No. 12-417

IN THE
Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,
Petitioners,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is being filed on behalf of the Chamber of Commerce of the United States of America (the "Chamber").[1] The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and from every industry sector and region of the country. The Chamber advocates for the interests of the business community in courts across the nation, in part by filing *amicus curiae* briefs in cases raising issues of national concern to its members.

The Chamber's members are subject to federal, state, and local laws respecting the wages paid to and hours worked by their employees. These laws serve the needs of employers and employees alike when the rules that govern their application are clearly prescribed and easily understood. In 2012, a record number of Fair Labor Standards Act ("FLSA") lawsuits were filed in federal court. Many of these cases were caused by unnecessary ambiguity in regard to how the FLSA's terms fit a particular business context.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Chamber's members have a significant interest in the interpretation of 29 U.S.C. § 203(o). In enacting § 203(o), Congress authorized an employer and its employees to tailor the application of the FLSA's rules to their specific context through collective bargaining in order to resolve the issue of when time spent changing clothes and washing at the beginning and end of a workday should be treated as compensatory time. That congressional judgment should be honored and the results of the trade-offs made at the bargaining table respected. When a collective agreement has been reached under the terms of the FLSA and applicable labor laws, employees—having previously obtained the benefits of the collective bargain—may not subsequently bring a class action suit to relitigate what was settled at the bargaining table.

The Chamber's members also have a strong interest in ensuring that courts do not improperly defer to an agency's informal statutory interpretations that are substantively and procedurally unsound. Here, the Department of Labor ("Department" or "DOL") properly construed § 203(o) to allow collective bargaining regarding the time it takes to put on and take off protective clothing. The contrary position more recently taken by the agency is unsound, was not promulgated through notice-and-comment rulemaking, and brings no agency expertise to bear. No deference is owed in this context.

SUMMARY OF ARGUMENT

This Court previously issued a series of decisions that read the wage and hour laws

expansively and provided no role for collective bargaining regarding such matters. Congress responded by making clear that in regard to certain wage and hour issues collective bargaining can play a proper and important role.

At issue in this case is § 203(o) of the Fair Labor Standards Act. In enacting that statute, Congress provided that the employees and their employers may collectively bargain to determine when and whether the time spent changing clothes and washing at the beginning and end of each workday should be deemed compensable work time under the FLSA. That is exactly what the employees and U.S. Steel did in this case. Petitioners, a group of those employees, now seek to undo that deal by arguing that protective clothing should not be considered clothing at all for the purposes of this statute. Petitioners posit that § 203(o) is an exemption from the wage and hour laws favoring employers and must, therefore, be narrowly construed. The Seventh Circuit, in an opinion by Judge Posner, properly and thoroughly rejected that argument, recognizing that § 203(o) is not an exemption from the FLSA, that protective clothing plainly constitutes "changing clothes" within the meaning of the statute, and that there was no basis for adopting a narrow construction of the term.

Petitioners' argument that § 203(o) should be narrowly construed because the statute purportedly favors employers is completely misguided. The goal of § 203(o) is "to give sanctity once again to the collective-bargaining agreements." 95 Cong. Rec. 11,210 (1949). This statutory provision is not one favoring the employer, but one empowering the

union to engage in collective bargaining, at its discretion, on the time spent changing clothes and/or washing at the beginning and end of the work day. Congress recognized that, as to issues regarding changing and washing at the start and end of the workday, the employees should be able to act collectively and bargain with their employer. It was Congress' considered judgment that where the employees decide to engage in such collective bargaining and can strike a deal, it would best serve all involved to respect the deal. Congress understood that, as to such matters, employees and employers, working together, are best situated to tailor an optimal solution to their specific employment environment.

The cases suggesting that exemptions in the FLSA should be narrowly construed also do not apply because § 203(o) is a definitional provision that sets limits on the Act, not an exemption from the Act. In *Christopher v. SmithKline Beecham Corp.*, this Court made clear that those cases have no application where the relevant term is a "general definition that applies throughout the FLSA." 132 S. Ct. 2156, 2172 (2012). Section 203(o) is such a term. It offers a definition of "hours worked" to calculate "hours" under the FLSA's minimum wage and overtime provisions. As the Fifth, Sixth, Seventh, Tenth, Eleventh, and Federal Circuits have each correctly reasoned, § 203(o) is not an exemption from the FLSA at all. Consistent with *Christopher*, this Court should reject Petitioners' argument that § 203(o) should be narrowly construed.

For all these reasons, the cases speaking to a narrow construction of FLSA exemptions favoring

employers have no application here. In any event, this "anti-employer" rule of construction is ill-conceived. The plain, natural meaning of the term "clothes" includes all forms of clothing, including protective clothing. There is no basis for a canon of construction that requires courts to disregard the natural meaning of the words enacted by Congress simply because the terms might be applied in a way that could favor employers.

Finally, no deference is due to the Department of Labor's interpretation of § 203(o). Contradicting prior opinion letters, the Department's most recent interpretation took the novel form of an "Administrator Interpretation" that was designed to provide general guidance rather than respond to any particular factual context. The Department's interpretation fails to adhere to administrative procedures and lacks any "force of law." Furthermore, the agency's interpretation brings no expertise to bear and is unsound. Thus, it does not warrant any judicial deference.

