TAKING IT ALL OFF: *SALAZAR V. BUTTERBALL* AND THE BATTLE OVER FAIR COMPENSATION UNDER THE FLSA'S "CHANGING CLOTHES" PROVISION

INTRODUCTION

Immigrant workers are a mainstay in American industries that rely on minimum-wage, low-skill labor as a key component to their economic viability.[1] Immigrants are often more willing to take menial jobs than low-skilled workers born in the United States, and they are also more likely to take jobs in sectors of the economy that U.S.-born workers have largely vacated over the last few decades.[2] These low-wage jobs are abundant in sectors such as construction, manufacturing, and the hospitality industry, and they often involve strenuous and repetitive labor.[3] One of the industries that depends most on the presence of an inexpensive immigrant workforce is the meat-packing industry, especially poultry processing.[4] The work at meatpacking plants adds another dimension to the everyday challenges faced by other low-wage workers—not only is meatpacking inherently messy and unpleasant, but it poses many serious risks to the health and safety of employees.[5]

Salazar v. Butterball, L.L.C.,[6] is a case about a group of these low-wage meatpacking employees demanding payment for the time they spend each day putting on and taking off (donning and doffing) required safety equipment. While the meatpacking industry has come a long way from the unsettling practices depicted in Upton Sinclair's *The Jungle*,[7] abuses of power continue to take place in this industry that illuminate how far employers and courts still need to go in order to ensure that all employees receive fair pay and adequate safety precautions.

This Comment explores the Tenth Circuit's opinion in *Salazar*, in which the Tenth Circuit rejects the idea that workers should be paid for time spent donning and doffing personal protective equipment (PPE) because it falls under the "changing clothes" exclusion of section § 203(o) of the Fair Labor Standards Act (FLSA). Part I describes the

1. Gordon Hanson, *Two Very Different Groups Seeking Work*, N.Y. TIMES, Mar. 18, 2009, http://roomfordebate.blogs.nytimes.com/2009/03/18/the-competition-for-low-wage-jobs/.

2. *Id.*; Michael Fix, *Moving to Where the Jobs Are*, N.Y. TIMES, Mar. 18, 2009, http://roomfordebate.blogs.nytimes.com/2009/03/18/the-competition-for-low-wage-jobs/.

3. Fix, *supra* note 2.

4. Pamela Constable, *Immigrant Workers Vital, Va. Firms Say Poultry Industry Seeks Better U.S. Screening to Cull Illegal Applicants, Avert Fines*, WASH. POST, July 13, 2008, at C01.

5. HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 24 (2004) (noting that nearly every worker interviewed for the report had suffered some kind of serious injury while working at a meat or poultry plant).

6. 644 F.3d 1130 (10th Cir. 2011).

7. UPTON SINCLAIR, THE JUNGLE (1906).

landscape of the modern meatpacking industry, explains the employee protections of the FLSA and the confusion courts have created in their attempts to define "work" and "changing clothes" under the FLSA and the Portal-to-Portal Act, and examines the challenges faced by the Department of Labor (DOL) in enforcing the FLSA under this chaotic judicial framework. Part II outlines the facts, procedural history, opinion, and amicus curiae briefs of *Salazar*. Part III offers a critique of the opinion and its approach to the issues, and it concludes that Congress should revise the FLSA in light of the recent circuit split over how to correctly interpret the Portal-to-Portal Act and that the DOL should use notice and comment procedures to secure *Chevron* deference for its interpretation of "changing clothes." Congress and the DOL must take legally binding action to ensure the protection employee rights under the FLSA in the modern workplace.

I. BACKGROUND

The main issue in *Salazar* is whether or not PPE should be defined as "clothing" for purposes of excluding the donning and doffing of PPE from compensable work under the FLSA, also known as the federal minimum wage statute.[8] The FLSA does not require an employer to pay its employees for time spent "changing clothes or washing at the beginning or end of each workday" if noncompensation for these activities is an express or implied term of a collective bargaining agreement (CBA).[9] The other issue in the case is whether donning and doffing can be considered "work" under the FLSA, although the court chooses not to address this issue.[10] While payment for donning and doffing PPE may seem like a straightforward issue of statutory interpretation for the courts, the legal standards for analyzing this issue are actually incredibly confusing and not well defined.

A. PPE and the Modern Meat-Packing Industry

The technological advances in mechanized manufacturing at the turn of the twentieth century turned meatpacking into one of the most dangerous industries in the United States.[11] According to the United States Department of Labor (DOL), thousands of employees are injured while on the job at animal slaughtering and meatpacking plants every year, making these jobs among the most hazardous in America today.[12] As a result, the safety standards for this industry require employers to

8. *Salazar*, 644 F.3d at 1133.
9. 29 U.S.C. § 203(o) (2006).
10. *Salazar*, 644 F.3d at 1136 & n.3.
11. HUMAN RIGHTS WATCH, *supra* note 5, at 11.
12. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, INDUSTRY INJURY AND ILLNESS DATA (2009), http://www.bls.gov/iif/oshwc/osh/os/ostb2423.pdf.

provide their workers with PPE to reduce the incidence of on-the-job illness and injury.[13]

The Occupational Health and Safety Administration (OSHA), an arm of the DOL, is charged with enforcing the right of all employees to a safe workplace. "OSHA requires the use of personal protective equipment (PPE) to reduce employee exposure to hazards when engineering and administrative controls are not feasible or effective in reducing these exposures to acceptable levels."[14] Employers are required to evaluate their workplace to determine whether PPE will reduce the risk of injury to their employees.[15]

OSHA has identified multiple hazards that may require PPE at the two main stages of poultry processing.[16] The first stage of processing is when the birds are grown and prepared for slaughter, and the second stage is the actual slaughter, butchering, and packaging of the birds.[17] The major hazards of the first stage are related to airborne toxins and particulates, many of which stem from bird feces.[18] The hazards at the second stage include those associated with large machinery, knives, and slippery working areas.[19] Many of these hazards are unavoidable, especially because most PPE cannot completely protect workers from all of the "blood, grease, animal feces, ingesta (food from the animal's digestive system), and other detrius from the animals they slaughter."[20] There are no specific OSHA standards for poultry processing, but all plants must meet the minimum standards for general safety areas such as sanitation, machine guarding, and knife safety.[21]

While these standards are extremely important to protecting the health and safety of poultry workers, many of these workers still suffer from hand and wrist injuries and repetitive task-related pain conditions, such as carpal tunnel.[22] One journalist summarized these more subtle dangers in a 2002 article:

> Tasks involve repetitive movements (workers sometimes perform the same motion 30,000 times a shift), and knife-wielding employees work perilously close together as they struggle to keep up with the

13. 29 C.F.R. § 1910.132 (2011).

14. *OSHA Safety and Health Topics: Personal and Protective Equipment (PPE)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/SLTC/personalprotectiveequipment/ (last visited Oct. 17, 2011).

15. *Id.*

16. *OSHA Safety and Health Topics: Poultry Processing*, OCCUPATIONAL SAFETY & HEALTH ADMIN., http://www.osha.gov/SLTC/poultryprocessing/index.html (last visited Oct. 17, 2011).

17. *Id.*

18. *Id.*

19. *Id.*

20. HUMAN RIGHTS WATCH, *supra* note 5, at 40.

21. *OSHA Safety and Health Topics: Poultry Processing*, *supra* note 16.

