1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CLIFTON SANDIFER, ET AL., :

4 Petitioners : No. 12-417

5 v. :

6 UNITED STATES STEEL CORPORATION :

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8 Washington, D.C.

9 Monday, November 4, 2013

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:05 a.m.

14 APPEARANCES:

15 ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of

16 Petitioners.

17 LAWRENCE C. DiNARDO, ESQ., Chicago, Illinois; on

18 behalf of Respondent.

19 ANTHONY A. YANG, ESQ., Assistant to the Solicitor

20 General, Department of Justice, Washington, D.C.; for

21 United States, as amicus curiae, supporting

22 Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: Our second case is

4 Case 12-417, Sandifer v. United States Steel.

5 Mr. Schnapper?

6 ORAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONERS

8 MR. SCHNAPPER: Mr. Chief Justice, and may

9 it please the Court:

10 We agree with the government that not

11 everything an individual wears is clothes. We disagree

12 with the government as to the appropriate standard for

13 distinguishing things that are and are not clothes under

14 Section 203(o).

15 I'd like to begin with the area we're -- in

16 which we are in agreement with the government, although

17 not with respondent. In ordinary parlance, not

18 everything an individual wears would be referred to as

19 clothes. There are examples of that in this courtroom:

20 Glasses, necklaces, earrings, wristwatches. There may

21 be a toupee for all we know. Those things are not

22 commonly referred to as clothes.

23 JUSTICE SCALIA: I resent that.

24 (Laughter.)

25 MR. SCHNAPPER: And nor are neck braces,

1 which I've seen one in this courtroom. It's also the
2 case that there are any number of things that people
3 wear to do their jobs that are not clothes. The police
4 officers outside the building are wearing guns, radios.
5 I suspect they have handcuffs; I couldn't see those.
6 The quarterback who played for your team yesterday had a
7 quarterback playbook wristband with the plays on --
8 on his -- on his wrist.
9 Workers wear tool belts. It's -- one of the
10 recurring -- recurring issues that has come up in these
11 cases are knife scabbards. We don't think anyone would,
12 in ordinary parlance, call those things clothes. And we
13 think that's the significant limitation on this.
14 The -- the company's account of this is that
15 everything that you wear to do your job is -- is clothes
16 and we think that's just not consistent with ordinary
17 language. And although the government's views have, to
18 some extent, evolved over time in all of this, they've
19 always taken the position that not everything you wear
20 are clothes. Even in its -- in the 2002 opinion letter,
21 they drew the line at tools and scabbards. And so even
22 though you could be wearing those things, those are not
23 clothes.
24 JUSTICE SCALIA: Tools and what?
25 MR. SCHNAPPER: Scabbards.

1 JUSTICE SCALIA: Scabbards.

2 MR. SCHNAPPER: Knife scabbards. The Tenth

3 Circuit holds a knife scabbard as clothes because it's

4 like holsters.

5 JUSTICE GINSBURG: But we're dealing with

6 here, from the picture, that looks like clothes to me.

7 MR. SCHNAPPER: Your Honor, I think that

8 your question raises an excellent point. One of the

9 problems with the picture is that it withholds from you

10 other information that you would use to assess whether

11 to describe it as clothes. You don't know what --

12 JUSTICE KENNEDY: Except you would look and

13 say, those clothes probably have something special

14 underneath them. I mean, in ordinary parlance I think

15 that would be a proper use of diction.

16 MR. SCHNAPPER: If you saw an airbag jacket,

17 you would probably call it clothes unless you are an

18 equestrian. It looks like a jacket. If you saw a

19 compression torsion -- a torso compression bandage in a

20 photograph, you would call it clothes, because you don't

21 have all the relevant information.

22 JUSTICE ALITO: Why is it that the jacket

23 and the pants in that picture are not clothes?

24 MR. SCHNAPPER: In our view -- well, let

25 me -- part of it -- first of all, they are designed for

1 a protective function, to protect you from catching
2 fire.
3 JUSTICE ALITO: This is one of the aspects
4 of your argument that seems really puzzling to me. I
5 don't know when a human being first got the idea of
6 putting on clothing. I think it was one of the main
7 reasons, probably the main reason, was for protection.
8 It's for protection against the cold, it's for
9 protection against the sun. It's for protection
10 against -- against thorns. So you want us to hold that
11 items that are worn for purposes of protection are not
12 clothing?
13 MR. SCHNAPPER: No, Your Honor. We've
14 been -- we've tried to be quite specific about that. We
15 distinguish between items that are designed and worn to
16 protect from a workplace hazard. And the court of
17 appeals argued that everything is, in a sense,
18 protective. That is not the standard that we propose.
19 Workplace hazards are different. And in ordinary usage,
20 when things are being used for that kind of protection,
21 they are typically described in other terms.
22 JUSTICE ALITO: So if it -- if it protects
23 against something other than workplace hazard, it can be
24 clothes. But if it protects against a workplace hazard,
25 it isn't clothing. Is that your test?

1 MR. SCHNAPPER: And it's designed to provide
2 that kind of protection. Let me explain why -- why
3 we've added that. There are some instances in which one
4 would wear ordinary clothing on the job, things that are
5 no different from what you would buy at J.C. Penney's,
6 because it was to some degree protective from a
7 workplace hazard. That's true here. Whatever else you
8 are wearing, underneath it you have to wear cotton or
9 wool. You can't wear --
10 JUSTICE ALITO: What if you are working out
11 in the sun? So you are wearing clothing so that you
12 don't get burned by the sun. What if you are working
13 out in the cold and you wear a parka so that you don't
14 freeze while you're working? Are those workplace
15 hazards?
16 MR. SCHNAPPER: I don't think in ordinary
17 parlance they would be called a workplace hazard. I
18 mean, that's just -- that's just the normal vicissitudes
19 of life. But to give you an example of --
20 JUSTICE SOTOMAYOR: So the guy who works in
21 a freezer is not experiencing a normal hazard? So
22 the --
23 MR. SCHNAPPER: I submit -- I think that --
24 that you would be wearing a parka in a freezer just
25 because it was warmer. I mean, if you stayed there all

1 day, it would be dangerous. Dangerous cold is the South
2 Pole. The South Pole is a hazard. There will be times
3 when the weather forecast will be it's so cold that it's
4 dangerous to go outside. And I think it's that degree
5 of --
6 JUSTICE SOTOMAYOR: So you have to pay a
7 worker who's in the South Pole overtime for putting on
8 his parka?
9 MR. SCHNAPPER: Well, you put on more than a
10 parka. I think that's the point --
11 JUSTICE SOTOMAYOR: To put on his leggings
12 and things like that.
13 MR. SCHNAPPER: There's a whole lot of stuff
14 that I'm sure he puts on.
15 JUSTICE SCALIA: I lived in Chicago when it
16 never got above zero for two weeks.
17 MR. SCHNAPPER: There would come a point
18 where I think people would call it a hazard in ordinary
19 English.
20 JUSTICE KAGAN: But --
21 MR. SCHNAPPER: But those are not the cases
22 that come up. I mean, we have given you in an appendix
23 to our reply brief a list of all the cases in the last
24 20 years that we could find involving 203. That's not
25 what actually happens. I mean, we are trying to give

