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

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QUESTION 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. 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 excluded from compensable time under a bona fide collective bargaining agreement applicable to that worker.

The question presented is: what constitutes "changing clothes" within the meaning of section 203(o)?

PARTIES

The petitioners are approximately 800 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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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 Petition Appendix (Pet.App.). 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 Petition 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 Petition 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 Petition Appendix.

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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). On February 19, 2013, this Court granted certiorari limited to Question 1 in the petition.

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STATUTES AND REGULATION INVOLVED

The statutes and regulations involved are set out in the Appendix to the brief.

STATEMENT

Legal Background

The Fair Labor Standards Act (FLSA) generally requires that a covered employer pay overtime, at a rate one and one-half times the regular rate, to a covered employee who has worked more than forty hours in any given week. 29 U.S.C. § 207(a)(1). The statute itself does not define "work," or "workweek" (the actual language of section 207(a)(1)). Because the meaning of those terms determines an employer's obligation to pay overtime, they have been the subject of considerable controversy since the enactment of the statute. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 25-29 (2005).

Work begins when an employee engages in the first "principal activity" of the day, and continues until the last principal activity. *Id.* at 33-37. Consistent with the decisions of this Court, the Department of Labor has adopted the continuous workday rule, which means that the "workday" is generally defined as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." 29 C.F.R. § 790.6(b). In *Steiner v. Mitchell*, 350 U.S. 247 (1956), this Court held that activities such as donning and doffing

protective gear "are compensable ... if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed...." 350 U.S. at 256. In this case the court of appeals concluded that the donning and doffing of protective gear by the workers in this case was indeed "an integral and indispensable part of the workers' main activity ... and therefore a principal activity." Pet.App. 12a.

But the FLSA contains a narrow exception to the rule that an employer must pay time and one-half overtime for any work in excess of forty hours in a week. Under section 203(o), in determining 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 ... by the express terms of or a custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o) (emphasis added). In other words, where the section 203(o) exclusion applies, an employer need not compensate a worker for changing clothes or washing that would otherwise be a principal activity, and that activity does not start (or mark the end of) the workday for overtime purposes.[1] At a non-union plant,

[1] The courts of appeals are divided as to whether a principal activity that is non-compensable under section 203(o) may nonetheless trigger the start of the workday. *Compare* Pet.App. 11a-13a *with Franklin v. Kellogg Co.*, 619 F.3d 604, 618-19 (6th Cir. 2010). This Court declined to grant certiorari with regard to that question. *See* Petition, i; 133 S.Ct. 1240 (2013).

time spent on clothes changing that is a principal activity is compensable and (if the workday continues for long enough) may give rise to an obligation to pay overtime. On the other hand, at a unionized plant the company and union may agree that clothes-changing time is not part of the workday.[2] But aside from the specific terms of section 203(o), and certain other provisions not relevant here, a union does not have the authority to bargain away any of a worker's individual statutory rights under the FLSA. Except for "washing," which is not at issue here, section 203(o) applies only to "changing clothes."

Section 203(o) has given rise to a substantial volume of litigation regarding the meaning of "changing clothes." The lower courts have disagreed about two inter-related questions: what objects are "clothes" and what actions constitute "changing" clothes?

The Personal Protective Equipment Used At U.S. Steel

This case originated at the Gary Works, U.S. Steel's flagship facility, an integrated steel plant spread across nearly 3,000 acres in Gary, Indiana.[3]

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[2] The lower courts are divided as to whether under section 203(o) a worker's rights can be lost without the conscious agreement of the union.

[3] Although the vast majority of the workers opting into this collective action are or were employees at Gary Works in Indiana, a substantial number of employees also opted in from

(Continued on following page)

Gary Works produces steel from iron ore and other raw materials, and manufactures from it a variety of flat-rolled steel. The plant employs approximately 5,000 workers, including about 4,500 union-represented employees who work in production and maintenance. Pet.App. 35a-36a.

Gary Works, like all steel plants, is a dangerous place. Some employees work near molten steel, and are at risk of molten metal or sparks landing on them. Other tasks are in close proximity to powerful acids or other dangerous chemicals, or in environments where the air is so noxious that respirators are required. In certain jobs workers are near large moving steel product or powerful machinery. In portions of the plant the production or manufacturing process results in hard objects or dangerous chemicals flying through the air. There are dangerous high-voltage cables, and some work must occur at a considerable height above the ground. Any of these problems can result in serious injury, illness, or even death.

U.S. Steel imposes a wide range of practices and procedures to reduce risks to its workers. Those safety measures are the result of the overlapping requirements of the federal Occupational Safety and Health Act, the similar Indiana law and the applicable collective bargaining agreement, and of the

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U.S. Steel's plants in Granite City, Illinois and Ecorse and Troy, Michigan.

company's recognition that work-related injuries or deaths are bad for business. A linchpin of those safety measures is the requirement that employees wear safety equipment, referred to at the plant as Personal Protective Equipment (PPE). Each employee receives a 37-page pamphlet entitled "Personal Protective Equipment," which details the purpose, nature, and proper use and maintenance of each of the safety items. Employees are also issued a General Plant Safety Rules book and a Code of Ethical Business Conduct, which emphasize the requirement that every worker wear the appropriate PPE. The job responsibilities of each employee are carefully assessed to determine what PPE should be worn. Workers receive in person, video and written training in the relevant safety procedures. A worker's exposure to dangerous substances may be monitored, and the results can lead to a change in the PPE to be used. A worker's failure to wear the required PPE can and does lead to disciplinary action.[4]

Workers enter the plant at one of seven different gates and proceed to locker rooms where much of their assigned PPE is stored.[5] The workers put on their PPE and then go to their work station; because of the size of the plant, some employees travel from the locker room to their work station by bus.

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[4] J.A. 54-60.

[5] Some other safety equipment (such as a welder's helmet), not at issue in this case, is stored and donned and doffed at a worker's job site during the work shift.

At the end of the day the workers return to the locker room and take off the PPE. In some instances workers take showers before returning home. Pet.App. 38a.

The particular PPE items which a worker must wear depend to some degree on his or her job. U.S. Steel put in the record a box of exhibits which contains the twelve most commonly required PPEs: a hardhat, safety glasses, earplugs, a respirator, a "snood," a flame retardant hood, a flame retardant jacket, "wristlets," work gloves, flame retardant pants, "leggings," and metatarsal (steel-toed) boots.[6] The jacket and pants are infused with an unidentified chemical which reduces the risk that they will be set afire by molten metal or sparks. The snood is a hood-like covering that goes over the head and extends over part of the chest and shoulders, and has an opening for the face. The wristlet is a Kevlar sleeve, cylindrical in shape and about fifteen inches long, that is worn over the lower arm and upper part of the glove to keep dangerous objects from getting into the glove. The legging is a Kevlar rectangle, approximately five inches by fifteen inches, with Velcro straps at

[6] The Seventh Circuit's list of the disputed items omits the hood, the wristlet, the leggings and the respirator. Pet.App. 4a. The model whose photograph appears in the court of appeals' opinion (Pet.App. 5a) is not wearing the ear protection, the hood, the respirator, the wristlets or the leggings, all of which were in the box of exhibits from which the other items were taken.

either end. It is held in place in front of the lower leg by the straps around top and bottom of the lower leg, and is used to prevent molten metal or other dangerous items from getting into a worker's boots.

Laundering the flame retardant jacket and pants must be done in a particular way to preserve their flame retardant quality. Bleach attacks the flame retardant treatment, and harsh laundry soaps can leave fatty acid deposits, which adhere to the fabric and compromise the flame retardant clothing. Fabric softeners must not be used. The maximum wash temperature is 140 degrees and the maximum dry temperature is 160 degrees. The items must never be boiled or steam cleaned, or cleaned with solvents. The jacket and pants must not be washed with synthetic garments, because fibers from synthetic clothing could adhere to the jacket or pants, reducing the effectiveness of the flame retardant treatment.[7]

There are several significant differences among the workers regarding the utilization of PPE. First, which PPE a worker is required to wear depends on his or her job. A respirator, for example, is mandatory in the coke unit, but may not be needed in other units. Second, there are different versions of some of the commonly used types of PPEs. There are several types of hardhats, ear protection, and eye protection, and many kinds of gloves, including eight different types of rubber and synthetic gloves. Third, the PPE

[7] Dkt. 134-34, Exhibits D at 11 and E at 61-62.

is ordinarily put on (and taken off) at the locker room, but practice varies with regard to the respirators; some workers put the respirator over their face at the locker room, while others do not do so until they reach their job site or perhaps until their shift begins; the latter would either carry their respirators to and from the locker room or put the respirator around their necks.[8] Fourth, while many workers simply put the PPE on *over* their street clothes, others may take off their pants and/or shirts (or blouses and/or skirts) before donning the PPE.[9] There may be disputes of fact regarding the extent to which some items are donned and doffed at the locker room,

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[8] The workers' declarations consistently refer to putting on the PPE before going to their work station and taking it off only when back in the locker room, and make no distinctions in this regard among the various types of PPE. Dkt. 134-1 to 134.40. U.S. Steel, on the other hand, contends that workers "generally" do not put on their gloves or hearing protection until their shift started. Regarding respirators, the company contends that "[r]espirators are generally not donned prior to the start of a shift or prior to the employee reporting to his or her work location." Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corporation, 5.

[9] Several declarations expressly state that the worker put on his or her PPE over his or her "regular clothing." Dkt. 134-35, ¶ 4; Dkt. 134-39, ¶ 3; Dkt. 134-40, 40, ¶ 3. In many other declarations workers describe having to launder at home both contaminated shirts and contaminated pants, which necessarily means that the flame retardant jacket and pants were being put on over the worker's pants and shirt. Dkt. 134-6, p. 2; Dkt. 134-8, p. 2; Dkt. 134-9, p. 2; Dkt. 134-11, p. 2; Dkt. 134-16, p. 2; Dkt. 134-17, p. 2; Dkt. 134-20, p. 2; Dkt. 134-25, p. 2; Dkt. 134-34, p. 2.

rather than the job site, and the extent to which workers put on PPE over their street clothes rather than in place of those clothes.

