No. 12-417

In The
Supreme Court of the United States

CLIFTON SANDIFER, ET AL.,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

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

BRIEF OF *AMICI CURIAE* AMERICAN MEAT INSTITUTE, NORTH AMERICAN MEAT ASSOCIATION, NATIONAL TURKEY FEDERATION, NATIONAL CHICKEN COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*[1]

Amicus Curiae American Meat Institute ("AMI") is the oldest and largest national trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed meat products. AMI member companies produce more than 95 percent of the meat products available in the United States. *Amicus Curiae* North American Meat Association ("NAMA") is a national trade association that has been advocating the interests of the meat industry since 1946. NAMA members include packers, processors, and distributors of meat and meat products. *Amicus Curiae* National Turkey Federation ("NTF") is the only national trade association exclusively representing the turkey industry. NTF represents more than 95 percent of the turkey industry in the United States, including breeders, hatchery owners, growers, and processors. The National Chicken Council ("NCC") is the primary trade organization representing the

[1] Pursuant to Supreme Court Rule 37.3, Petitioners have filed with the Court a letter granting blanket consent to the filing of *amicus curiae* briefs in support of either or neither party and, accordingly, have consented to the filing of this Brief *Amici Curiae*. *See* Docket entry March 11, 2013. In addition, Respondent has given consent to the filing of this Brief *Amici Curiae*. Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was not authored in whole or part by counsel for a party, and no person or entity, other than *Amici*, made a monetary contribution for the preparation or submission of this brief.

chicken industry in the United States. The member companies of NCC produce and process approximately 95 percent of the chickens in the United States.

There are more than 417,000 workers employed in the meat and poultry packing and processing industries in the United States. AMI, NAMA, NTF and NCC members contribute to the U.S. Gross Domestic Product in an amount exceeding $156 billion annually. These revenues pay workers, shareholders, creditors, other investors, and also contribute significantly to federal, state and local tax revenues through income, sales, real estate and other taxes.

About 60 percent of the workers employed by *Amici* members currently are members of labor organizations which represent their interests with employers through collective bargaining. These union workers and their representatives typically negotiate and execute Collective Bargaining Agreements ("CBAs") for one or more years with *Amici* members. Those CBAs govern the wages, hours, and working conditions of the represented workers. In some cases, *Amici* members and their unions have been parties to CBAs for decades. Many *Amici* members and their unions have expressly addressed clothes-changing time in their CBAs while others have addressed clothes-changing time through established customs and past practices under their CBAs.

Amici and their unionized members have a compelling interest in the question presented by this case. *Amici* members have been inundated with Fair

Labor Standards Act ("FLSA") collective actions seeking compensation for clothes-changing time since the late 1990s despite the fact that many *Amici* members have addressed clothes-changing time either expressly or implicitly in their CBAs. These companies have done so in reliance upon Section 203(o) of the FLSA, 29 U.S.C. § 203(o), that reserves to unions and employers the right to negotiate and define in CBAs or through established custom and practice thereunder whether represented workers' clothes-changing time is compensable under the FLSA. The Seventh Circuit's decision challenged here, along with earlier decisions of the Fourth, Fifth, Sixth, Tenth and Eleventh Circuits, confirm the validity of long-established CBA provisions and practices of *Amici* members and their union-represented workers with respect to clothes-changing time.

If the Seventh Circuit's decision is overturned, employers and their workers would be deprived of the benefits struck through collective bargaining on this issue. A reversal would ignore Congress' express intent in Section 203(o) to reserve the issue of FLSA compensability for clothes-changing time to collective bargaining for represented workers. The uncertainty, confusion and undesirable policy that would ensue would adversely affect *Amici* members and their represented workers by destroying the carefully-crafted compromises and long-established practices on compensability of clothes-changing time that have been achieved through the collective bargaining process. Such a result would increase the ongoing deluge of

FLSA collective action lawsuits seeking undeserved multi-million dollar backpay awards and deny *Amici* members and the unions representing their workers the opportunity to freely negotiate such compromises in the future. If not checked, such interference with the collective bargaining process will continue to grow. The Court should prevent such disruption by affirming the decision below in full.

