No. 07-910

In the Supreme Court of the United States

LESSIE ANDERSON, ET AL.,
Petitioners,

v.

CAGLE'S INC. AND CAGLE FOODS JV LLC,
Respondents.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit's decision correctly focused on and enforced the parties' collective bargaining agreement, negotiations and relationship when it determined that summary judgment was properly granted by the District Court pursuant to Section 3(o) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o), which excludes from the definition of "hours worked" all "time spent in changing clothes or washing ... 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?"

RULE 29.6

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Cagle Foods JV LLC ("CFJV"), now called Equity Group-Georgia Division LLC, discloses that its sole member is Grow-Out Holdings LLC, which is affiliated with Keystone Foods LLC, both of which are privately held Delaware limited liability companies. No publicly held company owns 10% or more of the interests of either of these companies. Further, no publicly held company owns 10% or more of the interests of respondent Cagle's, Inc.

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COUNTER-STATEMENT OF THE CASE

Petitioners attempt to avoid well established Congressional policy, as reflected by Section 3(o), and obtain through litigation what they did not achieve through collective bargaining. Congress, however, has limited the scope of the FLSA. Thus, this case is not about speculative concerns for millions of American workers; it focuses on the real need for certainty in collective bargaining. This deference to collective bargaining by Congress has been **consistently** recognized by the Courts and agency responsible for the FLSA. Petitioners' current focus ignores this Congressional emphasis, and the importance of collective bargaining and the compromises reached by companies and unions on a daily basis, as clearly reflected in the contracts negotiated by CFJV and the Union and their overall, stable relationship. Despite petitioners' plea regarding the impact of the Eleventh Circuit's decision, the real issue is the sanctity and stability of collective bargaining, which the Eleventh Circuit's narrow ruling fully assured.

No matter how plaintiffs attempt to paint the issue as one of legal importance or conflict, it was the detailed analysis of the facts and law by the Courts below that dictated the outcome of this case. The proper focus (as consistently determined by the Circuits) is CFJV's particular operations as a processor of chickens and its bargaining history with the union representing **its** employees, and not misstatements concerning the record facts nor exaggerations regarding the applicable law. Petitioners' reference to industries generally (without regard to, or contrary to, the facts of record) is nothing more than posturing to

attempt to obtain review. In short, there is no Circuit conflict, nor other compelling need for review, and this Petition should be denied.

A. CFJV's Operations.

CFJV's poultry processing facility is principally engaged in the slaughtering, deboning and processing of chickens. CFJV's production employees wear a smock, bump cap, hairnet/beardnet and ear protection. [Petition, 3; App. 44a.][1] Depending on their particular job, some employees wear plastic armguards, mesh gloves (which are put on at the production line) and rubber gloves. Production employees are paid on the basis of "line time," that is, for the entire time that the processing line is operating, whether or not the employee is required to be at the line.[2] Employees receive two **paid** rest breaks (contrary to petitioners' contention) and an unpaid meal break.[3] As the time donning and doffing the limited required clothing in

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[1]References to the Appendices to the Petition for Writ of Certiorari ("Petition") are designated by the prefix "App."

[2]The amount of time actually spent donning and doffing was observed by CFJV's expert in time-study analysis, Dr. Stephen E. Konz, who concluded that such time was *de minimis* under appropriate legal standards. The time "estimates" by employees, as cited in the Petition, were guesses only, varied widely and were not supported by any empirical data or analysis. [*See* Petition, 4.]

[3]Petitioners' claim (*see* Petition, 4) that CFJV did not pay employees for donning and doffing any clothing before and after rest breaks is unsupported by the record -– those breaks are **paid in full**, and there can be no issue under the FLSA appropriate for review.

the **poultry** industry and at CFJV is not defined as "hours worked" by Section 3(o) of the FLSA, 29 U.S.C. § 203(o), such activity cannot be deemed a principal activity or part of the work day, consistent with what virtually all courts and the Department of Labor ("DOL") previously concluded.[4]

B. The Labor Contracts.

CFJV (and its predecessors) have been under contract with the Retail, Wholesale and Department Store Union ("Union") since 1975. CFJV's processing employees were employed and properly paid pursuant to the terms of successive collective bargaining agreements ("CBAs") with the Union. Contrary to petitioners' claims, these CBAs contained **negotiated** provisions regulating wages and time worked **and** adopted "line card" time as the method of calculating pay. [App. 45a-48a, 49a-50a.] Moreover, the 2000 and 2003 CBAs were negotiated after the filing of this lawsuit, which was known to both the Union and CFJV negotiators.

Notwithstanding the terms of the 1997, 2000 and 2003 CBAs, the Eleventh Circuit made no finding with respect to specific provisions but, for purposes of its decision only, "simply assume[d] that the CBAs never addressed the compensation policy with respect to clothes changing and that the parties to the relevant CBAs never discussed the policy." [App. 26a.] The Eleventh Circuit did not suggest, however, that the

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[4]There is no basis in the record for petitioners' reference to "cleaning equipment," as there is no dispute that CFJV's employees were paid for such work. [Petition, 3.]

CBAs were not "bona fide," and, most critically, noted that petitioners "do **not** contend that they lacked notice of the relevant compensation policy when executing the 1997, 2000, or 2003 CBAs." Recognizing these facts, the Eleventh Circuit properly held: "Absence of negotiations cannot in this instance equate to ignorance of the policy. Rather, it demonstrates acquiescence to it." [App. 27a.]

