No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER ET AL.,
Petitioners,

v.

UNITED STATES STEEL CORP.,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

J. MICHAEL JARBOE
The Law Department of
United States Steel
Corporation
600 Grant Street,
Room 1500
Pittsburgh, Pennsylvania
15219-2800

LAWRENCE C. DINARDO
Counsel of Record
BRIAN J. MURRAY
JONES DAY
77 West Wacker Dr.,
Suite 3500
Chicago, Illinois 60601
(312) 782-3939
lcdinardo@jonesday.com

AMY E. DIAS
WARREN D. POSTMAN
JONES DAY
51 Louisiana Ave. NW
Washington, D.C. 20001

BRIAN M. JORGENSEN
JONES DAY
2727 N. Harwood St.
Dallas, Texas 75201

Counsel for Respondent
United States Steel Corporation

QUESTION PRESENTED

Under 29 U.S.C. § 203(o), an employer and a union may agree that time spent "changing clothes" will not be part of "the hours for which an employee is employed" for purposes of the Fair Labor Standards Act ("FLSA"). Petitioners' union has agreed with Respondent that time Petitioners spend changing into protective clothing—such as flame-retardant pants and jackets, work gloves, work boots, hoods, leggings, and long wrist bands—is not part of the compensable workday.

The question presented is:

Does the donning and doffing of protective work clothes at issue in this case constitute "changing clothes" within the meaning of § 203(o), such that Petitioners' changing time is excluded from the hours for which they are employed?

CORPORATE DISCLOSURE STATEMENT

Respondent United States Steel Corporation ("U. S. Steel") is a publicly held company. It has no parent company, and there is no publicly held company owning 10% or more of U. S. Steel's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued)

TABLE OF CONTENTS

(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

(continued) Page(s)

STATUTES

TABLE OF AUTHORITIES

(continued)

OTHER AUTHORITIES

TABLE OF AUTHORITIES

(continued)

Page(s)

TABLE OF AUTHORITIES

(continued)

STATEMENT OF THE CASE

This case arises out of a putative collective action brought by Petitioners under the FLSA, 29 U.S.C. § 216(b). Petitioners alleged that they were entitled to overtime compensation for time spent donning and doffing protective clothing notwithstanding the agreement of Petitioners' union that such activities are not part of the compensable workday. Congress amended the FLSA in 1949 to provide that time spent "changing clothes … at the beginning or end of each workday" is excluded from "the hours for which an employee is employed," where, as here, a union and an employer so agree. 29 U.S.C. § 203(o). If this language refers to the activity of changing into and out of the outfit worn by an employee to be ready to work, then the agreement of Petitioners' union places the donning and doffing time in this case outside the compensable workday, and Petitioners' claims fail. As described below, the statutory text, structure, and context all make clear that Congress intended precisely this meaning.

A. Statutory Background

1. Congress enacted the FLSA in 1938 to "give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive 'a fair day's pay for a fair day's work.'" *Barrentine v. Arkansas Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transport. Co. v. Missel*, 316 U.S. 572, 578 (1942)) (emphasis omitted).

The two core provisions of the Act—the minimum wage provision and the overtime provision—require that employees receive a minimum hourly wage for each hour that they are "employ[ed]" as well as a

premium wage (one and one-half times the regular rate of pay) for each hour they are "employ[ed]" beyond 40 in one workweek. 29 U.S.C. §§ 206(a), 207(a). The FLSA defined the term "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). The Act, however, did not define the term "work."

This statutory gap touched off a series of lawsuits seeking compensation for time spent by employees in preparing to engage in productive work. For example, iron and coal miners sought payment for travel time to and from "the working face" of mines, *Tennessee Coal, Iron & R.R. Co. v. Muscoda*, 321 U.S. 590, 597-98 (1944); *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 161, 165-66 (1945), and manufacturing workers sought compensation for "various preliminary duties, such as putting on aprons and overalls, [and] removing shirts." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 683 (1946).

In a trio of high profile cases, the Court held that even if such practices were not considered work according to the customs of an industry, they were still deemed work under the FLSA. The Court reasoned that "work" under the Act included all "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 and his business." *Tennessee Coal, Iron & R.R. Co.*, 321 U.S. at 597-98; *see also Jewell Ridge Coal Corp.*, 325 U.S. at 165-66. Moreover, the Court added, "work" also included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson*, 328 U.S. at 690-91.

2. This broad definition of "work" produced a flood of new claims seeking compensation for activities such as "proceeding to places of work and changing into work and/or protective clothing." *Grospian v. Pan Am. Ref. Corp.*, 6 F.R.D. 453, 456 (S.D. Tex. 1947); *see also, e.g.*, Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53, 116 n.333 (1991) (citing *Portal Pay Suits Exceed a Billion*, N.Y. Times, Dec. 29, 1946, at 1, col. 8; *Bethlehem Sued for $200,000,000*, N.Y. Times, Dec. 29, 1946, at 3, col. 4; *Portal Pay Suits Pass $900,000,000*, N.Y. Times, Dec. 28, 1946, at 2, col. 4; *6 Billion Possible in Portal Claims*, N.Y. Times, Dec. 22, 1946, at 3, col. 4; *Asks $120,000,000 in Portal Pay Suit*, N.Y. Times, Dec. 10, 1946, at 24, col. 5 (suit by USWA members against U. S. Steel)).

"After [over] a half-century, it is difficult to recapture the intensity of a conflict over what was after all only a minor aspect of the federal wage and hour law—which the New York Times called 'one of the greatest legal-economic controversies in American history.'" Linder, *supra* at 54 (quoting White, *Government Asks Portal Case Ban; Origin "Trifling,"* N.Y. Times, Jan. 24, 1947, at 1, col. 8).

Congress reacted quickly to address the threat of "wholly unexpected liabilities" and to protect "long-established customs, practices, and contracts between employers and employees" by passing the Portal to Portal Act of 1947, § 1, 61 Stat. 84, 29 U.S.C. § 251(a). The Portal to Portal Act operated both retrospectively and prospectively. Retrospectively, the Act eliminated all claims seeking compensation for any activity prior to the date of enactment unless

based on an express provision in a contract or an established custom or practice that treated the time in question as compensable. *Id.* § 2, 29 U.S.C. § 252(a).

Prospectively, the Portal to Portal Act amended the FLSA to provide that "no employer shall be subject to any liability or punishment under the [FLSA] … 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 ….

29 U.S.C. § 254(a). This default rule of non-compensability could be altered, however, by the parties' agreement. Specifically, the activities could be made compensable by "an express provision of a written or nonwritten contract" or by "a custom or practice in effect … at the establishment or other place where such employee is employed." *Id.* § 254(b).

The Portal to Portal Act thus drew a key distinction between two types of activities that fell within the Court's broad definition of "work": mere travel or "preliminary" and "postliminary" activities on the one hand (which did not need to be

compensated absent a contrary practice or agreement), and "principal" activities on the other (which always had to be compensated).[1]

3. The Portal to Portal Act did not fully settle the question of whether activities that were not considered "work" under industry custom or contract could nonetheless be compensable under the FLSA. In 1947, immediately after the Portal to Portal Act was enacted, the Wage and Hour Division of the Department of Labor issued a guidance suggesting that the Portal to Portal Act should be "narrowly construed" such that some clothes changing and washing might not be a preliminary or postliminary activity, and could instead be part of an employee's

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[1] The impact of that distinction increased under a Department of Labor regulation first adopted in 1947, which imposed a "continuous workday rule." *See* U.S. Dep't of Labor, Wage and Hour Division, General Statements on the Effects of the Portal to Portal Act of 1947 on the Fair Labor Standards Act of 1938 (Nov. 18, 1947), 29 C.F.R. § 790.6(b); *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005). That rule requires that a covered employee be paid for the entire "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). Accordingly, if a particular task assigned to an employee is a "principal" work activity, it generally triggers a duty by the employer to compensate the employee until the end of the employee's day, as marked by the completion of the last principal activity.

principal activity. 29 C.F.R. §§ 790.2(a), 790.7. In particular, the Division cautioned that:

> "Washing up after work, like the changing of 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.'"

Id. § 790.7, n.49. The Division cited an example from the legislative history of the Portal to Portal Act, in which Senators Cooper and McGrath had suggested that if "chemical plant[] workers [we]re required to put on special clothing and to take off their clothing at the end of the day" to protect themselves from chemicals, this changing time would not constitute a preliminary or postliminary activity. *See* Colloquy Between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298 (cited at 29 C.F.R. § 790.8(c)). Referring to this exchange, the Division concluded that such donning and doffing of essential clothing "would be an integral part of the employee's principal activity" while "changing clothes [that] is merely a convenience to the employee and not directly related to his principal activities … would be considered as a 'preliminary" or "postliminary' activity." *Id.* § 790.8(c).

Soon after the issuance of this guidance, industry groups pressed Congress to "cur[e] the defect in the Fair Labor Standards Act itself which caused the previous 'portal' emergency and now presents us with another." *A Bill to Provide For the Amendment of the Fair Labor Standards Act of 1938 and For Other Purposes: Hearings on H.R. 2033 Before the House Comm. on Educ. and Labor*, 81st Cong. 1565 (1949)

(statement of William Quinlan, on Behalf of Associated Retail Bakers of America) ("Bakers Statement"). The National Association of Manufacturers complained:

> [I]t is now contended by the Wage and Hour Administrator that much of the time sought to be excluded from the legal workday by the "Portal" Act, must be considered as compensable under that act if the nature of an employee's job requires or encourages him to perform "preliminary" or "postliminary" activities such as putting on special clothes or washing up before or after work. Thus, within a relatively short time after Congress has acted to correct recognized evils of interpretation of the FLSA, it would seem necessary that it enact additional legislation to guarantee that its intent as expressed in a statute will be followed.

An Act To Amend the Fair Labor Standards Act of 1938, Hearings on S. 653, Subcommittee of the Senate Committee on Labor and Public Welfare, 81st Cong. 394 (1949) (memorandum of the National Association of Manufacturers) ("NAM Statement").

The House responded with a bill that would have allowed an employer and a union to exclude *any* time from "hours worked." H.R. 5856, 81st Cong. (1949). Although that first version was not adopted, Congress did enact a later version, which addressed the two specific activities that the Wage and Hour Division had suggested could constitute principal activities: "washing up" and "the changing of clothes." *See* 95 Cong. Rec. 14,991 (Oct. 17, 1949).

