No. 22-1613

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RODNEY TYGER, ET AL.,

Plaintiffs – Appellants,

v.

PRECISION DRILLING CORP., ET AL.,

Defendants – Appellees.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 4:11-cv-01913-MWB, Honorable Matthew W. Brann)

SECRETARY OF LABOR'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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The Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Plaintiffs-Appellants Rodney Tyger and others. For the reasons set forth below, the district court erred in granting summary judgment to Defendants-Appellees Precision Drilling Corp., Precision Oilfield Services, Inc., and Precision Drilling Company, LP ("Precision"), on Plaintiffs' claims under the Fair Labor Standards Act ("FLSA" or "Act") 29 U.S.C. 201 et seq., as amended by the Portal-

to-Portal Act ("Portal Act"), 29 U.S.C. 254, asserting that time spent donning and doffing certain personal protective equipment ("PPE") was compensable.

SECRETARY'S INTEREST AND AUTHORITY

The Secretary has a substantial interest in the interpretation of the "hours worked" principles of the FLSA because the Secretary administers and enforces the FLSA, as amended by the Portal Act. The FLSA generally requires employers to compensate employees for all "hours worked," defined to include all hours spent between an employee's first and last "principal activities" of the day. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005). The Portal Act excludes from compensable time "walking, riding or traveling to and from" the place of performance of an employee's principal work activities, and activities "which are preliminary to or postliminary to said principal activity or activities" if they occur prior to the commencement of or subsequent to the cessation of the employee's principal activity or activities. 29 U.S.C. 254(a). Activities that are integral and indispensable to a principal activity are, however, themselves compensable principal activities. *Alvarez*, 546 U.S. at 37. The Secretary has an interest in ensuring that employees are properly compensated for all "hours worked," including for all time that is integral and indispensable to employees' principal activities. Federal Rule of Appellate Procedure 29(a) authorizes the Secretary to file this brief.

ISSUE PRESENTED

Whether the district court erred in concluding that Plaintiffs' time spent donning and doffing personal protective equipment at the beginning and end of each workday was not integral and indispensable to Plaintiffs' principal work activities and therefore not compensable under the FLSA, as amended by the Portal Act.

STATEMENT OF THE CASE

A. Factual Background

Plaintiffs are current and former rig hands who worked on drilling rigs operated by Precision, an oil and gas company. Pls.' App'x (App.) 72. Precision's policies and Occupational Safety and Health Administration ("OSHA") regulations require Plaintiffs to wear certain personal protective equipment ("basic PPE") on the worksite, including flame-retardant coveralls, steel-toed boots, gloves, goggles, hardhats, and earplugs. App. 73. The parties agreed that (1) Plaintiffs wore basic PPE to avoid worksite hazards, such as electrical shock, falling objects, flying debris, slippery surfaces, and chemical exposure; and (2) as they performed their drilling work, Plaintiffs' PPE became covered with harmful substances, including caustic chemicals, drilling mud, grease, and lubricants, and basic PPE reduced Plaintiffs' risk of exposure to those harmful substances. *Id.*

B. Procedural Background

In this FLSA collective action, Plaintiffs alleged, among other things, that Precision failed to compensate them for pre-and-post-shift donning and doffing of basic PPE. App. 93-95.

In 2018, the district court denied Precision's motion for summary judgment on the question of whether donning and doffing basic PPE was integral and indispensable to Plaintiffs' principal activities. App. 122. The court drew on Second Circuit caselaw in articulating and applying a standard for the integral-and-indispensable inquiry. App. 115-16 (citing *Perez v. City of New York*, 832 F.3d 120 (2d Cir. 2016); *Gorman v. Con. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007)). Under this standard, donning and doffing of gear are integral and indispensable if the gear guards against workplace dangers that accompany the employee's principal activities and transcend ordinary risks. App. 116.

In 2019, after an interim order granting Precision's motion to exclude Plaintiffs' expert witness, the court, on reconsideration, granted summary judgment to Precision. App. 85-86. The 2019 summary-judgment order held that (1) Plaintiffs needed to present expert, not lay, testimony showing that their work environment presented hazards that transcend ordinary risks and that (2) absent such expert testimony, Precision was entitled to summary judgment. App. 89-90.