22. Peter St. Onge et al., *The Cruelest Cuts: An Epidemic of Pain*, CHARLOTTE OBSERVER, Sept. 30, 2008, at 15A.

> production line. [OSHA] statistics for 2000 reveal that one out of every seven poultry workers was injured on the job, more than double the average for all private industries. Poultry workers are also 14 times more likely to suffer debilitating injuries stemming from repetitive trauma—like "claw hand" (in which the injured fingers lock in a curled position) and ganglionic cysts (fluid deposits under the skin).[23]

Employers also put a huge amount of pressure on workers to maximize the volume of animals that go through processing by increasing the speed of the processing line.[24] The speed of production lines is directly related to injuries, but there are no state or federal laws that limit line speed.[25] A 2002 investigative article in the *Denver Post* described the experiences of workers at the Swift & Co. meatpacking plant in Greeley, Colorado, who could barely move after finishing a day of work at the plant because they were "exhausted from working on a line that turns live animals into processed meat as fast as six times a minute."[26] Workers also told the *Denver Post* that "supervisors apply constant pressure to keep the line moving" because of the company's financial goals:

> [A] world in which they are driven, sometimes insulted and humiliated, to keep the plant's production up. "From the time you enter, you're told that if the plant stops 10 minutes, the company will lose I don't know how many millions of dollars," said Maria Lilia Almaraz, who earns $10.60 an hours cutting bones from cuts of meat with a razor-sharp blade. "It's always, faster, faster," she said.[27]

OSHA issued more restrictive regulations concerning ergonomic standards in January 2001 in an effort to reduce the debilitating injuries caused by the repetitive motions required for tasks like deboning and cutting.[28] However, Congress and President George W. Bush struck down the standards just two months later amid pressure from large corporations who argued that the standards were based on insufficient scientific and medical understanding.[29] OSHA now relies on voluntary adherence to ergonomics guidelines.[30]

The PPE generally required for work in a poultry processing plant includes "frocks, aprons, plastic sleeves, gloves, cotton glove liners,

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23. Nicholas Stein, *Son of a Chicken Man: As He Struggles to Remake His Family's Poultry Business into a $24 Billion Meat Behemoth, John Tyson Must Prove He Has More to Offer than the Family Name*, FORTUNE, May 13, 2002, at 136.

24. HUMAN RIGHTS WATCH, *supra* note 5, at 33.

25. *Id.*

26. *Id.* at 34 (quoting Michael Riley, *Woes at Swift Blamed on Pace, Speed Valued Above All Else, Workers Say*, DENVER POST, Nov. 26, 2002, at A1).

27. *Id.*

28. St. Onge et al., *supra* note 22.

29. *OSHA's Ergonomics Regulation*, U.S. CHAMBER OF COMMERCE, http://www.uschamber.com/issues/labor/oshas-ergonomics-regulation (last visited Oct. 17, 2011).

30. St. Onge et al., *supra* note 22.

boots or overshoes, hard hats, earplugs, and safety glasses."[31] Employees that work in deboning and evisceration, the departments that perform the actual dismembering of the dead birds, also wear mesh gloves, knife holders, and arm guards to protect themselves from knife and scissor injuries.[32] While payment for donning and doffing time amounts to a minimal amount each day (around twenty minutes), these wages can add up to around $500 a year per employee.[33] According to expert Robert G. Radwin, the average amount of daily donning and doffing before and after shifts, including one meal break per employee, is approximately 16,858 minutes for an average-sized plant.[34]

Another major issue in the modern meatpacking industry is its reliance on immigrant labor, both legal and undocumented.[35] Many of the employer abuses that take place in the industry are directly linked to the vulnerability of these workers and employer willingness to take advantage of these weaknesses.[36] While many undocumented workers are afraid to assert their rights because they fear deportation, workers who are in the country legally are also unwilling to stand up to employers for fear that their fellow workers who are not yet legal will suffer the consequences.[37] Major poultry production plants, including Tyson Foods, deny that they hire undocumented workers purposely, although many companies often find workers though what industry researchers call "ethnic network recruitment," where companies promise to secure jobs for the family members of current workers.[38]

B. The FLSA and the Portal-to-Portal Act

In 1938, Congress enacted the FLSA "to establish nationwide minimum wage and maximum hours standards."[39] The most important provisions of the FLSA require that employees be paid a minimum wage and be paid at an overtime rate for any hours they work over the standard forty-hour workweek.[40] Congress created the FLSA as a way to protect covered workers against unfair wages and unreasonable hours, two significant labor concerns that had been exacerbated by the economic tur-

31. Salazar v. Butterball, L.L.C., 644 F.3d 1130, 1134 (10th Cir. 2011).

32. *Id.*

33. *Salazar*, 644 F.3d at 1134; Steven Greenhouse, *Poultry Plants to Pay Workers $10 Million in Compensation*, NY TIMES, May 10, 2002, at A20.

34. Phase I Expert Report of Robert G. Radwin, Ph.D.for Plaintiffs, Salazar v. Butterball, LLC, No. 08-CV-02071-MSK-CBS, 2009 WL 6048979 (D. Colo. Dec. 3, 2009), 2009 WL 29155833.

35. HUMAN RIGHTS WATCH, *supra* note 5, at 106.

36. *Id.* at 101; Annette Bernhardt, *Expect More Workplace Abuses*, N.Y. TIMES, Mar. 18, 2009, http://roomfordebate.blogs.nytimes.com/2009/03/18/the-competition-for-low-wage-jobs/.

37. HUMAN RIGHTS WATCH, *supra* note 5, at 103.

38. *Id.* at 109–10.

39. Moreau v. Klevenhagen, 508 U.S. 22, 25 (1993).

40. Salazar v. Butterball, L.L.C., 644 F.3d 1130, 1135 (10th Cir. 2011).

moil of the Great Depression.[41] Congress also sought to prevent all labor conditions that were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers."[42]

The FLSA gives employees a private right of action to recover earned but unpaid wages from their employers.[43] The FLSA allows courts to award any owed back pay as well as any attorney fees and costs incurred by the employee while pursuing their FLSA claim.[44]

Employees also have the right to pursue FLSA claims as a class if the employees are "similarly situated."[45]

The Wage and Hour Division (WHD) of the DOL routinely reports that 70% or more of the businesses it investigates are not in compliance with the minimum wage requirements of the FLSA.[46] The WHD is the sole enforcer of the FLSA, and it responds only to complaints that employers are not in compliance with the Act. In 2008 alone, the WHD collected over $185 million in back wages for 228,000 employees based on almost 24,000 complaints.[47] However, this is likely only the tip of the iceberg in terms of earned wages that employers do not pay to employees every year. The Employer Policy Foundation, an employer-supported think tank, estimated in 2004 that workers would receive an additional $19 billion annually if their employers complied fully with the FLSA.[48]

Under the FLSA, employers must pay employees for all "hours worked." There are two main issues in *Salazar* and other donning and doffing cases, and there are circuit splits with regard to both issues. The first is whether time spent donning and doffing PPE and time spent walking to the production line after donning and doffing PPE constitutes "work" under the FLSA and the Portal-to-Portal Act, and the second is whether PPE are clothes for purposes of the exclusion provided by § 203(o). In *Salazar*, the Tenth Circuit focuses its opinion on determining whether PPE are clothes because the employer in that case entered into a CBA with the union representing its employees, thus implicating § 203(o).[49] However, the larger and more complex issue is whether don-

41. Danuta Bembenista Panich & Christopher C. Murray, *Back on the Cutting Edge: "Donning-and-Doffing" Litigation Under the Fair Labor Standards Act*, 58-APR. FED. LAW. 14, 14 (2011).

42. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981).

43. Panich & Murray, supra note 41, at 14.

44. *Id*. at 15.

45. *Id*.

46. *See, e.g.*, U.S. Department of Labor, *Wage and Hour Collects over 1.4 Billion in Back Wages for over 2 Million Employees Since Fiscal Year 2001*, at 2 (2008), www.dol.gov/whd/statistics/2008FiscalYear.pdf [hereinafter *2008 WHD Report*] (FY 2008: 78% violation rate); *see also* U.S. Department of Labor, *Wage and Hour Division 2002 Statistics Fact Sheet*, www.dol.gov/whd/statistics/200212.htm (FY 2002: approximately 70% violation rate).

47. *2008 WHD Report*, *supra* note 46, at 1.

48. Craig Becker, *A Good Job for Everyone*, LEGAL TIMES, Sept. 6, 2004, at 1.

49. Salazar v. Butterball, L.L.C., 644 F.3d 1130, 1136 (10th Cir. 2011).

ning and doffing is "work," a question that has created a separate and more problematic circuit split.

