addressed the question of whether travel between the employer's shop or yard and the job site at the beginning and end of the workday must be compen-

sated. This question arises when employees are required to report to the yard prior to proceeding to the job-site. Nearly every court has held that where some "work," however minimal, is performed at the yard, including work activities which are integral and indispensable to a principal activity, the travel must be compensated. Examples of such principal activities have included completing paperwork, loading tools, performing maintenance on trucks, and removing debris from trucks at the end of the day. *See*, *e.g.*, *Herman v. Rich Kramer Const., Inc.*, 163 F.3d 602, 1998 WL 664622 (8th Cir. 1998) (unpublished table decision) (travel time compensable where construction foremen loaded trucks, received crew assignments, and studied blueprints prior to traveling from employer's shop to job site and filled out time-sheets, unloaded and locked trucks, and secured equipment upon return to shop); *O'Brien v. Encotech Const.*, No. 00 CV 1133, 2004 WL 609798, *4 (N.D. Ill. Mar. 23, 2004) ("on any day that the [employee] performed preparation or cleanup that constituted a 'principal activity,' not just 'preliminary' or 'postliminary' activity . . . , the [employee's] travel time to a job site after preparation or from a job site before cleanup would be [compensable]."); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 C 5755, 2004 WL 1882449, *3 (N.D. Ill. Aug. 18 2004) (same); *Breen v. Concrete By Wagner, Inc.*, No. 98 C 3611, 1999 WL 1016267, *12 (N.D. Ill. Nov. 4, 1999) (same).

Likewise, in the context of a temporary labor agency, where employees meet at a central dispatch hall to receive training or instruction or to perform other activities prior to being dispatched for the day's work, travel time from the dispatch hall to the place of work is compensable. *See*, *e.g.*, *Preston v. Settle Down Enterprises, Inc.*, 90 F. Supp. 2d 1267, 1281 (N.D. Ga. 2000). *But see Powell v. Northwestern Resources Co.*, No. 03-S1244, 2004 WL 1576572 (5th Cir. Jul 15, 2004) (travel time not compensable where pre-travel activity was not "work" because not in the ordinary course

of business and not done for the benefit of the employer). However, where the employee performed no work at the dispatch hall prior to being dispatched, travel time from the hall was not compensable. *Preston*, 90 F. Supp. 2d at 1281.

Similar results have been reached with respect to travel from a designated meeting place in other industries. *See*, *e.g.*, *Dole v. Enduro Plumbing*, No. 88 7041-RMT, 1990 WL 252270, *4-5 (C.D. Cal. Oct. 16, 1990) (plumbers' travel time compensable where workers required to report to designated meeting place, perform work, and carry tools to job site); *Marshall v. Boyd*, No. LR C 77-4, 1979 WL 1922, *3 (E.D. Ark. Apr. 4, 1979) ("Where the [inventory control] employees are required to report to a meeting place to receive instructions, to perform other work, or to pick up and to carry tools or materials, the travel from the designated meeting place to the work place in [sic] part of the day's work and must be counted as hours worked."); *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961) (travel time of truck drivers between truck yard and material plant compensable where truck was serviced in yard prior to travel to material plant and cleaned and refueled upon return to the yard).

Another line of cases deals with the compensability of travel time from service workers' homes to their first job assignments each day. In these cases, courts have held that where the employee performs some required compensable work activity at home prior to the first service call, such as initiating or completing paperwork, scheduling appointments with customers, or receiving and inventorying supplies, the subsequent travel time to the customer's location is compensable. *See*, *e.g.*, *Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 242-43 (D. Mass. 2004) ("Because the plaintiffs' drive to the first appraisal site does not occur 'prior to the time [the] employee commences [his or her] principal activity or activities,' the drive is outside the ambit of the Portal-to-Portal Act." (quoting 29 U.S.C.