SUMMARY OF ARGUMENT

The decision below affirms the long-established customs, practices, and expressly bargained-for CBA provisions of *Amici* members and their employees. That result is fully in accord with the expressed intent of Congress in passing Section 203(o) that deference be given to the collective bargaining process. If the decision below is reversed, the rights of *Amici* members and their represented workers to bargain and reach agreement on clothes-changing time would be adversely affected.

The primary purpose of Congress in enacting the National Labor Relations Act ("NLRA") was to promote stability in labor relations and reduce the deleterious effects of unregulated combat between unions and employers. The 1947 Labor Management Relations Act ("LMRA") amendments to the NLRA demonstrated Congress' commitment to a uniform national labor policy promoting and encouraging the process of the peaceful resolution of labor disputes through collective bargaining, as this Court repeatedly

has recognized. 29 U.S.C. § 141 *et seq.* *See also*, *e.g.*, *Schneider Moving & Storage Co., v. Robbins*, 466 U.S. 364, 371-72 (1984); *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Following controversy and uncertainty over the impact of the FLSA on the negotiation of clothes-changing time by union-represented employers, Congress enacted Section 203(o) in 1949 to clarify its position and protect the outcome of collective bargaining. That enactment was clearly intended to reflect a "hands-off" policy under the FLSA when employers and their represented workers negotiate questions of compensability for clothes-changing time either expressly or through established customs and past practices.

The language, placement, and legislative history of Section 203(o) clearly show that the term "clothes" should be construed broadly to encompass all items of work apparel, including personal protective equipment. That conclusion is underscored by both the current interpretation and understanding of the term "clothes" to include personal protective equipment as well as the interpretation and understanding of that term contemporaneous with the enactment of Section 203(o).

Amicus AFL-CIO's contention that Congress intended to adopt a narrow interpretation of "changing clothes" pursuant to unrelated decisions of the War

Labor Board is entirely unfounded. Rather, the intent of Congress was that "changing clothes" be interpreted broadly in conjunction with the commonly used meaning of that phrase in the context of the workplace.

The Court, consistent with the national labor policy favoring collective bargaining, should defer to agreements and established past practices reached by the parties over what is and what is not compensable clothes-changing time. Allowing the give-and-take of collective bargaining to work in this context benefits all parties. In upholding the decision below, the Court should adopt a bright line test recognizing that "clothes" includes any and all parts of the work outfit, including personal protective equipment, worn by employees and used in the workplace.

For all these reasons, the Court should affirm the decision below of the Seventh Circuit Court of Appeal, and the interpretation of Section 203(o) articulated by the Seventh Circuit and followed by at least five other Circuits.

ARGUMENT

I. The Express Language, Legislative History and Context of Section 203(o) Demonstrate That Congress Intended to Defer to the Collective Bargaining Process With Respect to Time Spent Changing Clothes

Passed in 1938, the FLSA requires that employees be paid overtime compensation for "hours worked" in excess of 40 per week at a rate not less than one and one-half times the regular rate at which they are employed. 29 U.S.C. § 207(a)(1). Unfortunately, the FLSA does not define the term "hours worked," and conflicts soon arose between employers and employees with respect to what activities required compensation. In interpreting those terms, this Court initially adopted a broad definition in its early FLSA cases. *E.g.*, *Tennessee Coal Corp. v. Muscoda Local No. 123*, 321 U.S. 590 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161 (1945); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

In *Anderson*, employees at a pottery factory were required to walk the length of the facility before performing preliminary activities such as donning aprons and overalls, taping their arms, putting on finger cots, and preparing equipment for the work day. *Anderson*, 328 U.S. at 683. The Court held the workers' preliminary time compensable because the workweek included "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson*, 328 U.S. at 690-91 (1946). As a result of

Anderson, time spent performing preliminary activities such as donning work clothing was counted as hours worked. *Id.* at 692-93.

Reacting to *Anderson*'s broad interpretation of the FLSA, and to the subsequent flood of FLSA suits in the wake of that case, Congress passed the Portal-to-Portal Act in 1947. In doing so, Congress stated that the Courts had interpreted the FLSA "in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C § 251(a). As a result, Congress provided that employers would not be required to pay employees for activities which are preliminary or postliminary to principal activities. 29 U.S.C. § 254(a)(2).

