No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

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

REPLY BRIEF

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I. THE DECISION OF THE COURT OF APPEALS IS CLEARLY IN CONFLICT WITH DECISIONS IN THE SIXTH AND NINTH CIRCUITS

The Seventh Circuit decision candidly emphasized that its opinion was in disagreement with the decisions of several other circuits. Respondent acknowledges that this case presents two circuit conflicts. "[T]he . . . Ninth Circuit decision . . . conflicts with the decision below." (Br. Opp. 10). "[T]he Sixth Circuit took a contrary approach to the question of whether § 203(o) activity can start the workday." (*Id.* 25).

(1) The uncertainty caused by those two circuit conflicts has been compounded by the position of the Department of Labor. In June 2010 the Department issued a lengthy "Administrator Interpretation" addressing in detail both of the questions that are the subject of these conflicts. 2010 WL 2468195. The Administrator of the Wage and Hour Division adopted the "analysis of the Ninth Circuit in *Alvarez* [*v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003)]," holding that "the § 203(o) exemption does not extend to protective equipment that is required by law, by the employer, or due to the nature of the job." *Id.* With regard to the second question presented, the Administrator concluded that "clothes changing covered by 203(o) may be a principal activity. Where that is the case, subsequent activities, including walking and waiting, are compensable." *Id.* In *Franklin v. Kellogg Co.,* 619 F.3d 604 (6th Cir. 2010), decided

two months after the issuance of the Administrator's Interpretation, the Sixth Circuit expressly relied on the Interpretation in holding that clothes changing covered by section 203(o) can mark the start of a continuous work day. 619 F.3d at 618. The 2010 Administrator Interpretation was consistent with opinion letters that had been issued by the Department in 1997 and 2001[1], but inconsistent with opinion letters issued in 2002 and 2007.[2]

The 2010 Administrator Interpretation is of considerable practical importance, because the Wage and Hour Division has a major enforcement role, bringing hundreds of FLSA actions every year and investigating and settling even more. The Administrator Interpretation, in the face of the acknowledged circuit conflicts, has posed confounding problems for employers. Some management law firms and attorneys have advised employers to comply with the 2010 Administrator Interpretation[3]; others have suggested that it is simply unclear what employers should now do.[4]

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[1] 1997 WL 998048; 2001 WL 58864.

[2] 2002 WL 33941766; 2007 WL 2066454.

[3] "[I]n practical terms . . . [a]n organized employer that requires its employees to wear protective gear must pay them for the time spent donning and doffing such gear, which obligation cannot be avoided through collective bargaining . . . ." http://www.crowell.com/NewsEvents/AlertsNewsletters/all/Department-of-Labors-Wage-and-Hour-Division-Provides-Answers-Raises-New-Questions (visited Jan. 29, 2013)

[4] "The DOL's recent interpretation substantially affects employers with employees who don and doff protective

It is the general practice of the Wage and Hour Division not to bring civil actions against employers for practices that are lawful under controlling circuit precedent. The Division will enforce the Administrator's Interpretation in eight circuits, but apparently will not seek to enforce its interpretation of "clothes" in the Fourth, Sixth, Seventh and Tenth Circuits, or seek to enforce in the Seventh Circuit its view that clothes-changing covered by section 203(o) can trigger the start of the work day. This crazy quilt pattern of enforcement, possibly shifting over time as other circuits weigh in, will continue until the underlying issues have been finally addressed by this Court.

(2) In 2005, when this Court declined to review *Alverez*'s interpretation of section 203(o), the Solicitor General had pointed out that the Ninth Circuit decision was not then in conflict with decisions in any other circuit.[5] Now, however, there are four circuits which have rejected the Ninth

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equipment. . . . [I]t is recommended that employers promptly confer with legal counsel to assess whether their current compensation practices comport with the DOL's latest interpretation of the FLSA." Laurent Badoux and Michael Lehet, "Department of Labor Issues Interpretation Narrowing Clothes-Changing Exclusion and Expanding Scope of Compensable Workday," ASAP (Littler Mendelson, P.C.), (June 2010).

