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Toiling in Factory and on Farm: An Employer-Friendly Approach to the Compensability of Donning and Doffing Activities Under the "FLSA"

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TOILING IN FACTORY AND ON FARM: AN EMPLOYER-FRIENDLY APPROACH TO THE COMPENSABILITY OF DONNING AND DOFFING ACTIVITIES UNDER THE “FLSA”

JACOB A. BRUNER*

ABSTRACT

No realm of employment litigation has been more active in recent years than class action lawsuits under the FLSA. Although the FLSA was originally enacted to help those who toiled in factories and on farms obtain a fair day’s pay for a fair day’s work, it continues to haunt unwary employers nearly seventy years later. This Note attempts to resolve those problems through the proposition of a single, uniform, and employer-friendly standard for donning and doffing claims arising under the FLSA. Specifically, this Note argues that courts should construe the “integral and indispensable” test narrowly to protect employers from compensation claims for relatively effortless activities while also exposing them to litigation for work that is essential to completion of the principal activity, as contemplated by early labor standard advocates. This ensures that legitimate claims for uncompensated work time are fully covered by the FLSA and that frivolous suits fall by the wayside.

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I. INTRODUCTION

No realm of employment litigation has been more active in recent years than class action lawsuits under the Fair Labor Standards Act (“FLSA”).¹ Although the FLSA was originally enacted in 1938 to “to help those who toil[ed] in factor[ies] and on farm[s]” obtain “a fair days pay for a fair days work,” it continues to haunt unwary employers nearly seventy years later.²

Over the past decade, the number of FLSA lawsuits filed nationwide has increased more than 300%, while the total amount of cases continues to rise each year.³ Commentators have offered varying opinions to explain the growing trend of litigation: increased employee awareness of the Act’s requirements, assertive employees’ counsel’s widespread mining for plaintiffs, more sophisticated use of the internet, increasingly transient workers with dwindling loyalties to a single employer, the relative ease with which claims may be brought, and the potential for large, aggregate damage awards.⁴ Most prominently, however, the outdated and ambiguous language of the statute has resulted in significant gray areas that serve as fertile breeding grounds for potential claims.⁵

Following the economic decline of the 1920s, the FLSA was adopted to serve two broad functions: (1) spread employment across the largest possible span of

¹ See *The Proliferation of FLSA Collective Actions*, LAW360 (June 28, 2007), <http://www.law360.com/articles/28245/the-proliferation-of-flsa-collective-actions>.

² *Id.*; see also *Message to Congress on Establishing Minimum Wages and Maximum Hours*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=15405> (last visited July 15, 2015) (discussing the purpose of the FLSA at the time of enactment).

³ See *A Developing and Simple Faragher Defense to FLSA Claims*, CORP. COMPLIANCE INSIGHTS (Jan. 17, 2013), <http://corporatecomplianceinsights.com/kelly-kolb/> (citing *Federal Judicial Caseload and Statistics*, UNITED STATES COURTS, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> (last visited November 17, 2016)).

⁴ See Douglas Darch et al., *Compensable Time*, PRACTICAL LABOR & EMPLOYMENT LAW (West 2015) (providing an overview of common class action lawsuits under the FLSA based on an employer’s failure to recognize and count certain hours worked as compensable).

⁵ See *Number of New FLSA Lawsuits filed Each Continues to Rise*, A.B.A. (Oct. 14, 2010), https://apps.americanbar.org/litigation/litigationnews/top_stories/101410-rise-in-flsa-employment-and-labor.html.

available workers, and (2) alleviate oppressive working conditions.⁶ Congress intended to accomplish these goals by placing a ceiling over the number of hours worked, a floor under the amount of wages earned, and restrictions on most kinds of child labor.⁷ Legislators anticipated that these measures would increase the number of jobs and reduce high unemployment rates by limiting the hours each individual employee could work before employers would be forced to pay them extra compensation—an explicit financial disincentive to deter employers from forcing workers to work excessive hours.⁸ Further, the enactment of minimum wage laws and child labor restrictions would eliminate the prevalence of labor conditions “detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and well-being of workers.”⁹ At the time of its enactment, President Franklin D. Roosevelt characterized the FLSA as “the most far reaching, far-sighted program for the benefit of workers ever adopted in this or any other country.”¹⁰

In the years since Roosevelt’s proclamation, however, the federal courts have struggled to reach a consensus on activities that constitute compensable “work.”¹¹ Generally, an entity is said to “employ” a person under the FLSA if it “suffers or permits [a person] to work.”¹² Although the FLSA requires overtime pay for work performed in excess of forty hours per week, it does not define the meaning of the term “work.”¹³ While certain “preliminary” and “postliminary” activities have been expressly excluded from compensability under the Portal-to-Portal Act of 1947, the federal courts have been tasked with filling in the gaps.¹⁴ The broad meaning that has emerged from Supreme Court cases describes “work” as an exertion or loss of employees’ time that is (1) controlled or required by the employer, (2) pursued necessarily and primarily for the employer’s benefit, and (3) if performed outside scheduled work time, then such performances are an “integral and indispensable”

⁶ See *FLSA: A Two-Minute History Issue No. 582*, 2013 WL 420439 (West 2015) (describing the primary purposes behind the Congressional enactment of the Fair Labor Standards Act); see also *FLSA: A Two-Minute History*, CCH EMPLOYMENT LAW BRIEFING: WHITE COLLAR EXEMPTION REVISIONS (April 21, 2004), <https://www.cch.com/press/news/2004/EmploymentLawBriefing.pdf>.

⁷ See generally *Fair Labor Standards Act*, UNITED STATES HISTORY, <http://www.u-s-history.com/pages/h1701.html> (last visited July 15, 2015).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Darch et al., *supra* note 4.

¹² 29 U.S.C. § 203(g) (2015).

¹³ See generally 29 U.S.C. § 203 (2015); see also *Jordan v. IBP, Inc.* 542 F. Supp. 2d 790 (M.D. Tenn. 2008) (citing *Tenn. Coal, Iron, & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (“In determining whether [a certain activity] constitutes compensable work or employment within the meaning of the [FLSA], we are not guided by any precise statutory definition of work or employment.”)).

¹⁴ See 29 U.S.C. § 254 (2015); see also *IBP, Inc. v. Alvarez*, 546 U.S. 21, 41 (2005) (noting that the Portal-to-Portal Act did not purport to change the Supreme Court’s earlier descriptions of the term “work”).

part of the employee's principal activities.¹⁵ Nowhere has this analysis been more controversial than in the context of donning and doffing activities.¹⁶

Donning and doffing—time spent putting on or taking off protective clothes and gear—has been a major source of litigation in recent years.¹⁷ Donning and doffing cases generally involve the following sequence of events:

In a typical scenario, the employee commutes from his or her home to the employer's facility, and upon entering the facility, proceeds to a locker room. This time is termed "pre-doffing" because it elapses before the donning of protective gear occurs. After the employee dons the required protective gear, he or she typically walks to an assigned work area. The time between the donning of protective gear and the start of actual production tasks is termed "post-donning." After completing production tasks and completed his or her shift, the employee walks back to the locker room. The time between the end of production tasks and the doffing of protective gear is termed "pre-doffing." After the employee doffs (and perhaps washes protective gear), he or she leaves the plant. This time is termed "post-doffing."¹⁸

Unfortunately for employers, the outcome of these cases depends frequently on the specific facts of the case and the presiding jurisdiction where the claim is filed.¹⁹ Four separate tests have emerged in the various courts of appeal:

- (1) The "unique versus non-unique gear" test;
- (2) The "exertion" test;
- (3) The "benefit to employer versus employee" test;
- (4) Various hybrid models adopted in other jurisdictions.²⁰

Each method attempts to describe activities that are so "integral and indispensable" to the employee's principal activity that they are properly characterized as compensable "work."²¹

Consequently, employers have been left guessing whether certain tasks require compensation and find themselves at risk for litigation.²² This position poses a number of significant problems. First, the costs and attorney's fees associated with defending against pending litigation are substantial. Second, frivolous claims present challenges for employers because most are poorly versed in the nuances of wage and

¹⁵ *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008).

¹⁶ *Darch et al.*, *supra* note 4.

¹⁷ *Id.*

¹⁸ James Watts, *Dressing for Work is Work: Compensating Employees Under the Fair Labor Standards Act for Donning and Doffing Protective Gear*, 87 U. DET. MERCY L. REV. 297 (2010) (evaluating the reasoning employed by the circuit courts of appeal to determine whether employees must be compensated for the donning and doffing of protective gear).

¹⁹ *Darch et al.*, *supra* note 4.

