No. 07-__

IN THE

Supreme Court of the United States

Lessie Anderson, et al.,
Petitioner,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act ordinarily requires an employer to pay covered employees a minimum wage and, in certain circumstances, overtime for all hours worked. 29 U.S.C. §§ 206-207. However, Section 3(o) of the Act permits an employer to exclude from hours worked time spent "changing clothes or washing at the beginning or end of each workday" when such activities are "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). The question presented is:

Whether the court of appeals erred in holding that the time petitioners spent donning and doffing protective equipment was excluded from mandatory compensation under Section 3(o) of the Fair Labor Standards Act?

PARTIES TO THE PROCEEDING BELOW

Parties to the proceedings below included plaintiffs Lessie Anderson, Burnice Cretcher, Brenda Geter, Dexter Jackson, Ella Lyons, Mattie Meadows, Darletta White, Willie Ford, and Diann Freeman. The defendants below were Cagle's, Inc. and Cagle Foods JV LLC (now known as Equity Group-Georgia Division, LLC).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lessie Anderson, et al. (petitioners), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a-29a) is published at 488 F.3d 945. The opinion of the district court (*id.* 32a-52a) is unpublished.

JURISDICTION

The Eleventh Circuit issued its decision in this case on June 11, 2007. *See* Pet. 1a. The court of appeals denied petitioners' timely petition for rehearing and rehearing en banc on September 6, 2007. *See* Pet. App. 30a-31a. On December 4, 2007, Justice Thomas extended the time to file this petition to and including January 4, 2008. App. 07A440. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), provides:

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

bona fide collective-bargaining agreement applicable to the particular employee.

STATEMENT OF THE CASE

Petitioners are unionized workers in a chicken processing plant in Camilla, Georgia. For many years, their employer required petitioners to spend significant time each day donning and doffing sanitary and protective gear, yet did not compensate them for that time. The court of appeals, in avowed conflict with a decision from the Ninth Circuit, held that such time was exempt from compensation under Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o).

1. The Fair Labor Standards Act (FLSA) of 1938, codified as amended at 29 U.S.C. §§ 201-219 (2000), generally requires employers to compensate workers for all "hours worked," defined to include all hours spent between the employees' first and last "principal activities" of the day, except during certain unpaid breaks. *See, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005). Donning and doffing required garments and equipment can constitute one such "principal activity" and, hence, is subject to compensation under the Act unless specifically exempted by one of the FLSA's exceptions. *See id.*; *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

Section 3(o) of the FLSA provides one such exception, allowing an employer to exclude time spent "changing clothes or washing at the beginning or end of each workday" when such activities are excluded from working time "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). By its terms, the provision applies only to time spent at the beginning

and end of the workday; it has no application to activities that take place during the workday. Moreover, because it applies only to time spent "changing clothes or washing," it has no application to any other activity, such as cleaning equipment.

2. Petitioners worked in respondent's poultry processing facility in Camilla, Georgia. Pet. App. 2a-3a. Respondent, a joint venture established in 1993, operated this facility during the relevant time period. Pet. App. 2a. As part of their jobs on the processing line, petitioners were required to wear protective and sanitary gear. The exact gear worn depended on an employee's particular job responsibilities and included some combination of sanitary smocks, hair/beard nets, gloves, and hearing protection. Pet. App. 4a. Respondent required petitioners to don and doff such protective gear at the beginning and end of the workday as well as for breaks during the workday. *Id.* But respondent did not pay petitioners for this time. *Id.*

Instead, respondent compensated petitioners using a "line-time" method in which pay begins when the first chicken reaches the first station on the production line and ends when the last chicken reaches the first station. Pet. App. 3a-4a. Thus, for example, when Ella Lyons, one of the seven petitioners who worked in the Camilla plant's De-boning Department, arrived at the plant for work, she would swipe a time card that recorded her entry into the plant but did not start her compensated time. R.159-PxDep30 at 8. Lyons then would wait in a supply line for respondent to issue her the personal protective gear that she wore on the processing line. *Id.* at 8-9. After obtaining her personal protective gear, Lyons would walk to a locker room and put on the issued gear over her street clothes. *Id.* at 10.

Wearing her gear, Lyons then would walk to sanitation vats, and wash her gloves and apron. *Id.* at 10-11. She would then walk to the production line while donning her sanitized gloves. *Id.* at 11. Respondent paid her for none of this time. Instead, Lyons' pay period began only after the first chicken reached the first station. *Id.* at 22. Her line-time compensation stopped with each midday break, even though Lyons was required to continue finishing processing the last chicken at her station before walking from the production line. *Id.* at 14. During her uncompensated break, Lyons was required to doff her protective gear and rinse it off, then re-don and re-sanitize the gear before walking back to the production line. *Id.* at 15-19. Compensable line-time at the close of the day ended when the last chicken reached the first station. Nevertheless, although she was no longer being paid, Lyons had to stay at her station and finish processing the remaining chickens on the line, walk from the production line to doff all protective gear, clean the gear thoroughly and then store all gear before leaving the plant. *Id.* at 19-20.

Altogether, this uncompensated time amounted to approximately 20 to 45 minutes per worker per day. *See* R159-PxApp1. With more than 2,000 production employees, Pet. App. 5a, respondent thus benefited from tens of thousands of hours of free labor every month.

Petitioners were represented by Local 938 of the Retail, Wholesale, and Department Store Union (the union), and collective bargaining agreements (CBAs) negotiated between the union and respondent governed their compensation. Pet. App. 4a. The 1997 CBA, which governed compensation at the time this

suit was filed,[1] did not address compensation for activities at issue in this case. Pet. App. 27a. Nor was the issue discussed during the negotiations leading to that contract. *Id.* In addition, the CBA declared that its express terms constituted the "full and complete understanding" between the parties R198-App. 4 at 44,[2] excluding the possibility that compensation for the disputed time was governed by any unwritten contract between the employer and the union.

