No. 12-_____

In The
Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Fair Labor Standards Act, the period of time during which a covered employee must be paid begins when the worker engages in a principal activity. Donning and doffing safety gear (including protective clothing) required by the employer is a principal activity when it is an integral and indispensable part of the activities for which the worker is employed. Such requirements are common in manufacturing firms. However, under section 203(o) of the Act an employer need not compensate a worker for time spent in "changing clothes" (even if it is a principal activity) if that time is expressly excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker.

The interrelated questions presented are:

(1) What constitutes "changing clothes" within the meaning of section 203(o)?

(2) If a worker's actions are a principal activity but fall within the scope of the section 203(o) exemption, do those actions nonetheless commence the period of time during which (aside from the clothes-changing time) the worker must be compensated?

(3) If a worker engages in a principal activity which is not exempted by section 203(o), but which involves only a *de minimis* amount of time, does the activity nonetheless commence the period of time during which the worker must be compensated?

PARTIES

The petitioners are approximately eight hundred current or former employees at the United States Steel's Gary (Indiana) Works and several other plants, who brought or joined this action asserting that their employer failed to compensate them for all the hours they worked, as required by the Fair Labor Standards Act.

The respondent is the United States Steel Corporation.

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Petitioners Clifton Sandifer, *et al.,* respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 8, 2012.

OPINIONS BELOW

The May 8, 2012 opinion of the Court of Appeals, which is reported at 678 F.3d 590 (7th Cir. 2012), is set out at pp. 1a-20a of the Appendix. The June 11, 2012 order of the Court of Appeals denying rehearing en banc, which is not reported, is set out at p. 82a of the Appendix. The January 5, 2010 Opinion and Order of the District Court for the Northern District of Indiana, which is unofficially reported at 2010 WL 61971 (N.D. Ind. Jan. 5, 2010), is set out at pp. 21a-33a of the Appendix. The October 15, 2009 Opinion and Order of the District Court for the Northern District of Indiana, which is unofficially reported at 2009 WL 3430222 (N.D. Ind. Oct. 15, 2009), is set out at pp. 34a-81a of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on May 8, 2012. A timely petition for rehearing and rehearing en banc was denied on June 11, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATION INVOLVED

Section 203(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(o), provides:

> 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.

Section 254(a) of 29 U.S.C., section 4 of the Portal-to-Portal Act, provides in pertinent part:

> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938...on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 –
>
> > (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,
>
> which occur either prior to the time on which any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Section 790.8(c) of 29 C.F.R. provides in pertinent part:

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes [footnote], changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.

(footnote omitted). The footnote (numbered 65), inserted following the phrase "certain clothes," provides in pertinent part:

> Such a situation may exist where the changing of clothes on the employer's premises is

required by law, by rules of the employer, or by the nature of the work.

STATEMENT OF THE CASE

In many industries workers are required to wear various forms of safety gear. Those requirements frequently derive from the Occupational Safety and Health Act. The lower courts are divided regarding how the time required to put on and take off the required safety items affects the workers' right to compensation under the Fair Labor Standards Act. This case presents the three inter-related circuit conflicts that have arisen involving this problem.

(1) This case arose primarily at the Gary Works of the United States Steel Corporation; several of the plaintiffs work at other U.S.Steel plants in Michigan or Illinois. The Gary Works is the largest integrated steel mill in North America. The plant occupies some 4,000 acres and employs approximately 5,000 workers, of whom 4,500 are production and maintenance workers represented by the United Steelworkers of America. The union workers enter the plant through one of seven assigned gates, go to one of several locker rooms where they put on safety gear, and then proceed to their work stations; at the end of the day the workers travel back to their assigned washroom and remove the safety gear, which remains at the plant. Because of the size of the plant, some workers travel to and from their work stations on buses.

The time which individual workers spent donning and doffing the safety gear, and traveling from the locker rooms to their work stations, is significant, and can total several hours per week. The amount of time varies significantly from worker to worker. U.S.Steel only pays the workers, however, for the time that they are at their work stations.