As the District Court recognized, the CBAs contained extensive negotiated provisions regarding the Company's pay practices:

> In the instant case, Plaintiffs work in positions covered by a series of enforceable collective bargaining agreements entered into by Defendant and RWDSU. **Article 11.6B of the 2003 CBA expressly addresses donning and doffing payments**....
>
> This provision unmistakably controls compensable working time earned while the 2003 CBA is in effect.
>
> **Article XI(6) of the 1997 CBA, Article 11.6 of the 2000 CBA, and Article 11.6A of the 2003 CBA state that "[a]ll employees shall be paid according to the time record on their line card** or the time on the individual's card if less than on the line card." (Doc. 197, App. 4, p. 28; App. 5, p. 26; App. 6, p. 29). **Line card time is generally determined by the start and stop time of the operating times and does not include the donning and doffing time spent by each employee**. (Doc. 197). Neither the 1997 nor the 2000 CBA provides for employee

> compensation for changing and cleaning time during their respective applicable time periods. (**See generally**, Doc. 197, Apps. 5, 6). **The Court, having been presented no evidence which might suggest otherwise, supports the finding that [the Union] signed the 1997 and 2000 CBAs with full knowledge that employees, including Plaintiffs, would not be compensated for donning and doffing time under these agreements**. The state of the evidence also supports the inference that **compensation for donning and doffing was the subject of negotiations**. [App. 49a-50a.]

As summarized by the District Court, despite petitioners' false assertions [Petition, 4-5], the CBAs between CFJV and the Union reflect the results of the parties' bargaining on pay for donning and doffing, and adopt "line card" time as the method of calculating hours worked, as permitted by Section 3(o):

> All employees shall be paid according to the time record on their line card or the time on the individual's card if less than on the line card.[5]

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[5] "Line card" time is determined by the start and stop time of the operating lines and not the clock in or out times of any specific employee. Because employees are not required to report to their work station when "line time" begins (but only when the first bird reaches their individual work station), they are properly paid for all time worked, even if they work until the last bird passes their work station. Petitioners fail to note this balancing feature when suggesting that they were treated unfairly or unpaid for time worked.

In 2003, CFJV and the Union also negotiated and agreed to compensation for donning, doffing and washing:

> All employees also shall be paid an additional 3 minutes per day, at their regular rate, for clothes changing and cleaning time, in addition to any pay for hours worked.

In addition to those specific terms, Article 6 of the CBAs contains extensive **negotiated** provisions concerning "Hours of Work and Overtime" and related pay practices, which further reflect the compromises of the parties' bargaining (including, prior to 2003, the lack of pay for donning and doffing):

- Section 1 - regular workweek and hours, and daily and weekly overtime; no guarantee
- Section 2 - mandating overtime work; notice of daily overtime
- Section 3 - training in deboning department and overtime pay
- Section 5 - Saturday and Sunday overtime work and pay
- Section 6 - excused overtime work
- Section 7 - rest periods [App. 46a-47a.]

Furthermore, contrary to petitioners' representation [Petition, 4], under all of the CBAs, both rest breaks are **paid**, including any donning, doffing and washing time.

Thus, whether applying the Court of Appeals' or District Court's approach, in light of the terms of the CBAs, review cannot be warranted as the result under Section 3(o) would be identical.

C. The Labor Negotiations And The Record Below.

The deposition testimony -- both of petitioners and CFJV -- confirms the Eleventh Circuit's conclusions regarding the parties' knowledge of CFJV's pay practices. Although now ignored by petitioners, they **admitted** that CFJV's donning and doffing practices **had been discussed in Union meetings**. This was not slipped by without the Union's and the employees' full knowledge. Diann Freeman, one of the named plaintiffs, admitted:

> Q. *** Were you ever at a union meeting where these issues about -- that you've explained to me about not getting complete breaks or not being paid for all of the time you worked where these issues were discussed?
>
> * * *
>
> A. Yes, we've talked about it, several times. Almost every time it came up.
>
> Q. Was one of your union representatives there?

A. Yes, always.

Q. And what did the union representative tell you?

A. That he would work -- he would look into it. But nothing never got done about it. [R30-223, Exhibit B, 33-4.]

David Harris explained that he attended a Union meeting prior to the ratification of the 2000 CBA where donning, doffing and cleaning were discussed:

Q. Do you ever remember being at a union meeting where these issues that you've indicated the lawsuit is about, [donning, doffing and cleaning], where those issues have been discussed?

A. Yes. [R30-223, Exhibit C, 30-1.]

Petitioners took **no** depositions from any individuals involved in the negotiations, offered **no** affidavits from any employees on any bargaining committee and offered no contrary testimony or evidence. Their current professed lack of knowledge is false and contrary to the record.

Buddy Paracca, CFJV's Complex Manager from 1999 to 2002, testified only that no provision of the 1997 or 2000 CBA expressly addressed **pay** for donning, doffing and cleaning of clothing. He did **not**

state that no provision of the CBA **dealt** with donning or doffing – and the CBAs clearly define the manner of timekeeping and method of pay – that is, by line card. [*Cf.* App. 49a-50a.] Paracca also discussed donning and doffing with Edgar Fields, the Union's representative, during negotiations. [R28-197-App./Tab 9, 215-6.] Petitioners' argument that the issue of compensability for donning, doffing and washing was not raised during negotiations is disingenuous and not supported by the record or the CBAs. As the District Court recognized, and the Eleventh Circuit affirmed, in face of a fully developed factual record, petitioners presented "no evidence" that would give rise to a **genuine** issue of material fact regarding any issue relevant to Section 3(o). [App. 51a.] Section 3(o) should be given its full effect; review is not appropriate as the outcome, under any analysis of the facts and Section 3(o), must be the same.

SUMMARY OF ARGUMENT

1. Consistent with the expressed intent and terms of Section 3(o), CFJV's employees were subject to a series of CBAs, including terms and conditions of employment relevant to the employees' compensation, clothing and hours of work, which were negotiated and implemented with the employees' and Union's full knowledge.

2. At a minimum, there exists at CFJV a long-established practice with respect to donning, doffing and washing that was and is unequivocal, clearly enunciated (as the parties had negotiated a specific term relating to line time and other issues regarding compensation) and readily ascertainable.

3. The Eleventh Circuit properly concluded that all donning, doffing and washing time, and the related walking time, was properly excluded from hours worked under Section 3(o) of the FLSA "by the express terms of or by custom or practice under" the CBAs and the applicable case law (including decisions by this Court).