On October 26, 2020, in an unpublished decision, this Court reversed the district court's entry of summary judgment for Precision. App. 78-82. Noting that the district court had "adopted" a transcends-ordinary-risks "inquiry set forth by the Second Circuit," this Court said the district court erred in concluding that, absent expert testimony, Plaintiffs could not show that their "work was sufficiently hazardous." App. 80-81. This Court could not identify any "FLSA case in the donning and doffing context that requires plaintiffs to provide an expert opinion on workplace safety risks or the protective value of their PPE in order to meet the integral and indispensable standard." App. 81. Accordingly, to meet the integral-and-indispensable standard, employees may offer "lay witness testimony and documentary evidence concerning worksite safety risks and the nature of the job and PPE at issue—evidence which Plaintiffs have produced in this case." App. 81-82. The panel remanded without addressing the merits. App. 82.

On remand, the district court, on March 25, 2022, again granted summary judgment to Precision and denied it to Plaintiffs. App. 3.

C. District Court Decision

In its March 25, 2022 decision, the district court explained that it would again apply a transcends-ordinary-risk standard for the integral-and-indispensable analysis because, in the court's view, this Court did not object to that standard. App. 44. The district court identified "three components" employees must show

that purportedly underlie the transcends-ordinary-risks analysis used by the Second Circuit in *Perez* and *Gorman*: (1) "a workplace danger that transcends ordinary risks," which the court viewed as the "magnitude" of the risk; (2) "that this transcendent risk accompanies their principal activities," which the court viewed as the "frequency" of the risk; and (3) that their protective equipment "guards against" against this "transcendent risk," which the court viewed as providing "meaningful protection" against the risk. App. 55-56. The court concluded that Plaintiffs could not satisfy this new three-component test on the rationale that the "hazards that [Plaintiffs] have described are either ordinary, hypothetical or isolated" and that Plaintiffs' basic PPE provided insufficient protection against those hazards. App. 66.

The court considered three categories of risks in Plaintiffs' workplace: mechanical, fire-and-burn, and chemical risks. App. 57-65. As to mechanical risks, the court acknowledged that the PPE provided some "protection" against "common hazards" including falling objects, flying debris, and slippery surfaces, but nevertheless concluded that the attendant risks—burns, blisters, and pinches on workers' hands, debris and dust in workers' eyes, and crushed toes—were "quintessentially ordinary" and were not "persistent or severe enough to transcend ordinary risks." App. 43-44, 56-77. The court similarly concluded that hearing loss was not "hazardous enough" to constitute a "transcendent" risk, particularly

because Plaintiffs had not presented evidence that "workers across-the-board experienced deafness." App. 58. The court added that the more serious (including fatal) workplace accidents to which Plaintiffs had pointed were not frequent and that basic PPE would not have prevented some of these accidents. App. 59-61. As to fire-and-burn risks, the court concluded that, although basic PPE protected against burns, Plaintiffs failed "to offer evidence on the severity or frequency of these supposed risks" and the court found that the risks were only hypothetical. App. 61-62. Regarding chemical risks, the court acknowledged that Plaintiffs sustained frequent exposures to "drilling mud, grease, lubricants, and caustic chemicals" and that the basic PPE provided a barrier to such substances. App. 43. But the court concluded that the rashes and skin infections that employees testified to suffering from the exposure were not "transcendent" and questioned whether basic PPE adequately protected Plaintiffs from drilling fluid. App. 63-65.

The district court acknowledged (1) that Plaintiffs were required to wear basic PPE under Precision's company policies and OSHA rules and (2) that the OSHA rules are relevant (although not determinative) to the integral-and-indispensable question. App. 18, 42-43. However, its analysis of the integral-and-indispensable question did not discuss or mention OSHA's rules or Precision's requirements. App. 56-65.

ARGUMENT

COURTS ARE NOT REQUIRED TO APPLY A TRANSCENDS-ORDINARY-RISK STANDARD IN ANALYZING WHETHER PLAINTIFFS' DONNING-AND-DOFFING ACTIVITY WAS INTEGRAL AND INDISPENSABLE AND, IN ANY EVENT, THE DISTRICT COURT'S APPLICATION OF THAT STANDARD SUFFERS FROM SEVERAL ERRORS

The FLSA, as amended by the Portal Act, generally requires that employers must compensate employees for all "hours worked," *Smiley v. E.I. DuPont De Nemours & Co.*, 839 F.3d 325, 330 (3d Cir. 2016), including time spent on pre-and-post-shift activities that are "an integral and indispensable part of the principal activities," *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956). The district court granted summary judgment to Precision on Plaintiffs' claims that they should be compensated for post-and-pre-shift time spent donning and doffing basic PPE on the ground that Plaintiffs' donning-and-doffing activity was not integral and indispensable to their principal activities. In reaching this conclusion, the district court applied a standard analyzing whether Plaintiffs' PPE protects against workplace hazards that "transcended ordinary risks." But, under the Supreme Court's integral-and-indispensable decisions, the proper standard for determining the compensability of protective measures, such as donning-and-doffing protective gear, is whether the activity is integral and indispensable to the proper performance of the work the employees are employed to perform, which means performing that

work in a safe and effective manner. This standard does not require employees to show that protective gear guards against workplace hazards that transcend ordinary risks. Moreover, in applying a transcends-ordinary-risks standard, the district court misunderstood that test as articulated in *Perez*.