This action concerns whether under the Fair Labor Standards Act the workers are entitled to be paid as well for the time they spend putting on and taking off ("donning and doffing") their safety equipment (the donning and doffing claim) and the time they spend traveling between the locker rooms and their work stations (the travel-time claim). Because the workers spend 40 hours a week at their work stations, the donning and doffing time and the travel time – if compensable – would be overtime. (App. 38a).

The safety gear, all of which is worn on the person, includes three distinct types of items. First, there are three things that resemble ordinary clothing, but have special safety-related elements: fire retardant jackets, fire retardant pants, and metatarsal (steel toed) boots. Second, the workers wear protective items that would not usually be described as clothes and that are generally available and utilized in a wide variety of other circumstances: protective goggles, ear plugs, and hard hats. Third, the workers put on several types of safety gear that do not resemble ordinary clothing and that have been specially fashioned for the particular dangers of the

Gary Works steel plant: (1) a flame retardant or aluminized "snood," a head covering similar to the flash hood worn by Navy and Coast Guard gun crews, designed to protect the head and neck from flames and molten metal,[1] (2) a flame-retardant "wristlet," which covers the forearm from the elbow to the hand, and is designed to protect the wrist from flames or molten metal, and (3) flame-retardant spats, designed to prevent molten-metal from falling into the boots. (App. 4a-6a, 37a-38a). Most workers wear all of this equipment.

(2) Sandifer and several other employees at the Gary Works brought this action under the Fair Labor Standards Act in federal district court. Ultimately approximately 800 other current or former Gary Works employees joined in the collective action against United States Steel. The plaintiffs sought compensation for two types of time during which they had been at the Works but were not compensated: the time donning and doffing the safety gear and the time traveling between the locker rooms and their work stations.

United States Steel moved for summary judgment. The District Court granted summary judgment dismissing the donning and doffing claim, but refused to dismiss the travel-time claim.

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[1] There is a woman's bag-like device of the same name used to hold one's hair. A hair "snood" rhymes with "food"; the safety item in this case rhymes with "good."

The donning and doffing claim turns on the meaning of section 203(o) of the Fair Labor Standards Act. 29 U.S.C. § 203(o). Putting on and taking off required safety equipment would, at least ordinarily, be activities for which a worker would be entitled to compensation under the FLSA. 29 C.F.R. § 790.8(c). Section 203(o), however, states that where an applicable collective bargaining agreement so provides an employer need not compensate a worker for time spent "changing clothes." The collective bargaining agreement applicable to the plaintiffs in this case did not include compensation for the period when the workers don and doff the safety equipment. The controlling legal question is whether the donning and doffing of that safety equipment constitutes "changing clothes." The District Court held that all the safety equipment at issue constitutes "clothes" within the meaning of section 203(o). (App. 44a-50a). The court also concluded that the phrase "changing clothes" in section 203(o) is not limited to substituting one item for another (e.g., changing shoes), but also included putting on additional items (e.g., putting on wristlets, snoods).[2] (App. 50a-52a).

The travel-time claim turned on the interrelationship between section 203(o) and section 254(a), which provides that a worker must be compensated for time spent traveling between "principal

[2] The plaintiffs asserted that they put on the flame retardant jacket and pants *over* their street clothes.

activities." 29 U.S.C. § 254(a). The district court concluded that the time spent donning and doffing the safety gear could constitute a "principal activity," so that the time spent traveling from the locker room to the individual work stations (and back) would be time traveling between principal activities. (App. 62a-64a). U.S.Steel argued, however, that if the donning and doffing was non-compensable under section 203(o), it necessarily followed that the travel time too must be non-compensable. The District Court rejected that contention. (App. 62a-64a).

On appeal[3] the Seventh Circuit upheld the dismissal of the donning and doffing claim and concluded that the travel-time claim should also have been dismissed.

The Court of Appeals held that special protective safety clothes, even if "different in kind from typical clothing," is still clothing within the meaning of section 203(o), expressly rejecting the Ninth Circuit's decision to the contrary in *Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds sub nom. IBP, Inc v. Alvarez,* 546 U.S. 21 (2005). (App.

