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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.

20 There are examples of that in this
21 courtroom: Glasses, necklaces, earrings, wristwatches.
22 There may be a toupee, for all we know. Those things
23 are not commonly referred to as clothes.

24 JUSTICE SCALIA: I resent that.

25 (Laughter.)

1 MR. SCHNAPPER: And nor are neck braces,
2 which I've seen worn in this courtroom. It's also the
3 case that there are any number of things that people
4 wear to do their jobs that are not clothes. The police
5 officers outside the building are wearing guns, radios.

6 I suspect they have handcuffs; I couldn't
7 see those. The quarterback who played for your team
8 yesterday had a quarterback playbook wristband with the
9 plays on -- on his -- on his wrist.

10 Workers wear tool belts. It's -- one of the
11 recurring -- recurring issues that has come up in these
12 cases are knife scabbards. We don't think anyone would,
13 in ordinary parlance, call those things clothes. And we
14 think that's the significant limitation on this.

15 The -- the company's account of this is that
16 everything that you wear to do your job is -- is
17 clothes, and we think that's just not consistent with
18 ordinary language. And although the government's views
19 have, to some extent, evolved over time in all of this,
20 they've always taken the position that not everything
21 you wear are clothes.

22 Even in its -- in the 2002 opinion letter,
23 they drew the line at tools and scabbards. And so even
24 though you could be wearing those things, those are not
25 clothes.

Official

1 JUSTICE SCALIA: Tools and what?

2 MR. SCHNAPPER: Scabbards.

3 JUSTICE SCALIA: Scabbards.

4 MR. SCHNAPPER: Knife scabbards. The Tenth
5 Circuit holds a knife scabbard as clothes because it's
6 like holsters. I --

7 JUSTICE GINSBURG: But we're dealing with
8 here, from the picture, that looks like clothes to me.

9 MR. SCHNAPPER: Your Honor, I think that
10 your question raises an excellent point. One of the
11 problems with the picture is that it withholds from you
12 other information that you would use to assess whether
13 to describe it as clothes. You don't know what --

14 JUSTICE KENNEDY: Except you would look and
15 say, those clothes probably have something special
16 underneath them. I mean, in ordinary parlance I think
17 that would be a proper use of diction.

18 MR. SCHNAPPER: If you saw an airbag jacket,
19 you would probably call it clothes, unless you are an
20 equestrian. It looks like a jacket. If you saw a
21 compression torsion -- a torso compression bandage, in a
22 photograph, you would call it clothes because you don't
23 have all the relevant information.

24 JUSTICE ALITO: Well, why is it that the
25 jacket and the pants in that picture are not clothes?

1 MR. SCHNAPPER: In our view -- well, let
2 me -- part of it -- well, first of all, they are
3 designed for a protective function, to protect you from
4 catching fire.

5 JUSTICE ALITO: Well, this is one of the
6 aspects of your argument that seems really puzzling to
7 me. I don't know when -- when a human being first got
8 the idea of putting on clothing. I think it was one of
9 the main reasons -- probably the main reason was for
10 protection. It's for protection against the cold. It's
11 for protection against the sun. It's for protection
12 against -- against thorns.

13 So you want us to hold that items that are
14 worn for purposes of protection are not clothing?

15 MR. SCHNAPPER: No, Your Honor. We've
16 been -- we've tried to be quite specific about that. We
17 distinguish between items that are designed and worn to
18 protect from a workplace hazard. And the court of
19 appeals argued that everything is, in a sense,
20 protective.

21 That is not the standard that we propose.
22 Workplace hazards are -- are different. And in ordinary
23 usage, when things are being used for that kind of
24 protection, they are typically described in other terms.

25 JUSTICE ALITO: So if it -- if it protects

1 against something other than workplace hazard, it can be
2 clothes. But if it protects against a workplace hazard,
3 it isn't clothing. Is that your test? Excuse me.

4 MR. SCHNAPPER: And it's designed to provide
5 that kind of protection. Let me explain why -- why
6 we've added that. There are some instances in which one
7 would wear ordinary clothing on the job, things that are
8 no different from what you would buy at J.C. Penney's,
9 because it was, to some degree, protective from a
10 workplace hazard.

11 That's true here. Whatever else you are
12 wearing, underneath it, you have to wear cotton or wool.
13 You can't wear --

14 JUSTICE ALITO: But what if you are working
15 out in the sun? So you are wearing clothing, so that
16 you don't get burned by the sun. What if you are
17 working out in the cold and you wear a parka, so that
18 you don't freeze while you're working? Are those
19 workplace hazards?

20 MR. SCHNAPPER: I don't think, in ordinary
21 parlance, they would be called a workplace hazard. I
22 mean, that's just -- that's just the normal vicissitudes
23 of life. But to give you an example of --

24 JUSTICE SOTOMAYOR: So the guy who works in
25 a freezer is not experiencing a normal hazard? So

1 the --

2 MR. SCHNAPPER: I submit -- I think that --
3 that you would be wearing a parka in a freezer just
4 because it was warmer. I mean, if you stayed there all
5 day, it would be dangerous. Dangerous cold is the South
6 Pole. The South Pole is a hazard.

7 There will be times when the weather
8 forecast will be it's so cold that it's dangerous to go
9 outside. And I think it's that degree of --

10 JUSTICE SOTOMAYOR: So you have to pay a
11 worker who's in the South Pole overtime for putting on
12 his parka?

13 MR. SCHNAPPER: Well, you put on more than a
14 parka. I think that's -- that's the point --

15 JUSTICE SOTOMAYOR: To put on his leggings
16 and things like that?

17 MR. SCHNAPPER: There's a whole lot of stuff
18 that I'm sure that goes on.

19 JUSTICE SCALIA: I lived in Chicago when it
20 never got above zero for two weeks.

21 MR. SCHNAPPER: There would come a point
22 where -- where I think people would call it a hazard in
23 ordinary English.

24 JUSTICE KAGAN: But --

25 MR. SCHNAPPER: But those -- those are not

1 the cases that come up. I mean, we have given you, in
2 an appendix to our reply brief, a list of all the cases
3 in the last 20 years that we could find involving 203.
4 That's not what actually happens.

5 I mean, we are trying to give you something
6 that makes sense of what's going on. The overwhelming
7 majority of cases involve things everyone would call a
8 hazard -- knives, molten metal, acids.

9 JUSTICE SOTOMAYOR: I have -- I do have an
10 understanding that you're right, that jewelry are not
11 clothes, that toupees might not be, that makeup is not,
12 and they cover the body. So I agree that a definition
13 that says anything that covers the body might go too
14 far.

15 But I do have a problem with things that
16 look like clothes. If I don't buy your -- your argument
17 that fire-resistant pants and shirts are not clothes,
18 where would you propose I draw the line? Assume I say
19 you are wrong on least -- if it looks like clothes, it
20 is clothes.

21 Let's apply a little bit of common sense to
22 life.

23 MR. SCHNAPPER: I'm not entirely sure
24 where -- what we would fall back to -- let me -- let me
25 respond to that question, though, the premise of it a

1 little bit.

2 There is -- there is an old saying that, if
3 it looks like a duck and it swims like a duck and it
4 quacks like a duck, it's a duck.

5 JUSTICE SOTOMAYOR: It's a very famous
6 saying.

7 (Laughter.)