§ 254(a)); *Boudreaux v. Banctec, Inc.*, No. Civ. A. 03-2111, 2005 WL 517494, *5 (E.D. La. Feb. 22, 2005) ("[W]hether . . . travel time [from home to first service stop] is compensable depends on whether a principal activity is being performed at home."). In such cases, the compensability of the home to job-site travel time is within the control of the employer, who can require the worker to perform work activities only on employer or customer premises. Moreover, application of the bright-line rule in these cases prevents the employer from avoiding liability for travel time simply by moving pre-travel work from an employer-supplied office to an employee's home office.

Finally, in a line of cases factually quite similar to the donning and doffing cases here, the U.S. Court of Federal Claims and its predecessors have considered whether federal guards and prison personnel must be compensated under the FLSA for walk time to their duty stations after required stops in control rooms or equipment rooms in which equipment integral to their job duties was retrieved. *See Amos v. United States*, 13 Cl. Ct. 442, 449-50 (Cl. Ct. 1987); *see also International Business Investments, Inc. v. United States*, 11 Cl. Ct. 588 (Cl. Ct. 1987); *Whelan Sec. Co., Inc. v. United States*, 7 Cl. Ct. 496 (Cl. Ct. 1985); *Baylor v. United States*, 198 Ct. Cl. 331 (Ct. Cl. 1972).

In all of these cases, travel time that occurs subsequent to an employee's performance of his or her first principal activity or prior to the last principal activity is outside the exclusion of the Portal Act and is compensable. These cases are consistent with the first principal activity rule established by the Portal Act, and show that this rule is well-grounded in the case-law and widely applied to questions of travel and walk time in many contexts.

B. *Under Existing Case-Law, Wait Time Incident to a Principal Activity, Such as Donning or Doffing Required Safety Equipment, is Compensable.*

Established law concerning wait time is likewise consistent with the first principal activity rule. Cases addressing the compensability of pre-shift and post-shift wait time have uniformly held that where waiting is integral to an employee's principal activity and the employee is therefore "engaged to wait," the wait time is compensable even where it occurs prior to or after the work shift.

Numerous courts have recognized that pre-shift wait time must be compensated when an employer requires the employee to be on the premises but is not ready for or able to allow the employee to engage in "productive" work. *See*, *e.g.*, *Mireles v. Frio Foods*, 899 F.2d 1407 (5th Cir. 1990) (wait time held compensable where employees at frozen foods plant were required to sign in and be on production line but there was a delay in the arrival of produce or a mechanical failure at the plant); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269 (M.D. Fla. 1999) (pre-shift time spent by agricultural workers waiting for equipment to be available or inspections to occur held compensable); *Sedano v. Mercado,* No. Civ. 92-0052-HB, 1992 WL 454007, *3 (D.N.M. Oct. 8, 1992) ("Time spent . . . waiting in the fields for the fields to dry . . . , for trailers to arrive, or for their employer to prepare to begin the work day is predominately for the benefit of the employer" and is compensable under the FLSA); *Fields v. Luther,* No. JH-84-187S, 1988 WL 59963 (D. Md. May 4, 1988) (time harvest crew sat idle in fields waiting for dew on tomatoes to dry was compensable under the FLSA because it was of no benefit to the plaintiffs to sit there and the employer had required them to be there at that hour); *Brock v. DeWitt,* 633 F. Supp. 892 (W.D. Mo. 1986) (wait time compensable where restaurant workers were required to report to work at specified time but could not clock in until the employer determined that there was

enough business to justify allowing them to do so).

Under these cases, even short periods of time spent waiting prior to the performance of productive work are compensable where the wait resulted from the nature of the work or the realities of the workplace. *Mireles*, 899 F.2d at 1413 (compensability of idle time determined by "engaged to wait" test, not by "reasonableness" of the wait time). These cases thus apply the Portal Act's bright-line rule that when an employee is engaged to wait to perform his or her first principal activity, the wait time is compensable.

