

No. 12-417

IN THE
Supreme Court of the United States

CLIFTON SANDIFER ET AL.,
Petitioners,

v.

UNITED STATES STEEL CORP.,
Respondent.

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

BRIEF IN OPPOSITION

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

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

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

*Counsel for Respondent
United States Steel Corporation*

QUESTIONS PRESENTED

The time for which a covered employee is “employed” for purposes of the Fair Labor Standards Act (“FLSA”) generally begins when the worker first engages in “a principal activity or activities which such employee is employed to perform.” 29 U.S.C. § 254(a). However, § 203(o) of the FLSA allows an employer and a union to agree that time spent “changing clothes” will not be part of “the hours for which an employee is employed.” Petitioners’ union has agreed with Respondent through collective bargaining agreements spanning 65 years that time Petitioners spend changing into protective clothing—such as flame-retardant pants and jackets, work gloves, work boots, and protective hoods—is not part of the compensable work day. The questions presented are:

(1) Does the protective work clothing at issue in this case constitute “clothes” within the meaning of § 203(o), such that Petitioners’ changing time is excluded from the hours for which they are employed?

(2) If time spent changing into protective clothing is properly excluded from “the hours for which [Petitioners are] employed” under § 203(o) may such changing nonetheless constitute “a principal activity ... which such employee is employed to perform” that triggers the start of the work day under the FLSA?

(3) If an employee engages in an activity that involves only a *de minimis* amount of time, such as donning a hard hat, safety goggles, or ear plugs, is that activity a principal activity that triggers the start of the compensable work day under the FLSA?

CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT OF THE CASE

This petition arises out of a putative collective action brought by Petitioners under the FLSA, 29 U.S.C. § 216(b).¹ Petitioners alleged that they were entitled to overtime compensation for time spent donning and doffing protective clothing and traveling to and from their assigned workstations. These claims implicate several interrelated provisions of the FLSA.

1. Congress enacted the FLSA in 1938 to “protect all covered workers from substandard wages and oppressive working hours.” *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981). The two core provisions of the Act—the minimum wage provision and the overtime provision—require that employees receive a minimum hourly wage for each hour that they are “employ[ed]” as well as a premium wage (one and one-half times the regular rate of pay) for each hour they are “employ[ed]” beyond 40 in one work week. 29 U.S.C. §§ 206(a), 207(a). The FLSA defines the term “employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). The Act does not, however, define the term “work.”

Early on, this Court construed the term “work” broadly. Citing the “remedial” purpose of the Act, it held that the term included all “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily

¹ The district court ruled on U. S. Steel’s motion for summary judgment and certified that decision for an interlocutory appeal before determining whether the case could properly proceed as a collective action. Pet.App.2a, 20a & n.1.

and primarily for the benefit of the employer and his business.” *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597-98 (1944). The Court later added that “work” also included “all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

Recognizing that through such judicial expansion of the term “work” courts could in effect overrule agreements made between unions and employers and create massive and retroactive liabilities, Congress moved quickly to cut back on that definition by enacting two overlapping modifications to the FLSA.

First, in the Portal-to-Portal Act of 1947, Congress explained that the Court’s expansive definition of “work” “disregard[ed] long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities.” 29 U.S.C. § 251(a). The Portal-to-Portal Act therefore amended the FLSA to clarify that:

[N]o employer shall be subject to any liability or punishment under the [FLSA] ... 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

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

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

29 U.S.C. § 254(a).

The Portal to Portal Act thus draws a key distinction between two types of activities that fell within the Court’s broad definition of “work”: mere travel or “preliminary” or “postliminary” activities on the one hand (which cannot create liability for an employer), and “principal” activities on the other (which can). The significance of that distinction increased under a Department of Labor regulation first adopted in 1947, which imposes a “continuous workday rule.” *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005). That rule requires that a covered employee be paid for the entire “period between the commencement and completion on the same workday of an employee’s principal activity or activities.” 29 C.F.R. § 790.6(b). Accordingly, if a particular task assigned to an employee is found to be a “principal” activity, it generally triggers a duty by the employer to compensate the employee until the end of the employee’s day, as marked by the completion of the last principal activity. *But see* 29 C.F.R. § 790.7(g) n.49 (noting that although washing and changing clothes may be considered a principal activity in certain circumstances, “[t]his does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be [compensable under the Portal to Portal Act]”).

Additionally, when drawing the line between a principal and a “preliminary” or “postliminary”

activity, the Court has held that activities that are “integral and indispensable” to a “principal activity,” are not mere preliminary or postliminary activities. *Steiner v. Mitchell*, 350 U.S. 247 (1956). In other words, activities are “preliminary” or “postliminary” under the Portal to Portal Act only if they are *not* “integral and indispensable” to a “principal activity.”