1. Defining "Work" and "Workday" Under the FLSA

The FLSA does not define "work" or "workweek," so the Supreme Court has developed its own definitions of these terms to assist in its interpretation of the statute.[50] The Court's first attempt at defining "work" came in 1944 in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*.[51] The Court held in *Tennessee Coal* that it had no reason to assume that Congress meant for the definition of work to be anything other than its generally accepted meaning, "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."[52]

The Court again defined "work" and "workweek" broadly in *Anderson v. Mt. Clemens Pottery, Co.*[53] by holding that the "workweek" included "all time during which an employee is necessarily *required* to be on the employer's premises, on duty or at a prescribed workplace."[54] The Court also held that preliminary activities done solely on the employer's premises that are a "necessary prerequisite to productive work" also constitute work for purposes of the FLSA.[55] These preliminary activities could include tasks such as putting on aprons or overalls, turning on machines, and sharpening tools.[56]

However, the court also created an exception to the requirement that preliminary activities be compensated—any activity that was *de minimis* could be excluded from an employee's workday.[57] The Court defined this *de minimis* exception in the following way: "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours . . . such trifles may be disregarded[, for] [s]plit-second absurdities are not justified by the actualities or working conditions or by the policy of the [FLSA]."[58] The Court has not established a test for determining when an activity is *de minimis*, leading courts to apply the idea in a variety of ways.[59]

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50. Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944) ("[W]e are not guided by any precise statutory definition of work or employment.").

51. 321 U.S. 590, 591–92 (1944).

52. *Id.* at 598.

53. 328 U.S. 680 (1946).

54. *Id.* at 690–91(emphasis added).

55. *Id*. at 693.

56. *Id*. at 692–93.

57. *Id*. at 692.

58. *Id.*

59. *See, e.g.*, Frank v. Wilson & Co., 172 F.2d 712, 716 (7th Cir. 1949) (holding that 9.2 minutes per day consisting of 6.2 minutes of walking time and 3 minutes of other preliminary activities is considered *de minimis*); Green v. Planters Nut & Chocolate Co., 177 F.2d 187, 188 (4th Cir. 1949) (*de minimis* rule applied to employees who reported up to ten minutes before start of shift to

In 1947, Congress enacted the Portal-to-Portal Act[60] in response to the Supreme Court's decision in *Anderson* and the cases that followed its reasoning, which Congress viewed as interpreting the FLSA in a way that disregarded "long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities" that would "bring about the financial ruin of many employers."[61] The key provision of the Portal-to-Portal Act is § 254(a), which provides that employers cannot be liable under the FLSA for not compensating employees for two categories of activities: "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities."[62]

The Supreme Court has interpreted the term "principal activities" as requiring compensation for any activities performed before or after a regular work shift where those activities are "an *integral and indispensable part* of the principal activities for which covered workmen are employed."[63] The Court has not specifically stated what activities should be considered integral and indispensable, but it has declined to alter the test articulated by the Ninth Circuit in *Alvarez v. IBP*, [64] which held that an activity is only integral and indispensable when it is "necessary to the principal work performed and done for the benefit of the employer."[65] The Ninth Circuit referred to this definition to as the bipartite *Steiner* test.[66]

Integral and indispensable activities must also be understood within the context of the continuous workday rule.[67] The "workday" is "the period between the commencement and completion on the same workday of an employee's principal activity or activities."[68] The DOL limited the application of the Portal-to-Portal Act using the idea of a definable beginning and end to the workday:

> [T]o the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a

check in and prepare for work); McIntyre v. Joseph E. Seagram & Sons Co., 72 F. Supp. 366, 372 (W.D. Ky. 1947) (ten to twenty minutes per day going to locker, exchanging uniform, changing uniform, and reporting to foreman within *de minimis* rule); Lasater v. Hercules Powder Co., 73 F. Supp. 264, 271 (E.D. Tenn. 1947) (changing clothes and preliminary preparations for work were *de minimis*, although not stating the amount of time preliminary activities took).

60. 29 U.S.C. §§ 251–62 (2011).

61. *Id.* at § 251(a).

62. *Id.* at § 254(a).

63. Steiner v. Mitchell, 350 U.S. 247, 256 (1956) (emphasis added).

64. 339 F.3d 894 (9th Cir. 2003).

65. *Id.* at 902–03 (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 750 F.2d 47, 50 (8th Cir.1984)); *see also* Dunlop v. City Elec., Inc., 527 F.2d 394, 398 (5th Cir.1976)).

66. *Alvarez*, 339 F.3d at 903.

67. *See* 29 C.F.R. § 790.6(b) (2011).

68. *Id.*

> particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of [§ 254(a)] have no application.[69]

Under the continuous workday rule, the commencement of the workday can cause activities that might otherwise be considered non-compensable, preliminary activities to function as compensable, principal activities under the FLSA.[70]

In 2005, the Supreme Court further broadened this limitation on the Portal-to-Portal Act by explicitly holding that any post-donning and pre-doffing walking time, which occurs in most workplaces during the walk from a locker room to a production area, would be compensable under the Portal-to-Portal Act, assuming the initial donning and doffing was an "integral and indispensable activity."[71] Although the Portal-to-Portal Act specifically excludes preliminary activities and walking time from compensation, the continuous workday rule requires that employers compensate their employees for these activities when they occur between the first and last principal activities of each day. The exclusions of § 254(a) of the Portal-to-Portal Act have largely been eroded in the in a workplace where employees must use PPE because of the Supreme Court's recognition that donning and doffing can be "integral and indispensable" and therefore not "preliminary or postliminary."[72]

Under this new framework that recognizes the potential for donning and doffing to be principal activities, the Second, Fifth, Seventh, and Ninth Circuits have held that employers do not need to compensate their employees for donning and doffing "non-unique" or generic PPE, even if employees are required to wear such gear by their employers or by government regulations.[73] The Third and the District Court of Maryland in the Fourth Circuit have held that employers must compensate employees for donning and doffing PPE when it is required by an employer or government regulation, making the donning and doffing integral and indispensable to the work performed by the employees.[74]

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69. *Id.* at § 790.6(a).

70. *See* Franklin v. Kellogg Co., 619 F.3d 604, 620 (6th Cir. 2010).

71. IBP Inc. v. Alvarez, 546 U.S. 21, 36 (2005).

72. *Id.* at 21.

73. *See* Von Friewalde v. Boeing Aerospace Operations, Inc., 339 F. App'x 448, 454 (5th Cir. 2009) (holding that donning and doffing generic safety gear is *de minimis*); Pirant v. U.S. Postal Serv., 542 F.3d 202, 208 (7th Cir. 2008) (holding that donning and doffing uniform shirt, gloves, and work shoes is not integral and indispensable); Gorman v. Consolidated Edison Corp., 488 F.3d 586, 594 (2d Cir. 2007) (holding that safety gear can be indispensable to an employee's principal activities without being integral, even if required by law and the employer); Alvarez v. IBP, Inc., 339 F.3d 894, 903 (9th Cir. 2003) (holding that donning and doffing non-unique PPE, such as hard hats and safety goggles, is not compensable because it is *de minimis*, even though it is integral and indispensable), *aff'd*, 546 U.S. 21 (2005).