ARGUMENT

I. SECTION 203(o) SHOULD BE CONSTRUED REASONABLY, NOT NARROWLY.

"In the past," this Court has stated that "exemptions to the FLSA must be 'narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit.'" *Christopher*, 132 S. Ct. at 2172 (alteration in original) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)); *see also Mitchell v. Ky. Fin.*

Co., 359 U.S. 290, 295 (1959) (citing cases). Petitioners erroneously rely on these cases to argue that protective clothing does not fall within the scope of 29 U.S.C. § 203(o), which grants employees the right to bargain collectively over whether time spent changing clothes and washing at the beginning and end of the workday will count as compensable time.[2] *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

These cases cannot properly be applied to § 203(o). Indeed, the Court of Appeals here and all other courts of appeals that have addressed the issue except for the Ninth Circuit have rejected or criticized Petitioners' unnatural and unduly narrow construction of § 203(o).[3]

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[2] Section 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.

29 U.S.C. § 203(o).

[3] *See* Pet. App. 9a ("[S]ection 203(o) does not create an exemption."); *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1138 (10th Cir. 2011) ("[T]he Ninth Circuit assumed, without analysis, that § 203(o) is an exemption and must be read narrowly."); *Franklin v. Kellogg Co.*, 619 F.3d 604, 612 (6th Cir. 2010) ("The reasons set forth by the majority of our sister circuits for interpreting § 203(o) . . . as an exclusion [rather than an exemption] from the definition of work, placing the burden on the plaintiff, are persuasive."); *Allen v. McWane,*

The notion that exemptions from the FLSA should be narrowly construed was founded on a desire to enforce the terms of the Act in a manner that fulfills its mission of protecting workers' wage and hour rights:

> The Fair Labor Standards Act was designed "to extend the frontiers of social progress" by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.

A. H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (citation omitted) (quoting Message of the President to Congress, May 24, 1934).

Section 203(o), however, is not an exemption from the FLSA favoring employers to the detriment

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Inc., 593 F.3d 449, 458 (5th Cir. 2010) ("[T]he Eleventh Circuit persuasively critiqued the Ninth Circuit's characterization of § 203(o) as an exemption."); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007) ("[W]e conclude that § 203(o) is not an exemption under the FLSA but is instead a definition that limits the scope of the FLSA's key minimum wage and maximum hour provisions."); *cf. Sepulveda v. Allen Family Foods*, Inc., 591 F.3d 209, 214 n.1 (4th Cir. 2009) (questioning the applicability of the narrow construction canon to § 203(o)); *Adams v. United States*, 471 F.3d 1321, 1325–26 (Fed. Cir. 2006) (observing that the Portal-to-Portal Act does not create an exemption from the FLSA on the grounds that it deals with the exclusion of certain activities from the FLSA rather than the exempt status of workers).

of the wage and hour rights of employees. Rather, it is a provision born of an era in which Congress viewed collective bargaining as an important right for protecting employees and creating an atmosphere of labor harmony. Section 203(o) empowers employees and their employer to bargain and to agree as to how the time spent washing and changing clothing at the start and end of the workday will be treated under the wage and hour laws. Permitting employees to bargain collectively for solutions that make sense in their particular contexts does not derogate from the FLSA rights of employees. Therefore, none of the concerns that might call for a narrower construction applies here. In any event, the so-called canon of narrow construction in the FLSA context is unsound and should be rejected.

A. Section 203(o) Empowers Employees To Bargain Collectively.

Section 203(o) arose from an era in which Congress was actively embracing a national policy favoring collective bargaining. In enacting the National Labor Relations Act ("NLRA") of 1935, 29 U.S.C. § 151 *et seq.*, and the Labor Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*, Congress empowered employees to act and bargain collectively. The policy reflected in these labor laws was that "by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working

conditions." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

In 1947, and then two years later in 1949, Congress enacted legislation to ensure that the nation's wage and hour laws were not construed in a manner that unduly diminished the right of employees to bargain collectively. This Court had issued a series of rulings in 1945 and 1946 holding "that congressionally granted [FLSA] rights take precedence over conflicting provisions in a collectively bargained compensation arrangement." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740–41 (1981) (citing *Martino v. Mich. Window Cleaning Co.*, 327 U.S. 173, 177–78 (1946); *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430–32 (1945); *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 166–67, 170 (1945)). Congress immediately responded to those rulings and took unambiguous steps to restore a limited role for collective bargaining in the application of the FLSA's wage and hour laws.

In enacting the Portal-to-Portal Act in 1947 as an "emergency" response, *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956), Congress had two primary goals. First, Congress sought to cure the unfair retroactive effects of the Court's FLSA rulings. *Id.* at 253–54; 29 U.S.C. § 251(a). Second, Congress acted prospectively "to correct existing evils" by, *inter alia*, "protect[ing] the right of collective bargaining." 29 U.S.C. § 251(b).

For example, in response to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692–93 (1946), Congress rejected the Court's ruling that all activities that are "preliminary to or postliminary to"

principal work activities must be treated as compensable work time under the FLSA. 29 U.S.C. § 254(a)(2). Further, Congress restored the right of employees and employers to bargain collectively to reach their own determination of whether such preliminary activities should be considered compensatory work time. *See* 29 U.S.C. § 254(b).