3. In 2000, petitioners brought this action in the Middle District of Georgia, seeking compensation for work done before and after the compensated line-time. Pet. App. 4a.

Respondent moved for summary judgment, arguing that Section 3(o) of the FLSA excluded the challenged work activities from compensation. *Id.* at 37a-38a. The district court granted the motion. *Id.* at 48a-52a. The court assumed without discussion that donning and doffing protective gear constituted "changing clothes" within the meaning of Section 3(o). *Id.* at 49a. The court then held that even though the parties had not addressed compensation for donning and doffing protective equipment in the CBA, the time was nevertheless noncompensable pursuant to a "practice under a bona fide collective-bargaining agreement" within the meaning of the statute. *Id.* at 49a-52a. The district court also rejected petitioners'

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[1] After this suit was filed, the union and the employer negotiated a new CBA, but again, neither the CBA nor the contract negotiations dealt with compensation for the time at issue in this litigation until a new agreement was negotiated in 2003. Pet. App. 4a, 17a.

[2] *See also* R198-App. 5 at 40-41 (2000 CBA) (same); R198-App. 6 at 46 (same).

assertions that Section 3(o), by its terms, did not apply to activities during the workday (such as donning and doffing during midday breaks), or to other activities that were plainly not "changing clothes" (such as waiting for and sanitizing protective equipment, walking to and from the production line, and working on chickens after "line-time" compensation ended). *Id.* at 48a-52a.

4. Petitioners appealed, but the Eleventh Circuit affirmed. The court of appeals acknowledged that the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (2003), *aff'd on other grounds*, 546 U.S. 21 (2005), had held under substantially similar circumstances that donning and doffing of protective equipment did not fall within the Section 3(o) exception. Pet. App. 18a. Nevertheless, the Eleventh Circuit concluded that the Ninth Circuit was wrong and that the term "changing clothes" in Section 3(o) included any modification to any "covering for the human body or garments in general," including the donning and doffing of protective equipment. *Id.* at 18a-21a.

In so holding, the court of appeals did not dispute that it "is well settled that exemptions from the Fair Labor Standards Act are to be narrowly construed," *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959). *See* Pet. App. 22a; *see also Moreau v. Klevenhagen*, 508 U.S. 22 (1993); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *A.H. Phillips Inc. v. Walling*, 324 U.S. 490 (1945). Nevertheless, the Eleventh Circuit concluded – again, in open conflict with the Ninth Circuit's decision in *Alvarez* – that Section 3(o) did not constitute an exemption to the FLSA within the meaning of that rule. Pet. App. 22a-23a. The court reasoned that because Section 3 was entitled "Definitions" and not "Exemptions" like

Section 13, the traditional rule did not apply to Section 3(o). *Id.*

The court also found support in a 2002 opinion letter by the Department of Labor (DOL) in which the agency concluded – in conflict with its earlier position in opinion letters from December 1997 and January 2001 – that "changing clothes" did not include the donning and doffing of personal protective gear worn in the meat processing industries. *Id.* at 21a-22a.

The Eleventh Circuit then held that the donning and doffing of protective equipment was made noncompensable "by custom or practice under a bona fide collective-bargaining agreement" in this case. *Id.* at 25a-28a. The court assumed that the CBAs of 1997 and 2000, as well as the negotiations leading up to the two agreements, failed to address the compensability of donning and doffing time. *Id.* at 27a. It nevertheless held that "a policy concerning compensation (or noncompensation, as the case may be) for clothes changing, written or unwritten, in force or effect at the time a CBA was executed satisfies § 203(o)'s requirement of a 'custom or practice under a bona fide' CBA." *Id.* at 26a-28a (quoting 29 U.S.C. § 203(o)).

Finally, the court of appeals declined to review the compensability of petitioners' various other activities that plainly fell outside the scope of Section 3(o), including, for example, time spent donning and doffing during the work day, sanitizing and washing protective equipment, and working on chickens after the "line-time" compensation period ended. Id. 28a-29a. Although petitioners devoted the first five pages of their argument to this issue in a Section entitled "Employees' Time Between Donning And Doffing Protective Equipment Is Compensable Under The

Supreme Court's Decision In *IBP, Inc. v. Alvarez*," *see* Pet'r Corr. C.A. Br. 20-25, the court of appeals held the brief's treatment of the question was "insufficient for the purpose of appellate review" and that petitioners had therefore waived the argument. Pet. App. 28a-29a.

REASONS FOR GRANTING THE WRIT

This case provides the Court an opportunity to resolve a growing circuit conflict and to provide much needed guidance on the proper interpretation of an important provision of a statute that affects millions of American workers and employers every day. The courts of appeals are intractably divided over whether donning and doffing protective gear, such as that worn in the food processing industry and many others, constitute "changing clothes" within the meaning of Section 3(o). The courts are even conflicted over the basic interpretive framework for answering that question, with some courts applying the narrow construction rule for FLSA exemptions and others, like the Eleventh Circuit here, holding the rule inapplicable. The confusion has extended to the Executive branch as well, with the Department of Labor unable to maintain a stable interpretation of the statute it is charged with administering.

The decision below also reflects a broad confusion in the lower courts over what constitutes a "custom or practice under" a collective bargaining agreement for purposes of the Section 3(o) exclusion. Here, the Eleventh Circuit held that the parties' mere silence in collective bargaining negotiations on the compensability of donning and doffing personal protective equipment established nonpayment as a "custom or practice under a bona fide collective-bargaining agreement." Other courts have required

more, consistent with the context of the provision, with this Court's decisions, and with the underlying purposes of the statute.