Two years later, reacting to broad Department of Labor ("DOL") interpretations of the FLSA that donning special clothing might be a principal activity, Congress again amended the FLSA by adding Section 203(o) to clarify that it intended to allow employers and unions representing their workers to resolve through collective bargaining whether the compensable work day includes time spent "changing clothes."

The text of Section 203(o) explicitly declares Congress' intent that deference be given to the collective

bargaining process with respect to clothes changing at work:

> As used in this Chapter –
>
> (o) Hours Worked. – In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. 29 U.S.C. § 203(o).

Congress' use of the phrase "shall be excluded" demonstrates the intent that the issue of "changing clothes" at the beginning and end of the work day not be subject to limitation or override by courts. *E.g.*, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) ("shall" is ordinarily "the language of command") (citation omitted). Specifically, with regard to time spent donning and doffing work outfits, the amendment was intended to allow unions and employers to "define exactly what is to constitute a working day and what is not to constitute a working day." *Id.* Congress' forceful command that collective bargaining agreements and customs as to clothes-changing compensation were to be left undisturbed by the Courts indicated just such an intent. That is exactly what the Seventh Circuit decided here.

Congress' purpose in adding Section 203(o) was clear. Section 203(o) was intended to "avoid [] another series of incidents which led to the Portal-to-Portal legislation" and "**to give sanctity once again to the collective bargaining agreements**." 95 Cong. Rec. 11433 (1949) (emphasis added). That intent is entitled to substantial weight in interpreting Section 203(o). *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 546 (1976) (holding that "a statement of one of [a statute's] sponsors . . . deserves to be accorded substantial weight in interpreting th[at] statute"). Congressman Herter was also explicit that 203(o) was to allow collective bargaining to "define exactly what is to constitute a working day and what is not to constitute a working day." Thus, the goal of Congress was to allow unions and employers to remove these activities from the work day so that the work day would start only after employees had put on their work gear and were *ready to work*. Defining clothes to exclude items that had to be worn to be ready to work would therefore frustrate Congress' purpose.

As enacted, Section 203(o) was intended to defer to the collective bargaining process in determining whether compensation is paid, or not, for time spent by union-represented employees in changing the types of clothes involved in cases such as *Anderson*. The language and intent of Section 203(o) is "thoroughly reflective of that purpose" as it clearly shows that the intent of Congress was to give private parties latitude to define the outer contours of the work day,

especially where specific measurements are administratively difficult. *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009). Accordingly, the legislative history of Section 203(o) demonstrates, consistent with the plain language of the statute, a clearly defined intent to defer to the private collective bargaining process with respect to the definition and compensability of clothes-changing time in the workplace.

Congress also recognized that employers and unions are in a far better position than legislatures or the Courts to "thresh out" how many minutes of time should be allocated to compensable time. *See* 95 Cong. Rec. 11210 (1949) (comments of Rep. Herter). This is, of course, quite logical since employers and unions are in a far better position than are courts or the DOL to tailor specific solutions to particular factual circumstances, such as plant layout and the types of clothing worn in the industry, and to modify those solutions to fit the ever-evolving workplace. This is precisely what has happened to *Amici's* members, which have modified and improved protective clothing as new materials, such as Kevlar, have become available. Such changes have often been accompanied by bargaining and have been agreed-upon with employee representatives.

Section 203(o) demonstrates the preference of Congress for private resolution of clothes-changing time by the parties over the certain morass that would ensue should the determination be left to a "one-size fits all" or even a "one-size-fits-none" approach should it be left to the courts or politically

motivated, ever-shifting administrative interpretations. That preference allows the parties to reach a suitable compromise where, for example, a union might trade compensation for clothes changing in return for higher wages, benefits, or better working conditions. An employer might offer those enhancements, or as is often the case a specified amount of pay to cover clothes changing, in lieu of taking the administratively difficult task of measuring the small amounts of time employees engage in clothes changing, especially since that time often differs from employee to employee and day to day.

The Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits have relied upon Section 203(o)'s language and legislative history to support holdings that the purpose of this statutory provision is to leave the issue of payment for time spent "changing clothes and washing" to the collective bargaining process. Employers in those circuits have, in turn, relied on the court's rulings and rationales in tailoring their compensation policies and negotiating their collective bargaining agreements, as have employee representatives. *See Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009), cert. denied, No. 09-1529, 2010 WL 2420333 (Oct. 4, 2010); *Allen v. McWane, Inc.*, 593 F.3d 449, 458-59 (5th Cir. 2010); *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010); *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427, 428 (7th Cir. 2010) (adopting the rationale of *Sepulveda, supra*); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 958

(11th Cir. 2007); *see also Salazar v. Butterball, LLC*, 644 F.3d 1130 (10th Cir. 2011) (reaching the same result without resort to an analysis of Section 203(o)'s legislative history).

II. Section 203(o) Should Be Broadly Interpreted to Include Protective Clothing

A. The Language, Legislative History and Common Understanding of Workplace "Clothes" All Encompass Protective Clothing.

The statute defers to bargaining whether "changing clothes" will be compensable. "The plain meaning of legislation should be conclusive . . . " *E.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). Here, the plain meaning of Section 203(o) conclusively demonstrates that "clothes" includes personal protective equipment. As courts have noted, dictionaries at the time defined (and still define) 'clothes' as 'clothing' which is to say that it is "covering for the human body or garments in general: all the garments and accessories worn by a person at one time." *See, e.g.*, *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 214-15 (4th Cir. 2009) (quoting *Webster's Third New International Dictionary* (unabridged)); *see also Cambridge Dictionary of American English* (defining "equipment" as "the set of tools, **clothing**, etc., needed for a particular activity or purpose") (emphasis added); *Webster's Third* (listing "outfit" as synonym of "equipment"); *The American College Dictionary* 406 (1949) (defining "equipage" as "outfit,

as of a ship, an army, or a soldier"); *Shorter Oxford*, 1939 at 627 (defining "equipment" as "Anything used in equipping; furniture, outfit, warlike apparatus; necessities for travelling, etc."). Accordingly, the plain meaning of "clothes" is broad, and it clearly applies to protective equipment that is worn as a covering for the human body, and which already was in wide use in the workplace at the time the law was passed.

Congress was patently referring to work clothes in Section 203(o) rather than to non-work clothes. Thus, there is no logical reason to limit the definition of that term to "ordinary" non-work clothes, as suggested by Petitioner in this case. Instead, it is most logical to interpret "clothes" in the text of the statute regulating the workplace, as all coverings for the human body or garments in general which are worn for work. *See Franklin v. Kellogg*, *Co*., 619 F.3d 604, 614 (6th Cir. 2010); *Sepulveda*, 591 F.3d at 215.

If the term "clothes" in Section 203(o) is interpreted to exclude any garment or item that serves a protective function, that section would be rendered meaningless and unnecessary. When Congress enacted Section 203(o) in 1949, changing into and out of street clothing at the beginning and end of the workday already was not compensable under the Portal-to-Portal Act as a preliminary or postliminary activity. Therefore, there would have been no need to protect collective bargaining on clothes changing through the deference mechanism of Section 203(o), as street clothes changing would never be an issue.

The legislative history further confirms that Section 203(o) was enacted in reaction to Portal-to-Portal interpretations of the DOL suggesting that the donning and doffing of specialized and essential clothes could be a principal activity and, therefore, compensable.

Giving a broad interpretation to the meaning of "clothes" in Section 203(o) that includes garments and other items that serve a protective function is fully consistent with *Steiner v. Mitchell*, 350 U.S. 247 (1956). In holding that the donning and doffing of special clothing worn by employees in a battery plant was integral and indispensable to their principal activities, and therefore compensable, the Court relied upon and cited to the legislative history of the Portal-to-Portal Act, in particular the colloquy between Senators McGrath and Cooper, to distinguish between the donning and doffing of ordinary clothing in the workplace, which would not be compensable, since it is a mere convenience to the employee, and the donning and doffing of special clothing, which would be compensable if it is integral and indispensable to the employees' principal activities. *See Steiner v. Mitchell*, *id.* (Appendix). Certainly, the donning and doffing of protective clothing and equipment such as that involved in this case, would otherwise be compensable, **but for** the application of Section 203(o). Yet, under the interpretation of "clothes" espoused by the Petitioner in this case, Section 203(o) would be rendered meaningless, because the donning and doffing of

ordinary non-protective clothing is not in any event compensable under the Portal-to-Portal Act.

