IN THE SUPREME COURT OF THE UNITED STATES

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IBP, INC., :

Petitioner, :

v. : No. 03-1238

GABRIEL ALVAREZ, INDIVIDUALLY :

AND ON BEHALF OF ALL OTHERS :

SIMILARLY SITUATED, ET AL.; :

and :

ABDELA TUM, ET AL., :

Petitioners, :

v. : No. 04-66

BARBER FOODS, INC., DBA BARBER :

FOODS. :

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Washington, D.C.

Monday, October 3, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:37 a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner in 03-1238 and the Respondent in 04-66.

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

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

C O N T E N T S

P R O C E E D I N G S

[10:37 a.m.]

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

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF PETITIONER

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: So, you think Steiner is irrelevant?

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

the proper disposition of this case, yes.

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

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

JUSTICE SOUTER: No, but your argument --

MR. PHILLIPS: -- or primary activities.

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

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

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

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

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

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

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

JUSTICE SCALIA: They felt otherwise.

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

MR. PHILLIPS: Right.

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

MR. PHILLIPS: It --

JUSTICE O'CONNOR: -- after that.

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

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

JUSTICE GINSBURG: But, Mr. Phillips --

MR. PHILLIPS: -- health and safety.

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

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

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

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

MR. PHILLIPS: Right. But that --

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

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

JUSTICE SOUTER: "Or activities."

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

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

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

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

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

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

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

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

JUSTICE BREYER: But "in certain" --

MR. PHILLIPS: -- that language.

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

MR. PHILLIPS: Right.

JUSTICE BREYER: The Secretary's.

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

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

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

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

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

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

MR. PHILLIPS: Yes.

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

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

JUSTICE SCALIA: Right. Okay.

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

JUSTICE SCALIA: Okay.

MR. PHILLIPS: -- word.

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

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

MR. PHILLIPS: Right. But that --

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

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

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

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

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

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

MR. PHILLIPS: It's work --

JUSTICE GINSBURG: -- principal activity?

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

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

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

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

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

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

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

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

of the day.

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

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

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

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

MR. PHILLIPS: Right.

CHIEF JUSTICE ROBERTS: -- they have to doff the other equipment, don new equipment, and walk back. Wouldn't your analysis say that that walking time is excluded?

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

CHIEF JUSTICE ROBERTS: Why not?

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

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

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

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

MR. PHILLIPS: If the --

JUSTICE KENNEDY: Two hours of scrubbing --

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

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

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

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

MR. PHILLIPS: The walk is not compensable,

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

JUSTICE O'CONNOR: But the problem --

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

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

MR. PHILLIPS: No.

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

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

CHIEF JUSTICE ROBERTS: What was --

MR. PHILLIPS: What we do --

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

MR. PHILLIPS: I'm sorry?

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

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

CHIEF JUSTICE ROBERTS: No, but the --

MR. PHILLIPS: -- circumstance.

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

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

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

JUSTICE SOUTER: But you're saying --

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

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

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

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

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

JUSTICE SCALIA: You would say that's --

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

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

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

JUSTICE KENNEDY: No, no, no.

JUSTICE SCALIA: But your --

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Why is it --

MR. PHILLIPS: -- and --

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

MR. PHILLIPS: Well --

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

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

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

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

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

JUSTICE SCALIA: Not --

MR. PHILLIPS: -- plain as day --

JUSTICE SCALIA: -- not necessarily.

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

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

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

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

I think you're --

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

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

MR. PHILLIPS: But, Justice Scalia--

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

MR. PHILLIPS: Well, the --

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

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

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

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

JUSTICE KENNEDY: My problem with your argument is Steiner.

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

JUSTICE SCALIA: No, it doesn't.

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

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

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

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

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

MR. PHILLIPS: IBP.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

MR. PHILLIPS: -- balance of my minutes.

CHIEF JUSTICE ROBERTS: Mr. Goldstein.