[5] Brief for the United States as Amicus Curiae, *IBP, Inc. v. Alvarez,* No. 03-1238; see 543 U.S. 1144 (limiting certiorari to Question 1).

Circuit's interpretation of that provision, albeit disagreeing among themselves as to the meaning of "clothes." The conflict that did not exist in 2005 clearly has now developed and should be resolved by this Court.

There is no reason to believe, as respondent suggests, that the Ninth Circuit is going to repudiate its longstanding interpretation of section 203(o), particularly in light of the fact that the Department of Labor has now emphatically endorsed the Ninth Circuit decision in *Alvarez*. That Ninth Circuit precedent has repeatedly been applied by the lower courts.[6] Respondent suggests that "[i]f and when an employer finds this issue to be inconvenient, it can petition the Ninth Circuit to reconsider its decision in *Alvarez en banc*." (Br. Opp. 21). That is entirely unrealistic. To get this issue again before the Ninth Circuit, an employer would first have to persuade the relevant union to agree to a collective bargaining agreement that denied union members wages to which they were legally entitled in that Circuit; it is difficult to imagine why any union would agree to that. The employer would then have to deliberately engage in a systemic practice of refusing to pay wages required by Ninth Circuit precedent, and hope that some of its workers would file suit under the FLSA. Such a step would involve unacceptable

[6] *E.g., Spoerle v. Kraft Foods Global*, 527 F.Supp.2d 860, 867, 868 (W.D.Wisc. 2007); *Perez v. Mountaire Farms, Inc.,* 2008 WL 2389798 at *2-*5 (D.Md. June 10).

financial risk; the total judgment against the defendant in *Alvarez* was more than $9 million.

Respondent argues that the Sixth Circuit is likely in *Franklin* itself to grant a petition for rehearing en banc at some point in the future. (Br. Opp. 25). In fact, however, the defendant in *Franklin* already filed just such a petition for rehearing, which was denied on October 25, 2010. There is no possibility that the defendant in *Franklin* will try again in some later appeal—the parties to that litigation have now agreed on the terms of a settlement. As would be true in the Ninth Circuit, an employer in the Sixth Circuit could only challenge *Franklin*'s holding by persuading a union to agree to a collective bargaining agreement that violates *Franklin*, and then exposing itself to a large backpay claim in the hope that its workers would file suit under the FLSA. It is highly unlikely that any employer would do so.

Although only two circuits have addressed the second question presented, that was also the case in *Christopher v. Smithkline Beecham Corp.,* 132 S.Ct. 2156, 2168 (2012); because the second question presented (like the first) governs practices in several major industries employing hundreds of thousands of workers, it is important that they be resolved by this Court without further delay.

(3) As then Judge Sotomayor noted in *Singh v. City of New York*, 524 F. 3d 361, 372 n. 8 (2d Cir. 2008), this Court's decision in *Tum v. Barber Foods,*

Inc., 546 U.S. 21 (2005), "impl[ied] that . . . post donning/pre-doffing walking time should have been part of the . . . *de minimis* analysis." Such a rule would be of controlling importance here, because the travel time at issue (usually on a bus across an exceptionally large plant complex) was usually substantial.

This third question would not by itself warrant review by this Court. But the longstanding dispute about the significance of donning and doffing protective gear may lack a final resolution if certiorari is limited to the first two questions presented. The third question is intertwined with the first two. The practical significance of holding certain protective gear outside the scope of section 203(o) will turn on whether a *de minimis* principal activity would mark the start of the work day. For that reason all of these issues should be before the Court at the same time.

II. THE QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE

There is a large and growing volume of litigation regarding the scope and significance of section 203(o). In a period of three years, there have been appellate decisions in the Fourth, Sixth, Tenth and now Seventh Circuits regarding these issues. "Section 203(o) is a crucial provision for all unionized employers whose employees are required to don and doff mandatory attire at the workplace." "Department of Labor's Second Administrator's

Interpretation May Drastically Affect Unionized Negotiations Over Compensable Time," 19 Labor & Employment Law Update, No. 5 at 2 (2010).