[3] The District Court certified under 28 U.S.C. § 1292(b) an interlocutory appeal by U.S.Steel regarding the travel-time issue. The Seventh Circuit on appeal also reviewed the District Court's determination regarding the donning and doffing issue, because plaintiffs' argument that the donning and doffing was not "changing clothes" under section 203(o) provided an alternative basis for affirming the District Court decision regarding the travel-time claim. (App. 3a).

10a) (quoting *Alvarez*). It also concluded, however, that not all of the safety gear in this case was "clothes" within the meaning of section 203(o). Under that provision, the appellate court held, "clothes" is limited to items that are "clothing in the ordinary sense," something that would generally be "regarded as an article of clothing." (App. 6a). Under that interpretation of section 203(o), the court of appeals concluded, the glasses and ear plugs (and perhaps the hard hat) were not clothes. The Seventh Circuit nonetheless held that the donning and doffing claim was properly dismissed, reasoning that time required to put on and take off the non-clothes items was *de minimis* and thus not compensable under the FLSA. (*Id.*).

The Seventh Circuit rejected the travel-time claim as well, holding that the district judge should have granted U.S.Steel's motion for summary judgment regarding that claim. It agreed that in the absence of section 203(o) the donning and doffing of the safety gear would have been a "principal activity" under section 254(a), which would have meant that the workers were entitled to be paid for the travel time between the locker rooms (where they put on and took off the gear) and their work stations. (App. 11a). But, the Court of Appeals held, in a case in which the donning and doffing is non-compensable because of section 203(o), the donning and doffing cannot constitute a "principal activity" under section 254(a). (App. 11a-17a). The Seventh Circuit expressly rejected the contrary holding of the Sixth Circuit in

Franklin v. Kellogg Co., 619 F.3d 604 (6th Cir. 2010). (App. 17a). In the instant case the Seventh Circuit itself had held that some of the donning and doffing (e.g., of the eye glasses and ear plugs) was not covered by section 203(o); it concluded, however, that the time required for putting on and taking off these non-clothes items was *de minimis*, and thus not sufficient to start the work day and render compensable the travel time at issue.

Plaintiffs filed a timely petition for rehearing en banc. The Court of Appeals denied the petition on June 11, 2012. (App. 82a).

REASONS FOR GRANTING THE WRIT

A large number of employers require their workers to wear safety gear while on the job. Those requirements are particularly important and common in plants that process raw materials, dangerous chemicals, or food. See *IBP, Inc. v. Alvarez,* 546 U.S. 21 (2005). At least ordinarily the Fair Labor Standards Act requires that workers be compensated for the time (unless *de minimis*) they spend donning and doffing such safety gear, as well as for the time the workers spend traveling from where they don and doff that gear to their work stations.

Unionized plants, however, are subject to a special provision which has given rise to widespread litigation in and disagreements among the lower courts. Under section 203(o), if an applicable collective

bargaining agreement so provides, an employer need not compensate workers for time spent "changing clothes." 29 U.S.C. § 203(o). The circuit courts are divided regarding three inter-related issues: (1) when if at all is donning and doffing safety gear "changing clothes" within the meaning of section 203(o); (2) if all of the donning and doffing is non-compensable under section 203(o), does it nonetheless constitute a "principal activity" under the FLSA and thus begin the continuous work day, so that travel time to and from an employee's work station must be compensated; and (3) can donning and doffing, even if it is not "changing clothes" within the meaning of section 203(o), constitute a principal activity if it requires only a *de minimis* amount of time.

This case presents all three circuit conflicts. The Seventh Circuit candidly acknowledged that "courts of appeals...have reached varied conclusion on the issues presented by this appeal" (App. 20a). The Court of Appeals below clearly recognized that its decision conflicted with decisions in the Ninth and Sixth Circuits, and expressed its emphatic disagreements with those other circuit courts. (App. 9a, 10a, 17a).