As a result, employers and workers are subject to different legal rights and obligations in different circuits, or to substantial legal uncertainty in jurisdictions that have yet to weigh in on the conflict. This Court's intervention is required to bring clarity and stability to the law in this important area.

I. The Courts of Appeals Are Irreconcilably Divided On The Construction Of Section 3(o) Of The FLSA.

The Eleventh Circuit's conclusion that donning and doffing protective equipment falls within the Section 3(o) exception for "changing clothes" conflicts with the law of the Ninth Circuit, but is consistent with a decision from the Fifth. In reaching that decision, the Eleventh Circuit declined to apply this Court's narrow construction rule for FLSA exemptions to limitations codified in Section 3 of the Act, in conflict with the decisions of at least five other circuits and this Court. And in ruling that respondent had a practice of noncompensation for donning and doffing time under a collective bargaining agreement simply because respondent was refusing to pay for the work in a factory subject to a CBA, the court of appeals contributed to the broad confusion among the lower courts over the proper scope of Section 3(o) in unionized industries.

A. The Courts of Appeals' Definitions of "Changing Clothes" Are in Direct Conflict.

1. The Eleventh Circuit acknowledged that its decision conflicted with the Ninth Circuit's decision in

Alvarez v. IBP, Inc., 339 F.3d 894 (2003), *aff'd on other grounds,* 546 U.S. 21 (2005). *See* Pet. App. 18a. In *Alvarez*, the Ninth Circuit considered whether donning and doffing personal protective gear by employees working in a meat processing plant counted as "changing clothes" under Section 3(o). 339 F.3d 894. There, as here, employees were required to gather assigned protective gear, don the items, prepare work-related tools, and walk to their stations on the processing floor before the start of their shift. *Id.* at 898. And as in this case, the employees were required at the end of their shift to walk from the processing line, doff, wash, and replace their protective gear, and wash and replace work-related tools. *Id.* Like petitioners, the employees in *Alvarez* were not paid for any of this work, as their employer, like respondent, used a "line time" method of compensation based "entirely on the times during which employees are actually cutting and bagging meat." *Id.* at 899-900.

Under these similar circumstances, the Ninth Circuit held that the pre- and post-shift donning and doffing of personal protective gear did not fall within the "changing clothes" exception to Section 3(o). *Id.* at 905. The court rejected the employer's proposed definition – which the Eleventh Circuit essentially adopted in this case – concluding that it "would embrace any conceivable matter that might adorn the human body, including metal-mesh leggings, armor, spacesuits, riot gear, or mascot costumes." *Id.* Such an interpretation both failed to recognize that "specialized protective gear is different in kind from typical clothing," *id.*, and conflicted with this Court's admonition that exemptions to the FLSA must "be narrowly construed against the employers seeking to

assert [it].” *Id.* (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

The Ninth Circuit acknowledged that the Department of Labor had taken a contrary view in a recent advisory opinion letter. But the court concluded that the letter was entitled to “considerably less deference” than would otherwise apply because it conflicted with the agency’s earlier interpretation of the Act, and that it was ultimately unpersuasive. *Id.* at 905 n.9 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

In the instant case The Eleventh Circuit expressly “disagree[d]” with the Ninth. Pet. App. 18a. It did not contest that the Ninth Circuit’s view would be correct if the court were required to construe Section 3(o) narrowly. But it rejected the Ninth Circuit’s conclusion that the narrow construction rule applied. *Id.* at 22a-23a. It also disagreed with the Ninth Circuit’s view that the Department of Labor’s view was unpersuasive and not entitled to deference. *Id.* at 21a-22a.

While in conflict with the Ninth Circuit, the Eleventh Circuit’s decision comports with the Fifth Circuit’s decision in *Bejil v. Ethicon, Inc*, 269 F.3d 477 (2001). In *Bejil*, workers at a medical suture and needle plant sought compensation under the FLSA for time spent donning and doffing sanitary garments, including lab coats, shoe coverings, and hair/beard nets. *Id.* at 480 n.3. The Fifth Circuit upheld summary judgment for the employer under Section 3(o), holding donning and doffing such protective gear constituted “changing clothes” under Section 3(o). *Id.*[3]

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[3] The district courts also have been divided over the interpretation of Section 3(o)’s “changing clothes” provision.

2. The conflict over the interpretation of "changing clothes" arises in large part from a broader split among the circuits over which FLSA provisions fall under this Court's settled rule that exemptions to the FLSA should be narrowly construed. *See, e.g., Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959).

In this case, the Eleventh Circuit declined to apply the narrow construction rule to Section 3(o) because the provision fell outside Section 13 of the Act, which is labeled "Exemptions." Pet. App. 22a-23a. But other courts of appeals have applied this Court's narrow construction rule to FLSA exemptions outside of Section 13, including to Section 3(o). As noted above, the Ninth Circuit determined that Section 3(o) was an exemption to be narrowly construed against the employer. *Alvarez*, 339 F.3d at 905. The Fifth Circuit reached the same conclusion in *Hoover v. Wyandotte Chemicals Corp.*, 455 F.2d 387, 389 (1972). Courts of appeals have applied the narrow construction rule to other subsections of Section 3 as well. For example, in *Nichols v. Hurley*, the Tenth Circuit held that Section 3(e)(2)(c) is an exemption to the FLSA that must be construed

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Compare Spoerle v. Kraft Foods Global, Inc., 2007 WL 4564094 (W.D. Wis. Dec. 31, 2007) (finding donning and doffing personal protective gear not "changing clothes" under Section 3(o)); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 930 (N.D. Ill. 2003) (same); *Fox v. Tyson Foods Inc., No. CV-99-BE-1612-14*, 2002 WL 32987224, at *7 (N.D. Ala. Feb. 4, 2002) (same); *with Kassa v. Kerry, Inc.,* 487 F. Supp. 2d 1063, 1065-67 (D. Minn. 2007) (finding donning and doffing personal protective gear is "changing clothes" under Section 3(o)); *Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1321 (M.D. Ala. 2004) (same).