Second, Congress further amended FLSA in 1949 to clarify that a collective bargaining agreement (“CBA”) may exclude certain activities from the work day entirely. Specifically, Congress inserted subsection (o) in the definitions section of the FLSA. It provides:

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

Id. § 203(o). Although some in Congress thought that “[t]he Portal-to-Portal Act was [already] intended to cover just such situations,”—likely because clothes-changing time was considered to be the sort of “preliminary” and “postliminary” activity exempted under the § 254(a)(2)—the amendment was passed “to avoid the kind of misunderstanding that arose before.” 95 Cong. Rec. 11192, 11210 (1949) (statements of Reps. Herter & Lucas). Thus, where a union and an employer agree that time spent

washing up or changing clothes at the beginning or end of a work day will not constitute “hours worked,” such time is excluded entirely from “the hours for which an employee is employed” for purposes of the FLSA’s wage requirements.

2. Before beginning each 8-hour shift at U. S. Steel’s Gary Works, Petitioners change into protective work clothes. As shown in the picture below, this may include: “flame-retardant pants and jacket, work gloves, metatarsal boots (work boots containing steel or other strong material to protect the toes and instep), a hard hat, safety glasses, ear plugs, and a ‘snood’ (a hood that covers the top of the head, the chin, and the neck).”



Pet.App.4a-5a. After donning, Petitioners travel from the locker rooms to their work stations, complete their shifts, and then travel back to the locker rooms to change and wash up. Pet.App.2a.

Under the current collective bargaining agreement between Petitioners' union (the United Steelworkers

of America) and U. S. Steel, simply being in the plant or a locker room, or being on their way to a work station has never been considered “being at work.” Pet.App.23a-24a; Dct.Dkt.85, App.9-10. Indeed, every CBA in the last 65 years has provided the same. Dct.Dkt.85, App.9-10. Instead, a worker must be at his work station at the beginning of each 8-hour shift. Pet.App.23a-24a.

3. Notwithstanding the agreement of their union to the contrary, Petitioners claim they are entitled to compensation for time they spent donning and doffing before and after each shift as well as the time spent travelling from locker rooms to their work stations and back again.

The district court agreed with U. S. Steel that the time Petitioners spent changing into and out of protective work clothes constituted “changing clothes” for purposes of § 203(o), (and, as such, that time and the related washing time were not “hours for which an employee is employed”). Pet.App.31a-32a. However, the district court refused to grant summary judgment for U. S. Steel on Petitioners’ claim that travel time was part of their work day. Pet.App.46a. The court reasoned that, even though the clothes changing and washing time was excluded by § 203(o) from Petitioners’ “hours employed,” those activities might still constitute “principal” work activities. Pet.App.46a-47a. And if Petitioners’ donning, doffing, and washing, were principal work activities, all travel time following donning and preceding doffing would count as work time under the continuous workday rule. Pet.App.71a.

4. A unanimous panel of the Seventh Circuit rejected all of Plaintiffs’ positions. The court agreed

that Petitioners' donning and doffing fell within § 203(o). And it reversed the district court's conclusion that Petitioners could be entitled to compensation for their travel time. Pet.App.1a-19a.

Writing for the court, Judge Posner observed that the glasses, ear plugs, and hard hats worn by Petitioners might or might not be "clothing in the ordinary sense," but did not definitively resolve this ambiguity because "in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*." Pet.App.5a-6a (citing *Mt. Clemens*, 328 U.S. at 692).

The remaining items (pants, jackets, gloves, boots, and hoods) were clothing, the Court of Appeals reasoned, because "[a]lmost any English speaker would say that the [items constituted] work clothes." Pet.App.7a. The court rejected Petitioners' argument that the clothing was instead "personal protective equipment," explaining that this distinction assumed a false dichotomy:

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

Pet.App.6a. Indeed, the court added, "it would be beyond odd to say that the word 'clothes' in section

203(o) excludes work clothes” when that very provision “is about changing into and out of clothes at the beginning and end of the workday.” Pet.App.7a. “[W]orkers who change at the beginning and end of the workday are changing into and out of work clothes, and if they are governed by a collective bargaining agreement that makes such changing noncompensable the agreement must apply to work clothes, for otherwise the noncompensation provision would have virtually no applications.” *Id.*

The Court of Appeals rejected Petitioners’ argument that it should depart from the plain meaning of “clothes” in light of “language from a number of cases to the effect that ‘exemptions’ from the Fair Labor Standards Act are to be construed narrowly.” Pet.App.8a. The Court first expressed skepticism that this canon was valid at all, asking, “Why should one provision in a statute take precedence over another?” *Id.* (quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 508 (7th Cir. 2007)). However, the court concluded that the canon was inapplicable in any event because § 203(o) was not an “exemption,” but, rather, was an “exclusion,” contained in the “definitions” section of the Act, that “help[ed] to define the scope of the Act.” Pet.App.9a.