74. *See* DeAsencio v. Tyson Foods, Inc., 500 F.3d 361, 372 (3d Cir. 2007) (holding that employer requirement that employees don PPE mainly benefitted employer); Perez v. Mountaire Farms, Inc., 601 F. Supp. 2d 670, 679–80 (D. Md. 2009) (noting that donning and doffing PPE is

The Tenth Circuit has taken a different approach, using the *Tennessee Coal* definition of work as "physical exertion" to hold in *Reich v. IBP, Inc.*,[75] that the FLSA only requires compensation for donning and doffing protective gear that requires time, exertion and concentration to don and doff.[76] At least one district court in the Tenth Circuit has questioned the continuing viability of the *Reich* test.[77]

2. The Changing Clothes Exception/Exclusion Under § 203(o)

Congress amended the FLSA yet again in 1949, giving further concessions to employers who were unhappy with the repercussions of the FLSA.[78] One major addition to the FLSA during this amendment period was 29 U.S.C. § 203(o).[79] Section 203(o) limits what activities may be excluded from an employee's "hours worked" if a collective bargaining relationship exists in the workplace:

> In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.[80]

In simpler terms, § 203(o) only applies if two conditions are met: (1) the items worn by employees are "clothes," and (2) there is an express or implied term in the CBA that excludes "changing clothes" from compensation. This provision adds another layer to the FLSA that insulates employers and recognizes their ability to bargain or use a custom or practice such that they would not have to pay employees for the preparatory activities of changing clothes or washing, even if those activities are "principal activities" under the Portal-to-Portal Act. However, the Sixth Circuit has held that changing clothes may be excluded by § 203(o) but still function as a principal activity that starts the workday.[81]

Section 203(o) can serve as a loophole for employers, especially if an employer can argue that non-payment for donning and doffing is an implied term of a CBA, because it allows employers to use the process of collective bargaining over the issue (or lack thereof) to justify non-

done not merely for the convenience of the employee and that it is necessarily for employer's benefit).

75. 38 F.3d 1123 (10th Cir. 1994).

76. *Id.* at 1126.

77. Garcia v. Tyson Foods, Inc., 474 F.Supp.2d 1240, 1246 (D. Kan. 2007) (noting that the Tenth Circuit "did not analyze the issues through the lens of the continuous workday rule as clarified by the Supreme Court in *Alvarez*").

78. Anderson v. Cagle's, Inc., 488 F.3d 945, 958 (11th Cir. 2007).

79. *Id.*

80. 29 U.S.C. § 203(o) (2011).

81. Franklin v. Kellogg Co., 619 F.3d 604, 619–20 (6th Cir. 2010).

payment for an activity that is otherwise compensable work in several circuits.[82] The circuits are split as to whether § 203(o) is an exemption for employers, which must be narrowly read in favor of an employee, or whether it is merely an exclusion that works to remove certain tasks from compensable hours and does not require a narrow reading.[83] The Supreme Court has yet to consider this issue or the meaning of "changing clothes" under § 203(o), and both questions in *Salazar* were issues of first impression for the Tenth Circuit.[84]

C. Alvarez v. IBP, Inc.

In 2003, the Ninth Circuit issued a controversial opinion in *Alvarez v. IBP, Inc*., interpreting the meaning of "changing clothes" under FLSA § 203(o). In *Alvarez*, the Ninth Circuit held that unionized employers should be required to compensate employees for the time they spend donning and doffing PPE, even where there is an express or implied CBA term excluding this activity from compensation, because PPE are not "clothes" for the purposes of § 203(o).[85] The Ninth Circuit also addressed the important threshold issue of whether donning and doffing PPE is a principal activity that is integral and indispensable to the work done at the IBP plant.[86]

In *Alvarez*, the Ninth Circuit examined the payment practices of IBP (formerly known as Iowa Beef Packers), the world's largest producer of fresh beef and pork.[87] Unionized employees at one of IBP's Washington "kill and processing" plants brought a claim under the FLSA alleging that IBP was not compensating them for time spent donning PPE at the beginning of each shift, donning and doffing during their 30-minute unpaid meal breaks, and doffing PPE at the end of each shift.[88] IBP paid its workers according to a "gang time pay" scheme, under which employees are only paid during times when they are actually cutting and bagging meat.[89] This means employees are paid starting when the first piece of meat hits the processing line and ending when the last piece of meat is packaged.[90]

82. *See* DeAsencio v. Tyson Foods, Inc., 500 F.3d 361, 372 (3d Cir. 2007); Alvarez v. IBP, Inc., 339 F.3d 894, 904 (9th Cir. 2003) (holding that donning and doffing unique PPE is compensable); Perez v. Mountaire Farms, Inc., 601 F. Supp. 2d 670, 679–80 (D. Md. 2009).

83. *Compare* Salazar v. Butterball, LLC, 644 F.3d 1130, 1138 (10th Cir. 2011) (holding § 203(o) is not an exemption.), *and* Allen v. McWane, Inc., 593 F.3d 449, 458 (5th Cir. 2010) (holding § 203(o) is a definition and not an affirmative defense, so employee had the burden of proving a custom or practice existed), *and Franklin*, 619 F.3d at 612 (same), *and Anderson*, 488 F.3d at 957 (holding § 203(o) is a definition and not an affirmative defense), *with Alvarez*, 339 F.3d at 905 (holding § 203(o) is an exemption and must be read narrowly).

84. Salazar, 644 F.3d at 1136.

85. *Alvarez*, 339 F.3d at 897.

86. *Id.* at 904.

87. *Id.* at 898.

88. *Id.* at 900.

89. *Id.* at 900–01.

90. *See id*. at 901.

The Ninth Circuit first analyzed the issue of whether donning and doffing is compensable work using what it described as "*Steiner*'s bipartite 'integral and indispensable test,'" which requires employers to pay employees for activities that are "necessary to the principal work performed and done for the benefit of the employer."[91] The court held that donning and doffing required PPE satisfies this test.[92] The court reasoned that because the PPE "is required by law, by rules of [IBP], [and] by the nature of the work," the donning and doffing of the PPE is necessary to the principal work performed. It also held that the donning and doffing was done for the benefit of IBP to allow it to satisfy its requirements under OSHA's federal regulations to prevent injury, as well as preventing contamination of the meat products themselves.[93] While the court held that non-unique items of PPE, such as hardhats and earplugs, and unique items of PPE, like Kevlar gloves, are both integral and indispensable to the workers' duties at the meatpacking plant, the court ultimately concluded that employers need not compensate employees for donning and doffing non-unique items of PPE because the time it takes to do so is de minimis.[94]

The court then addressed the issue of whether PPE should be considered "clothes" for purposes of § 203(o). The court noted that PPE does not "plainly and unmistakeably" fit within the meaning of § 203(o)'s "clothing" exception, and that the definition of clothing should be construed against the employer seeking to assert the exception.[95]

Perhaps the most important observation of the Ninth Circuit was that specialized protective gear is different from normal clothing because it "provides a barrier against exposure to workplace hazards."[96] The court also referenced the distinction between normal clothes and PPE drawn by OSHA that "general work clothes (e.g. uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment."[97] The court used these distinctions to affirm the district court's ruling that § 203(o) does not apply to the donning and doffing of PPE.[98]

The U.S. Supreme Court granted certiorari in the case, but only on the issue of whether the time employees spend walking between the changing area and the production area is compensable under the FLSA.[99]

91. *Id.* at 903.
92. *Id.*
93. *Id.*
94. *Id.* at 904.
95. *Id.* at 905 (citing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)).
96. *Id.* at 905.
97. *Id.* at 905 (citing 29 C.F.R. § 1910.1030(b)).
98. *Id.* at 905.
99. IBP, Inc. v. Alvarez, 546 U.S. 21, 24 (2005).