C. *Rejecting the Bright-Line Rule in this Case Will Upset Settled Expectations Throughout the Economy.*

As these cases illustrate, courts in nearly every other industry have applied a bright line first principal activity rule in determining the compensability of walk, travel, and wait time. The *Tum* court's rejection of the first principal activity rule in favor of an ill-defined *ad hoc* determination therefore represents a radical departure from existing law, and threatens to jeopardize the settled expectations of both employers and employees under the federal overtime laws.

Tum is wholly inconsistent with established law on the compensability of pre-shift travel time. *Tum* found the donning and doffing of at least some protective equipment to be an integral and indispensable activity. Nevertheless, in finding post-donning walk-time non-compensable, *Tum* comes to precisely the opposite result concerning related walk time from the cases described above, in which some item of compensable work was sufficient to start the workday and take subsequent travel time out of the scope of Section 4 of the Portal Act.

In *Tum*, the court found the first principal activity rule to be "an expansion of the ordinary 'workday' rule." *Tum*, 360 F.3d at 280. As the established law shows, however, the

ordinary workday rule applied in nearly every other context is nothing other than the first principal activity rule. That is, *Tum*, rather than the first principal activity rule, represents a substantial departure from existing law. Yet the *Tum* court puts forth no principle or policy that would permit, much less require, such a departure here. While the amounts of time involved in *Tum* were small in comparison with the travel time in the construction and other cases, the federal guard cases involved, if anything, even smaller amounts of time. Moreover, the compensability of travel time or other preliminary or postliminary activities is not determined by reference to the length of time involved. The fact that the travel time in the construction cases was so long does not make it compensable under the statute. *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994) (citing 29 C.F.R. § 790.7) (finding two hours each way of travel time on company buses not compensable where no work was performed prior to or during the bus ride). Conversely, the fact that the walk time in the *Tum* case was short does not make it non-compensable.

Similarly, the established case law makes pre-shift wait time compensable where the wait time is part of a principal activity, and there is no principled distinction between that wait time, and the wait time at issue in the instant matter. Like the employees who were compensated in *Mireles* and the other cases discussed above, an employee who is waiting in line to retrieve and don safety equipment is on the employer's premises, is waiting for the employer's benefit, and is not at leisure to use the time as she sees fit. Where donning safety equipment is a principal activity under *Steiner*, and the employee is at the equipment distribution station, ready to perform that activity, but cannot do so "for some reason beyond his control," 29 C.F.R. § 790.7(h) (such as an insufficient number of distribution stations or the presence of a number of employees who also require the equipment), the employee is "engaged to wait," and must be

compensated.

The *Tum* rule would upset the settled principle that employees must be paid for wait time whenever they are "engaged to wait." It would find some instances in which an employee was engaged to wait non-compensable because, notwithstanding that finding, the wait time in those instances is preliminary or postliminary activity under the Portal Act. *Tum*, 360 F.3d at 282. Presumably, the same could be said of an employee who arrives at work, and finds that there is nothing for him to do because needed parts are not available or a machine is out of service, although federal regulations require compensation in such circumstances. 29 C.F.R. § 785.15. However, *Tum* provides no basis for distinguishing this clearly compensable situation from one in which employees must wait to don required safety equipment.

If an employee who can watch television, read, and even travel within a reasonable distance of a jobsite premises can be compensated for "wait time" on the grounds that this time is for the benefit of the employer and the employee's freedom is restricted, *see* 29 C.F.R. §§ 785.16-785.17, then surely an employee who is actually on the employer's premises and has no choice to do anything but stand in line and wait for necessary safety equipment her employer requires her to wear is "engaged to wait." Simply put, an employee who must wait in line for necessary safety equipment cannot use this time effectively for her own purposes and should be compensated for this time.

Thus, if this Court affirms *Tum's* holding concerning the compensability of wait and walk time in the donning and doffing context, it will upset the settled case law in innumerable other contexts and industries, and will introduce uncertainty into current expectations in a wide array of fields in which employees have routinely been compensated for pre- and post-shift travel and wait time.