While the personal protective equipment at issue here is meant to provide protection for the worker's body from workplace hazards particular to the Respondent's industry, there is simply no logical reason to distinguish that equipment from any other type of clothing that provides protection from the elements or from more general workplace hazards such as heat, cold, common abrasions in a manufacturing environment, for the kind of conditions commonly found in the *Amici's* industries.

As discussed above, a broad interpretation of Section 203(o) is the most logical one because that section was enacted to rein in interpretations of the FLSA that resulted in unforeseen liability for compensable time, particularly that involving the donning and doffing of specialized work clothing in manufacturing settings like that addressed in *Anderson*. That case, moreover, addressed protective items much like those in this case, and if Congress intended to address in Section 203(o) the same type of protective clothing at issue in *Anderson*, which it did, then Section 203(o) must be interpreted to address that same type of protective clothing and equipment.

B. Both Contemporaneous and Later Administrative Interpretations Have Construed "Clothes" to Include Protective Gear.

The broad interpretation of the word "clothes" discussed above is consistent not only with the plain meaning of that term and its common contemporary workplace meaning, it is also consistent with the common usage of "clothes" in the workplace at the time Section 203(o) was enacted. For example, in its Handbook of Labor Statistics issued in 1936, the DOL stated that "**protective clothing** in good condition shall be furnished to workers exposed to injury hazards from physical contact with materials, such as goggles . . . , safety hats or helmets, and safety shoes . . . , fire-resisting leggings . . . , leather or asbestos aprons . . . , [and] gloves for protection against sharp edges, splinters or electric shocks, etc." United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Issue 616, pp.309-11 (1936) (emphasis added). Thus, as early as 1936 the DOL recognized that "clothing" within the plain meaning of that term and in the context of the workplace included specialized protective garments not unlike the types worn in this case and by A*mici* members' workers in the meatpacking industry (e.g., aprons, gloves, safety helmets and shoes).

The DOL's 1941 Handbook of Labor Statistics was also consistent with the common usage of "clothes" to include specialized protective items. In particular, that publication included "safety hats, gloves, special

safety shoes, leggings, spats, and aprons" as well as "a special foot protector for girls, covering the ankle and tip of the foot" and goggles in its description of "Practical Work Clothing for Women to Prevent Injury." United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Vol. 1, p.525 (1941). It could hardly be clearer that the DOL itself included specialized protective gear within its commonly-used definition of "clothes" with respect to garments worn in the workplace just a few years prior to the enactment of Section 203(o).

In that respect the DOL was certainly not alone. The term "clothes" was commonly used in the manufacturing industry to describe protective garments worn in the workplace at the same time that Congress drafted and passed Section 203(o). Various other publications issued both prior to and contemporaneous with the adoption of Section 203(o) demonstrate that "clothes" included specialized protective gear in the common lexicon of the time. *E.g.*, R.M. Little, *Protective Clothing for Men*, Safety Fundamentals 32 (1919) ("We wear clothing for two principal reasons: First, for protection and, second, for comfort and appearance. Man first wore clothes to protect himself from the thorns of the jungle."; "The use of special protective clothing in industry is increasing"; describing "asbestos gloves or mitts"; "a heavy gauntlet rubber glove"; "heavy helmets . . . to protect the head from the force of blows"; picturing various "asbestos garments" including leggings and forearm guards; "'Protect-toe' shoes" or other boots with "[r]einforced,