narrowly in favor of employees. 921 F.2d 1101, 1103 (1990). Similarly, the First, Fifth, and Eighth Circuits have held that Section 3(f) must be construed narrowly against the employer.[4] Numerous decisions have extended the narrow construction rule to other FLSA exceptions outside of Section 13 as well.[5]

3. The conflict between the Ninth Circuit's and the Department of Labor's interpretation of the Act provides further reason for review. Congress charged the Department of Labor with the responsibility to bring suit on behalf of workers denied the compensation guaranteed them under the FLSA. *See* 29 U.S.C. §§ 204(a), 211(a) (2006). Congress recognized that, in many cases, workers would lack the resources to prosecute such actions on their own, and intended the federal government to play an important role in enforcing rights workers may be unable to vindicate on their own. At present, workers in the Ninth Circuit have a right to compensation for donning and doffing protective gear under the court's decision in *Alvarez*. However, given the DOL's position that *Alvarez* was wrongly decided,[6] there is a

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[4] *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077, 1081 (5th Cir. 1980), *abrogated on other grounds by Holly Farms v. NLRB*, 517 U.S. 392 (1996); *Miller Hatcheries v. Boyer*, 131 F.2d 283, 285-86 (8th Cir. 1942); *Calaf v. Gonzalez*, 127 F.2d 934, 937 (1st Cir. 1942).

[5] *E.g.*, *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505 (7th Cir. 2007) (Section 7(i)); *McGavock v. City of Water Valley*, 452 F.3d 423 (5th Cir. 2006) (Section 7(k)); *Beck v. City of Cleveland*, 390 F.3d 912 (6th Cir. 2004) (Section 7(o)(5)); *O'Brien v. Town of Agawam*, 350 F.3d 279, 294 (1st Cir. 2003) (Section 7(e)); *Roy v. County of Lexington*, 141 F.3d 533 (4th Cir. 1998) (Section 7(k)).

[6] *See* DOL, Changing Clothes in the Meat Packing Industry and Section 3(o), FLSA2007-10 Opinion (May 14, 2007),

real risk that the Department will decline to enforce that right on behalf of the millions of workers in that circuit.[7] Such open conflict between an agency and a federal court, and the resulting untenable gap in enforcement, should not be allowed to persist and can only be resolved by this Court.

The conflict also has an undesirable effect in other circuits where the question has not yet been addressed by the court of appeals. In those circuits, the conflict between the Ninth Circuit and the Department of Labor's view of the statute draws into question whether employers and unions can safely rely on the Department's advisory opinion letter, thereby defeating in large part the purpose of issuing such letters in the first place.

The inefficacy of the Department of Labor's advice is also due in large part to the Department's own inability to settle on a construction of the Act. An interpretative question that vexes both courts and the administrative agency charged with administering a statute is one that is ripe for final and conclusive resolution by this Court.

4. This case presents an ideal vehicle to resolve this intractable split among the circuits and to decide the proper construction of Section 3(o). The issue was squarely presented below, and the survival of the petitioners' claims depends on its answer. Moreover, the split is considered and entrenched. The Ninth

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available at http://www.dol.gov/esa/whd/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf.

[7] Alternatively, though more unlikely, the Department could decide to bring such suits solely in the Ninth Circuit, resulting in the equally untenable situation in which the Department provides different protection depending on where the employees work.

Circuit took into account, but squarely rejected, the views of the Department of Labor, while the Eleventh Circuit openly disagreed with the Ninth Circuit's decision on the same issue and denied petitioners' request for rehearing en banc. Further percolation is unnecessary as future courts will simply choose sides, further exacerbating the split with no hope of resolving it without this Court's intervention.

B. There Is Considerable Confusion Among the Lower Courts Over When An Employer's Practice Of Nonpayment Constitutes A "Custom or Practice Under a Bona Fide Collective-Bargaining Agreement."

This case also presents the Court an opportunity to resolve the considerable confusion that exists among the lower courts over how to interpret Section 3(o)'s statement that "changing clothes" may be excluded from working time "by custom or practice under a bona fide collective-bargaining agreement." The Eleventh Circuit's decision below adds to this confusion by holding that silence in negotiations leading up to a CBA resulted in a "custom or practice" of noncompensation for the new company after only three years of existence.

The courts of appeals that have considered the issue agree that when compensation for changing clothes is actually discussed in CBA negotiations but the resulting CBA is silent as to such compensation, it is proper to infer union acquiescence to a custom or practice of noncompensation under the CBA.[8] But

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[8] *See, e.g., Bejil* 269 F.3d at 479-80; *Arcadi v. Nestle Food Corp.*, 38 F.3d 672 (2d Cir. 1994); *Hoover,* 455 F.2d at 389.

that is where the consensus ends. When, as happened in this case and predictably many others, an employer unilaterally refuses compensation and the matter is not the subject of negotiation, the courts are in disarray.