The court also reversed as “puzzling and paradoxical” the district court’s conclusion that “clothes-changing time could be a ‘principal activity’ even though the employer and the union had decided, as [the district court] agreed they were entitled to do, that changing time is not work time.” Pet.App.10a-11a. As the court asked rhetorically, “[i]f it is not work time ... how can it be one of the ‘principal activities which the employee is employed to

perform?” Pet.App.11a. Furthermore, the court noted, although the Supreme Court’s analysis in *Steiner* might suggest that changing clothes was outside the Portal to Portal Act absent a CBA to the contrary, *Steiner* itself had “remarked [that] ‘the clear implication’ of section 203(o) [was] ‘that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage by agreement.’” Pet.App.12a (quoting, *Steiner*, 350 U.S. at 255) (emphasis omitted).

Finally, the Court of Appeals refused to grant deference to a 2010 Administrative Interpretation by the Department of Labor regarding the scope of § 203(o) because the agency’s position had shifted repeatedly with the political winds and was not based on “any institutional knowledge of labor markets possessed by the Department’s staff—or to anything indeed to which the parties might not have complete access—that might help the court to decide the case sensibly.” Pet.App.17a-18a. Moreover, the court noted, every court of appeals to have addressed the issue has “come together in spurning, as Judge Wilkinson has put it, ‘the gyrating agency letters on the subject.’” Pet.App.19a (quoting *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n. 3 (4th Cir. 2009)).

REASONS FOR DENYING THE PETITION

I. Although Petitioners claim there is an “entrenched split” regarding whether the work clothes at issue in this case constitutes “clothes” under § 203(o), the single Ninth Circuit decision that conflicts with the decision below has not been followed in almost ten years, and there are good reasons to believe that the Ninth Circuit would

reconsider that decision in an appropriate case. Moreover, the Court of Appeals below, and the numerous other circuits that take the same approach, are also clearly correct, as any specialized and protective aspects of the pants, jackets, gloves, boots, and hoods at issue do not change the fact that they fall squarely within the term “clothes.” Finally, and in all events, the question presented is not one of national importance. Rather, the question affects only a small class of employees who work in a unionized workplace, are regularly required to spend non-*de-minimis* amounts of time donning and doffing work clothing, and whose CBA excludes changing time from the work day.

Besides, as the Seventh Circuit explained, Petitioners have been paid a competitive wage pursuant to a CBA that was aggressively negotiated by their union. Therefore, even if Petitioners were to prevail in their claim to count clothes-changing time as additional work *hours*, market forces would compel employers and unions to negotiate a lower pay *rate*, such that overall compensation remained roughly the same. Pet.App.8a. The petition for certiorari therefore implicates only whether Petitioners may obtain a short-term windfall in the form of supra-competitive compensation beyond what was bargained for by their union. *See also Tum v. Barber Foods, Inc.*, 360 F.3d 274, 286 (1st Cir. 2004) (Boudin, J., concurring) (“Unless ... wages are the federal minimum, a decision that now such time is compensable will likely be offset by wage adjustments in the future, leaving only a one-time windfall for employees.”).

The scope of the term “clothes” under § 203(o) accordingly does not present the sort of entrenched circuit split of national importance that justifies this Court’s review.

II. For similar reasons, there is no basis for this Court to review the question of whether an activity that is properly excluded from “the hours for which an employee is employed” under § 203(o) may nonetheless constitute “a principal activity or activities which such employee is employed to perform” for purposes of the FLSA’s overtime requirement.

To begin with, as already described, the resolution of this issue will not meaningfully affect employees’ overall wages in the future. Instead, the petition at most would afford Petitioners a short-term windfall in the form of supra-competitive wages beyond those agreed to by their union.

Moreover, the question presented is not subject to a sufficiently developed circuit split to justify this Court’s review. The sole appellate decision disagreeing with the decision below, *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010), is barely two years old. It was rendered (like the decision below) in an interlocutory posture, and so could soon come before the Sixth Circuit again. And that court might well decide to reconsider the issue given the Seventh Circuit’s compelling reasoning here—especially since, as Judge Posner noted, the *Franklin* decision “offers only a conclusion, not reasons.” Pet.App16a. Moreover, like the *Franklin* decision, the petition also fails to explain how an activity that has been removed entirely from the work day can constitute a principal work activity. Petitioners’ only

argument is that §203(o) restricts solely the scope of the FLSA's minimum wage provision (§206) and overtime requirement (§207), and does not alter the scope of the Portal to Portal Act. But Petitioners' claims in this case arise under § 207, not the Portal to Portal Act, so the distinction is of no practical import. In light of the dearth of judicial analysis supporting Petitioners' position, the question of whether an activity covered by § 203(o) may nonetheless be a principal work activity warrants further percolation.