²⁰ *Id.*

²¹ *Watts*, *supra* note 18.

²² *The Proliferation of FLSA Collective Actions*, *supra* note 1 (noting that employers have been advised merely to review their practices to take account of the most commonly litigated activities to help determine whether tasks should be compensated).

hour laws.²³ Third, many employers also endure significant measures to limit exposure in the future and incur a number of non-financial burdens as well, including high levels of stress, damaged reputations, and fewer resources available to operate the business.²⁴

This Note attempts to resolve those problems through the proposition of a single, uniform, and employer-friendly standard for donning and doffing claims arising under the FLSA. Specifically, this Note seeks to limit employers' exposure to litigation by narrowing the possible avenues through which employees can seek compensation. In doing so, this Note recognizes the importance of shielding unwary employers from liability against today's onslaught of wage and hour claims.

Part II of this Note provides a lengthy background discussion of the history of the FLSA. Part II.A begins with a discussion of the early years of the labor reform movement to consider the Act's purpose and origins. Part II.B supplements the discussion in Part II.A through a study of the New Deal era to highlight the effects of important Supreme Court cases on the development of the nation's most prominent wage and hour law.

Part III provides an overview of the statutory language, amendments, and case law that guide claims for compensation under the FLSA to familiarize readers with a number of interconnected legal doctrines that form the basis of donning and doffing litigation.²⁵

Part IV of this Note summarizes the current state of the law through a survey of various donning and doffing tests that circuit courts have adopted around the country before synthesizing their holdings in the context of this Note's proposal.

Part V of this Note argues that courts should construe the "integral and indispensable" test narrowly to provide the most amount of protection for modern day employers. Part V.A identifies the circuit court tests that best effectuate this proposal by considering employers' potential exposure to litigation in each jurisdiction. Part V.B then highlights the pragmatic concerns imposed by broader tests in the context of a recent Supreme Court decision.

Part VI comments on potential criticism of this Note's proposal in light of the legislative history and purpose of the FLSA before outlining how the Second Circuit has already incorporated these policy concerns into its employer-friendly standard.

Part VII of this Note offers a brief conclusion and shifts gears to discuss the potential impact of the proposal on plaintiff-employees.

²³ *Id.*

²⁴ See generally *Employment Litigation and Dispute Resolution*, DEP'T OF LABOR, http://www.dol.gov/_sec/media/reports/dunlop/section4.htm (last visited July 15, 2015).

²⁵ Note that collective bargaining issues raised within the context of Section 203(o) are outside the scope of this paper. See 29 U.S.C. § 203(o) (2015).

II. HISTORICAL FRAMEWORK OF WAGE AND HOUR LAWS IN THE UNITED STATES

A. *The Early Labor Movements and the Progressive Era*

“The History of the FLSA has included some big steps forward—and a few steps back . . .” -Collete Irving, National Women’s Law Center²⁶

For almost an entire century prior to passage of the FLSA in 1938, demand for progressive labor reform grew as the country moved from an agrarian to an industrial society.²⁷ The life of a nineteenth-century American industrial worker was far from easy: wages were low, hours were long, and factory conditions were poor.²⁸ Most of the country’s financial resources were concentrated in the hands of capitalists while a majority of workers, both skilled and unskilled, suffered the effects of periodic market fluctuations, eroding wages, and high levels of unemployment.²⁹ To make matters worse, large influxes of migrants empowered industry bosses by increasing the supply of cheap labor, and technological advancements made unskilled workers expendable.³⁰ Predictably, early attempts for labor reform were unsuccessful.³¹ Some reformists were even indicted and prosecuted for criminal conspiracy as a result of their reformist activities.³² In 1842, the Massachusetts Supreme Judicial Court put an end to those prosecutions in *Commonwealth v. Hunt*.³³ *Hunt* ultimately repudiated the application of old English Common Law to post-Revolutionary America and sparked the first sign of progress for the American labor movement.³⁴

In the wake of *Hunt* and other labor combination cases, thousands of workers fled to join workers’ rights organizations in hopes of establishing stronger coalitions.³⁵ Through entities such as the American Federation of Labor and its predecessor, the Knights of Labor, workers from all socioeconomic categories united

²⁶ *Fair Labor Standards Act (FLSA): Care Work is Real Work—And Must be Compensated as Such*, NAT’L WOMEN’S LAW CTR. (May 11, 2015), <http://www.nwlc.org/tags/fair-labor-standards-act-flsa>.

²⁷ *See Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, BUREAU OF LABOR STATISTICS (Dec. 2000), <http://stats.bls.gov/opub/mlr/2000/12/art3full.pdf>.

²⁸ *See The Struggle of Labor*, AMERICAN HISTORY, <http://www.let.rug.nl/usa/outlines/history-1994/discontent-and-reform/the-struggle-of-labor.php> (last visited July 15, 2015).

²⁹ *Id.*

³⁰ *See The Early Labor Movement*, PBS.ORG, <http://www.pbs.org/opb/historydetectives/feature/the-early-labor-movement/> (last visited July 15, 2015).

³¹ *The Struggle of Labor*, *supra* note 28.

³² *See* DAVID TWORNEY, *LABOR AND EMPLOYMENT LAW: TEXT & CASES* § 2 (13th ed. 2007).

³³ *Id.*; *see also* *Commonwealth v. Hunt*, 45 Mass. (1 Met.) 111 (1842).

³⁴ *Hunt*, 45 Mass. at 111 (“We can not perceive that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests.”).

³⁵ *The Struggle of Labor*, *supra* note 28.

to embrace their desires for freedom from industrial order.³⁶ These efforts became known as the “short hours movements.”³⁷ Activists believed that shorter work hours would usher in a new and progressive era of labor life in three ways: first, shorter hours would protect the safety of workers by tempering worker fatigue and reducing the prevalence of occupational injuries; second, shorter work hours would increase personal welfare by reducing labor strife and allowing more time for home and family life; third, shorter hours reflected a moral belief that measures ought to be taken to counter the effects of harsh working conditions.³⁸ A number of significant labor reforms followed in the wake of the “short hours movement:” federal ten-hour workdays, Labor Day, two-day weekends, and more.³⁹ States would eventually get on board as well.⁴⁰

By 1884, labor was no longer a “united force,” and Federations had differing ideas about democracy, politics, legislation, immigration, and the inclusion of certain minorities:

On the left were the socialists; the middle road was held by the Knights [of Labor]; the right was shared by F.O.O.T.A.L.U [“Federation of Organized Trades and Labor Unions”] and the independent trade unions. There was disagreement over methods. Socialists were divided between trade unionists, advocates of political action, and advocates of violence; the Knights fostered the “one big union”; the trades were vacillating between economic and legislative action . . . [The] socialists looked to overthrow the capitalistic order; the Knights looked to the destruction of the wage system and the eventual establishment of a cooperative economic system which included both owners and laborers; the trade were becoming more and more conscious of the magical quality of high wages to solve all their troubles.⁴¹

As heated as the debates became within the Federations themselves, class warfare between the working class and *laissez-faire* capitalists like John D. Rockefeller and Andrew Carnegie resulted in some of the most violent labor conflicts in the nation’s brief history.⁴² These conflicts played out on the national stage through the railway strike of 1877, Haymarket Square riot of 1886, Homestead strike of 1892, Pullman strike and boycott of 1892, anthracite strike of 1902, garment workers’ uprisings of 1909-1911, and the steel strike of 1919.⁴³

³⁶ Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1 (2001) (examining the original rationales of maximum hours labor standards, reviewing empirical research corroborating their continued relevance, and outlining proposed changes to the FLSA).

³⁷ *Id.* at 7-8.

³⁸ *Id.* at 9.

³⁹ *Id.* at 15.

⁴⁰ *Id.*

⁴¹ JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR*, 158-59 (1966).

⁴² *The Struggle of Labor*, *supra* note 28.

⁴³ Miller, *supra* note 36.