When workers arrive at the plant, they swipe a time card at the entry gate to the plant. Employees whose gate time is not recorded at least 12 to 20 minutes before their official shift begins are considered tardy and their pay is docked.[10] But employees are only paid for the eight hours that they spend at their work stations during their shift. They are not compensated for the time they spend putting on and taking off the PPE, or for the time required to travel between the locker room and their work stations.[11] Because an employee normally works five eight-hour shifts a week, if the time donning and doffing the PPE (and the intervening travel time) were compensable, it would be paid at a rate one and one-half times the worker's regular rate. 29 U.S.C. § 207(a). The parties are in disagreement regarding how much time workers spend on these uncompensated activities; the amount of time necessarily varies from worker to worker. Pet.App. 76a-80a.

Since 1937 production and maintenance workers at U.S. Steel have been represented by the United

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[10] Dkt. 140 ¶ 3.

[11] In the collective bargaining agreement signed in 2008 between U.S. Steel and the Steelworkers, the company agreed to pay employees in the Coke plant for an additional 20 minutes a day for wash-up time. (Dkt. 112, App. 390 at ¶ 69).

Steelworkers. Between 1947 and 2003 collective bargaining agreements contained a provision stating that the employer was not obligated to compensate worker "for any travel or walking time or time spent in preparatory and closing activities...." (Dkt. 112-2, p. 5). This provision did not specifically mention time spent donning and doffing clothes or personal safety equipment (to the extent any such equipment was in use in 1947). In 2008, subsequent to the filing of this action, the Steelworkers in connection with the collective bargaining agreement of that year agreed to a statement that the activities which the company was not required to compensate included the "donning and doffing of protective clothing." (*Id.* at ¶ 70). (Dkt. 85-9, p. 3).

The Proceedings Below

Sandifer and several other employees at Gary Works brought this action against U.S. Steel under the Fair Labor Standards Act in federal district court. Approximately 800 other current or former Gary Works employees joined in the putative collective action. The plaintiffs sought backpay for the time spent donning and doffing the PPE and for the time traveling between the locker rooms and work stations.

U.S. 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. In rejecting the donning and

doffing claim, the district court addressed two distinct issues. First, the court held that all of the items of PPE were "clothes" within the meaning of section 203(o). Pet.App. 44a-50a. The district judge construed "clothes" in that provision broadly to mean anything that is a "covering for the human body." Pet.App. 48a (quoting *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955 (11th Cir. 2007)). Second, the district court ruled that "changing" in section 203(o) does not require that a worker substitute some clothes for other clothes, but includes merely adding something to what the worker is already wearing. Pet.App. 50a-52a. "Even if each employee did nothing more than put the items of PPE over the clothes he or she wore to the plant, adding those items would satisfy the 'change' requirement." Pet.App. 51a. Thus under the district court's interpretation of section 203(o), a worker "chang[es] clothes" if he or she merely puts on, or takes off, a hardhat.

The district court's resolution of the travel time claims 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 activities." 29 U.S.C. § 254(a). The district court concluded that even though the donning and doffing was in its view non-compensable because of section 203(o), they could still mark the beginning and end of the workday if they were indeed a principal activity. Pet.App. 62a-64a. The district judge rejected U.S. Steel's contention that if the donning and doffing were non-compensable under section 203(o), it necessarily followed that the travel time too

must be non-compensable. Because the court had concluded that whether the donning and doffing constituted a principal activity could only be resolved at trial (Pet.App. 65a-68a), the court declined to dismiss the travel time claim. Pet.App. 79a, 81a.

At the request of U.S. Steel, the district court certified for interlocutory appeal under 28 U.S.C. § 1292(b) his order resolving the summary judgment motion. The district judge identified as the controlling question of law warranting an interlocutory appeal the issue of whether activity which is non-compensable under section 203(o) may nonetheless constitute a principal activity that begins and ends a workday. Pet.App. 21a-33a. The court of appeals accepted the appeal. Pet.App. 2a. Sandifer cross-appealed the district court's holding that the donning and doffing of the PPE is "changing clothes" within the meaning of section 203(o). Pet.App. 2a. The court of appeals concluded that it had no jurisdiction over Sandifer's cross-appeal, but held that the issues raised by that appeal could be considered in U.S. Steel's section 1292(b) appeal, because if (as Sandifer argued) the district court's "ruling on clothes-changing time was erroneous, the plaintiff's case for compensation for travel time [would be] irrefutable." Pet.App. 3a.[12]

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[12] *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

The court of appeals concluded that the donning and doffing of the PPE was a principal activity under the FLSA, and thus would ordinarily mark the start and end of the workday. Pet.App. 11a-12a. The appellate court rejected the district court's view that "clothes" includes anything that covers a part of the human body (Pet.App. 7a), but also disagreed with the Ninth Circuit's view that items worn to protect against workplace hazards are not clothes under section 203(o). Pet.App. 10a; *see 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). Applying yet a third standard, the Seventh Circuit concluded that the safety glasses and earplugs (and perhaps the hardhat) were not "clothes" under section 203(o), but reasoned that the time needed to put on and take off these items was *de minimis* and therefore non-compensable. The other PPE items discussed by the court of appeals, however, were held to be clothes under section 203(o).[13]

With regard to the travel time claim, the Seventh Circuit held that a principal activity that is non-compensable under section 203(o) cannot commence, or prolong, the workday. Pet.App. 11a-20a. Having thus rejected on the merits both of Sandifer's claims, the court of appeals concluded that "the suit has no

[13] The court of appeals' opinion did not address whether items not worn by its model – the leggings, wristlets, hood, and respirator – were "clothes" within the meaning of section 203(o).

merit and should be dismissed by the district court." Pet.App. 20a.

The court of appeals denied Sandifer's petition for rehearing. Pet.App. 82a.

SUMMARY OF ARGUMENT

The term "clothes" is ambiguous. The district court noted that two editions of the same dictionary provide conflicting definitions of the term, one favorable to the plaintiff and one to the defendant. Although there are some things which everyone would refer to as clothes, such as a shirt made out of ordinary materials, there are items whose categorization in common use cannot be determined from the divergent dictionary definitions. It can be difficult to predict whether or not an English speaker would describe a particular object as clothes, and not everyone necessarily uses this term in the same way.

On the other hand, the term "changing" in the phrase "changing clothes" does have a clearly established meaning. When used in this context, "changing" refers to substituting certain clothes for other clothes. Dictionaries are consistent in explaining that this meaning of the verb "change" (or the gerund "changing") is the correct one when the object of the verb is "clothes." That is important because safety items are often put on over (or in addition to) a worker's clothes, and because there is evidence in this case

that a significant number of workers put the safety items on over their street clothes.

"Clothes" does not mean everything that covers some part of the human body or anything that a person "wears." Applying that overbroad definition, lower courts have reached the implausible conclusion that earplugs, safety glasses and knife scabbards are clothes. People wear all sorts of things which cover some portion of the body, but that are not referred to as clothes, from back braces, barrettes and bandoliers to wigs and wristwatches. If a tourist asked for directions to a clothes store, we would not direct her to an optician, a jewelry store, or a shoe store. Although "clothes" cannot be given a precise definition, an item is more likely to be referred to in that way if its primary purpose is to assure comfort or decency.

The Seventh Circuit erred in suggesting that the meaning of "clothes" could be determined by asking how an English speaker would describe a photograph of a model wearing the item in question. The dispute in this case is about whether an item would or should be described as "clothes" if its purpose is to protect the wearer from a workplace hazard. In a photograph the protective properties and purpose of an item might not be apparent. That is precisely the problem with the Seventh Circuit's photograph. It is impossible to discern from that photograph that the pants and jacket are flame retardant, just as it might be impossible to detect from a photograph that a vest is bulletproof or that a jacket incorporates an air bag to protect a rider who fell off a horse. In determining

whether a protective item would be referred to as clothes, it makes no sense to ask only whether the item would be called clothes by an English speaker who did not know of that protective function.

The term "clothes" in section 203(o) should be interpreted to exclude items that, unlike ordinary clothing, both are used to protect an employee against *workplace* hazards and are designed to provide such protection.

That construction is consistent with what Congress would have had in mind in 1949 when it enacted section 203(o). At that time most American workers who changed clothes at the beginning and end of the day did so because their jobs in mines and factories were dirty. The work clothes that they substituted for their street clothes were ordinary clothing, differing from street clothes (if at all) primarily in durability or color. The sponsor of section 203(o) pointed to bakers as the paradigm of clothes changing. Bakers' clothes differed from street clothes only in that – to assure cleanliness – they were washed and stored at the bakery, and often were white. In that era personal safety equipment was far less common than today.

This interpretation of "clothes" is consistent with this Court's repeated decisions that limitations on the Fair Labor Standards Act should be narrowly construed. The court of appeals erred in holding that this rule of interpretation applies only to provisions codified in section 213, which is headed "exemptions."

This Court's decisions do not hold that the applicability of the narrow construction presumption turns on whether a provision uses the term "exemption." This Court has repeatedly described as exemptions, and applied the presumption in favor of the narrow construction of exemptions to, provisions that did not include the word exemption, but were phrased in other language. If this Court were now to hold that the applicable rule of construction turns on whether or not a limiting provision uses the words "exemption" or "exemptions," such a decision would have far reaching and unpredictable consequences. There are thousands of provisions of the United States Code that use the terms like exemption, exclusion, and exception.