ON BEHALF OF RESPONDENTS

MR. GOLDSTEIN: Mr. Chief Justice, and may it please the Court:

As the previous questioning suggests, the outcome of this case follows directly from Steiner. The Portal Act, by its terms, applies only to activities that occur before the commencement of -- before the commencement of, or after the conclusion of, the employees' principal activities. Steiner holds that donning and doffing, such as in this case, is "part of" -- that's a quote -- the employees' principal activities, and it, therefore, follows that the Portal Act applies only to activities either prior to, or after, that donning and doffing.

JUSTICE SCALIA: But why isn't walking from the gate of the -- of the factory to the -- to the place where you're on the assembly line, why isn't that integral and essential to the performing of the activities?

MR. GOLDSTEIN: Because -- and this is the language that Mr. Phillips is referring to in Steiner -- 4(a)(1) itself makes clear that a walk will not be the first principal activity, including on the theory that it's integral and indispensable. The first principal activity has to be something other than a walk, and that's what happens in this case. As in Steiner, there is

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

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

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

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

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

JUSTICE KENNEDY: Yes.

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

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

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

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

And so, after 4(a)(1) and 4(a)(2), there's this concluding clause, and the text frames the workday. And it says that the Portal Act, 4(a)(1) and (2), will apply to activities which occur -- I'm quoting now -- "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." And it simply follows, as a matter of the plain text, that when Steiner held that those activities, "such principal activities," include the donning and the doffing, that everything that happens between those two events is not encompassed by the Portal Act.

CHIEF JUSTICE ROBERTS: Your --

JUSTICE SCALIA: What if -- what if --

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

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

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

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

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

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

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

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

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

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

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

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

I did want to --

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

MR. GOLDSTEIN: Justice Ginsburg, it is an

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

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

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

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

JUSTICE GINSBURG: What --

MR. GOLDSTEIN: Could --

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

MR. GOLDSTEIN: The line that has been drawn by

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

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

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

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

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

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

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

MR. GOLDSTEIN: Yes.

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

MR. GOLDSTEIN: But --

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

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

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

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

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

JUSTICE BREYER: Is that what the reg says?

MR. GOLDSTEIN: The reg doesn't --

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

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

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

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

MR. GOLDSTEIN: Yes.

JUSTICE BREYER: First thing --

MR. GOLDSTEIN: Yes.

JUSTICE BREYER: -- in the day.

MR. GOLDSTEIN: Yes. Unquestionably.

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

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

JUSTICE SCALIA: No, I understand.

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

JUSTICE SCALIA: No, I --

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

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

JUSTICE SCALIA: Right.

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

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

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

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

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

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

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

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

[Laughter.]

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

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

[Laughter.]

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

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

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

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

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

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

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

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

If there are no further questions.

CHIEF JUSTICE ROBERTS: Thank you, Mr.

Goldstein.

Mr. Gornstein.

ORAL ARGUMENT OF IRVING L. GORNSTEIN

ON BEHALF OF THE UNITED STATES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GORNSTEIN: That's correct.

JUSTICE SOUTER: You've got to have both.

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

JUSTICE SOUTER: Yes.

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

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

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

MR. GORNSTEIN: That's correct.

JUSTICE BREYER: Did you say --

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

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

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

MR. GORNSTEIN: The initial wait.

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

MR. GORNSTEIN: The initial wait --

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

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

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

JUSTICE BREYER: But the word --

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

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

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

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

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

JUSTICE BREYER: He has to --

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

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

MR. GORNSTEIN: When --

JUSTICE BREYER: -- not a wait.

MR. GORNSTEIN: If --

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: No, no, no.

MR. GORNSTEIN: -- the question.

JUSTICE BREYER: I don't mean that.

MR. GORNSTEIN: It's --

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

MR. GORNSTEIN: I -- the --

JUSTICE BREYER: It's not thoroughly briefed.

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

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

MR. GORNSTEIN: The Court granted --

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

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

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

MR. GORNSTEIN: 49.

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

[Laughter.]

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Gornstein.

Mr. Phillips, you have four minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF PETITIONER

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

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

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

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

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

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

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

JUSTICE GINSBURG: They decided --

MR. PHILLIPS: -- as possible.

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

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

I want to --

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

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

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

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

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

The case is submitted.

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