4. Virtually all similar poultry industry cases have been resolved in favor of the employer in similar, if not exactly identical, circumstances where the employees worked in **chicken** plants (wearing virtually identical articles of clothing).

5. This Court's decision in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514 (2005)("*Alvarez*"), did not involve the application of Section 3(o), nor address the non-unique clothing worn by CFJV's employees.

REASONS FOR DENYING THE PETITION.

I. The District Court's And Eleventh Circuit's Opinions Concerning Section 3(o) Are Consistent With Applicable Law And Do Not Raise Issues Of Exceptional Importance.

Contrary to the petitioners' suggestion, review here is unnecessary as there is no dispute among the Circuits as to the compensability of donning and doffing activities in the **unionized** poultry industry -- the Eleventh Circuit's thoughtful and well constructed opinion is correct. Even petitioners' "best" case results in the same outcome. Whether controlled by Section 3(o), or deemed *de minimis* as a matter of law, employees in the **unionized poultry** industry are not required to be compensated for such time, exactly as

Congress intended in adopting Section 3(o), by giving deference to the parties' negotiated CBAs, customs or practices. Despite petitioners' suggestion, rather than being "intractably divided," the Courts and the DOL are consistent in their analysis, interpretation and application of Section 3(o) in these respects. The only confusion that exists is generated by petitioners' continuing refusal to focus on the facts of record and accept the impact of Section 3(o) and the terms of the **negotiated** CBAs between CFJV and the Union representing its employees. Instead, petitioners improperly seek through litigation what they did not achieve through negotiation. Review is simply not warranted and would upset the collective bargaining process which Congress, by adopting Section 3(o), intended to fortify and support. Petitioners' speculation as to an alleged "split" and "choos[ing] sides" is not a proper basis on which to request review by this Court where, in fact, no such split exists. [*See* Petition, 15.]

A. Overwhelming Judicial Consistency.

Contrary to petitioners' argument, the Eleventh Circuit properly determined that the District Court's grant of summary judgment here was appropriate under Section 3(o), which specifically excludes clothes changing and washing time from the definition of compensable work time based on the terms of, or custom or practice under, a collective bargaining agreement or labor contract. *See Anderson v. Cagle's, Inc.*, 2005 U.S.Dist.LEXIS 41747 (M.D.Ga., December 8, 2005), *aff'd*, 488 F.3d 945 (11th Cir. 2007). This decision is consistent with virtually every other Court which has reviewed similar issues, and presents no

compelling reason for review by this Court. There simply is no irreconcilable or other discrepancy among the Circuits, especially given the record facts. *See Anderson v. Pilgrim's Pride Corp.*, 147 F.Supp.2d 556, 564-5 (E.D.Tex. 2001), *aff'd*, 44 Fed.Appx. 652, 2002 U.S.App.LEXIS 13429 (5th Cir. 2002)("The UFCW's understanding that clothes-changing time and 'wait time' were not compensable under the agreements constitutes a 'practice' for purposes of Section 203(o). Pilgrim's Pride long-standing policy of non-compensation for these activities similarly constitutes a 'custom' for purposes of Section 203(o)."); *Pressley v. Sanderson Farms, Inc.*, 2001 U.S.Dist.LEXIS 6535 (S.D.Tex. April 20, 2001)(as to the claims of those employees covered by a collective bargaining agreement, "[t]he Court might be inclined to agree that this agreement excludes time spent changing or washing clothes pursuant to section 3(o)"); *Gutierrez v. Specialty Brands, Inc.*, Civ. No. 00-102 DJS/RLP at 2, 6 (D.New Mexico, January 14, 2002)(Court granted summary judgment to employer under Section 3(o) on claims for donning and doffing smock, hairnets and boots: "activities which Plaintiffs engage in generally fall within the common meaning of 'changing clothes' and washing and so fall within the exception contained in 29 U.S.C. § 203(o)"); *Bejil v. Ethicon, Inc.*, 125 F.Supp.2d 192, 196, n.3 (N.D.Tex. 2000), *aff'd*, 269 F.3d 477 (5th Cir. 2001)(smocks, hair nets, beard nets, special shoes were "clothes" under Section 3(o) and related donning and doffing time is noncompensable in light of established practice, even in the absence of collective bargaining); *Reich v. Oscar Mayer Foods Corp.*, 1995 U.S.Dist.LEXIS 22225, *6 (E.D.Tex., March 2, 1995)(Section 3(o) excludes from compensable

work time the time spent by unionized employees at a meat processing plant donning and doffing work uniforms that were worn over their street clothes, as well as shoe covers, hair nets and bump hats).

Petitioner's reliance on *Fox v. Tyson Foods, Inc.*, 2001 U.S.Dist.LEXIS 26050 (N.D.Ala. 2001), *adopted*, 2002 U.S.Dist.LEXIS 27968 (N.D.Ala. 2002), is clearly misplaced as the District Court reversed its position by Order dated August 31, 2007. *See Fox v. Tyson Foods, Inc.*, Case No. 99-1612 (N.D. Ala, August 31, 2007)("The Plaintiffs concede that *Anderson* reverses this Court's conclusion that § 203(o) does not apply to their pre- and post-shift clothes changing activities. Hence, as to this conceded issue, the court hereby **GRANTS** Defendant's Motions to Reconsider."). Petitioners' reliance on *Spoerle v. Kraft Foods Global, Inc.*, 2007 U.S.Dist.LEXIS 95037 (W.D.Wis., December 31, 2007), is likewise misplaced since that Court relied principally on the now reversed 2002 *Fox* decision. Other courts have rejected the now reversed 2002 *Fox* analysis as unpersuasive. *See Kassa v. Kerry, Inc.*, 487 F.Supp.2d 1063, 1068 (D.Minn. 2007); *Gutierrez v. Specialty Brands, Inc.*, *supra* at 6 (in granting summary judgment, the Court was "unpersuaded by [the employees'] argument or the proffered authority," that is, the discredited 2002 *Fox* Opinion).