There is no reason to believe Congress intended that a different rule of interpretation would apply to section 203(o) because it was codified in section 203 rather than in section 213. Sections 203 and 213 contain similar types of exceptions, and the suggestion that the sections are subject to different rules of construction is of relatively recent origin.

A distinction between ordinary clothing and items used and designed to provide protection against workplace hazards is consistent with well-established distinctions in the OSHA regulations. Pursuant to those regulations, U.S. Steel and all employers already identify workplace hazards and select the particular items of personal safety equipment that are needed to protect against them.

ARGUMENT

I. The Term "Clothes" In Section 203(o) Is Ambiguous

"Clothes," like "art" or "beauty," is an everyday word whose meaning is clear in some circumstances, but that defies precise definition. "Since 2002, courts have aptly noted the vastly divergent definitions of 'clothes' that appear in a single dictionary, in different editions of a dictionary, and in different publishers' dictionaries...."[14] It would be quite impossible to devise a single formulation that depicts the diverse ways in which people use the term "clothes" or that captures the degree to which speakers may differ about its use.

Several different factors may affect whether a speaker would use the term "clothes" to characterize a particular item. *First*, certain things cover only a portion of the human body that would be covered by ordinary clothing. Thus in this case the wristlet and leggings cover a much smaller area than would a shirt or a pair of pants, respectively. *Second*, some items are worn on the extremities, parts of the body not covered by the apparel (such as shirts or pants) that we most often describe as clothes. Here a majority of the disputed Personal Protective Equipment was

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[14] Wage and Hour Division, Opinion Letter**,** June 16, 2010, 2010 WL 2468195; *see id.* ("The Administrator shares those concerns about reliance on dictionary definitions of the term 'clothes.' " (footnote omitted)).

worn on the extremities. The hardhat, snood, hood, hearing protection, safety glasses and respirator were on the head or face, the gloves were on the hands, and the metatarsal boots were on the feet. *Third*, although what we refer to as clothes is at least usually made of cloth (*e.g.*, cotton, wool, or artificial fabrics), people also wear items made of other substances. In the instant case the various PPE were made of hardened plastic (the hardhat and the safety glasses), rubber (the earplugs), Kevlar (the wristlets and leggings), leather and metal (the boots), a combination of metal and other materials (the respirator), and some heavy material infused with an unidentified chemical that reduced its tendency to burn (the fire retardant pants and jacket). *Fourth*, while at least the primary purposes of ordinary clothes are modesty and comfort, perhaps with an element of fashion determining form or color, some things we wear are intended to serve a different function, and covering the body is only an incidental consequence. The purpose of an item may be purely decorative (a necklace), religious (a cross or yarmulke), functional (suspenders), informational (a watch), medical (a neck brace), symbolic (a team mascot costume), or protective (a helmet). In this case all of the PPE items were intended to protect the wearer from injury or death.

Whether a particular speaker would describe a particular item as "clothes" might turn as well on whether some other word seemed more appropriate instead. In ordinary use, for example, "clothes" and

"accessories" are distinct; clothes and accessories are usually sold in separate departments of a store or at different parts of a retailer's website. But the line separating what a speaker would call "clothes" rather than an "accessory" is not that precise.

People do not all use the term "clothes" in the identical manner. A steelworker in Gary might use the term "clothes" differently than a sales associate at Forever 21 or the fashion editor at GQ. A teenager might refer to something as "clothes" which his or her parents would emphatically describe in different terms. Whether or not a speaker would refer to chaps as "clothes" could depend on whether she was a native of Arizona or of the Bronx. And usage to some degree has probably evolved over time. The statute in this case was written more than sixty years ago, in an era when lawmakers purchased what were then known as "furnishings" from the now long-shuttered Raleigh Haberdashers, and when some people of means still changed clothes when they "dressed for dinner" at home, a practice that today is largely unfamiliar except to fans of Downton Abbey.

All of this, unsurprisingly, has led to divergent dictionary definitions of "clothes." In the courts below U.S. Steel relied on Webster's Third New International Dictionary (1986), which arguably defines "clothes" quite broadly as "covering for the human body." *Id.* at 428; *see* Pet.App. 48a. Sandifer, on the other hand, invoked Webster's Second New International Dictionary (1957), which defines clothes

far more narrowly as items "worn ... for decency or comfort." *Id.* at 507; *see* Pet.App. 46a. These (and other) dueling dictionary definitions make clear only that dictionaries themselves cannot provide a definitive resolution of the meaning of "clothes" in section 203(o).

II. The Term "Changing" In Section 203(o) Unambiguously Refers To The Substitution Of Clothes for Other Clothes

Unlike the term "clothes" in section 203(o), the term "changing" has a clear and well-established meaning when the object of the gerund "changing" is the noun "clothes."[15] The phrase "changing clothes" is a common idiom that refers to substituting certain clothes for others, not to merely putting on something else. The distinction is important because most safety items – regardless of whether classified as "clothes" under section 203(o) – are put on over a worker's street clothes.[16] That limitation on

[15] Although the lower courts occasionally describe section 203(o) as applying to the "donning" and "doffing" clothes (*e.g.*, Pet.App. 12a, 48a), the text of the statute actually refers to time spent in "changing" clothes. The difference is critical, because one could "don" an item without substituting it for anything else. A gentleman who doffs his hat at an acquaintance momentarily takes it off, then returns it to his head.

[16] Wage and Hour Division, Opinion Letter, Dec. 3, 1997, 1997 WL 998048 ("protective safety equipment ... is generally worn over ... apparel"); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 478

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the scope of section 203(o) also sheds light on the proper interpretation of the term "clothes."

When used with regard to clothes, "changing" emphatically refers to substitution.

> 'Changing clothes' is an everyday, plain-language term that describes what most people do every day – taking off pajamas to put on work clothes in the morning, or taking off dress clothes to put on casual wear in the evening.... All of the sanitary and protective gear at issue here is worn over, and in addition to, the employees' street clothes.

Fox v. Tyson Foods, Inc., 2002 WL 32987224 at *6 (N.D.Ala. Feb. 4, 2002). Any school child knows that "change your clothes" does not mean "put on your coat." "Change clothes" is an idiomatic expression like "change a diaper" or "change a tire." No one understands the sentence "the father changed the baby's diaper" to mean that the father put a second diaper on top of the first smelly one, or took off the full diaper and left the baby naked.

With regard to the meaning of "change" in the context of clothes, dictionaries are completely consistent. In definitions of "change," every reference to clothes concerns substitution. Substitute is one of the various meanings of "change," and substituting

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(5th Cir. 2001) (noting that items worn for sanitation reasons were worn "over street clothing").

certain clothes for others is the most common example found in dictionaries for that particular meaning of change. One dictionary defines change as "to put or take (a thing) in place of something else; substitute: as, he *changed* his clothes" Webster's New World Dictionary of the American Language: The Everyday Encyclopedic Edition 124 (1966) (emphasis in original). "When you change or change your clothes, you take off some or all of your clothes and put on different ones, [e.g.] ... *She changed into the working clothes she had brought with her.*" Collins Cobuild English Language Dictionary, 226 (1987) (emphasis in original).[17] The analogous intransitive form of the

[17] The American Heritage Dictionary of the English Language, 319 (3rd ed. 1992) (defining change as "[t]o put on other clothing: *We changed for dinner*") (emphasis in original); The American Heritage Dictionary: Second College Edition, 258 (1982) ("[t]o put fresh clothes on"); The Illustrated Heritage Dictionary and Information Book, 224 (1977) ("[t]o put fresh clothes on"); II The Oxford English Dictionary, vol. C, 268 (1933) ("[t]o put or take another or others instead of; to substitute another...."; 1622 Bible, *Gen. xli* 14 "He shaued himself, and changed his raiment.... [*t*]*o change oneself: i.e.* one's clothes"); Encarta World English Dictionary, 304 (1999) ("to remove clothes and put on others") (capitalization and bold omitted); The Oxford Encyclopedic English Dictionary, 246 (1991) ("put fresh clothes ... on (... *changed into something loose*")); Funk & Wagnalls Standard Dictionary of the English Language International Edition, 222 (1966) ("[t]o put other garments, coverings, etc., on; to *change* the bed"); Webster's II New Riverside University Dictionary 248 (1984) ("[t]o put fresh clothes or coverings on [:] *change* a baby's diapers"); Collins English Dictionary, 268 (4th ed. 1998) ("to put on other clothes"); I Funk & Wagnalls Standard Dictionary of the English Language, 317 (1903) ("[t]o exchange

(Continued on following page)

verb change (*e.g.*, she came home from work and changed) also refers to substituting certain clothes for others.[18] The United States Department of Labor's 1965 Glossary of Current Industrial Relations and Wage Terms explained that "clothes changing time" means "[t]ime allotted within the paid workday for changing from street wear to working clothes or from working clothes to street wear, or both." 14 (1965).

That common usage is reflected in decisions from the era when section 203(o) was enacted.[19] In *In re Continental Baking Co.*, 18 War Labor Rep. 470 (Regional Bd. II 1944), the Regional Board ordered "payment for time spent in changing clothes." *Id.* at 470; *see id.* at 472 ("[t]he directive order in this case

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for something else; replace by substitution; as ... to *change* one's dress.... We *change* our clothes whenever we put on others").

[18] Webster's Third International Dictionary 374 ("to disrobe and rearray oneself more suitably esp. in clothes suitable for a social or formal occasion"); 1 Shorter Oxford English Dictionary on Historical Principles, 379 (2002) ("change one's clothes, *spec.* change into evening dress"); The American Heritage Dictionary: Second College Edition, 258 (1982) ("[t]o put on other clothing").