8 MR. SCHNAPPER: Right, right. Well,
9 there's -- there's -- but part of the takeaway from that
10 is you have -- whether you call something a duck,
11 depends on all the information you have. Let me
12 change -- let me change it a little bit.

13 It looks like a duck, it's floating there in
14 the water, there is a quacking sound, and there are some
15 men in a shed wearing camouflage gear and guns; it's
16 probably not a duck. And yet, if you took a picture of
17 just the duck --

18 JUSTICE SCALIA: You don't want to say they
19 are "wearing guns," not in this case.

20 (Laughter.)

21 MR. SCHNAPPER: No, they are wearing
22 camouflage and holding guns.

23 JUSTICE SCALIA: And holding guns.

24 MR. SCHNAPPER: Holding. I certainly
25 misspoke.

1 (Laughter.)

2 MR. SCHNAPPER: I certainly -- yes. But --
3 but our point is whether -- how you characterize
4 something depends on all the information. Now, you may
5 want to -- you may want to conclude, although I think it
6 would be wrong, that even when you have all the
7 information, even if you understand that this is
8 protective in nature, you understand that it has to be
9 worn because of very severe dangers.

10 You understand that the person is wearing a
11 hood over his head, not because it's cold, but because,
12 although it's probably 100 degrees where he is working,
13 he is in danger of being burned if he doesn't wear it.
14 If, after that, you call it clothes, I disagree with
15 you. But I think that's at least the right way to
16 analyze it.

17 But to say a picture looks like clothes is
18 to -- is to ask how we would characterize something if
19 we didn't have all the information. That is certainly
20 inappropriate. You have to assess it with all the other
21 things that you know and in the full context.

22 JUSTICE BREYER: I have an underlying
23 question, just for my understanding of this. Now, the
24 unions are on your side and -- I think, and I wondered
25 why. And I'll -- this is my thought, which suggests

1 that -- that I may not understand this perfectly.

2 It seemed like, to me, a brilliant statute,
3 because if, in fact, the unions -- those they represent,
4 the workers, don't want -- want to be paid for donning
5 and doffing, all they have to do is not put something in
6 the collective bargaining agreement.

7 But -- and if they do put something in the
8 collective bargaining agreement, they can exert their
9 bargaining power to get something else, which they must
10 want more. So you with your narrow definition do
11 is you prevent the workers from doing that. And so I
12 don't know why the ordinary worker would be on your side
13 of it.

14 Now, I say that because I want you to
15 explain what I'm missing.

16 MR. SCHNAPPER: I am delighted that you
17 asked that question. It raises a number of issues, some
18 of them having to do with the way the statute operates
19 today, some of them historical.

20 Let me start with the way the statute
21 operates today. You said, to paraphrase, all they have
22 to do is not put something in the agreement and then
23 they have to be paid.

24 JUSTICE BREYER: Yes.

25 MR. SCHNAPPER: That is not what the statute

1 says, and it's not the way it works. The statute says
2 in the agreement or a custom under the agreement.

3 The lower courts, as we've explained in our
4 reply brief, have taken the position that what that
5 means is, if there is a collective bargaining agreement
6 and it doesn't expressly require that they be paid for
7 the stuff, then not paying for it is a custom under the
8 contract.

9 And so what actually happens is, in this
10 negotiation - and it is described in one of these
11 cases, the gear changes over time. An employer comes in
12 and says, I want you to wear some additional gear. The
13 union objects and says, that -- that's wrong, we ought
14 to be paid for it.

15 They don't succeed in negotiating --

16 JUSTICE BREYER: I see, so that's where the
17 problem lies.

18 MR. SCHNAPPER: It goes the other way.

19 JUSTICE BREYER: Is there a way around that
20 that doesn't involve this case, the Secretary of Labor?
21 Or I guess you can amend the statute, but that's tough. I
22 mean --

23 MR. SCHNAPPER: Well, that's the way the
24 statute works now, and that explains -- it's part of the
25 reason why they are there. But there's something

1 broader, and this will take a minute, but the historical
2 context is uniquely important to understanding why there
3 was opposition to this at the time. It's sort of a
4 three-act play, so bear with me.

5 The first has to do with the three lawsuits
6 that lead to the Portal-to-Portal Act. Those are
7 lawsuits between employers and unions. The CIO, at this
8 point in time, was advancing the rights of workers and
9 interests of workers in two ways: A, in negotiations;
10 and, B, if they couldn't get something in negotiations,
11 but they thought it was required under the Fair Labor
12 Standards Act, then they would sue, or they would take
13 the position in negotiations that you had to be
14 provided. There is a 1991 Buffalo Law Review article
15 that describes this history.

16 In one of those cases, the union actually
17 struck unsuccessfully for this and then proceeded on a
18 legal track. So that was what the CIO was doing. They
19 wanted both -- they wanted both the statute and
20 negotiation.

21 In the House version of the Portal-to-Portal
22 Act, Section 3 effectively banned that. Section 3 said
23 if this -- if something's going on, and it's a company
24 practice, and it doesn't violate the collective
25 bargaining agreement, it's legal.

1 It grandfathered -- and this was -- the CIO
2 objected to this. And this was not adopted. It
3 grandfathered in all existing violations. Indeed, it --
4 it prospectively grandfathered things in, because if
5 they would adopt a new practice, it would be illegal.

6 And the example that the CIO gave was suppose
7 it was the practice of the employer to turn back
8 the clock an hour every day. And that would have
9 been -- that would have been permitted. So the Senate
10 rejected that, and it didn't end up in the bill.

11 Now, what happens is this comes back in
12 another version in 1949 with a very different Congress.
13 And -- and my brother has referenced the -- a comment --
14 it's buried in the long statement by the National
15 Association of Manufacturers -- essentially asking for
16 the -- this old language. They did it a little bit
17 differently.

18 It -- it would be a mistake to assume
19 Congress just picked up the work of the last Congress in
20 '49 and said, oh, well, we didn't -- all we were trying
21 to accomplish didn't get accomplished, so let's work on
22 it some more. The '48 elections had completely changed
23 Congress.

24 As you may recall, Dewey did not win that
25 election. The Republicans lost the House. They lost

1 the Senate. The sponsor of the House bill was defeated,
2 and the new members of the House and Senate included
3 Hubert Humphrey and Gene McCarthy and a very different
4 group of people.

5 They were not there to further the -- the
6 agenda of the last Congress. The Herder Amendment was a
7 somewhat -- the -- not what was adopted -- what was
8 proposed was a version of this.

9 It said anything about the length of the
10 workday is -- is legal if it's in a contract or in a
11 custom or practice under a contract. It doesn't --
12 didn't -- we know from experience that custom or
13 practice under a contract works to grandfather things --
14 old things and new things.

15 It went over to the Senate, and the Senate
16 rejected that and then ended up with this narrowly drawn
17 provision.

18 CHIEF JUSTICE ROBERTS: Counsel --

19 MR. SCHNAPPER: Sorry that's so long, but
20 that's why.

21 CHIEF JUSTICE ROBERTS: We began with the
22 assumption that the unions are on your side. Is the
23 United Steelworkers of America on your side?

24 MR. SCHNAPPER: No, they have not filed.
25 They -- they agreed in the last collective bargaining

1 agreement not -- not to file.