In *Davis v. Charoen Pokphand (USA), Inc.*, 302 F.Supp.2d 1314 (M.D.Ala. 2004), the Court, pursuant to Section 3(o), granted summary judgment in favor of a poultry processor despite similar claims. Like petitioners here, the *Davis* plaintiffs wore standard poultry industry sanitary clothing: hat or hairnet, smock, apron, earplugs, rubber gloves, boots,

protective gloves, plastic sleeves and arm guards. *Id.* at 1317-8, 1319. Although, **unlike this case**, the CBA failed to refer to line time or donning, doffing and washing time, and such compensation was never part of the negotiations between the Union and the Company, *id*. at 1320-21, the Court had "no trouble finding that the FLSA's § 203(o) exception" barred the claims related to any position covered by the CBA. *Id.* at 1321. The Court, likewise, easily dismissed plaintiffs' assertion that the "sanitary equipment" worn by them was not "clothing" under Section 3(o):

> The plaintiffs attempt to distinguish their case by claiming that the sanitary garments used in the present case are not "clothes" under § 203(o) and therefore, that section should not be applicable. **The distinction plaintiffs make, however, is nonsensical**.... Webster's defines "clothing" as "covering for the human body or garments in general." The plaintiffs here put on, among other things, (1) a lab coat; (2) dedicated shoes or shoe coverings; and (3) hair or beard coverings. These items all appear to fall under the definition of "clothes." *Id.* at 1321.

Most recently, in *Kassa v. Kerry, Inc.*, *supra*, the Court rejected plaintiffs' reliance on terms or descriptions (as petitioners do here) and held that smocks, pants, shirts and boots constitute "clothes" for purposes of Section 3(o):

> Plaintiffs attach too much significance to labels. Regardless of whether it is labeled 'personal protective equipment' or something

else, a hair net is still a hair net, pants are still pants, and a smock is still a smock. Whether the items that plaintiffs don and doff are "clothes" under § 203(o) depends on what those items **are**, not on what they are called by the CBA, by Kerry's plant manager, or by anyone else.

* * *

The Court agrees with Judge Graham that, based on the undisputed evidence adduced so far, the items at issue in this case -– except perhaps the hair nets and the beard nets -– are "clothes" under § 203(o). Specifically, based on the word's ordinary meaning, "clothes" includes pants, shirts, smocks, and boots. And, for people who wear them, glasses are essentially part of their clothing, so standard safety glasses also qualify as "clothes." (Even if standard safety glasses are not 'clothes,' the time that it takes to put on a pair of glasses is *de minimis*.)

* * *

The Court believes that whether a particular item of protective gear should be considered "clothes" under § 203(o) depends on the exact nature of the item and the exact circumstances under which it is used.... **None of the items at issue in this case, however, presents a close question**. All of those items are "clothes" for purposes of § 203(c)[*sic*] -- or, in the case of hair nets and beard nets, the time devoted to

> donning the items is *de minimis*. 487 F.Supp.2d at 1066-7 (footnote omitted).[6]

Despite this consistent analysis, petitioners claim a "split" and assert that "[t]he Eleventh Circuit's expansive interpretation of Section 3(o) does not comport with the common sense understanding of 'changing clothes'" and that the term "clothes" does not cover the garments worn by CFJVs employees. [Petition, 21-2.] Petitioners base their "common sense interpretation" of the phrase on "contemporary dictionaries," but then quote the definition of "clothes" in *Webster's Second New International Dictionary* as "[c]overing for the human body; dress; vestments; vesture...." [*Id.*, 21.] In reaching its result, however, the Eleventh Circuit and other courts relied on the almost identical definition of "clothes" in *Webster's Third New International Dictionary*: "covering for the human body or garments in general...." [App. 19a.] It is doubtful that petitioners' "common sense" concept of "covering for the human body" changed from *Webster's Second* to *Webster's Third*, or that the distinction petitioners suggest is anything but "nonsensical." *See Davis v. Charoen Pokphand (USA), Inc.*, *supra* at 1321. Moreover, relying also on the dictionary definition of "change" -- "'to make different,' that is 'to modify in some particular way but short of conversion into something else,'" [App. 20a], the Eleventh Circuit reached the right result, fully consistent with the law. Moreover, as to these terms, petitioners' reference to

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[6]As to hair nets and beard nets, the Court held that, while they **may** not be "clothes," "donning and doffing those items alone is surely a *de minimis* activity." *Id.* at 1067, n.1.

Mitchell v. Southeastern Carbon Paper Company, 124 F.Supp. 525 (N.D.Ga. 1954), *aff'd*, 228 F.2d 934 (5th Cir. 1955), and *Laudenslager v. Globe-Union Inc.*, 180 F.Supp. 810 (E.D.Pa. 1958), *aff'd*, 274 F.2d 814 (3d Cir. 1960), [*see* Petition, 24], is wholly irrelevant, as no CBA existed in either case and Section 3(o) had no application.

B. Agency Consistency.

As admitted by petitioners, the Eleventh Circuit's conclusions regarding Section 3(o) are consistent with the "interpretation of the term 'changing clothes'... of the agency responsible for administering the FLSA," the Wage and Hour Division of the Department of Labor ("DOL"). [Petition, 7; App. 21a.] As the Eleventh Circuit correctly noted, the DOL's Opinion Letter dated June 6, 2002 (FLSA 2002-2) advises that "for the purpose of applying § 203(o), clothes 'include items worn on the body for covering, **protection**, or sanitation'." Like the Eleventh Circuit here, the DOL there held:

> One dictionary defines "clothes" as "garments for the body; articles of dress; wearing apparel" (The Random House College Dictionary (revised ed. 1982)), and another defines "clothes" as "**articles**, usually of cloth, designed to cover, **protect** or adorn the body..." (*Webster's New World Dictionary* (2d college ed. 1982))(emphasis added). *See also* 29 C.F.R. § 1920 1050 App.A (OSHA regulations characterizing "face shields" as a kind of "**protective clothing**").

