No. 09-1529

IN THE

Supreme Court of the United States

SANJUANITA SEPULVEDA, *et al.*,

Petitioners,

v.

ALLEN FAMILY FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Petition seeks review of these issues:

1. Does the term "changing clothes," used in § 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), apply to the items worn by poultry plant workers?

2. Does the adage that exemptions from the Fair Labor Standards Act are to be narrowly construed require a narrow construction of § 203(o)?

3. Does the so-called "continuous day" rule require that paid time include (a) "sanitizing" gloves and aprons at the beginning and end of the shift and (b) donning and doffing and sanitizing gloves and aprons of the beginning and end of the meal break?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Allen Family Foods, Inc. is a privately held corporation. It has no parent corporation and no publicly traded corporation owns 10 percent or more of it's stock.

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STATEMENT

Petitioners' Statement of the Case oversimplifies the facts. Pursuant to Rule 15.2, Respondent submits that most of the relevant facts are stated in the Court of Appeals' Opinion, as follows.

> The employees who work on the production line are required to wear the following items: (1) safety, steel-toe shoes, (2) a United States Department of Agriculture (USDA) required smock, (3) a USDA required plastic apron, (4) safety glasses, (5) ear plugs, (6) a bump cap, (7) a hair net, (8) USDA required rubber gloves, (9) sleeves, and (10) arm shields. The company commonly refers to these items as either "protective gear" or "personal protective equipment."
>
> At the beginning of each workday, production employees must don these items. They typically do so in the plant's locker room or as they walk from the locker room to the production area. Once they enter that area, they sanitize their gear by dipping their gloves into a tank, splashing the liquid solution onto their aprons, and stepping through a footbath. Afterward, they take their places along the production line and begin the task of processing poultry.
>
> Each day, the employees receive a thirty-minute lunch break, during which no chickens are placed on the production line. Employees

> are free to leave the production area when the last chicken passes their stations but are expected to be back when the first new chicken arrives. During the lunch break, they typically take off their gloves and aprons, wash up, and then walk to the cafeteria. Upon returning to the production area, they put these items back on and then sanitize them before resuming work. At the end of each workday, the employees are not required to go through a particular routine. But they typically rinse and doff their gear before leaving the plant.
>
> The company has a long-standing practice of paying these employees on the basis of "line time." That is, it pays them for time spent processing chickens on the production line; it does not pay them for time spent donning and doffing protective gear, walking to and from the production area, or washing their gear before or after work. Employees also do not receive compensation during the lunch break.

Petition at 22a-24a.

In addition, the summary judgment record shows that employees are permitted to, and did, don the required items at home or en route to the plant. Petition at 4a. They took their required items home on Friday after work, and brought them back the following Monday. Motion for Summary Judgment, *Sepulveda v. Allen Family Foods*, (D. Md. 07-cv-097), Doc. 34-2, at 9. The only limit on employees' ability to don and doff items outside the plant is that clean smocks cannot be worn

outside the production area, before work, unless covered by an outer garment. Petition at 4a.

Petitioners' estimates about the amount of time involved in donning and doffing varied. Two petitioners testified that it took one minute to don the smock and one minute to doff it. One testified that it took one to two minutes to don the smock and that he often wore it out of the plant at the end of his shift. Two testified that it took two minutes to put on the smock. One testified it took three minutes to put on the hat, smock and boots and four minutes to take them off. Two testified it took five minutes to put on everything. One testified it took seven to eight minutes to don the smock, apron and hair net. Motion for Summary Judgment, *supra* at 10-11.

REASONS FOR DENYING THE PETITION

This case does not meet the criteria in Supreme Court Rule 10 for granting review on certiorari. The Fourth Circuit's decision does not conflict with the decision of another court of appeals with respect to the interpretation of the term "changing clothes" nor with respect to the adage that exemptions from overtime are to be narrowly construed. Petitioners' argument that the "continuous workday" concept requires clarification does not raise an important question of federal law.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

A. There is no conflict on the meaning of "clothes."

The Fourth Circuit's opinion in this case is consistent with rulings from the Fifth and Eleventh Circuits. *Allen v. McWane*, 593 F.3d 449, 454 (5th Cir. 2010)(manufacturing plant); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001)(poultry plant), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007)(poultry plant), *cert. denied*, 128 S. Ct. 2902 (2008). It is also consistent with an opinion letter from the Department of Labor. O.L. FLSA 2002-2, 2002 WL 33941766 (Petition at 35(a)).[1]

The ostensible split arises from a Ninth Circuit decision finding that § 203(o) does not apply to donning and doffing in the meatpacking industry. *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005). However, as the Fourth Circuit noted (Petition 25a, n. 2) the Ninth Circuit reached essentially the same result, via a different route, by holding that the donning and doffing of what it termed "non-unique protective gear" is *de minimis* as a matter of law. 339 F.3d at 903. The non-unique gear in *Alvarez* included most of the items worn by the employees in this case, hats, earplugs, frocks (smocks), safety goggles and hairnets. *Id.* at 901, n. 6, 903, 904.