Two years after the passage of the Portal-to-Portal Act, Congress further acted to carve out permissible areas of collective bargaining in the application of the FLSA's wage and hour laws. Congress passed an additional set of amendments to the FLSA, which, *inter alia*, served to ensure that collective bargaining rights would be honored regarding a number of important aspects of the wage and hour laws.

Most relevant here, Congress enacted § 203(o), which provides a partial definition of "hours worked." *See* 29 U.S.C. § 203(o); *see also* 29 C.F.R. § 785.6 (2013) ("[Section 203(o)] contains a partial definition of 'hours worked' . . . ."). This provision ensures that collective bargaining rights are respected as to two common preliminary and postliminary work activities—the time spent changing clothes and washing before and after work.[4] Under the Portal-to-Portal Act, whether such

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[4] Other provisions of the 1949 Amendments to the FLSA, including revisions to §§ 207(f) and 207(g) of the FLSA, similarly permit employers and employees by collective bargaining and other private agreements to enter into certain employment relationships that take precedence over the default rules adopted by Congress, as long as those agreements meet statutory minimum payment standards. 63 Stat. 910, 914–15 (1949) (codified as amended at 29 U.S.C. § 207(f)–(g)).

time is compensable first turns on whether it is deemed "preliminary or postliminary" to principal work activities, and thus otherwise noncompensable, or "integral and indispensable" to principal work activities, and thus otherwise compensable. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37, 42 (2005). Section 203(o) makes clear that regardless whether changing clothes or washing is preliminary or postliminary or integral and indispensable to the job, employees and their employer are nonetheless allowed to resolve through collective bargaining whether and how the time for such changing and washing is compensated. 29 U.S.C. § 203(o).

Absent a collective bargaining agreement addressing those issues, there can be significant ambiguity about the compensability of time spent changing clothes or washing at the beginning and end of each day. Such time may otherwise be noncompensible as preliminary, postliminary, or *de minimis*, or compensable as integral and indispensable to an employee's work. Section 203(o) allows the employer and employees, acting cooperatively, to resolve these ambiguities in a way that is mutually beneficial. The collective bargaining agreement also offers flexibility as it can be tailored to address different categories of workers and their different needs regarding washing and clothes-changing activities (whether involving a uniform, dress clothing, work clothing, protective clothing, clothing items to protect the public, or other items worn by the employee to perform his or her job).

Furthermore, as *amici* for Petitioners recognize, it is often difficult and inefficient to

measure the amount of time employees spend on the work site changing into their work attire. *See* AFL-CIO Br. 8. Collective bargaining permits the parties to overcome these difficulties and inefficiencies by adopting workable rules that fit the needs of the parties. *See Sepulveda*, 591 F.3d at 218.

Thus, the statute accords employees and the employer the flexibility to tailor the compensability of clothes-changing or washing activities in a way that suits the environment of each workplace. And that was the intended end of the statute. Representative Christian Herter, who introduced § 203(o), explained that employers and employees in certain industries had "carefully threshed out" through collective bargaining whether, for example, to treat as compensable the time that employees spent at the work site at the beginning and end of each day preparing for work by changing clothes. 95 Cong. Rec. at 11,210. Nonetheless, the concern was that the DOL might not respect the role and value of collective bargaining in this context and construe these collective bargaining agreements as violative of the FLSA. *Id.* Accordingly, § 203(o) was designed to close this potential "loophole" and "to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement." 95 Cong. Rec. at 11,210.

As the Fourth Circuit observed, removing the compensability of clothes-changing time from "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. In this case, as the district court noted, employees at U.S. Steel's Coke

and Chemical Division successfully bargained for 20 minutes of compensable washing time at the end of each workday. Pet. App. 37a & n.2. Deference to such tailored collective bargaining agreements better comports with "the FLSA's spirit of protecting the interests of covered workers." *Figas v. Horsehead Corp.*, No. 06-1344, 2008 WL 4170043, at *9 (W.D. Pa. Sept. 3, 2008).

Hence, § 203(o) should not be viewed as a provision that detracts from employees' rights under the FLSA and, for that reason, given a narrow construction. Rather, it empowers employees to act collectively and to bargain over the time spent changing clothes, which might otherwise be noncompensable. If the employees cannot reach a satisfactory result as a product of collective bargaining, they can choose not to address the subject in the collective bargaining agreement and have the default rules of the FLSA apply. There is no reason to construe that power granted to employees in a narrow fashion. And there is no rational basis to read § 203(o) to allow collective bargaining over the changing of some types of clothing, but not others, such as protective clothing.

B. Related Provisions Of The FLSA Similarly Empower Employees To Bargain Collectively.

In addition to enacting § 203(o), Congress added other provisions to the FLSA that mandate respect for the role of collective bargaining. Section 207(b), for example, provides that employees are not subject to the FLSA's overtime provisions where a collective bargaining agreement imposes a certain

maximum hours requirement over a 26-week period. 29 U.S.C. § 207(b). And § 207(o) permits public agencies and workers to replace overtime compensation with compensatory time off through the collective bargaining process. *Id.* § 207(o); *see also Moreau v. Klevenhagen*, 508 U.S. 22 (1993).