Meanwhile, the Federations faced even stronger opposition from the U.S. Supreme Court.⁴⁴ Over the first three decades of the twentieth century, the Supreme Court managed to deal significant blows to the labor reform movement through a wave of cases attacking the constitutionality of minimum wage laws, maximum hour limits, and child labor provisions.⁴⁵

1. *Hammer v. Dagenhart*

Hammer v. Dagenhart, opined in 1918, is among the most noteworthy Supreme Court cases decided.⁴⁶ Roland Dagenhart, the litigant in the case, worked in a cotton mill in Charlotte, North Carolina with his two minor sons, both of whom were barred from employment at the mill under the Keating-Owen Act of 1916 (“Child Labor Act”).⁴⁷ The Child Labor Act, originally enacted pursuant to congressional commerce power, prohibited the transportation in interstate commerce of goods produced at factories where children were employed beneath a certain age.⁴⁸

Dagenhart brought suit seeking an injunction that would bar the statute’s enforcement.⁴⁹ Dagenhart argued that the Act unconstitutionally exceeded the scope of Congress’s power under the Commerce Clause.⁵⁰ Writing for the majority of the Court, Justice William R. Day struck down the law, in a significant departure from Supreme Court precedent that had permitted use of congressional policing power to regulate the health, safety, morality and general welfare of individuals under the Commerce Clause.⁵¹ The Court reasoned that Congress’s commerce power could only be used to prohibit the interstate shipment of *intrinsically* harmful goods, like lottery tickets or impure food, but not items that were harmless in and of themselves, like the products of child labor.⁵²

While *Hammer* proved to be a major victory for Mr. Dagenhart and family, Justice Holmes’ famous dissent characterized his dissatisfaction with the decision as follows:

If there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where it is my opinion

⁴⁴ See *Fair Labor Standards Act*, *supra* note 7.

⁴⁵ *Id.*

⁴⁶ *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (prohibiting the transportation in interstate commerce of manufactured goods produced in factories employing children under the age of fourteen).

⁴⁷ *Id.* at 268.

⁴⁸ *Id.* at 269.

⁴⁹ *Id.* at 268.

⁵⁰ *Id.* at 269.

⁵¹ *Id.* at 276-77.

⁵² See Logan E. Sawyer III, *Creating Hammer v. Dagenhart*, 21 WM. & MARY BILL RTS. J. 67 (2012) (defending the Court’s use of federal policing power in its widely criticized opinion in *Hammer v. Dagenhart*).

they do not belong, this was preeminently a cause for upholding the exercise of all of its powers by the United States.⁵³

Hammer was the first of many setbacks for the fair labor standards movement of the time.

2. *Adkins v. Children's Hospital*

Five years after the Supreme Court's decision in *Hammer*, the judiciary sent another crushing blow to labor reformists by striking down a District of Columbia statute that would have established minimum wage laws for women.⁵⁴ The D.C. law created a board to investigate, solicit input, and ultimately set minimum wages for women and children to protect them from conditions detrimental to their health and morals.⁵⁵ When the board eventually set an agreed upon wage, a local hospital—well known for employing women at wages below the recommended amount—decided to sue the board.⁵⁶ The hospital attacked the law as unconstitutional on grounds that it violated the “liberty of contract” doctrine previously established in *Lochner v. New York*.⁵⁷

In a 5-3 decision written by Justice Sutherland, the Court agreed and held the law to be an “arbitrary interference with the liberty of contract” because the statute imposed uniform wages on all women regardless of need and prevented them from obtaining results through private bargaining.⁵⁸ Despite years of progress, the *Lochner* era appeared to reaffirm the “backward looking and politicized commitment to laissez faire economics.”⁵⁹

B. *The Great Depression and the “New Deal”*

“All but the hopelessly reactionary will agree that to conserve our primary resources of man power, government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor.”—President Franklin D. Roosevelt, Message to Congress on Establishing Minimum Wages and Maximum Hours (May 24, 1937)⁶⁰

⁵³ *Hammer*, 247 U.S. at 280.

⁵⁴ See *Adkins v. Children's Hosp. of the D.C.*, 261 U.S. 525, 562 (1923) (invalidating D.C.'s minimum wage law for women on *Lochner* era principles).

⁵⁵ *Id.* at 539-42.

⁵⁶ *Id.* at 542.

⁵⁷ *Id.* at 545 (“The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment.”); see also *Lochner v. New York*, 198 U.S. 45 (1905) (upholding “liberty of contract” doctrine for employees in bakery pursuant to the substantive component of the 14th Amendment Due Process Clause).

⁵⁸ *Adkins*, 261 U.S. at 545, 559; see also Alex McBride, *Capitalism and Conflict*, PBS.ORG (Dec. 2006), http://www.pbs.org/wnet/supremecourt/capitalism/landmark_adkins.html.

⁵⁹ See Sawyer III, *supra* note 52, at 68.

⁶⁰ See *Message to Congress*, *supra* note 2.

Reform came to a halt during the economic boom of the 1920s partly because of the Supreme Court decisions discussed above and a growing desire for less government regulation, which resulted in less need for activism.⁶¹ Fortunately for workers, labor organizations maintained “structures of reform” throughout the decade that would form the foundation for change in the wake of the Great Depression.⁶² On October 29, 1929, the stock market crashed, setting off a worldwide decline in economic standards like nothing anyone had seen before.⁶³

By 1932, Franklin D. Roosevelt had already jump-started the wheels of a “New Deal” for American workers.⁶⁴ Roosevelt promised to restore faith in American industries through ardent labor reform and to enact emergency measures that would counter the effects of high unemployment that the Depression created.⁶⁵ Accordingly, Roosevelt nominated Frances Perkins as his Secretary of Labor and instructed her to begin work under the National Industrial Recovery Act (“NIRA”).⁶⁶

The NIRA shared many of the same goals as labor federations: eight-hour workdays, forty-hour workweeks, improved working conditions, etc.⁶⁷ But the NIRA faced opposition from the Supreme Court as well.⁶⁸ On May 27, 1935, the Supreme Court disarmed major provisions of the statute in the famous “sick chicken” case, *A. L. A. Schechter Poultry Corp., et al. v. United States*.⁶⁹

1. *A. L. A. Schechter Poultry Corp., et al. v. United States*

Schechter involved a challenge to Section 3 of the NIRA, which empowered the President to approve “codes of fair competition” for a number of trades, including the poultry processing industry, and impose penalties for violations of the code in any transaction affecting commerce.⁷⁰ These codes regulated schedules of minimum wages, prices, maximum work hours, collective bargaining, and other rules that would be binding upon entire industries.⁷¹ *Schechter Poultry Corporation* was charged with having violated the poultry code by selling sick chickens to butchers in

⁶¹ See Miller, *supra* note 36, at 16.

⁶² *Id.* at 17.

⁶³ See Charless Duhigg, *Depression, You Say? Check Those Safety Nets*, N.Y. TIMES (Mar. 23, 2008), <http://www.nytimes.com/2008/03/23/weekinreview/23duhigg.html?n=Top%2FReference%2FTimes%20Topics%2FSubjects%2FFinances>.

⁶⁴ See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, DEP’T OF LABOR, <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm#3> (last visited July 15, 2015).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*; see also Miller, *supra* note 36, at 18-19.

⁶⁸ See Grossman, *supra* note 64.

⁶⁹ *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating as unconstitutional a provision of the NIRA that authorized the President to approve codes of fair competition for the poultry processing industry).

⁷⁰ *Id.* at 521-22.

⁷¹ *Id.* at 522.

the northeast region of the country.⁷² Thereafter, Schechter challenged the constitutionality of the NIRA as an unconstitutional exercise of congressional commerce powers and a violation of separation of powers principles.⁷³ In an opinion written by Chief Justice Hughes, the Court unanimously reversed the convictions and held that, because the NIRA was an unconstitutional delegation of authority, the Code enacted pursuant to that authority was void.⁷⁴ Even if the Code was an otherwise valid regulation, the Court noted that it could not be applied against the defendants because they were engaged in strictly local activities with no direct effect on interstate commerce:

Were these transactions ‘in’ interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other states. But the code provisions, as here applied, do not concern the transportation of the poultry from other states to New York, or the transactions of the commission men or others to whom it is cosigned, or the sales made by such cosignees to defendants. When defendants made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the city, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and the local sale to retail dealers and butchers who in turn sold directs to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.⁷⁵

Following major policy blows in *Schechter* and related state and federal labor cases, President Roosevelt terminated the administration in charge of promulgating rules under the NIRA and went back to the drawing board.⁷⁶

Wage and hour legislation was a major campaign issue again in the 1936 presidential race between Roosevelt and Alf Landon, a Republican Governor from the State of Kansas.⁷⁷ To date, the 1936 faceoff is the most lopsided presidential election victory in the history of the United States: Democratic incumbent Franklin D. Roosevelt won a total of 583 electoral votes in comparison to the 8 Landon won.⁷⁸ Roosevelt interpreted the landslide victory as support for his New Deal platform.⁷⁹

⁷² *Id.* at 527.

⁷³ *Id.* at 519.

⁷⁴ *Id.* at 541-42; see generally Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine From Swift to Jones & Laughlin*, 61 *FORDHAM L. REV.* 105 (1992) (arguing that the Court’s “switch in time” was conceptually, stylistically, and doctrinally congruent with the Court’s contemporary jurisprudence).