[19] *See Alberts v. Porter*, 10 Lab. Cas. ¶ 62,809 at 68,213 (N.D.Ill 1945) (employees entitled to compensation for time spent "changing their clothes" when they "changed from their street clothes into their uniforms"); Bureau of National Affairs, Wage and Hour Division Manual, 247 (1945) (Wage and Hour Division release R-1739 reaffirmed the WHD position that "time spent in changing clothes by employees who are required – either by their employer, by state or local statute, by the particular nature of the work, or by any other factor – to change to and from working clothes on the premises, should be considered hours worked").

directs that payment be made to bakery workers for time spent in changing clothes") (Zeller, Member, dissenting). The Board's explanation of the facts made clear that the bakers were replacing their street clothes with clean clothes, not simply putting aprons on over their street clothes.[20] Similarly, in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 682 (1946), this Court explained that adjacent to the plant entrance were "cloak and rest rooms where employees may change to their working clothes and place their street clothes in lockers." *After* having changed clothes, the employees proceeded to their places of work where they would "perform various preliminary duties, such as putting on aprons and overalls [and] removing shirts." *Id.* at 683. The Court used the term "change" to refer only to the substitution of working clothes to street clothes, not to the addition of aprons and overalls over their work clothes.

A number of lower courts have mistakenly held that "changing clothes" includes merely adding an item to what a worker is already wearing.

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[20] 18 War Labor Rep. at 471:

> As an incident of their employment, the[ ] [employees] are required to wear clothing made of a washable material which must be kept clean at all times and which may be worn only when they are at work. As a consequence of the latter requirement, the employees may not change to and from their working clothes at their homes, but must do so upon the company's premises; indeed, they are specifically prohibited from wearing in the baking room the clothing they have previously worn on the street.

> The definition of 'change' is ... broad. It means 'to make different,' that is 'to modify in some particular way but short of conversion into something else.'.... Nothing in the statute's language suggests that its application turns on whether one must fully disrobe or exchange one shirt, for example, for another.... [O]ne need not exchange clothes to change clothes for the purpose of applying section 203(o).

Anderson v. Cagle's, Inc., 488 F.3d at 956 (quoting Webster's Third International Dictionary 373 (1986)).[21] The district court interpreted "changing" in this manner. "Even if each employee did nothing more than put the items of PPE over the clothes he or she wore to the plant, adding those items would satisfy the 'change' requirement." Pet.App. 51a. In the court of appeals the defendant argued that under section 203(o) a worker changes clothes simply by putting on anything new.[22] But if glasses are clothes, and

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[21] *See Sepulveda*, 591 F.3d 216 ("To 'change' means 'to make different,' that is 'to modify in some particular way but short of conversion to something else.' Webster's [Third International Dictionary at] 373.... The employees contend ... that the term 'changing' requires the exchange or substitution of one item for another. In their view, simply layering protective gear on top of one's clothes does not count as 'changing.' We reject this narrow definition.... Rather, one can also change something by modifying it. Accordingly, the employees' act of donning and doffing their equipment [over their street clothes] fits comfortably within the meaning of 'changing.' ").

[22] Reply/Response Brief of Defendant-Appellant, 23-25.

"changing" is not limited to substitution, then the Chief Justice changes clothes in open court whenever he puts on or takes off his glasses. No member of this Court would describe in that manner the events that occur during oral argument.

That "changing clothes" means substituting clothes is important in the instant case, because there is substantial record evidence that many of the employees in fact put their flame retardant jackets and pants on over their street clothes, rather than first removing those street clothes. (*See* p. 9 n.9, *supra*). The meaning of the term "changing" also strongly supports the conclusion that "clothes" does not refer to safety equipment. The limited safety equipment that existed when section 203(o) was enacted in 1949, such as welder's helmets or meat cutter belly guards, were put on over a worker's clothes; generally only ordinary work clothing – differing from street clothes, if at all, only in color (dark in factories, white in bakeries) or durability (*e.g.*, blue jeans) – would have been put on in place of street clothes.

III. Not Every Item That Covers Some Part of The Body Is "Clothes"

A number of lower courts have held that every item which covers any portion of the human body is "clothes." That simple definition is palpably overbroad.

The Fourth Circuit interprets "clothes" in this sweeping manner. "A leading dictionary defines 'clothes' as 'clothing,' which in turn is defined as 'covering for the human body or garments in general ... '.... [T]the items which are at issue here ... [a]ll ... serve as 'covering.'" *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214-15 (4th Cir. 2009) (quoting Webster's Third New International Dictionary 428 (unabridged) (1986)).[23] Because anything a person wears necessarily covers the portion of the body on which it is worn, the Tenth Circuit holds that everything "worn by a person" is clothes. *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011) (quoting Webster's Third New International Dictionary 428 (unabridged) (1986)). Stringing together several definitions, the Eleventh Circuit holds that all accessories are clothes.[24] In the court below U.S. Steel urged the Seventh Circuit to adopt this interpretation of the term "clothes."[25]

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[23] *See Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010); *Bejil v. Ethicon, Inc.*, 269 F.3d 477, 480 n.3 (5th Cir. 2001).

[24] "The dictionary defines 'clothes' as 'clothing,' which itself is defined as 'covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.'" *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 955 (11th Cir. 2007) (quoting Webster's Third New International Dictionary 428 (unabridged) (1986)).

[25] Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corp., 7, 12, 13, 14, 19, 20, 21.

Applying this sweeping definition, some lower courts in section 203(o) cases have reached conclusions that would undoubtedly surprise at least most English speakers. The Fourth, Sixth and Tenth Circuits have held, for example, that earplugs and safety glasses are clothes. "[G]oggles[and] ear plugs ... are ... clothes within the meaning of § 203(o) [because] [e]ach of these items provides covering for the body." *Franklin v. Kellogg Co.*, 619 F.3d 604, 614 (6th Cir. 2010).[26] Indeed, the protective items that have most frequently been held to be clothes in section 203(o) cases include safety glasses and earplugs.[27] The Tenth Circuit insists that a knife holder is clothes, explaining that knife holders are "quite similar to ordinary ... holsters." *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1140 (10th Cir. 2011). The Fifth Circuit pointedly remarked that it would be "nonsensical" to deny that a beard holder is clothes. *Bejil v. Ethicon*, 269 F.3d 477, 480 n.3 (5th Cir. 2001). In the court below defendant argued that under this standard "harnesses[ ] [and] respirators ... would ... fit within the definition of 'clothes.' "[28]

Those implausible conclusions demonstrate the palpable overbreadth of defining clothes as anything

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[26] *Salazar v. Butterball, LLC*, 644 F.3d at 1134, 1140; *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d at 215.

[27] A list of decisions holding that safety glasses or earplugs are "clothes" is set out in an appendix to the brief.

[28] Reply/Response Brief of Defendant-Appellant/Cross-Appellee United States Steel Corp., 17 n.3.

that covers the body, or that a person wears. Such a sweeping interpretation of the term clothes "would embrace any conceivable matter that might adorn the human body, including metal mesh leggings, armor, spacesuits, riot gear, or mascot costumes." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003). Other than some lawyers and judges in section 203(o) cases, virtually no one calls harnesses, respirators, earplugs or safety glasses "clothes." A sign mislabeling a respirator as "clothes" would be likely to be reproduced in one of the humorous Signspotter books collecting photographs of misused words.

The Seventh Circuit correctly acknowledged "not everything a person wears is clothing." (Pet.App. 7a). People wear scores of things, all of which cover some portion of the body, that are not referred to as "clothes," from back braces, barrettes and bandoliers to wigs and wristwatches.[29] When an informant wears a wire, the electronic equipment covers part of his body, but no one would call the microphone and

[29] *E.g.*, bandages, bicycle helmets, Bluetooths, bracelets, brass knuckles, casts, catcher's masks, contact lenses, corsages, earbuds, earrings, elbow pads, eyepatches, falls, fake beards or mustaches, false eyelashes, fanny packs, fencer's masks, football helmets, football shoulder pads, gas masks, eye glasses, goalie masks, gun belts, hair pins, hair clips, hearing aids, knee braces, knee pads, lacrosse arm guards, leg braces, life jackets, medals, motorcycle helmets, motorcyclist body armor, neck braces, necklaces, nicotine patches, night vision goggles, pocket protectors, post-surgical boots, press-on nails, prosthetic limbs, rings, shin guards, slings, surgical masks, tennis sweatbands, tiaras, toupees, and visors.

transmitter "clothes." If tourists asked for directions to a clothes store, we would not direct them to an optician, a jewelry store, a shoe store, or a beauty supply store. The shirts, blouses, pants, skirts and dresses that are sold at J.C. Penney's or Nordstrom's would certainly be described as clothes. But as the court below acknowledged (Pet.App. 6a), safety goggles and earplugs are not referred to as clothes. The overly broad "covering for the body" or "items ... worn by a person" standard is not a plausible interpretation of "clothes," because it encompasses not only goggles and earplugs, but also countless other things that are to be found at a Home Depot or at a Sears Roebuck in the tools department, rather than in the men's or women's clothing departments.

This manifestly overly broad account of the meaning of "clothes" derives from an incautious use of a dictionary definition. Dictionaries can often provide only a rough account of how a word is used, not the sort of precise, prescriptive definitions to be found in a plane geometry text book. Dictionaries may be helpful in interpreting statutes, but they should not be used as if courts were translating some unfamiliar foreign language. The definitions of only a few words are exact (*e.g.*, rectangle). Most dictionary definitions are attempts to capture in a handful of words all the complexities of the ways in which a particular term may be used by hundreds of millions of English speakers. Unavoidably those efforts often result in definitions that are somewhat overinclusive or underinclusive, which is why in this case, as in others,

there are inconsistencies among the definitions found in different dictionaries. *Compare Kasten v. Saint-Gobain Performance Plastics*, 131 S.Ct. 1325, 1331 (majority opinion) *with id.* at 1337 (Scalia, J., dissenting) (2011). Certainly when various dictionaries offer divergent definitions of a term, a court may not simply pick the one it prefers and declare the meaning clear and obvious.