However, the Court did recognize the possibility that donning and doffing can function as principal activities when it held that walking time is not excluded by the Portal-to-Portal Act if it occurs after an integral and indispensable activity triggers the workday.[100] This possibility that donning a required uniform or other safety equipment could initiate the continuous workday has led to a new flood of FLSA claims, filed by workers from many industries, including workers from foundries and nuclear power plants as well as security guards and police officers.[101] More than one hundred "donning and doffing" claims have been filed since the Supreme Court's 2005 decision in *IBP*.[102]

D. Multi-Million Dollar Settlements in Perdue Farms *and* In re Tyson Foods

While the DOL is still pursuing more effective strategies for enforcing the FLSA, it has had some past success in securing back pay for employees that were not compensated for donning and doffing PPE through settlement agreements.[103] The DOL negotiated multi-million dollar settlements for poultry plant workers in *Trotter v. Perdue Farms, Inc*.[104] and more recently in *In re Tyson Foods Inc. Fair Labor Standards Act Litig.*[105]

In *Perdue Farms*, the DOL, under the guidance of the Clinton Administration, pursued a claim against Perdue Farms, a poultry processing factory, in an attempt to get poultry companies to compensate workers for donning and doffing time after years of resistance.[106] The poultry companies argued that donning and doffing should be considered part of the employees' personal time, but the DOL viewed it as a task related directly to enforcement of workplace safety.[107] The DOL negotiated a settlement with Perdue under which it was to distribute $10 million to 25,000 former and current workers.[108] One attorney for the DOL estimated that workers at Perdue spent about eight minutes a day donning and doffing their PPE, which totaled about $500 worth of unpaid work per year.[109] The settlement covered a two-year period of non-compensation, meaning many Perdue workers received over $1,000 in back pay.[110] The back pay also went to undocumented immigrants who worked for Per-

100. *Id.* at 37.
101. Panich & Murray, *supra* note 41, at 76.
102. *Id.*
103. *See, e.g.*, *In re* Tyson Foods Inc., 694 F. Supp. 2d 1358, 1370 (M.D. Ga. 2011); Stipulation and Agreement of Settlement at 12, Trotter v. Perdue Farms, Inc., No. CIV.A.99-893-MPT (D. Del. Aug. 5, 2002), 2002 WL 34226966.
104. Stipulation and Agreement of Settlement, *supra* note 103, at 12.
105. Order Granting Joint Motion for Final Approval of Settlement Agreement, *In re* Tyson Foods Inc., 694 F. Supp. 2d 1358, 1370 (M.D. Ga. 2011) (No. 4:07-md-01854-CDL).
106. Greenhouse, *supra* note 33.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

due.[111] In *In re Tyson Foods Inc.*, a Georgia district court recently approved a settlement of up to $17.5 million in back pay and up to $14.5 million in attorney fees.[112]

E. Colorado Wage Order 27

Most states also have their own minimum wage laws to govern the conduct of their employers. The Colorado Minimum Wage Act[113] prohibits employment of workers "for wages which are inadequate to supply the necessary cost of living and to maintain the health of workers so employed" or "under conditions of labor detrimental to [workers'] health or morals."[114] The Act also allows the Colorado Department of Labor to set minimum wage and maximum hour standards.[115] The Colorado Department of Labor used this authority to issue Wage Order 27, which prescribes minimum wage and overtime requirements for employees in the retail, food and beverage, commercial support, and health and medical industries.[116] Plaintiffs across the country have started to bring "hybrid" suits that allege employer wage violations under both the FLSA and state laws governing wage and hour law,[117] which is exactly the route taken by the plaintiffs in *Salazar*.[118]

The plaintiffs in *Salazar* brought a claim under Wage Order 27, which covers workers in the "food and beverage industry," supporting their claim with the argument that the Butterball plant produces food for consumption.[119] The Tenth Circuit agreed with Butterball that Wage Order 27 only applies to retail-type food and beverage employers and not to "wholesale or industrial" workplaces like the Butterball facility, choosing to strike down the state law claim.[120]

Some practitioners argue that claims under state wage statutes should be preempted by the FLSA,[121] but at least one federal court of appeals has held that the FLSA does not preempt state laws where those laws offer more protection than the FLSA.[122]

111. *Id.*
112. Order Granting Joint Motion for Final Approval of Settlement Agreement, *supra* note 105.
113. *See* COLO. REV. STAT. §§ 8-6-101 to 8-6-119 (2011).
114. § 8-6-104.
115. § 8-6-106.
116. 7 COLO. CODE REGS. § 1103-1:1 (2011).
117. Anna Wermuth & Jeremy Glenn, *It's No Revolution: Long Standing Legal Principles Mandate the Preemption of State Laws in Conflict with Section 3(o) of the Fair Labor Standards Act*, 40 U. MEM. L. REV. 839, 841 (2010).
118. Salazar v. Butterball, L.L.C., 644 F.3d 1130, 1143 (2011).
119. *Id.*
120. *Id.* at 1144.
121. *See* Wermuth & Glenn, *supra* note 117, at 841–42.
122. Spoerle v. Kraft Foods Global, Inc., 614 F.3d 427, 429 (7th Cir. 2010).

II. *SALAZAR V. BUTTERBALL, L.L.C.*

A. Facts

The plaintiffs in this case, a group of workers at Butterball's plant in Longmont, Colorado, alleged that Butterball failed to properly compensate them under the FLSA for all of their hours worked.[123] The Longmont processing plant produces turkey products, including cooked, ready-to-eat turkey products.[124] Butterball purchased the plant from ConAgra Foods in 2006 and retained the same hourly employees, management, and pay practices that ConAgra had used during its time at the plant.[125]

There were two named plaintiffs in this case, Clara Salazar and Juanita Ybarra. Ms. Salazar worked at the Longmont plant from 1981 to 2009. Ms. Ybarra had worked at the plant since 1978 and was employed at the plant as of 2009 when Magistrate Judge Craig Shaffer initially heard the case.[126] Members of the class worked in the various areas of the plant, including in the deboning, evisceration, packaging, and quality assurance departments.[127] Company policy required the employees to wear various pieces of PPE while working in these areas of the plant, which they had to put on before clocking in at the beginning of their shifts.[128] They were also required to remove and sanitize their PPE after clocking out at the end of each shift.[129]

Generally, production employees wore PPE including frocks, aprons, plastic sleeves, gloves, cotton glove liners, boots or overshoes, hard hats, earplugs, and safety glasses.[130] When working in the deboning and evisceration areas, employees also wore mesh gloves, knife holders, and arm guards.[131] ConAgra did not pay most employees for time spent putting on and removing these articles of PPE, choosing to only pay employees in the "live hang unit" for donning and doffing time with twenty extra minutes of pay per day.[132] Butterball continued this practice and only paid live hand employees for donning and doffing time.[133] However,

123. *Salazar*, 644 F.3d at 1134.
124. *Id.*
125. *Id.*
126. Salazar v. Butterball, L.L.C., No. 08-CV-02071-MSK-CBS, 2009 WL 6048979, at *2 (D. Colo. Dec. 3, 2009), *report and recommendation adopted*, 2010 WL 965353 (D. Colo. Mar. 15, 2010) *aff'd*, 644 F.3d 1130 (10th Cir. 2011).
127. *Salazar*, 644 F.3d at 1134.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*, at 1134 n.2. "Live hanger" employees lift live poultry from the supply conveyer and hang the birds by their feet from a shackle conveyor. *See* Occupational Safety & Health Administration, *Poultry Processing Industry eTool—Plant Positions Glossary* http://www.osha.gov/SLTC/etools/poultry/glossary.html (last visited Jan. 27, 2012).
133. *Salazar*, 644 F.3d at 1134 n.2.

the live hang department was dissolved in 2008, and all remaining employees became known simply as "production employees."[134]

The United Food and Commercial Workers Local 7 (UFCW 7) represented the production employees at the Longmont plant.[135] ConAgra and UFCW 7 entered into two CBAs from 2005 to 2009 that outlined a grievance process for employees to voice any complaints against Butterball.[136]

On December 16, 2005, UFCW 7 filed a grievance claiming that employees should be paid for time spent donning and doffing PPE.[137] ConAgra denied the grievance and the union demanded arbitration on November 13, 2006.[138] However, arbitration never occurred and the union never brought up the issue of payment for the donning and doffing of PPE at either CBA negotiation.[139]

B. Procedural History

The plaintiffs filed suit against Butterball on September 25, 2008, alleging that Butterball had failed to pay employees for all of their time worked pursuant to the FLSA and Colorado Wage Order 27.[140] Magistrate Judge Shaffer issued a recommendation and report on the case on December 3, 2009, granting Butterball's motion for summary judgment and finding that Butterball had not violated the plain language of the FLSA.[141] Judge Shaffer also held that and that Wage Order 27 did not apply to the case.[142] The United States District Court for the District of Colorado adopted Judge Shaffer's report and recommendations.[143] The plaintiffs appealed this judgment, and the Tenth Circuit issued its opinion on July 5, 2011.[144]