The DOL **reaffirmed** its 2002 position in an Opinion Letter dated May 14, 2007 (FLSA 2007-10) issued after this Court's decision in *Alvarez*. [11th Cir., Docket - Supplemental Authority.] The DOL's consistent interpretation of the FLSA is entitled to considerable respect. *See*, *e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 164 (1944)(DOL opinions entitled to respect as "body of experience and informed judgment").

In its recent opinion, the DOL emphasized that Section 3(o) should be given its plain meaning, and that collective bargaining relationships are paramount. The DOL **again** concluded that "clothing" under Section 3(o) included **all** of the clothes of the type worn by CFJV's employees:

> After carefully reviewing the interpretation of section 3(o) set forth in Wage and Hour Opinion Letter FLSA 2002-2 (June 6, 2002), it remains our view, based upon the statute and its legislative history, that the "changing clothes" referred to in section 3(o) applies to putting on and taking off the protective safety equipment typically worn by employees in the meat packing industry.... As specified in the 2002 letter, this clothing includes, among other items, heavy protective safety equipment worn in the meat packing industry such as mesh aprons, sleeves and gloves, plastic belly guards, arm guards, and shin guards.

The DOL also, and **again**, rejected any suggestion that the activities excluded by Section 3(o) could be

"principal activities" (and, thus, could not mark the start of the "continuous workday"):

> In promulgating this provision Congress plainly excluded activities covered by section 3(o) from time that would otherwise be '[h]ours worked.' 29 U.S.C. § 203(o). Accordingly, activities covered by section 3(o) cannot be considered principal activities and do not start the workday. Walking time after a 3(o) activity is therefore not compensable unless it is preceded by a principal activity.

In light of the DOL's consistent interpretation of Section 3(o), as reflected by its 2002 and 2007 Opinion Letters, petitioners' focus on an alleged conflict with the Ninth Circuit discussion in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), *aff'd sub nom.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), is improper. [Petition, 13.] Not only does this case not arise out of the Ninth Circuit, but also that Court had no opportunity to consider the 2007 DOL Opinion Letter. Speculation about possible enforcement action in the Ninth Circuit cannot justify review in this case.[7] *But see* Part I.D., *infra*.

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[7]Petitioners' reference to the regulations issued by the Occupational Safety and Health Administration ("OSHA") is irrelevant to an understanding of Section 3(o) and the related Congressional intent, as correctly interpreted by the DOL. If anything, the OSHA Regulation cited by petitioners regarding "Bloodborne pathogens," 29 C.F.R. § 1910.1030(b), if relevant at all, suggests that "personal Protective Equipment" and "general work clothes" are subsets of "clothes," exactly as defined by Section 3(o).

C. Legislative Consistency.

Section 3(o) is derived from the expressed Congressional intent to redefine the nature of hours of work, consistent with collective bargaining relationships, and avoid litigation designed, as here, to upset the collective bargaining process. *See 95 Congressional Record - House at 11210* (August 10, 1949). Thus, Congressman Herter (R. Mass.), who offered the amendment, desired to prevent the need for further legislation where hours of work "have been spelled out in ... collective bargaining agreements but have not necessarily been defined in the same ways." As Congressman Herter noted:

> But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements.
>
> The difficulty, however, is that suddenly some representative of the Department of Labor may step into one of those industries and say. "You have reached a collective bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody had considered was excluded as a part of the working day." That situation may arise at any moment. **This amendment is offered merely to prevent such a situation arising and to give sanctity once again to the collective-bargaining agreements as the determining factor in finally adjudicating that type of arrangement.** *Id.*

D. The Ninth Circuit - Consistent Result Under These Facts.

Notwithstanding the consistent application of Section 3(o) by various Courts in various Circuits, and by the DOL, petitioners suggest the existence of "an issue of exceptional importance" by reference to a single opinion by the Ninth Circuit which, in fact, is not inconsistent with the result here, and does not deal with the type of clothing worn by these petitioners. Critically, the Ninth Circuit's allegedly "contrary" decision in *Alvarez* was based upon the distinct nature of the clothing worn by those employees (in the beef, not chicken, industry). 339 F.3d at 898. Even applying the Ninth Circuit's analysis, the result on the facts of this case would be the same, thereby making review here unnecessary. As to the items of clothing worn by petitioners (and CFJV's employees), the Ninth Circuit concluded (as did the Eleventh Circuit here) that employees did not have to be paid for such time:

> [W]e agree with the district court's alternative conclusion as to why the time spent donning and doffing non-unique protective gear such as hardhats and safety goggles is not compensable: **The time it takes to perform these tasks vis-a-vis non-unique protective gear is de minimis as a matter of law**.... As the Tenth Circuit posited in an alternative conclusion in *Reich*, time spent donning and doffing non-unique protective gear, "although essential to the job[] and required by the employer," is at once so insubstantial and so difficult to monitor that it "is *de minimis* as a

> matter of law." 38 F.3d at 1126 & n.1. 339 F.3d at 903-4.

See also Id. at 901, n.6 (noting that the time spent donning and doffing non-unique protective gear such as hard hats, frocks, ear plugs, safety goggles and hair nets was not compensable). As such, the Court of Appeals in *Alvarez* (and, thus, this Court) only considered the impact of donning, doffing and washing the armor-like, specialized protective equipment used in the red meat industry -– a face shield; weight-lifting-type belts to prevent back injury; chain-link (*i.e.*, "mesh") metal aprons, leggings, vests, sleeves and gloves; plexiglass arm guards; Kevlar gloves; and puncture-resistant protective sleeves. *Id.* at 898, n.2. Conversely, the donning and doffing of **non-unique items** (as used by petitioners) was not part of those employees' "principal activity."[8] Since CFJV's employees do not don or doff anything other than such "non-unique" clothing, the Ninth Circuit and all Circuit Courts, including the Eleventh Circuit, have deemed such activity to be **non**-compensable. *See*, *e.g.*, *Kassa v. Kerry, Inc.*, *supra* at 1066-7:

> [T]his case does not involve a mixture of what *Alvarez* labeled "non-unique protective gear" and what *Alvarez* labeled "specialized protective gear." To the contrary, this case

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[8]This Court also recognized that the nature of the clothing worn by the employees was critical: "[T]he Court of Appeals endorsed the distinction between the burdensome donning and doffing of elaborate protective gear, on the one hand, and the time spent donning and doffing nonunique gear such as hardhats and safety goggles, on the other." 546 U.S. at 32.