⁷⁵ *Schechter*, 295 U.S. at 542-43.

⁷⁶ See Miller, *supra* note 36, at 19-20.

⁷⁷ See *On This Day*, N.Y. TIMES (Oct. 13, 1987), <http://www.nytimes.com/learning/general/onthisday/bday/0909.html>.

⁷⁸ See 1936 PRESIDENTIAL ELECTION, 270TOWIN, http://www.270twin.com/1936_Election/ (last visited July 15, 2015).

⁷⁹ See Grossman, *supra* note 64.

Roosevelt was determined to overcome decades-long scrutiny by the Supreme Court.⁸⁰

In February 1937, Roosevelt struck back at the Justices through his Court-Packing Plan.⁸¹ The effect of the proposal would be to ultimately reduce the power of each individual voter on the Court by saturating the bench with new members—a concept the Justices would certainly disfavor:

Whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office [up to an additional maximum of six Justices], with the approval, as required by the Constitution, of the Senate of the United States.⁸²

Before Roosevelt could act on his proposal, the Supreme Court reversed its course in what has come to be known as the “switch in time that saved the nine.”⁸³ The switch is an important turning point for American legal history—even more so for fair labor standard advocates.⁸⁴ *West Coast Hotel* followed suit.⁸⁵

2. *West Coast Hotel v. Parrish*

Less than a decade removed from the *Lochner* era, an era in which the Court struck down minimum wage laws for women and invalidated efforts to improve labor standards on a nationwide scale, a significant theoretical shift in the Supreme Court occurred in 1937.⁸⁶ In *West Coast Hotel v. Parrish*, a former hotel chambermaid brought suit against a Washington-based hotel to recover \$216.19 in back wages stemming from state minimum wage violations.⁸⁷ On March 29, 1937, the Court ruled in favor of Elsie Parrish with a liberal minority to uphold the validity of the Washington law and provide the framework for enactment of the FLSA just one year later.⁸⁸

Following *West Coast Hotel v. Parrish*, labor advocates learned of an interesting story. In 1933, when President Roosevelt asked Frances Perkins to become his Secretary of Labor, she told him that she would accept if she could advocate a law that would regulate wages, hours, and child labor—the three pillars of labor reform that would later become the foundation of the FLSA.⁸⁹ When Roosevelt agreed,

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *Fireside Chat: On “Court-Packing”*, MILLER CTR. (Mar. 9, 1937), <http://millercenter.org/president/speeches/speech-3309>.

⁸³ See Grossman, *supra* note 64.

⁸⁴ *Id.*

⁸⁵ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁸⁶ See Grossman, *supra* note 64.

⁸⁷ *West Coast Hotel Co.*, 300 U.S. at 388.

⁸⁸ *Id.* at 586; see also Grossman, *supra* note 64.

⁸⁹ Grossman, *supra* note 64. For an overview of the three main objectives of the FLSA, see *supra* Section I.

Perkins cautioned the President that “to launch such a program . . . might be considered unconstitutional?”⁹⁰ Roosevelt responded, “Well we can work out something when the time comes.”⁹¹ In the aftermath of *Schechter* and various challenges to the NIRA, Secretary Perkins asked lawyers at the Department of Labor to draw up a number of wage, hour, and child-labor bills that she hoped could survive Judicial review.⁹² She then locked the bills in her desk drawer and informed the President what she had done.⁹³ One of the bills, known later to be the Davis-Bacon Act, proposed using the purchasing power of the Government contractors as an instrument for improving labor standards in the construction industry.⁹⁴ Although the bill proved successful at times before “the Switch,” the Act was later supplemented with more progressive legislation in the form of the Public Contracts Act of 1936 (“Walsh-Healey Act”).⁹⁵ Following the Supreme Court’s decision in *West Coast Hotel*, “When he felt the time was ripe, [President Roosevelt] asked [Secretary of Labor] Frances Perkins, ‘What happened to that nice unconstitutional bill you tucked away?’”⁹⁶

That bill—a general piece of legislation on fair labor standards—would eventually turn into the FLSA.⁹⁷ After months of heated debate and substantial compromise within both houses of Congress, FDR signed the bill into law on June 25, 1938.⁹⁸ *United States v. Darby* later affirmed its constitutionality.⁹⁹

III. OVERVIEW OF THE FLSA AND ITS PROGENY

The structure of the FLSA is nearly as complicated as its history. Several interconnecting statutes and legal doctrines affect compensation requirements under the FLSA.¹⁰⁰ Aside from the language of the statute itself, these include a number of amendments (such as the Portal-to-Portal Act), the “continuous workday rule,” and various legal doctrines (including the “integral and indispensable” activity test, “engaged to wait” test, and *de minimis* time doctrine) that attempt to define the outer boundaries of compensable “work.” This Note considers each in turn below.

A. Scope of the FLSA

29 U.S.C. § 202 (“FLSA”) reads as follows:

⁹⁰ Grossman, *supra* note 64.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding the validity of the FLSA under congressional commerce power).

¹⁰⁰ Watts, *supra* note 18, at 299.

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress Further finds that the employment of persons in domestic service in households affects commerce;

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.¹⁰¹

The U.S. Department of Labor (“DOL”) indicates in its guidance on the FLSA that the statute “establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and Federal, State, and local governments.”¹⁰² Generally speaking, the Act requires employers to pay covered employees who are engaged in commerce or in the production of goods for commerce at a minimum wage of \$7.25 per hour—a figure that has steadily risen since the enactment of the statute in the 1930s.¹⁰³ The FLSA also requires employers to pay at least time-and-a-half to covered employees who work more than forty hours in a given workweek.¹⁰⁴ Numerous exemptions and exceptions are provided as to the payment of both minimum wages and overtime, most of which are beyond the scope of this paper.¹⁰⁵ Sections 11(c) and 12, respectively, require employers subject to the FLSA to (1) maintain records in accordance with regulations promulgated by the Wage and Hour Administrator and (2) prohibit the shipment or delivery of commerce produced by oppressive child labor.¹⁰⁶ The FLSA provides a number of remedies to aggrieved plaintiffs: criminal sanctions, private suits for the payment of

¹⁰¹ 29 U.S.C. § 202 (2015).

¹⁰² See *Compliance Assistance—Wages and the Fair Labor Standards Act (FLSA)*, DEP’T OF LABOR, <https://www.dol.gov/whd/flsa/> (last visited July 15, 2015).

¹⁰³ See *The Fair Labor Standards Act (FLSA): An Overview*, CONG. RES. SERV. (July 4, 2013), <https://www.fas.org/sgp/crs/misc/R42713.pdf>; see also 29 U.S.C. § 206 (2015) [hereinafter *An Overview*].

¹⁰⁴ *Id.*; see also 29 U.S.C. § 207 (2016).

¹⁰⁵ See Les A. Schneider & J. Larry Stine, *Wage and Hour Law: Compliance and Practice*, 1 WAGE & HOUR LAW 1 § 3 (2015).

¹⁰⁶ *Id.*

back wages, liquidated damages, attorney’s fees and costs, and injunctive actions, which the Wage and Hour Administrator can commence.¹⁰⁷

After more than seventy years, the FLSA remains the primary federal statute setting the minimum wage and maximum hour standards applicable to most American workers.¹⁰⁸ Despite its impact on employment practices for over a half-century, many employers are still unclear on the language of the statute—and rightfully so.¹⁰⁹ Although the FLSA governs certain aspects of the employment relationship, the statute fails to provide clearly defined limits on that relationship.¹¹⁰ Section 203(d) defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to any employee.”¹¹¹ Meanwhile, the term “employee” is defined as “any individual employed by an employer” and an entity is said to “employ” an individual under the FLSA if it “suffers or permits [him or her] to work.”¹¹²

Pursuant to these basic guidelines, most FLSA litigation can be divided into three categories:

- (1) Misclassification of employees as exempt from overtime requirements;
 - (2) Misclassification of employees as independent contractors not eligible for overtime over minimum wage; and
 - (3) Failure to pay nonexempt employees for all hours worked.
- This Note focuses strictly on the third category.¹¹³

B. The Portal-to-Portal Act and “Continuous Workday” Rule

Since 1938, the FLSA has been amended on multiple occasions, most prominently in 1947 with the passing of the Portal-to-Portal Act.¹¹⁴ In the wake of vague definitions, confusing DOL regulations, and judicial uncertainty, compliance with the statute became increasingly complex in the years following its enactment.¹¹⁵ Large employers and wealthy businessmen—many of whom shared ideals reminiscent of tyrannical industry bosses—were fearful of potential overcompensation of employees in the wake of the Supreme Court’s decision in *Anderson v. Mt. Clemons Pottery, Co.*¹¹⁶

¹⁰⁷ *Id.*

¹⁰⁸ *See Miller, supra* note 36, at 2-3.