boxed toes [to] prevent toe accidents"; heat resistant leggings made of "chrome leather [or] asbestos"; "leather aprons"; "safety belts"; "a protective mask should be worn by iron and cinder men" that is "made of wire cloth with adjustable cloth cap, and a full fireproof apron [*i.e.*, a hood] extending over the chest and protecting the neck. The eyes of the wearer are safeguarded by strong, clear optical glass"); J.J. Lamb, *What is Safe Clothing for Factory Workers*, National Safety News, Vol. 3, No. 10, pp.5-6 (Mar. 7, 1921) (describing "easily removable leggings" that can "resist heat and prevent hot substances or acids from reaching the flesh"; "safe shoes, including some with steel or aluminum soles"; "special stockings of non-conductive material"; "leggings [which] are recognized as necessary parts of sage clothing" and "should be made of canvas, asbestos, or chrome leather"; "canvas leggings should be treated so as to make them fire-proof"; aprons made of "leather asbestos, or other fireproof material"; "helmets"; "heavy leather or canvas gloves reinforced with steel ribbons"; "asbestos gloves or mittens").

A broad interpretation of "clothes" in Section 203(o) to encompass protective clothing is also consistent with the DOL's own usage of that term in analogous circumstances. Indeed, in 29 C.F.R. § 1910.1030(b), the Occupational Safety & Health Administration, a branch of the DOL, defines personal protective equipment as "specialized **clothing** or equipment worn by an employee for protection against a hazard." (emphasis added). What is more, that same section

explicitly indicates that its definition of personal protective equipment is not intended to include general work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard. Thus, the DOL has firmly stated that "clothing" includes far more than the simple ordinary clothing urged by Petitioner, but also the type of personal protective equipment that serves as protection from workplace hazards.

OSHA's information booklet on Personal Protective Equipment also repeatedly refers to protective equipment as clothing, and states that "Protective clothing comes in a variety of materials, each effective against particular hazards." The DOL's booklet on Personal Protective Equipment goes on to list as personal protective equipment protective clothing made of paper-like fiber; treated wool and cotton; duck (closely woven cotton that protects against cuts and bruises); leather, and rubber, rubberized fabrics, neoprene, and plastics. Thus, the personal protective equipment worn in this case, and that worn in the meat packing and poultry industries, which is made of cotton, rubber, neoprene, and often plastic, and is designed and implemented specifically to protect workers from hazards particular to their wearers' industries, is clothing within the plain meaning of that word **and** within the common workplace usage of that word as well.

The DOL adopted this same view in its 2002 and 2007 Opinion Letters. In 2002, the DOL reexamined the text and legislative history of Section 203(o) and

concluded that it was intended to apply to the donning and doffing of the personal protective equipment used in the meat packing industry. Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter, 2002 WL 33941766 (June 6, 2002). In particular, the DOL found that it was "reasonable to assume that when Congress enacted § 203(o), it had in mind the kind of protective clothing at issue in the *Mt. Clemens* case just three years earlier, which involved aprons and overalls, shirts and finger sheaths." *Id.* Following that reasoning, the DOL concluded that the term "clothes" was intended to encompass work clothing that was worn for "covering, protection, or sanitation". *Id.* In 2007, the DOL once again thoroughly analyzed the issue and reiterated its position that "clothes," as used in Section 203(o), included "heavy protective safety equipment worn in the meat packing industry such as meat aprons, sleeves and gloves, plastic belly guards, arm guards, and shin guards." Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter, 2007 WL 2066454 (May 14, 2007).[2]

[2] Although the DOL's conflicting opinion letters interpreting Section 203(o) issued in 1997, 2001, 2002, 2007 and 2010 are not entitled to significant deference by the Court under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *Amici* believe the DOL correctly interpreted the meaning of "clothes" under Section 203(o) in its 2002 and 2007 opinion letters.

C. The Placement Of Section 203(o) In the Statute Excludes Bargained-For Clothes-Changing Time From Being Compensable.

Contrary to the clear Congressional intent, Petitioner seeks an unduly narrow reading of "changing clothes" as applied in Section 203(o). Therefore, it is not surprising that Petitioner seeks to treat Section 203(o) as an *exemption*, rather than an *exclusion* from FLSA because, as this Court has admonished, exemptions from the FLSA must be construed narrowly. *See, e.g.*, *Arnold v. Ben Kanowski*, *Inc.*, 361 U.S. 388, 392 (1960). However, Petitioner's interpretation is not supported by either the text or structure of the FLSA. Indeed, the text and structure of Section 203(o) and the FLSA demonstrate that Section 203(o) is *an exclusion*, which should be interpreted more broadly to give full effect to the intent of Congress.