1 you something that makes sense of what's going on. The
2 overwhelming majority of cases involve things everyone
3 would call a hazard -- knives, molten metal, acids.
4 JUSTICE SOTOMAYOR: I have -- I do have an
5 understanding that you're right, that jewelry are not
6 clothes, that toupees might not be, that makeup is not,
7 and they cover the body. So I agree that a definition
8 that says anything that covers the body might go too
9 far.
10 But I do have a problem with things that
11 look like clothes. If I don't buy your argument that
12 fire resistant pants and shirts are not clothes, where
13 would you propose I draw the line? Assume I say you are
14 wrong with if it looks like clothes, it is clothes.
15 Let's apply a little bit of common sense to life.
16 MR. SCHNAPPER: I'm not entirely sure
17 where -- what we would fall back to. Let me respond to
18 that question, though, the premise of it a little bit.
19 There is an old saying that if it looks like a duck and
20 it swims like a duck and it quacks like a duck, it's a
21 duck.
22 JUSTICE SOTOMAYOR: It's a very famous
23 saying.
24 (Laughter.)
25 MR. SCHNAPPER: Right, right. There's --

1 but part of the takeaway from that is whether you call
2 something a duck depends on all the information you
3 have. Let me change -- let me change it a little bit.
4 It looks like a duck, it's floating there in the water,
5 there is a quacking sound and there are some men in a
6 shed wearing camouflage gear and guns; it's probably not
7 a duck. And yet, if you took a picture of just the
8 duck --
9 JUSTICE SCALIA: You don't want to say they
10 are "wearing guns" in this case.
11 (Laughter.)
12 MR. SCHNAPPER: No, they are wearing
13 camouflage and holding guns.
14 JUSTICE SCALIA: And holding guns.
15 MR. SCHNAPPER: Holding. I certainly
16 misspoke.
17 (Laughter.)
18 MR. SCHNAPPER: I certainly -- but our point
19 is whether -- how you characterize something depends on
20 all the information. Now, you may want to -- you may
21 want to conclude, although I think it may be wrong, that
22 even when you have all the information, even if you
23 understand that this is protective in nature, you
24 understand that it has to be worn because of very severe
25 dangers, you understand that the person is wearing a

1 hood over his head not because it's cold, but because,
2 although it's probably 100 degrees where he is working,
3 he is in danger of being burned if he doesn't wear it.
4 If after that, you call it clothes, I
5 disagree with you. But I think that's at least the
6 right way to analyze it. But to say a picture looks
7 like clothes is to ask how we would characterize
8 something if we didn't have all the information. That
9 is certainly inappropriate. You have to assess it with
10 all the other things that you know and in the full
11 context.
12 JUSTICE BREYER: I have an underlying
13 question just for my understanding of this. Now, the
14 unions are on your side and -- I think. And I wondered
15 why. This is my thought, which suggests that I may not
16 understand this perfectly. It seemed like, to me, a
17 brilliant statute, because if in fact the unions, those
18 they represent, the workers, don't want -- want to be
19 paid for donning and doffing, all they have to do is not
20 put something in the collective bargaining agreement.
21 But -- and if they do put something in the
22 collective bargaining agreement, they can exert their
23 bargaining power to get something else which they must
24 want more. So what you with your narrow definition do
25 is you prevent the workers from doing that. So I don't

1 know why the ordinary worker would be on your side of
2 it.
3 Now, I say that because I want you to
4 explain what I'm missing.
5 MR. SCHNAPPER: I am delighted to answer
6 that question. It raises a number of issues, some of
7 them having to do with the way the statute operates
8 today, some of them historical.
9 Let me start with the way the statute
10 operates today. You said, paraphrasing, all they have
11 to do is not put something in the agreement and then
12 they have to be paid.
13 JUSTICE BREYER: Right.
14 MR. SCHNAPPER: That is not what the statute
15 says and it's not the way it works. The statute says in
16 the agreement or a custom under the agreement. The
17 lower courts, as we've explained in our reply brief,
18 have taken the position that what that means is if there
19 is a collective bargaining agreement and it doesn't
20 expressly require that they be paid for the stuff, then
21 not paying for it is a custom under the contract.
22 And so what actually happens is, in this
23 negotiation, and that is described in one of these
24 cases, the gear changes over time. An employer comes in
25 and says, I want you to wear some additional gear. The

1 union objects, and says, that's wrong, we ought to be
2 paid for it. They don't succeed in negotiating --
3 JUSTICE BREYER: I see, that's where the
4 problem lies.
5 MR. SCHNAPPER: -- it goes the other way.
6 JUSTICE BREYER: Is there a way around that
7 that doesn't involve this case, the Secretary of Labor?
8 Or I guess you can amend the statute. That's tough. I
9 mean --
10 MR. SCHNAPPER: That's the way the statute
11 works now, and that explains -- it's part of the reason
12 why they are there. But there's something broader and
13 this will take a minute, but the historical context is
14 uniquely important to understanding why there was
15 opposition to this at the time. It's sort of a
16 three-act play, so bear with me.
17 The first has to do with the three lawsuits
18 that lead to the Portal to Portal Act. Those are
19 lawsuits between employers and unions. The CIO at this
20 point in time was advancing the rights of workers and
21 interests of workers in two ways: A, in negotiations;
22 and B, if they couldn't get something in negotiations
23 but they thought it was required under the Fair Labor
24 Standards Act, then they would sue, or they would take
25 the position in negotiations that you have to be

1 provided. There is a 1991 Buffalo Law Review article
2 that describes this history.
3 In one of those cases the union actually
4 struck unsuccessfully for this and then proceeded on a
5 legal track. So that was what the CIO was doing. They
6 wanted both. They wanted both the statute and
7 negotiation in the House version of the Portal to Portal
8 Act, Section 3 effectively banned that. Section 3 said
9 if this -- if something's going on, and it's a company
10 practice, and it doesn't violate the collective
11 bargaining agreement, it's legal.
12 It grandfathered -- and this was the CIO
13 objective to this. And this was not adopted. It
14 grandfathered in all existing violations. Indeed, it --
15 it prospectively grandfathered things in, because if
16 they would adopt a new practice, it would be illegal.
17 And the example that the CIO gave was to
18 pose it was the practice of the employer to turn back
19 the clock an hour every day. And that would have
20 been -- that would have been permitted. So the Senate
21 rejected that, and it didn't end up in the bill.
22 Now, what happens is this comes back in
23 another version in 1949 with a very different Congress.
24 And -- and my brother has referenced the -- a comment --
25 it's buried in the long statement by the National

1 Association of Manufacturers -- essentially asking for
2 the -- this old language. They did it a little bit
3 differently.
4 It -- it -- it would be a mistake to assume
5 Congress just picked up the work of the last Congress
6 in -- in '49 and said, oh, well, we didn't -- all we
7 were trying to accomplish didn't get accomplished, so
8 let's work on it some more. The '48 elections had
9 completely changed Congress.
10 As you may recall, Dewey did not win that
11 election. The Republicans lost the House. They lost
12 the Senate. The sponsor of the House bill was defeated,
13 and the new members of the House and Senate included
14 Hubert Humphrey and Gene McCarthy and a very different
15 group of people.
16 They were not there to further the -- the
17 agenda of the last Congress. The herder amendment was a
18 somewhat -- the -- not what was adoptable -- what was
19 proposed was a version of this. It said anything about
20 the length of the workday is -- is legal if it's in a
21 contract or in a custom or practice under a contract.
22 It doesn't -- didn't -- we know from experience that
23 custom or practice under a contract works to grandfather
24 things, old things and new things.
25 Went over to the Senate and the Senate