Accordingly, the same bright line "first principal activity" test should control here as it does in other contexts. Once the donning and doffing at issue is determined not to be covered by the changing clothes provisions of 3(o) or the preliminary and postliminary activity provisions of the Portal Act, there is no basis in the FLSA or the Portal Act for a special donning and doffing exception to the general rule that the first principal activity starts the workday, and there is no basis differentiating donning and doffing from any other integral and indispensable activity for purposes of walk or wait time.

III. THIS COURT SHOULD RECONFIRM THE BRIGHT LINE RULE THAT THE COMPENSABLE WORKDAY BEGINS WITH THE FIRST PRINCIPAL ACTIVITY, WHETHER OR NOT THE TIME FOR THE ACTIVITY IS *DE MINIMIS*.

A. *The First Principal Activity Rule is Simplest for Employers and Regulators to Administer, and Will be Less Subject to Abuse than a Rule Permitting Employers to Carve up the Workday*.

The bright-line "first principal activity" test established by the Portal Act and properly applied by the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), serves the interests of employers, employees, and regulators alike. It provides clear notice to employers and employees of their rights and obligations under the FLSA and the Portal Act, simplifying both compliance and enforcement. In contrast, the *ad hoc* rule applied in *Tum*, and *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) ("*Reich II*"), permits some travel time that occurs after an initial principal activity to be excluded while requiring compensation for other travel time, and requires compensation for wait time in connection with some compensable principal activities but not others. Such a rule will create uncertainty regarding the rights and obligations of employees and employers, and may be subject

to manipulation and abuse by employers, thereby undermining the goals of the FLSA.

1. The First Principal Activity Test Provides a Clear Rule that Serves the Interests of All Stakeholders.

The first principal activity rule simply requires that once an employee has begun her compensable work, she must be paid for all subsequent hours worked, including travel time which would otherwise fall under Section 4 of the Portal Act (and hence go uncompensated) if performed before the first compensable activity. It also requires that any time necessarily spent waiting in connection with an employee's first or last principal activities must be compensated. This rule serves employers' interests by encouraging employers to arrange their workplaces efficiently by minimizing the time employees spend on these activities. It serves employees' interests by encouraging employers to make efficient use of their employees' work time. And it serves the wider social and regulatory interest animating the FLSA by ensuring that employers pay the full cost of their business decisions concerning how to arrange their workplaces and business processes.

It was this latter interest that motivated Congress to pass the FLSA in 1938, and it is this stated congressional policy which should be of foremost concern in interpreting these statutes and formulating general rules, as well as in applying the FLSA and the Portal Act to the specific circumstances here. In Section 2 of the FLSA, 29 U.S.C. §§ 202, Congress expressed its concern about the adverse impact on interstate commerce of employment conditions detrimental to the health, safety and well-being of workers. In particular, Congress was concerned that poor working conditions, including the failure to pay workers for all hours worked, "constitute[d] an unfair method of competition in

commerce." *Id.* Thus, it is the policy of the FLSA, as clarified by the Portal Act, to ensure that employees are paid for all work activities performed between their first and last principal activities of the day, particularly where the time spent on those activities is within the control of the employer.

The *Tum* rule improperly would permit employers to start and stop the time clock, and cause employees to go uncompensated for time spent in the service of the employer during the workday, even when the amount of that time is entirely within the employer's control. Where time spent waiting to retrieve required safety equipment and walking after donning is entirely within the control of the employer, it should be compensated. Only the employer can control the arrangement of equipment distribution points, locker rooms, and the production floor to minimize the walk and wait time required for employees to don or doff protective gear and to perform other integral and indispensable pre- and post-shift activities. *See, e.g.*, *Reich v. Monfort, Inc.*, No. 92-M-2450, 1995 WL 817796 (D. Colo. Oct. 19, 1995), aff'd 144 F.3d 1329 (10th Cir. 1998) (noting that wait time for wash stations had been shortened after the employer added more wash stations).