A. The Portal Act and the Integral-and-Indispensable Requirement

1. The Portal Act provides limited exceptions to the FLSA's general requirement that employers must compensate employees for all "hours worked." Under the Portal Act, employers are not required to pay employees for "walking, riding, or traveling to and from the actual place of performance of [employees'] principal activity or activities" or for "preliminary" or "postliminary" activities, "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a).

Other than articulating limited exceptions to the FLSA's general rule, the Portal Act "does not purport to change [the Supreme] Court's earlier descriptions of the terms 'work' and 'workweek,' or to define the term 'workday.'" *Alvarez*, 546 U.S. at 28. And the Portal Act's limited exceptions for preliminary and postliminary activities (including walking, riding, or traveling to the workplace), apply *only* when such activities occur outside the workday, 29 U.S.C. 254(a), which is defined as "the period between the commencement and completion on the

same workday of an employee's principal activity or activities," 29 C.F.R. 790.6(b). This governing principle, known as the "continuous workday" rule, requires employers to compensate employees for *any* activities (except for bona fide meal breaks) that occur between the first and last principal activities of the workday. *Alvarez*, 546 U.S. at 28-29.

2. Because the Portal Act excludes from compensation only activities that occur before the first principal activity and after the last principal activity, the scope of that exclusion depends on the meaning of the term "principal activity." The Department of Labor ("Department") and the Supreme Court agree that principal activities include activities that are "indispensable" or "integral" to the employee's principal activities.

a. The Department's regulations interpreting the Portal Act emphasize that the term "principal activities" encompasses activities that "are indispensable to the performance of productive work" or "are an integral part of a principal activity." 29 C.F.R. 790.8(a) & (b). In accordance with the Department's interpretation of "principal activities," the regulations recognize that "changing clothes" may be performed outside the workday and thus may be considered a noncompensable "preliminary" or "postliminary" activity. 29 C.F.R. 790.7(g). However, changing clothes "may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of

the employee's 'principal activity"' and thus compensable. 29 C.F.R. 790.7(g) n.49. For example, an employee may not be able to perform his principal activities without wearing special clothes, "where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) & n.65. However, where changing clothes "is merely a convenience to the employee and not directly related to his principal activities," it is instead considered preliminary or postliminary. 29 C.F.R. 790.8(c). The regulations explain that the Portal Act's legislative history "indicates that Congress intended the words 'principal activities' to be construed liberally … to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. 790.8(a).

The Department first issued these regulations in an interpretive bulletin interpreting the Portal Act shortly after its enactment, U.S. Dep't of Labor, *General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, 12 Fed. Reg. 7655 (Nov. 18, 1947), codified at 29 C.F.R. Part 790, and Congress ratified the Department's interpretation in 1949. *See Steiner*, 350 U.S. at 254-55 & n.8; *see also U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 427 (3d Cir. 2017) (explaining that, in 1949, Congress

ratified the Department's existing interpretations of the FLSA).[1] These regulations have remained substantively the same since they were issued in 1947 and ratified by Congress in 1949.

b. The Supreme Court has likewise concluded that "principal activities" under the Portal Act include "all activities which are an integral and indispensable part of the principal activities." *Steiner*, 350 U.S. at 252-53 (citation omitted). In 1956, in *Steiner,* the Court concluded, based in part on the Department's regulations, that "activities performed either before or after the regular work shift, on or off the production line, are compensable" under the Portal Act "if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." 350 U.S. at 255 n.9, 256. *Steiner* examined the situation of battery plant employees who were exposed to toxic chemical fumes, where exposure could result in lead poisoning. *Id*. at 249-50. State regulatory law, the employer, and the employer's workers' compensation insurance carrier all required workers to change clothes and shower at the end of the shift for safety and operational efficiency reasons. *Id*. at 250-51. The Court stated that "it would be