1 rejected that and then ended up with this narrowly drawn
2 provision.
3 CHIEF JUSTICE ROBERTS: Counsel --
4 MR. SCHNAPPER: Sorry that's so long, but
5 that's why.
6 CHIEF JUSTICE ROBERTS: We began with the
7 assumption that the unions are on your side. Is the
8 United Steelworkers of America on your side?
9 MR. SCHNAPPER: No, they have not filed.
10 They -- they agreed in the last collective bargaining
11 agreement not -- not to file.
12 CHIEF JUSTICE ROBERTS: Well, it does seem
13 to support to notion that this is something that should
14 be left to the collective bargaining process.
15 MR. SCHNAPPER: Your Honor, it's not
16 being -- the view of -- of the opponents of this kind of
17 proposal, which was defeated repeatedly directed, was it
18 isn't being let -- you're -- you're essentially carving
19 unionized plants out of the protections of the statutes.
20 You're stripping the workers of their statutory rights
21 and saying to a union, if you can negotiate for
22 something, that's fine, but the -- but the statute --
23 CHIEF JUSTICE ROBERTS: No, the point would
24 be that the steelworkers gave up something when -- you
25 know, it's part of a bargain. Okay? If they say, all

1 right, we're not going to count this time, but, you
2 know, you've got to give us ten more cents an hour or,
3 you know, greater cafeteria facilities or something.
4 It's a normal part of the bargaining process. And it
5 seems to me that if they're willing to give it up to get
6 something else, what's -- what's the benefit to them of
7 saying you can't do that?
8 MR. SCHNAPPER: If I -- again, if I might
9 return to the first part of my answer to
10 Justice Breyer's question. The way this ordinarily
11 works, and it's reflective in cases we've described in
12 our yellow brief, is that the company's position is this
13 is -- we don't need your permission to do this. And --
14 and that's true -- that's true in one sense, which is if
15 it's not committed -- unless the contract bans it, it
16 becomes a de facto practice and it's legal. But it's
17 also usually the company's position that -- that the
18 union is wrong about the meaning of Fair Labor Standards
19 Act.
20 There's a dispute in this case on the part
21 of the company as to whether this is a principal
22 activity. They've argued it's -- so this is an issue
23 about which people bargain the way they would bargain
24 about an extra holiday. But it is not a situation where
25 the union walks in, is entitled to this, and trades it

1 for something. That simply isn't what's going on.
2 JUSTICE ALITO: No, but if the union -- is
3 it consistent with the union's duty to represent your
4 client for them to bargain away something to which your
5 clients are entitled under the Fair Labor Standards Act?
6 MR. SCHNAPPER: The company's position is
7 it's -- it's not something that they're entitled to.
8 JUSTICE ALITO: No, no, the union. If the
9 union --
10 MR. SCHNAPPER: I -- I understand -- I
11 understand the question. But the union can go in and
12 say, we think we're entitled to this under the Fair
13 Labor Standards Act, and the company would say, no, we
14 don't. And then if they can't get it, it --
15 JUSTICE GINSBURG: Mr. Schnapper, can I ask
16 you another question? We're talking about time and
17 whether it will be paid. And we have one worker that
18 puts on this protective garb. And then we have another,
19 the baker. It takes them about the same amount of time
20 to do -- put on everything he has to put on. But
21 everybody agrees, he doesn't get paid for that. What
22 is the -- that that would come within the clothing.
23 So we have all kinds of people who have to
24 wear special uniforms, a doorman in an apartment house.
25 It takes them time to put it on. Why should there be a

1 distinction in getting paid between the protective garb
2 and something that you must wear on the job? That --
3 yes.
4 MR. SCHNAPPER: Okay. Our answer to that,
5 Justice Ginsburg, is that the statute says "clothes," it
6 doesn't say "anything you wear." And we agree with the
7 government that there are things you could put on that
8 would not be clothes and that you'd have to be paid for.
9 And we -- I think we disagree with the government about
10 what those are. But there's -- but -- and indeed, the
11 court of appeals in this case and most courts of appeals
12 have held that there are things you put on that are not
13 clothes.
14 So the statute distinguishes between clothes
15 and other things. We have to figure out what that
16 distinction means.
17 JUSTICE KAGAN: But I thought that your
18 distinction was well, there are two sets of clothes, to
19 use a better word. There are two sets of clothes and
20 they both look like clothes, but one is for
21 protective -- a protective function, and one is for a
22 sanitary function. And that's the distinction that you
23 want to draw.
24 And I guess another way of saying Justice
25 Ginsburg's question is: Why should we look at a word

1 that just says "clothes" and make that distinction as to
2 what the purpose of changing clothing is, whether it's
3 for sanitary reasons or whether it's for protective
4 reasons or whether it's because people want doormen to
5 look nice?
6 MR. SCHNAPPER: Well, Your Honor, I think in
7 ordinary parlance, whether you're going to call
8 something clothes or not depends, as the government says
9 at page 25 of its brief, on both its form and its
10 function. And there's a continuum of things, and you
11 have to draw a line somewhere.
12 JUSTICE SCALIA: Yes. But common usage
13 doesn't separate from the meaning of clothes only
14 those -- those protective garments that are required by
15 the occupation, that are required by the employer.
16 That's a -- that's a very strange definition of clothes.
17 Hunters, when -- when they're hunting birds
18 wear -- wear trousers that are brush-proof. They, you
19 know, resist briars and other things. Those are
20 protective. And those -- those pants wouldn't be worn
21 elsewhere.
22 Now, I can understand you're arguing those
23 are not clothes because they perform a protective
24 function other than heat and cold. But you're -- you're
25 proposing a very odd definition of clothes. It excludes

1 only those protective garments that are protection
2 against workplace hazards. That's very strange.
3 MR. SCHNAPPER: All right. Your Honor --
4 well, Your Honor, we are not undertaking to give you a
5 comprehensive definition of what items are and aren't
6 clothes. The -- the variety of things people wear is --
7 is extraordinarily complicated, and we -- we have not
8 taken that on. What we have tried to do is suggest --
9 JUSTICE SCALIA: No, but you have taken it
10 on. You're trying to tell us what is the ordinary
11 meaning of clothes. That's what you're appealing to,
12 the ordinary meaning.
13 MR. SCHNAPPER: Your Honor --
14 JUSTICE SCALIA: And I suggest the ordinary
15 meaning is not -- is not what you -- you have proposed.
16 MR. SCHNAPPER: Well, we may disagree of the
17 substance, but --
18 JUSTICE SCALIA: It includes protective
19 garments, and -- and you want it to include all
20 protective garments, I guess, except those that protect
21 against workplace hazards. That's peculiar.
22 MR. SCHNAPPER: All -- all we're asking the
23 Court to hold is that certain things are not clothes.
24 We're not undertaking to sort out among the things that
25 hunters wear, where you would draw the line. I mean,