Section 203(m), like § 203(o), is also a definitional provision that permits employers and their employees to deviate from a statutory default rule by private agreement. Section 203(m) offers a partial definition of the term "wage," which includes "the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees." 29 U.S.C. § 203(m). This provision further provides "[t]hat the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee." *Id.*

Congress added the collective bargaining component of § 203(m) to the FLSA as part of the Fair Labor Standards Amendments of 1961. Senator Barry Goldwater remarked during congressional debate that the purpose of this amendment was to ensure that the "fringe benefits" workers received, such as board and lodging, would be excluded from the calculation of wages under applicable collective bargaining agreements and would not offset overtime compensation. 106 Cong. Rec. 16,213–14 (1960). Unless the parties have collectively

bargained for this exclusion, the Wage and Hour Division is authorized to account for the reasonable cost of such benefits in the determination of wages. 29 C.F.R. § 531.2 (2013).

Like § 203(o), § 203(m) empowers employees to bargain collectively and reach agreements that can deviate from the FLSA's default rules. Under both § 203(m) and § 203(o), the agreements adopted collectively by the parties can and do benefit both the employer and its employees. There is no basis for treating these statutory provisions as ones favoring either the employer or employees. Rather, they respect collective bargaining and the ability of the parties to act in their mutual interest. Thus, rather than construing § 203(o) narrowly, as Petitioners argue, this Court should interpret § 203(o) in a broad manner that respects the outcome of collective bargaining agreements between employers and employees.

C. Section 203(o) Is A Definitional Provision That Defines The Limits Of The FLSA, Not An Exemption To The Act.

This Court's cases suggesting that exemptions from the FLSA should be narrowly construed do not apply here because § 203(o) is a definitional provision that sets limits on the FLSA, not an exemption from the Act.

1. This Court's recent decision in *Christopher v. SmithKline Beecham Corp.* forecloses any application of the narrow construction line of cases to § 203(o). There, the Court held that where the

FLSA term is a "general definition that applies throughout the FLSA," the term should not be construed narrowly. *Christopher*, 132 S. Ct. at 2172. That rationale equally applies here.

In *Christopher*, this Court considered the breadth of the "outside salesman" exemption in 29 U.S.C. § 213(a)(1) and the meaning of the word "sale" in 29 U.S.C. § 203(k). The Department of Labor's regulations provided that an "employee employed in the capacity of outside salesman" under § 213(a)(1) includes any employee whose primary responsibility is "making sales within the meaning of [§ 203(k)] of the Act." 29 C.F.R. § 541.500 (2013). This Court rejected the application of that narrow-construction approach to these statutory provisions:

> In the past, we have stated that exemptions to the FLSA must be "narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960). Petitioners and the DOL contend that *Arnold* requires us to construe the outside salesman exemption narrowly, but *Arnold* is inapposite where, as here, we are interpreting a general definition that applies throughout the FLSA.

Christopher, 132 S. Ct. at 2172 n.21 (alteration in original).

Like § 203(k), § 203(o) offers a general definition that applies elsewhere in the FLSA. Section 203(o) partially defines the meaning of "hours" in the FLSA's minimum wage and overtime provisions. This definition affects nearly every subsection of §§ 206 and 207. And § 203(o) is even *more* structurally removed from the FLSA's exemptions than § 203(k), which this Court determined should not be construed narrowly. Whereas the interpretation of § 203(k) affects the application of the "outside salesman" *exemption* in § 213(a)(1), *see* 29 C.F.R. § 541.500, the interpretation of "hours worked" does not clearly shape the contours of any of the exemptions from the FLSA. Consistent with *Christopher*, this Court should decline to construe § 203(o) narrowly against employers.

2. The narrow-construction approach also has no application here because, as Judge Posner explained, § 203(o) is an exclusion, not an exemption. Pet. App. 9a–10a. An exclusion narrows the scope of a statute, whereas an exemption creates an exception to statutory coverage without altering the limits of the statute. *See* Pet. App. 9a. Section 203(o) is plainly the former.

Section 203(o) is located in the "Definitions" section of the FLSA. In introducing this provision, Representative Herter explicitly stated that it was "an amendment to the definitions" of the FLSA. 95 Cong. Rec. at 11,210. Section 203 also contains another definitional exclusion, *see* 29 U.S.C. § 203(m), but nowhere uses the term "exemption."

Exemptions to the FLSA, by contrast, appear in § 213 (which is indeed titled, "Exemptions"). *Id.*

§ 213. These provisions exempt certain otherwise-covered employees from the FLSA's minimum wage and overtime requirements. The vast majority of § 213's exemptions provide that one or more remedial sections of the FLSA "shall not apply with respect to any employee" who satisfies certain criteria. *Id.* Contrary to Petitioners' assertion, it was not "mere happenstance" that Congress added § 203(o) to the "Definitions" section of the FLSA rather than the "Exemptions" section. Pet'r. Br. 54. It would be difficult, if not impossible, to modify the language of § 203(o) while preserving its intended meaning in a way that would conform to the structure of § 213. Section 213 provides when §§ 206 and 207, among other FLSA provisions, shall not apply to employees, whereas § 203(o) provides when certain hours shall not apply to §§ 206 and 207. Section 203(o) is thus only *inversely* related, if at all related, to § 213.

There are other important differences between § 203(o) and § 213. First, § 213 exempts entire categories of *employees* from the FLSA's minimum wage and overtime requirements while § 203(o) excludes certain *activities* from the definition of "hours worked." *Salazar*, 644 F.3d at 1138. Accordingly, employees subject to § 203(o) experience, at most, a reduction in the force of the FLSA's minimum wage and maximum hours provisions, whereas employees subject to § 213 are not covered by one or both of those provisions. *Id.*; *see also Adams* 471 F.3d at 1326 (distinguishing the exclusion of only limited activities from the FLSA with the exempt status of entire categories of workers).