The Third Circuit, for example, has held "a particular custom or practice can become an implied term of a labor agreement though a *prolonged* period of acquiescence." *Turner v. City of Philadelphia*, 262 F.3d 222, 226 (2001) (emphasis added) (finding that a 30-year period of non-payment evidenced acquiescence sufficient to amount to a custom or practice under a collective bargaining agreement). When faced with shorter periods of time, however, some courts have been unwilling to infer such acquiescence. In *Kassa v. Kerry, Inc.*, for example, the court refused to find that an employer's six-year history of nonpayment for time spent changing clothes established, as a matter of law, a "custom or practice" of nonpayment for the purposes of Section 3(o), reasoning that otherwise, "§ 203(o) would essentially be an unlimited FLSA exemption applicable to every unionized employer that did pay for clothes-changing time." 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007). And prior to the Eleventh Circuit's decision in this case, at least one district court in that circuit had come to the exact opposite conclusion, holding that "[m]ere silence alone cannot confer on a particular practice the status of a 'custom or practice under a bona fide collective-bargaining agreement,'" regardless of how long the period of silence has lasted. *Fox v. Tyson Foods, Inc.*, No. CV-99-BE-1612M, 2002 WL 32987224 (N.D. Ala. Feb. 4, 2002).

C. The Importance of Section 3(o) Of The FLSA To The American Workforce Makes This Circuit Conflict Untenable.

Certiorari is especially warranted in light of the broad and important impact Section 3(o) has on workers and employers in large industries across the nation.

Nearly 17 million Americans work under collective bargaining agreements. Bureau of Labor Statistics, *Union Members in 2006*, at 5 tbl. 1, *available at* http://www.bls.gov/news.release/pdf/union2.pdf. Of these, around 4 million work in occupations in which donning and doffing of protective equipment has given rise to litigation under Section 3(o).[9] This includes occupations in food processing, police and correctional work, the oil and gas industry, and other industrial work.[10] In the food processing

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[9] *See* Bureau of Labor Statistics, *Union Members in 2006*, at 7 tbl. 3. These include 1.07 million employees represented by unions in the category "protective service occupations," which includes, for example, police and correctional officers, firefighters and animal control workers; 1.47 million in "production occupations," which include most areas of manufacturing and production, including food-production; and 1.40 million in "construction and extraction" occupations, which include oil and gas workers and numerous other construction and industrial occupations. *Id.* For a list of occupations covered under the respective BLS occupation group, see *Protective Service Occupations (Major Group)* at http://www.bls.gov/oes/current/oes330000.htm; *Production Occupations (Major Group)* at http://www.bls.gov/oes/current/oes510000.htm; *Construction and Extraction Occupations (Major Group)* at http://www.bls.gov/oes/current/oes470000.htm.

[10] *See, e.g., Martin v. City of Richmond*, 504 F. Supp. 2d 766 (N.D. Cal. 2007) (police officers); *Turner v. City of Phila.*, 96 F. Supp. 2d 460 (E.D. Pa. 2000) (correctional officers), *aff'd*, 262

industry alone, 150,000 employees work under collective bargaining agreements, and 35% of workers in this industry work in animal slaughtering and processing plants. Bureau of Labor Statistics, DOL, Occupational Outlook Handbook, 2007-08 Edition, Bulletin 2600, *available at* http://www.bls.gov/oco/print/ocos219.htm.

It is thus no accident that this Court has previously been required to address the compensability of donning and doffing time in order to resolve other, related circuit splits under the FLSA. *See IBP v. Alvarez*, 546 U.S. 21 (2005); *Steiner v. Mitchell*, 350 U.S. 247 (1956). The vast numbers of affected employees makes donning and doffing a recurring issue in the lower courts.[11] And the accumulated value of the time makes the compensability of such time an issue of real importance to employees and employers alike.

F.3d 222 (3d Cir. 2001); *Apperson v. Exxon Corp.*, No. S-78-192, 1979 WL 1979 (E.D. Ca. Feb. 7, 1979) (refinery workers); *Williams v. W. R. Grace & Co.*, 247 F. Supp. 433 (E.D. Tenn. 1965) (chemical company employees); *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336 (D.N.J. 1962) (autoworkers); *Mitchell v. SE Carbon Paper Co.*, 124 F. Supp. 525 (N.D. Ga. 1954) (carbon paper manufacturing), *aff'd*, 228 F.2d 934 (5th Cir. 1955).

[11] *See Conerly v. Marshall Durbin Co.*, No. 06CV205KS, 2007 WL 3326836 (S.D. Miss. Nov. 6, 2007) (refusing to hold as a matter of law that the employers acquiesced to a custom or practice of nonpayment for "changing clothes" under a collective bargaining agreement); *Kassa v. Kerry, Inc.*, 487 F. Supp. 2d 1063 (D. Minn. 2007) (interpreting "clothes" under Section 3(o)); *Davis,* 302 F. Supp. 2d at 1321 (holding thhat protective gear constituted "clothes" under Section 3(o)); *Gonzalez,* 296 F. Supp. 2d at 930 (holding donning and doffing personal protective equipment does not constitute "changing clothes" under Section 3(o)); *Fox*, 2002 WL 32987224, at *7 (same).

The conflicting interpretations of the Fifth, Ninth and Eleventh Circuits subject these unionized workers and their employers to different legal rules based on accidents of geography. That disparate treatment is bad enough in itself, but it is particularly untenable for the many unions and employers that operate across the conflicting circuits.[12] Moreover, the varying rules can have unfair effects on the competitive positions of companies operating in different jurisdictions, raising the labor costs for some employers, but not others, contrary to the basic scheme Congress intended under the FLSA.

The circuit split also contributes to uncertainty in labor relations. In jurisdictions where donning and doffing personal protective equipment does not constitute "changing clothes," employees have an absolute right to be paid for donning and doffing, and that right is not subject to negotiation through the collective bargaining process.[13] On the other hand, in

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[12] The United Food and Commercial Workers International Union, for example, represents 170,000 workers in the food processing industry throughout the United States and Canada, including workers in facilities across the Eleventh, Fifth, and Ninth Circuits. United Food and Commercial Workers International Union website, *available at* http://www.ufcw.org/about_ufcw/who_we_are/where_we_work/food_processing.cfm. Similarly, Tyson Foods operates 123 food processing plants with approximately 114,000 employees in twenty-six states. Tyson runs four poultry processing plants in Alabama and four plants in Georgia in the Eleventh Circuit in addition to its plants in Idaho and Washington in the Ninth Circuit. Tyson Corporate website, *available at* http://www.tyson.com/Corporate/AboutTyson/Locations/ListPage.aspx.