Specifically, Congress inserted subsection (o) in the definitions section of the FLSA. It provides:

> Hours Worked.— In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

29 U.S.C. § 203(o).

The legislative history confirms that this amendment was intended to address the possibility, identified in the Wage and Hour Division guidance, that employers could be held liable for clothes changing and washing that was deemed integral and indispensible to an employee's job. As described by Representative Herter, the House sponsor, the amendment was "offered for the purpose of avoiding another series of incidents which led to the portal-to-portal legislation." 95 Cong. Rec. 11,210 (Aug. 10, 1949). Representative Herter explained that:

> In the bakery industry, for instance, … there are collective-bargaining agreements with various unions in different sections of the country which define exactly what is to constitute a working day and what is not to constitute a working day.… [T]he matter has been carefully threshed out between the employer and the employee and apparently both

> are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day." …This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement.

Id.

B. Factual Background

1. Gary Works, U. S. Steel's flagship facility, is an integrated steel plant spread across nearly 3,000 acres in Gary, Indiana. J.A. 65-66. The nonmanagement work force of approximately 4,500 employees is represented by the United Steelworkers of America AFL-CIO-CLC ("USWA"), the largest industrial labor union in North America. J.A. 68-69.

Gary Works operates on a continuous, twenty-four hour basis, with each day divided into three eight-hour shifts. J.A. 73, 84. Since as far back as 1947, U. S. Steel and the USWA have agreed in national

collective bargaining agreements that employees are to be paid by the shift. J.A. 73-75; R.85 at 267, 392.[2] Thus, although employees use security swipe cards at the entry gates, they do not use time clocks to track daily working time. J.A. 74, 76. Rather, most employees' shifts begin and end at exact times—*e.g.*, 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and from 10:00 p.m. to 6:00 a.m. *See, e.g.*, J.A. 76, R.85 at 324. Other shifts operate on a "buddy relief" system, under which the shift change occurs by way of face-to-face, personal relief that ensures continuation of operations. J.A. 84-86. In all events, however, employees are assigned to, work, and are paid for an eight-hour shift. J.A. 74, 92-93.

To get ready to work, many employees change into their work clothes in locker rooms before walking or riding buses to their assigned work stations. J.A. 77-81. While the work clothing worn by individual employees varies based on their specific assignments, work clothes can include: flame-retardant pants and a jacket (often called "greens," though now orange in color), metatarsal boots, leggings, long wrist bands (or "wristlets"), a cloth hood (or "snood"), a hard hat, safety glasses, and ear plugs. *Id.* Although some employees are required to wear respirators intermittently at their work stations, they are not required to don and doff them in the locker rooms at the beginning of the day. Rather, though some

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[2] Citations beginning with "R._" refer to the district court record; *e.g.*, "R.85" refers to ECF No. 85 in the district court.

employees may carry respirators from their locker rooms, they are "put on as needed at job locations." Pet. App. 21a; *see also* R.85 at 326.

After changing into their work outfits, employees travel from their locker rooms to their assigned work locations. R.85 at 327. After the end of a shift, employees travel back to their lockers from their assigned work locations. *Id.* at 329. Some (but not all) employees then use company facilities to shower or otherwise wash up and change into their personal clothes before leaving the plant. J.A. 53-54, 76-77, 88; R.85 at 332, 372, 338. Since employees are not "on the clock" during their changing and travel at the beginning and end of the work day, they may proceed to and from their work locations at their own pace, so long as they are at their work locations for their scheduled shifts. J.A. 76, 77.

2. For over 60 years, the collective bargaining agreements, or Basic Labor Agreements ("BLAs"), between U. S. Steel and the USWA have provided that time spent in preparatory and closing activities is not compensable. R.85 at 267, 392. Rather, to meet the staffing requirements for continuous 24-hour production, employees must be at their assigned work locations at the commencement of their eight-hour shifts. J.A. 75. Simply being in the plant, in a locker room, or on the way to or from a work location has never been considered "being at work." J.A. 75, 82-83.

In 2008, after this case was filed, USWA and U. S. Steel negotiated and agreed to a successor BLA that, once again, confirmed USWA's agreement to exclude preparatory and closing activities from the compensable workday. The BLA affirmed that:

> starting in 1947, every national collective bargaining agreement or BLA negotiated by the Parties has included an agreement that the Company is not obligated to pay Employees for preparatory or closing activities which occur outside of their schedule shift or away from their worksite (i.e., so-called "portal-to-portal" activities). Such activities include such things as donning and doffing of protective clothing (including such items as flame-retardant jacket and pants, metatarsal boots, hard hat, safety glasses, ear plugs, and a snood or hood), and washing up.

R.106-4 at 392.[3]

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[3] In the course of the 2008 collective bargaining, USWA and U. S. Steel also agreed that certain coke plant employees "who are required to shower at the end of their shift will be provided with twenty (20) minutes wash-up time prior to the end of the Employee's shift, or a daily additive in an amount calculated at four-tenths (0.4) of an hour at the Employee's Base Rate of Pay." *Id.*

USWA also agreed to "withdraw any so-called donning and doffing claims or lawsuits" and to "use its best efforts to have any such claims or lawsuits to which it is a party, and … use its best efforts to have any such claims to which it is not or was not a party dismissed." *Id.*[4]

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[4] Petitioners note that, between 1947 and 2003, the applicable BLAs excluded only travel time or "time spent in preparatory and closing activities" but "did not specifically mention time spent donning and doffing clothes or personal safety equipment." Petr. Br. 11. To the extent Petitioners contend that the clothes changing time at issue in this case was *not* excluded from compensable working time "under a bona fide collective-bargaining agreement," 29 U.S.C. § 203(o), this is contrary to the position Petitioners took in their certiorari petition and the findings of the district court. Pet. 12, Pet. App. 42a-43a. Moreover, it is contrary to the ratified collective bargaining agreement of the parties, which expressly observed: "[S]tarting in 1947, every national collective bargaining agreement or BLA negotiated by the Parties has included an agreement that the Company is not obligated to pay Employees for preparatory or closing activities." R.106-4 at 392. Of course, to the extent Petitioners' donning and doffing time is not excluded from compensable working time under a collective bargaining agreement, the Question Presented is not implicated here, and the Court should dismiss this case as improvidently granted.

3. The eight Petitioners in this case were all employees at Gary Works during at least some of the time period in question and were covered by the minimum wage and overtime provisions of the FLSA. J.A. 94-99. Petitioners filed a putative collective action against U. S. Steel seeking overtime compensation for time spent donning and doffing protective clothing, washing after work, and traveling to and from their assigned workstations.

C. The Decisions Below

1. The district court granted summary judgment in favor of U. S. Steel on the clothes changing claims.[5] Pet. App. 28a-43a. The district court reasoned that "the cloth jacket and pants, fabric snoods, hoods, leggings, and wristlets, and boots here at issue easily fall within the ordinary definition of 'clothes.'" Moreover, the court explained, "even if [it] were to assume that hard hats, safety glasses, and ear plugs aren't 'clothes,' … the time expended by each employee donning and doffing those items is

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[5] The district court also granted summary judgment on the related washing claims, Pet. App. 53a, but denied summary judgment on the travel time claims, Pet. App. 50a. Petitioners did not perfect an appeal of the washing time claims, Pet. App. 2a-3a. The Court of Appeals later reversed the denial of summary judgment on the travel claims, Pet. App. 10a-19a, but this Court denied certiorari on that issue, 133 S. Ct. 1240 (Feb. 19, 2013).

minimal, or *de minimis*, and thus not compensable under the FLSA." Pet. App. 33a-34a.

2. A unanimous panel of the Seventh Circuit affirmed on similar reasoning. The pants, jackets, gloves, boots, and hoods were clothing, the court concluded, because "[a]lmost any English speaker would say that the [items constituted] work clothes." Pet. App. 7a. The court rejected Petitioners' argument that items could not be clothing because they were "personal protective equipment," explaining that this distinction assumed a false dichotomy:

> Protection—against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting—is a common function of clothing, and an especially common function of work clothes worn by factory workers. It would be absurd to exclude all work clothes that have a protective function from section 203(o), and thus limit the exclusion largely to actors' costumes and waiters' and doormen's uniforms.

Id. at 6a.

The Court further emphasized that finding clothing to be within the scope of § 203(o) did not necessarily mean that any employees would be denied compensation for clothes changing time but, rather, would simply allow unions and employers to engage in collective bargaining over the issue. *Id.* at 7a. Indeed, the Court explained, "[t]he fact that the clothing exclusion is operative only if it is agreed to in collective bargaining implies … that workers are compensated for the time they spend changing into

work clothes, and washing up and changing back." *Id.* That is, § 203(o) "allows unions and employers to trade off the number of compensable hours against the wage rate" and "[t]he steelworkers would not have given up their statutory entitlement to time and a half for overtime, when changing clothes or traveling to and from their work stations, without receiving something in return." *Id.* (quoting *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010)).

Finally, although the court suggested that the glasses, ear plugs, and hard hats worn at Gary Works might not be clothing "in the ordinary sense," the court did not definitively resolve the matter under § 203(o), finding that, "in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*." Pet. App. 5a-6a (citing *Mt. Clemens*, 328 U.S. at 692).

SUMMARY OF ARGUMENT

I. When read in context and as a complete, integrated sentence, § 203(o) does not simply address the compensability of wearing isolated items of "clothes." Rather, it allows unions and employers to bargain over the compensability of an *activity*: "changing clothes…at the beginning or end of each workday." This complete phrase clearly refers to the process of putting on the entire outfit worn by an employee to be ready to work at the beginning of the day, and taking off that outfit at the end of the day. That plain, straightforward meaning is clear from the statutory text, and is further confirmed by the context, structure, and purpose of § 203(o).

As an abstract matter, dictionary definitions show that the phrase "changing clothes" can refer broadly to any act that "alter[s]" any "covering for the human body." *See* The Shorter Oxford English Dictionary on Historical Principles 291 (2d ed. 1939) ("Shorter Oxford") (defining "changing" to mean "to render different, alter"); Webster's New International Dictionary 507 (2d ed. 1948) ("Webster's Second") (defining "clothes" as "covering for the human body"). The surrounding text, moreover, refers to clothes changing that occurs "at the beginning or end of each workday" and is significant enough to be a subject of "bona-fide collective bargaining." 29 U.S.C. § 203(o).

