No. 07-910

IN THE

Supreme Court of the United States

Lessie Anderson, et al.,
Petitioners,

v.

Cagle's Inc. and Cagle Foods, JV, L.L.C.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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Respondent does not dispute what the Eleventh Circuit openly acknowledged in this case: the decision below decides a question of federal law – whether Section 3(o) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(o), applies to the donning and doffing of personal protective equipment – in direct conflict with the Ninth Circuit's resolution of the same legal question in a prior case. *See* Pet. App. 18a (noting conflict with *Alvarez v. IBP*, 339 F.3d 894 (2003), *aff'd on other grounds*, 546 U.S. 21 (2005)). Nor does respondent dispute that this question is important. As another chicken processing company recently told this Court in a closely-related case, a division of authority over compensation requirements for donning and doffing in that industry "has introduced substantial uncertainty in business planning, decisionmaking, and labor negotiations"[1] which, the petition demonstrated, is harmful to employers and employees alike. *See* Pet. 19-20. Likewise, respondent does not deny that questions presented by the petition are recurring. To the contrary, respondent goes to some lengths to catalog some of the extensive litigation that has already been

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[1] Petition for Certiorari 20, *Tyson Foods, Inc. v. De Asencio*, No. 07-1014. The petition in *De Asencio* asks this Court to resolve a circuit split over whether donning and doffing personal protective equipment in the chicken processing industry constitutes "work" within the meaning of the FLSA. Should the Court grant certiorari to resolve that question, it would make sense to grant review in this case as well in order to conclusively resolve the compensability of donning and doffing time in this heavily litigated area.

undertaken over these issues. *See* BIO 11-17, 25-28.[2] If petitioners are right, those cases demonstrate that many thousands of workers are systematically being denied compensation due them under the FLSA. If, on the other hand, respondent is right, it is time for this Court to put an end to the litigation once and for all by conclusively resolving these frequently litigated issues.

Respondent nonetheless urges this Court to deny certiorari for reasons that, as explained below, are unavailing.

1. Respondent argues that the acknowledged conflict between the Ninth and Eleventh Circuits over the scope of Section 3(o) is immaterial as a practical matter because the Ninth Circuit has held that time spent donning and doffing personal protective gear in the poultry industry is, in all cases, *de minimis* as a matter of law and therefore non-compensable. BIO 21-23. This argument fails for three reasons.

First, *Alvarez* did *not* purport to establish any such universal rule. Much to the contrary, the court simply invoked its long-established test from *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984). *See Alvarez*, 339 F.3d at 903. That test requires a court to examine three case-specific factors: (1) the "amount of daily time spent on the additional work"; (2) the "practical administrative difficulty of recording small amounts of time for payroll purposes"; and (3) "the size of the aggregate claim." 738 F.2d at 1062-63. While the *Alvarez* court found that the time spent

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[2] The *De Asencio* petition, at 19 n.6, further collects cases demonstrating that "[s]ignificant decisions in at least six donning and doffing cases have been handed down in the Ninth Circuit alone since July 2007."

donning and doffing "non-unique" equipment to be *de minimis* under *Lindow* on the facts of the case before it, the court did not purport to establish any general principal that such activities would always be *de minimis* in every case involving similar equipment.

The point is illustrated by the Ninth Circuit's decision in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004). In that case, employees were required to don and doff gowns in a silicon wafer manufacturing facility. *Id.* at 903-04. Although the gowns were no more "unique" than the smocks worn by the workers in *Alvarez*, the Ninth Circuit did not simply hold that the donning and doffing of the gowns was *de minimis* as a matter of law. To the contrary, the court remanded the case to the district court to apply the *de minimis* analysis to the specific facts of the case. 370 F.3d at 912. Moreover, the court of appeals expressed doubt whether the time was *de minimis* in that case, noting that the time spent was not "insubstantial," that it did not appear that the time was "difficult to monitor." *Id.* at 912.

So, too, in this case, there is no reason to think, simply on the basis of *Alvarez*, that the Ninth Circuit would hold petitioners' donning and doffing time to be *de minimis*. The aggregate time claimed here is substantial. *See* Pet. 4; *see also* Wage and Hour Advisory Memo. No. 2006-2, May 31, 2006, at 4, *available at* http://www.dol.gov/esa/whd/Field Bulletins/AdvisoryMemo2006_2.htm (stating that "where the aggregate time spent donning, walking, waiting and doffing exceeds the *de minimis* standard, it is compensable"). Moreover, as Department of Labor regulations make clear, an "employer may not arbitrarily fail to count as hours worked any part, *however small*, of the employee's fixed or regular working time or practically ascertainable period of

time he is regularly required to spend on duties assigned to him." 29 C.F.R. § 785.47 (emphasis added); *see also Lindow*, 738 F.3d at 1062-63 (same). Respondent points to nothing in the record of this case that would compel the Ninth Circuit to conclude that respondent was unable to ascertain and record the time petitioners predictably and regularly spend donning and doffing their protective equipment.