Many of the major unionized employers affected by these issues, including U.S.Steel, have plants in several different circuits, and thus may be subject to inconsistent legal standards. Several of the plaintiffs in this case work at a U.S.Steel plant in Ohio, where (had they filed suit there rather than joining the instant case) the Sixth Circuit decision in *Franklin* would have resulted in a favorable ruling on their

travel-time claim. The situation is in some circumstances compounded by the existence of national collective bargaining agreements, which may have differing legal consequences at different plants. These considerations give added force to the need to resolve these circuit conflicts.

I. There Is An Important Circuit Conflict Regarding The Scope of The "Changing Clothes" Provision in Section 203(o) of The Fair Labor Standards Act

The Seventh Circuit decision in the instant case exacerbates what was already an entrenched circuit conflict regarding the meaning of the phrase "changing clothes" in section 203(o). Four circuits hold that "clothes" includes anything that can be worn on the person, even "accessories." The Ninth Circuit has ruled that "special protective gear different in kind from typical clothing" is not clothes under section 203(o). *Alvarez*, 339 F.3d at 905. In the instant case the Seventh Circuit has adopted yet a third interpretation of section 203(o).

The Fourth, Sixth, Tenth and Eleventh Circuits hold that "clothes" includes anything an individual "wears," including any "accessories." *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) ("all the garments and accessories worn by a person at any one time"); *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010); *Sepulveda v. Allen Family Foods, Inc.,* 591 F.3d 209, 215 (4th Cir. 2009);

Anderson v. Cagle's, Inc., 488 F.3d 945, 955 (11th Cir. 2007). Thus the Tenth Circuit in *Salazar* held that knife scabbards are "clothes" because they are "quite similar to ordinary...holsters." 644 F.3d at 1140. In those circuits the controlling standard is whether a safety item is something the worker can "wear." In its appellate brief U.S.Steel urged the Seventh Circuit to adopt that construction of section 203(o), under which all of the safety gear in this case would constitute "clothes."[4]

The Seventh Circuit rejected that broad interpretation of section 203(o). The panel insisted "that not everything a person wears is clothing. We say that a person 'wears' glasses, or a watch,...but this just shows that 'wear' is a word of many meanings." (App. 7a). Applying this standard, the panel held that "clothes" does not include earplugs or safety glasses. (App. 6a). The Fourth, Sixth, Tenth and Eleventh Circuits, utilizing a decidedly broader definition of "clothes," have held, to the contrary, that safety glasses and ear plugs are indeed "clothes" under section 203(o). *Salazar,* 644 F.3d at 1134; *Franklin,* 619 F.3d at 614; *Sepulveda,* 591 F.3d at 216; *Anderson,* 488 F.3d at 949; see App. 18a (noting that the Labor Department's 2002 interpretation of "clothes" was "broader" than that adopted by the panel).

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[4] Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corp., pp. 12-22.

The Ninth Circuit applies a much narrower interpretation of section 203(o) "clothes." In that Circuit this term does not include "specialized protective gear...different in kind from typical clothing." 339 F.3d at 905. The Ninth Circuit utilizes a distinction drawn in OSHA regulations between ordinary clothing (including work clothes) and personal protective equipment, "materials worn by an individual to provide a barrier against exposure to workplace hazards." *Id.*; see 29 C.F.R. § 1910.1030(b).[5]

The Seventh Circuit rejected the Ninth Circuit holding in *Alvarez* that if an item is required and fashioned for safety reasons it necessarily cannot be "clothes" within the meaning of section 203(o). (App. 6a). Under the Seventh Circuit standard an item is "clothes" for purposes of section 203(o) if it would be "regarded as an article of clothing" (App. 6a) by "[a]lmost any English speaker." (App. 7a). The fact that the gear might have been fashioned in some special manner to serve a safety purpose – for example, the fact that the pants or jacket are flame retardant – does not remove that item from coverage as "clothes" under the decision below.