This context makes clear that the "covering" contemplated by § 203(o) was the work outfit worn by an employee to be ready to work, and that the "alteration" contemplated was the activity of putting on or taking off this work outfit at the beginning and end of each day. The statutory text, moreover, draws

no distinction between donning and doffing different types of work outfits, or specific parts of a work outfit. Thus, "changing clothes" refers to the activity of putting on the entire outfit worn by an employee to be ready to work at the beginning of the day, and taking off that outfit at the end of the day.

The purpose of § 203(o) and its interaction with the broader statutory scheme only confirm this plain meaning. In 1949, industrial workers regularly donned and doffed a wide range of work outfits, which included items such as protective boots, leather and asbestos aprons, fire-resistant leggings and arm protection, heavy helmets, protective hoods, and respirators, all of which were referred to as "work clothes" when worn as part of a work outfit. Given the passage of the Portal to Portal Act only two years earlier, Congress was well aware of such work outfits, and the controversy over whether time spent donning these outfits at the beginning of each workday (and doffing these outfits at the end of the workday) should be part of the compensable workday.

Having enacted § 203(o) to allow collective bargaining over the compensability of such donning and doffing time, there is no basis to believe Congress would have distinguished between donning and doffing any of the individual parts of a work outfit, or between donning and doffing different kinds of work outfits. Congress would not have deemed it sensible for unions to bargain over the time spent changing into pants, but not over the time spent donning a hardhat, or flame-retardant pants. Moreover, any such distinction would have frustrated Congress's clear purpose of deferring to collective bargaining regarding whether time spent getting ready to work

by donning a work outfit was part of the compensable workday, and would have mired Courts in precisely the sort of fact-intensive judgments that § 203(o) was intended to avoid.

In fact, if Congress was more concerned with the donning and doffing of some outfits in particular, it was concerned primarily with the donning and doffing of the specialized and protective work outfits that were essential to industrial jobs. Where donning and doffing "ordinary" work clothes was merely "preliminary" or "postliminary" to work, it was *already* rendered non-compensable by the Portal to Portal Act. Even the Department of Labor's narrow 1947 interpretation of the Portal to Portal Act assumed that changing clothes would be non-compensable "under the conditions normally present." 29 C.F.R. § 790.7(g). Accordingly, if § 203(o) has any affect at all, it necessarily must apply to clothes changing that otherwise would be a principal activity. Indeed, Congress enacted § 203(o) as a direct response to the Department of Labor's suggestion that the Portal to Portal Act did not extend to principal "activities such as putting on *special* clothes [*e.g.*, to protect from chemical exposure] or washing." NAM Statement, *supra* at 394 (emphasis added).

Reading § 203(o) to encompass time spent donning and doffing any part of a work outfit also produces a clear, administrable rule. In most cases, it will be easy to apply because an item is generally either put on as part of the work outfit at the beginning of the day, or it is not. This clear rule eliminates the risk that courts will upend collective bargaining agreements and leaves unions and employers with

the flexibility to determine, in light of the best interests of the parties and the practicalities of the workplace, whether "hours worked" under the FLSA should include donning and doffing time. That, of course, was precisely what Congress intended when it enacted § 203(o).

II. Petitioners ask this Court to hold that § 203(o) does not apply to any clothes that are specially designed to be protective in the workplace. They appear to offer three reasons for this expansive limitation. First, they contend that when Congress used the term "clothes" in § 203(o), it was likely not contemplating specialized and protective work clothing. Second, and relatedly, they assert that specialized and protective work clothing is not the sort of clothing one "changes" into and out of. Third, they contend that excluding such clothing from the reach of § 203(o) would make the provision easier to administer.

These arguments are fundamentally misguided. Petitioners ignore that § 203(o) refers to the *activity* of "changing clothes"—donning and doffing the outfit worn by an employee to be ready to work—and instead focus on individual words in isolation from each other and the statutory context. Moreover, even on their own terms, Petitioners' arguments fail to offer any affirmative definition of "clothes." Instead, Petitioners seek to engraft an arbitrary exclusion for items that, although clearly clothing under any definition, are also specialized and protective.

That clothes are "protective" or "specialized" does not mean that they cease to be clothes. Specialized and protective clothes are common. They are

particularly common within the subset of clothes that are put on and taken off "at the beginning or end of each workday." 29 U.S.C. § 203(o). And they are the paradigm of clothes, the donning and doffing of which could be deemed "integral and indispensible" to industrial jobs. Excluding the changing of such clothes from the coverage of § 203(o), such that it is outside the reach of collective bargaining, would exclude precisely the class of activities targeted by Congress.

Petitioners attempt to justify their arbitrary limits on the statutory text by engaging in an extended discussion of hypotheticals—ranging from "tourists ask[ing] for directions to a clothes store," Petr.32, to magic cloaks, Petr. Br. 36 n.31, to "burn pressure garments" Petr. Br. 37-38—that ignores the context of § 203(o). But the fact that Petitioners' approach would exclude from § 203(o) precisely the class of clothes changing with which Congress was most concerned only highlights the importance of reading statutory text in light of "the specific context in which that language is used, and the broader context of the statute as a whole" *Caraco Pharm. Laboratories, Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). Congress was not thinking of magic cloaks when it enacted § 203(o); it was focused on the activity of donning and doffing work outfits, particularly those that were essential to heavy industrial jobs.

Petitioners also ignore statutory context when they argue that the verb "changing" excludes protective work clothes because such clothes are not "substituted" for other clothes. The function of §

203(o) makes clear that the phrase "changing clothes" refers to any donning and doffing of work outfits, and that it would be unworkable and arbitrary to limit § 203(o) to situations in which employees remove some clothing before donning those outfits. Under Petitioners' approach, whether or not an employee changed clothes would depend on the highly variable and utterly inconsequential question of what clothes he wore to work, and his personal choices regarding what garments to leave on under his work clothes. In all events, such a definition of "changing" does not even advance Petitioners' position: many workers, including employees at Gary Works, remove their street clothes before donning protective work clothing.

Finally, Petitioners' approach makes § 203(o) less administrable, not more. Petitioners create ambiguity in § 203(o) only by refusing to read the provision as a whole and asking what items, viewed in isolation and outside the context of § 203(o), resemble everyday clothes. They then urge an atextual exception for specialized and protective work clothes to avoid this ambiguity of their own creation. However, even assuming that it were appropriate for the Court to pursue administrability by engrafting arbitrary limitations onto a statute, Petitioners' approach would only make § 203(o) more ambiguous.

Excluding all protective work clothes from § 203(o) does nothing to define "clothes," but simply introduces the additional line-drawing problems of what clothing is "specialized" and "protective." Petitioners' approach thus departs from congressional intent while remaining no more administrable than the straw man Petitioners attack.

III. Even if the Court declines to read the term "changing clothes" in § 203(o) as applying to the activity of donning the entire outfit that the employee will wear to be ready to work (and doffing that outfit at the end of the workday), the items at issue in this case are still "clothes" under any definition. Two such definitions are possible.

First, one could define "clothes" according to its dictionary definition—as any "covering for the human body"—but simply apply that definition on an item-by-item basis. Under that definition, each of the items at issue in this case—the jackets, pants, boots, gloves, hoods, wristlets, and leggings described above—are clearly "clothes," as each is a "covering for the human body." The categorization of other parts of the work outfit worn at Gary Works—a respirator, hard hat, glasses, and earplugs—is no longer at issue in this case, because the courts below held that the time spent donning these items was either *de minimis*, or already compensated. However, these items are clearly "coverings for the human body" as well.

Second, one could conceivably attempt to define "clothes" on a case-by-case and item-by-item basis to include only items that an English speaker, unaware of any statutory context, might consider somehow similar to everyday, commonplace "clothes." Under that approach, as well, the pants, jackets, boots, gloves, hats, leggings, and wristlets are plainly clothes, as these items are not materially different from "ordinary" articles that an English speaker would readily describe as "clothes."

Although both of these alternative approaches depart from the text and purpose of § 203(o) (the second dramatically so), they at least offer a definition of the statutory term "clothes, while Petitioners' approach offers no definition of "clothes" at all.

ARGUMENT

I. "CHANGING CLOTHES" IN SECTION 203(o) REFERS TO THE ACTIVITY OF DONNING AND DOFFING THE ENTIRE OUTFIT WORN BY AN EMPLOYEE TO BE READY TO WORK.

When understood in light of the plain statutory text, structure, purpose, and history, the intent behind § 203(o) is obvious: to allow unions and employers to bargain collectively over the compensability of time employees spend putting on the entire outfit worn by an employee to be ready to work at the beginning of the day, and taking off that outfit at the end of the day.

A. The Statutory Text And Context Make Clear That "Changing Clothes" In § 203(o) Refers To The Activity of Donning And Doffing The Entire Outfit Worn By An Employee To Be Ready To Work.

It is a fundamental rule of statutory construction (and indeed language), that "a single word cannot be read in isolation." *Smith v. United States*, 508 U.S. 223, 233 (1993). *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole."). Likewise, in assessing the scope of a statute, one must read the text in light of

"the specific context in which that language is used, and the broader context of the statute as a whole." *Caraco Pharm. Labs.*, 132 S.Ct. at 1680 (quoting *Robinson*, 519 U.S. at 341).

These principles are particularly important in this case, as reading the statutory text in context and as a complete sentence eliminates any doubt regarding congressional intent.

As a matter of context, it is important to recognize that § 203(o) allows collective bargaining over the compensability of time spent on the *activity* of changing clothes, not the compensability of wearing specific objects. The entire statutory framework that § 203(o) modified dealt with time spent on different types of activities. Thus, although the Act did not contain a definition of "work," the Court had initially defined the concept of work as any "*physical or mental exertion* … controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.*, 321 U.S. at 597-98 (emphasis added). In responding to this definition, the Portal to Portal Act eliminated liability on account of "*walking, riding, or traveling* to and from the actual place of performance of *the principal activity or activities*" as well as "*activities* which are preliminary to or postliminary to said *principal activity or activities*." 29 U.S.C. § 254(a) (emphasis added).