¹⁰⁹ *See An Overview, supra* note 103.

¹¹⁰ *Id.*

¹¹¹ 29 U.S.C. § 203(d) (2015).

¹¹² 29 U.S.C. § 203(g) (2015).

¹¹³ *See Darch et al., supra* note 4.

¹¹⁴ *See Watts, supra* note 18, at 4.

¹¹⁵ *See Miller, supra* note 36, at 23 (discussing how the FLSA passed by “legislative fiat”).

¹¹⁶ *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680, 692-93 (1946) (holding that preliminary work activities, where controlled by the employer and performed entirely for the employer’s benefit, are properly included as working time under the FLSA).

Anderson involved a group of employees who brought suit to recover lost wages for time spent walking to and from clock-in stations at a large pottery plant.¹¹⁷ The employees were required to enter the plant at a time station located in the northeast corner of the grounds before working their way through the eight acres of factory floor to the production area where they performed their work, including various preliminary duties.¹¹⁸ Despite arriving nearly fourteen minutes prior to their clock-in times and leaving nearly fourteen minutes after their clock-out times, workers were paid for a straight eight hours of work—fifty-six minutes fewer per day than the amount alleged in their complaint.¹¹⁹ Writing for the majority of the Court, Justice Murphy held that the plaintiffs were entitled to compensation for their activities under the FLSA.¹²⁰

Congress then swiftly and forcefully enacted 29 U.S.C. § 254 (the “Portal-to-Portal Act”) in response to *Anderson* to repudiate claims for compensation stemming from routine travel and other inherently preliminary or postliminary activities.¹²¹ The Portal-to-Portal Act states, in part:

No employer shall be subject to any liability or punishment on the Fair Labor Standards Act of 1938 . . . on account of the failure . . . to pay an employee minimum wages or to pay an employee overtime compensation, for or on account of any of the following activities . . .

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities. . . .¹²²

The DOL has promulgated one large exception to this rule through its “continuous workday” rule, which generally requires compensation for all activities taking place in “the period between the commencement and completion on the same workday of an employee’s principal activity or activities . . . and includes all time within that period whether or not the employee engages in work throughout all of that period.”¹²³

Understandably, federal courts have struggled to adopt a uniform test to wean out those activities that are between the beginning and end of the employee’s principal activities, yet not of such preliminary or postliminary nature as to fall within the

¹¹⁷ *Id.* at 682-83.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 682-84.

¹²⁰ *Id.* at 694.

¹²¹ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005) (finding that time spent walking to production area after donning protective gear was covered by the FLSA).

¹²² 29 U.S.C. § 254 (2015).

¹²³ 29 C.F.R. § 790.6(b) (2015).

Portal-to-Portal Act exceptions.¹²⁴ Courts, however, have identified a number of legal doctrines to help narrow down compensable activities under the FLSA:

- (1) the integral and indispensable activity test;
- (2) the engaged to wait versus waiting to be engaged test;
- (3) the *de minimis* time doctrine.¹²⁵

C. “Integral and Indispensable”

Activities performed before or after the principal activity which are “integral and indispensable” to that activity are compensable under the FLSA.¹²⁶ The element of “integrality” primarily “turns on whether, in relation to the principal activity, a task is essential to completeness, organically joined, or linked or composed of constituent parts making a whole.”¹²⁷ A number of cases illustrate, however, that certain activities which are “necessary” in the sense that they are required by law or the employer may not be “essential to completeness” if they are the modern paradigms of preliminary and postliminary activities.¹²⁸ In that sense, “integral” and “indispensable” are not necessarily synonymous.

D. Engaged to Wait Versus Waiting to Engage

Time spent “engaged to wait” is also compensable, while time spent “wait[ing] to be engaged” is not.¹²⁹ The critical issue, initially set forth in *Skidmore v. Swift* and now codified by statute, is whether “the employee is unable to use the [on-call] time effectively for his own purposes.”¹³⁰ Key factors for determining the compensability of certain activities include: (1) whether the employee is required to remain on the employer’s premises, (2) the frequency of calls, (3) whether an employee can conduct personal activities while on call, and (4) the frequency of interruption from

¹²⁴ See Darch et al., *supra* note 4; see also *infra* Section V.B (regarding Integrity Solutions’ success in “squeezing into this gap”).

¹²⁵ See Darch et al., *supra* note 4.

¹²⁶ *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956); see also *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007) (finding that integrality turns on whether, in relation to the principal activity, a task is “essential to completeness, organically joined or linked or composed of constituent parts making a whole”).

¹²⁷ *Gorman*, 488 F.3d at 592. Note also that some courts have phrased the issue differently by focusing on whether the tasks are the sort of relatively non-physical and effortless movements anticipated by the Portal-to-Portal Act.

¹²⁸ See, e.g., *Steiner*, 350 U.S. 227; *Gorman*, 488 F.3d 586.

¹²⁹ 29 C.F.R. § 785.14 (2015) (citing *Skidmore v. Swift*, 323 U.S. 134 (1944) (finding that an administrative agency’s interpretative rules deserve deference according to their persuasiveness)).

¹³⁰ 29 C.F.R. § 785.15 (2015).

work calls.¹³¹ Generally speaking, however, the compensability for waiting time depends upon the particular facts and circumstances of the case.¹³²

E. De Minimis Time Doctrine

The *de minimis* time doctrine prevents an employee from recovering for otherwise compensable labor when the matter at issue concerns only a few minutes of work beyond regularly scheduled hours and the employee is not required to exert a substantial amount of time and effort.¹³³ In *Brock v. City of Cincinnati* and related cases in other circuits, courts have articulated three factors for consideration under the *de minimis* test: “(1) the practical administrative difficulty of recording the additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis.”¹³⁴ To apply the factors properly, a court must strike “a balance between requiring an employer to pay for activities it requires of its employees and the need to avoid split-second absurdities that are not justified by the actuality of the working conditions.”¹³⁵

IV. THE CIRCUIT SPLIT

Keeping in mind the complicated and often convoluted legal doctrines that make up the FLSA, the critical issue is as follows: whether donning and doffing activities are so “integral and indispensable” to the employee’s principal activity in a given workday that they constitute compensable “work.”

A. Alvarez v. IBP, Inc.: “Unique Versus Non-Unique Gear” Test

The “unique versus non-unique gear” test is best illustrated by the Ninth Circuit’s decision in *Alvarez v. IBP, Inc.*¹³⁶ By and large, the *Alvarez* line of cases indicates that, for employers in the Ninth and Third Circuits, compensation should be paid when employees spend time donning and doffing industry-specific gear and clothing.¹³⁷

In *Alvarez*, employees of a meat production plant brought a class action lawsuit against their employer under the FLSA and related state provisions, alleging that the employer was required to compensate them for time it took to change into required and specialized protective clothing and gear.¹³⁸ IBP, Inc., the meat packing empire of

¹³¹ See WAGE AND HOUR DIV., DEP’T. OF LABOR, FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf>.

¹³² See 29 C.F.R. § 785.14 (2011).

¹³³ *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001).

¹³⁴ *Id.*; see also *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 373 (4th Cir. 2011) (addressing whether the employees’ acts in donning and doffing protective gear were “integral and indispensable” to the principal purpose of poultry processing or fell within the three-factor *de minimis* test).

¹³⁵ *Rutti v. Lojack Corp., Inc.*, 596 F.3d 1046, 1057 (9th Cir. 2010) (quoting *Lindow v. US*, 738 F.2d 1057 (9th Cir. 1984) (internal quotation marks omitted)).

¹³⁶ *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003).

¹³⁷ See Darch et al., *supra* note 4.