2 CHIEF JUSTICE ROBERTS: Well, it does seem
3 to support to notion that this is something that should
4 be left to the collective bargaining process.

5 MR. SCHNAPPER: Your Honor, it's not
6 being -- the view of -- of the opponents of this kind of
7 proposal, which was defeatedly -- repeatedly directed,
8 was it isn't being let -- you're -- you're essentially
9 carving unionized plants out of the protections of the
10 statutes.

11 You're stripping the workers of their
12 statutory rights and saying to a union, if you can
13 negotiate for something, that's fine, but the -- but the
14 statute --

15 CHIEF JUSTICE ROBERTS: No, the point would
16 be that the steelworkers gave up something when -- you
17 know, it's part of a bargain. Okay? If they say, all
18 right, we're not going to count this time, but -- you
19 know, you've got to give us ten more cents an hour or --
20 you know, greater cafeteria facilities or something.
21 It's a normal part of the bargaining process.

22 And it seems to me that, if they're willing
23 to give it up to get something else, what's -- what's
24 the benefit to them of saying you can't do that?

25 MR. SCHNAPPER: If I -- again, if I might

Official

1 return to the first part of my answer to
2 Justice Breyer's question. The way this ordinarily
3 works, and it's reflective in cases we've described in
4 our yellow brief, is that the company's position is this
5 is -- we don't need your permission to do this.

6 And -- and that's true -- that's true in one
7 sense, which is if it's not permitted -- unless the
8 contract bans it, it becomes a de facto practice, and
9 it's legal. But it's also usually the company's
10 position that -- that the union is wrong about the
11 meaning of Fair Labor Standards Act.

12 There's a dispute in this case on the part
13 of the company as to whether this is a principal
14 activity. They've argued it is de minimis-- so this is an issue
15 about which people bargain the way they would bargain
16 about an extra holiday. But it is not a situation where
17 the union walks in, is entitled to this, and trades it
18 for something. That simply isn't what's going on.

19 JUSTICE ALITO: No, but if the union -- is
20 it consistent with the union's duty to represent your
21 client for them to bargain away something to which your
22 clients are entitled under the Fair Labor Standards Act?

23 MR. SCHNAPPER: The company's position is
24 it's -- it's not something that they're entitled to.

25 JUSTICE ALITO: No, no, the union. If the

1 union --

2 MR. SCHNAPPER: I -- I understand -- I
3 understand the question. But -- but the union can go in
4 and say, we think we're entitled to this under the Fair
5 Labor Standards Act, and the company would say, no, we
6 don't.

7 And then if they can't get it, it --

8 JUSTICE GINSBURG: Mr. Schnapper, can I ask
9 you another question? We're talking about time and
10 whether it will be paid. And we have one worker that
11 puts on this protective garb. And then we have another,
12 the baker. It takes them about the same amount of time
13 to do -- put on everything he has to put on. But
14 everybody agrees, he doesn't get paid for that. What
15 is the -- that that would come within the clothing.

16 So we have all kinds of people who have to
17 wear special uniforms, a doorman at an apartment house.
18 It takes them time to put it on. Why should there be a
19 distinction in getting paid between the protective garb
20 and something that you must wear on the job? That --
21 yes.

22 MR. SCHNAPPER: Okay. Our answer to that,
23 Justice Ginsburg, is that the statute says, "clothes,"
24 it doesn't say, "anything you wear." And we agree with
25 the government, that there are things you could put on

1 that would not be clothes and that you'd have to be paid
2 for.

3 And we -- I think we disagree with the
4 government about what those are. But there's -- but --
5 and, indeed, the court of appeals in this case and most
6 courts of appeals have held that there are things you
7 put on that are not clothes.

8 So the statute distinguishes between clothes
9 and other things. We have to figure out what that
10 distinction means.

11 JUSTICE KAGAN: But I thought that your
12 distinction was, well, there are two sets of clothes --
13 to use a better word. There are two sets of clothes,
14 and they both look like clothes, but one is for
15 protective -- a protective function, and one is for a
16 sanitary function. And that's the distinction that you
17 want to draw.

18 And I guess another way of saying Justice
19 Ginsburg's question is: Why should we look at a word
20 that just says, "clothes," and make that distinction as
21 to what the purpose of changing clothing is, whether
22 it's for sanitary reasons or whether it's for protective
23 reasons or whether it's because people want the doormen
24 to look nice?

25 MR. SCHNAPPER: Well, Your Honor, I think in

1 ordinary parlance, whether you're going to call
2 something clothes or not depends, as the government says
3 at page 25 of its brief, on both its form and its
4 function. And there's a continuum of things, and you
5 have to draw a line somewhere.

6 JUSTICE SCALIA: But common usage doesn't
7 separate from the meaning of clothes only those -- those
8 protective garments that are required by the occupation,
9 that are required by the employer. That's a -- that's a
10 very strange definition of clothes.

11 Hunters, when -- when they're hunting birds
12 wear -- wear trousers that are brush-proof. They -- you
13 know, resist briars and other things. Those are
14 protective. And those -- those pants wouldn't be worn
15 elsewhere.

16 Now, I can understand you're arguing
17 those are not clothes because they perform a protective
18 function other than heat and cold. But you're -- you're
19 proposing a very odd definition of clothes. It excludes
20 only those protective garments that are protection
21 against workplace hazards. That's very strange.

22 MR. SCHNAPPER: All right. Your Honor --
23 well, Your Honor, we are not undertaking to give you a
24 comprehensive definition of what items are and aren't
25 clothes. The -- the variety of things people wear is --

1 is extraordinarily complicated, and we -- we have not
2 taken that on.

3 What we have tried to suggest is --

4 JUSTICE SCALIA: No, but you have taken it
5 on. You're trying to tell us what is the ordinary
6 meaning of clothes. That's what you're appealing to,
7 the ordinary meaning.

8 MR. SCHNAPPER: Your Honor --

9 JUSTICE SCALIA: And I suggest the ordinary
10 meaning is not -- is not what you -- you have proposed.

11 MR. SCHNAPPER: Well, we may disagree of the
12 substance, but --

13 JUSTICE SCALIA: It includes protective
14 garments, and -- and you want it to include all
15 protective garments, I guess, except those that protect
16 against workplace hazards. That's peculiar.

17 MR. SCHNAPPER: All -- all we're asking the
18 Court to hold is that certain things are not clothes.
19 We're not undertaking to sort out among the things that
20 hunters wear, where you would draw the line. I mean,
21 ordinary -- ordinary parlance is -- is complicated. But
22 we think -- look, it's certainly the case, we believe,
23 that not everything people wear is clothes.

24 And the problem is to fashion a standard.
25 We think the government standard simply doesn't work,

1 and it doesn't work for two reasons. Their standard, as
2 we understand it -- and my brother will address this in
3 greater detail -- is that the Court should distinguish
4 between clothes, on the one hand, and equipment,
5 devices, and tools, on the other.

6 Now, we think this doesn't work for a couple
7 of reasons. First of all, the -- the distinction isn't
8 clear. In footnote 6, they note the lower courts have
9 been divided about gloves, and then say they -- they
10 think gloves are clothes. They don't explain it.