With regard to the meaning of "clothes," the pattern of prevailing usage of that term is better[30] captured by the longer definition in the edition of Webster's International Dictionary that was in print at the time section 203(o) was adopted: "covering for the human body; vestments; venture; a general term for whatever covering is worn, or is made to be worn, *for decency or comfort*." Webster's Second New International Dictionary, 507 (1948) (emphasis added); *see* Cambridge Dictionary of American English, 153 (2d ed. 2008) ("things you wear to cover your body and

[30] Ordinary usage is too complex to be precisely captured in this or any other formulation. A person alighting from a shower might wrap up in a towel, for warmth and modesty, yet few people would call the towel clothes. Conversely, a person on a warm day might wear a sweater over a shirt or blouse, not for modesty (the shirt or blouse sufficed) or comfort (quite the opposite), but just because it looked nice. In that circumstance most people would still refer to the sweater as clothes. Gloves or a hat may be worn for comfort on a cold day, but they are not usually described as clothes. A stylish hat or gloves would probably be called an accessory rather than clothes, while work gloves or a hardhat would probably not be called either. Shoes and boots are in a category of their own.

keep you warm, to be comfortable, or for the way they make you look"); Aileen Ribiero, The Art of Dress: Fashion in England and France 1750-1820, 3 (1995)") ("Clothes ... defend us 'from the inclemencies and vicissitudes of climate and season, and hide those parts which delicacy and the interests of society require to be hidden") (quoting unidentified philosopher). If the primary purpose of a particular item is not to provide "decency or comfort," it is less likely to be referred to as clothes.

IV. The Seventh Circuit Standard Is Neither Sound Nor Administrable

(1) The Seventh Circuit, correctly rejecting the "any covering for the body" standard, used a demonstration to delineate the meaning of "clothes" in section 203(o). The court had a model put on some of the protective items in the box of exhibits, not including the respirator, hearing protection, wristlets or leggings. A photograph was taken of the model and included in the court of appeals' opinion. Pet.App. 5a. The Seventh Circuit then insisted that "[a]lmost any English speaker would say that the model in our photo is wearing work clothes." Pet.App. 7a. This method of determining the meaning of "clothes" is neither accurate nor judicially administrable.

What divides the courts of appeals, and the parties, is whether an item worn by a worker is "clothes" within the meaning of section 203(o) if that item is designed and used to protect against a workplace

hazard. Nothing in the Seventh Circuit's photograph, however, reveals that the jacket and pants are flame retardant, to protect against molten metal and sparks, or that the boots (if "clothes" at all) have metal toe boxes to protect against heavy falling objects. Judge Posner emphasized that "a picture is worth a thousand words" (Pet.App. 4a); but the words this picture conveys do not include "flame retardant" or "steel-toed." The appellate court's photograph demonstration merely points out that English speakers would call pants "clothes" if they did not know that that item was flame retardant or had other properties to protect against workplace hazards. That tells us nothing at all about how the question that matters, which is how English speakers would describe an item if they actually knew that it had special protective properties. In addition, the Seventh Circuit model in the photograph put on only some of the items in the box of exhibits, not donning the wristlets, the leggings, the earplugs or the respirator. An English speaker who saw a photograph of a model wearing *all* of this gear would have realized that a worker using it needed protection from an unusually dangerous environment, and might for that reason have been less likely to describe the outfit (or any of its components) as mere "work clothes."

The function of something worn by an individual is certainly relevant to whether an English speaker would call it "clothes," regardless of whether that

characteristic would be apparent from a photograph.[31] There is an important difference between a down vest and a bulletproof vest; certainly many English speakers would not call a bulletproof vest "clothes." A vest worn by bomb squads, or a flak jacket used by soldiers, might be distinguishable in a photograph from a down vest; if so, an English-speaking viewer might not call the bulletproof vest or a flak jacket "clothes." On the other hand, some bulletproof vests are designed to *look* like ordinary vests, with fashionable tailoring and buttons down the front, perhaps for the very purpose of disguising the fact that the person wearing it is a law enforcement officer.[32] Surely whether an English speaker would call a bulletproof vest "clothes" would not turn on how stylish it is.

An English speaker who had complete information might avoid using the term "clothes" to characterize bulletproof pants[33] or radiation-proof lead lined

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[31] Probably only a muggle, unaware of the item's unusual function, would refer to Harry Potter's cloak of invisibility as "clothes."

[32] *See* http://www.bulletproof-vest.biz/bulletproof-vest-bullet-and-stab-proof-jackets-body-armour-nij-iiia-black-p-58.html, visited May 8, 2013.

[33] *See* http://www.bluedefense.com/body-armor/bullet-proof-pants-3a.html visited May 4, 2013 ("Originally developed as part of our bomb squad offerings, these Kevlar pants will save you from most bomb threats including hand grenades, pipe bombs, C4 explosive, and anything else under the 3A umbrella (.357, 9mm, .40 cal)").

underpants[34], even though those protective properties and functions are not apparent in a photograph. Some equestrians wear airbag vests or jackets; in a photograph they look much like ordinary vests or jackets, but if a rider is thrown from a horse the device instantly inflates, protecting the arms, elbows and spine.[35] An English speaker who only saw a photograph of a person wearing this safety device would probably call the vest or jacket "clothes," but might not do so if the operation and purpose of the device were revealed.

Similarly, it is at least uncommon to refer to medical devices worn on the person as clothes. Certainly it would be surprising if any English speaker used that term for a plaster cast or a post-surgical boot. Although these items look unlike ordinary clothes, the medical function of some other items would not be readily apparent. For example, victims of severe burns must wear burn pressure garments to avoid deformities, reduce scarring and ensure joint movement; those garments must be worn 24 hours a day for twelve to eighteen months. Although some variants of this device look quite unusual, a burn pressure garment to treat burns of the torso could

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[34] *See* http://www.drct/com/dss/lead/leadwear.html, visited May 3, 2013 ("The Radiation Guard [underpants] stop[ ] more than 99% of the Palladium radiation and 95% of the Iodine radiation").

[35] *See* http://www.air-vest.com/category/EquestrianAirbagJacket.html, visited May 6, 2013.

resemble some sort of ordinary clothing. An English speaker (other than a doctor or a nurse) who saw these items in a photograph, or even in person, might call them "clothes" unless informed of their purpose and function.

In at least some circumstances, probably most, whether an English speaker would describe something as "clothes" would be influenced, perhaps decisively, by knowledge that the item was designed and used to protect the wearer from hazards such as bullets, spinal fractures, burn scarring or molten metal.[36] The court of appeals erred in basing the determination of whether an item is "clothes" on a demonstration in which the protective properties of the item were not revealed.

(2) If this Court holds that an item can constitute "clothes" under section 203(o) even if intended to protect against workplace hazards, it will be necessary to fashion some other standard for determining which protective items are and are not "clothes." That would be a vexingly difficult task, in part because

[36] Perhaps the hypothetical English speaker might also be influenced by the degree to which the item at least *appeared* to be ordinary clothing, even though it was not. Today the flame retardant apparel at U.S. Steel is a heavy fabric infused with a flame retardant chemical; but tomorrow, because of new knowledge about comparative effectiveness (or, perhaps, about side effects of that chemical), steel mills might instead have workers use apparel that looks far less like ordinary clothing, such as an aluminized jump suit.

popular usage of the term "clothes" is so complex and variable.

The Seventh Circuit opinion offers no meaningful standard. An item is not "clothes," that court held, if it is "not clothing in the ordinary sense." Pet.App. 6a. Conversely, an item is "clothes" if "[a]lmost any English speaker would say that [the object] is ... clothes." Pet.App. 7a. These truisms are entirely unhelpful. *Whether* English speakers would or would not describe a particular item as "clothes" is the very question at issue, or at least a key part of the answer.

The court of appeals' classification of the various items it considered is simply unexplained. It held (correctly in our view) that "[safety] glasses and ear plugs are not clothing in the ordinary sense" (Pet.App. 6a), but did not say why that was so. Regarding a hardhat, the Seventh Circuit could not make up its mind, commenting that a "hard hat *might* be regarded as an article of clothing." *Id.* (emphasis in original). The boots, gloves and snood, the appellate court observed, "*seem*[ ] to be clothing," (Pet.App. 6a) (emphasis in original), ultimately concluding that they are clothes, but offered no explanation for that conclusion. The court of appeals said nothing at all about the other protective gear in the box of exhibits, the wristlets, leggings, and respirator. The court's statement that "[a]lmost any English speaker would say that the model in our photo is wearing work clothes" (Pet.App. 7a) does not mean that the Seventh Circuit believed that everything worn by the model would be called clothes, because

the appellate court held that at least one of the things the model is wearing – safety glasses – is not clothes. Nothing in this series of *ipse dixits* remotely resembles any sort of legal standard.

It certainly is not the case that "[a]lmost any English speaker would say" that boots are "clothes." No one refers to a Rockport or Mephisto shop as a "clothes store." In the large department stores, shirts, blouses, pants, skirts and dresses are in the "clothes," "clothing" or "apparel" departments, while shoes and fashionable boots (but perhaps not work boots) are in the shoe department. Gloves are invariably in the accessory department, not in clothing or apparel. That same pattern of classification prevails on the websites of on-line retailers. The only major department store that sells hardhats, respirators and safety glasses appears to be Sears Roebuck, but those items (like work gloves) are sold in the tools or gardening departments, not in men's or women's clothing.

"Almost any English speaker" would probably be unsure what to make of the snood, the wristlet and the leggings. These items simply do not resemble any object – clothing or otherwise – most people have ever seen. If asked to put on the "leggings" at issue, few people would have any idea how or on what part of the body to do so, especially if not given the hint implicit in the name "leggings." Telling someone that the wristlet is called a "wristlet" would probably add to the confusion, because much of that item is worn over the forearm, not the wrist. (A doctor or nurse might think it was a tubular compression bandage).