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[5] That regulation provides:

> Personal Protective Equipment is specialized clothing or equipment worn by an employee for protection against a hazard. General work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment.

The Seventh Circuit recognized that the Ninth Circuit had construed section 203(o) differently, holding in *Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003), that the term "clothes" in section 203(o) does not apply to "special protective gear different in kind from typical clothing." 339 F.3d at 905. The Seventh Circuit commented that its interpretation of "clothes" did not "accord[ ] with...the outlier...Ninth Circuit's decision in *Alvarez*." (App. 10a). The Seventh Circuit acknowledged that the safety gear which the Ninth Circuit in *Alvarez* held was not section 203(o) "clothes" was "similar to those the steelworkers wear" in the instant case. (*Id.*). The Court of Appeals was sharply critical of the Ninth Circuit decision in *Alvarez*.

> The Ninth Circuit...thought it important that protective clothing...is "different in kind from typical clothing," which the court instanced by "warm clothing." [339 F.3d] at 905.... But that can't be the end of the analysis. Since workers very rarely change at work from street clothes into street clothes, section 203(o) would...be virtually empty if the Ninth Circuit were right.

(*Id.*). Similarly, the Sixth Circuit in *Franklin* candidly recognized that its construction of section 203(o) "is at odds with...the Ninth Circuit." 619 F.3d at 615. The Eleventh Circuit in *Anderson* "[a]cknowledged that our conclusion conflicts with the Ninth Circuit's opinion." 488 F.3d at 958.

In arriving at its interpretation of section 203(o), the Seventh Circuit insisted that that provision is not governed by the principle that exemptions from the Fair Labor Standards Act are to be narrowly construed. (App. 8a-9a). Section 203(o), the Court of Appeals insisted, is not an "exemption" at all. The Seventh Circuit expressly acknowledged that there is a circuit split regarding whether or not section 203(o) creates an "exemption" from the FLSA, and is thus subject to the narrow construction rule.

> Section 203(o) creates an exclusion rather than an exemption, as all but one appellate decision to address the issue has held. See *Salazar v. Butterball, LLC,* 644 F.3d 1130, 1138 (10th Cir. 2011); *Franklin v. Kellogg Co.,* 619 F.3d 604, 611-12 (6th Cir. 2010); *Allen v. McWane, Inc.,* 593 F.3d 449, 458 (5th Cir. 2010); *Anderson v. Cagle's, Inc.,* 488 F.3d 945, 957-58 (11th Cir. 2007).
>
> The outlier is *Alvarez v. IBP, Inc., supra,* 339 F.3d at 905....

(App. 9a). The Seventh Circuit was harshly critical of the contrary Ninth Circuit's *Alvarez* in this regard. "[T]he Ninth Circuit seemed to have forgotten that subsection (o) of section 203 is not found in the section of the FLSA that creates exemptions." (App. 10a).

II. There Is An Important Circuit Conflict Regarding Whether Section 203(o) Exempt Donning and Doffing Can Constitute A "Principal Activity" Under Section 254(a) and Thus Start The Beginning of A Work Day

The lower courts are also divided regarding whether section 203(o) affects whether "changing clothes" within the scope of that provision can mark the beginning (and end) of a work day, thus entitling the employee to compensation for the period that follows.

Under section 254(a), a worker is entitled to compensation for time spent "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." 29 U.S.C. § 254(a)(1). Any action required of a worker is a "principal activity" if it is an "integral and indispensable part of the principal activities" for which the employee is employed. *Steiner v. Mitchell,* 350 U.S. 247, 252-53 (1956). Once a worker has engaged in a principal activity, all subsequent walking and other travel is outside the scope of section 254(a)(1) until the end of the work day, similarly delineated by the occurrence of the last "principal activity." In the instant case the plaintiffs contended that donning and doffing the safety gear constituted a principal activity under section 254(a)(1), thus entitling the plaintiffs to compensation for time that they thereafter spent traveling to and from their work stations.