[1] These contemporaneous and longstanding interpretations are entitled to deference because they reflect the considered views of the agency charged with enforcing the FLSA and the Portal Act, and Congress has left them undisturbed in its numerous subsequent reexaminations of the FLSA. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment." *Id*. at 256. Therefore, changing into and out of "old but clean work clothes" on the employer's premises was compensable. *Id.* at 251, 253-56. The Court added that section 3(o) of the FLSA (enacted in 1949 to provide that collective-bargaining agreements may exempt clothes-changing and washing from work hours, 29 U.S.C. 203(o)) strengthened the government's position that such clothes-changing and showering time was compensable. *Id.* at 25-455. The Court said section 3(o)'s "clear implication is that clothes changing and washing, *which are otherwise a part of the principal activity*, may be expressly excluded from coverage by agreement." *Id.* at 254-55 (emphasis added).

The same day it decided *Steiner*, the Supreme Court held in *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956), that time meatpacker employees spent sharpening their knives was "an integral part of and indispensable to the various butchering activities for which they were principally employed." *Id.* at 263. The Court cited testimony that dull knives slowed production, caused accidents, increased waste, and affected the quality of meat and hides. *Id*. at 262. Therefore, although the knife sharpening occurred "before or after the direct or productive labor for which the worker is primarily paid," *id*. at 260, the Court deemed sharpening time integral and indispensable.

The Court has reaffirmed these precedents in more recent decisions, including in cases involving donning and doffing of work-related clothing and gear. In 2005, *IBP, Inc. v. Alvarez* concluded that walking-and-waiting time before and after donning and doffing was compensable. 546 U.S. at 24, 37. In reaching that conclusion, *Alvarez* necessarily approved the Ninth Circuit's conclusion that the actual donning and doffing of employer-required equipment were integral and indispensable to the employees' principal work activities, *id.* at 24, 32, 37, 42. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (explaining that *Alvarez* "applied *Steiner* to treat as compensable the donning and doffing of protective gear"). The Court stated that although pre-donning waiting time "may or may not be necessary in particular situations or for every employee," "the donning of certain types of protective gear … is *always* essential if the worker is to do his job." *Alvarez*, 546 U.S. at 40.

In 2014, in *Sandifer*, the Court interpreted the phrase "changing clothes" in FLSA section 3(o) (29 U.S.C. 203(o)) to determine that most of the protective gear donned by unionized steelworkers qualified as "clothes" under section 3(o), and that time spent donning such "clothes" was not compensable under the applicable CBA. 571 U.S. at 224, 227-36. As the Court explained, section 3(o) applies only to activities that are otherwise compensable because they are integral and indispensable to the employees' principal work activities. *Id*. at 229. The Court

underscored that, absent the fact that the CBA rendered such time noncompensable under section 3(o), "*this donning-and-doffing time would otherwise be compensable under the Act*." *Id*. at 223 (emphasis added).

Also in 2014, in *Integrity Staffing Solutions v. Busk*, 574 U.S. 27 (2014), the Court reaffirmed that it "has consistently interpreted the term 'principal activity or activities' to embrace all activities which are an integral and indispensable part of the principal activities." *Id.* at 33 (internal quotation marks and alterations omitted). *Integrity Staffing* stated that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform [the] principal activities." *Id.* The Court concluded that warehouse workers were not entitled to compensation for time spent waiting for and undergoing employer-required security screenings because such screenings were not an intrinsic element of the workers' principal activities (retrieving products and packaging them for shipment). *Id.* at 29, 33, 35. The Court added that the employer could have eliminated the screenings without impairing employees' ability to complete their work and explained that the fact that the employer required the screenings was insufficient on its own to render the activity compensable. *Id.* at 35-36.

B. To Show that Donning and Doffing Protective Gear Are Compensable, Employees Need Only Demonstrate that the Gear Is Integral and Indispensable to the Proper Performance of the Employees' Work, Which Does Not Require Showing that Such Gear Guards Against Workplace Hazards that Transcend Ordinary Risks.

1. The Supreme Court has interpreted the words "integral and indispensable" in their ordinary sense. The Court's most recent integral-and-indispensable decision, *Integrity Staffing*, articulated a broad standard: an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform [the] principal activities." 574 U.S. at 33.