The questions presented by this case are of great importance to several major industries which both are highly unionized and involve unusual workplace dangers that require specialized protective gear. Most of the section 203(o) litigation has concerned three specific industries where those circumstances exist—meatpacking[7], poultry processing[8], and the production and forging of metals.[9] In the steel industry, for example, most production workers are unionized. The total union membership in these three industries is far larger than the number of industry pharmaceutical representatives potentially affected by the issue in *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct.

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[7] *Spoerle v. Kraft Foods Global, Inc.,* 626 F.Supp.2d 913 (W.D.Wis. 2009); *In re Cargill Meat Solutions Wage and Hour Litigation,* 632 F.Supp.2d 368 (M.D.Pa. 2008); *Sisk v. Sara Lee Corp.,* 590 F.Supp.2d 1001 (W.D.Tenn. 2008); *Gonzalez v. Farmington Foods, Inc.,* 296 F.Supp.2d 912 (N.D.Ill. 2003).

[8] *Salazar v. Butterball, LLC,* 644 F.3d 1130 (10th Cir. 2011); *Sepulveda v. Allen Family Foods, Inc.,* 591 F.3d 209 (4th Cir. 2009); *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007); *Alvarez v. IBP, Inc.,* 339 F.3d 894 (9th Cir. 2003); *Israel v. Raeford Farms of Louisiana, LLC,* 784 F.Supp.2d 653 (W.D.La. 2011); *In re Tyson Foods, Inc.,* 694 F.Supp.2d 1358 (M.D.Ca. 2010).

[9] In addition to the instant case see *Adams v. Alcoa, Inc.,* 822 F.Supp.2d 156 (N.D.N.Y. 2011)(aluminum); *Andrako v. United States Steel Corp.*, 632 F.Supp.2d 398 (W.D.Pa. 2009); *Figas v. Horsehead Corp.,* 2008 WL 4170043 (W.D.Pa. Sept. 3, 2008)(zinc).

2156 (2012). While the portion of the overall national workforce that is unionized has declined in recent decades, that is largely the result of employment growth in non-unionized industries where workers do not face similar safety risks. For example, although reckless practices in the rapidly expanding and generally non-unionized financial services sector may endanger the financial security of millions of Americans, investment bankers do not need to wear protective safety gear.

The importance of the questions presented by this case is reflected in the actions of the Department of Labor. Administrator Interpretations are issued only in situations where the Department concludes that they "will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees" and are intended to provide "guidance and compliance assistance to the broadest number of employers and employees."[10] The 2010 Interpretation was issued "to assist employees and employers in all industries." 2010 WL 2468195. The very fact that the Department has twice revisited and changed its interpretation of section 203(o) is indicative of the great significance of this issue to employers and employees alike. The importance of these issues is attested to as well by the large number of amicus briefs submitted in these cases in the courts of appeals. Briefs were submitted in the instant case by Department of Labor, the

[10] http://www.doc.gov/whd/opinion/opinion.htm (visited Jan 29, 2013).

National Association of Manufacturers, and the United Food and Commercial Workers, in *Alvarez* by the Department of Labor, and in *Salazar v. Butterball, LLC,* 644 F. 3d 1130 (10th Cir. 2011), by the United Food and Commercial Workers and the National Employment Lawyers Association.

Respondent argues that the questions presented are of no practical importance, asserting that if this Court requires that workers be paid overtime for time spent donning and doffing safety gear, or for travel time post-donning or pre-doffing, United States Steel and other employers will simply lower their straight time wage levels enough so that workers receive no net additional income . (Br. Opp. 11, 12, 19-21, 26). On this view FLSA overtime claims and the FLSA overtime provision itself never produce any real long term benefit to workers, and thus could not be important enough to warrant review by this Court of legal issues related to such claims.