The Seventh Circuit agreed that donning and doffing required safety equipment (at least but for

section 203(o)) would be a principal activity. "If an employer requires his employees to don and doff work clothes at the workplace, then donning and doffing are an integral and indispensable part of the workers' main activity...and therefore a principal activity." (App. 12a). Absent section 203(o), the lower court agreed, the plaintiffs would have been entitled to compensation for their travel time. The Court of Appeals acknowledged that "[h]ad the clothes-changing time in this case not been rendered noncompensable pursuant to section 203(o), it would have been a principal activity." (App. 11a).

The panel held, however, that donning and doffing that would otherwise constitute a principal activity is not a principal activity under section 254(a)(1) if it is noncompensable under section 203(o). (App. 11a-18a). The panel reasoned that because section 203(o) controls whether a worker is "employed" under section 206 and 207, it logically must also determine whether the worker is engaged in a principal activity under section 254(a)(1).

> [T]he employer and the union decided...that changing time is not work time and need not be compensated. If it is not work time...how can it be one of the "principal...activities which [the] employee is employed to perform"? [H]e is not employed to...change clothes.

(App. 11a-12a; see *id.* 13a ("[s]ection 203(o) permits the parties to a collective bargaining agreement to reclassify changing time as nonworking time")).

The Seventh Circuit candidly acknowledged that its interpretation of the interrelationship between sections 203(o) and 254(a) had been expressly rejected by the Sixth Circuit.

> In *Franklin v. Kellogg Co.,* 619 F.3d 604, 618-19 (6th Cir. 2010), as in this case, the employer, invoking section 203(o), did not pay its workers for time spent changing into work clothes. The court concluded nevertheless that changing time, because required by the employer, was a "principal activity."

(App. 17a). "[B]y disagreeing with *Franklin* we...create an inter-circuit conflict." (*Id.*). The Court of Appeals was sharply critical of the Sixth Circuit's decision in *Franklin*. "This seems clearly wrong...and the *Franklin* opinion offers only a conclusion, not reasons." (*Id.*).

Conversely, the Sixth Circuit in *Franklin* noted that " '[t]he courts have taken divergent views' on the issue of whether activities deemed excluded under § 203(o) may still constitute 'principal activities.' " 619 F.3d at 618. That circuit reasoned that "Section 203(o) relates to the *compensability* of time spent donning [and] doffing.... It does not render such time any more or less integral or indispensable to an employee's job." *Id.* (quoting *Andrako v. U.S.Steel Corp.*, 632 F.Supp.2d 398, 413 (W.D. Pa. 2009) (emphasis in original)).

This conflict is of great importance to the practical consequences of section 203(o). If, as the several

courts of appeals have held, the donning and doffing of safety gear is within the scope of section 203(o), workers who put on such items at large plants will often if not ordinarily travel for a significant period of time to reach their work station.

III. The Decision of The Seventh Circuit Conflicts With The Decision of The First Circuit in *Tum v. Barber Foods, Inc.*, and The Decision of This Court in *IBP, Inc. v. Alvarez*

The Seventh Circuit correctly acknowledged that the donning and doffing of required safety gear, if outside the scope of section 203(o), would constitute a principal activity and therefore entitle a worker to compensation for travel time that occurred after he or she put on, and until he or she took off, such items. The Court of Appeals also held that at least some of the safety equipment in the instant case did not constitute "clothing" within the scope of section 203(o). The court below nonetheless held that the plaintiffs were not entitled to compensation for travel time after they donned, and before they doffed, those non-clothes items.

That holding is inconsistent with this Court's decision in *IBP, Inc. v. Alvarez,* and with the First Circuit decision in *Tum v. Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003), which in this Court was consolidated and decided with *Alvarez*. In *Tum* the workers at a poultry processing plant were required to put on certain safety equipment (including, as in the instant

case, safety glasses and ear plugs[6]) at the beginning of the work day. The district court concluded that donning and doffing that equipment was a principal activity, but at trial the jury concluded that the donning and doffing were non-compensable because the amount of time involved was *de minimis*. 546 U.S. at 39. This Court nonetheless held that workers were entitled to compensation for the walking time that followed the donning (or picking up of) that equipment. 546 U.S. at 527.