Second, unlike the FLSA's rigid exemptions, § 203(o) gives employers and employees the *option* of removing certain otherwise compensable time from the definition of hours worked. *Salazar*, 644 F.3d at 1138. It is thus illogical to call § 203(o) an exemption when it is impossible to know whether it will serve to remove *any* time from the definition of hours worked until *after* the collective bargaining process has concluded.

For these reasons, the Fifth, Sixth, Seventh, Tenth, Eleventh, and Federal Circuits have each correctly reasoned that § 203(o) is not an exemption under the FLSA. Pet. App. 9a–10a; *Allen*, 593 F.3d at 458; *Franklin*, 619 F.3d at 612; *Salazar*, 644 F.3d at 1138; *Anderson*, 488 F.3d at 957; *cf. Adams*, 471 F.3d at 1325–26. And the Fourth Circuit has expressed skepticism that § 203(o) constitutes an exemption. *See Sepulveda*, 591 F.3d at 214 n.1.

The Ninth Circuit is the only court of appeals that has narrowly construed § 203(o), *Alvarez*, 339 F.3d at 905, but it never explained why the provision should be treated as an exemption, *see Salazar*, 644 F.3d at 1138 ("[T]he Ninth Circuit assumed, without analysis, that § 203(o) is an exemption and must be read narrowly.").

Because the FLSA, like other federal statutes,[5] differentiates between exclusions and

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[5] The Freedom of Information Act, for example, separately enumerates exclusions and exemptions. *Compare* 5 U.S.C. § 552(b), *with* 5 U.S.C. § 552(c). And in the bankruptcy law context, exempted property and excluded property refer to different types of assets that are treated differently by the bankruptcy estate. *Compare* 11 U.S.C. § 522, *with* 11 U.S.C. § 541(c)(2). *See also* Laurence B. Wohl, *Pension and Bankruptcy*

exemptions, and because § 203(o) clearly operates as an exclusion from the FLSA, the cases suggesting that exemptions from the FLSA are to be narrowly construed against employers simply have no application here.

D. This Court Should, In Any Event, Reject Any Anti-Employer Canon.

If this Court were, however, to determine that § 203(o) is an exemption from the FLSA and that it would otherwise be subject to this Court's cases requiring a narrow construction, it should revisit—and reject—that interpretive approach.

As Justice O'Connor explained in *Lingle v. Chevron U.S.A. Inc.*, sometimes "a would-be doctrinal rule or test finds its way into [this Court's] case law through simple repetition of a phrase—however fortuitously coined." 544 U.S. 528, 531 (2005). Such is the case with this Court's FLSA cases suggesting the propriety of a narrow construction approach. This Court in 1945 reasoned that, because the FLSA was "designed to extend the frontiers of social progress," exemptions from "such humanitarian and remedial legislation" should "be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *A. H. Phillips, Inc.*, 324 U.S. at 493 (citation omitted) (internal quotation marks omitted). Over the years, this principle has been shorn of its original concern for the plain language of the statute and has instead been contorted into an

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Laws: A Clash of Social Policies, 64 N.C. L. Rev. 3, 6 & n.18 (1985).

"anti-employer" canon, whereby if a provision of the FLSA could be interpreted to favor an employer, it must be read narrowly. As in *Lingle,* it is appropriate to reexamine the evolution and rationale behind this anti-employer canon and determine whether it maintains any validity today.

In *Mitchell*, 359 U.S. at 295–96, and *A. H. Phillips, Inc.*, 324 U.S. at 493, this Court applied earlier formulations of the canon to § 213(a)(2), which the Fair Labor Standards Act of 1989 subsequently repealed. *See* 103 Stat. 938, 939 (1989). Notably, neither *Mitchell* nor *Walling* suggested that the FLSA's provisions should be construed against employers. Rather, the Court emphasized the importance of the "literal words" of exemptions, *Mitchell*, 359 U.S. at 296, and "the plain meaning of statutory language and the intent of Congress," *A. H. Phillips, Inc.*, 324 U.S. at 493.

In *Arnold v. Ben Kanowsky, Inc.*, the Court further stated that exemptions from the FLSA should be narrowly construed "*against the employers* seeking to assert them." *Arnold*, 361 U.S. at 392 (emphasis added). From this statement some courts of appeals have held that the FLSA should generally be narrowly construed against employers. *See, e.g.*, *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011). There is no basis for such a skewed presumption. The words of the statute mean what they say and should not be read myopically by the courts anytime it is perceived that a provision may inure more benefit to the employers than the employees. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 355-66 (2012).

Thus, some appellate courts have rightly questioned the vitality of this "anti-employer" canon. For example, the Tenth Circuit has rejected this canon at the evidentiary stage, pointing out that *Arnold* applied the canon to legal, rather than factual, issues. *Lederman v. Frontier Fire Prot., Inc.*, 685 F.3d 1151, 1157 (10th Cir. 2012). And the Seventh Circuit criticized this canon on the grounds that its justification was "mysterious." *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007). As Judge Posner noted, "generalizations about interpretation, such as that exemptions from remedial statutes should be narrowly construed, are at best tie-breakers." *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1177 (7th Cir. 1987); *see also* Reading Law, *supra*, at 363 ("Without some textual indication, there is no reason to give statutory exceptions anything other than a fair (rather than a 'narrow') interpretation.").