Against this statutory background, Congress enacted § 203(o) to permit a union and employer to bargain over the compensability of any "*time spent in changing clothes* …at the beginning or end of each

workday." (Emphasis added).[6] Thus, it could not be clearer that, in enacting § 203(o), Congress was focused on allowing collective bargaining over the compensability of the activity of changing clothes, not the objects that the employee was wearing.

What, then, did Congress mean when it referred to the activity of "changing clothes…at the beginning or end of each workday?" As an abstract matter, dictionary definitions show that the phrase "changing clothes" is extremely broad. When Congress enacted § 203(o), the term "clothes" was consistently defined (and is still defined) to include any "covering for the human body." Webster's Second at 507.[7] And the primary dictionary definition of "changing" was "to render different, alter," Shorter

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[6] Section 203(o) also refers to the *activity* of "washing."

[7] *See also* Shorter Oxford at 327 (defining "clothes" as "[c]overing for the person"); The New Century Dictionary of the English Language 271 (1944) ("New Century") (defining "clothes" as "[g]arments or coverings for the body"); The American College Dictionary 228 (1949) (defining "clothing" as "garments collectively; clothes; raiment; apparel" and "a covering"); Webster's Third New International Dictionary 428 (1986) ("Webster's Third) (defining "clothes" as "clothing," and "clothing" in turn as "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time").

Oxford at 291.[8] Thus, the phrase "changing clothes," in the abstract, encompasses any act that "alter[s]" a "covering for the human body."

But § 203(o) does not simply refer to "clothes" or "changing clothes" in isolation. Rather, it refers to the activity of "changing clothes … at *the beginning or end* of each *workday*." 29 U.S.C. § 203(o) (emphasis added). And it contemplates "changing clothes" that is significant enough to be a subject of a "collective-bargaining agreement applicable to the particular employee." *Id.*

These surroundings make clear that the "covering" contemplated by § 203(o) was the work outfit worn by an employee to be ready to work, and that the "alteration" contemplated was the activity of putting on or taking off this work outfit at the beginning and end of each workday. *See* Webster's Third at 1601 (defining "outfit" to mean "wearing apparel with accessories designed to be worn on a special occasion

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[8] *See also* Webster's Second at 448 (defining "change" as "[t] alter; to make different"); The American College Dictionary 201 (1949) (defining "change" as "to make different; alter in condition, appearance, etc."); New Century at 236 (defining "change" as "to make different; alter in appearance, condition, etc."); Webster's Third at 373 (defining "change" as "to make different in some particular but short of conversion into something else").

or in a particular situation or setting"). Thus, "changing clothes" in § 203(o) refers to the activity of donning and doffing the outfit worn by an employee to be ready to work.

Nor does the text of § 203(o) draw any distinction between changing into "ordinary" work outfits versus other outfits, such as those that are specialized or protective, or otherwise integral and indispensable to safely performing a principal work activity. Congress could easily have inserted a limiting modifier before "clothes." But it did not. *Cf. Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164, 177 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."); *Taylor v. United States*, 495 U.S. 575, 597 (1990) ("[I]f Congress had meant to include only an especially dangerous subclass of burglaries as predicate offenses, it is unlikely that it would have used the unqualified language [it chose].").

As a result, the unqualified phrase "changing clothes…at the beginning or end of each workday" is as broad as the various permutations of possible work outfits and donning and doffing procedures. Those permutations, in turn, reflect the myriad outcomes of collective bargaining between employers and employee representatives regarding the outfits that are necessary and appropriate in light of the practical realities of each workplace.

For example, in 1949, agencies and experts described a wide array of industrial work outfits, including many specialized and protective items (and,

not surprisingly, referred to these outfits as "work clothes" and protective "clothing.").

For example, in setting "Minimum Standards for the Safety and Health of Workers in Manufacturing Industries," the Department of Labor stated that:

> Suitable types of protective clothing in good condition shall be furnished to workers exposed to injury hazards from physical contact with materials, such as goggles for protection against flying objects or metal splashes, safety hats or helmets, and safety shoes for protection against falling objects, fire-resisting leggings for protection against molten metal, leather or asbestos aprons for protection against fire, gloves for protection against sharp edges, splinters or electric shocks, etc.

Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Issue 616, pp.309-11 (1936).[9]

In a later publication, the Department of Labor described "Practical Work Clothing for Women" to include "[s]afety hats," "gloves," "special safety shoes," "[l]eggings, spats, and aprons," a "special foot protector for girls, covering the ankle and top of the foot" and "[g]oggles." United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor

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[9] *available at* http://goo.gl/kd1uo.

Statistics, Vol. 1, 525-26 (1941).[10] *See also* Department of Commerce, United States Bureau of Mines, *Protective Clothing In The Mining Industry* (1933) (describing "protective clothing in the mining industry" as including "goggles," protective hats made from "hard insulating material" and "other types of protective clothing" including "gloves, leggings or high-cut boots, and safety belts."); R.M. Little, *Protective Clothing for Men*, Safety Fundamentals 28-32 (1919)[11] ("Protective Clothing for Men") (describing "special protective clothing in industry" to include "asbestos gloves or mitts," "heavy gauntlet rubber glove[s]"; "heavy helmets," heat resistant leggings made of "chrome leather [or] asbestos," "safety belts," and "protective mask[s] … worn by iron and cinder men" that were "made of wire cloth with adjustable cloth cap, and a full fireproof apron [*i.e.*, a hood] extending over the chest and protecting the neck."); J.T. Carpenter, *Working Clothes*, Factory, The Magazine of Management 402 (January 1914)[12] ("Working Clothes") (describing various "Working Clothes" used in manufacturing including "[s]teel bradded leather aprons," "special suits and shields for sand-blast operators," "respirators for workers in cotton mills," "leather leggings," and "special wearing apparel to meet special conditions").

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[10] *available at* http://goo.gl/yPz0C.

[11] *available at* http://goo.gl/7uldd.

[12] *available at* http://goo.gl/XzQqj.

As this Court has stated "time and again":

> courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "'judicial inquiry is complete.'"

Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461-62 (2002) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)).

When read in context as a complete sentence, § 203(o) unambiguously refers to the activity of donning and doffing the entire outfit worn by an employee to be ready to work.

B. The Purpose of § 203(o) And Structure Of The FLSA Confirm That Congress Intended "Changing Clothes" To Refer To The Activity of Donning and Doffing The Entire Outfit Worn By An Employee To Be Ready To Work.

Congress enacted § 203(o) only two years after it had enacted the Portal to Portal Act in response to "one of the greatest legal-economic controversies in American history." Linder, *supra*, at 54 (internal quotation marks omitted). As a result, Congress was familiar with the specialized and protective work outfits described above and worn in heavy industries that gave rise to the portal to portal controversies in industries such as mining and manufacturing. *See supra* at 3-5. Congress was also aware of the operation of the Portal to Portal Act, and its goal of allowing employers to exclude from the compensable workday time spent getting ready to work, as opposed to engaged in productive work.

Notwithstanding the Portal to Portal Act, however, the Department of Labor issued a guidance stating that donning and doffing some essential work outfits, and certain washing, might require compensation. In response, Congress enacted § 203(o), which empowers unions and employers *in all cases* to bargain over whether these activities will be excluded from the "hours for which an employee is employed." 29 U.S.C. § 203(o).

In light of this purpose, there is no basis to distinguish between any of the individual parts of a work outfit or between different kinds of work outfits. That is particularly clear for three related reasons.

First, there is no reason to think that Congress in 1949 deemed it sensible for unions to bargain over the compensability of putting on some parts of a work outfit, but not others. Congress would not have allowed unions to bargain over the compensability of putting on a jacket, but not a belt, or a hardhat. Nor would Congress have distinguished between changing into work outfits that are specialized and protective and changing into work outfits that are not. The purpose of § 203(o) was to allow the parties best situated to describe the work outfit (and who had historically dealt with the issue in the course of collective bargaining) to negotiate and to agree on whether the compensable workday would include the time associated with donning and doffing the outfit worn by employees to be ready for work at the beginning of the workday. Limiting § 203(o) to putting on and taking off only some parts of the outfit or to donning and doffing only "ordinary" work outfits would substantially undermine that purpose.

Second, distinguishing between donning and doffing different parts of a work outfit or different types of work outfits would mire courts in precisely the sort of fact-specific judgments that Congress intended to leave to the collective bargaining process. Section 203(o) does not directly preclude compensation for any particular changing (or washing) time but, rather, reflects a judgment that the practical implications of compensating for such time in industrial workplaces are complex and varied. "[E]mployers and employee representatives can tailor solutions at the bargaining table to fit their particular circumstances and … negotiating parties can modify those solutions to address changing conditions." *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 218 (4th Cir. 2009).

For example, employees may be willing to trade off compensation for clothes changing and washing time in exchange for a higher hourly wage as well as the flexibility of not having to be "on the clock" while in the locker room, the shower, or traveling to their work stations. Indeed, Petitioners' union appears to have struck just such a bargain in this case. *See supra* at 12 & n.3. And employers would likely prefer this arrangement since having employees on the clock during these times could create difficult monitoring and enforcement problems. "Taking this issue out of the give-and-take of the collective-bargaining process and putting it in courts or agencies could preclude such flexible and mutually preferable agreements." *Sepulveda*, 591 F.3d at 218. And "courts and agencies would find themselves in a morass of difficult, fact-specific determinations if

they were ultimately charged with deciding whether and how much of this time was compensable." *Id.*

Third, although § 203(o) by its terms applies to all instances of "changing clothes," it is clear from the face of the Portal to Portal Act, and the 1947 Wage and Hour Division guidance, that § 203(o) was *especially* targeted at the donning and doffing of specialized and protective work outfits.

The Portal-to-Portal Act *already* precluded compensation for preliminary and postliminary activities, even without affirmative agreement from a union. *See supra* at 4-5. Thus, any time spent changing into a *non-specialized* outfit that was *not* a direct requirement of the job was already non-compensable. *See* 29 C.F.R. 790.7(g) (stating that changing clothes and washing up "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities").