The question of whether a *de minimis* principal activity could trigger the start of the work day – thus rendering compensable any subsequent travel – was expressly before this Court in *Alvarez*. In the earlier First Circuit proceedings, Chief Judge Boudin, in a concurring opinion, had argued that the donning of required equipment ought not constitute a principal activity, thus rendering compensable subsequent walking time, if the time required to put on that equipment was *de minimis*. *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 285-86 (1st Cir. 2004) (en banc) (concurring opinion). The government successfully argued in this Court that "th[e] de minimis rule...has nothing to do with whether an activity begins or ends the workday for purposes of the Portal Act."[7] As the United States

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[6] See *Tum v. Barber Foods, Inc.*, 331 F.3d 1, 6 (1st Cir. 2003).

[7] Brief for the United States as Amicus Curiae, No. 04-66, p. 25, available at 2005 WL 1185927. This issue was also addressed in the Brief for Petitioner, pp. 41-46, available at 2005

(Continued on following page)

pointed out in that brief, under the terms of the Department of Labor regulations principal activity involving "any amount of time" will begin the work day under the Portal-to-Portal Act. See 29 C.F.R. 790.8(b) n.63. The Department of Labor filed this brief during the Bush administration, and its position on this issue has not varied.

The Seventh Circuit expressed disapproval for the very idea that a worker could be entitled to compensation for time traveling from a locker to his or her place on the production line. "Employers could emasculate...the 'primary activity' provision by placing the locker rooms *in* the work stations, for then there would be no post-primary-activity travel time.... What sense would that make?" (App. 14a) (emphasis in original). "There is something amiss with an interpretation that implies that the location of the locker room...determines one's statutory entitlement to compensation." (*Id.*). This very objection, however, was made by one of the lower court opinions in *Tum*,[8] and was unsuccessfully advanced in this Court by both employers.[9]

WL 1185926, and the Brief of the National Chicken Council as Amicus Curiae, pp. 22-25, available at 2005 WL 1841384.

[8] *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 280 (majority opinion), 285 (Boudin, C.J., concurring) (1st Cir. 2004) (en banc); *Tum v. Barber Foods, Inc.,* 331 F.3d 1, 6 (1st Cir. 2003).

[9] Brief for Respondent, No. 04-66, pp. 40-41, available at 2005 WL 1841383; Brief for Petitioner, No. 03-1238, pp. 32-36, available at 2005 WL 1185925.

IV. The Decision of The Seventh Circuit Is Clearly Incorrect

(1) The Ninth Circuit correctly concluded in *Alvarez* that the "clothes" referred to in section 203(o) do not include safety gear intended to protect the wearer from some unusual workplace hazard.

In ordinary parlance "clothes" refers to items people put on to deal with the common needs and interests of dressing on a day to day basis: assuring modesty, providing protection from normal variations in temperature, creating a particular appearance, and responding to the likely degree of dirt or precipitation to be encountered. In that sense people change clothes because they are going out to dinner, because they are going to garden, or because the temperature has gotten hotter or colder. Similarly, an employee might change clothes to create a particular appearance (e.g., a police officer's uniform) or to work in a dirty environment without soiling one's street clothes (e.g., a garage mechanic's coverall). This use of "changing clothes" is far different from putting on special protective gear like a hazmat suit, a beehive keepers suit, or a deep sea diver's suit. It would, at the least, be odd to describe those events as "changing clothes."

The Ninth Circuit decision establishes a workable rule, declining to treat safety gear as clothes if they are intended to guard against some workplace hazard unlike the problems of ordinary life. The majority rule, insisting on treating as clothes anything

that a worker can "wear," implausibly includes all sorts of things no one would describe as clothes, such as glasses, earplugs, respirators, or even hazmat suits. The Seventh Circuit rule, though less extreme, entails intractable problems of interpretation. In this case, for example, a court would have to decide whether ordinary English speakers would label as clothes such things as a "snood" or "wristlet" – devices so novel that the employer had to invent names for them – and to decide when the safety modifications of a particular item had gone so far that it would no longer be described as clothes in ordinary conversation. In the poultry industry, for example, aprons and gloves are made of the modern equivalent of chain mail. The Ninth Circuit rule in *Alvarez* avoids these difficulties.