1 ordinary -- ordinary parlance is -- is complicated. But
2 we think -- look, it's certainly the case, we believe,
3 that not everything people wear is clothes.
4 And the problem is to fashion a standard.
5 We think the government standard simply doesn't work,
6 and it doesn't work for two reasons. Their standard, as
7 we understand it -- and my brother will address this in
8 further detail -- is that the Court should distinguish
9 between clothes on the one hand and equipment, devices,
10 and tools on the other.
11 Now, we think this doesn't work for a couple
12 of reasons. First of all, the -- the distinction isn't
13 clear. In Footnote 6, they note the lower courts have
14 been divided about gloves, and then say they -- they
15 think gloves are clothes. They don't explain it.
16 They note that the lower courts have been
17 divided about leather aprons. At page 24 and 25, they
18 describe labor board decisions and some other things
19 which -- which have characterized certain items as --
20 CHIEF JUSTICE ROBERTS: Counsel, the whole
21 approach here -- you are saying you are not going to
22 give us a test, you are just going to criticize --
23 MR. SCHNAPPER: No, no, no.
24 CHIEF JUSTICE ROBERTS: -- their test.
25 MR. SCHNAPPER: No. Our test is an item is

1 not clothes if it is worn to protect against a workplace
2 hazard and was designed to protect against hazards.
3 And -- but if I might just finish my point, the
4 government standard is -- it's not clear how they have
5 gotten where they did. There are divisions about a
6 number of different things. And then what they describe
7 as on the not-clothes side of the line on pages 24 and
8 25 sound a lot like what people are wearing here.
9 In addition, casting it as the government
10 has forces the lower courts to decide what are
11 equipment, tools and devices because anything that is
12 not an equipment, tool, or device would end up being
13 clothes. And that simply recasts the question about
14 a -- some words that are not in the statute.
15 The words that is somewhat broader and
16 doesn't trigger all of this is gear. And if I might say
17 one or two things about it. But court -- the government
18 used the word "gear" in its 1997, 2001, 2002 and 2010
19 opinion letters, although they take different
20 substantive positions. They quote the word "equipment"
21 from this Court's decision in Alvarez, and the word
22 "equipment" is there twice, but the word "gear" is used
23 28 times.
24 And a month ago when I was here and the
25 construction was still going on outside, there was a

1 sign outside, and it depicted a worker with an arrow
2 pointing to and labelling his hardhat, his goggles, his
3 work gloves, and his boots, and it said "Do not enter
4 without proper gear." So --
5 CHIEF JUSTICE ROBERTS: What about heavy
6 duty pants, you know, blue jeans that somebody -- the
7 thick ones that you use because the work environment
8 will involve, you know, grease and hot things and all,
9 but that you wouldn't necessarily or a particular worker
10 wouldn't wear off the steel mill site? Is that clothing
11 designed to protect against work hazards or is it --
12 some people would wear that outside the steel plant,
13 other people wouldn't.
14 MR. SCHNAPPER: Certainly, people wear blue
15 jeans under all sorts of circumstances.
16 CHIEF JUSTICE ROBERTS: Yes, yes, but there
17 are heavier-duty blue jeans that are made out of a
18 particular fabric that you would see commonly in the
19 steel mill, but you maybe wouldn't see commonly outside.
20 MR. SCHNAPPER: If -- if there was something
21 identifiable in the -- in the -- in the mill that was --
22 that was a hazard, that might fall there. But we have
23 also taken the position, and I'm not quite sure -- I am
24 not familiar with these particular kinds of clothes,
25 items, that things that you would wear for -- that

1 weren't designed to deal with hazards wouldn't be --
2 wouldn't be in our carveout.
3 Thank you very much. I'd like to reserve
4 the balance.
5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. DiNardo.
7 ORAL ARGUMENT OF LAWRENCE C. DiNARDO
8 ON BEHALF OF THE RESPONDENT
9 MR. DiNARDO: Mr. Chief Justice, and may it
10 please the Court:
11 When Congress enacted 203(o), the Portal to
12 Portal Act had already relieved employers of the
13 obligation to pay for changing into or out of ordinary
14 clothing. There is little question that 203(o) was
15 directed at the sort of clothing that, absent 203(o),
16 could be deemed to be a principal activity, the changing
17 into or out of clothing that was not already excluded by
18 the preliminary and postliminary exclusion in the Portal
19 to Portal Act.
20 Congress referred in 203(o) to time spent
21 changing clothes, to time spent changing clothes that is
22 excluded from the workday pursuant to an agreement, a
23 collective bargaining agreement. It was in the context
24 of an agreement with the labor organization that the
25 time would be excluded. Collective bargaining takes

1 place around activities and determines how certain
2 activities are to be treated. Collective bargaining
3 does not focus on whether or not a shirt is clothes or a
4 pair of pants are clothes or protective eye gear, and
5 that is how the statute was written.
6 Given those two points, the term "clothes"
7 as used in the statute was intended to encompass the
8 work outfit industrial workers were required to change
9 into and out of to be ready for work. That's the
10 logical conclusion of --
11 JUSTICE SOTOMAYOR: Does that include a
12 scuba tank?
13 MR. DiNARDO: Your Honor --
14 JUSTICE SOTOMAYOR: Because you can wear
15 anything to be ready for work. I -- my own inclination
16 is to say that a respirator unit on your back is not
17 clothes, the way a scuba tank isn't. So it can't be
18 just something that covers your body.
19 MR. DiNARDO: If the labor --
20 JUSTICE SOTOMAYOR: Or ready for work.
21 MR. DiNARDO: If the labor organization and
22 the employer, for whatever odd reason, would decide that
23 part of the outfit you need to be ready to go to work
24 included the tank -- it doesn't make a lot of sense
25 because it would make more sense to put the tank on when

1 you get to the location where you are going to perform
2 your principal activities. But were they to do that,
3 that's what this statute empowered them to do. And in
4 terms of custom or practice, I should mention this --
5 JUSTICE SOTOMAYOR: Then why didn't -- why
6 wasn't the statute written that way?
7 MR. DiNARDO: It wasn't written that way --
8 JUSTICE SOTOMAYOR: Why wasn't it written --
9 I mean they use very specific words, "changing clothes."
10 That's in my mind narrower than your definition.
11 MR. DiNARDO: Well, Your Honor, they use
12 those words with other words when they say "any time
13 spent in changing clothes" that the labor organization
14 and the employer agree shall be excluded. They don't
15 say it in the abstract. It is pursuant to an agreement.
16 And a custom or practice, and case law will bear this
17 out, is an agreement. It is not unilateral action, Your
18 Honor. It is by either very open acquiescence or
19 long-term acquiescence --
20 JUSTICE BREYER: Yes, what I think he's
21 saying is this, that my puzzle was, why was this a big
22 deal for the unions? All they have to do is keep their
23 mouths shut and the employer is going to have to go to
24 them and say, we want this in the agreement.
25 But he says: You haven't read those words

1 "custom or practice," and if you see the words "custom
2 or practice" you'll see that an awful lot of businesses
3 or firms or manufacturing across the country actually
4 has long had a custom or practice where they didn't pay
5 for that or they didn't exclude it, or they didn't -- so
6 in those circumstances, it's the union that's going to
7 have to go to the employer and say: Please put some
8 other words in the agreement so we get this out of the
9 statute. And now I have no idea -- I think that's what
10 his point was.
11 And of course this is an empirical question
12 in part of, that kind of point, which is logically
13 sound, affects a certain number of workers in
14 industries. And I would next be curious either you or
15 the SG or anyone has some estimate of what we are
16 talking about quantitatively.
17 MR. DiNARDO: So for the first part of the
18 question, the notion of custom or practice is a notion
19 of agreement or, at the very least, long-time
20 acquiescence. If a union is not able to get a provision
21 in a labor contract that satisfies it on this subject,
22 it seem -- it simply needs to object to the nonpayment.
23 And then the question becomes, is this clothes changing
24 preliminary or postliminary under the Portal Act and
25 therefore not work, or is this a principal activity that

