IN THE SUPREME COURT OF THE UNITED STATES

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CLIFTON SANDIFER, ET AL., :

Petitioners : No. 12-417

v. :

UNITED STATES STEEL CORPORATION :

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Washington, D.C.

Monday, November 4, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

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

LAWRENCE C. DiNARDO, ESQ., Chicago, Illinois; on behalf of Respondent.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: Our second case is Case 12-417, Sandifer v. United States Steel.

Mr. Schnapper?

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONERS

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

We agree with the government that not everything an individual wears is clothes. We disagree with the government as to the appropriate standard for distinguishing things that are and are not clothes under Section 203(o).

I'd like to begin with the area we're -- in which we are in agreement with the government, although not with Respondent. In ordinary parlance, not everything an individual wears would be referred to as clothes.

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

JUSTICE SCALIA: I resent that.

(Laughter.)

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

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

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

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

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

JUSTICE SCALIA: Tools and what?

MR. SCHNAPPER: Scabbards.

JUSTICE SCALIA: Scabbards.

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: So if it -- if it protects

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

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

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

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

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

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

the --

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

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

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

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

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

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

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

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

JUSTICE KAGAN: But --

MR. SCHNAPPER: But those -- those are not

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

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

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

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

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

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

little bit.

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

JUSTICE SOTOMAYOR: It's a very famous saying.

(Laughter.)

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

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

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

(Laughter.)

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

JUSTICE SCALIA: And holding guns.

MR. SCHNAPPER: Holding. I certainly misspoke.

(Laughter.)

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

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

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

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

that -- that I may not understand this perfectly.

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

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

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

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

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

JUSTICE BREYER: Yes.

MR. SCHNAPPER: That is not what the statute

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

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

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

They don't succeed in negotiating --

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

MR. SCHNAPPER: It goes the other way.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Counsel --

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

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

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

agreement not -- not to file.

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

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

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

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

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

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

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

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

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

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

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

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

union --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What we have tried to suggest is --

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

MR. SCHNAPPER: Your Honor --

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

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

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

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

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

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

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

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

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

MR. SCHNAPPER: No, no, no.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. DiNardo.

ORAL ARGUMENT OF LAWRENCE C. DiNARDO

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Does that include a SCUBA tank?

MR. DiNARDO: Your Honor --

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

MR. DiNARDO: If the labor --

JUSTICE SOTOMAYOR: Or ready for work.

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

your principal activities.

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

JUSTICE SOTOMAYOR: Then why didn't -- why wasn't the statute written in that way?

MR. DiNARDO: It wasn't written that way --

JUSTICE SOTOMAYOR: Why wasn't it written -- I mean, they use very specific words, "changing clothes." That's, in my mind, narrower than your definition.

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

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

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

them and say, we want this in the agreement.

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

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

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

And then the question becomes is this

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

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

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

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

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

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

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

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

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

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

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

count, but equipment can be distinguished?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DiNARDO: There is, Your Honor.

JUSTICE BREYER: What?

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

JUSTICE BREYER: Opening your locker is not clothes.

(Laughter.)

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

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

MR. DiNARDO: Yes.

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

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

but we won't for the shirt.

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

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

JUSTICE BREYER: Or custom and --

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

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

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

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

that everything you put on is clothes.

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

JUSTICE SCALIA: Earrings, eyeglasses, whatever.

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

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

That -- it doesn't make any sense.

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

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

(Laughter.)

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

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

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

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

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

JUSTICE SOTOMAYOR: Right.

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

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

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

JUSTICE SOTOMAYOR: Function covers the body.

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

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

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

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

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

MR. DiNARDO: So, Your Honor --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Yang.

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

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

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

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

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

And, in that context, there are two central

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: Like what?

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

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

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

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

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

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

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

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

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

(Laughter.)

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

If it's just one item --

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

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

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

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

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

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

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

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

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

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

your top -- your jacket and you walked out.

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

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

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

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

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

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

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

MR. YANG: The specific one.

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

MR. YANG: But --

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

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

JUSTICE BREYER: I wonder if anyone knows.

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

JUSTICE SCALIA: I don't know.

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

JUSTICE BREYER: All right. So there is --

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

JUSTICE BREYER: Exactly.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Schnapper, you have four minutes.

REBUTTAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONERS

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

With regard to the question of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

for this time or not?

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

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

Why hasn't -- this is really a question to Mr. Yang, but do you just happen to know, given the history of all this and all this -- these guidance documents, why they've never just like come to everybody's aid and issued a regulation?

MR. SCHNAPPER: I do not know, Your Honor.

JUSTICE SCALIA: Too complicated is why.

(Laughter.)

MR. SCHNAPPER: If the Court has no further questions.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Counsel.

The case is submitted.

(Whereupon, at 12:06 p.m. the case in the above-entitled matter was submitted.)