III. Finally, there is no decisional conflict whatsoever regarding whether *de minimis* activities such as donning and doffing a hard hat, safety glasses, or ear plugs are principal activities that render later travel time compensable. Contrary to Petitioners' assertion, neither the First Circuit in *Tum* nor the Supreme Court in *IBP* addressed this question. In *Tum*, the First Circuit held that, even assuming that the previous changing time was a principal activity, the travel time at issue was still non-compensable under the Portal to Portal Act. 360 F.3d at 280-81. And in *IBP*, the Court specifically denied certiorari on this very question, 543 U.S. 1144 (2005), and did not address it in its opinion, 546 U.S. 21. Accordingly, as the Second Circuit noted in *Singh v. City of New York*, 524 F.3d 361 (2d Cir. 2008) (Sotomayor, J.), there is no basis to "read *IBP* as casting doubt on" the consistent holdings of the circuits that a *de minimis* activity "does not trigger the continuous workday rule." *Id.* at 371 n.8. Moreover, in addition to creating no split, the decision below is clearly correct, and, for the reasons already noted, the petition is significant only to the

extent Petitioners seek a short-term windfall in the form of greater wages than their union bargained for.

The petition for a writ of certiorari should accordingly be denied in its entirety.

I. THERE IS NO REASON TO REVIEW THE MEANING OF CLOTHING UNDER § 203(o).

A. The Sole Decision Creating A Split In This Case Is A Dated, Poorly Reasoned Ninth Circuit Decision That Was Issued Without The Benefit Of Later Cases And Which The Ninth Circuit Could Revisit *En Banc*.

As Petitioners acknowledge, four other circuits would agree with the Seventh Circuit that the items at issue in this case constitute “clothes” under § 203(o); only a single decision by the Ninth Circuit suggests a contrary result. *See* Pet. 16-17 (citing *Salazar v. Butterball, LLC*, 644 F.3d 1130, 1139 (10th Cir. 2011); *Franklin*, 619 F.3d at 614; *Sepulveda*, 591 F.3d at 215; *Anderson v. Cagle’s, Inc.*, 488 F.3d 945, 955 (11th Cir. 2007); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003)).² Noting that the

² Petitioners assert that the Seventh Circuit created a three-way split by refusing to treat accessories such as glasses, ear plugs, and hard hats, as clothing. Pet.17. However, as explained above, *supra* at 8, the court did not in fact resolve this question. Rather, it merely noted that it was unclear whether such items were “clothing in the ordinary sense” and held that “in any event putting on the glasses and the hard hat and putting in the ear plugs is a matter of seconds and hence not compensable, because *de minimis*.” Pet.App.5a-6a. Thus, this case does not present the question of whether glasses, ear plugs, and hard hats are clothing, and all the cases apart from *Alvarez* are in agreement regarding the items held to be clothing in this case.

later decisions issued between 2007 and 2011 have been sharply critical of the Ninth Circuit's 2003 decision in *Alvarez*, Petitioners assert that there is an "entrenched circuit conflict" that warrants this Court's review. Pet.16. Not so.

To the contrary, there are good reasons to believe that the Ninth Circuit would reconsider its decision in *Alvarez* in an appropriate case, thereby eliminating any split.

To begin with, the decision in *Alvarez* was handed down in 2003, before any decision from another circuit had shed light on the issue. Indeed, Respondent has not found a single case in which the Ninth Circuit has considered the scope of § 203(o) since *Alvarez*. As described below, *infra* at 18-21, 26-27, this may reflect that the issue in this case does not have broad significance and can be easily worked around by employers and unions. However, to the extent another case presents the same issue in the Ninth Circuit, an employer would have a compelling basis to request that the Ninth Circuit reconsider *Alvarez en banc*.

Moreover, perhaps due to its relative age, the reasoning of *Alvarez* is extraordinarily thin. The court offered two bases for its holding:

First, it reasoned that subsection 203(o) should not be read to include protective clothing because "FLSA exemptions ... are to be narrowly construed against the employers seeking to assert them" and the clothing at issue "does not plainly and unmistakably fit within §3(o)'s 'clothing' term." 339 F.3d at 905 (internal quotation marks omitted). However, while the maxim that FLSA exemptions should be construed against the employer is dubious to begin

with, Pet.App.8a, it is doubly indefensible in this context. As the Seventh Circuit noted, subsection 203(o) is a definitional provision that sets the scope of the Act itself, not an “exemption.” Pet.App.9a. Moreover, subsection 203(o) was inserted by a separate amendment that was enacted precisely to narrow prior judicial interpretations of the FLSA that Congress felt were too expansive, *see supra* at 2-5; in that context, continuing to presume that Congress wanted the FLSA to be read broadly would border on the obtuse.