1 absent an agreement under Section 203(o) is work and
2 must be paid?
3 The notion that custom or practice is
4 something that an employer can unilaterally adopt is
5 simply false. It -- there must be the union's
6 agreement, either expressly, as there has been for
7 60 years in this labor contract between the Steel
8 Workers and U.S. Steel, that this entire block of time
9 will be excluded, or a union must say by its silence or,
10 absent an agreement, a formal agreement, but its verbal
11 agreement, this is acceptable to us, we need not be paid
12 for this beginning-of-the-day block of time.
13 And our suggestion that the test ought to be
14 what these parties agree will be part of the work outfit
15 that will start the day is, in large measure, a
16 recognition of the way collective bargaining operates.
17 A labor union and an employer don't say, should there be
18 pay for putting the hat on or putting the jacket on?
19 The discussion surrounds: What do we do about this 10
20 minutes or 5 minutes or 3 minutes or 15 minutes that
21 precedes active, productive work? Do we include that
22 activity?
23 Now, granted, Your Honor, they said any time
24 spent in changing clothes pursuant to a collective
25 bargaining agreement, because that was the nature of the

1 debate that preceded the 1949 amendment. The Department
2 of Labor said perhaps some clothes changing is not
3 preliminary or postliminary. Perhaps it is a principal
4 activity. They started the discussion around clothes
5 changing, but the industrial practice that was being
6 debated was this beginning-of-the-day activity, the
7 locker room activity of getting yourself invested in the
8 outfit you need to wear to be ready for work.
9 JUSTICE GINSBURG: Mr. DiNardo, in this
10 case, does it matter if we take your position that
11 anything you need to wear to be ready for work or the
12 government's position -- and I think it was the Seventh
13 Circuit's position, too -- that equipment is different
14 from clothes? But here the Seventh Circuit said the
15 equipment that's involved, hard hats, glasses, earplugs,
16 respirator, none of those things -- that they -- they
17 take de minimis time, so we don't have to worry about
18 them.
19 In this case, will it make a difference if
20 we go your way and say, everything worn counts; or the
21 government's way saying, well, that these clothes count,
22 but equipment can be distinguished?
23 MR. DiNARDO: So in our particular case,
24 Your Honor, this does not matter. The -- the items, the
25 hard hat, the earplugs, the protective eye gear and the

1 respirator are not at issue in this case. The -- the
2 lower court said the time is de minimis, and it doesn't
3 matter.
4 Clearly, the items here are clothes, the
5 government agrees they're clothes. They're clothes by
6 any measure, by any test. But on a going-forward basis,
7 this notion that there is a dichotomy between clothes
8 and equipment is a problem.
9 JUSTICE KAGAN: Well, what would it matter?
10 Could you give a few examples of when it would make a
11 difference, the -- the difference between your test and
12 the government's test?
13 MR. DiNARDO: Well, it'll make a difference,
14 Your Honor, in -- in all of those circumstances where
15 part of the outfit that you put on to wear to be ready
16 to work is not something that one might, absent an
17 industrial context, look at and say intuitively, that's
18 clothing.
19 JUSTICE KAGAN: Well, like what, that's not
20 de minimis?
21 MR. DiNARDO: So, for -- for example --
22 well, in many respects, I should say, these sorts of
23 items are, in fact, de minimis. It takes seconds for a
24 police officer to put a -- a vest on that has -- that's
25 made of Kevlar, for example, a modern fabric that can

1 protect and yet, it's specialized. But it's a matter of
2 seconds.
3 But that's the sort of argument you would
4 leave the lower courts to deal with. Is -- is that
5 vest, one might call it equipment, the government might,
6 we don't know, or they might call it clothing, and
7 here's an opportunity to deal with that in a definitive
8 sort of way.
9 JUSTICE KAGAN: I guess it just seems that
10 in most of these cases, everybody is just going to say
11 it takes two seconds to put on a pair of eyeglasses. So
12 I guess I'm -- I'm struggling with why you and the
13 government are fighting so hard about the proper test.
14 MR. DiNARDO: Well, again, we're not
15 fighting that hard because they -- they urge affirmance.
16 But the proper test -- I would suggest this: As the
17 Court of Appeals mentioned, is this clothing or
18 equipment, and it answered its own question, well,
19 really it's both. The problem with trying that
20 dichotomy is you'll leave everyone to argue, is this
21 particular item quote "equipment"?
22 So is -- is the -- is the worker in the meat
23 factory's chain-link vest, vest or shirt, they call it a
24 shirt, but it's made out of chain link. Is that
25 equipment or is that clothes?

1 JUSTICE SCALIA: I think -- I think the
2 government is -- you and the government are fighting
3 simply because the government is being principled. The
4 word of the statute is "clothes." And nobody would
5 consider eyeglasses or a wristwatch or some of this
6 other specialized equipment to be clothes. I mean, the
7 word is what it is.
8 And -- and I mean, it's wonderful to say, we
9 can eliminate all the problems by, you know, saying
10 everything is clothes, you know. Everything, no matter
11 what, wristwatch, eyeglasses. Well, yes, it makes a --
12 a lovely world. But it does not adhere to the words of
13 the statute which says "clothes." Doesn't that mean
14 anything? Everything is clothes.
15 MR. DiNARDO: It -- it does mean something,
16 but it must be read as part of any time spent --
17 JUSTICE BREYER: Why would it be difficult?
18 Why not just say clothes, at least from your point of
19 view, clothes are -- are those items that have, as a
20 significant purpose, the covering of one's body. That's
21 not the purpose of eyeglasses; it's not the purpose of
22 wristwatches; it's not the purpose of -- of cameras held
23 around your neck; it's not the purpose even of an iPod.
24 MR. DiNARDO: The -- the statute is activity
25 focused. If we look at --

1 JUSTICE BREYER: Well, is there anything
2 wrong with what I just said?
3 MR. DiNARDO: There is, Your Honor.
4 JUSTICE BREYER: What?
5 MR. DiNARDO: So what of opening your
6 locker? Opening your locker --
7 JUSTICE BREYER: Opening your locker is not
8 clothes.
9 (Laughter.)
10 MR. DiNARDO: Yet, the time is excluded.
11 Yet, the time is excluded.
12 JUSTICE BREYER: Well, that's not -- but
13 still, we're back to the statute which says "clothes."
14 MR. DiNARDO: Yes.
15 JUSTICE BREYER: And therefore, what's wrong
16 with the definition I just proposed?
17 MR. DiNARDO: Well, as a practical matter,
18 labor organizations and employers don't negotiate that
19 way. They don't say, we'll pay you for the eyeglasses,
20 but we won't for the shirt.
21 JUSTICE BREYER: Well, that's -- that's up
22 to them how they negotiate. But -- but the statute says
23 "clothes," so we would have to pay for the clothes time.
24 They'd have to pay for the clothes time unless it's in
25 the collective bargaining agreement or -- you know, if