Second, even if the Ninth Circuit would find the time petitioners spend donning and doffing their gear to be *de minimis*, the court nonetheless would require respondent to compensate petitioners for walking and waiting time during the workday, *see* Pet. 3-4, in conflict with the Eleventh Circuit's decision below.

Alvarez held that "plaintiffs' donning, doffing, and cleaning activities are 'integral and indispensable' to [their] 'principal' activity," 339 F.3d at 903, and thus marked the beginning of their workday, *id.* at 906. As a result, the employer was required to compensate its employees for time spent walking to their stations and waiting for production to begin, as well as the time spent in the reverse process at the end of the day. *Id.* Importantly, the court made clear that its "'integral and indispensable' conclusion extends to donning, doffing, and cleaning of non-unique gear (*e.g.*, hardhats) and unique gear (*e.g.*, Kevlar gloves) alike." *Id.* at 903. *See also id.* at 904 (repeating that "donning and doffing of *all* protective gear is integral and indispensable to 'the principal activities for which [the plaintiffs] are employed") (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)) (emphasis added).

In this case, petitioners seek compensation not only for the time spent donning and doffing their equipment, but also for the substantial amounts of

time they subsequently spend walking to their stations, cleaning their equipment, and waiting for the first chicken to arrive, as well as the time spent at the end of the day waiting for the last chicken to arrive and walking to the doffing area. *See* Pet. 3-4. There is no question that the Ninth Circuit would hold such walking and waiting time compensable, regardless of whether it deemed the time spent donning and doffing particular protective equipment to be *de minimis* or not.

Accordingly, there is no basis for respondent's assertion that "[e]ven applying the Ninth Circuit's analysis, the result on the facts of this case would be the same, thereby making review here unnecessary." BIO 21.[3]

Third, respondent does not contest that at the very least, the conflict between the Ninth and Eleventh Circuits' interpretation of Section 3(o) has an important impact in cases in which donning and doffing of protective personal equipment cannot be considered *de minimis*, as occurred in *Alvarez* itself, where the court found that time spent donning and doffing items such as Kevlar gloves in a meat processing facility was not *de minimis*. *See* 339 F.3d at 903-04. Granting certiorari in this case to resolve the conflict will indisputably serve to bring clarity in this much-litigated and important area of the law.

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[3] The distinction between "unique" and "non-unique" equipment is at issue in a closely related context in the pending petition for certiorari in *Gorman v. Consolidated Edison Corp.*, No. 07-1019. As with the pending petition in *De Asencio*, if the Court were to grant the petition in *Gorman*, it would make sense to also review the questions presented in this case at the same time.

2. The petition demonstrated that this Court's intervention is also required because of the untenable conflict between the decision of the Ninth Circuit and the present interpretation given Section 3(o) by the Department of Labor. Pet. 13-14. Respondent's one-paragraph response to this argument, *see* BIO 19, is unpersuasive. Respondent does not dispute that an interpretative conflict between an agency charged with enforcing a federal statute and a circuit in which it has enforcement obligations creates an untenable conflict. *See* Pet. 13-14. Instead, respondent attempts to suggest that the Ninth Circuit, which expressly rejected the Department's view of the statute in *Alvarez*, *see* 339 F.3d at 905-06 n.9, might change its mind in light of a more recent opinion letter. BIO 19. But that letter, issued in response to an inquiry whether the Department had changed *its* mind in light of the Ninth Circuit's decision in *Alvarez*, provides no new analysis and simply re-asserts the position the Ninth Circuit has already rejected.[4] There is simply no realistic possibility that the present standoff between the Ninth Circuit and the Department of Labor will be resolved without this Court's intervention.

Nor does respondent attempt to deny that the Department itself has been of two minds about the scope of Section 3(o), switching positions in 2002. *See* Pet. App. 21a. As the petition noted, the Department's inability to come to a consistent interpretation of the Act, coupled with the division among the courts of appeals, cries out for final and decisive clarification by this Court. Pet. 14.

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[4] The letter is available at http://www.dol.gov/esa/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf.

3. Respondent further insists that certiorari is unwarranted because the Eleventh Circuit's decision is correct, consistent with the plain meaning of the phrase "changing clothes," which respondent asserts includes any alteration of a "covering for the human body." BIO 16. Respondent does not deny that under this construction, workers are "changing clothes" whenever they don "metal-mesh leggings, armor, spacesuits, riot gear, or mascot costumes." *Alvarez*, 339 F.3d at 905. Nor can respondent plausibly claim that such an interpretation constitutes a "narrow construction" of the exemption, as required by this Court's long-standing decisions. *See* Pet. 26-28.

Instead, petitioner defends the Eleventh Circuit's refusal to apply the narrow construction rule, even while denying that in doing so, the court of appeals parted company with other courts, including this one, that have applied the rule to Section 3(o) and other provisions outside of Section 13. *See* BIO 30-33. That attempt fails on both counts.