Take, for example, a hypothetical meat processing company that has 100 employees on its production line at any given time.[2] Each of these employees is required to don a number of pieces of safety and sanitary gear. This employer can structure its operations in a number of different

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[2] The issues presented by this appeal will affect employees in numerous lines of work, not just those employed in meat or poultry processing plants. Employees who work in refineries, laboratories, power stations, construction sites, chemical plants, clean rooms, plumbing companies, insurance companies, call centers, and may other industrial contexts may be affected by the outcome of this case.

ways that would have a significant impact on the amount of time it takes each employee to retrieve and don this equipment and to travel to her work station after doing so.

Under Scenario A, the employer requires all 100 employees to report to their work stations on the production line at exactly the same time. The employer requires all protective equipment to be obtained from and returned to an equipment distribution station, but provides only one such station. The distribution station is on the opposite side of the production floor from the locker room, where employees go to don the required protective equipment. The employees cannot enter the production floor until they have donned the safety equipment, and must walk around the production floor in order to reach the locker room and don their gear. Once they have donned their protective gear, various employees must obtain other required equipment from separate distribution stations. Thus, upon arrival at work, all employees must wait in line at the single protective equipment distribution station. Once an employee has her protective gear, she must walk around the production floor to the locker rooms to don this equipment. Various employees must then wait in line again to retrieve other required equipment. The employee must then walk back to the opposite side of the plant to enter the production floor. At the end of the day, employees must clock out, walk around the production floor to the locker room, doff the protective equipment, wait in line at cleaning stations to clean the equipment, and then again stand in multiple lines to return equipment before they may leave the plant.

Under Scenario B, the employer has multiple equipment distribution stations located just inside the plant entrance where employees can retrieve all of the equipment they need at one time. The locker rooms are directly adjacent to the distribution stations, and the employees enter the production floor directly from the locker rooms. In addition, employee start times are staggered so that everyone is not

arriving at the distribution stations at exactly the same time.

Under Scenario A, each of the 100 employees knows that he or she is likely to face long lines and walks in connection with retrieving the safety and sanitary equipment that they must don before they can even enter the production floor. Because tardiness can result in discipline (including termination), these employees have no choice but to arrive at work long before their scheduled "start time" on the production line. If this Court rules that walk and wait time in connection with retrieving necessary safety equipment is not compensable, it is the employees, rather than the employer, who will bear the entire cost of this inefficiency. As noted above, this is contrary to the purpose of the FLSA.

Although the employees have no control over the time spent on pre- and post-shift activities in this scenario, the employer does have a number of choices that could reduce the walk and wait time the employees must endure in connection with the donning and doffing of the required gear. As demonstrated in Scenario B, wait times could be reduced by slightly staggering start times and/or by providing additional equipment distribution stations, and walk time could be reduced by placing these stations at an efficient location. Even where physical or fiscal constraints make it difficult or costly for the employer to rearrange a plant, it is a simple matter of fairness as well as the sound policy of the FLSA that the employer should bear the cost of its business decisions.

Under the *Tum* rule, an employer has no incentive to make efficient choices to reduce walk and wait time as the costs of these inefficiencies will be borne entirely by its employees. In fact, under the rule proposed by Judge Boudin, *see infra* Part III.B, the employer may have an incentive to make the arrangement inefficient by carving the preparatory activities into discrete units which, in

isolation, are *de minimis*, and separating each such activity with uncompensated waiting or walking time. The result is that the employer can unilaterally impose substantial time burdens on employees without having to bear the attendant costs. This is exactly the type of detrimental working condition Congress sought to address when it passed the FLSA. Only a bright-line rule that employers must pay employees for all work after the employee's first principal activity and prior to the employee's last principal activity, and for all wait time attendant to those activities, gives employers the incentive to minimize the amount of time an employee loses waiting for equipment or walking from an equipment room to a work station.