1 it's in the collective bargaining -- unless it's in the
2 collective bargaining agreement.
3 MR. DiNARDO: Unless it's in the
4 collective --
5 JUSTICE BREYER: Or custom and --
6 MR. DiNARDO: And then you look up the
7 definition of clothes and it's any covering for the
8 human body and it includes accessories.
9 JUSTICE BREYER: No. Why -- why does it
10 include eyeglasses? Eyeglasses do not have as a
11 principal -- as a significant purpose the covering of
12 one's body.
13 MR. DiNARDO: The safety glasses that go
14 over the eyeglasses are, in fact, designed to cover
15 the -- part of the face. They are designed to cover
16 part of the face. If we leave --
17 JUSTICE SCALIA: Well, if it doesn't matter,
18 why make a liar out of us? You know, why -- why make us
19 say something that -- that everybody knows is not true,
20 that everything you put on is clothes.
21 MR. DiNARDO: But it's not everything you
22 put on. It's a work outfit.
23 JUSTICE SCALIA: Earrings, eyeglasses,
24 whatever.
25 MR. DiNARDO: It would be the work outfit

1 that the employer and the union agreed you need to have
2 on your person to be ready for work.
3 JUSTICE SCALIA: You -- you cannot get that
4 very precise limitation out of the word "clothes." You
5 just can't. And say it's protective gear for work, it's
6 not other protective gear. Okay? It's only those
7 earrings you have to wear for work, otherwise, earrings
8 are not clothes. Ah, but if they're required for work,
9 they become clothes. It doesn't make any sense.
10 MR. DiNARDO: It's -- it's less required for
11 work as it is -- the Congress was after allowing this
12 block of time to be dealt with.
13 JUSTICE BREYER: So maybe we can call them
14 constructive clothes, which means they're not clothes.
15 (Laughter.)
16 MR. DiNARDO: And it's less the individual
17 nature of the item as it is the activity. Is this part
18 of the activity of changing your clothes? And if part
19 of the activity of changing your clothes is taking off
20 your eyeglasses and putting them in your locker and
21 putting safety glasses on, that piece of time is covered
22 by the statute, even though, in reality, the union
23 wouldn't bargain over that piece of time. They would
24 argue -- they would bargain over, what shall we do with
25 this pre-shift attire.

1 Leaving -- go ahead, Madam --

2 JUSTICE SOTOMAYOR: Your definition would

3 include somebody spending an hour of putting on a suit

4 of armor if he's going to be a jouster. It would

5 include the space people who put on that complicated

6 white suit that has all the connections to equipment.

7 MR. DiNARDO: Well, I would suggest -- I

8 would suggest that what it's made of should not matter.

9 So the material shouldn't matter.

10 JUSTICE SOTOMAYOR: Right.

11 MR. DiNARDO: The function shouldn't matter.

12 In terms of the time --

13 JUSTICE SOTOMAYOR: If function doesn't

14 matter, then how do we define "clothes?"

15 MR. DiNARDO: The function doesn't matter

16 because --

17 JUSTICE SOTOMAYOR: Function covers the

18 body.

19 MR. DiNARDO: Sometimes it could be for

20 protection; sometimes it could be for identification.

21 So some people have to wear certain things so they're

22 identified. Other people have to wear things at work so

23 they are protected. I think that shouldn't matter.

24 And the length of time, frankly, shouldn't

25 matter because the agreement must be bona fide. The

1 statute has a protection for a union that doesn't
2 extract something in exchange for agreeing that this
3 increment of time will be excluded. The -- the statute
4 requires that the labor agreement be a bona fide labor
5 agreement. So the -- the obligation of bargaining
6 and -- and fulfilling your obligation of fair
7 representation is built into the statute.
8 I believe there's been a great deal of focus
9 on an item-by-item investigation of these issues in
10 countless numbers of these cases and that is the wrong
11 approach.
12 JUSTICE ALITO: Well, nothing has been said
13 about the word "changing." Maybe you could say
14 something about that. Isn't it -- isn't it awkward to
15 refer to the changing of clothes when all that the
16 person is doing is putting on clothing on top of
17 clothing that the person is already wearing? That's not
18 the way the term is normally used, is it?
19 MR. DiNARDO: So I would say this: In this
20 particular case, the facts of this case, and the
21 record's replete with declarations, the most common
22 event is a worker comes to his locker, takes off some of
23 their clothes. They have to -- they're required to put
24 their personal long underwear shirt on and long
25 underwear pants on, then the gear that's in the -- the

1 gear -- then the clothing that's in the picture, that's
2 the actual events in this case.
3 But if someone were to come in and -- in
4 their long underwear and not have to take their outer
5 clothes off and just put the items that are in the
6 record on, then the question becomes have they changed
7 because they have simply layered.
8 I would say this: It's not the most common
9 use of the term "changing," but it is a -- it is a
10 definition of changing, "to make different." I think it
11 would happen here. So it's actually not the facts of
12 this particular case. I think the word is certainly
13 broad enough to encompass.
14 And lastly, it would make no sense in the
15 statute to allow the personal idiosyncrasies of those
16 people coming to work, someone who decides to layer
17 their items over what they have on, someone else who
18 decides to take them off before they layer.
19 I would say that reading the statute as an
20 activity-based statute is consistent as well with the
21 notion of washing, which is in this statute. We don't
22 think of turning a shower on necessarily or retrieving a
23 towel as washing. The statute excludes time spent
24 washing, and we don't try to drill down what exactly is
25 washing.

1 We say in close cases, the determining
2 factor should be the agreement the labor organization
3 has reached with the employer. Leave all of this
4 craziness about whether a particular item is covered or
5 not covered to the parties closest to deal with it, the
6 labor organization, and the employer, who have had, in
7 this particular case, 60 years of dealing with this.
8 If you say to a worker at U.S. Steel, "Go
9 change your clothes," they will know exactly what you
10 meant. And they will take that to mean, "Put my hard
11 hat on. Put my protective eyewear on."
12 JUSTICE SCALIA: Are there no non-unionized
13 employers that -- that have to confront this problem,
14 and they have to pay -- they have to pay for work time,
15 no?
16 MR. DiNARDO: So the statute only covers --
17 203(o) only applies in unionized workplaces. It's only
18 where a labor organization and an --
19 JUSTICE SCALIA: Yes, and everybody else has
20 to pay for the changing time, right?
21 MR. DiNARDO: Unless it's preliminary or
22 postliminary.
23 JUSTICE SCALIA: It is, so you -- so you
24 have the same issue there, don't you?
25 MR. DiNARDO: Well, yes -- it's --

1 JUSTICE SCALIA: And -- and the union cannot
2 pull your chestnuts out of the fire.
3 MR. DiNARDO: Well, of course, there is no
4 union present, so the question becomes is it preliminary
5 activity? Is it ordinary clothes changing that's not a
6 principal activity, et cetera? There's -- clearly this
7 applies in unionized workplaces. There is a
8 representative of these employees. They can bargain
9 over these blocks of time, over these activities, and
10 determine how best to deal -- how best to deal with it.
11 Thank you.
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Yang.
14 ORAL ARGUMENT OF ANTHONY A. YANG,
15 FOR UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE RESPONDENT
17 MR. YANG: Mr. Chief Justice, and may it
18 please the Court --
19 JUSTICE SOTOMAYOR: Mr. Yang, I will let you
20 speak, but could you answer Justice Scalia's question?
21 Would our -- if we were to adopt your colleague's
22 broader definition, would it affect a preliminary and
23 post-activity definition?
24 MR. YANG: Not at all. We only get to the
25 question of Section 3(o) when a preliminary activity is