FLSA Section 213, entitled "Exemptions," exempts certain classes of employees from various requirements of the FLSA. The exemptions found in Section 213 operate to deny FLSA coverage to specific categories of employees, and are treated by the courts as affirmative defenses with the burden of proof resting with the employer.

Unlike exemptions from coverage, Section 203(o) is found in the separate "Definitions" section of the Act. As part of that section, Section 203(o) is an explicit modification of hours worked that excludes from

compensability clothes-changing time if that is the result of collective bargaining. *See* 29 U.S.C. § 203(o).

If Congress had wished to bestow upon Section 203(o) the same status as the exemptions set forth in Section 213, it easily could have amended Section 213 instead of Section 203 when it added Section 203(o). However, it is quite clear that Congress fully understood the distinction between an FLSA definition and an FLSA exemption at the time it enacted Section 203(o). At the same time it included Section 203(o) in the "Definitions" section of the FLSA in the 1949 amendments, Congress also amended Section 213(a)(2) of the FLSA to exclude "any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located." 29 U.S.C.A. § 213(a)(2). *See Burden v. SelectQuote Ins. Services*, 848 F. Supp.2d 1075, fn. 6 (N.D. Cal. 2012). This irrefutably demonstrates that at the time it enacted Section 203(o), Congress knew and fully understood the importance of the distinction between FLSA exclusions and exemptions.

III. There Is No Evidence to Support the Argument That Congress Intended to Adopt the Treatment Given By the War Labor Board to Clothes-Changing Practices

Amicus AFL-CIO offers the strained argument that Congress intended in Section 203(o) to adopt the

War Labor Board's usage of the term "clothes" which, allegedly, would exclude protective equipment. That argument is flawed for one inescapably fatal reason: there is no evidence whatsoever that Congress had any intention to adopt a narrow interpretation of the term "clothes" in line with anything the War Labor Board had determined and, as noted above, all evidence directs the opposite conclusion.

In fact, the AFL-CIO points to no reference at all in either the text or the legislative history of the FLSA in general or Section 203(o) in particular that leads to its erroneous conclusion. As discussed above, the text of 203(o) refers only to "clothes," leading to the conclusion that Congress intended the common meaning of that term with respect to clothes worn in the workplace. As demonstrated in the preceding sections, that common meaning, both now as well as at the point in time that Congress wrote 203(o), included protective equipment. Moreover, if Congress had intended the term "clothes" in Section 203(o) to refer only to street clothing, as the AFL-CIO contends, there would have been no need to enact the provision at all, because changing into and out of ordinary clothing in the workplace had already been rendered non-compensable by the Portal-to-Portal Act.

Contrary to the AFL-CIO assertions, in 1949 Congress did evince the very specific intent to "avoid [ ] another series of incidents which led to the Portal-to-Portal legislation" and "**to give sanctity once again to the collective bargaining agreements**,"

an intent that leads to the inescapable conclusion that Section 203(o) was and is intended to allow employers and employees to determine, based on the particular working conditions and circumstances at issue, whether to include compensation for donning and doffing or protective equipment, because such equipment is plainly included within the meaning of "clothing." *See* 95 Cong. Rec. 11210 (1949) (Statement of Rep. Herter).

IV. Allowing the Issue of Clothes-Changing Time to Be Determined By the Collective Bargaining Process Furthers All Parties' Interests

For decades *Amici* members, and the unions representing their employees, have relied upon the specific provisions of Section 203(o), along with recent court decisions interpreting Section 203(o) to address clothes-changing time through the collective bargaining process. Such reliance can hardly be misplaced, given the language of Section 203(o), and the legislative history demonstrating Congress' intent to protect and restore the sanctity of the collective bargaining process. Many *Amici* member-employers, through collective bargaining, have agreed to extend benefits to represented workers in exchange for removal or limitation of compensability for clothes-changing time, and have memorialized those agreements in their CBAs.