The court in *Tum* expressed concern that a bright line rule would simply reverse the current situation and permit employees to impose substantial costs on employers. The court gives as an example "an employee who dons required equipment supplied by the company at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m." *Tum*, 360 F.3d at 280-81. This situation is again entirely within the control of the employer, who can require that equipment be donned at a particular time and place that reduces his liability. Indeed, the FLSA imposes on the employer the obligation to ensure that employees do not perform undesired work. *See*, *e.g.*, 29 C.F.R. § 785.13 (management has a duty to exercise control and see that work is not performed that it does not want to be performed). Moreover, if the concern is that the employee who arrives at work early will be compensated for several hours of leisure time simply because she has already donned protective gear, such time is already excludable from compensability by regulations concerning off-duty time. *See* 29 C.F.R. § 785.16; *see also* 29 C.F.R. § 790.7(h); *Skidmore*, 323 U.S. at 137.

Thus, current regulations already distinguish between cases where an employee voluntarily shows up early and

cases where the employer requires her to do so, either via workplace rule or as a practical result of the employer's business decisions. An employee who voluntarily shows up and dons equipment earlier than she needs to would not be entitled to compensation. However, when an employee is *de facto* required to report to work early so that she can don the equipment necessary for her to be on the production line at the time the employer requires her to be there, this is beyond the employee's control and should be compensated because it is done for the benefit of the employer—that is, because the employee is "engaged to wait." Under the bright line rule, once it is determined that the donning of protective equipment is compensable, and that associated wait time is time for which employees are "engaged to wait," there is no need for a further analysis of whether the wait time may nevertheless be "preliminary" under the Portal Act.

2. A Bright Line Rule Will Reduce Litigation Over Which Activities Begin and End the Workday.

Under the FLSA, the Portal Act, and Department of Labor regulations, it is clear that certain types of travel time during the workday are compensable. For example, travel time from the place of performance of one principal activity to the place of performance of another is compensable. *See* 29 C.F.R. § 785.38; 29 C.F.R. § 790.7(c). Similarly, "[w]here an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work." 29 C.F.R. § 785.38. Such travel is excluded from the coverage of Section 4 of the Portal Act because it occurs after the employee commences his principal activities. The issue is which activities trigger the workday and remove all subsequent travel or other pre-shift activities from the coverage of Section 4.

Wait time is likewise compensable under the Portal Act when it occurs during the course of the work day, unless the employee is "completely relieved from duty" for a sufficient period of time. 29 C.F.R. §§ 785.15, 785.16. The issue with respect to wait time incident to the first principal activity is whether the employee is waiting to be engaged (which is not compensable) or is engaged to wait (which is compensable). *Skidmore*, 323 U.S. at 137. If the employee is engaged to wait, she is by definition performing a principal activity outside the coverage of Section 4 of the Portal Act, and must be compensated.

Alvarez v. IBP, Inc. resolves these issues with a simple and straightforward rule. 339 F.3d at 906-07. Under *Alvarez*, once it is established that donning protective gear or any other preparatory work activity is integral and indispensable, all subsequent work and any attendant employer-controlled wait-time is compensable. *Id.* at 906. *Tum*, on the other hand, does not resolve these issues with a general rule, but essentially adopts an *ad hoc* standard that will require every court facing a "walk time" or "wait time" issue to determine whether an activity the court has already deemed integral and indispensable also justifies compensation for attendant wait time or subsequent walk time. 360 F.3d at 280-81, 282. This second determination is wholly unnecessary and invites a host of problems, including the potential for serious inconsistencies.