In addition, much of the safety gear that would be treated as "clothes" under the majority and Seventh Circuit standards is put on over, or added to, street clothes. In the instant case plaintiffs contend that is true of all the items in question except the boots. Because of the different manner in which safety gear is used, the lower courts which treat these items as "clothes" have been forced to hold that putting on an *additional* item – rather than, for example, substituting work pants for street pants – is changing clothes. Thus in most circuits putting in ear plugs is "changing clothes," and in the Seventh Circuit putting on a "snood" is "changing clothes." That conclusion is clearly inconsistent with ordinary usage.

(2) Whether donning and doffing fall within the scope of section 203(o) is irrelevant to whether those actions constitute principal activities under section 254(a).

Section 203(o) expressly states that a collective bargaining agreement that changing clothes (or washing) is not to be compensated is controlling "[i]n determining for the purposes of section 206 and 207 of this title the hours for which an employee is employed." 29 U.S.C. § 203(o). Section 203(o) by its own terms simply does not apply or even refer to determinations under section 254(a)(1) as to whether an employee is engaged in a principal activity. When Congress wanted to permit the terms of a collective bargaining agreement to control whether a worker's actions could constitute a "principal activity" for purposes of section 254(a)(1), it did so expressly. Congress included just such a provision in section 254(a), but it is limited to the use of a collective bargaining agreement to determine whether a worker engages in a principal activity when, on the way to or from work in an employer owned vehicle, he or she does some "incidental" work.

> *For the purposes of this subsection,* the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the

> employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

29 U.S.C. § 254 (emphasis added).

The panel also reasoned that the amendments to the FLSA gave labor and management negotiators blanket authority to "determine[ ]...what is compensable work in borderline cases," such as the question of whether "walking from a locker room to a work station [is] 'work.'" (App. 15a). But neither the FLSA, the Portal-to-Portal Act, nor any other amendment to the FLSA gives to labor and management negotiators any such general authority to decide – in place of the federal courts that ordinarily are responsible for applying federal statutes and regulations – what constitutes compensable work in "borderline cases." The FLSA and its amendments permit an employer's FLSA responsibilities to be affected by a collective bargaining agreement only in limited and highly specific circumstances. In addition to sections 203(o) and 254(a), seven other narrowly framed provisions of the FLSA provide that an employer's responsibilities may be reduced, or expanded, by an agreement with an authorized union.[10] But none of these provisions

[10] 29 U.S.C. §§ 203(m) (exclusion of board and lodging from wage), 207(b)(1) (exemption from overtime requirement), 207(b)(2) (same), 207(e)(7) (calculation of regular rate), 207(f) (exemption from overtime requirement), 207(o)(2)(A)(i) (compensatory time

(Continued on following page)

includes the compensability of travel time within an employer's premises as one of the issues that can be affected by a collective bargaining agreement. (And in no instance does the applicability of any such provision turn on whether the matter affected involved a "borderline" issue). The very specificity of these limited provisions makes it emphatically clear that Congress did not intend collective bargaining agreements to alter in any other circumstances a worker's entitlement to compensation. The Congress which enacted section 203(o) expressly rejected a proposal to give management and labor negotiators general authority to bargain away rights otherwise granted by the FLSA.[11]

(3) The decision of the Court of Appeals that the *de minimis* donning and doffing of non-clothes items outside the scope of section 203(o) does not entitle workers to compensation for travel time that occurs between the donning and doffing is squarely contrary to this Court's decision in *Alvarez*.

in lieu of overtime), 254(b) (compensation not otherwise required by Portal-to-Portal Act).

[11] That legislative history is described in the Department of Labor 2010 Opinion Letter, 2010 WL 12468195.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

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