11 They note that the lower courts have been
12 divided about leather aprons. At page 24 and 25, they
13 describe labor board decisions and some other things
14 which -- which have characterized certain items as --

15 CHIEF JUSTICE ROBERTS: Well, counsel, the
16 whole approach here -- you are saying you are not going
17 to give us a test, you are just going to criticize --

18 MR. SCHNAPPER: No, no, no.

19 CHIEF JUSTICE ROBERTS: -- their test. I
20 mean, it's --

21 MR. SCHNAPPER: No. Our test is an item is
22 not clothes if it is worn to protect against a workplace
23 hazard and was designed to protect against hazards.
24 And -- but -- if I might just finish my point, the
25 government standard is -- it's not clear how they have

1 gotten where they did. They noticed -- there are
2 divisions about a number of different things.

3 And then what they describe as on the
4 not-clothes side of the line on pages 24 and 25 sound a
5 lot like what people are wearing here.

6 In addition, casting it as the government
7 has forces the lower courts to decide what are
8 equipment, tools, and devices because anything that is
9 not an equipment, tool, or device would end up being
10 clothes. And that simply recasts the question about
11 a -- some words that are not in the statute.

12 The words that is somewhat broader and
13 doesn't trigger all of this is "gear." And if I might
14 say just one or two things about it, the Court -- the
15 government used the word "gear" in its 1997, 2001, 2002,
16 and 2010 opinion letters, although they take different
17 substantive positions.

18 They quote the word "equipment" from this
19 Court's decision in Alvarez, and the word "equipment" is
20 there twice, but the word "gear" is used 28 times. And
21 a month ago, when I was here and the construction was
22 still going on outside, there was a sign outside, and it
23 depicted a worker with an arrow pointing to and
24 labelling his hardhat, his goggles, his work gloves, and
25 his boots.

1 And it said, "Do not enter without proper
2 gear." So --

3 CHIEF JUSTICE ROBERTS: So what about heavy
4 duty pants -- you know, blue jeans that somebody -- the
5 thick ones that you use because the work environment
6 will involve -- you know, grease and hot things and all,
7 but that you wouldn't necessarily -- or a particular
8 worker wouldn't wear off the steel mill site?

9 Is that clothing designed to protect against
10 work hazards? Or is it -- some people would wear that
11 outside the steel plant; other people wouldn't.

12 MR. SCHNAPPER: Certainly, people wear blue
13 jeans under all sorts of circumstances.

14 CHIEF JUSTICE ROBERTS: Yes, yes, but there
15 are heavier-duty blue jeans that are made out of a
16 particular fabric that you would see commonly in the
17 steel mill, but you maybe wouldn't see commonly outside.

18 MR. SCHNAPPER: If -- if there was something
19 identifiable in the -- in the -- in the mill that was --
20 that was a hazard, that might fall there. But we have
21 also taken the position -- and I'm not quite sure -- I
22 am not familiar with these particular kinds of
23 clothes -- items, that things that you would wear for --
24 that weren't designed to deal with hazards wouldn't
25 be -- wouldn't be within our carveout.

1 Thank you very much. I'd like to reserve
2 the balance.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.
4 Mr. DiNardo.

5 ORAL ARGUMENT OF LAWRENCE C. DiNARDO

6 ON BEHALF OF THE RESPONDENT

7 MR. DiNARDO: Mr. Chief Justice, and may it
8 please the Court:

9 When Congress enacted 203(o), the
10 Portal-to-Portal Act had already relieved employers of
11 the obligation to pay for changing into or out of
12 ordinary clothing. There is little question that 203(o)
13 was directed at the sort of clothing that, absent
14 203(o), could be deemed to be a principal activity, the
15 changing into or out of clothing that was not already
16 excluded by the preliminary and postliminary exclusion
17 in the Portal-to-Portal Act.

18 Congress referred in 203(o) to time spent
19 changing clothes -- to time spent changing clothes that
20 is excluded from the workday, pursuant to an
21 agreement -- a collective bargaining agreement. It was
22 in the context of an agreement with the labor
23 organization that the time would be excluded.

24 Collective bargaining takes place around
25 activities and determines how certain activities are to

1 be treated. Collective bargaining does not focus on
2 whether or not a shirt is clothes or a pair of pants are
3 clothes or protective eye gear, and that is how the
4 statute was written.

5 Given those two points, the term "clothes"
6 as used in the statute was intended to encompass the
7 work outfit industrial workers were required to change
8 into and out of, to be ready for work. That's the
9 logical conclusion of --

10 JUSTICE SOTOMAYOR: Does that include a
11 SCUBA tank?

12 MR. DiNARDO: Your Honor --

13 JUSTICE SOTOMAYOR: Because you can wear
14 anything to be ready for work. I -- my own inclination
15 is to say that a respirator unit on your back is not
16 clothes, the way a SCUBA tank isn't. So it can't be
17 just something that covers your body.

18 MR. DiNARDO: If the labor --

19 JUSTICE SOTOMAYOR: Or ready for work.

20 MR. DiNARDO: If the labor organization and
21 the employer, for whatever odd reason, would decide that
22 part of the outfit you need to be ready to go to work
23 included the tank -- it doesn't make a lot of sense
24 because it would make more sense to put the tank on when
25 you get to the location where you are going to perform

1 your principal activities.

2 But were they to do that, that's what this
3 statute empowered them to do. And in terms of custom or
4 practice, I should mention this --

5 JUSTICE SOTOMAYOR: Then why didn't -- why
6 wasn't the statute written in 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
10 clothes." That's, in my mind, narrower than your
11 definition.

12 MR. DiNARDO: Well, Your Honor, they -- they
13 use those words with other words when they say, "any
14 time spent in changing clothes," that the labor
15 organization and the employer agree shall be excluded.
16 They don't say it in the abstract.

17 It is pursuant to an agreement. And a
18 custom or practice, and the case law will bear this out,
19 is an agreement. It is not unilateral action, Your
20 Honor. It is by either very open acquiescence or
21 long-term acquiescence --

22 JUSTICE BREYER: Yes, what I think he's
23 saying is this, that my puzzle was, why was this a big
24 deal for the unions? All they have to do is keep their
25 mouths shut, and the employer is going to have to go to

1 them and say, we want this in the agreement.

2 But he says, but you haven't read those words
3 "custom or practice," and if you see the words "custom
4 or practice," you'll see that an awful lot of businesses
5 or firms or manufacturing across the country actually
6 has long had a custom or practice where they didn't pay
7 for that -- you know, they didn't exclude it, or they
8 didn't -- so in those circumstances, it's the union
9 that's going to have to go to the employer and say,
10 please put some other words in the agreement, so we get
11 this out of the statute. And now, I have no idea -- I
12 think that's what his point was.

13 And, of course, this is an empirical
14 question in part of that kind of point, which is
15 logically sound, affects a certain number of workers in
16 industries. And I would next be curious if either you
17 or the SG or anyone has some estimate of what we are
18 talking about quantitatively.

19 MR. DiNARDO: So, the first part of the
20 question, the notion of custom or practice is a notion
21 of agreement or, at the very least, long-time
22 acquiescence. If a union is not able to get a provision
23 in a labor contract that satisfies it on this subject,
24 it seem -- it simply needs to object to the nonpayment.

25 And then the question becomes is this

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1 clothes changing preliminary or postliminary under the
2 Portal Act and, therefore, not work? Or is this a
3 principal activity that, absent an agreement under
4 Section 203(o), is work and must be paid?