Similarly, with respect to wait time, the first principal activity test provides that once it is established that an employee is "engaged to wait" with respect to his or her first principal activity, the wait time is compensable. In contrast, *Tum* complicates this straightforward rule, injecting unnecessary additional issues and providing no guidelines for resolving them. Thus, although the First Circuit recognized that "[w]ait time is compensable when it is part of a principal activity, but not if it is preliminary or postliminary activity." *Tum*, 360 F.3d at 282 (quoting *Vega*

v. Gasper, 36 F.3d 417, 425 (5th Cir. 1994)), the court concluded that "the short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." *Id.* The court emphasized that "a line must be drawn" between compensable and non-compensable wait time, but provided no guidelines for drawing that line. In fact, the *Tum* court's conclusion that time for which employees are "engaged to wait" may nevertheless qualify as non-compensable preliminary or postliminary activity under Section 4, *id.*, upsets the existing bright line rule established by this Court in *Skidmore*, and codified in 29 C.F.R. § 785.15, that employees must be paid for all such time. Moreover, under federal regulations and existing law, the shortness of the wait time is a factor leaning towards compensability. *See* 29 C.F.R. 785.16; *Mireles*, 899 F.2d at 1413 (finding shortness of wait-time favors compensability, and rejecting rule making "reasonable" waits non-compensable). The *Tum* decision throws this established law into disarray by improperly and inexplicably re-weighing this factor against compensability.

Thus, *Tum*'s *ad hoc* rule provides no principled basis for determining which activities are compensable and which are not, and in fact seriously undermines existing rules and guidelines established by the executive department and this Court. Moreover, *Tum*'s unprincipled test will increase litigation risks for both employees and employers, increasing the likelihood that employees will compromise meritorious case for far less than their actual value, and that employers will settle unmeritorious cases rather than risk an adverse finding on the compensability of walk or wait-time.

The problems created by this *ad hoc* rule are illustrated in *Reich II*, which was heavily relied upon by the *Tum* court and the defendants in the case below. The *Reich II* opinion and other decisions in the related litigation demonstrate the difficulty courts face in the absence of a bright line rule in

determining which activities trigger the start of the compensable workday. *See Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1325 (D. Kan. 1993) ("*Reich I*"), *aff'd* 38 F.3d 1123 (10th Cir. 1994); *Reich v. IBP, Inc.*, No. 88 2171, 1996 WL 137817, *1 (D. Kan. Mar. 21 1996) ("*Reich III*"), *aff'd sub nomine Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997). In *Reich I*, the district court found that both donning required protective gear and retrieving a knife from the knife room were integral and indispensable activities for the knife-using employees, and that both activities were compensable. *Reich I*, 820 F. Supp. at 1325. At the same time, the court found that the wait time to retrieve protective gear, and the walk time after donning it were excluded from compensability by the Portal Act, while the wait and walk time in connection with knife retrieval was compensable. *Id.* The court's stated basis for this finding was that knife retrieval, which occurred after the donning of protective gear, was nevertheless the first principal activity of the day. *Id.*

The result of the district court's conclusions was that employees were off the clock while waiting for protective gear, on the clock while donning it, off the clock while walking to the knife room, and then on the clock again while waiting for and retrieving their knives and walking from the knife room to the production floor. However, the court put forth no principled reason for distinguishing between the donning of protective gear and the exchange of knives at the knife room in terms of starting the workday. Both activities were found to be "integral and indispensable," *Reich I*, 820 F. Supp. at 1326. In addition, while the court did not apply the *de minimis* rule in determining which activities were compensable, *id.* at 1327 n.17, any of them viewed in isolation could have been deemed *de minimis*. *See Metzler*, 127 F.3d at 962-63 (finding reasonable time of "three minutes to wait for and exchange knives [and] three minutes to put on and take off personal protec-

tive equipment"). Nor was there any practical reason for distinguishing these two activities. While part of the court's reasoning was that the sequence of activities upon arrival at the plant varied from employee to employee, this variation appears to have encompassed both donning and knife exchange. *See Reich I*, 820 F. Supp. at 1321. Moreover, the court ultimately imposed liability only for the "reasonable time" required for each of the pre-shift activities it found to be compensable, and thus, the sequence of activities was irrelevant to the employer's liability. *Reich III*, 1996 WL 137817, at *4. Thus, the variations in routine fail to inject any principle into the exclusion of post-donning walk time. Only the bright-line first principal activity rule will bring consistency and predictability to the resolution of these issues in individual cases.