[13] FLSA rights typically cannot be waived through collective bargaining or other contractual negotiations. *See Barrentine v.*

jurisdictions where donning and doffing personal protective equipment constitutes "changing clothes," the issue is properly the subject of union negotiations. In jurisdictions that have not yet faced this question, unions and employers are left to guess whether the issue is the proper object of collective bargaining (not knowing whether the DOL's position on the question will be accepted or rejected by the courts in their circuit), and employers do not know whether they violate the law by failing to pay for that time.

Employers, unions, and employees alike need a conclusive answer to the questions presented in this case, and at this point, only this Court can provide it.

III. The Eleventh Circuit's Decision Incorrectly Interpreted Section 3(o) Of The FLSA.

Certiorari also is warranted because the Eleventh Circuit's decision is wrong.

A. "Changing Clothes" Does Not Include Donning And Doffing Protective Equipment.

The Eleventh Circuit construed "changing clothes" under Section 3(o) to include any modification to any "covering[s] for the human body or garments in general." Pet. App. 19a-20a. That construction disregarded the common sense meaning of the phrase, the context in which Congress used it, and the established rule that exemptions to the FLSA must be narrowly construed.

Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945).

1. The Eleventh Circuit's expansive interpretation of Section 3(o) does not comport with the common sense understanding of "changing clothes." One would not describe a person who removes a hat or puts on driving gloves as having "changed clothes." Even less so would an ordinary English speaker say that a worker has "changed clothes" by putting on a hairnet and inserting earplugs into his ears. As the Ninth Circuit observed, "specialized protective gear is different in kind from typical clothing." *Alvarez v. IBP, Inc.,* 339 F.3d 894, 905 (2003), *aff'd on other grounds*, 546 U.S. 21 (2005). Yet, under the Eleventh Circuit's interpretation, "changing clothes" would even include donning and doffing "armor, spacesuits, riot gear, or mascot customs." *Id.*

The common sense interpretation of the phrase is confirmed by contemporary dictionaries. *Webster's Second New International Dictionary* (1957) (*Webster's Second)* defines "clothes" as "[c]overing for the human body; dress; vestments; vesture; – a general term for whatever covering is worn, or is made to be worn, for decency or comfort." *Webster's Second* 507.[14] While protective gear may cover the human

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[14] In the 1940s this Court consistently relied on *Webster's Second* to interpret statutory terms in the FLSA. *See, e.g.*, *Roland Elec. Co. v. Walling*, 326 U.S. 657, 673 (1946); *Tenn. Coal, Iron, & R. Co. v. Muscoda, Local No. 123*, 321 U.S. 590, 598 n.11 (1944); *see also Spiegel's Estate v.Comm'r of Internal Revenue*, 335 U.S. 701 (1949); *Lichter v. United States*, 334 U.S. 742 (1948); *Mitchell v. Cohen*, 333 U.S. 411 (1948); *Crane v. Comm'r of Internal Revenue*, 331 U.S. 1 (1947); *Bd. of Governors v. Andrew*, 329 U.S. 411 (1947); *United States v. Carmack*, 329 U.S. 230 (1946); *Fishgold v. Sullivan Drydock & Repair Corp*, 328 U.S. 275 (1946); *United States v. Beach*, 324 U.S. 193 (1945); *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490 (1945).

body in a generic sense, such equipment is not worn "for decency or comfort," but rather as a component of the gear and equipment the worker uses to perform the task required of him by his employer. As the Ninth Circuit noted, the distinction between clothing and protective equipment is well-recognized in labor law. *Alvarez*, 339 F.3d at 905. For example, regulations of the Occupational Safety and Health Administration make an express distinction between "[g]eneral work clothes" and "personal protective equipment." 29 C.F.R. § 1910.1030(b). This distinction "underscores the fact that, from both a regulatory and common sense perspective, 'changing clothes' means something different from 'donning required specialized personal protective equipment.'" *Alvarez*, 339 F.3d at 905.

The Eleventh Circuit's interpretation of the word "changing" is also inconsistent with contemporary usage and dictionary definitions. At the time Section 3(o) was enacted, the first definition for the transitive verb "change" in Webster's Second read:

> [t]o alter *by substituting* something else for, or by giving up for something else . . . *as, to change one's clothes*, one's occupation, or one's intention; to change cars or trains, partners, sides, or parties."

448 (emphasis added).[15] Petitioners do not "change clothes" under this definition when they don sanitary

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[15] The broader definition relied upon by the Eleventh Circuit – "to make different," or "to modify in some particular way but short of conversion into something else," Pet. App. 20a – is used only in a very different context, in which the object of the verb is an abstract or unitary object. Thus Webster's Second gives the following examples of that usage of the term: "to *change* the countenance" and to "*change* their glory into shame."

smocks over their street clothes, insert ear plugs, or put on a pair of gloves or a hair net because such acts do not involving the *substitution* of clothing. One would not, for example, describe a person who removes a hat or puts on a coat as having "changed clothes." Similar expressions, such as "changing diapers" or "changing tires" likewise refer not to any modification to a diaper or tire, but to the substitution of one diaper or tire for another.

2. Accordingly, "changing clothes" is most sensibly construed to refer to the act of exchanging one set of ordinary clothing for another, such as a uniform or work clothes. That, in fact, is the situation Congress plainly contemplated when it passed the statute, as can be seen by the statutory and historical context.