Only some Navy and Coast Guard veterans, or an afficiando of medieval chain mail armor, would ever have seen anything like the snood, and to them it would resemble an item used for protection in battle. If asked whether these items were "clothes," "accessories," or neither, many English speakers might respond that they simply had no idea. Particularly with regard to these objects at least, "would most English speakers call it clothes?" is not a viable legal standard, because judges would have no reliable way of knowing the answer.

Absent any clear definition of "clothes," the lower courts have at times floundered. In the instant case the district court quoted with approval a decision holding that it would be "nonsensical" to define "clothes" to exclude hair and beard nets (Pet.App. 49a), and then on the next page quoted a different decision which said precisely the opposite. Pet.App. 50a (("[h]air nets and beard nets ... are not generally considered 'clothes'") (quoting *Kassa v. Kerry, Inc.*, 487 F.Supp.2d 1063, 1067 n.1 (D.Minn. 2007)). Regarding jump suits and space suits, the district judge ventured equivocally that the former "is probably clothing" while the latter "is probably not clothing." Pet.App. 48a. (quoting *Kassa*, 487 F.Supp.2d at 1067). Evincing surprisingly emphatic certainty, the Tenth Circuit insisted that plastic sleeves (worn by workers at a turkey processing plant) "would in other contexts (such as if worn on the street), obviously be considered clothes." *Salazar v. Butterball, LLC*, 644 F.3d at 1139. But no one wears on the street plastic (or other

types of) sleeves unconnected to a shirt or blouse, and the only thing such a device would "obviously be considered" if worn on the street is strange. The same court commented that a poultry processor's steel mesh (*i.e.*, chain mail) gloves "are quite similar to ordinary gloves." 644 F.3d at 1140. That has not been true since the thirteenth century.

There are a few things that everyone calls clothes, such as a shirt or blouse made out of ordinary fabric. If, as the Seventh Circuit suggested, the composition and function of an object is legally irrelevant under section 203(o), then flame retardant, bulletproof and lead pants would be "clothes" under the statute. But the vast majority of the things at issue in section 203(o) cases are either items that the public does not refer to as clothes (such as safety glasses, boots, earplugs, or respirators) or items whose characterization by the public would be difficult to predict (such as snoods, wristlets and leggings). The Seventh Circuit opinion does not articulate any rule at all for deciding these cases, and does not provide employers with a predictable standard that they could use to determine their responsibilities under the FLSA.

V. "Clothes" In Section 203(o) Should Be Interpreted To Exclude Items That Are Used To Protect Against Workplace Hazards and Were Designed To Provide Such Protection

The term "clothes" in section 203(o) should be interpreted to exclude items that, unlike ordinary clothing, both are used to protect employees against workplace hazards and were designed to provide such protection.

There are three possible rules regarding when such personal protective items are "clothes" within the meaning of section 203(o): always, sometimes, and never. Several circuits hold that such protective equipment is always "clothes," reasoning that everything a worker wears is clothes. But that standard leads to the implausible conclusion that things such as earplugs and safety goggles are clothes. The Seventh Circuit holds that such equipment is sometimes clothes, but that circuit fails to articulate a plausible and administrable standard regarding when personal protective items are and are not clothes. The correct approach is the third alternative: personal protective equipment used to protect employees against workplace hazards and designed to provide such protection is never clothes within the meaning of section 203(o).

Protective equipment of that sort is not what Congress would have had in mind when it enacted Section 203(o) in 1949. That interpretation is consistent with patterns of current usage, which tends

not to refer to protective items as "clothes." This construction is congruent with the OSHA regulations regarding personal protective equipment, which provide an already established body of law that distinguishes such protective equipment from ordinary clothing.

A. The Clothes That Congress Would Have Had In Mind When It Enacted Section 203(o) Were Ordinary Apparel

"The 'clothes' that Congress had in mind when it adopted section 203(o) in 1949 – those 'clothes' that workers in the bakery industry changed into and 'took off' in the 1940s – hardly resemble the modern-day protective equipment commonly donned and doffed by workers in ... industries where protective equipment is required by law, the employer, or the nature of the job." Wage and Hour Division, Opinion Letter, Dec. 3, 1997, 1997 WL 998048. Sixty years ago personal safety equipment was relatively uncommon, and nothing like the elaborate protective equipment which employers have required since the 1970 adoption of the Occupational Safety and Health Act.

In the middle of the twentieth century workers most often changed clothes at the beginning and end of the day because the work environment was dirty. Miners usually emerged from the mines covered in grit, "begrimed and exhausted by their continuous physical ... exertion." *Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 166

(1945). Factories could be as dirty, or worse. In the plant at issue in *Steiner v. Mitchell*, 350 U.S. 247 (1956), "the chemicals permeate[d] the entire plant and everything and everyone in it.... [E]ven the families of ... workers may be placed in some danger if ... particles are brought home in the workers' clothing or shoes." 350 U.S. at 249-50. At the end of the day workers frequently needed to get out of the filthy clothes in which they had worked, shower, and put on other clothing. Often workers met that need by wearing street clothes to the mine or factory, changing into work clothes, then at the end of the day removing their work clothes, washing up and changing back to their street clothes. In *Steiner* "employees regularly change[d] into work clothes before the beginning of the productive work period, and shower[ed] and change[d] back at the end of that period." 350 U.S. at 251. The clothes worn by mine and factory workers had no protective properties, although they were often dark in color (because of the dirt) and strongly made (to withstand the rigors of the job.) The Sears Roebuck catalogue for Spring Summer 1949 assured customers that its "Hercules" brand outfits "ha[d] been work-proved by thousands," were "famous for long wear and strength," "stand[ ] up to hard service" and "[t]ake[ ] toughest work." *Id.* at 369, 376. "They've got what it takes for grueling work." *Id.* at 368. Buyers were reminded that "[d]ark colors won't show soil; ideal for dirty or greasy jobs." *Id.* at 375.

Bakery employees often changed clothes before and after work, but for different reasons. A number of states laws, adopted to assure the safety of food, required that bakery employees wear on the job only garments that had not been worn on the street.[37] Where those laws did not exist, at least some bakeries followed the same practice out of concern for the public. Here too the work clothes donned and doffed at the beginning and end of the day had no protective function, but just needed to be clean. Often those work clothes were white, so that any dirt would be visible. Representative Herter, the original proponent of the proposal that became section 203(o), specifically pointed to the clothes-changing of bakery workers as the paradigm to which his legislation was addressed.[38]

At the time section 203(o) was adopted, on the other hand, personal safety equipment was relatively uncommon. There were at that time few laws

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[37] *In re Continental Baking Co.*, 18 War Labor Rep. 470 (Regional Bd. II 1944) described the typical situation.

> As an incident of their employment, [employees] are required to wear clothing of a washable material which must be kept clean at all times and which may be worn only when they are at work. As a consequence of the latter requirement, the employees may not change to and from their working clothes at their homes, but must do so upon the company's premises; indeed, they are specifically prohibited from wearing in the baking room the clothing they have previously worn on the street.

[38] 95 Cong. Rec. 11210 (Aug. 10, 1949).

regulating on-the-job safety, some of the risks were not fully appreciated, and unions were only beginning to add safety to the list of working conditions about which they negotiated. Hardhats, ubiquitous today, did not come into widespread use until the 1960s.[39] Sears Roebuck, which now sells an enormous variety of hardhats, did not include a single one in its 1949 catalogue. Kevlar, an essential component in many modern safety products, was only invented in 1965.[40] The most familiar safety device used by workers in 1949 was probably a welder's helmet; Sears marketed it in the tools section of its catalogues, not under clothing or hats. It is exceedingly unlikely that anyone in 1949 would have described putting on a welder's helmet as "changing clothes."

To the extent that personal safety equipment did exist, it was regarded as quite distinct from clothes. The difference is repeatedly reflected in a 1945 decision of the War Labor Board regarding the meat packing industry. *In re Swift & Co.*, 21 War Labor Rep. 652 (1945). The union which then represented meat packers asked the Board to require the nation's four major meat packers to reimburse workers for the cost of specialized clothing, tools, and safety items. The Board's order in favor of the union repeatedly and expressly distinguished between clothes on the

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[39] *See* http://www.bullard.com/V3/products/head_face/head_protection/Hard_Hat_History/, visited May 11, 2013.

[40] *See* http://www2.dupont.com/Phoenix_Heritage/en_US/1965_a_detail.html, visited May 11, 2013.

one hand and safety equipment on the other. "The companies are directed to supply the employees with (a) all special purpose outer working garments and equipment peculiar to the industry which, because of the nature of the work or the requirements of the meat inspection regulations, it is necessary for the employees to wear while performing their work; and (b) all safety and protective devices, and all tools and equipment necessary for the work and not now furnished by the companies" 21 War Labor Rep. at 655; *see id.* at 711 (same), 725 (same), 733. "Our recommendation regarding work clothing is limited to outer working garments, such as smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats, and gloves.... Our recommendation with regard to tools includes ... metal guards, and other protective and safety equipment." *Id.* at 673; *see id.* at 672.

B. Prevailing Usage Refers To Protective Apparel As "Clothing" Not "Clothes"

There is evidence that English speakers generally, although not invariably, use the noun "clothing," rather than "clothes," when an item of apparel is protective in nature.