5 The notion that custom or practice is
6 something that an employer can unilaterally adopt is
7 simply false. It -- there must be the union's
8 agreement, either expressly, as there has been for
9 60 years in this labor contract between the Steel
10 Workers and U.S. Steel, that this entire block of time
11 will be excluded; or a union must say, by its silence
12 or -- absent an agreement -- a formal written agreement, but its
13 verbal agreement, this is acceptable to us, we need not
14 be paid for this beginning-of-the-day block of time.

15 And our suggestion that the test ought to be
16 what these parties agree will be part of the work outfit
17 that will start the day is, in large measure, a
18 recognition of the way collective bargaining operates.

19 A labor union and an employer don't say,
20 should there be pay for putting the hat on or putting
21 the jacket on? The discussion surrounds what do we do
22 about this 10 minutes or 5 minutes or 3 minutes or
23 15 minutes that precedes active, productive work? Do we
24 include that activity?

25 Now, granted, Your Honor, they -- they said

1 any time spent in changing clothes pursuant to a
2 collective bargaining agreement because that was the
3 nature of the debate that preceded the 1949 amendment.

4 The Department of Labor said, perhaps some
5 clothes changing is not preliminary or postliminary,
6 perhaps it is a principal activity. They started the
7 discussion around clothes changing.

8 But the industrial practice that was being
9 debated was this beginning-of-the-day activity, the
10 locker room activity of getting yourself invested in the
11 outfit you need to wear to be ready for work.

12 JUSTICE GINSBURG: Mr. DiNardo, in this
13 case, does it matter if we take your position that
14 anything you need to wear to be ready for work or the
15 government's position -- and I think it was the Seventh
16 Circuit's position, too -- that equipment is different
17 from clothes?

18 But, here, the Seventh Circuit said the
19 equipment that's involved, hard hats, glasses, earplugs,
20 respirator, none of those things -- that they -- they
21 take de minimis time, so we don't have to worry about
22 them.

23 In this case, will it make a difference if
24 we go your way and say, everything worn counts; or the
25 government's way, saying, well, at least clothes

1 count, but equipment can be distinguished?

2 MR. DiNARDO: So in our particular case,
3 Your Honor, this does not matter. The -- the items, the
4 hard hat, the earplugs, the protective eye gear, and the
5 respirator are not at issue in this case. The -- the
6 lower court said the time is de minimis, and it doesn't
7 matter.

8 Clearly, the items here are clothes. The
9 government agrees they're clothes. They're clothes by
10 any measure, by any test. But on a going-forward basis,
11 this notion that there is a dichotomy between clothes
12 and equipment is a problem.

13 JUSTICE KAGAN: Well, when would it matter?
14 Could you give a few examples of when it would make a
15 difference, the -- the difference between your test and
16 the government's test?

17 MR. DiNARDO: Well, it'll make a difference,
18 Your Honor, in -- in all of those circumstances, where
19 part of the outfit that you put on to wear to be ready
20 to work is not something that one might, absent an
21 industrial context, look at and say, intuitively, that's
22 clothing.

23 JUSTICE KAGAN: Well, like what, that's not
24 de minimis?

25 MR. DiNARDO: So, for -- for example --

1 well, in many respects, I should say, these sorts of
2 items are, in fact, de minimis. It takes seconds for a
3 police officer to put a -- a vest on that has -- that's
4 made of Kevlar, for example, a modern fabric that can
5 protect, and yet, it's specialized, but it's a matter of
6 seconds.

7 But that's the sort of argument you would
8 leave the lower courts to deal with. Is -- is that
9 vest -- one might call it equipment, the government
10 might, we don't know, or they might call it clothing.
11 And here's an opportunity to deal with that in a
12 definitive sort of way.

13 JUSTICE KAGAN: I guess it just seems that,
14 in most of these cases, everybody is just going to say
15 it takes two seconds to put on a pair of eyeglasses. So
16 I guess I'm -- I'm struggling with why you and the
17 government are fighting so hard about the proper test.

18 MR. DiNARDO: Well, again, we're not
19 fighting that hard because they -- they urge affirmance.
20 But the proper test -- I would suggest this: As --as
21 the court of appeals mentioned, is this clothing or
22 equipment, and it answered its own question, well,
23 really it's both. The problem with trying that
24 dichotomy is you'll leave everyone to argue is this
25 particular item "equipment "?

1 So is -- is the -- is the worker in the meat
2 factory's chain-link vest -- vest or shirt, they call it
3 a shirt, but it's made out of chain link -- is that
4 equipment, or is that clothes?

5 JUSTICE SCALIA: I think -- I think the
6 government is -- you and the government are fighting
7 simply because the government is being principled. The
8 word of the statute is "clothes." And nobody would
9 consider eyeglasses or a wristwatch or some of this
10 other specialized equipment to be clothes. I mean, the
11 word is what it is.

12 And -- and, I mean, it's wonderful to say,
13 we can eliminate all the problems by -- you know, saying
14 everything is clothes -- you know, everything, no matter
15 what, wristwatch, eyeglasses. Well, yes, it makes a --
16 a lovely world.

17 But it does not adhere to the words of the
18 statute, which says, "clothes." Doesn't that mean
19 anything? Everything is clothes.

20 MR. DiNARDO: It -- it does mean something,
21 but it must be read as part of any time spent --

22 JUSTICE BREYER: Well, what is difficult?
23 Why not just say clothes -- at least from your point of
24 view, clothes are -- are those items that have, as a
25 significant purpose, the covering of one's body. That's

1 not the purpose of eyeglasses; it's not the purpose of
2 wristwatches; it's not the purpose of -- of cameras held
3 around your neck; it's not the purpose, even, of an
4 iPod.

5 MR. DiNARDO: The -- the statute is activity
6 focused. If we look at --

7 JUSTICE BREYER: Well, is there anything
8 wrong with what I just said?

9 MR. DiNARDO: There is, Your Honor.

10 JUSTICE BREYER: What?

11 MR. DiNARDO: So what of opening your
12 locker? Opening your locker --

13 JUSTICE BREYER: Opening your locker is not
14 clothes.

15 (Laughter.)

16 MR. DiNARDO: Yet the time is excluded. Yet
17 the time is excluded.

18 JUSTICE BREYER: Well, that's not -- but
19 still, we're back to the statute, which says, "clothes."

20 MR. DiNARDO: Yes.

21 JUSTICE BREYER: And, therefore, what's
22 wrong with the definition I just proposed?

23 MR. DiNARDO: Well, as a practical matter,
24 labor organizations and employers don't negotiate that
25 way. They don't say, we'll pay you for the eyeglasses,

1 but we won't for the shirt.

2 JUSTICE BREYER: Well, that's -- that's up
3 to them how they negotiate. But -- but the statute
4 says, "clothes," so we would have to pay for the clothes
5 time -- they'd have to pay for the clothes time unless
6 it's in the collective bargaining agreement or -- you
7 know, if it's in the collective bargaining -- unless
8 it's in the collective bargaining agreement.

9 MR. DiNARDO: Unless it's in the
10 collective --

11 JUSTICE BREYER: Or custom and --

12 MR. DiNARDO: And then you look up the
13 definition of clothes, and it's any covering for the
14 human body, and it includes accessories. So --

15 JUSTICE BREYER: No. Why -- why does it
16 include eyeglasses? Eyeglasses do not have as a
17 principal -- as a significant purpose the covering of
18 one's body.