Section 3(o) applies to time spent "changing clothes *or washing* at the beginning or end of each workday." 29 U.S.C. § 203(o) (emphasis added). This pairing of "changing clothes" with "washing" is instructive: Congress contemplated the common circumstance – exemplified in this Court's decision in *Steiner v. Mitchell* – in which workers are provided an opportunity at the beginning of the day to change from their street clothes into work clothes, and a chance at the end of the day to doff those work clothes, shower, and return to their street clothes before heading

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448. Similarly, the Oxford English Dictionary uses examples such as to "*change* his purpose," or to "*change* the political aspect of the world." *2 Oxford English Dictionary* 268 (1933) (reprinted in 1978). Nowhere does this definition speak of changing any plural object that can be replaced for others of its kind, such as "changing clothes" or tires or diapers. This is because when change is used in the context of "changing clothes," it means substitution.

home. *See* 350 U.S. 247, 251-52 (1956).[16] Thus, it is unsurprising that, like *Steiner*, early decisions applying or discussing Section 3(o) also addressed this commonplace situation of workers changing into and out of a work uniform and washing up at the end of the day, and fail to suggest that "changing clothes" applies to personal protective equipment.[17]

The legislative history and purposes support the same conclusion. In illustrating the application of Section 3(o), the legislative history gives an example from the baking industry and refers to "the time taken to change clothes and to take clothes off at the end of the day," in which workers changed from ordinary clothes into uniforms. 95 Cong. Rec. 11210. Moreover, the House sponsor of Section 3(o) stated that the impetus for the amendment was the desire to "avoid[] another series of incidents which led to the portal-to-portal legislation," *id.*, and thus the "unexpected liabilities" created by this Court's decision in *Anderson v. Mt. Clemens Pottery,* 328 U.S. 680 (1946). *See Steiner*, 350 U.S. at 253 (discussing

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[16] In *Steiner*, workers at a lead battery manufacturing plant sought compensation for time spent changing from "street cloth[es]" to "old but clean work clothes" at the beginning of the workday, and time spent "shower[ing] and chang[ing] back at the end of [the productive work] period." *Id.*

[17] *See, e.g.*, *Mitchell v. SE Carbon Paper Co.*, 124 F. Supp. 525, 526 (N.D. Ga. 1954) (discussing Section 3(o) where employees at carbon paper plant would "chang[e] into their work clothes" before work and "take a bath and change clothes" at the end of the shift); *Laudenslager v. Globe-Union Inc.*, 180 F. Supp. 810, 812-14 (E.D. Pa. 1958) (applying Section 3(o) where workers at lead battery plant were "exposed to lead and acid hazard . . . to an extent which necessitate[d] their changing into work clothes, washing their hands before lunch and bathing at the end of the day").

Portal-to-Portal Act). In *Mt. Clemens Pottery*, the workers changed into work clothes, "removing shirts" and "putting on aprons and overalls," a situation far different from donning personal protective equipment of the sort at issue in this case. *See* 328 U.S. at 683, 692-93, 695.

3. To be sure, as the Eleventh Circuit noted, its view is consistent with the Department of Labor's current interpretation of Section 3(o), as expressed in an advisory opinion. Pet. App. 21a. But even under the best of circumstances, such informal interpretative documents are "entitled to respect . . . only to the extent that those interpretations have the 'power to persuade'[.]" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citation omitted). Moreover "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citation omitted). Here, as the court of appeals acknowledged, the Department has issued two opinions on each side of the question within the last ten years. Pet. App. 21a. More importantly, even setting the Department's vacillations aside, its present position is inconsistent with the statute's plain text, context, and legislative history.[18]

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[18] Even the Department of Labor's guidance extends only to the donning and doffing of equipment at the beginning and end of the workday and does not include donning and doffing during unpaid breaks during the work day, or activities such as cleaning equipment, which plainly falls outside the scope of Section 3(o). The court of appeals' only ground for affirming the dismissal of petitioners' claims regarding those activities was its baseless assertion that petitioners had not preserved the argument for appellate review, even though they had devoted

B. Section 3(o) Is An Exemption To The FLSA And Thus Should Be Narrowly Construed.

Even if the Eleventh Circuit's interpretation of Section 3(o) were otherwise plausible, it would be incompatible with the well-settled rule that "exemptions from the [FLSA] are to be narrowly construed." *Moreau v. Klevenhagen*, 508 U.S. 22, 33 (1993) (citing *Mitchell v. Kentucky Fin. Co.*, 359 U.S. 290, 295 (1959)); *see, e.g.*, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388 (1960); *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510-15 (1950); *A.H. Phillips, Inc., v. Walling*, 324 U.S. 490, 493 (1945). The court of appeals did not dispute that its expansive reading of Section 3(o) would conflict with that narrow construction rule, if the rule applied. In fact, the court openly acknowledged that it was giving the terms of Section 3(o) a "broad definition." Pet. App. 19a; *see also id.* at 20a. Instead, the Eleventh Circuit denied that the narrow construction rule was invoked in this case because, in its view, the principle applies only to the interpretation of Section 13 of the Act, which is entitled "Exemptions." *Id.* at 22a-25a. That conclusion is erroneous and contrary to opinions of this Court, other courts of appeals,[19] and the Department of Labor regulations.[20]

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five pages of their brief to the claims. *See supra* at 7-8. Although that error is not independently worthy of this Court's review, it should be corrected if this Court were to grant certiorari to review the Eleventh Circuit's judgment.

[19] *See supra* at 12-13.

[20] *See* 29 C.F.R. § 785.9(b) (describing Section 3(o) as a "[s]tatutory exemption").