In some contexts "clothes" and "clothing" are used interchangeably. For example, in the New York Times and in opinions on Westlaw, the phrases "work clothes" and "work clothing" are both common; "work clothes" is used substantially more often than "work

clothing."[41] However, when the adjective "work" is replaced with the adjective "protective," usage is dramatically different. The New York Times has used the phrase "protective clothing" 1480 times, but utilized "work clothes" in only 51 instances. In opinions on Westlaw, "protective clothing" appears in 1242 cases, while "protective clothes" is in only 27 cases.[42] The phrase "protective clothes" is not to be found in any federal judicial decision prior to 1987[43], although before that date "protective clothing" had been used in 133 different opinions. The lower courts in this very case, although insisting that protective items are "clothes," always use the phrase "protective clothing" (some 16 times) but never "protective clothes"; conversely, those decisions use the phrase "work clothes" (26 times) far more often than "work clothing" (once). That difference may reflect a tendency to associate "clothes" primarily with ordinary, everyday items. Whatever the source of this distinction in usage, it suggests that protective items were not what Congress had in mind when it used the term "clothes" – not "clothing" – in section 203(o). *See* Wage and Hour Division, Opinion Letter, Dec. 3, 1997, 1997 WL

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[41] In federal and state opinions in Westlaw, "work clothes" appears 1649 times and "work clothing" 409 times. In the New York Times "work clothes" is used about 2900 times and "work clothing" about 1300 times.

[42] In LEXIS the phrase "protective clothing" appears in 1281 federal and state opinions, while the phrase "protective clothes" is used in only 34 opinions.

[43] *Higgins v. E.I.Dupont de Nemours, Inc.*, 871 F.Supp. 1063, 1065 (D.Md. 1987).

998048 ("§ 203(o) and its legislative history refer only to 'clothes' – and not to 'protective clothing' ").

The Seventh Circuit insisted that an item (such as flame retardant pants) could be both "work clothes" and "protective clothing." On the court's view "protective clothing" designed to deal with workplace hazard is merely a subset of "work clothes." Pet.App. 6a. However, dictionaries in fact treat the phrases "work clothes" and "protective clothing" as non-overlapping. The most common dictionary definition of "blue collar" draws just that distinction. Webster's Third New International Dictionary, for example, defines blue collar as "belonging or relating to a broad class of wage earners whose duties call for the wearing of work clothes *or* protective clothing." 241 (1981) (emphasis added).[44] If, as the Seventh Circuit believed, protective clothing is just a subset of work clothes, this definition would make no sense; it would be like the phrase "meat or beef." These definitions reflect the fact that English speakers tend to use the phrases "work clothes" and "protective clothing" (when worn by workers) as distinct categories.

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[44] *See* Microsoft Encarta World English Dictionary, 151 (2001) (defining blue collar as "relating to or belonging to workers who do manual or industrial work, and who often require work clothes or protective clothing"); Merriam-Webster On Line ("relating to, or constituting the class of wage earners whose duties call for the wearing of work clothes or protective clothing"), available at http://www.merriam-webster.com/dictionary/blue-collar, visited May 6, 2013.

C. Section 203(o) Should Be Narrowly Construed

This Court has repeatedly held that limitations on the scope of and the rights established by the FLSA should be narrowly construed.[45] *Livadas v. Bradshaw*, 512 U.S. 107 (1994), recognized that section 203(o) was intended to be a "narrowly drawn opt-out provision[ ]." 512 U.S. at 132 n.26. Section 203(o) should be construed to limit rights that otherwise exist under the FLSA only when the plain text of section 203(o) clearly mandates that application.

The Portal-to-Portal made emphatically clear that workers are to be paid for work that constituted a principal activity, and for time on the job between the first and last principal activities of the day. 29 U.S.C. § 254(a). The court of appeals in this case expressly concluded that the donning and doffing of the PPE would constitute a principal activity unless section 203(o) made those activities non-compensable.[46] Because U.S. Steel did not cross-petition for review of

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[45] *E.g.*, *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993); *Arnold v. Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Kentucky Finance Co., Inc.*, 359 U.S. 290, 295 (1959); *Phillips v. Walling*, 324 U.S. 490, 493 (1945).

[46] Pet.App. 11a ("Had the clothes-changing time in this case not been rendered noncompensable pursuant to section 203(o), it would have been a principal activity"), 11a ("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 (in this case, making steel) and therefore a principal activity"); *see Alvarez*, 339 F.3d at 903.

this aspect of the Seventh Circuit's decision, that issue is not before the Court. Thus if section 203(o) is given the avowedly broad construction advocated by a number of lower courts, it will strip Sandifer and the other claimants of the right to compensation that is otherwise guaranteed by the FLSA.[47] That burden would not fall on all workers equally; workers don and doff different types and amounts of equipment, so some workers' claims are larger than those of others.

The Seventh Circuit acknowledged that this Court has repeatedly held that limitations on the FLSA should be narrowly construed. Pet.App. 9a. It thought those decisions inapplicable, however, because they had involved provisions of section 213 of the FLSA. Section 213 is titled "Exemptions," and this Court's FLSA decisions have held that exemptions should be narrowly construed. The Seventh Circuit insisted that the narrow construction rule is therefore limited to "exemptions," and that a provision of the FLSA can only be an exemption if it is codified in section 213. Section 203(o), the appellate court asserted, "creates an exclusion rather than an exemption" (Pet.App. 9a), and the "difference between exclusion and exemption" it held "is more than a quibble." *Id.*

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[47] U.S. Steel contends that even if section 203(o) does not apply, the time required for donning and doffing the PPE is *de minimis*, and for that reason non-compensable. The district court concluded that that defense raised factual issues which would have to be resolved at trial. Pet.App. 76a-80a.

But it is indeed a quibble. The FLSA decisions of this Court do not recognize a distinction between exemptions and exclusions. In common parlance "exemption" and "exclusion" do not have sharply defined different meanings. Nothing in this Court's FLSA narrow construction decisions suggests that the Court, in using the word "exemption" in its narrow construction decisions, was attempting to fashion a rule that would apply only to section 213. The rationale of this Court's longstanding narrow construction decisions regarding the FLSA does not rest on any special meaning of "exemption" (as opposed to exclusion or exception), but on the importance of that "humanitarian and remedial legislation." *Phillips v. Walling*, 324 U.S. 490, 493 (1945).

The types of exceptions in sections 213 and 203 are not fundamentally different. The Seventh Circuit held that the narrow construction rule is inapplicable to section 203 because that provision – unlike section 213 – excludes categories of workers from the protections of the FLSA, including "American workers abroad." Pet.App. 9a. But section 213 also denies protections to specific categories of individuals, and the provision regarding Americans abroad is actually in section 213(f), not in section 203. The Seventh Circuit described section 213 as the place where "we find exemptions for certain types of worker, such as certain agricultural workers." Pet.App. 9a; *see* 29 U.S.C. §§ 213(h), 213(i), 213(j). But section 203(e)(3) also withholds coverage from certain agricultural workers; it is impossible to see why a narrow construction rule should apply to the exclusion of certain

agricultural workers under section 213 but not to the exclusion of certain agricultural workers under section 203. The Seventh Circuit distinction may be based on its view that under section 203 the FLSA "does not apply" to certain workers, whereas under section 213 the FLSA "exempt[s]" certain workers. Pet.App. 9a. It is unclear why that difference would matter. In any event, the verb "does not apply" appears in section 213, not in section 203. *See* 29 U.S.C. §§ 213(a), 213(b).

The Seventh Circuit thought it significant that section 203 is headed "definitions." Pet.App. 9a. Twenty-four of the subsections in section 203 are indeed definitions; they begin with a word or phrase being defined, in quotation marks, followed most often by the verb "means." But section 203(o) does not look anything like a definition; there is no quoted term being defined, and it reads like a method of calculating something, "the hours for which an employee is employed." Given the absence of any well-established distinction between exemptions and exclusions, it would be as natural to use either word to describe section 203(o).

There is certainly no reason to believe that Congress would have intended, or contemplated, that a different rule of construction would apply to section 203(o) because the drafters of that legislation happened to provide that it would be added to section 203, rather than to section 213. This seems to have been a matter of mere happenstance, at a time when no member of Congress would have had any basis for thinking the difference would be of any importance.

Decisions calling for a different rule of construction for provisions in section 213 and 203 appear to have arisen only within the last decade, more than half a century after section 203 was adopted, a development which Congress could not have foreseen at the time.

This Court has repeatedly applied a presumption in favor of narrow construction of "exemptions" to statutory provisions which did not contain the term "exemption" at all. For example, in *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996), the Court applied to "exemptions from NLRA coverage" the principle that exemptions from the FLSA are to be narrowly construed. 517 U.S. at 399. But the NLRA provision at issue in that case, which placed certain agricultural workers outside the coverage of the NLRA, did not use the term "exemption." The key text of the provision was "shall not include," and the section as a whole (like section 203 in the instant case) was captioned "Definitions." 29 U.S.C. § 152.[48] In *Abbott Laboratories v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 4, 12 (1976), the Court used the terms "exception" and "exemption" interchangeably in describing the rule favoring narrow construction (425 U.S. at 12), and referred to the provision at issue as creating an "exemption" even though the text of the provision itself did not use the term "exemption." *Id.* at 6; *see* 15 U.S.C. § 13c. In *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726

[48] The meaning of that provision of the NLRA was governed by the scope of section 203(f) of the FLSA. 517 U.S. at 397.

(1973), the Court applied its "view that exemptions from antitrust laws are strictly construed" to what it termed the "exemption" from antitrust laws for certain matters regulated by the Federal Maritime Commission, even though the operative language of the provision in question was "shall be excepted." 411 U.S. at 733; *see* 39 Stat. 734.[49]

The terms "exemption," "exclusion," and "exception" (and variations thereof) are used thousands of times throughout the United States Code. "Exemption," for example, appears 2352 times, while "exclusion" appears 1371 times. A parsing of the various long-established rules of narrow construction that turned on which particular word was in a provision would have wide ranging and wholly unpredictable consequences.[50]

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[49] *See Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (applying the rule "that exemptions from the antitrust laws are to be narrowly construed" to 15 U.S.C. § 1012(b)).