¹³⁸ See *Alvarez*, 339 F.3d at 897.

the American West, employed a complicated, yet efficient, production process through which animals were slaughtered, moved along a series of chains into the slaughter division, stored in an overnight cooling facility, transported to the processing assembly line, and eventually cut, trimmed, divided, and packaged.¹³⁹ To ensure that plant production ran on time, employees were required to be at their respective workstations by the time meat reached their position along the line.¹⁴⁰ Employees were required to complete a number of preliminary tasks prior to the start of their shifts and had to arrive early to “gather their assigned equipment, don . . . equipment in one of the . . . [plant’s] four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors.”¹⁴¹ At the end of every shift, employees were required to complete many of these same tasks in reverse and “clean, restore, and replace their tools and equipment.”¹⁴² Further, employees were only permitted to exit the processing and slaughter floors mid-shift after removing their outer garments, protective gear, gloves, scabbards, and chains.¹⁴³

Once shifts began, plant employees’ time was strictly regulated and monitored—rest and meal-break times began as soon as the last piece of meat passed through the production line.¹⁴⁴ Accordingly, IBP paid its plant employees according to a “gang time pay” model, based solely on the times during which employees were actually working on the production line (“line time”).¹⁴⁵ Notably, this excluded any of the required time spent conducting pre-donning or post-doffing activities.¹⁴⁶ Based on these practices, a number of employees filed suit to recover back-wages for (1) pre-shift donning of protective gear and the preparation of work-related tools, (2) time spent donning and doffing protective gear during the thirty minute unpaid meal-break, and (3) post-shift doffing of protection gear, cleaning, and storing of the gear and tools.¹⁴⁷

The Ninth Circuit, holding in favor of the Pasco plant employees in part, noted first that “because donning and doffing of this gear on the Pasco plant’s premises is required by law, by rules of [IBP], [and] by the nature of the work” the donning and doffing is “necessary” to the principal work performed and, therefore, “integral and indispensable” to the principal activities taking place on the production line.¹⁴⁸ Second, the court found that “it is beyond cavil that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP” because without them the potential for contamination would

¹³⁹ *Id.* at 898.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 899.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 899-900.

¹⁴⁶ *Id.* at 900.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 903 (internal quotation marks omitted).

inevitably impede IBP's disassembly process.¹⁴⁹ Finally, and most importantly for the purposes of this Note, *Alvarez* stated as follows:

This "integral and indispensable" conclusion extends to donning, doffing, and cleaning of non-unique gear (e.g. hardhats) and unique gear (e.g. Kevlar gloves) alike. Little time may be required to don safety glasses and the use of safety goggles is undoubtedly pervasive in industrial work. But ease of donning and ubiquity of use do not make the donning of such equipment any less "integral and indispensable" as that term is defined in *Steiner*.¹⁵⁰

Although the Ninth Circuit interpreted the "integral and indispensable" test broadly enough to apply to both "unique and non-unique gear," it ultimately excluded time spent donning and doffing the non-unique gear as *de minimis*. The court noted that "time spent donning and doffing non-unique protective gear, 'although essential to the job[] and required by the employer[,] is at once so insubstantial and so difficult to monitor that it is *de minimis* as a matter of law."¹⁵¹ The Supreme Court later affirmed the Ninth Circuit's decision and limited it to the specific facts of that case.¹⁵² The Third Circuit has since followed suit in *De Ascencio v. Tyson Foods, Inc.*¹⁵³

B. Reich v. IBP, Inc.: "Exertion" Test

While the Ninth Circuit explicitly rejected the exertion test in its *Alvarez* decision, courts in the Tenth and Fifth Circuits have continued to support its usage.¹⁵⁴ In both Circuits, employers must generally compensate employees for tasks that require physical or mental effort beyond an ordinary degree of concentration.¹⁵⁵

In *Reich v. IBP, Inc.*, the Secretary of Labor brought an action against the famous meat packing company to enforce overtime and record-keeping provisions of the FLSA.¹⁵⁶ There, company employees were required to wear certain garments and safety equipment for protection during the plant's regular hours of production.¹⁵⁷ Workers were paid in accordance with "line time" and were divided into two distinct

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Note that this language explicitly rejects the exertion test considered *infra* Section IV.B. See also *De Ascencio v. Tyson Foods, Inc.*, 500 F.3d 361 (3d Cir. 2007) (holding jury instructions impermissibly directed jury to consider whether employees demonstrated sufficient exertion in deciding whether their activities were compensable under the FLSA).

¹⁵¹ See *Alvarez*, 339 F.3d at 904 (quoting *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994)); see also *Lindow v. United States*, 738 F.2d at 1061 (9th Cir. 1984) (holding that seven to eight minutes spent by employees reading log book and exchanging information, even if not preliminary, was *de minimis*, and therefore not compensable).

¹⁵² See *IBP, Inc.*, 546 U.S. 21, 41 (2005).

¹⁵³ See *De Ascencio*, 500 F.3d at 372.

¹⁵⁴ See *Darch et al.*, *supra* note 4.

¹⁵⁵ *Id.*

¹⁵⁶ See *Reich*, 38 F.3d at 1124.

¹⁵⁷ *Id.*

categories: those who used knives in their duties and those who did not.¹⁵⁸ Knife-wielding workers were required to wear specialized safety equipment and protective gear consisting of “a mesh apron, a plastic belly guard, mesh sleeves or plastic arm guards, wrist wraps, mesh gloves, rubber gloves, ‘polar sleeves,’ rubber boots, a chain belt, a weight belt, a scabbard, and shin guards,” while non-knife wielding workers wore hard hats, earplugs, safety footwear, safety eyewear, and clean, white, and outer-garments required of all employees.¹⁵⁹

On appeal, the Tenth Circuit determined that IBP failed to compensate its knife-wielding workers for time spent “taking off, cleaning and storing the specialized safety equipment.”¹⁶⁰ Ruling in favor of the employees in part, the court ultimately reached the same conclusion as *Alvarez*, but did so for a different reason.¹⁶¹ The Tenth Circuit held that compensation was owed for tasks requiring “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer”¹⁶² Thus, the goggles and hard hats that the non-knife wielding employees donned and doffed did not require compensation because they required very little concentration.¹⁶³ Alternatively, the court found that compensation was owed to the knife-wielding employees because the donning and doffing of specialized gear required “physical exertion, time, and a modicum of concentration to put [it] on securely and properly” and was different “in kind, not simply degree, from the mere act of dressing.”¹⁶⁴

C. *Perez v. Mountainaire Farms, Inc.*: “Benefit to Employee Versus Employer” Test

The Fourth Circuit has adopted its own test for compensation claims under the FLSA.¹⁶⁵ The Fourth Circuit instructs employers to evaluate the purpose for which the equipment is worn and whom the equipment benefits most.¹⁶⁶ This test is best illustrated in *Perez v. Mountainaire Farms, Inc.*¹⁶⁷

In *Perez*, a group of uncompensated poultry processing employees filed suit against their employer, Mountainaire, for time spent donning and doffing personal protective equipment.¹⁶⁸ Mountainaire managed the operation of its business much like IBP: employees were instructed to begin work on the production line when the first chickens arrived, end work when the last chicken left, and complete a number of

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1124-25.

¹⁶⁰ *Id.*

¹⁶¹ *See* Darch et al., *supra* note 4.

¹⁶² *See Reich*, 38 F.3d at 1125 (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local*, 321 U.S. 590, 598 (1944)).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1126.

¹⁶⁵ *Perez v. Mountainaire Farms, Inc.*, 650 F.3d 350, 365-66 (4th Cir. 2011).

¹⁶⁶ *See* Darch et al., *supra* note 4.

¹⁶⁷ *See Perez*, 650 F.3d at 350.

¹⁶⁸ *Id.* at 360.

preparatory activities.¹⁶⁹ Employees were then compensated based strictly on “line time,” which excluded their preliminary and postliminary work.¹⁷⁰

To calculate the amount of compensable time, the court applied *Steiner*’s “integral and indispensable” test to the donning and doffing activities at issue. *Perez* then concluded that because the preparatory activities “primarily benefit Mountaire by ‘protecting the products from contamination, help[ing] keep workers’ compensation payments down, keep[ing] missed time to a minimum, and shield[ing] the company from pain and suffering payments,’” they were “integral and indispensable” to the plant’s operation and required compensation.¹⁷¹ Notably, *Perez* did not distinguish between activities that involved either “specialized” gear or absorbent amounts of exertion. Thus, the employees were able to recover for the entire amount of uncompensated work.¹⁷²

D. Gorman v. Consolidated Edison Corp.: Hybrid Test

Some jurisdictions have tried to combine elements of both the “unique gear” and “exertion” tests. For instance, in *Gorman v. Consolidated Edison Corp.*, a case from the Second Circuit Court of Appeals, workers at a nuclear power plant facility filed suit against their employer to recover wages for time spent passing through security screening and donning and doffing non-unique protective gear, including metal capped safety boots, safety glasses, and a helmet.¹⁷³ Although it was undisputed that employees were paid for donning and doffing *specialized* protective gear required within the nuclear containment area, the court had to determine whether compensation was also required for the more basic equipment and preliminary waiting time.¹⁷⁴

To make this determination, the court considered elements of both *Alvarez* and *Reich*. The court found that “indispensable” meant “necessary” and integral meant “essential to completeness” or “organically joined or linked.”¹⁷⁵ Accordingly, workers’ helmets, safety glasses, and metal-capped safety boots were “indispensable” [necessary] but not “integral” [essential to completeness] to their activities (even though such equipment was required by government regulation).¹⁷⁶ The court recognized that it was not following the Ninth Circuit’s *Alvarez* decision, citing it for the proposition that “donning and doffing of non-unique gear (e.g. hard hats) [is] [both] ‘integral and indispensable’ as that term is defined in *Steiner*.”¹⁷⁷ The panel concluded, “donning and doffing of a helmet, safety glasses and boots are ‘relatively effortless,’” evoking the *Reich* test of exertion or concentration required

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 367.