Second, the court reasoned that “specialized protective gear” was different from “typical clothing.” 339 F.3d at 905. According to the court, “[t]he admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit. Rather, personal protective equipment generally refers to materials worn by an individual to provide a barrier against exposure to workplace hazards.” *Id.* However, as the Court of Appeals convincingly explained in this case, there is no basis to assume that an item must be *either* clothing *or* “protective gear,” and no basis to assume that “clothes” does not include protective work clothes. Rather, “[p]rotection ... is a common function of clothing, and an especially common function of work clothes worn by factory workers,” and “it would be beyond odd to say that the word ‘clothes’ in section 203(o) excludes work clothes” when that very provision “is about changing into and out of clothes at the beginning and end of the workday.” Pet.App.6a-7a. *Alvarez* is accordingly so poorly reasoned as to be ripe for reconsideration.

The petition accordingly does not present the sort of entrenched, current split that would warrant this Court's review.

B. The Decision Below And The Four Other Circuits That Agree With It Are Correct.

The decision below, as well as the decisions from the four circuits that take a consistent approach, are plainly correct. Specialized and protective work clothing is still a type of "clothing." And when Congress provided that a union and an employer could agree to place time spent "changing clothes" outside of the compensable work day, it obviously contemplated agreements regarding protective work clothes.

Apart from echoing the Ninth Circuit's false dichotomy between specialized protective clothing and clothing, Pet.23-24, Petitioners offer only one additional argument for why the decision below was incorrect: According to Petitioners, deciding whether ordinary English speakers would label specialized or protective clothing as "clothes" would present "intractable problems of interpretation," while treating all specialized or protective clothing as non-clothing "avoids these difficulties." Pet.25. As an initial matter, no matter how attractive a bright-line rule might be in the abstract, courts are not free to create them where doing so requires ignoring the plain text of a statute duly enacted by Congress. Indeed, redefining "clothes" to mean only "pants" might arguably produce a somewhat brighter line. But it would obviously ignore clear congressional intent. Likewise, redefining "clothes" to mean non-specialized, non-protective clothes, would ignore the plain meaning and clear purpose of § 203(o).

Worse, Petitioners' proposed rule does not even have the virtue of clarity that they claim. It merely trades one line-drawing task (What is clothing?) for another (When is clothing "specialized" and "protective"?). The latter question offers no greater precision in exchange for its departure from congressional intent. If a thick denim jacket treated with a flame retardant chemical is specialized protective clothing, is a thick, untreated denim jacket as well? A thin denim jacket? A long-sleeve shirt? The incoherence of distinguishing between these items of clothing only confirms the error of Petitioners' approach.

C. The Question Presented Has No Importance Beyond Its Potential To Provide A Short-Term Windfall To Petitioners.

Finally, even if there were an entrenched split on the definition of clothing under § 203(o), this Court's review would still not be warranted because the issue is not one of national importance. To the contrary, the question presented implicates only a small category of employees and affects only whether those employees who file lawsuits may obtain the short-term windfall of extra compensation beyond what was bargained for by their unions.

On its face, § 203(o) is only relevant to a small number of U.S. employees. The provision applies only where clothes-changing time is "excluded from measured working time ... under a bona fide collective-bargaining agreement." In 2011, only 6.9 percent of private-sector employees were union

members.³ Moreover, even the Ninth Circuit did not hold that time spent changing into *non*-specialized protective clothing must count as work time. 339 F.3d at 903-04. And it is undisputed that employees have no right to compensation for *de minimis* activities. *Id.* Thus, the petition, on its face, could affect only the tiny subgroup of the 6.9% of private workers who wear protective work clothing that cannot be put on or taken off in a *de minimis* amount of time, and is not compensated for this time pursuant to a CBA.

More fundamentally, even this small subgroup would not be affected in any meaningful way, no matter how the question presented were resolved. Petitioners and the workers they purport to represent benefited from an aggressively-negotiated CBA in which their union obtained the best compensation for them it could in a competitive market. Pet.App.8a. That agreement excluded hours spent changing clothes or travelling to employees' work stations, and had those additional hours been counted, market forces would have required that Petitioners' accept a lower base rate. *Id.* Having received the benefits of that bargain (a higher pay rate for time actively engaged at work stations), Petitioners would now like the windfall of additional compensation for hours that were not to be counted in their work day.

However, as the Seventh Circuit recognized:

³ U.S. Dept. Labor, Bureau of Labor Statistics, Union Members—2011 at 1 (Jan. 27 2012) *available at* <http://www.bls.gov/news.release/pdf/union2.pdf>.

If the workers have a legal right to be paid for [clothes-changing time], the company will be less willing to pay them a high wage for the time during which they are making steel; it will push hard to reduce the hourly wage so that its overall labor costs do not rise. The steel industry is international and highly competitive, and unions temper their wage demands to avoid killing the goose that lays the golden eggs. They don't want the American steel industry to go where so much American manufacturing has gone in recent years—abroad. The plaintiffs are adverse to their union, to the interests of other steelworkers, and to their own long-term interests.