Where the activity in question consists of protective safety measures, including donning and doffing of protective gear, the Court's application of the integral-and-indispensable test has broadly focused on whether such measures are integral and indispensable to the proper performance of the work the employee is employed to perform, which means the work is performed in a safe and effective manner. For example, in *Steiner*, where the Court explained that "safe operation" of the employer's plant required the protective measures at issue, 350 U.S. at 250-56, the workers could have theoretically performed their principal activities without protective measures, but they could not have *safely* and *effectively*

performed their work in that manner, as reflected in regulatory and employer requirements, *id.* at 250. In observing that "it would be difficult to conjure up an instance" where protective measures "more clearly" met the integral-and-indispensable standard, *id.* at 256, the Court essentially characterized *Steiner* as an easy case. Similarly, in *King Packing*, where the Court noted that the safe and efficient butchering required sharpening knives, 350 U.S. at 262-63, the workers could have theoretically performed their principal activities without sharpening their knives (albeit less effectively and safely). As with *Steiner*, in concluding that "the facts clearly demonstrate[d]" that the knife sharpening was integral and indispensable, *id.* at 263, the Court essentially viewed *King Packing* as an easy case. *See also Integrity Staffing*, 574 U.S. at 34 (reaffirming *Steiner* and *King Packing*). The Court's view of *Steiner* and *King Packing* as easy cases is significant because, despite the district court's suggestion otherwise, App. 55, 57, nothing in either case shows that the Court intended to limit its compensable protective measures to highly hazardous work environments.

These Supreme Court decisions make clear that workplace hazards need not "transcend ordinary risks"—particularly as the district court understood that phrase—before preliminary or post-liminary protective measures, such as donning and doffing protective gear, can be integral and indispensable. Of course, the Court's decisions indicate workplace hazards may be relevant in evaluating

whether protective measures are necessary for workers to perform their duties safely and effectively. *See, e.g.*, *Integrity Staffing*, 574 U.S. at 37-38 (Sotomayor, J., concurring) ("[A]n activity is 'indispensable' to another, principal activity only when an employee could not dispense with it without impairing his ability to perform the principal activity safely and effectively."). But the integral-and-indispensable analysis does not hinge on a showing that such measures guard against non-ordinary risks. Thus, nothing in *Integrity Staffing* compelled the district court here to rely on a transcends-ordinary-risks standard as the single, dispositive inquiry.

2. Indeed, the district court's primary authority, *Perez v. City of New York*, did not seem to view the transcends-ordinary-risks standard as compelled by *Integrity Staffing*, but rather appeared to adopt the standard as a means of reconciling its analysis with its own precedent in *Gorman v. Consolidated Edison Corp.* (which pre-dated *Integrity Staffing*). *Perez*, 832 F.3d at 125. *Gorman* concluded that nuclear-power-plant employees' donning and doffing of gear—helmets, safety glasses, and steel-toed boots—were not compensable because the gear was generic protective equipment that guarded against only routine workplace risks. 488 F.3d at 593-94 (citing *Steiner*, 350 U.S. at 249, 250, 256). *Perez* clarified that *Gorman* had not established a categorical rule that generic protective gear could never be integral and indispensable. 832 F.3d at 127. Instead, *Perez*

said that courts should determine "whether the gear—however generic or specialized—guards against 'workplace dangers' that accompany the employee's principal activities and 'transcend ordinary risks'" but underscored that this is a "fact-intensive" inquiry, which requires examining "the gear at issue, the employee's principal activities, and the relationship between them." *Id.* (quoting *Gorman*, 488 F.3d at 593).

In *Perez*, the court examined the gear that city park rangers were required to don and doff (uniforms and security equipment, including bulletproof vests, utility belts, handcuffs, and radios), and the rangers' principal activities (providing public assistance and law enforcement), and examined the relationship between the two. 832 F.3d at 122, 125-26. It concluded that the rangers' donning and doffing of bulletproof vests "may qualify as integral and indispensable" under *Gorman* because the vests "protect[ed] against risks collateral to" the rangers' principal activities. *Id.* at 125 (citing *Gorman*, 488 F.3d at 593).[2]

Significantly, *Perez* had no occasion to determine whether donning gear to protect against more ordinary workplace risks would be compensable because

[2] *Perez* applied different rationales (instead of *Gorman*'s transcends-ordinary-risks analysis) in concluding that donning and doffing uniforms and other gear were integral and indispensable; namely, the rangers' uniforms identified them to the public as law enforcement officers and their utility belt contained tools of the trade needed to accomplish their principal duties. *Id.* at 125-26.

"[t]he risk of sustaining gunfire" was "not, [in the court's] view, an ordinary risk of employment." *Id.* Thus, the district court here erred in reasoning that it would not "lower[] the bar" below the standard for workplace risks supposedly established by *Steiner* and *Perez*, App. 55, 57; none of those decisions set a minimum "bar" for sufficient workplace risks.