¹⁷² *Id.* at 376.

¹⁷³ *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 598 (2d Cir. 2007).

¹⁷⁴ *Id.*; *see also* Darch et al., *supra* note 4.

¹⁷⁵ *Gorman*, 488 F.3d at 592.

¹⁷⁶ *Id.* at 593.

¹⁷⁷ Recall however that *Alvarez* did not require compensation for non-unique gear on other grounds (i.e. *de minimis* doctrine). *Alvarez v. IBP, Inc.*, 339 F.3d 894, 904 (9th Cir. 2003).

to complete a task.¹⁷⁸ Thus, employers need not compensate workers for donning and doffing non-unique gear.¹⁷⁹

The Second Circuit's reasoning, though different in form, is theoretically similar in substance to many of the tests discussed above—in at least two of the those instances, *Alvarez* and *Reich*, employees were limited to some extent by what they could recover.¹⁸⁰ The same story holds true in *Gorman*: employees could not recover for time spent donning and doffing non-specialized gear. Employers in the Second Circuit would be well-advised to consider the specific facts of each case and ask two separate questions: (1) does the claim involve time spent donning and doffing *specialized* gear?—and if so, (2) does the activity require physical or mental exertion?¹⁸¹ If the answer is yes to both, then employers should compensate employees for their time.

V. THE FLSA SHOULD BE CONSTRUED NARROWLY TO CURB LITIGATION AGAINST EMPLOYERS

A. *The Narrow Tests: Alvarez, Reich, and Gorman*

Alvarez, *Reich*, and *Gorman* exemplify attempts to *narrow* the scope of compensable activities under the FLSA to exclude the sorts of preliminary and postliminary activities anticipated by the Portal-to-Portal Act. While *Alvarez* interprets those activities to be “integral and indispensable” to the principal activities on the production line, it excludes them from compensation under the *de minimis* time doctrine.¹⁸² In doing so, it accomplishes the same policy goals by limiting employer liability—albeit through a more back channel approach.¹⁸³ *Gorman*, on the other hand, interprets the activities at issue to be “indispensable” (necessary) but not “integral” (essential) to the principal activities on the production line and excludes them from compensation accordingly based on the lack of required exertion.¹⁸⁴ *Reich* takes it one step further. Under *Reich*, the preliminary and postliminary activities at issue are neither “integral nor indispensable” because they can be accomplished with “less than a modicum of concentration.”¹⁸⁵

In each approach, it could be said that employees “won” their case in the sense that they recovered large amounts of money for donning and doffing specialized gear. Employers, however, should be content with the approach the Circuit Courts have taken in limiting compensation for time spent working with non-specialized gear. Further, because these legal doctrines expand beyond the facts of each case, the prevailing message behind the narrower cases is that employees bear the burden of proving something beyond “suffering” to recover compensation.

¹⁷⁸ *Gorman*, 488 F.3d at 594.

¹⁷⁹ *Id.*

¹⁸⁰ *See supra* Part IV.A-B.

¹⁸¹ Darch et al., *supra* note 4.

¹⁸² *Alvarez*, 339 F.3d at 904.

¹⁸³ 29 U.S.C. § 202(b) (2015).

¹⁸⁴ *Gorman*, 488 F.3d at 594.

¹⁸⁵ *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994)

1. The Burden of Proving Compensable Work

Under *Alvarez*, the burden is weak. Because *Alvarez* concedes that preliminary donning and doffing activities are “integral and indispensable” to the principal activities of a production line, employees seeking to recover lost compensation need only prove that their activities fall outside the scope of the *de minimis* time doctrine.¹⁸⁶ As discussed above, work is *de minimis* when the matter at issue concerns only a few minutes of work beyond regularly scheduled hours and the employee is not required to exert a substantial amount of time and effort.¹⁸⁷ From a practical perspective, however, courts have struggled to set a threshold for the *de minimis* doctrine, which has made it increasingly difficult, if not impossible, to apply a consistent standard.¹⁸⁸ For instance, the *de minimis* exception may bar compensation for several activities when viewed separately, but may permit those same activities if the activities are aggregated together.¹⁸⁹ This incoherent threshold provides greater flexibility to employees in crafting plausible scenarios through which they then convince jurors and judges that time spent conducting an activity was compensable. Because donning and doffing activities are recognized as “integral and indispensable” to the principal activity,¹⁹⁰ employers could hypothetically face liability for just about anything once the *de minimis* doctrine is removed as an obstacle. So, while *Alvarez* has the potential to shield employers from liability in certain situations, it is not their best bet.

Under *Reich*, employers are well protected from mass litigation claims stemming from the most preliminary (or postliminary) of tasks, such as walking, cleaning, clocking-in or out, and anything else requiring less than a modicum of concentration.¹⁹¹ Although *Reich* does not shield employers from liability for more specialized tasks tied to the employee’s principal activity, the fact is that most employers are probably willing, if not happy, to adequately compensate employees for doing their job.¹⁹² For all remaining activities, employees bear the brunt of the burden to show that they exerted some sort of physical or mental exertion beyond ordinary expectation.¹⁹³ Of the three cases discussed in this section, *Reich*’s “exertion test” provides the most amount of security for unwary employers.

Gorman presents an interesting curveball for employers because it protects them from compensation claims stemming from “relatively effortless” activities while also

¹⁸⁶ *Alvarez*, 339 F.3d at 904.

¹⁸⁷ *See Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001).

¹⁸⁸ *See supra* note 22.

¹⁸⁹ *See, e.g., Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 95 (2d Cir. 1953) (granting relief for claims that would have been *de minimis* on a daily basis but for the fact that, when aggregated together, they amounted to a substantial claim); *Nardone v. General Motors, Inc.*, 207 F. Supp. 336, 336 (C.C.D. N.J. 1962) (upholding the *de minimis* doctrine when the claim was calculated in terms of minutes per day).

¹⁹⁰ *Alvarez*, 339 F.3d at 904.

¹⁹¹ *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994).

¹⁹² *See supra* Section IV.B (regarding employers agreement to provide compensation for specialized work in *Reich*).

¹⁹³ *See Reich*, 38 F.3d at 1125.

exposing them to litigation for work that is integral to completion of the principal activity.¹⁹⁴ While activities such as walking may be too effortless to require compensation, activities that occur just seconds prior to or after the principal activity itself—and which are required in order to complete that activity—must be compensated.¹⁹⁵ For instance, *Alvarez* required employees to “gather their assigned equipment . . . [and] prepare work-related tools before venturing to the slaughter or processing floors.”¹⁹⁶ Further, employees were required to “clean, restore, and replace their tools and equipment” at the end of each shift.¹⁹⁷ These are the sorts of activities that employers could be liable for under *Gorman*. In sum, the case presents a strong compromise among the “narrow” jurisdictions while still addressing the needs of employers in minimizing litigation risks.

Factual differences alone cannot explain the logic behind these conflicting methods as the majority of cases present very similar circumstances.¹⁹⁸ The reality is simply that the “true cause of the split is in the law itself—the circuit courts simply disagree on the proper test for determining when [and how] employees must be compensated.”¹⁹⁹ But these decisions reflect more than a scholarly pursuit of legal academia: they have real consequences for real people.²⁰⁰ A test is only useful if it can be applied practically and consistently to resolve disputes.²⁰¹ Consistency with prior precedent establishes predictability in the law; consistency with the underlying rational of the FLSA supports public policy objectives; and consistency in application among various courts enhances the perception of fairness in our legal system.²⁰² In light the discussion in Part I,²⁰³ the reality is that claims for compensation have spiraled out of control, and employers are more vulnerable now than ever. Courts should bear this trend in mind as they struggle to find the proper framework for assessing the validity of donning and doffing claims under the FLSA.

A. The Broad Test: *Perez*

So far, this Note has withheld detailed discussion of the “benefit to employer versus employee” test adopted by the Fourth Circuit in *Perez*. The *Perez* test focuses primarily on whether the activity in question benefits the employee, through protection from workplace hazards, or the employer, by protecting the product.²⁰⁴ Much like the narrow *Alvarez* test, the *Perez* line of cases illustrates the same troubling trend this Note has attempted to resolve: potential overexposure of

¹⁹⁴ See *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 590 (2d Cir. 2007).