Moreover, although the protective clothing and equipment worn by employees in the meatpacking

and poultry industries have gone through relatively dramatic changes and improvements over the years, some of which were mandated by OSHA and others voluntarily implemented by employers, the fact of the matter is that even in the mid-1940s, prior to the enactment of Section 203(o), meatpacking employees were required by governmental regulations to wear special garments for safety and sanitary reasons, including smocks, overalls, frocks, uniforms, boots, rubbers, leather aprons, raincoats and gloves. *See In re Swift & Company, Armour & Company, Wilson & Company and Cudahy Packing Company*, 21 War Labor Reports 652, 673 (1945). These and similar types of protective items that were in existence at the time Section 203(o) was enacted, as well as the more sophisticated items of protective gear, including kevlar and metal mesh that later evolved in the industry, are precisely the types of specialized protective items that Congress intended to defer to the collective bargaining process when it enacted Section 203(o). Indeed, throughout the entire time frame of such gear changes, many A*mici* members engaged in bargaining over the impact and compensability of those changes.

The instant case presents facts demonstrating just such an explicit trade between Respondent and its represented workers. This trade was expressly memorialized in CBAs which conferred extra benefits on employees through negotiations, in exchange for elimination of claims for clothes-changing time compensation. Respondent's Brief at 11-12. The reasons

for such an exchange by an employer are obvious and are shared by *Amici* members: the relatively small amount of time spent changing clothes imposes a disproportionate administrative burden on employers to account and pay for such time as compensable time. Employers are thus willing to confer, through negotiations and past practices, additional benefits in exchange for relief from that administrative burden. Employees are willing to forego this minimal pay in return for more certain and substantial benefits, as happened here and as has happened with *Amici* members.

A decision to reverse the Seventh Circuit would upend the decades of negotiations and practices as to clothes-changing time established at many *Amici* members, as well as at organized employers in other industries. This can only result in strained labor-management relations, renewed bargaining, possible labor strife, and most likely, a new deluge of private lawsuits seeking to overturn the bargains made between employers and employee representatives. Such a result, is bad for the economy, employers and employees, and helps only private counsel seeking to bring class action lawsuits to overturn mutually-agreed bargains reached between employees, their unions and employees. Such disruptions should not be countenanced by the Court.

V. The Court Should Adopt A Bright Line Test to Define the Meaning Of Clothes Changing Under Section 203(o)

In articulating a standard for determining what is and what is not "clothes changing," within the meaning of Section 203(o), the Court in deference to the collective bargaining process, at a minimum should allow the parties themselves to agree on what items of protective clothing and equipment should be included in or excluded from compensable time. Consistent with the overriding purpose of Section 203(o), the DOL and courts should defer to those collectively bargained or clearly defined custom and practice compensation arrangements.

The Court further should announce a bright line, common sense test which clearly states that the definition of "clothes" under Section 203(o) includes garments, attire, gear and other items that serve a protective or safety function. Absent clarification of what is and what is not encompassed within the parameters of clothes changing under Section 203(o), *Amici* and employers in other industries where protective clothing is utilized will continue to face uncertainty and ongoing, expensive collective action litigation over whether particular individual items of protective equipment and gear fall within the definition of "clothes" under Section 203(o). Hopefully, the test articulated by the Court will avoid this undesirable result and stem the tide of future litigation over this issue.

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CONCLUSION

Unlike Justice Stewart's difficulty in being able to define what is and what is not pornography, there is a clear and commonly understood definition of the term "clothes changing" under FLSA Section 203(o) that applies in the workplace setting. That definition without question includes not only garments, but other items and equipment that are worn by workers for purposes of protection, safety, health or sanitation. All Circuits except the Ninth that have addressed this issue have reached that conclusion and employers in those Circuits have relied upon those decisions. For the reasons stated above as well as those expressed in Respondent's main brief and other *Amici* supporting briefs, the Court should put this issue to rest and affirm in full the decision of the Seventh Circuit.

Dated: July 26, 2013

Respectfully submitted,

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