19 MR. DiNARDO: The safety glasses that go
20 over the eyeglasses are, in fact, designed to cover
21 the -- part of the face. They are designed to cover
22 part of the face. If we leave --

23 JUSTICE SCALIA: Well, if it doesn't matter,
24 why make a liar out of us? You know, why -- why make us
25 say something that -- that everybody knows is not true,

1 that everything you put on is clothes.

2 MR. DiNARDO: But it's not everything you
3 put on. It's a work outfit --

4 JUSTICE SCALIA: Earrings, eyeglasses,
5 whatever.

6 MR. DiNARDO: It would be the work outfit
7 that the employer and the union agreed you need to have
8 on your person to be ready for work.

9 JUSTICE SCALIA: You -- you cannot get that
10 very precise limitation out of the word "clothes." You
11 just can't. And say it's only protective gear for work, it's
12 not other protective gear. Okay? It's only those
13 earrings you have to wear for work, otherwise, earrings
14 are not clothes. Ah, but if they're required for work,
15 they become clothes.

16 That -- it doesn't make any sense.

17 MR. DiNARDO: It's -- it's less required for
18 work as it is -- the Congress was after allowing this
19 block of time to be dealt with by --

20 JUSTICE BREYER: So maybe we can call them
21 "constructive clothes," which means they're not clothes.

22 (Laughter.)

23 MR. DiNARDO: And it's less the individual
24 nature of the item as it is the activity. Is this part
25 of the activity of changing your clothes? And if part

1 of the activity of changing your clothes is taking off
2 your eyeglasses and putting them in your locker and
3 putting safety glasses on, that piece of time is covered
4 by the statute, even though, in reality, the union
5 wouldn't bargain over that piece of time.

6 They would argue -- they would bargain over,
7 what shall we do with this pre-shift attire. Leaving --
8 go ahead, Madam --

9 JUSTICE SOTOMAYOR: Your -- your definition
10 would include somebody spending an hour of putting on a
11 suit of armor, if he's going to be a jousting. It would
12 include the space people who put on that complicated
13 white suit that has all the connections to equipment.

14 MR. DiNARDO: Well, I would suggest -- I
15 would suggest that what it's made of should not matter,
16 so the material shouldn't matter.

17 JUSTICE SOTOMAYOR: Right.

18 MR. DiNARDO: The function shouldn't matter.
19 In terms of the time --

20 JUSTICE SOTOMAYOR: If function doesn't
21 matter, then how do we define "clothes"?

22 MR. DiNARDO: The function doesn't matter
23 because --

24 JUSTICE SOTOMAYOR: Function covers the
25 body.

1 MR. DiNARDO: Sometimes, it could be for
2 protection; sometimes, it could be for identification.
3 So some people have to wear certain things, so they're
4 identified. Other people have to wear things at work,
5 so they are protected. I think that shouldn't matter.

6 And the length of time, frankly, shouldn't
7 matter because the agreement must be bona fide. The
8 statute has a protection for a union that doesn't
9 extract something in exchange for agreeing that this
10 increment of time will be excluded.

11 The -- the statute requires that the labor
12 agreement be a bona fide labor agreement. So the -- the
13 obligation of bargaining and -- and fulfilling your
14 obligation of fair representation is built into the
15 statute.

16 I believe there's been a great deal of focus
17 on an item-by-item investigation of these issues in
18 countless numbers of these cases, and that is the wrong
19 approach.

20 JUSTICE ALITO: Well, nothing has been said
21 about the word "changing." Maybe you could say
22 something about that. Isn't it -- isn't it awkward to
23 refer to the changing of clothes when all that the
24 person is doing is putting on clothing on top of
25 clothing that the person is already wearing?

1 MR. DiNARDO: So, Your Honor --

2 JUSTICE ALITO: That's not the way the term
3 is normally used, is it?

4 MR. DiNARDO: So I would say this: In this
5 particular case, the facts of this case, and the
6 record's replete with declarations, the most common
7 event is a worker comes to his locker, takes off some of
8 their clothes, they have to -- they're required to put
9 their personal long underwear shirt on and long
10 underwear pants on, then the gear that's in the -- the
11 gear -- then the clothing that's in the picture.
12 That's -- that's the actual events in this case.

13 But if someone were to come in and -- in
14 their long underwear and not have to take their outer
15 clothes off and just put the items that are in the
16 record on, then the question becomes have they changed
17 because they have simply layered?

18 I would say this: It's not the most common
19 use of the term "changing," but it is a -- it is a
20 definition of changing, "to make different." I think it
21 would happen here. So it's actually not the facts of
22 this particular case.

23 I think the word is certainly broad enough
24 to encompass -- and, lastly, it would make no sense in
25 the statute to allow the personal idiosyncrasies of

1 those people coming to work, someone who decides to
2 layer their items over what they have on, someone else
3 who decides to take them off before they layer.

4 I would say that reading the statute as an
5 activity-based statute is consistent as well with the
6 notion of washing, which is in this statute. We don't
7 think of turning a shower on, necessarily, or retrieving
8 a towel as washing. The statute excludes time spent
9 washing, and we don't try to drill down what exactly is
10 washing.

11 We say, in close cases, the determining
12 factor should be the agreement the labor organization
13 has reached with the employer. Leave all of this
14 craziness about whether a particular item is covered or
15 not covered to the parties closest to deal with it, the
16 labor organization and the employer, who have had, in
17 this particular case, 60 years of dealing with this.

18 If you say to a worker at U.S. Steel, "Go
19 change your clothes," they will know exactly what you
20 meant. And they will take that to mean, "Put my hard
21 hat on. Put my protective eyewear on."

22 JUSTICE SCALIA: Are there no non-unionized
23 employers that -- that have to confront this problem,
24 and they have to pay -- they have to pay for work time,
25 no?

1 MR. DiNARDO: Your Honor -- so the statute
2 only covers -- 203(o) only applies in unionized
3 workplaces. It's only where a labor organization and
4 an --

5 JUSTICE SCALIA: Yes, and everybody else has
6 to pay for the -- for the changing time, right?

7 MR. DiNARDO: Unless it's preliminary or
8 postliminary.

9 JUSTICE SCALIA: It is, so you -- so you
10 have the same issue there, don't you?

11 MR. DiNARDO: Well, yes -- it's --

12 JUSTICE SCALIA: And -- and the union cannot
13 pull your chestnuts out of the fire.

14 MR. DiNARDO: Well, of course, there is no
15 union present, so the question becomes is it preliminary
16 activity, is it ordinary clothes changing that's not a
17 principal activity, et cetera?

18 There's -- clearly, this applies in
19 unionized workplaces. There is a representative of
20 these employees. They can bargain over these blocks of
21 time, over these activities, and determine how best to
22 deal -- how best to deal with it.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Yang.

1 ORAL ARGUMENT OF ANTHONY A. YANG,
2 FOR UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE RESPONDENT

4 MR. YANG: Mr. Chief Justice, and may it
5 please the Court.

6 JUSTICE SOTOMAYOR: Mr. Yang, I will let you
7 speak, but could you answer Justice Scalia's question?
8 Would our -- if we were to adopt your colleague's
9 broader definition, would it affect a preliminary and
10 post-activity definition?