¹⁹⁵ See *Alvarez*, 339 F.3d at 903.

¹⁹⁶ See *id.* at 898.

¹⁹⁷ *Id.*

¹⁹⁸ See *Watts*, *supra* note 18, at 298.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 313.

²⁰¹ *Id.* at 311.

²⁰² *Id.*

²⁰³ See *supra* Part I.

²⁰⁴ See *Darch et al.*, *supra* note 4.

employers to trigger-happy plaintiffs. Aside from the obvious problems this Note has already addressed in Part I, two additional concerns merit further discussion.

1. *Perez* Represents a Departure from the “Integral and Indispensable” Standard

First, the benefits test represents a significant departure from the legal analysis that is overwhelmingly employed in the context of donning and doffing litigation. Accordingly, it should be cast aside. As set forth above, most circuit courts attempt to define compensable “work” by considering whether or not the activity is “integral and indispensable” to the employee’s principal job duties.²⁰⁵ Admittedly, this is not the only way to approach the issue. Recall that the “integral and indispensable” test is one of many factors examined by a line of Supreme Court cases attempting to define the term “work” under the FLSA.²⁰⁶ The *Perez* test represents an attempt to emphasize the remaining factors: whether an activity is “controlled or required by the employer” and/or “pursued necessarily and primarily for the employer’s benefit.”²⁰⁷ While the approach is not wrong as a matter of law, it is improper in the context of donning and doffing activities because such activities take place *outside of scheduled work time*. Accordingly, *Chao v. Gotham Registry, Inc.* reiterates that the “integral and indispensable” test should govern:

The broad meaning that has emerged from Supreme Court cases describes “work” as an exertion or loss of employees time that is (1) controlled or required by the employer, (2) pursued necessarily and primarily for the employer’s benefit, and (3) if performed outside scheduled work time, an “integral and indispensable” part of the employee’s principal activities.²⁰⁸

1. *Integrity Staffing Solutions, Inc. v. Busk*: An Emerging Trend

Second, the Supreme Court recently addressed the matter further in *Integrity Staffing Solutions, Inc. v. Busk*.²⁰⁹ *Integrity* involved a pair of hourly employees who retrieved products from warehouse shelves and packaged those products for delivery to Amazon customers.²¹⁰ At the end of each shift, the warehouse workers were required to undergo security screenings before leaving the warehouses—this required them to remove wallets, keys, belts, and pass through a metal detector—a process that took roughly twenty-five minutes each day.²¹¹ When plaintiffs were uncompensated for time spent waiting in line, they brought suit against Integrity, arguing that the screens were done to prevent employee theft for the sole benefit of the employer and its customers.²¹² The Supreme Court ruled that “preliminary and

²⁰⁵ See *Steiner v. Mitchell*, 350 U.S. 247, 255 (1956).

²⁰⁶ See *supra* Section I, at note 15 (regarding the “broad meaning that has emerged from supreme Court cases that define ‘work’”).

²⁰⁷ *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008); see also *IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005).

²⁰⁸ See *Chao*, 514 F.3d at 285 (emphasis added); see also *IBP, Inc.*, 546 U.S. at 26.

²⁰⁹ *Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513, 517 (2014).

²¹⁰ *Id.* at 515.

²¹¹ *Id.*

²¹² *Id.*

postliminary activities done at the employer's request or for the employer's benefit" do not necessarily result in compensable time.²¹³ Instead, the Court "narrowed the definition of 'integral and indispensable' to cover only those activities that are an 'intrinsic element' of an employee's principal activities."²¹⁴ The Court further clarified that an activity is "integral and indispensable" to a worker's principal duties if it is "one with which the employee cannot dispense if he is to perform his principal activities."²¹⁵ Interestingly, the language supported by the Supreme Court in *Integrity* is essentially identical to the *Gorman* test, yet written in inverse form—*Gorman* exposes employers to litigation for work that is integral to completion of the principal activity. Writing for the Court, Justice Thomas held that "[t]he screenings were not an intrinsic element of retrieving products from warehouse shelves or packing them for shipment[.]"—and therefore were not "integral or indispensable" to the employees' principal activities, because products could be retrieved and packaged without security screening.²¹⁶

Integrity's conclusion is important for three reasons. First, *Integrity's* rejection of a broad brush to the "integral and indispensable" test falls in line with this Note's proposal for a more narrow interpretation. *Integrity* makes clear that, "[i]f the test could be satisfied merely by the fact that an employer required an activity . . . it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address."²¹⁷ Second, *Integrity* explicitly rejected the Ninth Circuit's approach in *Alvarez* and implicitly backed the holding of *Gorman*. In addition to unraveling *Alvarez's* "broad brush" approach, *Integrity* noted that even if the activities had been *de minimis*, as they were in *Alvarez*, "[t]he fact that an employer could conceivably reduce the time spent by employees on any preliminary or postliminary activity does not change the nature of the activity or its relationship to the principal activities that an employee is employed to perform."²¹⁸ Third, and most important, the Court's partial resolution of the "integral and indispensable" issue provides much needed guidance to circuit courts and employers regarding pre- and post-shift tasks tied to donning and doffing activities.²¹⁹ For the foregoing reasons, the "benefits" test is best understood as an outlier and one that is not to be used in the modern era of donning and doffing claims.

VI. PROPOSAL: THE SECOND CIRCUIT COMPROMISE

Although this Note has primarily focused its efforts on advocating on behalf of employers, certain theoretical realities exist with regard to the FLSA in the sense that it was primarily adopted for the benefit of workers. Accordingly, any reasonable

²¹³ See Esteban Shardonofsky, *The Supreme Court Clarifies the Compensability of Pre- and Post-Shift Donning Activities Under Federal Law*, 52 HOUS. LAW. 26, 28 (2015) (discussing the impact of the Supreme Court's recent decision in *Integrity Solutions, Inc. v. Busk*).

²¹⁴ *Id.*

²¹⁵ See *Integrity Staffing Solutions, Inc.*, 135 S.Ct at 518.

²¹⁶ *Id.*

²¹⁷ *Id.* at 519.

²¹⁸ *Id.*

²¹⁹ See Shardonofsky, *supra* note 213, at 28.

proposal must also take into account the FLSA's primary aim to effectuate higher wages, shorter hours, and better working conditions for all employees covered under the Act.

The *Reich* test offers the most amount of protection to employers. But it also provides the most amount of harm to employees by robbing them of the fruits of their "suffering." Conversely, the *Alvarez* and *Perez* tests ensure that employees receive wages for minute and preliminary tasks, but do so at great expense to their employers. The Second Circuit's approach in *Gorman* appears most suited for adoption by the Supreme Court from both a pragmatic and policy perspective. By protecting employers from compensation claims for "relatively effortless" activities while also exposing them to litigation for work that is essential to completion of the principal activity, *Gorman* squeezes into the gap created by the ambiguous language of the FLSA and the Portal-to-Portal amendments.²²⁰ In doing so, *Gorman* ensures two very important outcomes: legitimate claims for uncompensated "work" time are fully covered by the FLSA and frivolous suits fall by the wayside.

VII. CONCLUSION

This Note was inspired by the modern day, wage and hour litigation epidemic that continues to clog the federal courts. Parts I through V examined this epidemic in the context of employer liability as it relates to claims for uncompensated "work" time resulting from donning and doffing activities. This Note concluded that "work" should be construed more narrowly under the FLSA to reduce employers' risks of exposure to litigation in the future. It then ended with a brief discussion pinpointing an ideal standard that accomplished this goal without undermining the broader purposes of the Act.

Interestingly, this Note's proposal provides important benefits to employees as well. When employers are caught up in litigation and fewer resources are available to invest in the business, employees are left with stagnating wages, poorer working conditions, and unhappy bosses. Further, employees engaged in litigation against their employer are generally unable or unwilling to return to their respective positions and face certain career challenges. The reality is that legal ambiguity imposes difficulties on all parties involved. The end result is cyclical: because parties cannot adequately predict the outcomes of cases, they refuse to settle, and both are left significantly worse off than they would have been if the laws were clear. So, the frenzy of litigation continues.

Adoption of a single, uniform standard of "work" in the context of donning and doffing litigation would go a long way toward eliminating that frenzy and ensuring that the FLSA is restored to prominence as a tool for the prosperity of both employers and employees. The Second Circuit's *Gorman* test would be a good place to start.

²²⁰ *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592-94 (2d Cir. 2007).