Other courts of appeals have opted not to apply *Gorman*'s assumption that donning and doffing of protective equipment are compensable only where the equipment protects against an unusually risky environment and have instead concluded that donning and doffing protective gear in work environments that are not unusually risky are compensable. *See, e.g.*, *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011) (protective gear in a poultry processing plant); *Franklin v. Kellogg Co.*, 619 F.3d 604, 608, 619-20 (6th Cir. 2010) (food safety uniforms and protective equipment in a food processing plant); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 903, 911-12 (9th Cir. 2004) (cleanroom "bunny suits" in a silicon chip manufacturing plant); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 898-99, 903 (9th Cir. 2003) (protective gear in a meat processing plant).[3]

[3] Other than *Perez*, the only court of appeals decision to address donning and doffing in a relevant way after *Sandifer* and *Integrity Staffing* is *Llorca v. Sheriff*, 893 F.3d 1319 (11th Cir. 2018). Though *Llorca* relied on *Gorman*'s comment that an activity can be indispensable without being integral in concluding that sheriff deputies' donning and doffing of law enforcement gear were not integral, even if

3. The Secretary urges this Court to make clear that a showing of "transcendent" risk is not required to demonstrate that donning and doffing of protective gear meets the integral-and-indispensable standard. Although this Court has not yet articulated a specific test for whether donning and doffing is integral and indispensable, this would comport with circuit precedent (in addition to Supreme Court precedent, discussed above). In considering a related issue in *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007), this Court held that chicken-plant employees' donning and doffing of ordinary clothing and protective equipment constituted "work" under the FLSA. *Id.* at 363. That holding is consistent with the proposition that such activities can be integral and indispensable.[4]

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they were indispensable, it did not adopt or even *mention Gorman*'s transcends-ordinary-risks test. *Id.* at 1324-25.

[4] This Court's opinion in the prior appeal in this case did not take a position on the transcends-ordinary-risks standard. The district court correctly observed that this Court did not explicitly "reject" the district court's "adoption of the Second Circuit's transcendent risk inquiry as it was set out in *Perez*." App. 44. But neither did this Court adopt or approve that inquiry; instead, the panel merely described the district court's approach in summarizing the background and framing the limited question on appeal. App. 80-81. In doing so, this Court described the integral-and-indispensable inquiry as "inherently flexible," "context specific," and "fact intensive." App. 80-82. Moreover, this Court's ultimate conclusion that Plaintiffs could rely on lay testimony, *id.*, does not support the district court's narrow application of the transcends-ordinary-risks standard (discussed below).

Accordingly, this Court should clarify that the proper analysis in the donning-and-doffing context begins with *Integrity Staffing*'s broad standard: that an activity is "integral and indispensable … if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform [the] principal activities." 574 U.S. at 33. That is, courts should first identify the workers' principal activities (a step the district court failed to take here, *see infra* p. 24 n.6) and should then go on to consider whether the totality of the circumstances demonstrates that the workers "cannot dispense" with the protective gear if they are to perform those activities. As the Supreme Court's case law shows, this means focusing on whether the activity can be performed properly—*i.e.*, in an appropriately safe and effective manner as reflected in industry practice, regulatory requirements, and the nature of the work itself. *Steiner*, 350 U.S. at 248, 250 (explaining that, in light of employees' exposure to "lead dust and lead fumes," battery plant's "*safe operation*" required post-shift clothes-changing and showering (emphasis added)); *King Packing Co.*, 350 U. S. at 262 (focusing on "the *proper performance* of the work" and concluding that knife sharpening was integral and indispensable to meatpacking employees' productive work because, among other things, "dull knives" could cause "accidents") (emphasis added)); *see also Integrity Staffing*, 574 U.S. at 37-38 (Sotomayor, J.) (inquiry focuses on the employee's "ability to perform the principal activity *safely and effectively*")

(emphasis added)). In making this totality-of-the-circumstances assessment, courts should consider not only the hazardous nature of employees' work duties, but also other factors, such as whether employees donned PPE pursuant to employer or legal mandates (as discussed below) and whether the activity is "merely a convenience to the employee," 29 C.F.R. 790.8(c) (quoted with approval in *Integrity Staffing*, 574 U.S. at 34).

C. Not Only Did the District Court Err in Applying the Transcends-Ordinary-Risks Standard as the Single, Dispositive Inquiry, But It Also Committed Several Errors in Applying the Standard.