To narrowly construe § 203(o) would be particularly inappropriate. Congress sought to create a balance between the FLSA's wage and hour rights and the NLRA's collective bargaining rights. In general, the minimum wage and maximum hours laws were deemed sacrosanct and not subject to collective bargaining. As to other applications of the wage and hour laws, including whether time spent changing or washing will be included as compensatory time, Congress reached a different judgment and believed it appropriate to empower the employees to negotiate terms that fit the needs of the particular employment context. Given that Congress has already made the judgment in favor of the "sanctity" of collective bargaining in this context, 95 Cong. Rec. at 11,210, there is no legitimate basis

for a court to tip the scales, one way or the other, in construing this statutory term.

II. THE DEPARTMENT OF LABOR'S CURRENT INTERPRETATION OF § 203(o) IS OWED NO DEFERENCE IN THIS CONTEXT.

In 2010, the Department of Labor issued an "Administrator Interpretation" in which it concluded that § 203(o) does not extend to protective clothing. Administrator Interpretation, Wage & Hour Div., U.S. Dep't of Labor, No. FLSA2010-2, 2010 WL 2468195, at *3 (June 16, 2010). This interpretation departs from the substance and the procedural practices of the Department's prior interpretations of "changing clothes."

Previously, the DOL would issue fact-specific opinion letters in response to requests from employers and employees. In well-reasoned letters from 2002 and 2007, the Department analyzed the text, legislative history, and purpose of § 203(o) and found that "changing clothes" includes protective clothing. Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, No. FLSA2002-2, 2002 WL 33941766, at *4 (June 6, 2002); Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, No. FLSA2007-10, 2007 WL 2066454 (May 14, 2007).

Now, the Wage and Hour Division will provide "Administrator Interpretations" that "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue." Wage and Hour Division, U.S. Dep't of Labor, *Rulings and Interpretations*,

http://www.dol.gov/WHD/opinion/opinion.htm (last visited July 24, 2013). This "guidance," according to the Division, "will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees." *Id.*

The Seventh Circuit properly declined to defer to the DOL's interpretation of § 203(o). *See* Pet. App. 17a–20a. Because the DOL's Administrator Interpretation eschews traditional administrative procedures, fails to carry the force of law, and lacks persuasive value, this Court should accord no deference to the Department's interpretation of "changing clothes." The DOL has not even appeared in this Court to defend its interpretation or to argue that it warrants deference. That silence speaks volumes in support of the Seventh Circuit's ruling.

A. The Department Of Labor's Interpretation Lacks The Force Of Law And Does Not Warrant *Chevron* Deference.

A court defers to an administrative agency's reasonable interpretation of an ambiguous federal statute where Congress has authorized it to administer the statute. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Not every action an agency takes falls within this limited deference. As this Court recently explained in *City of Arlington, Texas v. FCC*, where Congress speaks "in plain terms," deference to the Executive Branch's conflicting interpretation is improper. 133 S. Ct. 1863, 1868 (2013).

In the present case, the language of the statute is plain. Congress left no gaps for the agency to fill in § 203(o), and the DOL's interpretation of § 203(o) is not based on a permissible construction of that provision. The plain meaning of "changing clothes" in § 203(o) encompasses all types of clothing, including protective clothing. *See, e.g.*, *Franklin*, 619 F.3d at 614 ("Given the context of the workday, § 203(o) clearly applies to the [protective] uniform at issue"); *Sepulveda*, 591 F.3d at 216 ("This case . . . involves a straightforward application of the statutory text."); *Anderson*, 488 F.3d at 956 ("[T]he [protective] garments . . . fit squarely within the commonly understood definition of 'clothes' as that term is used in § 203(o)"). Indeed, all but one of the courts of appeals that have considered the meaning of § 203(o) have reasoned that "changing clothes" extends to protective clothing. Thus, the plain meaning controls here, and this statute is not properly subject to reinterpretation by the DOL. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

Even if "changing clothes" in § 203(o) is ambiguous, the DOL's Administrator Interpretation is not entitled to *Chevron* deference. As this Court explained in *United States v. Mead Corp.*, *Chevron* deference is appropriate only where Congress authorizes an administrative agency to promulgate interpretations or rulings that carry the "force of law." 533 U.S. 218, 221, 226–27 (2001). Whether an interpretation carries the force of law is for the courts, not the agency, to decide. *City of Arlington*, 133 S. Ct. at 1876.

Here, the DOL's Administrator Interpretation does not carry the force of law. Unlike Congress's "general grant of authority" to the Federal Communications Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out" the provisions of the Communications Act of 1934, *City of Arlington*, 133 S. Ct. at 1866 (quoting 47 U.S.C. § 201(b)), no such general grant to the DOL exists here. Rather, Congress empowered the Department to promulgate rules and regulations only with respect to specific provisions of the FLSA. In 29 U.S.C. § 213(a)(1), for example, Congress authorized the Secretary of Labor to "define[]" and "delimit[]," with limited exceptions, the scope of the FLSA's minimum wage and overtime exemptions for executive, administrative, and professional employees, including outside salespeople. *See Auer v. Robbins*, 519 U.S. 452, 456 (1997).