First, respondent cannot deny that the Eleventh Circuit expressly rejected the Ninth Circuit's conclusion that the narrow construction rule applied to, and controlled the outcome of, the interpretation of Section 3(o). *Compare* Pet. App. 22a-23a *with Alvarez*, 339 F.3d at 905. Instead, respondent asserts that the conflict was immaterial to the outcome of this case because, it says, the Eleventh Circuit would have reached the same conclusion even if it had applied the narrow construction rule, apparently because the court looked to not only the language of the statute but also the "circumstances surrounding passage of the provision that became § 203(o)." BIO 32 (quoting Pet. App. 23a). But if the Eleventh Circuit thought that the narrow construction rule was irrelevant to its decision, there would have

been no need for it to go out of its way to find the rule inapplicable, much less to create a circuit split on the question. Instead, the Eleventh Circuit recognized the obvious: Section 3(o) is susceptible of a narrower construction (*i.e.*, the one given it by the Ninth Circuit), which the court would have been compelled to adopt if the narrow construction rule applied.

Second, respondent attempts to deny that this Court and others have applied the narrow construction rule to Section 3(o). BIO 31. It thus argues that in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), the Court construed Section 3(o) "without reference to an expansive or restricted approach." BIO 31. But this Court has expressly recognized *Powell* as one of the early cases applying the narrow construction rule. *See*, *e.g.*, *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295-96 (1959) ("It is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed. . . . see also *Powell v. United States Cartridge Co.*, 339 U.S. 497, 517.") (parallel citations omitted). Similarly, while the Fifth Circuit's decision in *Hoover v. Wyandotte Chemicals Corp.*, 455 F.2d 387 (1972), did not refer to the narrow construction rule in the such terms, it nonetheless expressed its understanding that a narrow construction principle applied to the interpretation of Section 3(o). *See id.* at 389. As respondent observes, BIO 31, the court ultimately ruled in favor of the defendant. But that does nothing to diminish the fact that the Fifth Circuit's opinion demonstrates that it understood that Section 3(o) must be narrowly construed, in conflict with the decision in this case.

Third, respondent attempts to dismiss the broad body of cases applying the narrow construction principle outside the confines of Section 13 by simply

noting that none of those cases involved Section 3. BIO 31-32.[5] But that observation is hardly to the point. There can be little question that these circuits would apply the narrow construction rule in the context of this case, for the same reason they applied it to exemptions embodied in other provisions outside of Section 13 – the courts uniformly recognize that the rule arises out of the FLSA's broad and remedial purposes, not out of some section-specific reason for construing some exemptions (*i.e.,* those codified in Section 13) narrowly, but not others (*i.e.*, those codified outside of Section 13, including Section 3). *See* Pet. 12-13.

4. Finally, respondent's opposition to review of the second question presented is equally unsound.

Respondent argues first that the second question presented does not arise in this case because petitioners' union, in fact, negotiated with respondent on the question of compensation for donning and doffing (and related walking and waiting) time and agreed that it would not be compensated. BIO 24-25, 28-29. That assertion was heavily contested in the court of appeals and is incorrect. *See* C.A. Corrected Brief for Plaintiffs-Appellees 27-31. More to the

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[5] Respondent accuses petitioners of being "intentionally misleading" in pointing to decisions applying the narrow construction principle in cases involving the FLSA's exception for agricultural workers, asserting that those cases involve the interpretation of an exemption in Section 13, rather than a definition in Section 3. BIO 32. But as respondent presumably is aware, the scope of the agricultural exemption in each case turned not on any construction of Section 13(a), but rather on the definition of "agriculture" in Section 3(f). *See, e.g., Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077, 1079 (5th Cir. 1980) (deciding whether "loader operators" and "live haul drivers" were agricultural employees by reference to Section 3(f)).

point, the Eleventh Circuit declined to resolve the dispute, deciding the case instead on the assumption that no such negotiations or agreement had taken place. Pet. App. 26a. This Court may, as it often does, take the case on the same assumption as the court of appeals.

Respondent further argues that the decision below was correct because so long as an employer refuses to pay for clothes changing, and the employees know that they are not being paid for that time, the employer is entitled to continue to refuse to pay for that time under Section 3(o) because the refusal constitutes a "custom or practice under a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o). *See* BIO 25-28. As the petition explained, however, that construction essentially renders the words "*under* a . . . collective-bargaining agreement" a nullity, allowing every employer in a unionized plant to unilaterally claim the right to withhold payment for clothes changing even if that refusal has no more relationship to a collective-bargaining agreement than the fact that the plant is unionized. *See* Pet. 28-31. That view hardly constitutes the narrow construction of a FLSA exemption required by this Court's cases, or even a plausible view of the statutory language. That a number of courts may have wrongly adopted capacious interpretations of Section 3(o), *see* BIO 25-28, is a reason to grant the petition, not to deny it.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted. In the alternative, the Court may wish to hold the petition pending its consideration of the petitions for certiorari in *Tyson Foods, Inc. v. De Asencio*, No. 07-1014, and *Gorman v. Consolidated Edison Corp.*, No. 07-1019.

Respectfully submitted,

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