This Court, however, has repeatedly granted certiorari to resolve legal issues arising out of overtime claims.[11] Employers themselves, which presumably would not bother seeking review of unimportant issues, have repeatedly and successfully sought review by this Court in overtime

[11] *Christopher v. Smithkline Beecham Corp.*, 132 S.Ct. 2156 (2012); *Auer v. Robbins*, 519 U.S. 452 (1997); *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128 (1988).

cases.[12] In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the plaintiffs sought compensation for time spent walking between locker rooms and production areas. Rather than simply agreeing to pay for that time and then lowering wage levels to recoup the cost, the company fought the claim for years and successfully urged this Court to review the underlying legal dispute. In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the only question at issue was whether the government could obtain a prospective order requiring overtime payments. In that case as well it was the employer that sought review by this Court, arguing that the case presented an important question.

The Court's past decisions to grant certiorari in overtime cases, and the repeated efforts by employers themselves to seek review, reflect the realities of labor relations. Except in the case of firms facing financial collapse, it is virtually unheard of for employers to lower their straight time wage rates; any attempt to do so would ordinarily trigger enormous resistance and morale problems. Where, as in the instant case, some workers have devoted more time than others to uncompensated overtime periods, an employer that sought to recoup legally required overtime payments would have to either lower the total wages of the workers with shorter overtime periods or create individualized wage rates based on each worker's travel or donning and doffing

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[12] *Icicle Seafoods v. Worthington*, 475 U.S. 709 (1986); *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

time, an administrative nightmare. Throughout the history of the FLSA, federal and state courts have ordered employers to pay overtime; respondent cannot identify a single case in which the employer responded by lowering wage rates to recoup the additional expense. United States Steel has plants in the Ninth Circuit, which for a decade have been subject to the rule in *Alvarez,* and in the Sixth Circuit, which for several years now have been governed by the rule in *Franklin*. In spite of this, respondent does not claim that it ever evaded the overtime requirements of *Alvarez* or *Franklin* by lowering wage rates. Manipulating wage rates to avoid the cost of FLSA mandated overtime payments would at least ordinarily be illegal. 29 C.F.R. § 778.500. Any employer seeking to invoke section 203(o) would by definition be a party to a collective bargaining agreement; a unilateral alteration of wage rates would violate any such agreement, and a union would be unlikely to agree to such a change. The only place where payment of federally mandated overtime automatically results in a concomitant and equal reduction in straight time wages is the faculty lounge of the University of Chicago School of Law.

Respondent argues that an FLSA case regarding a claim for travel time within a plant would never be important enough to warrant review by this Court, because an employer directed to compensate workers for such time would simply reconfigure its facility to eliminate the travel period. (Br. Opp. 26). But this Court granted certiorari in *IBP Inc. v. Alvarez*, which presented just such a

travel time claim. In that case the United States Chamber of Commerce, in an amicus brief written by the same law firm that now represents United States Steel, objected that reconfiguring plants to eliminate walking time would often be impractical because it would "compromise the operational efficiency of the plant or factory." See 2005 WL 1826318 at *14 n. 15. In the instant case such reconfiguration would be entirely impossible.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The court of appeals squarely decided each of the questions presented, and did not base its decision on any alternative ground. This case thus presents an excellent vehicle for resolving each of those questions.

This case is a particularly appropriate vehicle for resolving the meaning of "changing clothes" under section 203(o) because it involves three distinct types of gear: (a) protective gear that is specialized (e.g. flameproof jackets and pants), (b) protective gear that is not specialized (e.g., safety glasses and hardhats), and (c) protective gear that does not resemble an ordinary article of clothing (e.g., snoods and wristlets). In the proceedings below petitioners expressly argued (and adduced evidence) that the donning and doffing of these items, including the jacket and pants, did not constitute "changing" clothes because they were put on *over*—

rather than being substituted for--a worker's street clothes.

This appeal is also ideal for resolving whether activity excluded from compensation by section 203(o) can nonetheless constitute a principal activity that marks the commencement (and end) of the continuous workday. The court of appeals correctly concluded that the donning and doffing of the gear in question would ordinarily constitute such a principal activity; whether section 203(o) somehow renders those actions non-principal activities is thus of controlling importance.

CONCLUSION

A writ of certiorari should issue to review the judgment of the court of appeals. In the alternative, as in *IBP, Inc. v. Alvarez*, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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