> involves **only** items that *Alvarez* labeled "non-unique safety gear." As noted, *Alvarez* was silent on the question of whether such items should be considered "clothes" under § 203(o), and neither *Gonzalez* nor *Fox* establishes that such items are not "clothes."

In these circumstances, there is no need for further review by this Court. On these facts, the acts of donning, doffing and washing are not to be considered in determining hours worked nor compensation under Section 3(o). Petitioners' suggestions regarding this Court's *Alvarez* decision are not instructive.[9]

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[9]The Eleventh Circuit properly noted that "[t]he Supreme Court's opinion in *Alvarez* did not discuss issues relevant to this appeal...." [App. 18a, n.12.] In fact, this Court did not address the application of Section 3(o), proscribe "line time" arrangements in the poultry industry nor declare that donning and doffing **all** clothing are principal activities and compensable under the FLSA, as suggested by petitioners. Rather, this Court held that time spent walking to the production floor **after** donning unique protective gear, and the time spent walking from the production floor to doff unique, protective gear is compensable **when the donning time or the doffing time is otherwise compensable**. Although ignored by petitioners [*see*, *e.g.*, Petition, 3 (employees' wait in supply line)], this Court also held that the time employees spend waiting to obtain the first piece of "integral and indispensable gear" (such as waiting in line at the supply room) is **not** compensable under the FLSA. 546 U.S. at 40-1. Petitioners' comments regarding "waiting time" are baseless and require no further comment.

II. The Eleventh Circuit's Analysis Of The Parties' Collective Bargaining Relationship Is Supported By Every Other Court Decision.

Although not seemingly raised by the "Question Presented" offered by petitioners, there is no question that (a) all of the CBAs negotiated by the parties contain express provisions related to line time and donning and doffing activities and (b) the employees and Union were otherwise aware of these practices and accepted them. Ignoring these facts and CBAs entirely, petitioners contend that the Eleventh Circuit "did not dispute petitioners' contention that 'the CBAs never addressed the compensation policy with respect to clothes changing and that the parties to the relevant CBAs never discussed the policy." [Petition, 28.] However, that is not what the Eleventh Circuit in fact held; instead, for purpose of its decision only, the Eleventh Circuit stated:

> Rather than address their allegations of error directly, we simply **assume** that the CBAs never addressed the compensation policy with respect to clothes changing and that the parties to the relevant CBAs never discussed the policy. We nevertheless conclude that the named CFJV plaintiffs' view of the law is incorrect. [App. 26a.]

More critically, the Eleventh Circuit did not reject the terms of the CBAs (as do petitioners), as it also held that its "assumption" regarding negotiations did not imply a lack of knowledge of CFJV's practices by petitioners:

> For the purpose of our inquiry, we are concerned with the CBAs executed in 1997, 2000, and 2003, which were in effect during the relevant time period. As previously noted, the named CFJV plaintiffs' arguments focus on the language of the CBAs and the absence of negotiations. **They do not contend that they lacked notice of the relevant compensation policy when executing the 1997, 2000, or 2003 CBAs.** Nor do they contend that the CBAs in effect during the relevant time period were somehow not "bona fide." [App. 27a.]

As the District Court had found, and as reflected by the facts and terms of the CBAs, petitioners' now professed lack of knowledge and need for review are makeweight and false. In fact, the CBAs contain extensive **negotiated** provisions regarding line time and compensation. [*See* App. 45a-48a.] And, petitioners testified as to their actual knowledge. Consequently, however analyzed, petitioners cannot succeed as the terms required by Section 3(o) -- either "express terms of" a CBA or a "custom or practice under a bona fide" CBA -- were met. Accordingly, the Eleventh Circuit's analysis regarding the latter is wholly consistent with every other relevant judicial authority without exception.

Indeed, courts have made clear that, even if there is no mention of clothes changing and washing time in a labor contract, an existing practice still may be a "custom or practice under a bona fide collective-bargaining agreement" and the related "hours" properly deemed **not** compensable under the FLSA. *See*, *e.g.*, *Arcadi v. Nestle Food Corp.*, 38 F.3d 672,

674-5 (2d Cir. 1994); *Saunders v. John Morrell & Co.*, 1991 U.S.Dist.LEXIS 21069, *11 (N.D. Iowa, December 24, 1991)("Even if plaintiff were correct that Morrell has not expressly excluded clothes-changing time from hours worked, the court believes that the undisputed facts also show a custom or practice to exclude the time."); *Nardone v. General Motors, Inc.*, 207 F.Supp. 336, 340 (D.N.J. 1962). In *Bejil v. Ethicon, Inc.*, *supra*, the Court held donning and doffing time to be noncompensable in light of years of established practice, even in the absence of collective bargaining. 125 F.Supp.2d at 196-7. These consistent holdings are supported by any review of the terms of Section 3(o) itself, which refers, **separately**, to **either** the "express terms" of a CBA **or** a "custom or practice" under a CBA.

Nor is it a novel suggestion requiring this Court's review that, under basic tenets of labor law and employer-union relationships, acquiescence can establish a custom or practice. In *Turner v. City of Philadelphia*, 96 F.Supp.2d 460 (E.D.Pa. 2000), *aff'd*, 262 F.3d 222 (3d Cir. 2001), the Court **rejected** plaintiffs' argument that Section 3(o) was not applicable because the employer and union had not negotiated over compensation for clothes changing time: "[n]o court ... has held that the absence of such formal negotiations precludes the existence of a requisite custom or practice." 96 F.Supp.2d at 462; *see also Hoover v. Wyandotte Chemicals Corp.*, 455 F.2d 387 (5th Cir.), *cert. denied*, 409 U.S. 847, 93 S.Ct. 52 (1972); *Williams v. W. R. Grace & Co.*, 247 F.Supp. 433, 435 (E.D. Tenn. 1965); DOL Field Operations Handbook § 31b01.