C. Opinion

Chief Judge Mary Beck Briscoe wrote the unanimous opinion of the court, with Judge Stephanie Seymour and Judge Carlos Lucero participating in judgment and completing the three-judge panel for the Tenth Circuit.[145] The court affirmed the judgment of the district court and held

134. *Id.*
135. *Id.* at 1134.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1135.
140. Salazar v. Butterball, LLC, No. 08-CV-02071-MSK-CBS, 2009 WL 6048979, *3 (D. Colo. Dec. 3, 2009), *report and recommendation adopted*, 2010 WL 965353 (D. Colo. Mar. 15, 2010), *aff'd*, 644 F.3d 1130 (10th Cir. 2011).
141. *Id.* at *17.
142. *Id.*
143. Salazar v. Butterball, LLC, No. 08-CV-02071-MSK-CBS, 2010 WL 965353, at *12 (D. Colo. Mar. 15, 2010), *aff'd*, 644 F.3d 1130 (10th Cir. 2011).
144. *Salazar*, 644 F.3d at 1130.
145. *Id.* at 1133.

that Butterball was not required to pay any of its employees for time spent donning and doffing PPE because that time is excluded from "hours worked" under § 203(o) of the FLSA.[146] The court also held that because it chose to base its ruling on § 203(o) rather than on whether donning and doffing is "work" under the FLSA, the court did not have to determine whether the Supreme Court's holding in *IBP* affected the Tenth Circuit's holding in *Reich*.[147]

The court begins its analysis by stating that the definition of "changing clothes" under § 203(o) of the FLSA is ambiguous, which gives the court the authority to resolve this ambiguity.[148] The court holds that PPE should be considered clothes because this "expansive" definition "makes more sense" than a definition that would differentiate between normal clothes and PPE or between PPE and other equipment.[149] The court further notes that the unique PPE worn by the plaintiffs in the case is not so "cumbersome, heavy, or complicated" as to differentiate from regular clothing, referencing its holding in *Reich* that donning and doffing non-unique PPE is not "work."[150] The court chose not to defer to the 2010 interpretation of § 203(o) by the DOL distinguishing "clothes" from PPE, stating merely that the "persuasive power" of an agency decision is diminished if the agency repeatedly alters its interpretation of a statute.[151]

The court also held that the non-payment of donning and doffing time was a "mutually accepted custom or practice" that became an implied term of the CBA between the parties. The court concluded that UFCW 7 "acquiesced in the continuation of that practice" when it failed to bargain for payment for donning and doffing time in its 2008 CBA, and that UCFW 7 has no legitimate argument as to why the court should change this status quo.[152]

Furthermore, the court held that the workers could not appeal their claim that they should also be compensated for mid-day donning and doffing to take meal breaks because they failed to object to this aspect of Magistrate Shaffer's summary judgment order.[153]

146. *Id.* at 1142–43.

147. *Id.* at 1136 n.3. The Tenth Circuit held in *Reich* that donning and doffing non-unique PPE was not "work" under the FLSA in the context of *Tennessee Coal* rather than evaluating whether this activity was integral and indispensable, the proper test under *Alvarez*. *Garcia v. Tyson Foods, Inc.*, 474 F.Supp.2d 1240, 1246 (D. Kan. 2007).

148. *Id.* at 1138.

149. *Id.*

150. *Id.* at 1140.

151. *Id.* at 1139.

152. *Id.* at 1142.

153. *Id.* at 1143.

D. Amicus Briefs

1. National Employment Lawyers Association

The National Employment Lawyers Association (NELA) submitted a brief on behalf of the plaintiffs to highlight the importance of requiring employers to pay employees for donning and doffing PPE.[154] NELA argues that the FLSA offers necessary protection to "a vulnerable workforce," including many immigrants who are less likely to enforce their rights, and that this purpose should dictate interpreting § 203(o) to afford the most protection possible to low-wage workers.[155]

NELA also argues that the court should adopt the interpretation of "clothes" used by the DOL. One important argument made by NELA is that when Congress amended the FLSA in 1949 to include § 203(o), the "clothes" Congress had in mind were those that workers in the bakery industry changed into and took off in the 1940s.[156] NELA and the DOL argue that such clothes are nothing like the PPE worn in the meatpacking industry today.[157] NELA implores the Tenth Circuit to adopt the narrow definition of "clothes" used by the Ninth Circuit in *Alvarez v. IBP* because it is a "narrow, workable standard that effectuates the meaning of § 203(o) without overextending the meaning of 'clothes' such that the term 'would embrace any conceivable matter that might adorn the human body, including metal-mesh leggings, armor, spacesuits, riot gear, or mascot costumes.'"[158]

2. United Food and Commercial Workers Union

The UFCW also wrote an amicus brief on behalf of the plaintiff workers arguing against a finding that there was a "custom or practice" of non-payment for donning and doffing at the Butterball plant. The UCFW argues that this case does not demonstrate "waiver by acquiescence."[159]

The UCFW cites a number of NLRB precedents holding that employers are not absolved of their duty to bargain collectively just because certain subjects were "neither discussed nor embodied in any of the

154. Brief of the National Employment Lawyers Ass'n as Amicus Curiae Supporting Plaintiffs-Appellants, Salazar v. Butterball, L.L.C., 644 F.3d 1130 (10th Cir. 2011) (No. 1:08-cv-02071-MSK-CBS), 2010 WL 4597212.

155. *Id.* at *3–4.

156. *Id.* at *6 (citing DEPUTY ADM'R NANCY J. LEPPINK, U.S. DEP'T OF LABOR WAGE AND HOUR DIV., OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA), SUBJECT: SECTION 3(O) OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 203(O), AND THE DEFINITION OF "CLOTHES," 2010 WL 2468195).

157. *Id.* at *6–7.

158. *Id.* at *7 (quoting Alvarez v. IBP, Inc. 339 F.3d 894, 905 (9th Cir. 2003)).

159. Brief of United Food and Commercial Workers International Union and United Food and Commercial Workers Union Local 7R as Amici Curiae Supporting Plaintiffs-Appellants, Salazar v. Butterball, L.L.C., 644 F.3d 1130 (10th Cir. 2011) (No. 1:08-cv-02071-MSK-CBS), 2010 WL 4281015 at *7.

terms and conditions of the contract."[160] It argues that it would be a circular and superficial analysis of the rights guaranteed by the National Labor Relations Act and the process of collective bargaining to simply hold that silence on a particular issue by both employer and union can create an implied CBA term.[161]

III. ANALYSIS

The interpretation of the term "changing clothes" under FLSA § 203(o) is an issue of first impression in the Tenth Circuit. Varying interpretations of § 203(o) have now resulted in a circuit split between the Ninth Circuit and the Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits.[162] fDistrict courts in Pennsylvania, Wisconsin, and Illinois have also sided with the view of the Ninth Circuit.[163]

The Tenth Circuit's opinion gives little weight to the purpose of the FLSA, and it spends just four sentences discussing the DOL's interpretation of § 203(o).[164] The court fails to do a full analysis of the DOL's interpretation under *Skidmore v. Swift & Co.*,[165] instead using a Tenth Circuit case, *Pacheco v. Whiting Farms Inc.*,[166] to write off the DOL's position "is not particularly well-reasoned."[167] The outcome of *Salazar* hinges on the Tenth Circuit's uneasiness with the political nature of the DOL's opinion letters, leading the court to its decision against applying judicial deference in this case. However, this fear can be detrimental to the effective functioning of the administrative state when it leads to decisions like the one in Salazar.

The clear intent of the 2010 DOL Opinion Letter was to point out that § 203(o) has little practical application to today's modern workplaces where employers, government regulations, and the nature of certain jobs require many workers to wear PPE in order to perform those jobs.[168] The DOL also explains that workers should be compensated for donning

160. *Id.* at *2 (quoting NLRB v. Jacobs Mfg. Co., 196 F.2d 680, 683 (2d Cir. 1952)).

161. *Id.* at *13.