Pet.App.8a. Judge Boudin noted the same likelihood in *Tum*, 360 F.3d 274:

[I]t appears that wages at the Barber plant were set against a background practice of treating as non-compensable the donning, doffing, walking and waiting involved in this case. Unless those wages are the federal minimum, a decision that now such time is compensable will likely be offset by wage adjustments in the future, leaving only a one-time windfall for employees.

Id. at 286 (Boudin, J., concurring).

Indeed, despite being pressed repeatedly at oral argument for an explanation of how Petitioners' position could affect net compensation for employees in the future, the attorney for the Department of Labor was entirely unable to offer one. *See* Oral Argument at 43:35-49:00, *Sandifer v. U. S. Steel*, 678

F.3d 590 (7th Cir. 2012) (No. 10-1821) *available* at [http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=s howbr&shofile=10-1821_001.mp3](http://www.ca7.uscourts.gov/fdocs/docs.fwx?submit=s%20howbr&shofile=10-1821_001.mp3).

Creating a short-term windfall for a small group of plaintiffs (and their attorneys) without meaningfully altering compensation for employees going forward is not an issue of national importance that warrants this Court's review.⁴

II. THERE IS NO REASON TO REVIEW WHETHER AN ACTIVITY THAT IS PROPERLY EXCLUDED FROM THE WORK DAY UNDER § 203(o) CAN STILL BE A PRINCIPAL WORK ACTIVITY.

A. The Decision Below Is Correct.

It is undisputed that if Petitioners' first activity upon entering U. S. Steel's plant were walking to their work stations, this travel time would fall within the scope of the Portal to Portal Act and could not be the basis of an overtime claim by Petitioners. However, under the continuous workday rule, such time would be compensable if it occurred *within* the

⁴ Petitioners suggest that some employers might find it inconvenient to set employee compensation given the outlier rule in the Ninth Circuit. Pet.16. But there is no basis to believe this hypothetical would have any impact on Petitioners, and neither a union nor an employer has raised such a concern in this case. Indeed, even Petitioners' own union did not participate in this case below, and no union has sought to support Petitioners' petition for certiorari as an *amicus curiae*. This silence is telling. If and when an employer finds this issue to be inconvenient, it can petition the Ninth Circuit to reconsider its decision in *Alvarez en banc* and, barring a reversal, can seek certiorari from that decision.

continuous workday—triggered by the performance of the first principal activity—rather than *preceding* the workday. *IBP*, 546 U.S. at 34 (“Walking to [the place of performance] before starting work is excluded from FLSA coverage, but the [Portal to Portal Act] does not exclude walking from that place to another area within the plant immediately after the workday has commenced.”). Thus, whether overtime compensation is owed for the travel time in this case turns on whether Petitioners’ clothes changing was a principal activity that triggered the start of the workday.⁵

The Seventh Circuit was clearly correct in holding that Petitioners’ clothes changing did not start their workday. The plain text of § 203(o) provides that a union and an employer may agree that time spent changing clothes will not be “work” time under the FLSA:

Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours *for which an employee is employed*, there shall be excluded any time spent in changing clothes ... which *was excluded from measured working time* ... under a bona fide collective-bargaining agreement

29 U.S.C. § 203(o) (emphasis added).

⁵ For travel time at the end of the day, the analysis would of course be the reverse—travel time would be compensable only if the clothes changing was a principal activity that marked the end of the workday.

As Judge Posner explained, if, under § 203(o), changing clothes is not an activity “for which an employee is employed,” *id.*, it cannot possibly “be one of the ‘*principal*’ activities which the employee is employed to perform.” Pet.App.11a (quoting 29 U.S.C. § 254(a)) (emphasis added). Likewise, this Court in *Steiner* specifically noted that “the clear implication [of section 203(o)] is that clothes changing and washing, which are otherwise a part of the principal activity, may be expressly excluded from coverage [of the FLSA] by agreement.” *Steiner*, 350 U.S. at 255.

Accordingly, for purposes of determining whether Petitioners are entitled to the overtime compensation they seek, clothes-changing does not constitute an activity for which Petitioners are employed *at all*, let alone a *principal* activity of such employment.

Petitioners’ sole response is that § 203(o) is relevant only “in determining for the purposes of section[s] 206 and 207 of this title the hours for which an employee is employed” and “simply does not apply or even refer to determinations under [the Portal to Portal Act] as to whether an employee is engaged in a principal activity.” Pet.26. But this argument confuses the nature of Petitioners’ claim and the role of the Portal to Portal Act.