[50] A footnote in *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 1156 (2012), indicated that the well-established narrow construction rule might not apply to section 213(a)(1) because that provision is "a general definition that applies throughout the FLSA." 132 S.Ct. at 2172 n.21. That footnote is in some tension with previous decisions of this Court, which applied the narrow construction rule to other subparts of section 213(a) which, just like section 213(a)(1), provide that sections 206 and 207 do not apply to certain employees. The clarification of that question can await another day. Section 203(o) is clearly not a "general definition" and does not "appl[y] throughout the FLSA."

D. This Construction of Section 203(o) Provides A Clear Rule Using Distinctions That Already Exist Under OSHA Regulations

This Court should hold that the term "clothes" in section 203(o) does not include items that both are worn to protect the user from workplace hazards and were designed for such a protective function. That exclusion would encompass[51] the "personal protective equipment" required by OSHA regulations, excluding everyday clothing (even if worn for a protective purpose), which is treated differently under those regulations.

The OSHA regulations spell out the most common types of workplace hazards from which workers must be protected.[52] Subpart I of part 1910 of those OSHA regulations, entitled "Personal Protective Equipment," delineates the types of protective items that a covered employer must provide to safeguard

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[51] Whether an item of personal equipment is protective does not depend on whether the OSHA regulations require its use. Any such rule could turn disputes about section 203(o) into protracted litigation about the meaning and application of those regulations. Similarly, whether an item of personal equipment is protective does not depend on whether an employer requires its use; an employer might well accord workers a degree of discretion about what equipment to use. The existence of such a requirement, however, is relevant to whether donning and doffing the equipment is a principal activity. Pet.App. 11a-12a.

[52] 29 C.F.R. part 1910, subpart I, App. B 1 b.

workers against those hazards. 29 C.F.R. part 1910, subpart I. Because employers subject to OSHA are already required to evaluate the hazards at their workplaces, and to identify the personal protective equipment needed to safeguard workers, they at least ordinarily will already know what items are being used to protect against those workplace dangers. *See* 29 C.F.R. § 1910.132(d) ("Hazard assessment and equipment selection").

In the instant case, U.S. Steel has systematically identified workplace hazards at the Gary Works and has selected the particular protective equipment which each worker needs to wear to deal with those dangers. "The.... PPE ... program was developed to provide protection to Gary Complex employees from safety and health hazards in the work place."[53] "Gary Works Management ... assess[es] the workplace to determine if hazards that require the use of PPE are present or are likely to be present in the workplace.... If hazards are present, Gary Works Management ... [s]elect the type of PPE necessary to protect employees from the hazard."[54] All of the protective equipment worn by the workers in this case was specifically

[53] U.S. Steel Gary Works, Personal Protective Equipment, Dkt. 134-35, Ex. E, 1.

[54] *Id.*

selected by U.S. Steel to deal with a particular workplace hazard.[55]

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[55] *See id.* at 3 ("Each [a]ffected [e]mployee shall use appropriate eye and face protection when exposed to eye and face hazards from flying particles, molten metal, liquid chemicals, chemical gasses or vapors, heat or light radiation."), 9 ("[A]ppropriate eye and face protection [is used] when [a worker] is exposed to dust, flying particles, molten metals, liquid chemicals, liquid acids or caustics, chemical gases or vapors, harmful light radiation, or electrical arc/flash.... There are four types of eye and face protection, each with specific applications: [s]afety glasses ... monogoggles ... [f]ace shields ... [and] [w]elding helmet and hand shields...."), 12 ("Respirators and respirator filters are selected on the basis of the hazard to which the worker is exposed.... Every respirator filter is approved for a specific type or types of contaminant(s)."), 16 (Workers are required to "wear a hard hat ... when there are potential hazards of falling or flying objects or bumping the head against fixed objects. In addition to protecting against impact, hats can protect against electrical shock hazards."), 19 (Hearing protection such as earplugs is mandatory for employees "who work[ ] in an area that has been determined to have a potential for an 8-hour noise exposure of 85 decibels or more.), 21 (Foot protection, such as boots with metatarsal guard, must be worn "when there are hazards of falling or rolling objects, or objects piercing the sole of footwear. Protective footwear shall also be worn where employee's feet are exposed to electrical hazards."), 23 ("Affected Employees [must] use appropriate hand protection when their hands are exposed to hazards such as: [s]kin absorption of harmful substances.... [s]evere cuts or lacerations.... [s]evere punctures or abrasions.... [c]hemical or thermal burns/exposures.... [and] [e]xtreme temperatures.... The gloves must be matched to meet the specific type of hazard [the worker is] likely to encounter.") (italicization omitted), 28 (Flame retardant items are required "when there is potential for injuries from flames, sparks, molten metal, or electrical flash.").

Where an item is *not* specifically designed to have a protective function, it can constitute clothes within the meaning of section 203(o), even if it was selected (like wearing white at night) because it is safer. That would be consistent with the differences in common use, described above, between "work clothes" and "protective clothing." The OSHA regulations already draw just such a distinction, providing that although an employer ordinarily must itself pay for personal protective equipment, it need not pay for "[e]veryday clothing, such as long-sleeve shirts, long pants, street shoes, and normal work boots" or for "[o]rdinary clothing ... used solely for protection from weather, such as winter coats, jackets, gloves, parkas, rubber boots, hats, raincoats, [and] ordinary sunglasses." 29 C.F.R. § 1910.132(h)(4)(ii) and (iii). This distinction is already familiar to employers including U.S. Steel itself, which for safety reasons requires that the personal clothing employees wear under the PPE be cotton or wool,[56] but (in light of the distinction made by the OSHA regulations) does not pay for that everyday clothing. Otherwise, consistent with the requirement that employers must themselves pay for any other personal protective equipment, section 203(o) should be construed to require employers also to compensate workers for the time required to put on and take off personal protective equipment that was designed and is used to protect against workplace hazards.

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[56] Dkt. 134-35, Exhibit E, pp. 28-29.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES AND REGULATION INVOLVED

Section 203(o) of the Fair Labor Standards Act, 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[65], 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.

[65] 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.

Decisions Holding Ear Plugs or Safety Glasses Are "Clothes" Under Section 203(o)

Allen v. McWane, Inc., 593 F.3d 449, 451 (5th Cir. 2010) (safety glasses, ear plugs)

Anderson v. Cagle's, Inc., 2005 WL 3873160 at *5 (M.D.Ga. Dec. 8, 2005), *aff'd* 488 F.3d 945 (11th Cir. 2007) (ear protection)

Anderson v. Pilgrim's Pride Corp., 147 F.Supp.2d 556, 561 (E.D.Tex. 2001) (ear plugs, safety glasses)

Andrako v. United States Steel Corp., 632 F.Supp.2d 398, 410 (W.D.Pa. 2009) (safety glasses)

Arnold v. Schreiber Foods, Inc., 690 F.Supp.2d 672, 674-75 (M.D.Tenn. 2010) (safety glasses, ear plugs)

Atkinson v. House of Raeford Farms, Inc., 2011 WL 1526605 at *3 (April 20, 2011) (ear plugs, safety glasses)

Burks v. Equity Group-Eufaula Division, LLC, 571 F.Supp.2d 1235, 1240 (M.D.Ala. 2008) (earplugs)

Castaneda v. JBS USA, LLC, 2011 WL 3294032 at *1 (Aug. 1, 2011) (ear plugs, safety glasses)

Curry v. Kraft Foods Global, Inc., 2012 WL 104626 at *1 (Jan. 12, 2012) (ear plugs, safety glasses)

Davis v. Charoen Pokphand (US), Inc., 302 F.Supp.2d 1314, 1317-19 (M.D.Ala. 2004) (ear plugs)

Fox v. Tyson Foods, Inc., 2007 WL 6477624 (N.D.Ala. Aug. 31, 2007), 2002 WL 32987224 at *3 and n.3 (N.D.Ala. Feb. 4, 2002) (safety glasses, earplugs)

Franklin v. Kellogg Co., 619 F.3d 604, 608 (6th Cir. 2010) (safety glasses, ear plugs)

Gatewood v. Koch Foods of Mississippi, LLC, 569 F.Supp.2d 687, 689-90 (S.D.Miss. 2008) (eye protection)

Guinan v. Boehringer Ingelheim Vetmedica, Inc., 803 F.Supp.2d 984, 988 (N.D.Iowa 2011) (safety glasses with side shields, face shield, safety goggles)

Hudson v. Butterball, LLC, 2009 WL 3486780 at *1 n.2 (Oct. 14, 2009) (ear plugs, safety glasses)

Israel v. Raeford Farms of Louisiana, LLC, 784 F.Supp.2d 653, 656 (W.D.La. 2011) (ear plugs)

Johnson v. Koch Foods, Inc., 670 F.Supp.2d 657, 660 (E.D.Tenn. 2009) (ear plugs, safety glasses)

Kassa v. Kerry, Inc., 487 F.Supp.2d 1063, 1066 (D.Minn. 2007) (safety glasses)

Marshall v. Amsted Rail Co., 817 F.Supp.2d 1066, 1069, 1074 (S.D.Ill. 2011) (goggles, ear plugs, face shield)

McDonald v. Kellogg Co., 740 F.Supp.2d 1220, 1227 (D.Kan. 2010) (safety glasses)

Mitchell v. JCG Industries, 2013 WL 887985 at *1 (March 8, 2013) (ear plugs)

Salazar v. Butterball, LLC, 644 F.3d 1130, 1134 (10th Cir. 2011) (earplugs, safety glasses)

Saunders v. John Morrell & Co., 1991 WL 529542 at *1 (Dec. 24, 1991) (goggles)

Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 212 (4th Cir. 2009) (safety glasses, ear plugs)

Sisk v. Sara Lee Corp., 590 F.Supp.2d 1001, 1003 (W.D.Tenn. 2008) (ear plugs)

In re Tyson Foods, Inc., 694 F.Supp.2d 1358, 1362 (M.D.Ga. 2010) (ear plugs)