Over fifty years ago, this Court recognized that the FLSA "was designed 'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.'" *A.H. Phillips, Inc.*, 324 U.S. at 493 (quoting Message of the President to Congress, May 24, 1934). Consequently, "[a]ny exemption from such humanitarian and remedial legislation must therefore be narrowly construed," because "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *Id.*

Nothing in this Court's cases limits this principle to exemptions given a particular label or location in the codification of the statute.[21] To the contrary, the rule reflects the Court's recognition that Congress intended the protections of the Act to extend broadly and, therefore, that any limitation be narrowly construed.

Thus, this Court has applied the rule in interpreting FLSA provisions outside of Section 13, including the definitions of Section 3. For example, in *Powell*, this Court narrowly construed a proviso in the definition of "goods" in Section 3(i), which limited the effective scope of the FLSA. 339 U.S. at 512-15. In particular, the Court rejected an expansive interpretation of the exemption that would have excluded from coverage manufacturers who produced

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[21] Other than the fact that Section 3(o) is found within a section of the statute labeled "Definitions," the court of appeals did not dispute that it operates as an exemption from the general FLSA rules requiring compensation for all hours worked during the workday.

goods for delivery into the physical possession of a purchaser before their subsequent interstate shipment. The Court explained that the narrow construction of the exception was necessary because "[t]o hold otherwise would restrict the Act not only arbitrarily but also inconsistently with its broad purposes." *Id.* Similarly, in *Moreau*, the Court narrowly read the exception contained in subsection 7(o)(2)(A), a 1985 amendment to the FLSA that permits state and local government agencies to provide employees with compensatory time off instead of overtime pay pursuant to individual or collective bargaining agreements between employer and employees. 508 U.S. at 33.

C. A "Custom Or Practice Under" A CBA Does Not Arise From An Employer's Unilateral Refusal To Pay For Otherwise Compensable Time In A Unionized Plant.

Even if the donning and doffing of petitioners' protective gear constituted "changing clothes" within the meaning of Section 3(o), the Eleventh Circuit nonetheless erred in holding that the time spent on that activity was excluded from compensation "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).

The court of appeals 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." Pet. App. 26a. Nonetheless, the court held, as a matter of law, that the time was noncompensable under a "'custom or practice under a bona fide' CBA," because at the time the CBA was

executed, the employer was not paying workers for the donning and doffing time. *Id.* 26a-27a.

That interpretation is unsound. As discussed above, as an exemption from the general principle of required compensation, Section 3(o) must be given a narrow construction. The court of appeals' construction of what constitutes a "custom or practice under a bona fide collective-bargaining agreement" could hardly be less narrow. Indeed, it is difficult to imagine *any* construction that could expand the exemption further than the one given the Act by the court of appeals in this case. Under its view, an employer that is blatantly violating the law by refusing to pay for compensable clothes changing time can render its unlawful conduct legal by entering into a collective bargaining agreement that has nothing to do with compensation for that time, even if the practice was not the subject of negotiations and even if the CBA specifically provides that the contract constitutes the "full and complete understanding" between the parties. *See* R198-App. 4 at 44; R198-App. 5 at 40-41; R198-App. 6 at 46.

Even setting aside the narrow construction principle, the Eleventh Circuit's decision is an implausible construction of the words of the statute and the underlying congressional intent. Under the Act, it is not enough that an employer have a "custom or practice" of not paying for time spent changing clothes. The exemption applies only to a "custom or practice *under* a bona fide collective-bargaining agreement." 29 U.S.C. § 203(o) (emphasis added). The statute thus requires that the custom or practice have a relationship with the CBA itself. Moreover, it cannot be sufficient that the employer's refusal to pay for otherwise compensable time occurs in a plant subject to a CBA. Had Congress simply intended to

allow employers in unionized plants to decide for themselves whether or not to pay for clothes changing time, subject only to alteration by an agreement with the union, it could have said so with much greater economy and clarity. Instead, Congress allowed an exemption only for practices that arise "under" a CBA, implying that the practice must occur within the auspices of that agreement. To be sure, the practice need not have been memorialized within the text of the CBA. But the issue must at least have arisen as part of the CBA negotiation process, such that the CBA's failure to address the question can fairly be attributed to the union's decision to acquiesce to the employer's practice.

Here, any suggestion that the union's failure to address donning and doffing time amounted to an implicit agreement to the practice is particularly ill-founded. Prior to the Eleventh Circuit's unprecedented construction of the statute, the union would have had every reason to believe that its workers were entitled to compensation for clothes changing time absent some agreement, express or implied, under the CBA to the contrary. Accordingly, the failure to address the question in the CBA, particularly in light of the contract's integration clause, should have protected the employees' continued right to compensation, rather than resulting in an accidental forfeiture of that right.

Requiring evidence of acquiescence beyond a short period of unilateral refusal to pay is consistent with this Court's characterization of Section 3(o) as a "narrowly drawn opt-out provision[]." *Livadas v. Bradshaw*, 512 U.S. 107, 131-32 (1994). In *Livadas*, the Court explained that Section 3(o) guarantees "union-represented employees . . . the full protection of the minimum standard, absent an agreement for

something different." *Id.* The historical context and legislative history confirms this understanding. In proposing Section 3(o), Representative Herter explained that the provision was directed at circumstances like those present in the bakery industry: "In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee . . . ." 95 Cong. Rec. 11210.

Under the Eleventh Circuit's holding, however, the issue of compensation for clothes changing need not be "thresh out" between the union and the employer – it is enough the employer was unilaterally refusing to pay for the activity at the time the CBA was entered into. The result is to convert Section 3(o) from a "narrowly drawn opt-out provision," *Livadas*, 512 U.S. at 131-32, into an expansive "opt-in" provision that forecloses a right to compensation unless the union secures an express right to it in the CBA (in which case the FLSA serves no independent function).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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