Congress also gave the DOL discrete grants of authority in the "Definitions" section of the FLSA, in which § 203(o) is located. Section 203(*l*) permits the Secretary to determine what forms of employment are "particularly hazardous" to children within the meaning of "[o]ppressive child labor," while § 203(m), as discussed above, permits the Secretary to determine the fair value of board and lodging when calculating a "[w]age." 29 U.S.C. § 203(l)–(m). Section 203(o) lacks any such authorization. Like the interpretation at issue in *Mead*, the Administrator Interpretation here is not based on a congressional grant of authority and therefore does not carry the force of law. *Cf. Mead Corp.*, 533 U.S. at 231–32.

The Department of Labor's own regulations further indicate that its Administrator Interpretation lacks the force of law. A regulation or order, according to the DOL, refers to authoritative rules that are "issued pursuant to statute by an administrative agency" and that "have the binding effect of law." 29 C.F.R. § 790.17(b) (2013). An administrative interpretation, by contrast, refers to "merely the agency's present belief concerning the meaning of applicable statutory language." *Id.* § 790.17(c). "Advisory interpretations" by the Wage and Hour Division "serve only to indicate the construction of the law which will *guide* the Administrator in the performance of his administrative duties." *Id.* § 775.1 (emphasis added). Indeed, the Wage and Hour Division itself contrasted the "guidance and compliance assistance" that its Administrator Interpretations offer with the "definitive" quality of its former opinion letters. *Rulings and Interpretations*, *supra*.

Even if Congress implicitly authorized the DOL to interpret definitional provisions of the FLSA—which is difficult to credit in the face of nearby explicit authorizations—the DOL's exercise of any such authority would not warrant *Chevron* deference. As this Court observed in *Mead*, the "overwhelming number" of cases that have applied *Chevron* deference have involved notice-and-comment rulemaking or formal adjudication. *Mead Corp.*, 533 U.S. at 230. Agency interpretations contained in opinion letters, policy statements, agency manuals, and enforcement guidelines, however, are typically issued without notice and comment or formal adjudication and thus do not deserve a high level of deference. *Christensen v.*

Harris Cnty., 529 U.S. 576, 587 (2000). In *Christensen*, this Court accorded no deference to the Wage and Hour Division's opinion letter interpreting an FLSA regulation on the grounds that the interpretation was unaccompanied by formal administrative procedures and was unpersuasive in any event. *Id.*

Adherence to formal administrative procedures is an important factor in determining the applicability of *Chevron* deference. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).[6] The DOL's recent interpretation of § 203(o), however, employed neither formal administrative procedures nor any alternatives that would justify *Chevron* deference. The Wage and Hour Division did not subject its interpretation of § 203(o) to public notice and comment, thus preventing "fair notice" of its new legal position. *See Long Island Care*, 551 U.S. at 174. Although the DOL's Administrator Interpretation purports to offer "comprehensive guidance" about § 203(o), *see Rulings and Interpretations*, *supra*, the DOL arrived at that interpretation with even fewer procedural protections than its former opinion letters. Whereas the DOL's opinion letters responded to particular factual scenarios based on formal requests, the DOL's Administrator Interpretation represents a *sua sponte* effort to reinterpret the FLSA. Quite simply, there are no factors here that would support a high

[6] "Longstanding" informal interpretations can in some instances also warrant *Chevron* deference. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002). Here, as we explain below, the agency interpretation is neither formal nor longstanding.

level of deference. Indeed, the meaning of "changing clothes" is not essential to the overall administration of the FLSA, and the DOL's interpretations of § 203(o) have varied significantly over time. *Cf. Barnhart*, 535 U.S. at 222.

Notably, the Secretary of Labor as *amicus curiae* in the court below did not argue for *Chevron* deference to its Administrator Interpretation, only *Skidmore* deference based on the persuasiveness of its interpretation. Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellees/Cross-Appellants at 10 n.4, *Sandifer*, 678 F.3d 590 (7th Cir. 2012) (No. 10-1821). And the DOL has not even filed a brief before this Court defending the persuasiveness of its interpretation. Where the DOL has not even sought *Chevron* deference, none is due.[7]

B. The Department Of Labor's Interpretation Is Not Persuasive And Does Not Warrant *Skidmore* Deference.

Where an agency's informal interpretation fails to warrant *Chevron* deference, it may still be "entitled to respect" according to its persuasiveness. *Christensen*, 529 U.S. at 587; *see also Mead Corp.*, 533 U.S. at 228. The weight that courts attach to these types of interpretations is generally analyzed

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[7] *Auer* deference is unwarranted here because the DOL's Administrator Interpretation does not involve the Department's interpretation of its own ambiguous regulation. *See Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (citing *Auer*, 519 U.S. at 461–63).

under the framework of *Skidmore v. Swift & Co.* and depends, *inter alia*, on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944). These factors include the care with which the agency has issued its interpretation, its level of expertise, and the formality of the agency's position. *Mead Corp.*, 533 U.S. at 228. Applying these considerations here, no deference is due to the DOL's interpretation of § 203(o).