Accordingly, if § 203(o) were intended to have any effect at all, it was intended to apply to the donning and doffing of work outfits that might be deemed "integral and indispensible" to an employee's productive work. As this Court noted in *Steiner v. Mitchell*, the "clear implication" of § 203(o) "is that clothes changing and washing, *which are otherwise a part of the principal activity*, may be expressly excluded from coverage by agreement." 350 U.S. 247, 255 (1956) (emphasis added). Any contrary reading would violate the "canon that statutes should be read to avoid making any provision 'superfluous, void, or insignificant.'" *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Of course, outfits that are essential to the performance of industrial jobs often differ from those worn on the street. In particular, a great deal of the outfits that are peculiarly required by industrial jobs include safety clothing (which may or may not be similar to street clothes). *See supra* at 28-30. Such items vary widely. But unless Congress believed § 203(o) would be largely redundant, it intended "changing clothes" to include the donning and doffing of this category of work outfits.

The legislative history further confirms that § 203(o) was directed at donning, doffing, and washing that otherwise might have been deemed principal activities. As described above, *supra* at 5-7, the Wage and Hour Division issued a guidance in 1947 suggesting that "[w]ashing up after work, like the changing of clothes" could be "so directly related to the specific work [of] the employee"—such as where "chemical plant[] workers are required to put on special clothing" to protect themselves from workplace hazards—that they would not qualify as a preliminary or postliminary activity. 29 C.F.R. §§ 790.7(g), 790.8(c); 93 Cong. Rec. 2297-98. Employers lobbied Congress to eliminate this potential source of liability. *See e.g.* Bakers Statement, *supra* at 1567, ("We feared then that this novel nomenclature—'preliminary', 'postliminary,' and 'principal' activities—would not prevent a recurrence of the extensive unintended liabilities at which the act was directed…. Our fears unhappily are supported by the subsequent 'interpretative bulletin' of the Wage and Hour Division.").

Section 203(o) was a direct response to the possibility recognized by the Wage and Hour Division

guidance that clothes changing could be "integral and indispensible," and hence compensable. Employers expressly identified the guidance as their reason for seeking the amendment. *Id.*; NAM Statement, *supra* at 394. When Representative Herter introduced the amendment that would eventually become 203(o), he made specific reference to the concerns of employers that "*some representative of the Department of Labor* may step into one of those industries and say … [that] the employer must pay for back years the time everybody had considered was excluded as a part of the working day." 95 Cong. Rec. 11,210 (emphasis added). And Congress also enacted in the same package of amendments a provision expressly invalidating "[a]ny order, regulation, or interpretation of the Administrator of the Wage and Hour Division" if it was "inconsistent with the provisions of the [amendments]." 63 Stat. 920 (1949).

In sum, it could not be clearer that Congress used the phrase "changing clothes" to refer generally to the activity of donning and doffing any outfit worn to be ready to work, but *particularly* the donning and doffing of specialized and protective work outfits that otherwise could have been deemed a principal activity. The Court should accordingly follow the broad meaning of "changing clothes" mandated by the statutory text, context, and purpose, and hold that § 203(o) encompasses the donning and doffing of any outfit worn by an employee to be ready to work.

C. Interpreting § 203(o) To Encompass The Activity of Donning And Doffing The Entire Outfit Worn By An Employee To Be Ready To Work Provides A Clear, Easily Administered Rule, Consistent With Congress's Goal Of Deference To Collective Bargaining.

Applying the plain meaning of § 203(o) also produces an easily administered rule:

> "[C]hanging clothes" as used in § 203(o) encompasses the activity of donning the work outfit that the employee will wear so as to be ready for work at the beginning of the workday (and the doffing of that work outfit at the end of the workday).

It will generally be straightforward to determine when an employee is engaged in the activity of changing into his work outfit to be ready to work. Conversely, the activities that fall outside § 203(o) are also easy to determine. Certainly § 203(o) would not permit unions and employers to agree to exclude time spent by employees starting or operating machinery, and it is difficult to imagine anyone arguing otherwise. Employees put on each of the items at issue in this case in a locker room, as part of the outfit worn to be ready to work, before going to their work stations. The cloth jackets and pants, steel-toed boots, gloves, hoods, wristlets, and leggings all cover employees' bodies and must be worn by employees (depending on their duties) to be ready to work. As acknowledged in the 2008 BLA, between Petitioners' union and U. S. Steel, the parties have engaged in collective bargaining over "donning and doffing" the work outfit, which "include[ed] such

items as flame-retardant jacket and pants, metatarsal boots, hard hat, safety glasses, ear plugs, and a snood or hood." R.106-4 at 392.

Moreover, although the activities of donning and doffing hard hats, safety glasses, and earplugs at Gary Works is not at issue in this case,[13] those items are part of the work outfit that an employee will wear to be ready for work and, accordingly, are also within the scope of § 203(o). The simplicity of this analysis demonstrates the administrability of the foregoing rule.[14]

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[13] The district court held, and the Seventh Circuit agreed, that the time spent donning hard hats, safety glasses, and earplugs was *de minimis*. Petitioners did not seek certiorari on these points. Pet. 3. Moreover, the district court concluded based on ample evidence in the record that respirators are not donned at the beginning of the day, but, rather, are donned during time for which employees are already compensated. Pet. App. 21a; J.A. 80. That is not surprising since it would presumably be uncomfortable and unnecessary to wear a breathing apparatus during one's walk from a locker room to a work station. Accordingly, respirators are donned and doffed during time that is *already* compensated.

[14] Some parts of the work outfit might not themselves be "coverings for the human body," but putting them on would still be part of the *activity* of "changing clothes" under 203(o). For example, cufflinks are not a "covering for the human body" but putting on cufflinks would obviously be part of "changing clothes" for an employee who wore french cuffs. Similarly, the activity of changing

Reading § 203(o) to encompass the activity of donning and doffing the entire work outfit thus creates a clear outer limit and empowers unions to engage in collective bargaining regarding the compensability of donning and doffing within that limit. No employee would necessarily go uncompensated for clothes changing covered by § 203(o). Rather, the parties best positioned to address the complexities of their particular workplaces would be free to negotiate the terms that best suit the interests of employees and employers. And courts would be less likely to become embroiled in second guessing these judgments. "This sort of fact-intensive determination has classically been grist for the mill of collective bargaining, and Congress ensured that employers and unions could keep it that way by enacting Section 203(o)." *Sepulveda*, 591 F.3d at 211.

As Representative Herter explained, because "what is to constitute a working day" in a unionized workplace has been "carefully threshed out between the employer and the employee," § 203(o) was intended to "give sanctity once again to the collective-

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clothes for a basketball referee includes not only donning a striped shirt, but also putting a whistle around the neck. Generally, the time spent specifically on donning and doffing such accessories is likely to be *de minimis*, but such items are often an essential part of the work outfit. In this case, such items are no longer at issue in any event. *See supra*, at 38, n.13.

bargaining agreements as being a determining factor in finally adjudicating that type of arrangement." 95 Cong. Rec. 11,210.

II. PETITIONERS' ASSERTION THAT "CLOTHES" DOES NOT INCLUDE PROTECTIVE WORK CLOTHING ARBITRARILY NARROWS THE STATUTORY TEXT, IGNORES THE CONTEXT AND PURPOSE OF § 203(o), AND WOULD CREATE AN UNWORKABLE STANDARD.

Petitioners ask this Court to hold that § 203(o) should not apply to the donning and doffing of "clothes" that are specially designed to be protective in the workplace.

As a threshold matter, Petitioners improperly attempt to analyze the words "changing" and "clothes" separately and in isolation, without addressing the clear meaning of the singular phrase "changing clothes" in context. That approach is fundamentally misguided, *Smith*, 508 U.S. at 233, and causes Petitioners to ignore that § 203(o) does not focus on the compensability of wearing particular *items* (*i.e.*, "clothes") but, rather, focuses on the compensability of a particular *activity*—"changing clothes … at the beginning or end of each workday." Petitioners do not even attempt to argue that the process of donning and doffing the jackets, pants, boots, gloves, hoods, wristlets, and leggings at issue in this case is not part of the *activity* of "changing clothes…at the beginning or end of each workday."

Moreover, even on its own terms, Petitioners' atomistic approach provides no affirmative definition of "clothes," arbitrarily departs from the statute's plain text, ignores the purpose of § 203(o), and would create an unworkable standard.

A. Petitioners' Argument That "Clothes" Excludes Protective Work Clothes Is Contrary To The Plain Text Of § 203(o).

As shown above, the plain, ordinary definition of "clothes" encompasses any "covering for the human body." *See supra* at 26 & n.6. In an attempt to avoid this definition, Petitioners simply attempt to engraft a limitation on the meaning of the word "clothes" as used in 203(o), asserting that the provision does not apply to the donning and doffing of "protective clothing." Petr. Br. 49-50. Yet, although Petitioners argue at length that clothing can have different meanings in different contexts, *none* of those various contexts would support defining "clothes" to exclude all protective clothes. Some clothing may not be protective. But a vast amount of clothing is. As the Court of Appeals noted, "[p]rotection-against sun, cold, wind, blisters, stains, insect bites, and being spotted by animals that one is hunting—is a common function of clothing." Pet. App. 6a. Accordingly whether or not something is protective simply does not define whether it is clothes. "The adjective 'protective' does not deprive 'clothes' of their fundamental character." *Andrako v. U. S. Steel Corp.*,

632 F. Supp. 2d 398, 410 (W.D. Pa. 2009) (internal quotation marks omitted).[15]

Perhaps recognizing the oddity of asserting that clothing cannot be designed and worn for protection, Petitioners retreat to the position that the term "clothes" cannot include items that "are used to protect an employee against *workplace* hazards and are designed to provide such protection." Petr. Br. 17. (emphasis in original). In other words, although "ordinary" protective clothes are obviously clothes, *specialized* protective clothes are not.[16]

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[15] Indeed, even the sources cited by Petitioners undermine that position. For example, Petitioners note that Webster's Second defines clothes as "covering for the human body; vestments; venture; a general term for whatever covering is worn, or is made to be worn *for decency or comfort*." Petr. Br. 33 (quoting Webster's Second New International Dictionary, 507 (1948)). But what is protective clothing but clothing that is worn "for comfort?" Sunburn, frostbite, blisters, and industrial accidents are uncomfortable; we protect against them for our comfort. *See also* Petr. Br. 33 ("'Clothes ... *defend* us from the inclemencies and vicissitudes of climate and season …'") (quoting Aileen Ribiero, The Art of Dress: Fashion in England and France 1750-1820, 3 (1995)) (emphasis added).