1 deemed to be so integral and indispensable to the
2 primary work that itself is primary work and therefore
3 would be compensable.
4 So as, for instance, the Court held in
5 Steiner, there was chemical plant workers who the
6 donning and doffing of their clothing for work purposes
7 was so indispensable to their chemical factory work, it
8 was deemed to be essential. In that context, you might
9 have a collective bargaining agreement that allows the
10 union on behalf of the employees and the employer to
11 provide for an alternative method of compensating this
12 type of work.
13 And in that context, there are two central
14 inquiries that I would like to address today. First,
15 are the items clothes? We think "clothes" actually has
16 some textual meaning here and imposes a limit, which I'd
17 like to discuss a bit further later.
18 But second: If the employee puts on both
19 clothes and some non-clothes items, does the overall
20 process still nevertheless constitute the activity of
21 changing clothes?
22 Now, we didn't have to go in very deep depth
23 into that question in our brief because all the items
24 here are clothes. But I think it would be actually
25 quite useful to discuss for a little bit the activity of

1 changing clothes and then to discuss the specifics. I
2 think it would help the Court out at least in providing
3 a more general rule.
4 The activity of changing clothes is used in
5 the -- in the statute to exclude time spent in changing
6 clothes.
7 Congress used the gerund "changing" to
8 describe an activity. It is a verb form that's modified
9 by changing, by clothes. So it is an activity of
10 changing clothes. We think that activity also includes
11 ancillary matters. So for instance, if a worker comes
12 into a locker room, spends some time doing the
13 combination on the locker, opens it up, take -- opens
14 the locker, that is not actually changing clothes per
15 se, but it's part of the activity of changing clothes.
16 So, for instance, if the worker also happens
17 to put on some goggles, pop in an ear plug, maybe even
18 snap on a utility belt in the context of changing
19 clothes, those things are part of "changing clothes" as
20 part of the statute.
21 JUSTICE KAGAN: So then what does separate
22 you from Mr. DiNardo? Now you're sounding exactly the
23 same.
24 MR. YANG: Well, no, I don't think so,
25 because on the margin, we are largely the same. I think

1 for the mine run of cases, we will be at the same
2 result. However, there are some marginal cases where
3 there is a collection of equipment, what we would deem
4 to be equipment, which is put on by an employee that is
5 so significant that it no longer can be fairly treated
6 in conjunction with changing clothes.
7 JUSTICE KAGAN: Like what?
8 MR. YANG: Well, this is an area -- an issue
9 that comes up frequently in the meat packing industry.
10 And I can explain -- I need to explain a little bit
11 about the facts to explain why we think that that is a
12 much more difficult question.
13 So in the meat packing industry, for
14 instance, particularly meat packers that are rendering
15 large portions of the beef, either with electric saws or
16 very sharp knives or similar instruments, they actually
17 have to put on what the government considers to be or
18 has considered to be items of equipment. So, for
19 instance, the meat packer might have a chain mail kind
20 of like armor sleeve, chain mail gloves, another sleeve,
21 chain mail kind of all over the front end, a belly
22 guard, a Plexiglas belly guard. This is something that
23 is very rigid. You can't even sit down on it, and in
24 fact, you have to sterilize it in a chemical bath before
25 you go into the plant. You have metal arm guard -- or a

1 metal or, now, Plexiglas because of weight -- arm guard
2 on the front that helps to deflect blows for your
3 non-knife arm.
4 These types of things, we think, would not
5 normally be thought of as clothing. And so when you put
6 on a smock, either before or under or over it, we think
7 that the overall process there might not be fairly
8 deemed to be considered changing clothes.
9 JUSTICE SOTOMAYOR: So what's the
10 difference? Isn't this what some courts have described
11 as de minimis activity, as they did with the safety
12 glasses and the hat and the ear plugs? How about a
13 metal apron? Some meat packers only do a metal apron.
14 MR. YANG: Right. Well, that may well --
15 this is again going to be somewhat fact-dependent, and I
16 don't mean to provide a general rule for all cases.
17 JUSTICE SOTOMAYOR: Well, actually, that's
18 what we are looking for, so why don't you?
19 (Laughter.)
20 MR. YANG: No, no. I think, while we are
21 trying to general principles, they're not necessarily
22 going to resolve all cases, and they're not always going
23 to make the case easy, and I think on the margin, and
24 the meat packer does involve a marginal case, you're
25 going to have the questions. If it's just one item --

1 JUSTICE ALITO: What you just said -- what
2 you just said, I find quite confusing. I can make a
3 list of things that are considered to be clothing. One
4 of them would be a jacket perhaps. One would be a vest.
5 And if you tell me that a vest is not clothing if it's
6 made out of metal, then I don't know why Mr. Schnapper
7 is not right that a jacket is not a jacket if it's got
8 extra flame protection -- protecting chemicals in it.
9 MR. YANG: Our point is a linguistic point,
10 which is to say I don't think all these things are
11 normally characterized as clothing. For instance, there
12 are certain items in the body that are so distinctive in
13 form and function they don't have normal analogues in
14 what you would find people wearing in ordinary garments,
15 you know, in everyday life, that it's deemed to be
16 different. There are certain armor-type things, and I
17 think maybe because etymologically because armor with
18 the unique military context tends to -- we tend to call
19 these things equipment.
20 But for instance, the belly guards. In IBP,
21 this Court called those things "protective equipment,"
22 and I think that's the normal use of the term in that
23 context. Just because you might say, oh, it's a vest, a
24 chain mail vest for the specific function, particularly
25 when aggregated with the rest of the equipment used in

1 the meat packing industry, makes it an arguably
2 different case.
3 This case, however, I think is quite
4 different, and I wouldn't necessarily use the term "de
5 minimis." We agree with the general concept that the
6 Seventh Circuit reached, but de minimis is a term of art
7 in the FLSA. It involves, as we explained to the Court,
8 in our brief, which is the companion case to IBP, it
9 requires an aggregation of all the time deemed to be de
10 minimis. There is a regulation, Section 785.47, that
11 imposes some other requirements. We think it's not so
12 helpful to use that term.
13 JUSTICE ALITO: But when somebody in the
14 meat packing industry puts on something that would be
15 clothing but also puts on all these other things that
16 you say are not clothing, you would say in that
17 situation putting on all this additional stuff is not
18 ancillary, and that is for what reason? Because it
19 takes more time in relation to the clothing or the
20 number of non-clothing items exceeds the number of
21 non-clothing items? What does that mean?
22 MR. YANG: Well, I think it means that when
23 the process is predominantly involving equipment and not
24 clothes, we would think that it's different. And -- and
25 I don't think there's really any question that there has