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1. After the Petition was filed, the Department of Labor issued another opinion letter, stating that the term clothes in § 203(o) does not apply to the protective gear worn by meat packing employees. Administrator's Interpretation No. 2010-2 (June 16, 2010). The 2010 opinion letter distinguishes the heavy protective gear worn in meat packing plants from the lighter gear worn in poultry plants. *Id.* at n. 3.

B. There is no conflict on what principle of statutory interpretation applies.

The Supreme Court has held that any exemption from the Fair Labor Standards Act must be "narrowly construed, giving due regard for the plain meaning of statutory language and the intent of Congress." *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

Section 203(o) is not an exemption, because it does not remove any employee from the minimum wage or overtime provisions of the Act. Rather, § 203(o) is a definition, the sole effect of which is allow employers and unions to decide, through collective bargaining, whether a few minutes at the beginning and end of the shift should be treated as time worked. The only federal appellate decision holding that § 203(o) should be narrowly construed is the Ninth Circuit's decision in *Alvarez*, *supra*, in which the court deemed donning and doffing the type of gear involved here to be "*de minimis* as a matter of law." 339 F.3d at 901. Again, this difference between the routes taken by the Ninth Circuit and other courts of appeals to the same result does not raise a real conflict requiring resolution by the Supreme Court.

Moreover, even if § 203(o) is viewed as an exemption, the Fourth Circuit's decision does not conflict with the "plain meaning" of the term "clothes."

II. THE CONTINUOUS WORKDAY CONCEPT DOES NOT RAISE AN ISSUE REQUIRING CLARIFICATION BY THE SUPREME COURT.

Petitioners do not claim any circuit split with respect to their continuous workday argument. Rather, they claim that the Fourth Circuit's decision violates a "continuous workday" concept followed by the Department of Labor. This argument is, at best, a claim that the district court and court of appeals decided the case incorrectly, which is normally not a basis for obtaining a writ of certiorari. Supreme Court Rule 10. Moreover, Petitioner's argument is unpersuasive.

Petitioners' argument rests on the proposition that compensable workday starts when employees dip their gloves in a basin and splash some fluid from that basin on their aprons on their way to the production line and ends when they rinse their gloves and aprons at the end of their shift.[2] Those activities do not mark the beginning and end of the workday, under the Supreme Court's decision in *IPB v. Alvarez*, *supra*, because they are *de minimis* and because they are preliminary or

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2. The "sanitizing" activities performed by Petitioners in this case are not at all similar to the activities the Department of Labor found compensable in Opinion Letter FLSA 2002-2. Petition at 49a-58. In meatpacking plants, employees are required to clean their protective equipments, such as mesh and aluminum aprons, mesh gloves, arm guards, belly guards, shin guards and boots, using pressure hoses, brushes and disinfectant. *Saunders v. John Morrell & Co.*, 1 WH Cas.2d (BNA) 879 (N.D. Iowa 1991). This obviously involves a great deal more labor than dipping gloves in a basin and splashing some fluid from that basin on an apron.

"postliminary." 29 C.F.R. § 790.7(g) (Preliminary and "postliminary" activities include "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.")

Petitioners also assert that the doffing and rinsing of gloves and aprons before the meal break and the donning and "sanitizing" of the gloves and aprons after the meal break should be counted as part of their work time, not as part of the meal break time. The Fourth Circuit correctly found that this time was properly included in the meal break and *de minimis*. Petition at 36a, n.4.

Petitioners cite no court of appeals decision in support of their "continuous workday" argument. The two decisions they do cite are district court decisions denying summary judgment on the grounds that there were genuine issues of material fact. *Burks v. Equity Group*, 571 F. Supp.2d 1235 (M.D. Ala. 2008); *Gatewood v. Koch Foods of Mississippi, LLC*, 569 F.Supp.2d 687 (S.D.Miss. 2008). Those two decisions do not even contain final decisions on the merits. That the Fourth Circuit did not follow the two non-precedential district court decisions does not raise an issue requiring review by the Supreme Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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