[16] Petitioners avoid the word "specialized," but this is the unavoidable implication of their argument. Petitioners cannot contend that specialized protective clothes remain "clothes" in other non-work contexts, and that only

Petitioners attempt to support this distinction through an extended discussion of hypotheticals regarding what "we *most often* describe as clothes." Petr. Br. 19 (emphasis added). These general hypotheticals—involving everything from shopping tourists (Petr. Br. 32), to a person alighting from a shower (*Id.* at 33), to magic cloaks (*Id.* at 36, n.31)—have nothing to do with the specific context of § 203(o). But the distinction between clothes and specialized and protective clothes fails even as a conceptual matter.

Clothes are often designed or tailored for a particular use, yet this specialization does not mean they are no longer clothes. Pants are pants, whether they are camouflaged, or waterproofed, or made from aluminized fabric, or sprayed with a flame-retardant chemical. Like the adjective "protective," the adjective "specialized" does not deprive clothes of their essential character. As a result, Petitioners' position cannot be reconciled with common usage of the word "clothes." As shown above, *supra* at 28-30, it is both natural and common to refer to specialized and protective clothes as "clothes."

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specialized and protective *work* clothes cease to be "clothes." If specialized work clothes are not "clothes," there is no principled basis to argue that specialized hiking clothes, or skiing clothes, or fishing clothes remain "clothes." Thus, Petitioners' argument must be that clothes cease to be clothes whenever they are specialized and protective in *any* context.

When the term "clothes" is understood in light of "the broader context of the statute as a whole," *Caraco Pharm. Labs.*, 132 S. Ct. at 1680, Petitioners' distinction is even more untenable. As described above, § 203(o) contemplates the donning and doffing of work clothes that could be deemed integral and indispensable to a job. When asked to describe what "clothes" are so essential in an industrial setting that a worker could not start work without them, one would surely think of specialized protective clothing.[17]

Petitioners' suggestion that the answer would have been different in 1949, Petr. Br. 44, is wrong. Workers in 1949 wore precisely the same sorts of specialized and protective outfits as the clothing at issue in this case. *See supra* at 28-30. *See also Protective Clothing for Men*, *supra* at 32 (1919) ("The use of special protective clothing in industry is increasing"); *Protective Clothing in the Mining Industry* at 1 (1933) ("[T]he idea [of protective clothing in the leading industries] has grown rapidly").

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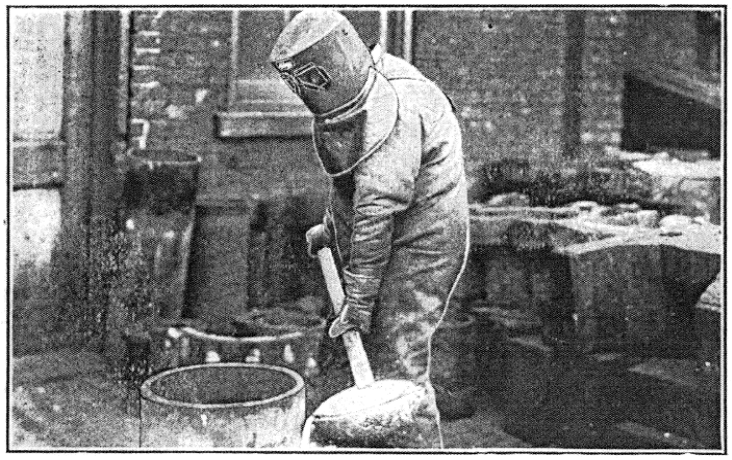
[17] Section 203(o) also refers to changing clothes in tandem with "washing," and when Congress in 1949 thought of work clothes used in industrial jobs that required washing up after work, it certainly would have contemplated specialized and protective work clothes. *See* Pet. App. 6a ("[W]orkers who wear work clothes for self-protection in a dangerous or noxious work environment are far more likely to require significant time for washing up after work than a waiter.").

Indeed, publications at the time described the following work outfits (and referred to them as "clothes," "garments," and "clothing"):

From the Collections of the Safety Institute of America

ASBESTOS GARMENTS FOR THE PROTECTION OF WORKERS EXPOSED TO THE HAZARDS OF MOLTEN METAL AND HIGH TEMPERATURES



MASK OF WIRE CLOTH WITH ADJUSTABLE CAP AND APRON OVER NECK AND CHEST FOR PROTECTION IN BABBITTING AND SIMILAR OPERATIONS

Protective Clothing for Men, *supra* at 38, 40.

FIGURE I: *Steel-bradded leather aprons are worn by casting grinders at the American Steel Foundries to protect the abdomen from vibrations*

Working Clothes *supra* at 402.

Special protective clothing is of course more technologically advanced now than in the past. But that hardly places it outside the definition of "clothes" or any analysis of the scope of § 203(o).

Petitioners also engage in a tortured chain of semantic speculation in an attempt to establish the bizarre proposition that the term "clothes"

necessarily excludes "protective clothing." These arguments are plainly flawed.

For example, Petitioners note that, in some electronic databases, the term "protective clothing" is more common than the term "protective clothes" and ask the Court to infer that the phrase "changing clothes" necessarily excludes "protective clothing." Petr. Br. 48-49. But anything that is "clothing" is obviously also "clothes"; the term "clothes" includes all forms of "clothing." *See, e.g.*, Websters Second (defining "clothes" to mean "clothing"). Congress's word choice simply reflects that, even if one is specifically contemplating protective clothing, it is still awkward to refer to employees "changing clothing." Indeed, if one employs Petitioners' own methodology, a Westlaw search of all federal cases for "changing clothing" returned only 15 results, while the same search for "changing clothes" (excluding cases that discuss the FLSA) returned 274 results.[18]

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[18] Petitioners' argument reflects, once again, the error of reading the word "clothes" in isolation rather than focusing on the singular phrase "changing clothes." Only by reading individual words in isolation can Petitioners suggest that it was odd for Congress to have chosen the word "clothes" as part of the phrase "changing clothes." The prevalence of "changing clothes" rather than "changing clothing" may reflect that it is unusual, and therefore sounds odd, for two neighboring words to both end in "ing." Whatever the reason, however, the everyday phrase "changing clothes" is clearly the natural word

Petitioners next claim that "dictionaries in fact treat the phrases 'work clothes' and 'protective clothing' as nonoverlapping" because Webster's Third and two other modern dictionaries define "blue collar" as a involving duties that call for "work clothes *or* protective clothing." Petr. Br. 50 (emphasis added by Petitioners). The term "blue collar" has no connection to the statutory text, context, or legislative history of § 203(o), and is therefore not instructive of the meaning of the term "changing clothes" in this case. But Petitioners' definition fails even on its own terms. The same dictionaries cited by Petitioner note that "or" can be used to "indicate … the *equivalent or substitutive* character of two words or phrases" *See* Webster's Third at 1585 (emphasis added). And that is precisely the manner in which these dictionaries use "or" in their definitions—listing two overlapping or synonymous terms to flesh out the meaning. *See, e.g.*, Webster's Third at 1822 (defining "protect" as "to cover *or* shield from that which would injure, destroy, *or* detrimentally affect) (emphasis added); *id.* at 1155 (defining "industry" to mean "diligence in an employment *or* pursuit; especially: steady *or* habitual effort") (emphasis added). Thus, assuming *arguendo* that the modern definition of "blue collar" were relevant to the meaning of § 203(o), that definition only confirms that the term "work clothes" is

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choice to describe donning and doffing protective work clothes.

naturally associated with the term "protective clothing."

In short, Plaintiffs ignore the plain meaning of § 203(o) when read as an integrated whole—"changing clothes … at the beginning or end of each workday." Rather than recognizing that this text refers to the *activity* of donning and doffing a work outfit, they attempt to engraft arbitrary exclusions onto the isolated word "clothes." As described below, the resulting approach is not only an untenable reading of the statutory text, but is also irreconcilable with the purpose of § 203(o).

B. Petitioners' Proposed Exclusion Of Protective Work Clothes Is Contrary To The Purpose of § 203(o).

Petitioners offer no explanation for why Congress would have wanted to distinguish between donning and doffing special protective clothes as opposed to non-specialized, non-protective clothes. As described above, there is no reason to believe Congress would have wished unions to be able to engage in collective bargaining over changing time for some parts of a work outfit, but not others. *See supra* at 32. Moreover, distinguishing between certain work outfits, or certain parts of work outfits would have undermined Congress's goal of deferring to collective bargaining over whether time spent changing to get ready for work should be part of the compensable workday. *Id.* at 33-34.

In fact, Petitioners' approach gets the purpose of Congress precisely backwards. In enacting § 203(o), Congress was targeting clothes changing that could be deemed "integral and indispensible" to industrial

jobs. In particular, it was specifically addressing the possibility, identified in the Wage and Hour Division guidance, that the Portal to Portal Act would not eliminate the obligation to compensate employees for "activities such as putting on *special* clothes … before or after work." NAM Statement, *supra* at 394 (emphasis added); *see also* 29 C.F.R. § 790.8(c) (citing statement of Senators Cooper and McGrath that employers would have to compensate "chemical plant[] workers [who] are required to put on *special* clothing and to take off their clothing at the end of the day") (emphasis added). As a result, Congress was clearly contemplating the donning and doffing of specialized and protective work clothes when it addressed the activity of "changing clothes" so as to be ready for work.

Petitioners' contrary reading would lead to the surprising proposition that Congress, legislating in 1949, had drafted § 203(o) so that it did *not* apply to the primary industries that gave rise to the portal to portal controversies. As described above, workers in the mining and metal industries wore special protective clothing. *See supra* at 28-30. Yet, under Petitioners' view, § 203(o) would exclude these industries and apply only to industries such as baking.

If Congress had intended to distinguish between different types of "indispensible clothes", and create a special rule for heavier protective clothes in the steel industry, it would have made some reference to this distinction. *Cf. Central Bank of Denver, NA*, 511 U.S. at 177. But that distinction cannot be found anywhere in the text or legislative history of § 203(o), or in the text or legislative history of the Portal to

Portal Act. Instead, the crucial distinction discussed in Congress during the two years leading up to § 203(o) was the one identified in the text of the Portal to Portal Act—that between changing clothes as a preliminary or principal activity. Statement of Senator Cooper, 93 Cong. Rec. 2297 (1947); Colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350 (1947).