The district court purported to apply the transcends-ordinary-risks standard as articulated in *Perez*, but it departed from the Second Circuit's test in several respects. The court (1) failed to give sufficient consideration to the undisputed fact that Precision's basic PPE requirement was mandated under an OSHA regulation and company policy, (2) applied a concept of "ordinary risk" that *Perez* does not support, and (3) misinterpreted *Perez* on the questions of whether generic gear may protect against non-ordinary risks.[5]

[5] The district court also gave insufficient consideration to Plaintiffs' principal work activities, despite *Integrity Staffing*'s directive that the integral-and-indispensable inquiry "is tied to productive work that the employee is *employed to perform*." 574 U.S. at 36. In applying what it termed the second "component" of the transcends-ordinary-risk analysis—whether a "transcendent risk accompanies [the employees'] principal activities"—the court primarily focused on the frequency of Plaintiffs' workplace risks, rather than assessing the connection between those risks and Plaintiffs' principal activities. App. 56-65.

1. The district court gave insufficient consideration to the undisputed fact that an OSHA regulation and Precision's company policies required Plaintiffs to wear basic PPE.

The district court erred in discounting the relevance of undisputed record evidence that both regulatory law and Precision's own policies required protective equipment for the work that the Plaintiffs were employed to perform. App. 51. The court opined that the "required-by and for-the-benefit-of-the-employer analysis" should be "divorce[d]" "from *any assessment* under the *Perez* inquiry," App. 51 (emphasis added), and the court also appeared to apply the same reasoning to legal requirements mandating PPE. App. 50-51 (stating that it based this view on its interpretation that *Integrity Staffing* "explicitly rejected" the reasoning of the Ninth Circuit's *Alvarez* decision that had concluded donning and doffing were integral and indispensable where "OSHA and company rules *required* [the] gear to be worn"); *but see* App. 42-43 (recognizing, in apparent inconsistency, that OSHA requirements may be relevant).

It is true that *Integrity Staffing* stated that courts should not "focus[] on whether an employer *required* a particular activity" as opposed to "the productive work that the employee is *employed to perform*," and that "[a] test that turns on whether the activity is for the benefit of the employer is similarly overbroad." 574 U.S. at 36. But the Court did not suggest that employer requirements are *irrelevant*. Rather, it stated only that employees could not satisfy the integral-and-

indispensable standard "*merely* by the fact that an employer required an activity," *id.* (emphasis added), underscoring that employer requirements remain relevant. Moreover, this language in *Integrity Staffing* did not pertain to an employer requirement that is closely linked to "the productive work that the employee is *employed to perform*," *id.* at 38. The employer-required activity at issue in *Integrity Staffing*—security screenings the employees had to undergo before leaving the warehouse—had no connection to the employees' productive work, which was "retrieving products from warehouse shelves [and] packaging them for shipment." *Id.* at 35.

Although the district court purported to follow the Second Circuit's *Perez* decision, *Perez* itself explains that "the less choice the employee has in the matter, the more likely such work will be found to be compensable" because the employer's requirement suggests that the "activity is undertaken for the employer's benefit," indicating that it is "indispensable" to "the primary goal of the employee's work." *Perez*, 832 F.3d at 124. Similarly, when an employer and a governmental regulatory body (like OSHA) both require employees to use protective gear when performing their productive work, such mandates are strong indicators that the donning and doffing of the gear is integral and indispensable.

2. In applying the transcends-ordinary-risk standard, the district court erroneously applied an overly high bar for "ordinary risk."

The district court's analysis of ordinary risk misinterpreted *Perez* in two respects. First, in characterizing the magnitude and frequency of the risks Plaintiffs faced, the district court appeared to contemplate that gear protects against transcendent risks only if employees would otherwise face death or serious injury with some level of frequency. App. 56-65. This heightened showing finds no basis in the Second Circuit decisions on which the court relied. Neither *Perez* nor *Gorman* defined "ordinary risk" or articulated a minimum threshold, much less a threshold as exacting as requiring that employees face death or serious injury with some level of frequency. As noted above, because *Perez* reasoned that "[t]he risk of sustaining gunfire" was not "an ordinary risk of employment," 832 F.3d at 125, it had no occasion to determine whether donning gear to protect against more ordinary workplace risks would be compensable. *Gorman*, likewise, did not reach that question; instead, the court explained, in concluding that the workers had failed to show that protective gear was integral to their principal activities, that the plaintiffs had failed even to identify their principal activities. 488 F.3d at 592 n.3, 594.