More recently, consistent with the approach taken by the Eleventh Circuit, the Court, in *Kassa v. Kerry, Inc.*, *supra*, rejected the doctrinaire approach suggested by petitioners:

> Plaintiffs argue that such a "custom or practice" does not exist in this case because the issue of paying for changing clothes has never been raised and abandoned by the union in the course of negotiations with Kerry.... The Court does not believe, however, that the case law requires "custom or practice" under § 203(o) to be defined so narrowly. 487 F. Supp.2d at 1068.

Indeed, the Court, after surveying the consistent case law (including this Court's holdings), held:

> To be sure, if the issue of paying for changing clothes is raised and abandoned in the course of union-management negotiations, this will generally be **sufficient** to establish a "custom or practice" of not paying for such time under a CBA. But it does not follow that the issue must **necessarily** have been raised and abandoned during CBA negotiations. Rather, the term "custom or practice" is broad enough to capture a long-standing practice by an employer of nonpayment for clothes-changing time -– even if the issue of payment for such time has not been raised in union-management negotiations -- provided that the employer can demonstrate that the practice of nonpayment was sufficiently long in duration

> and that its employees knew of and acquiesced in the practice.
>
> This interpretation is consistent with most federal case law on § 203(o). 487 F.Supp.2d at 1068 (emphasis in original).

See also Conerly v. Marshall Durbin Company, 2007 U.S.Dist.LEXIS 85994, *20 (S.D.Miss., November 5, 2007)(holding that acquiescence in custom or practice of non-compensation for donning and doffing is appropriate upon proof to support argument).[10]

Petitioners' suggestion that, on the facts here, "the union would have had every reason to believe that its workers were entitled to compensation for clothes changing time" [Petition, 30], or that the method of compensation was not addressed in the CBAs, ignores the record below and the Eleventh Circuit's analysis, or is deliberately false. There can be no dispute, as the District Court found, that the 1997 and 2000 CBAs expressly state: "All employees shall be paid according to the time record on their line card or the time on the individual's card if less than on the line card." [App. 47a.] The Union and the employees well knew how "line card" time was calculated, and the nature of their negotiated compensation, as even reflected in petitioners' Petition. [Petition, 3-4.] Both the District

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[10]As the record below (as summarized by the District Court) reflected, the manner of compensation by CFJV was well known both to the employees and the Union -– that alone is sufficient under any standard or analysis to reflect a custom **or** practice for Section 3(o) purposes. In addition, the parties negotiated "line card" time without additional pay in all contracts until 2003. [*See* App. 45a-48a.]

Court and the Eleventh Circuit so found. In fact, the Eleventh Circuit's carefully constructed opinion was based on facts **not disputed by petitioners**: "[t]hey do not contend that they lacked notice of the relevant compensation policy when executing the 1997, 2000, or 2003 CBAs." [App. 27a.] The District Court summarized the record evidence in detail. [App. 45a-48a.] Review should not be based on false statements or exaggerated circumstances.

Petitioners' additional suggestion that the Eleventh Circuit's application of Section 3(o) could be used as a cover for blatant violations of the law [*see* Petition, 29] is specious and ignores the presence and role of the Union, and its rights under the CBA. In light of the **admitted facts**, including the Union's and the employees' actual notice and discussion of the relevant compensation policies at CFJV [*see* App. 27a; *see also* Counter-Statement of the Case, Part C, *supra*], such violations did not and could not occur. The Eleventh Circuit did not expand the scope of Section 3(o) or modify employee rights under the FLSA. The Eleventh Circuit merely held that, as here, where compensation policies are well known, then the appropriate (and required) forum to modify those policies is at the negotiating table and not through litigation, exactly the result the Congress sought. [*See* Part I.C., *supra*.]

What petitioners seek is to effectively amend the scope of Section 3(o) and delete the reference to "custom or practice," and renegotiate the contract. That goal should not be countenanced and the Petition should not be granted -– the Eleventh Circuit properly considered Section 3(o) and reached the correct result,

fully consistent with its plain meaning and every judicial decision. In fact, the Fifth Circuit, in *Hoover v. Wyandotte Chemicals Corporation*, *supra* at 389, rejected a similar effort under Section 3(o) and aptly noted:

> More importantly, we think judicial approbation of the plaintiffs' position would constitute a holding that what a union fails to achieve through the process of collective bargaining will be delivered to it under the provisions of the [FLSA].

Accordingly, certiorari is not warranted.

III. The Eleventh Circuit's Interpretation Of Section 3(o) As A Definition And Not An Exemption Is Not A Basis For Review By This Court.

As a plain reading of the Opinion confirms, the Eleventh Circuit did not hold, as suggested by petitioners, that the FLSA's "narrow construction rule ... applies **only** to the interpretation of Section 13 of the Act...." [Petition, 26.] Rather, the Eleventh Circuit only "conclude[d] that **§ 203(o)** [and no other section] is not an exemption under the FLSA but is instead a definition that limits the scope of the FLSA's key minimum wage and maximum hour provisions." [App. 23a.] Thus, a proper reading of the Eleventh Circuit's Opinion does not suggest the broad holding posited by petitioners. In fact, Section 3 contains **only** definitions, **exactly as it is titled**. In contrast to the Eleventh Circuit's clearly stated interpretation, limited to Section 3 [*see* App. 22a-23a], petitioners focus upon multiple sections of the FLSA, none of which relate or refer to Section 3 or its proper

construction. Indeed, petitioners point to no case which suggests that the Eleventh Circuit's statutory interpretation is incorrect.