Petitioners at times imply that employers should not be permitted to avoid compensation for activities that employees cannot avoid. *See* Petr. Br. at 5-6 (emphasizing that the clothing at issue in this case is required by various regulations as well as the BLA, and that "[a] worker's failure to wear the required PPE can and does lead to disciplinary action."). Yet this is the precise policy intuition that was embodied in the Wage and Hour Division's 1947 guidance, and which was *rejected* by § 203(o). The fact that some work outfits may be essential, unavoidable, or specialized is the very reason Congress enacted § 203(o), not a basis for arbitrarily limiting it.

Petitioners and their *amici* ignore this same point when they rely on sources that distinguish between protective work clothes required by the job and "everyday clothing," Petr. Br. 57. For example, Petitioners suggest that "clothes" in § 203(o) should be defined based on OSHA regulations (promulgated 25 years after § 203(o)) that "delineate[] the types of protective items that a covered employer must provide [at the employer's cost] to safeguard workers against those hazards." Petr. Br. 57-58 (citing 29 C.F.R. part 1910, subpart I). As discussed, however, the fact that protective clothing is so related to special workplace hazards that OSHA determines

that such protective clothing should be paid for by the employer means it was *precisely* what Congress intended to cover in § 203(o).

Similarly, Petitioners' *amici* rely on decisions of the War Labor Board in 1944 and 1945. Union Amicus at 14-15. As a threshold matter, there is not a shred of evidence that Congress considered these decisions when it enacted the 1949 amendments to the FLSA. To the contrary, every discussion in the legislative history of § 203(o) identifies the Wage and Hour Division's 1947 guidance as the motivation for the provision. More, fundamentally, however, *amici* fail to explain why Congress would have passed § 203(o) in order to allow unions to bargain only over the "'purely personal activity' of changing from 'ordinary street clothes' to work clothes." *Id.* (quoting *Big Four Meat Packing Cos.*, 21 War Labor Rep. 652, 672 (1945)). If that were Congress's aim, there would have been no need to enact § 203(o) at all.[19]

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[19] For the same reason, the guidance letter issued by the Department of Labor in 2010 clearly misinterprets § 203(o). *See* U.S. Dep't of Labor, Administrator's Interpretation No. 2010-2, 2010 WL 2468195 (June 16, 2010). That guidance concludes that § 203(o) does *not* apply to the donning and doffing of any clothes that are "required by law, by the employer, or due to the nature of the job." *Id.* That rule would render §203(o) a complete nullity, as activities that are not "required by law, by the employer, or due to the nature of the job" are not even "work" under the broad definition of that term established

The closest Petitioners come to a rationale for their distinction between specialized protective clothes and other clothes that could be deemed integral and indispensible is to invoke the maxim that "exemptions from the [FLSA] are to be narrowly construed" against employers. *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993); Petr. Br. 52. But § 203(o) is a *definitional* provision, not an "exemption," and, in any event, the canon of narrow construction cannot justify Petitioners' position here.

First, even if it were proper to construe the definitional provisions of the FLSA narrowly in deciding a close case, this is not a close case. No canon of interpretation justifies the atextual and arbitrary exclusion Petitioners seek.

Second, putting a thumb on the interpretive scales is wholly inappropriate where, as here, Congress expressly narrows the scope of a general statute as a definitional matter. The canon cited by Petitioners has been applied only to the "exemptions" contained in § 13 of the FLSA, 29 U.S.C. § 213. Section 203(o) instead appears in the "definitions" section of the FLSA. And this Court has explicitly stated that the canon is "inapposite where, as here, we are interpreting a general definition" provision in the FLSA." *Christopher v. SmithKline Beecham Corp.*,

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by the Court prior to the Portal to Portal Act, let alone principal activities.

132 S. Ct. 2156, 2172 n.21 (2012). The canon is all the more inappropriate in this case given that § 203(o) was enacted by a later Congress and was part of a package of amendments aimed at confining the reach of the FLSA.

Third, even if it were appropriate to narrowly construe definitional provisions of the FLSA that restricted the statute's remedial purpose, a natural reading of § 203(o) does *not* undermine the FLSA's remedial goal—protecting individual employees who may lack bargaining power, *Barrentine*, 450 U.S. at 739. Section 203(o) does not deprive any employee of compensation; rather, it merely grants greater bargaining flexibility to union represented employees to address in a collective bargaining agreement the realities of their specific workplace.

Petitioners also claim that a statement of Representative Herter "pointed to the clothes-changing of bakery workers as the paradigm to which his legislation was addressed." Petr. Br. 46 (citing 95 Cong. Rec. 11,210). But the cited passage does not support that claim. As quoted above, *supra* at 8-9, the testimony merely states that the amendment would be helpful "[i]n the bakery industry, *for instance*." 95 Cong. Rec. 11,210 (emphasis added). Neither this statement, nor the testimony of the Bakers Association to which it refers, *see supra* at 6, 35 (let alone the statutory text) hints at any distinction between bakers changing into their work clothes and other industrial employees changing into theirs. Representative Herter's comments went well beyond the baking industry and argued for § 203(o) as a way "to give sanctity once again to the collective-bargaining agreements as being a determining factor

in finally adjudicating" the scope of the compensable workday. 95 Cong. Rec. 11,210.

Similarly, Petitioners' view finds no support in the fact that Congress enacted § 203(o) in favor of an earlier bill that would have allowed unions and employers to exclude any activity from the workday. That choice simply reflects a decision to limit § 203(o) to time spent donning and doffing a work outfit and washing—the specific activities that had been discussed in the Wage and Hour Division guidance and among industry groups, and had long been subject to collective bargaining. It does not, as Petitioners and their *amici* assume, mean that Congress wanted the amendment to be as narrow as possible, without regard to its text.

C. Petitioners' Suggestion That "Changing Clothes" Means Only "Substituting Clothes" Ignores The Primary Definition Of The Text, Conflicts With The Statute's Purpose, And Would Impose An Unworkable Rule.

Although the primary dictionary definition of "changing" is "to render different, alter," Shorter Oxford at 291, Petitioners suggest that "changing clothes" in § 203(o) is limited to situations in which an employee *substitutes* one set of clothes with another. Petr. Br. 22-28. Once again, however, Petitioners attempt to disregard the ordinary meaning of a statutory term where the context forecloses rather than supports their alternative definition.

It is entirely natural to refer to the donning and doffing of a *work outfit* as "changing" into and out of work clothes. A worker "changes" into and out of a

hazmat suit or heavy coat whether or not he removes another article of clothing.

Moreover, Petitioners' definition quickly becomes unworkable and nonsensical in practice. Petitioners presumably would not contend that an employee changes clothes only when he or she replaces *every* article of clothing with a different, corresponding article. Someone who changes out of his suit when returning from an office job is clearly "changing clothes" even if he does not replace his undershirt. Thus, Petitioners position must essentially be that, in order for a worker to "change" clothes, he or she must first remove at least *one* article of clothing.

Under that definition, however, whether donning and doffing is excluded from "hours worked" under § 203(o) would turn on the highly variable and utterly inconsequential question of whether a worker first removes an article of clothing. If a worker removes a sweatshirt or street shoes before putting on his work outfit, he would be changing clothes under Petitioners' definition. But if the same worker came to work in shorts, a t-shirt, and work boots, and donned his work outfit over this attire, his changing time would be considered beyond the scope of § 203(o).

Moreover, by focusing on the word "changing" in isolation—as opposed to the singular phrase "changing clothes" in its statutory context—Petitioners' approach would require intensive fact finding over which employees removed an article of street clothing, and on which days. And two workers who engaged in essentially the same activities could be paid differently if one of them wore a sweatshirt to

work and the other did not. That would be wholly arbitrary. There is no reason to think Congress would have intended employees to be in a different position under the Act based on whether they removed an article of clothing before donning their work outfit.

Perhaps recognizing that it would be unworkable and implausible to conclude that Congress meant "changing clothes" to mean "substituting clothes," Petitioners do not actually ask for the logical result of their position—a holding that reversal is warranted because, even if the items at issue were clothes, they were not "changed." Rather, Petitioners assert that the "clothes" in § 203(o) should not include specialized and protective clothes because such clothes in 1949 were "put on over a worker's clothes" and "generally only ordinary work clothing" would involve substitution of clothes. Petr. Br. 28.

This argument is equally flawed. First, as just demonstrated, Congress did *not* use "changing clothes" to mean substitute. Rather, Congress used the phrase to refer to the donning and doffing of work outfits, particularly the donning and doffing of work outfits that could be deemed integral and indispensable to the employee's job. Accordingly, there is no reason to interpret clothes to be limited to those items that are always substituted.

Second, Petitioners offer no citation for their claim that workers in 1949 did not remove some of their street clothes before donning protective work clothing (Petr. Br. 28), and that claim is inherently implausible. As shown above, a wide range of specialized and protective clothing was in use in

1949. *See supra* at 28-30, 45-46. Surely some workers, particularly those who wore warm jackets to the factory in winter, or worked in hot environments in the summer, stripped off some articles of clothing before donning their protective work clothes. Similarly, the record shows that many of the workers at the Gary Works remove their street clothes before changing into their work clothes, all of which had analogs in 1949.[20] Thus, even assuming that "changing" meant "substituting" to some degree, there is no basis for Petitioners' claim that only non-protective clothes are or can be substituted.

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[20] Employees at U. S. Steel often wear "greens" in place of street clothes; indeed, some workers wear them even when their position does not require it. R.85 at 339-40, 346. Some employees are also required to shower at the end of the day, or choose to do so for their own convenience, after which they dress in clean clothes not worn while working. For example, Petitioner Sandifer "always wears a nice shirt and tie and nice jeans and a hat [and] spends a good deal of time after his shift putting on this clothing." R.85 at 338. *See* also R.85 at 346 ("After changing, [Petitioner] Jenkins would put his personal clothes back on and leave the facility."); J.A. 83 (employees working at the Coke Plant are provided with a locker that provides, by way of a partition, for the separation of work clothes and street clothes"); R.85 at 372 ("In the event that [Stock Unloaders] elect[to wash up], and I think that most do, washing facilities and showers are provided"); J.A. 76-77 ("The Company provides over 50 wash houses and wash and locker facilities throughout the plant").