162. *See Salazar*, 644 F.3d at 1140–41 (holding that poultry workers' PPE were clothes); Franklin v. Kellogg Co., 619 F.3d 604, 614–15 (6th Cir. 2010) (holding that frozen food workers' uniforms and PPE, including hair nets, safety glasses, ear plugs, and hard hats, were clothes); Spoerle v. Kraft Foods Global, Inc., 614 F.3d 427, 428 (7th Cir. 2010) (holding that meat production workers' boots, hard hats, smocks, and hair nets were clothes), *cert. denied*, 131 S.Ct. 933 (2011); Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 215–18 (4th Cir. 2009) (holding that poultry workers' PPE were clothes); Anderson v. Cagle's, Inc., 488 F.3d 945, 955–56 (11th Cir. 2007) (holding that poultry workers' PPE were clothes); Bejil v. Ethicon, Inc., 269 F.3d 477, 480 n.3 (5th Cir. 2001) (holding that lab coats, hair covers, and shoe covers were clothes).

163. *In re* Cargill Meat Solutions Wage & Hour Litig., 632 F. Supp. 2d 368, 385 (M.D. Pa. 2008); Gonzalez v. Farmington Foods, 296 F. Supp. 2d 912, 930–31 (N.D. Ill. 2003) (using Alvarez as persuasive authority to find poultry workers' sanitary and safety equipment were not "clothes").

164. *Salazar*, 644 F.3d at 1139.

165. 323 U.S. 134 (1944).

166. 365 F.3d 1199 (10th Cir. 2004).

167. *Salazar*, 644 F.3d at 1139.

168. U.S. Dep't of Labor, Wage and Hour Div., FLSA2010-2, Section 3(o) of the Fair Labor Standards Act, 29 U.S.C. § 203(o), and the definition of "clothes." *2 (2010).

and doffing time because it often occurs after "clothes changing," which can be a principal activity that starts the compensable workday under *IBP*.[169]

Congress delegated power to the DOL, under the guidance of the President, to issue this kind of interpretive policy statement. The DOL is entitled to a full evaluation of its position under *Skidmore*, an analysis the Tenth Circuit did not complete in *Salazar*. A closer look at the DOL's position under the framework of *Skidmore* reveals that the DOL presents a well-reasoned, expert opinion that it intends to have broadly applicable effect. The unfortunate consequence of the court's refusal to consider deference to the DOL is that it allows unionized employers to continue to exploit the "custom or practice" language of § 203(o) to escape their obligations under the FLSA. With this kind of judicial distrust of agency policymaking, the best option for the DOL to protect employees from this exploitation is to use notice and comment rulemaking to secure more judicial deference.

A. The Court's Definition of Clothes Does Not Reflect the Goals of the FLSA or the Holding of IBP

The purpose of the FLSA is to protect workers' rights and promote their safety, health, and well-being.[170] However, the *Salazar* court undercuts this purpose when it holds that excluding the donning and doffing of non-unique PPE from compensable time under § 203(o) is appropriate because this task is not "work."[171] This assessment is problematic because it fails to take into account the integral and indispensable nature of PPE in the poultry packing industry and the role PPE plays in keeping employers compliant with OSHA and other safety regulations.

Payment for time spent properly donning safety gear should be required under § 203(o), not only because it serves the employer's goal of maintaining a safe workplace, but also because donning and doffing PPE is integral and indispensable to meat and poultry packing. Items of PPE such as, metal gloves and arm guards are required by employers and the law to perform many of the extremely dangerous jobs undertaken by poultry workers, meaning that they are absolutely integral and indispensable under the *Steiner* test to the tasks at hand.[172] The PPE used in the poultry industry are "necessary to the principal work performed and done for the benefit of the employer," so the donning and doffing of these items are principal activities themselves that must be included in the FLSA's expansive definition of work.[173]

169. IBP, Inc. v. Alvarez, 546 U.S. 21, 30 (2005); *id.* at *3.
170. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739 (1981).
171. *Salazar*, 644 F.3d at 1140.
172. *Alvarez*, 339 F.3d at 903.
173. *Id.*

The court's holding that PPE are clothes and should be excluded from "work" fails to recognize the safety functions that separate PPE from normal clothing and make the donning and doffing of PPE inherently beneficial to an employer's goal of complying with safety regulations.[174] The court fails to engage in a *Steiner* analysis of donning and doffing PPE, even though it bases its holding on whether PPE are clothes on whether or not they require "work" to don and doff, illustrating the court's view that "work" has an important bearing on whether certain items are "clothes." The court could have made a much more convincing argument if it had used the *Steiner* test to determine if donning and doffing PPE is "work" before incorporating any definition of work into an interpretation of "clothes." This approach would have been firmly grounded in the Supreme Court's holding in *IBP* rather than the outdated Tenth Circuit holding in *Reich*, but the court chose to leave the resolution of whether *Steiner* is now the proper standard for defining the principal activities that constitute "work" for another case.[175]

The court also holds that because it does not take much time or effort to don and doff the unique PPE in this case—mesh gloves, arm guards, and knife holders—it is not "work."[176] This holding implies that even if the court were to apply the *Steiner* test and hold that donning and doffing the PPE is "work," it would still hold that the work is *de minimis*, which would support the court's current view that PPE are more like traditional clothing that do not require quantifiable work to don and doff.[177]

Any future use of the *de minimis* doctrine to adjust the court's interpretation of § 203(o) would undermine the major financial implications of donning and doffing for employers and employees alike, as evidenced by one of the WHD's largest settlements against an employer in the *Perdue Farms* case.[178] The Supreme Court has previously recognized the *de minimis* exception to compensable work, defining the concept in *Anderson* by stating that "[s]plit-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act" and that it was "only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved."[179] However, the Supreme Court has never fully defined what constitutes a "split-second absurdity," leaving the federal circuit courts to determine when work is *de minimis*.[180] Courts have found activities to be *de minimis* anywhere from one to twenty minutes, but

174. *Salazar*, 644 F.3d at 1140–41.
175. *Id.* at 1136 n.3.
176. *Id.* at 1140.
177. *Id.*
178. *See* Greenhouse, *supra* note 33.
179. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946).
180. Richard L. Alfred & Jessica M. Schauer, *Continuous Confusion: Defining the Workday in the Modern Economy*, 26 A.B.A. J. LAB. & EMP. L. 363, 378 (2011).

normally only activities that take fewer than ten minutes are *de minimis*.[181]

Time spent donning and doffing amounts to many hours annually in the aggregate, constituting a huge amount of money per worker each year. This amount of time is hardly a "split second absurdity" that should be considered *de minimis* as a matter of law. Circuit courts are depriving thousands of low-wage workers within their jurisdictions of millions of dollars each year simply because they are applying different tests to define "work" and "clothing." These workers are the very employees the FLSA was enacted to protect, and any minimization of the impact of these donning and doffing wages does a disservice to the purpose of the FLSA.

B. The Court Should Defer to the Department of Labor's Interpretation of § 203(o)

1. The DOL Makes a Logical, Informed Opinion About the Definition of Clothes Which Merits Some Judicial Deference

Salazar hinges in the court's refusal to adopt the definition of "clothes" outlined by the Department of Labor in its most recent Opinion Letter on the FLSA.[182] The DOL is charged with the enforcement and interpretation of the FLSA, and should therefore receive some level of deference from the courts where an ambiguous provision, such as the one in § 203(o), is at issue. However, the Tenth Circuit does not even go through a full analysis of the DOL's interpretation under *Skidmore*, giving only four sentences to its evaluation.[183]

The DOL Administrator's most recent interpretation of § 203(o) is logically supported and serves the guiding purpose of the FLSA. The DOL distinguished protective equipment from "clothes" as defined in § 203(o) and found that "the § 203(o) exemption does not extend to protective equipment [PPE] worn by employees that is required by law, by the employer, or due to the nature of the job."[184] The Ninth Circuit relied on a similar definition of "clothes" in its decision in *Alvarez*.[185] The *Al-*

181. *Id.* (citing Green v. Planters Nut & Chocolate Co., 177 F.2d 187, 188 (4th Cir. 1949) (applying *de minimis* rule to employees who reported up to ten minutes before start of shift to check in and prepare for work); Frank v. Wilson & Co., 172 F.2d 712, 716 (7th Cir. 1949) (holding that 9.2 minutes per day consisting of 6.2 minutes of walking time and 3 minutes of other preliminary activities is considered *de minimis*); Lasater v. Hercules Powder Co., 73 F. Supp. 264, 271 (E.D. Tenn. 1947) (holding changing clothes and preliminary preparations for work were *de minimis*, although not stating the amount of time preliminary activities took); McIntyre v. Joseph E. Seagram & Sons Co., 72 F. Supp. 366, 372 (W.D. Ky. 1947) (holding ten to twenty minutes per day going to locker, exchanging uniform, changing uniform, and reporting to foreman within *de minimis* rule)).