11 MR. YANG: Not at all. We only get to the
12 question of Section 3(o) when a preliminary activity is
13 deemed to be so integral and indispensable to the
14 primary work that itself is primary work and, therefore,
15 would be compensable.

16 So as, for instance, the Court held in
17 Steiner, there was chemical plant workers who the
18 donning and doffing of their clothing for work purposes
19 was so indispensable to their chemical factory work, it
20 was deemed to be essential. In that context, you might
21 have a collective bargaining agreement that allows the
22 union, on behalf of the employees and the employer, to
23 provide for an alternative method of compensating this
24 type of work.

25 And, in that context, there are two central

1 inquiries that I would like to address today. First,
2 are the items clothes? We think "clothes" actually has
3 some textual meaning here and imposes a limit, which I'd
4 like to discuss a bit further later.

5 But, second, if the employee puts on both
6 clothes and some non-clothes items, does the overall
7 process still, nevertheless, constitute the activity of
8 changing clothes?

9 Now, we didn't have to go into great depth
10 into that question in our brief because all the items
11 here are clothes. But I think it would be actually
12 quite useful to discuss, for a little bit, the activity
13 of changing clothes and then to discuss the specifics.
14 I think it would help the Court out at least in
15 providing a more general rule.

16 The activity of changing clothes is used in
17 the -- in the statute to exclude time spent in changing
18 clothes. Congress used the gerund "changing" to
19 describe an activity. It is a verb form that's modified
20 by changing, not by clothes. So it is an activity of
21 changing clothes. We think that activity also includes
22 ancillary matters.

23 So, for instance, if a worker comes into a
24 locker room, spends some time doing the combination on
25 the locker, opens it up, take -- opens the locker, that

1 is not actually changing clothes, per se, but it's part
2 of the activity of changing clothes.

3 So, for instance, if the worker also happens
4 to put on some goggles, pop in an ear plug, maybe even
5 snap on a utility belt in the context of changing
6 clothes, those things are part of "changing clothes," as
7 part of the statute. Now --

8 JUSTICE KAGAN: So, then, what does separate
9 you from Mr. DiNardo? Now, you're sounding exactly the
10 same.

11 MR. YANG: Well, no, I don't think so
12 because, on the margin, we are largely the same. I
13 think, for the mine run of cases, we will be at the same
14 result.

15 However, there are some marginal cases where
16 there is a collection of equipment -- we would -- what
17 we would deem to be equipment, which is put on by an
18 employee that is so significant that it no longer can be
19 fairly treated in conjunction with changing clothes.

20 JUSTICE KAGAN: Like what?

21 MR. YANG: Well, this is an area -- an issue
22 that comes up frequently in the meat packing industry.
23 And I can explain -- I need to explain a little bit
24 about the facts to explain why we think that that is a
25 much more difficult question.

1 So, in the meat packing industry, for
2 instance, particularly meat packers that are rendering
3 large portions of the beef, either with electric saws or
4 very sharp knives or similar instruments, they actually
5 have to put on what the government considers to be -- or
6 has considered to be items of equipment.

7 So, for instance, the meat packer might have
8 a chain mail, kind of like armor sleeve, chain mail
9 gloves, another sleeve, chain mail kind of all over the
10 front end, a belly guard -- a Plexiglas belly guard.
11 This is something that is very rigid, you can't even sit
12 down on it.

13 And, in fact, you have to sterilize it in a
14 chemical bath before you go into the plant. You have
15 metal arm guard -- or a metal -- or, now, Plexiglas
16 because of weight -- arm guard on the front that helps
17 to deflect blows for your non-knife arm.

18 These types of things, we think, would not
19 normally be thought of as clothing. And so, when you
20 put on a smock, either before -- you know, or under or
21 over it, we think that the overall process there might
22 not be fairly deemed to be considered changing clothes.

23 JUSTICE SOTOMAYOR: So what's the
24 difference? Isn't this what some courts have described
25 as de minimis activity, as they did with the safety

1 glasses and the hat and the ear plugs? How about a
2 metal apron, that some meat packers only do a metal
3 apron?

4 MR. YANG: Right. Well, that may well --
5 this is, again, going to be somewhat fact-dependent, and
6 I don't mean to provide a general rule for all cases.

7 JUSTICE SOTOMAYOR: Well, actually, that's
8 what we are looking for, so why don't you?

9 (Laughter.)

10 MR. YANG: No, no. I think, while we are
11 trying to provide general principles, they're not necessarily
12 going to resolve all cases, and they're not always going
13 to make the case easy, and I think, on the margin, and
14 the meat packer does involve a marginal case, you're
15 going to have the questions.

16 If it's just one item --

17 JUSTICE ALITO: What you just said -- what
18 you just said, I find quite confusing. I can make a
19 list of things that are considered to be clothing. One
20 of them would be a jacket, perhaps. One would be a
21 vest. And if you tell me that a vest is not clothing if
22 it's made out of metal, then I don't know why Mr.
23 Schnapper is not right that a jacket is not a jacket if
24 it's got extra flame protection -- protecting chemicals
25 in it.

1 MR. YANG: Our point is a linguistic point,
2 which is to say I don't think all these things are
3 normally characterized as clothing. For instance, there
4 are certain items in the body that are so distinctive in
5 form and function, they don't have normal analogues in
6 what you would find people wearing in ordinary
7 garments -- you know, in everyday life, that it's deemed
8 to be different.

9 There are certain armor-type things, and I
10 think maybe because, etymologically, armor, with
11 the unique military context, tends to -- we tend to call
12 these things equipment.

13 But, for instance, the belly guards, In IBP,
14 this Court called those things "protective equipment,"
15 and I think that's the normal use of the term in that
16 context. Just because you might say, oh, it's a vest, a
17 chain mail vest for the specific function, particularly
18 when aggregated with the rest of the equipment used in
19 the meat packing industry, makes it an arguably
20 different case.

21 This case, however, I think is quite
22 different, and I wouldn't necessarily use the term "de
23 minimis." We agree with the general concept that the
24 Seventh Circuit reached, but de minimis is a term of art
25 in the FLSA. It involves, as we explained to the Court,

1 in our Tum brief, which is the companion case to -- to
2 IBP, it requires an aggregation of all the time deemed
3 to be de minimis. There is a regulation, Section
4 785.47, that imposes some other requirements.

5 We think it's not so helpful to use that
6 term, but we do think --

7 JUSTICE ALITO: But when somebody in the
8 meat packing industry puts on something that would be
9 clothing, but also puts on all these other things that
10 you say are not clothing, now, you would say in that
11 situation putting on all of this additional stuff is not
12 ancillary, and that is for what reason? Because it
13 takes more time in relation to the clothing or the
14 number of non-clothing items exceeds the number of
15 non-clothing items? What does that mean?

16 MR. YANG: Well, I think it means that when
17 the process is predominantly involving equipment and not
18 clothes, we would think that it's different. And -- and
19 I don't think there's really any question that there has
20 to be a line.

21 For instance, if an employer had an employee
22 go out and, as part of the changing clothes, also go and
23 collect your tools for the day and assemble them in your
24 tool belt, no one would say that's changing clothes,
25 even if, at the end of the -- all of that, you put on

1 your top -- your jacket and you walked out.