Nothing in *Powell v. United States Cartridge Co.*, 339 U.S. 497, 70 S.Ct. 755 (1950), which considered the application of the FLSA to government contractors based on certain other definitions in Section 3, suggests a different result. Despite petitioners' argument, this Court focused only on the express terms of each definition reviewed and did not express a rule regarding the construction of Section 3. Based solely on the words reviewed, the Court concluded that "[t]o hold otherwise would restrict the Act...," without reference to an expansive or restricted approach. 339 U.S. at 515.

Nor did the Fifth Circuit in *Hoover v. Wyandotte Chemicals Corporation*, *supra*, hold otherwise. In fact, that Court, applying Section 3(o), rejected overtime claims, just as did the Eleventh Circuit here. Although the Court, without specifically adopting any standard of review, noted the "remedial scope and function" of the FLSA and that it "skepticize[s] regarding its exceptions," it concluded that Section 3(o) insulated that company from liability (exactly as the Eleventh Circuit concluded here):

> The Act, however, is not limitless. In full knowledge that the [FLSA] has great length and breadth, we conclude in the instant case that its terrain is not universal. 455 F.2d at 387.

Petitioners' reference to various purported "Section 3(f)" cases does not compel a different result

or require review, as those cases did not discuss the application of Section 3. *See* Petition, 13; *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980); *Miller Hatcheries v. Boyer*, 131 F.2d 283 (5th Cir. 1942); *Calaf v. Gonzalez*, 127 F.2d 934 (1st Cir. 1942). At issue in each of those cases was the scope of the "agricultural exemption" in **Section 13(a)**, and not the definition of "agriculture" in **Section 3(f)**. Thus, those cases have no impact on the Eleventh Circuit's holding, and their citation by petitioners is intentionally misleading. Petitioners' reference to cases under Section 7 also is irrelevant as the Eleventh Circuit focused only on Section 3 and made no broader comment. Petitioners' speculation aside, there is no basis for review. As in virtually every case that has considered the application of Section 3(o), the definition of "hours worked" should be applied as written and as Congress intended.

Moreover, although ignored by petitioners, the Eleventh Circuit did not merely focus upon the standard to review Section 3(o), it also relied upon the legislative history leading to the enactment of Section 3(o) as an independent basis for its holding. [*See* App. 23a-24a ("The statute's plain meaning aside....").] In doing so, the Eleventh Circuit underscored the flaw in petitioners' position: "construing § 203(o) narrowly against employers as an FLSA 'exemption' contravenes **not only** basic tenets of statutory construction **but** *also* the readily apparent intent of the legislators who approved the amendment's language." [App. 25a.] Thus, the Eleventh Circuit made clear that it would reach the same result no matter which rule -– narrow or expansive -– applied:

> The statute's plain meaning aside, our conclusion in this regard also finds support in the circumstances surrounding passage of the provision that became § 203(o). [App. 23a.]

Petitioners simply are wrong when they state that "[t]he court of appeals did not dispute that its expansive reading of Section 3(o) would conflict with the narrow construction rule, if the rule applied." [Petition, 26.]

IV. The Eleventh Circuit's Decision Concerning Reservation Of Issues Is Derived From An Analysis Of Petitioners' Brief And Well Within Its Authority.

As the Eleventh Circuit made clear, but for "an aside in the context of a broader introduction to their brief on appeal" [App. 29a], petitioners never focused on issues related to alleged uncompensated break-time (even though the rest breaks are actually paid) or uncompensated time on the production line. Petitioners' focus throughout their brief was the "continuous work day" rule referenced by this Court in its decision in *Alvarez* (which, as the Eleventh Circuit made clear, did not apply to any of the issues determined by the District Court) and not on these "miscellaneous" issues. At most, 45 words within a 5 page section of petitioners' Brief relate to the alleged "miscellaneous" issues. These miscellaneous issues were not advanced in any way except as an aside to the improperly focused argument on the continuous work day rule, which does not apply here.

As even the decisions cited by petitioners make clear, the determination of the issues before a court is

well within that court's discretion, and does not raise any issue of significance, conflict with applicable precedents or present any basis for review. *See*, *e.g.*, *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1542 (11th Cir. 1994)("Issues that clearly are not designated in the initial brief ordinarily are considered abandoned."). Such issues are not worthy of consideration by this Court, as admitted by petitioners. [*See* Petition, 25-6, n. 18.]

The Eleventh Circuit's reliance on *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003), is appropriate and dispositive: "each mention of this evidence," which appellant sought to challenge, "is undertaken as background to the claims he does expressly advance or is buried within those claims" and, hence, is waived. *See also Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 n.6 (11th Cir. 1989)(passing references to issues are insufficient to raise a claim for appeal: "Although [appellant] refers to the district court's dismissal of its amendment in its Statement of the Case in its initial brief, it elaborates no arguments on the merits as to this issue in its initial or reply brief. Accordingly, the issue is deemed waived."). In these circumstances, the dictates of Supreme Court Rule 10 are compelling:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.
>
> * * *
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of

> erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

Despite petitioners' repeated suggestions, the Eleventh Circuit's Opinion is wholly consistent with decisions by every other Court which has considered Section 3(o), either in analysis or result, when applied to the poultry industry and the clothing worn by CFJV's employees. That decision also is supported by two recent opinions issued by the Department of Labor, which are entitled to appropriate deference, and the applicable Congressional history. These facts negate any need for further review.

The adoption of petitioners' suggested analysis would fly in the face of Congress' expressed intent when enacting Section 3(o) -- that is, to give "sanctity once again to the collective bargaining agreements." *See* 95 Congressional Record - House at 11210 (August 10, 1949). The Eleventh Circuit's opinion places collective bargaining exactly where it should be, in the control of the parties. Otherwise, the finality sought by Congress, both by contract or, recognizing the nature of employer-union relationships, custom or practice, will necessarily be lost and collective bargaining sacrificed.

Under all of these circumstances, and for all of the reasons set forth in this Opposition, there is no "compelling" need for further review and the Petition for Writ of Certiorari should be denied.

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