D. Petitioners' Approach Would Make The Meaning Of § 203(o) More Uncertain, Not Less.

A recurring theme of Petitioners' argument is that their exclusion of protective work clothes should be adopted because it reduces the ambiguity of the phrase "changing clothes." As described above, *supra* at 24-36 "changing clothes" as used in § 203(o) is *not* ambiguous—it plainly refers to the activity of donning and doffing the entire outfit worn by an employee to be ready to work. The ambiguity cited described by Petitioners is a result of failing to read § 203(o) in context as a complete sentence and instead asking what items an English speaker, *unaware of any context*, might consider somehow similar to *everyday, commonplace* "clothes." Petr. Br. 34-42. Even if this context-free, "everyday clothes" test were the only alternative, however, Petitioners' view would only add to the uncertainty.

Because Petitioners have done nothing to define "clothes," their position would still require a court to address whether an English speaker would consider items such as a hairnet, a chef's hat, or a tool belt to be sufficiently similar to everyday clothes. These items are not protective in the sense Petitioners use the term,[21] but Petitioners would likely contend that

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[21] A hairnet and a chef's hat do not necessarily protect the worker, but they could be said to protect the product or customer.

these items are not clothes. Thus, Petitioners' position that "clothes" are *not* specialized and protective clothes leaves unanswered the question of what "clothes" *are.*

Unlike a litigant who argues for one of several definitions on the ground that their definition would be easier to administer, Petitioners simply try to reduce the number of cases in which clothes must be defined by ignoring a large category of clothes. One could just as easily reduce the workload of courts by excluding from § 203(o) any clothes made of synthetic fibers, or clothes that are pink (presumably both of these were less common in 1949). Or one could only apply § 203(o) to cases filed on Mondays. But such arbitrary, counter-textual exclusions are not a proper means of avoiding interpretive questions.

Moreover, Petitioners' arbitrary limit does not even have the value of clarity that Petitioners promise. Unlike determining whether clothes are "synthetic" or "pink," it is not at all clear what clothes are specialized and protective enough to fall within Petitioners' exclusion. Are a pair of coveralls specialized and protective enough to cease being clothes when marketed for their durability and ability to protect from burns? Work pants with padded knees? A reflective jacket designed for workers repairing roads or working around mobile equipment? "Because many work clothes are protective to some extent, the distinction urged … by the employees would be difficult, if not impossible, for courts to administer in a consistent and coherent manner." *Sepulveda*, 591 F.3d at 215. Petitioners' position thus adds additional line drawing questions while leaving the definition of "clothes" unresolved.

This ambiguity is particularly untenable in light of the need for unions and employers to have clear ground rules for collective bargaining. The very purpose of § 203(o) was to allow the parties to negotiate and agree over whether the activity of "changing clothes" would be included as part of the compensable workday. By engrafting exceptions, limitations, and novel restrictions onto the statutory text, Petitioners approach would defeat not only this statutory purpose, but render the statute unworkable from a practical point of view.

As this Court has said:

> [W]here the words of a law … have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, *no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law*, until a judicial construction of those instruments had been obtained.

Green v. Biddle, 21 U.S. (8 Wheat) 1, 89-90 (1823) (emphasis added).

For the foregoing reasons, there is no justification for reading an atextual exception for specialized and protective work clothes into § 203(o). Rather, reading "changing clothes" to refer to the activity of donning and doffing the entire outfit worn by an employee to be ready to work is the only approach that provides a workable definition consistent with the text, structure, and purpose of § 203(o).

III. THE ITEMS AT ISSUE IN THIS CASE ALL FALL WITHIN § 203(o) UNDER *ANY* DEFINITION OF "CLOTHES."

As described in Part I, § 203(o) refers to the activity of "changing clothes"; specifically, donning the entire work outfit that the employee will wear so as to be ready for work at the beginning of the workday (and doffing that outfit at the end of the day). It is therefore not necessary or appropriate when applying § 203(o) to consider each individual part of the work outfit. *See supra* at 38-39 n.14.

However, if the Court declines to read "clothes" in § 203(o) as a part of the activity of donning a work outfit as a whole, there are only two approaches to defining the term "clothes."

As described above, Petitioners actually offer no definition of "clothes" at all, attempting instead to argue that certain clothes are *not* in fact "clothes." However, one alternative approach would be to define "clothes" according to its dictionary definition—as any "covering for the human body"—and simply apply that definition on an item-by-item basis. Thus, putting on any part of a work outfit that is a covering for the human body would be part of changing "clothes," but putting on parts of the work outfit that are not themselves a body covering would *not* be part of changing "clothes."

A second alternative would be to define "clothes" to include any item that an English speaker, unaware of any context, might consider somehow similar to everyday, commonplace "clothes." This approach would still include specialized and protective clothes, since no English speaker would think these

adjectives cannot describe clothes; however, it would limit clothes to those items that are intuitively similar to commonplace clothes.

Under either approach, the items at issue in this case would still be clothes. The record contains detailed descriptions, exemplars, and pictures of each of these items, J.A. 77-81, R.85 Ex. 4, R.85 at 262-265. Photographs from the record of the items at issue are reproduced below:


Metatarsal
Shoes

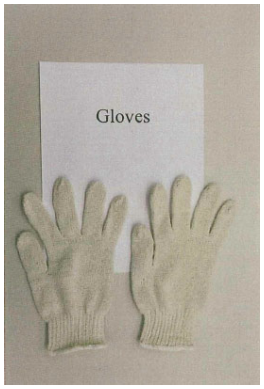

Snood


Wristlets


Leggings


Gloves


Gloves


Gloves

A. The Items In This Case Are All Clothes Because They Are All "Coverings For The Human Body."

For the same reasons that Congress intended "clothes" to refer to the entire work outfit, Congress would certainly have intended "clothes" to encompass any part of a work outfit that was itself a "covering for the human body." Nothing in the statutory text indicates that Congress intended to limit this broad, ordinary meaning. *See supra* at 28. And the statutory structure and purpose make clear that Congress, at a minimum, intended the term "clothes" to encompass specialized and protective work clothes, the donning and doffing of which was integral and indispensible to an employee's job. *Id.* at 34-36.

Moreover, just as it would be straightforward to determine whether an item is part of the outfit worn to be ready to work, it also would be straightforward to determine whether an item is worn as a "covering for the human body." And in all events, it is far more administrable than the approach urged by Petitioners. *Id.* at 37-40.

The jackets, pants, boots, gloves, hoods, wristlets, and leggings at issue in this case are obviously "coverings for the human body." Moreover, although the status of a respirator, hard hat, glasses, and earplugs are not at issue in this case, *supra* at 38 n.13, these items, too, are plainly "coverings for the

human body." Indeed, *every* circuit to have addressed this standard has recognized that items such as the clothes above fall within that definition.[22]

B. The Items In This Case Are Also Materially Indistinguishable From Everyday, Commonplace Clothes.

Even if "clothes" is limited to items that an English speaker, unaware of the statutory context, might consider similar to commonplace clothes, the items at issue in this case are still "clothes."

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[22] *See Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) ("The ordinary meaning of 'clothes' would appear to encompass all the items of PPE worn by plaintiff [meat processors]."); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010) (recognizing that "hair and beard nets, goggles, ear plugs, nonslip shoes, and a bump cap—are also properly construed as clothes [because e]ach of these items provides covering for the body."); *Sepulveda*, 591 F. 3d at 215 (noting that "shoes, smocks, aprons, gloves, and sleeves" as well as "bump caps, ear plugs, hairnets, arm shields, and glasses" all "serve as 'covering'"); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 950, 956 (11th Cir. 2007) (holding that "smocks, hair/beard nets, gloves, and hearing protection" all "fit squarely within the commonly understood definition of 'clothes' as that term is used in § 203(o)."); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (acknowledged the defining clothes based on its dictionary definition "would embrace … metal-mesh leggings, armor, space-suits, riot gear, or mascot costumes").

"Greens" are cloth garments that are not materially different from any ordinary pants and jacket. J.A. 78-79. Likewise, the boots and gloves worn at the Gary Works are not materially different from the boots and gloves one would find in a sporting goods store. *Id.* The snood is effectively a balaclava, R.85 at 261, 265, the wristlets are essentially long wristbands or detachable sleeves, R. 85 at 265, and the leggings are simply protective leggings worn around the ankles. J.A. 79; R.85 at 265. As stated by the court in *Andrako*, a case that involved the same items of clothing as are at issue in this case, "by description, look, feel, purpose, fit, and basic common sense, the items at issue are 'clothes' within any reasonable meaning of Section 203(o)." 632 F. Supp. 2d at 410-11 (internal quotation marks omitted).

To be sure, each of these items is treated with flame retardant chemicals and/or made from special fabric. J.A. 77-81. However, as described above, the fact that clothes are specialized or protective does not change their essential character. No English speaker would stop calling pajamas clothes because they have been treated with a flame retardant, or conclude that a jacket is not clothes if made from aluminized fabric.

Nor is it relevant if, as Petitioners claim, some English speakers might not at first know that leggings and wristlets are worn around the legs and arms. Petr. Br. 40-41. There are many forms of unusual clothes, with which some English speakers may not be familiar. For example, someone not familiar with a sari from South Asia might not realize that the long, rectangular bolt of cloth is in fact a piece of finished clothing. Yet, when informed

that leggings, wristlets, and a sari are all pieces of fabric that are worn wrapped around parts of the body for decency or comfort, any English speaker would realize that these items are all clothes.

CONCLUSION

For the foregoing reasons, this Court should hold that the donning and doffing of work outfits in this case is "changing clothes" under Section 203(o) and affirm in relevant part the judgment below.

Respectfully Submitted,

J. MICHAEL JARBOE
The Law Department of United States Steel Corporation
600 Grant Street, Room 1500
Pittsburgh, Pennsylvania 15219-2800

LAWRENCE C. DINARDO
Counsel of Record
BRIAN J. MURRAY
JONES DAY
77 West Wacker Dr., Suite 3500
Chicago, Illinois 60601
(312) 782-3939
lcdinardo@jonesday.com

AMY E. DIAS
WARREN D. POSTMAN
JONES DAY
51 Louisiana Ave. NW
Washington, D.C. 20001

BRIAN M. JORGENSEN
JONES DAY
2727 N. Harwood St.
Dallas, Texas 75201

Counsel for Respondent
United States Steel Corporation

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