2 So we're simply trying to draw a line that I
3 think faithfully reflects the common understanding of
4 clothes in this context. At the same time, we believe
5 that the term "clothes" is quite broad.

6 JUSTICE BREYER: Do you have any estimate on
7 the empirical -- there are only two people that know,
8 the Department of Labor and the AFL-CIO, and they didn't
9 tell us, the latter. So -- so what we're thinking of, I
10 think, is workplace hazard clothing. Okay?

11 And the problem, I think, that was raised is
12 that the union can't stop -- can't -- can't -- can't
13 make an agreement about this, without a lot of trouble
14 anyway. They can't just shut up, in other words, and
15 see that the -- there'll be compensation because there's
16 a custom or practice in the industry of giving -- of not
17 giving the compensation.

18 MR. YANG: I'm not -- there has to be --

19 JUSTICE BREYER: Do you follow? Do you
20 follow --

21 MR. YANG: There has to be a custom or
22 practice under the collective bargaining agreement.

23 JUSTICE BREYER: Yes, yes. But they've
24 had --

25 MR. YANG: The specific one.

1 JUSTICE BREYER: -- collective bargaining
2 agreements in steel forever.

3 MR. YANG: But --

4 JUSTICE BREYER: All right? So if we go
5 back to -- to 1949 or 1952 and they entered into some
6 big deal agreement, I mean, what was the custom or
7 practice at that time? I don't know. I suspect you
8 don't know. And I -- I wonder if the Department of
9 Labor knows.

10 MR. YANG: Well, I think the custom --

11 JUSTICE BREYER: I wonder if anyone knows.

12 MR. YANG: -- on the record in this case --

13 JUSTICE SCALIA: I don't know.

14 MR. YANG: -- I think the custom of practice
15 was to not separately compensate.

16 JUSTICE BREYER: All right. So there is --

17 MR. YANG: And so -- so that was actually
18 made express --

19 JUSTICE BREYER: Exactly.

20 MR. YANG: -- in this case. And I think
21 that's actually illustrative of the type of things that
22 we're talking about. Remember, we're talking about a
23 100 percent cotton. If you look at the label -- it's in
24 the record. A 100 percent cotton jacket and pants.
25 You've got -- you know, arm guards, wrist -- wristlets

1 and leggings, but these things are quite analogous to
2 what we would have in normal clothing.

3 And then you have some things that are on
4 the edge. But we think that, when that's done in
5 conjunction with changing clothes, that it's incidental,
6 just as an employee might put on a name tag after they
7 dress or put on their ID badge for security purposes or
8 snap on a utility belt --

9 JUSTICE SCALIA: You want us to say it's
10 incidental, instead of de minimis?

11 MR. YANG: That's -- that's our preference.

12 JUSTICE SCALIA: What -- what's the
13 consequence of calling it "incidental"?

14 MR. YANG: Well, we think it avoids
15 complications and problems with the special doctrine
16 that applies more generally in the FLSA, which is the de
17 minimis -- De Minimis Time Doctrine.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Schnapper, you have four minutes.

20 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

21 ON BEHALF OF THE PETITIONERS

22 MR. SCHNAPPER: I'd like to address a number
23 of questions I was asked earlier and then to respond
24 to a point my brother made.

25 With regard to the question of

1 Justice Breyer, it is the experience of the United Food
2 and Commercial Workers that the position companies take
3 with regard to this -- these items is simply another
4 bargainable unit -- item, like a holiday. It is not
5 treated by them as something unions are entitled to.

6 Justice Ginsburg, you asked why it matters
7 here and whether the items -- how we characterize the
8 items about which the government would disagree with the
9 company, at least in isolation. And it matters for two
10 reasons that have to do with the broader context of the
11 Fair Labor Standards Act.

12 First, as we explained in our reply brief,
13 there is an unchallenged rule that -- that an employer
14 has to pay a worker for carrying tools or other things
15 needed to do the job to the -- the work station.

16 If anything in this list isn't clothes and
17 the workers have to have it at the work station, it
18 would presumptively fall within the tool-carrying rule.
19 So it's very important to the company in this case that
20 all of it be clothes.

21 It's also important under the position that
22 the government took in its brief in Tum, which was a
23 companion case to Alvarez, the government's
24 position, with which we agree, is that once there is any
25 non-203(o) exempt item, it starts the calculation of the

1 de minimis time, which then includes, not only the time
2 for that item, but the travel time that follows.

3 It starts the de minimis clock. If that's
4 right, then if anything in this case isn't 203(o)
5 exempt, the company would have to change this practice.

6 Justice Kagan, you asked more broadly why
7 the test matters. And I think the government was moving
8 in this direction. There is generally few, if any,
9 cases involving poultry or -- poultry processing in
10 which there's stuff that would -- would meet the, well,
11 if I had a photograph of it, it looks like clothes test.
12 It's almost all gear.

13 And so in that industry, it's of enormous
14 importance the difference between the government's
15 position in its -- at least in its brief and the
16 company's position. That has great implications for
17 those -- those plants.

18 Finally, if I might respond to a point that
19 the government made, the government has introduced
20 another concept, I think, that's not set forth in their
21 brief, but I want to address, and that's that, in
22 addition to the process that would go on, on any of our
23 standards of separating out what things are clothes and
24 what things are not clothes, the government would then
25 overlay that with an ancillary test.

1 And if it's predominantly clothes, then the
2 whole thing counts as clothes; if it's predominantly
3 non-clothes, it goes the other way.

4 I don't know. I think that's another area
5 of uncertainty you shouldn't inflict on the lower
6 courts, and it's not consistent with the statute. The
7 statute doesn't say, "changing clothes and ancillary
8 stuff." I'd agree about opening the locker. It's --
9 it's necessary to change your clothes.

10 But when you start taking things which, the
11 government would agree, by themselves aren't clothes,
12 and say, well, this -- this falls within changing
13 clothes, even though it's not clothes because it's sort
14 of happening at the same time, seems to me you're
15 opening up another can of worms that should stay closed.

16 JUSTICE KAGAN: Mr. Schnapper -- I'm sorry.

17 JUSTICE ALITO: What is the practice in the
18 poultry industry to which you referred? Are those
19 unionized workplaces and have they bargained on this
20 issue?

21 MR. SCHNAPPER: I believe about 60 percent
22 are and the rest are not. The poultry industry filed a
23 brief --

24 JUSTICE ALITO: And under -- where they have
25 collective bargaining agreements, are they compensated

1 for this time or not?

2 MR. SCHNAPPER: Generally, not. Generally,
3 not. The -- the unions have not been able to negotiate
4 that. It's the arrangement that -- that I've just
5 described. And -- and, of course, there are a large
6 number of nonunionized plants, they have to pay for all
7 this.

8 JUSTICE KAGAN: Do you happen to know why
9 the government hasn't issued a regulation on this? It
10 seems the quintessential question of statutory
11 interpretation to which we would normally defer to the
12 agency.

13 Why hasn't -- this is really a question to
14 Mr. Yang, but do you just happen to know, given the
15 history of all this and all this -- these guidance
16 documents, why they've never just like come to
17 everybody's aid and 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 12:06 p.m. the case in the
2 above-entitled matter was submitted.)
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