1. The informal processes employed by the DOL here do not support deference to the agency's interpretation.

As an initial matter, the DOL's most recent interpretation of § 203(o) is inconsistent with its earlier pronouncements. The Department has modified its position on the compensability of donning and doffing protective clothing twice in the last two decades over the course of five opinion letters and one Administrator Interpretation. While an agency may, of course, change its interpretation of a statute when it believes that its prior position was mistaken, this Court has repeatedly explained that consistency is a factor in determining what measure of *Skidmore* deference, if any, is warranted. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013); *Christopher*, 132 S. Ct. at 2169.

As noted above, the DOL did not solicit public comment before changing its position on whether § 203(o) extends to protective clothing, nor did the

DOL issue its interpretation in the context of any specific factual dispute. The lack of such formal rulemaking in changing its views can be a factor counseling against deference. *Reno v. Koray*, 515 U.S. 50, 61 (1995) (according only "some deference" to an internal agency guideline that was not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment" (alteration in original) (internal quotation marks omitted)).

Where an agency fails to employ procedures that evince its careful consideration of an administrative matter, courts accord less deference. In *Gonzales v. Oregon*, for example, this Court declined to extend *Skidmore* deference to the Attorney General's interpretation of the Controlled Substances Act because, *inter alia*, the Attorney General failed to consult anyone outside the Department of Justice. 546 U.S. at 269. Similarly, this Court recently found unpersuasive the DOL's interpretation of the FLSA's "outside salesmen" exemption in part because the Department relied on its own "internal decisionmaking process" and provided no opportunity for public comment. *Christopher*, 132 S. Ct. at 2169.

As in *Christopher,* the DOL's interpretation here "lacks the hallmarks of thorough consideration." *Id.* Indeed, DOL's most recent interpretation did not bring to bear any of its expertise in construing "changing clothes" within the meaning of § 203(o). Rather, the DOL largely relied on the Ninth Circuit's opinion in *Alvarez* and several district court decisions for the proposition that § 203(o) does not extend to protective clothing.

Administrator Interpretation, 2010 WL 2468195, at *2–3.

2. The DOL's reasoning is beset by several logical shortcomings. In its Administrator Interpretation, the DOL observed that dictionary definitions of "clothes" were not uniform and argued that such definitions were inapposite to the proper construction of § 203(o). Administrator Interpretation, 2010 WL 2468195, at *1–2. At the same time, the DOL urged a "plain meaning" interpretation of § 203(o). *See id.* at *2–3. But as most courts of appeals that have addressed the issue have held, the unqualified meaning of "clothes" plainly *includes* clothes that are worn for protection (*i.e.*, protective clothing). *See Salazar*, 644 F.3d at 1139; *Franklin*, 619 F.3d at 615; *Sepulveda*, 591 F.3d at 214; *Anderson*, 488 F.3d at 955. Each of these opinions reached this conclusion by using dictionary definitions of the ordinary meaning of "clothes."

Furthermore, the DOL relied on a flawed interpretation of the legislative history. The Department noted that the original language of § 203(o) would have rendered noncompensable "any time" that was excluded from the workday pursuant to a collective bargaining agreement, but that the Conference Committee ultimately limited this exclusion to time spent "changing clothes" or washing. Administrator Interpretation, 2010 WL 2468195, at *2; *see also* 95 Cong. Rec. at 11,210. Based on this revision and a cursory examination of the congressional debate surrounding § 203(o), the DOL inferred that Congress intended to cabin the term "clothes" to those articles that employees in the baking industry wore in the 1940s. Administrator

Interpretation, 2010 WL 2468195, at *2. Although Representative Herter cited collective bargaining agreements in the baking industry when introducing § 203(o), he did so as an *example* of the types of private agreements that warranted statutory protection—not the types of *clothes*. *See* 95 Cong. Rec. at 11,210. And as discussed above, the goal of § 203(o) was to preserve the ability of employers and employees to bargain collectively. *Id*. The fact that Congress narrowed the original scope of § 203(o) from "any activity" to "changing clothes" does not imply that Congress similarly intended to narrow the plain meaning of "clothes."

More fundamentally, by excluding from the reach of § 203(o) all protective clothing "that is required by law, by the employer, or due to the nature of the job," 2010 WL 2468195, at *3, DOL has rendered this statutory provision a near nullity. *Cf.* Pet. App. 10a ("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."). DOL's exclusion of all essential and required protective clothing would leave within the scope of § 203(o) only changes of clothing into nonprotective clothing, such as a uniform. Changing from street clothes into a uniform is, typically, "merely a convenience" to employees and is therefore noncompensable under the FLSA. *See* 29 C.F.R. § 790.8(c) (2013). Even before the enactment of § 203(o), employees and employers were already allowed to bargain collectively to compensate employees for such noncompensable time. 29 U.S.C. § 254(b). Thus, under the DOL's interpretation, § 203(o) is largely superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (noting that

statutory exceptions should not be interpreted as "entirely superfluous in all but the most unusual circumstances").

In light of the plain meaning and purpose of § 203(o) and the statutory structure of the FLSA, there is no basis to adopt Petitioners' narrow construction of § 203(o). And because the Department of Labor's interpretation of § 203(o) lacks the force of law, brings no expertise to bear, and is based on flawed reasoning, this Court should not accord even *Skidmore* deference to the Department's similarly narrow construction of § 203(o). Therefore, the Court of Appeals was correct in holding that § 203(o)'s plain terms are properly read to extend to the types of protective clothing that are at issue in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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