Petitioners’ claim for overtime in this case *arises under § 207*, not the Portal to Portal Act (which is a shield for employers, not a sword for employees). *See* Pet.App.20a. Section 203(o), in turn, is subject to two, independent limitations. *First*, Section 203(o) amended the “Definitions” section of the FLSA such that Petitioners’ clothes changing is excluded from the definition of “hours worked.” Such time,

according to the language of the statute, is not time “for which [Petitioners’ are] employed,” or engaged in work, for purposes of § 207. *Second*, the Portal to Portal Act provides that, in applying § 207, Petitioners are also not entitled to compensation for travel time that is not preceded by a principal activity.

Accordingly, in determining if overtime compensation is owed under § 207, *both* § 203(o) *and* the Portal to Portal Act must be read together. When thus read, it is clear that § 207 does not give Petitioners a right to compensation for their travel time because the travel time occurred before the start of Petitioners’ workday (by operation of § 203(o)) and is the sort of preliminary activity that is outside the scope § 207 (by operation of the Portal to Portal Act).

This reading, moreover, is the only one consistent with the purpose of § 203(o) and the Portal to Portal Act. Congress passed the Portal to Portal Act precisely because it disagreed with the Court’s earlier approach of defining work to include travel time at the beginning and end of the day. In particular, Congress was concerned that such a rule refused to give effect to “long-established customs, practices, and contracts between employers and employees.” 29 U.S.C. § 251(a). Moreover, Congress enacted § 203(o) to clarify that unions and employers should be free to agree not only that washing and clothes-changing time would be uncompensated, but also that it would not count as part of the work day at all. Thus, Congress clearly intended that, with regard to activities such as travel, changing clothes, and washing up, employers and unions would be free to define the workday as they saw fit.

**B. The 1-1 Split Identified By The Petition
Would Benefit From Further Percolation.**

Although the Sixth Circuit took a contrary approach to the question of whether § 203(o) activity can start the workday in *Franklin*, 619 F.3d at 618-19, that recent decision, as the Seventh Circuit noted, “offers only a conclusion, not reasons.” Pet.App16a.

Specifically, the Sixth Circuit simply stated that it “agree[d]” with several district court decisions that had held that activities covered by § 203(o) could still be a principal work activity because “§ 203(o) only addresses the compensability of the time, not whether it is integral and indispensable [to a principal work activity].” *Franklin*, 619 F.3d at 618-19. Remarkably, neither *Franklin*, nor any of the district court decisions on which it relied, explains the conclusion that “§ 203(o) only addresses the compensability of” covered activities. Nor does *Franklin* attempt to reconcile this assertion with the plain text of the § 203(o)—which, as just discussed, provides that covered activities are excluded entirely from “the hours for which an employee is employed.”

Besides, like this case, *Franklin* came before the Sixth Circuit in an interlocutory posture. It could soon return after final judgment and, given the stark contrast between the Seventh Circuit’s extensive reasoning and *Franklin*’s threadbare conclusion, the matter would be ripe for reconsideration by the Sixth Circuit at that time. Other quarters, too, deserve to be heard from for a thorough vetting of the issue before this Court’s resources are expended. In short, in light of the lack of reasoning offered by *Franklin*, as well as the recent vintage of that decision, the 1-1

split between *Franklin* and the decision below would benefit from further percolation.

**C. Whether Activities Covered By § 203(o)
Can Commence The Work Day Has No
Importance Beyond Its Potential To
Provide A Short-Term Windfall To
Petitioners.**

Even if the issue were subject to a mature split, it does not have sufficient significance to warrant this Court's review. For the reasons already noted, *supra* at 18-21, 26-27, the resolution of this issue will not have any significant impact on the overall welfare of employees. Rather, if Petitioners were to prevail in this case, market forces would compel employers and unions to agree to a rate for the increased hours worked that resulted in equivalent overall compensation.

Moreover, employers could also adjust to Petitioners' travel time rule in many cases simply by rearranging the order of required activities such that employees travel first and don their work clothes in close proximity to their work stations. Pet.App.13a ("Employers would also be moved to limit the time they allowed their workers for travel . . . and perhaps to reduce travel time further by moving the locker rooms closer to the work stations.").

Thus, this case at most offers the possibility of a short-term windfall for Petitioners and does not present the sort of nationally important issue that warrants this Court's review.

III. THERE IS NO REASON TO REVIEW WHETHER *DE MINIMIS* ACTIVITIES OF THE SORT IN THIS CASE ARE PRINCIPAL ACTIVITIES THAT RENDER LATER TRAVEL TIME COMPENSABLE.

A. The Decision Below Does Not Conflict With Any Decision From This Court Or A Court Of Appeals.

Finally, there is no decisional conflict whatsoever over whether *de minimis* activities such as donning and doffing a hard hat, safety glasses, or ear plugs are principal activities that render later travel time compensable. Petitioners' assertion that this issue was addressed by the First Circuit in *Tum*, 360 F.3d 274, and this Court in *IBP*, 546 U.S. 21, mischaracterizes those decisions.