1 to be a line. For instance, if an employer had an
2 employee go out and as part of the changing clothes also
3 go and collect your tools for the day and assemble them
4 in your tool belt, no one would say that's changing
5 clothes even if, at the end of the -- all of that you
6 put on your top -- your jacket and you walked out.
7 So we're simply trying to draw a line that I
8 think faithfully reflects the common understanding of
9 clothes in this context. At the same time, we believe
10 that the term "clothes" is quite broad.
11 JUSTICE BREYER: Do you have any estimate on
12 the empirical -- there are only two people that know,
13 the Department of Labor and the AFL-CIO, and they didn't
14 tell us, the latter. So -- so what we're thinking of, I
15 think, is workplace hazard clothing. Okay? And the
16 problem, I think, that was raised is that the union
17 can't stop -- can't -- can't -- can't make an agreement
18 about this without a lot of trouble anyway. They can't
19 just shut up, in other words, and see that the --
20 there'll be compensation because there's a custom or
21 practice in the industry of giving -- of not giving them
22 compensation.
23 MR. YANG: I'm not -- there has to be --
24 JUSTICE BREYER: Do you follow? Do you
25 follow --

1 MR. YANG: There has to be a custom or
2 practice under the collective bargaining agreement.
3 JUSTICE BREYER: Yes, yes. But they've had
4 --
5 MR. YANG: The specific one.
6 JUSTICE BREYER: -- collective bargaining
7 agreements in steel forever. All right? So if we go
8 back to -- to 1949 or 1952 and they entered into some
9 big deal agreement, I mean, what was the custom or
10 practice at that time? I don't know. I suspect you
11 don't know. And I -- I wonder if the Department of
12 Labor knows.
13 MR. YANG: Well, I think the custom --
14 JUSTICE BREYER: I wonder if anyone knows.
15 MR. YANG: -- on the record in this case --
16 JUSTICE SCALIA: I don't know.
17 MR. YANG: -- I think the custom of practice
18 was to not separately compensate.
19 JUSTICE BREYER: All right. So there is --
20 MR. YANG: So that was actually made
21 express --
22 JUSTICE BREYER: Exactly.
23 MR. YANG: -- in this case. And I think
24 that's actually illustrative of the type of things that
25 we're talking about. Remember, we're talking about a

1 100 percent cotton. If you look at the label, it's in
2 the record. A 100 percent cotton jacket and pants.
3 You've got, you know, arm guards, wrist -- wristlets and
4 leggings, but these things are quite analogous to what
5 we would have in normal clothing. And then you have
6 some things that are on the edge. But we think that
7 when that's done in conjunction with changing clothes,
8 that it's incidental. Just as an employee might put on
9 a name tag after they dress, or put on their ID badge
10 for security purposes, or snap on a utility belt --
11 JUSTICE SCALIA: You want us to say it's
12 incidental instead of de minimis.
13 MR. YANG: That's -- that's our preference.
14 JUSTICE SCALIA: What -- what's the
15 consequence of calling it incidental?
16 MR. YANG: Well, we think it avoids the
17 complications and problems with the special doctrine
18 that applies more generally in the FLSA, which is the de
19 minimis -- De Minimis Time Doctrine.
20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 Mr. Schnapper, you have four minutes.
22 REBUTTAL ARGUMENT OF ERIC SCHNAPPER
23 ON BEHALF OF THE PETITIONERS
24 MR. SCHNAPPER: I'd like to address a number
25 of questions that were asked earlier and then to respond

1 to a point my brother made.

2 With regard to the question of

3 Justice Breyer, it is the experience of the United Food

4 and Commercial Workers that the position companies take

5 with regard to this -- these items is simply another

6 bargainable unit -- item, like a holiday. It is not

7 treated by them as something unions are entitled to.

8 Justice Ginsburg, you asked why it matters

9 here and whether the items -- how we characterize the

10 items about which the government would disagree with the

11 company, at least in isolation. And it matters for two

12 reasons that have to do with the broader context of the

13 Fair Labor Standards Act.

14 First, as we explained in our reply brief,

15 there is an unchallenged rule that -- that an employer

16 has to pay a worker for carrying tools or other things

17 needed to do the job to the -- the work station.

18 If anything in this list isn't clothes and

19 the workers have to have it at the work station, it

20 would presumptively fall within the tool-carrying rule.

21 So it's very important to the company in this case that

22 all of it be clothes.

23 It's also important under the position that

24 the government took in its brief in Tum, which was a

25 companion case to Alvarez. The government's position,

1 with which we agree, is that once there is any
2 non-203(o) exempt item, it starts the calculation of the
3 de minimis time, which then includes not only the time
4 for that item, but the travel time that follows. It
5 starts the de minimis clock. If that's right, then if
6 anything in this case isn't 203(o) exempt, the company
7 would have to change its practice.
8 Justice Kagan, you asked more broadly why
9 the test matters. And I think the government was moving
10 in this direction. There is generally few, if any,
11 cases involving poultry or poultry processing in which
12 there's stuff that would -- would meet the, well, if I
13 had a photograph of it, it looks like clothes test.
14 It's almost all gear. And so in that industry, it's of
15 enormous importance the difference between the
16 government's position in its -- at least in its brief
17 and the company's position. That has great implications
18 for those -- those plants.
19 Finally, if I might respond to a point that
20 the government made. The government has introduced
21 another concept, I think, that's not set forth in our
22 brief but I want to address, and that's that in addition
23 to the process that would go on, on any of our standards
24 of separating out what things are clothes and what
25 things are not clothes, the government would then

1 overlay that with an ancillary test. And if it's
2 predominantly clothes, then the whole thing counts as
3 clothes; if it's predominantly non-clothes, it goes the
4 other way.
5 I don't know. I think that's another area
6 of uncertainty you shouldn't inflict on the lower courts
7 and it's not consistent with the statute. The statute
8 doesn't say changing clothes and ancillary stuff. I'd
9 agree about opening the locker. It's -- it's necessary
10 to change your clothes. But when you start taking
11 things which, the government would agree, by themselves
12 aren't clothes, and say, well, this -- this falls within
13 changing clothes even though it's not clothes because
14 it's sort of happening at the same time, seems to me
15 you're opening up another can of worms that should stay
16 closed.
17 JUSTICE KAGAN: Mr. Schnapper -- I'm sorry.
18 JUSTICE ALITO: What is the practice in the
19 poultry industry to which you referred? Are those
20 unionized workplaces and have they bargained on this
21 issue?
22 MR. SCHNAPPER: I believe about 60 percent
23 are and the rest are not. The poultry industry filed a
24 brief.
25 JUSTICE ALITO: And under -- where they have

1 collective bargaining agreements, are they compensated
2 for this time or not?
3 MR. SCHNAPPER: Generally not. Generally
4 not. The -- the unions have not been able to negotiate
5 that. It's the arrangement that -- that I've just
6 described. And -- and, of course, there are a large
7 number of nonunionized plants, they have to pay for all
8 this.
9 JUSTICE KAGAN: Do you happen to know why
10 the government hasn't issued a regulation on this? It
11 seems the quintessential question of statutory
12 interpretation to which we would normally defer to the
13 agency. Why hasn't -- this is really a question to Mr.
14 Yang, but do you just happen to know, given the history
15 of all this and all this -- these guidance documents,
16 why they've never just like come to everybody's aid and
17 issued a regulation?
18 MR. SCHNAPPER: I do not know, Your Honor.
19 JUSTICE SCALIA: Too complicated is why.
20 (Laughter.)
21 MR. SCHNAPPER: If the Court has no further
22 questions.
23 CHIEF JUSTICE ROBERTS: Thank you, counsel.
24 Counsel.
25 The case is submitted.

1 (Whereupon, at 12:05 p.m. the case in the
2 above-entitled matter was submitted.)
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