B. *The Alternative Rule Suggested by the Tum Concurrence is Impracticable and Subject to the Same Abuses as an Ad Hoc Rule.*

The concurrence in *Tum* suggests a rule that only donning and doffing time that is not *de minimis* triggers the start or end of the workday for purposes of Section 4 of the Portal Act. 360 F.3d at 285 (Boudin, J., concurring). Judge Boudin argues that such a rule would be equally workable and would be equally consistent with the language and policy of the FLSA, the Portal Act, and Supreme Court precedent. As explained above, however, such a rule can only be based on a misapplication of the *de minimis* concept. Moreover, this proposal is less desirable from a policy perspective for a number of reasons.

First, as illustrated in the *Reich v. IBP* case, the rule would be difficult to apply. Viewed in isolation, each of the activities at issue in that case might be called *de minimis*. The court found that the donning and doffing of protective gear together required only three minutes. *Metzler*, 127 F.3d at 962. Similarly, exchanging knives required three minutes, and post-shift cleaning of protective equipment required two minutes. *Id.* at 962-63. None of these activities reaches the typical threshold for finding it more than *de minimis*, and thus, none would trigger the start of the workday for purposes of walk and wait time under Judge Boudin's rule. Indeed, even in aggregate, these activities required less than ten minutes (excluding walk and wait time), the threshold some courts use in making *de minimis* determinations. Nevertheless, the district court found some of the walk and wait time to be compensable. The inclusion of this time pushed the overall uncompensated time to fourteen minutes, which the court found was not *de minimis*. *Id.* Under Judge Boudin's rule, none of the walk and wait time would have been compensable, and the other activities would have likely been found *de minimis*

and non-compensable, even in the aggregate.[3]

Second, Judge Boudin's rule will leave in place—and in fact aggravate—the litigation-provoking issue of what activities are *de minimis*. Under the Boudin rule this will become the threshold issue in travel-time cases, and it will be contested in nearly every case, even those where aggregating the travel time with other pre-shift work would take the case out of the *de minimis* rule. Third, and for the same reason, the rule will leave employers just as uncertain of their obligations concerning walk and wait time as they are under present circumstances.

Judge Boudin raises the specter that the first principal activity rule will completely eviscerate the Portal Act by requiring compensation for walk time even after insubstantial activities such as donning a hard hat at a plant entrance. This concern is misplaced. Under the first principal activity rule, walk and wait time is only compensable after an activity has been found to be a principal activity or integral and indispensable to a principal activity. The lower courts have ample experience making such determinations, and this Court need not analyze whether donning a hard hat in any particular circumstance is a principal activity. In *Tum*, the district court already has found the donning and doffing of certain protective gear to be a compensable activity under the facts of the case, and the First Circuit

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[3] Even relatively small amounts of walk and wait time can add up to substantial amounts in the aggregate. For example, in *Reich*, the walk and wait time attendant to pre-shift knife retrieval and post-shift cleaning, which the court found compensable, amounted to six minutes per day. Six minutes per day, five days per week adds up to one half hour per week and 25 hours per 50-week work year. As a result, this seemingly insignificant amount of time could result in an employee working for well over half a week each year without compensation. Had walk and wait time attendant to donning and doffing protective gear been included, the amount of time would be even more significant.

affirmed that finding. Such a finding is sufficient to render subsequent walk time compensable. Simply put, a bright line rule that the first principal activity starts the work day still requires the activity that starts the day to be a principal activity.

CONCLUSION

For the forgoing reasons, *amici curiae* NELA, LAS-ELC, and NELP urge the Court to reverse the judgment below in *Tum*. The Court should reaffirm the Portal-to-Portal Act's definition of the workday in terms of the first principal activity rule, and should reject the *Tum* rule permitting employers to carve up the workday by starting, stopping, and restarting the time clock. Specifically, the Court should hold (1) that time employees must spend walking to and from stations where safety equipment is distributed is compensable, and (2) that employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations.

Respectfully submitted,

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