In *Tum*, employees appealed a district court judgment that denied them compensation for travel time between the locker rooms where they changed into work clothes and their work stations. 360 F.3d at 278. Although a jury had found that the time spent actually donning and doffing was *de minimis*, the employees did not appeal that finding, *id.*, and the First Circuit did not address or rely on it. Instead, the court concluded that, even assuming that donning and doffing was a principal and compensable activity, travel time between the locker rooms and the workstations would still be non-compensable because it fell within the travel-time exemption of the Portal to Portal Act. *Id.* at 280-81. Thus the First Circuit in *Tum* clearly did not hold that a *de minimis* activity could render later travel time compensable.

Indeed, not even the lone concurrence cited by Petitioners suggested such a result. To the contrary, the concurrence noted only, that, *under the position advocated by the Secretary of Labor*, a *de minimis* activity could render later travel time compensable *Id.* at 285 (Boudin, J., concurring). Such an anomalous result, Judge Boudin noted, was “[o]ne further basis for *resisting* the Secretary.” *Id.* (emphasis added).

Nor did this Court consider whether *de minimis* activities could render later travel time compensable when it reviewed *Tum* as part of the consolidated decision in *IBP*. The Petitioner in *Tum* sought certiorari on three questions presented, the third of which was whether “walking and waiting time [could be] rendered non-compensable merely because the associated compensable donning or doffing time is *de minimis*.” Petition for Writ of Certiorari, *IBP*, 546 U.S. 21 (No. 04-66), 2004 WL 1588308, at *i. In opposing certiorari, the respondent correctly explained that review of that issue was not warranted because it “was not addressed by the court of appeals and played no part in its decision.” Brief in Opposition, *IBP*, 546 U.S. 21 (No. 04-66), 2005 WL 39879, at *7. The Court then denied certiorari on this question, and granted certiorari “limited to Question 1 presented by the petition.” *Tum*, 543 U.S. 1144.

Not surprisingly, neither the respondent’s brief in *IBP* nor the Court itself addressed whether a *de minimis* activity can be a principal activity that renders associated travel time compensable. *See* Brief for Respondent, *IBP*, 546 U.S. 21 (No. 04-66), 2005 WL 1841383; *IBP*, 546 U.S. at 32. *See also*

Singh, 524 F.3d at 371 n.8 (Sotomayor, J.) (stating that “the law of this circuit—at least since [*Reich v. New York City Transit Authority*], 45 F.3d 646 (1995)]” is that a *de minimis* activity “does not trigger the continuous workday rule” and that “[w]e do not read *IBP* as casting doubt on this holding”).

Petitioners have thus cited no decision that creates a conflict with the Seventh Circuit’s conclusion that the *de minimis* activities in this case were not principal activities.

B. The Decision Below Was Correct.

The decision below was also correct to conclude that the *de minimis* activities in this case were not principal activities. As the Court noted in *Mt. Clemens*:

The *workweek* contemplated by [the FLSA] must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable *working* time is involved.

328 U.S. at 692 (emphases added). Thus, *Mt. Clemens* suggests that time spent on *de minimis* activities are not counted as time an employee is “employed” *at all*. It follows *a fortiori* that *de minimis* activities cannot be “a principal activity or activities which such employee is employed to perform.” 29 U.S.C. § 254(a). *See also Tum*, 360

F.3d at 285 (Boudin, J., concurring) (noting that *Mt. Clemens* suggests “that a *de minimis* activity which is non-compensable time under *Mt. Clemens* does not start of[f] the workday”).

This view, moreover, is the only one consistent with both common sense and the policies of the FLSA. The FLSA, as amended by the Portal to Portal Act and § 203(o), was intended to require compensation only for a workday beginning when a worker is customarily considered “on the job”—*i.e.*, with the completion of the first, significant, principal activity for which he or she is employed. Consistent with that policy, it is undisputed that where a worker’s first activity at an employer’s facility is to travel to his or her work station, the travel time is not considered part of the work day. Yet there is no conceivable policy basis to hold that the “[s]plit-second absurdit[y]” of donning a hard hat at the entrance to the plant would convert all subsequent travel time into working time. Indeed such a rule would “bear an uncanny resemblance to that which prompted the Portal-to-Portal Act.” 360 F.3d at 286 (Boudin, J., concurring).

**C. The Question Presented Is Unimportant
And Does Not Justify This Court’s Review.**

For similar reasons as already described, whether an employer is forced to pay employees a lower base wage for a larger number of hours rather than a higher base wage for a smaller number of hours, will not have a meaningful impact on the welfare of either employees or employers. Rather, the issue is significant only to the extent Petitioners seek a short-term windfall in the form of greater wages than their

union bargained for. The petition should accordingly be denied on this question as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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

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

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

Counsel for Respondent
United States Steel Corporation

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