Second, in assessing the risk employees face, *Perez* reasoned that "the risk of sustaining gunfire while enforcing municipal laws is not … *an ordinary risk of*

employment," 832 F.3d at 125 (emphasis added). That is, *Perez* did not analyze whether "the risk of sustaining gunfire while enforcing municipal laws" is an ordinary risk of being a law enforcement officer, but whether it is a risk of *ordinary* employment. But instead of comparing Plaintiffs' workplace risks to the risks generally present in workplaces, the district court appeared to analyze Plaintiffs' workplace risks in comparison to the specific job context of working on drilling rigs. *See generally* App. 56-65. For example, the district court failed to analyze whether the risk of burns and blisters on hands, pinched hands, debris and dust in eyes, and crushed toes were an ordinary risk of employment. App. 56-57. The court likewise deemed insubstantial the risks of daily exposure to hazardous fluids used in the drilling process because, according to the court, workers did not suffer lasting harm. App. 64; *see also* App. 57-58 (dismissing the harm of potential hearing loss resulting from the cementing process, opining that Plaintiffs had not shown that "the risk of hearing loss is hazardous enough"). Instead, the court seemed to view these risks as "quintessentially ordinary" risks in the specific job context of working on drilling rigs. App. 56.

3. In applying the transcends-ordinary-risk standard, the district court incorrectly implied that generic gear cannot protect against non-ordinary risks.

Perez and other decisions hold that there is no "categorical rule" that the "generic nature" of gear establishes that the gear "guard[s] against only routine

risks," rather than transcendent risks. 832 F.3d at 127; *see also Mountaire Farms*, 650 F.3d at 366 (whether protective gear was "generic" or "specialized" was not relevant to the integral-and-indispensable analysis). *Steiner* itself shows that "items as generic as a shower and a change of clothes can, in certain circumstances, neutralize extreme threats to worker safety." *Perez*, 832 F.3d at 127 (citing *Steiner*, 350 U.S. at 252-53, 256); *see also Mountaire Farms*, 650 F.3d at 366 (observing that the gear in *Steiner* consisted of ordinary work clothes).

However, the district court questioned whether employees who don "generic" protective gear may satisfy the transcends-ordinary-risks standard. The court stated that the Plaintiffs "have a tough row to hoe" in "show[ing] that their basic PPE" protects them from "transcendent risk" because *Gorman* "more-or-less stated outright that basic PPE is not up to the task when the risk is sufficiently great." App. 56; *but see* App. 45-46 (stating, in apparent contradiction, that, even "if *Gorman* adopted a generic test," *Perez* "walked it back"). The court further opined—incorrectly—that *Perez* and the Ninth Circuit in *Alvarez* "hint at that same conclusion." App. 56. Although *Perez* stated that "generic equipment is more likely than specialized equipment to address workplace conditions that are commonplace," 832 F.3d at 127, it does not follow that basic PPE *per se* does not protect against non-ordinary risks (as *Perez*'s reference to the ordinary work clothing in *Steiner* makes clear). And contrary to the court's suggestion, the

Alvarez court concluded that the time spent donning and doffing the "non-unique protective gear" at issue in that case *was* integral and indispensable; it deemed that time noncompensable only because it characterized those activities as "*de minimis*." 339 F.3d at 903-04.

In applying the transcends-ordinary-risk test, the district court appeared to adopt its incorrect characterization of *Perez* and *Gorman*, i.e., that basic PPE is not "up to the task." The court acknowledged that Plaintiffs' basic PPE served as a barrier to drilling mud and other chemicals and that the PPE provided some protections against falling objects and other hazards. App. 43-44, 64-65. Nevertheless, in applying its third "component"—whether the protective equipment provides "meaningful protection" against "transcendent risk"—the court largely rejected the idea that Plaintiffs' PPE could effectively protect against the workplace risks Plaintiffs identified. App. 56, 60-61, 64-65. The court's reasoning—acknowledging that Plaintiffs' PPE provided protection against workplace risks but nevertheless deeming that protection inadequate—suggests that the court may have applied its misguided assumption that basic PPE cannot be "up to the task." In doing so, the district court erred.

CONCLUSION

For the foregoing reasons, the Secretary respectfully urges this Court to reverse the district court's decision.

Respectfully,

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1. Bar Membership. As an attorney representing an agency of the United States, I am not required to be a member of the bar of this Court. See 3d Cir. L.A.R. 28.3, Committee Comments.

2. Type-Volume, Typeface, and Type Styles Requirements. This brief complies with the type-volume requirements of Fed. R. App. P. 29(a)(5) & 32(a)(7)(B) because this brief contains 6,406 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word for Office 365, Times New Roman 14-point font.

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