182. *Salazar*, 644 F.3d at 1139.

183. *Id.*

184. Opinion Letter Fair Labor Standards Act (FLSA), FLSA2010-2, 2010 WL 2468195 (Dep't of Labor June 16, 2010), at *2.

185. Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003).

varez court took the definition of PPE straight from OSHA's own regulations, which defines PPE as "specialized clothing or equipment worn by an employee for protection against a hazard."[186]

The DOL's analysis of the legislative history behind § 203(o) provides a thorough background for its distinction between normal clothing and clothing used for protection against a hazard.[187] In its analysis, the DOL highlighted Congress's intent to limit the scope of section § 203(o) by using the phrase "changing clothes" to limit the bill's original breadth, which excluded "all activity performed under a [collective bargaining agreement]" from hours worked for which the employer and union had an express or implied agreement to do so.[188] Congress "narrowed the scope of § 203(o)" because it wanted to allow the bakery industry to continue bargaining over the donning and doffing of clothing items like aprons, as many bakeries had done throughout the 1940s.[189] The DOL argues that because these "clothes" worn by bakers were neither required by law nor intended to protect against environmental hazards, PPE should be categorized as something entirely different from traditional clothes.[190]

A narrow definition of "clothes" that distinguishes between PPE and regular work clothes allows employers to continue bargaining over regular work clothes while protecting the safety interests of workers at the same time.[191] This definition also recognizes that PPE is required due to the nature of the job and the legal requirements of OSHA and that the donning and doffing of such equipment should be paid by the employer because it is "work" under *Steiner*.[192]

Agency interpretations should be given some weight when they have the power to persuade,[193] and the DOL's interpretation of § 203(o) deserves at least some deference under this standard because the DOL has the highest level of expertise in the area of the FLSA and its statutory definitions. Not only does the DOL's 2010 Opinion Letter protect employees more than any other interpretation, it is the first of the DOL's interpretations on § 203(o) that is intended to have a broad application.[194] Despite this emphasis that the 2010 interpretation provides more formal and comprehensive guidance, the Tenth Circuit minimizes the fact that it still owes some level of deference to the DOL under *Skidmore*.

186. *Id.* (quoting 29 C.F.R. § 1910.1030(b) (1999)).
187. Opinion Letter Fair Labor Standards Act (FLSA), *supra* note 184, at *3
188. *Id.*
189. *Id.*
190. *Id.*
191. *Alvarez*, 339 F.3d at 905 n.8.
192. *See id.* at 903.
193. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
194. Opinion Letter Fair Labor Standards Act (FLSA), *supra* note 185, at *5. The DOL has since issued multiple amicus briefs for employees in an attempt to secure more deference for its letter.

The U.S. Supreme Court held in *Skidmore* that the analysis of a non-binding agency interpretation of a statute "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[195] The Tenth Circuit references only the last piece of this framework, stating that "agency opinion letters are entitled to respect . . . to the extent that they have the 'power to persuade.'"[196] The court appears to completely ignore the first two elements of the analysis, the thoroughness of the consideration and the validity of its reasoning, instead basing its decision against giving deference on the consistency factor.[197]

Other circuits seem to have found a better balance between the factors. In a 2007 opinion analyzing the DOL's interpretations of § 203(o), the Eleventh Circuit noted the following about the DOL's 2002 opinion letter: "While less deference may be called for, the most recent advisory opinion is entitled to some deference just the same. Moreover, this most recent opinion provides a far more detailed rationale for its conclusion than the previous opinions."[198]

In the alternative to granting deference, the Tenth Circuit created its own definition of "clothes." Interestingly, the court goes through the very same points of statutory analysis as the DOL's opinion letter. Both bodies describe the legislative history of § 203(o) and the various definitions of "clothes" created in other circuits. However, the Tenth Circuit ultimately relied heavily on its outdated definition of when donning and doffing is work from *Reich* to hold that non-unique PPE are "clothes" because they are not "heavy, cumbersome, or complicated" such that they should not be considered clothes. This line of reasoning misses a crucial distinction articulated by the Sixth Circuit—defining something as clothing does not affect whether that thing is still integral and indispensable to an employee's work, meaning that donning and doffing that "clothing" can still be a principal, compensable activity outside of the exclusion offered by § 203(o). The DOL recognizes this distinction, and it in fact separates its letter into two sections to emphasize the importance of separating the concepts of PPE as clothing and the donning and doffing of PPE as a principal activity.

The Tenth Circuit seems to convolute these two ideas when it considers the issue of how much "work" is involved in donning and doffing an item while creating a definition of "clothes." Instead of combining these two ideas, the court should have determined whether donning and doffing certain PPE is integral and indispensable before determining if

195. *Skidmore*, 323 U.S. at 140.
196. Salazar v. Butterball, L.L.C., 644 F.3d 1130, 1139 (2011).
197. *Id.*
198. Anderson v. Cagle's, Inc., 488 F.3d 945, 956–57 (11th Cir. 2007).

the "changing clothes" exclusion under § 203(o) could apply to this case. It is precisely this kind of confusion surrounding these two distinct issues that warrants a ruling by the Supreme Court or a more binding interpretation from the DOL.

2. The Court's Characterization of the DOL's Shifting Stance on § 203(o) Reflects an Unnecessary Trend of Judicial Discomfort with Agency Interpretations

One of the court's main arguments for choosing not to adopt the DOL's interpretation of FLSA § 203(o) is that the "persuasive power of the opinion" was diminished because the agency has repeatedly altered its interpretation of a statute.[199] However, this Tenth Circuit stance seems to be in direct conflict with the U.S. Supreme Court, which has held that "the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute."[200] The Court's disapproval of the DOL's shifting interpretations seems to stem more from its discomfort with the current pro-employee position of the DOL that PPE are not clothes rather than any well-reasoned opinion that the DOL is no longer entitled to any level of respect for its opinions.

The DOL's position on § 203(o) has shifted very clearly with the political landscape of the DOL. During the Clinton era in 1997, the DOL found that PPE were not "clothes," requiring employers to pay employees for time spent donning and doffing PPE. The DOL issued another opinion letter on January 15, 2001, just two weeks before DOL Secretary Alexis Herman was replaced by former President George W. Bush's Secretary of Labor, Elaine Chao, that reiterated the same definition. In 2002, during the Bush Administration, an employer-friendly DOL shifted its official position to give an advantage back to employers by "reconsidering" the DOL's consistent interpretation of § 203(o). The most recent shift back to the idea that PPE are not "clothes" came in 2010, after the election of President Obama, who has ushered in a more employee-friendly DOL administration under current Secretary of Labor Hilda Solis.

The DOL announced on March 24, 2010, that going forward it would no longer issue opinion letters based on specific factual predicates, but "will set forth a general interpretation of the law and regulations, applicable *across-the-board* to all those affected by the provision

199. *Salazar*, 644 F.3d at 1139 (citing Pacheco v. Whiting Farms, Inc., 365 F.3d 1199, 1205 n.3 (10th Cir. 2004)).

200. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (noting that a change in an agency interpretation is not automatically invalidating); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 864 (1984) (deferring to change in agency's opinion and noting that Congress has never disapproved of a flexible reading of a statute).

in issue."[201] Thus, unlike previous letters, the Administrator's Interpretation was designed to provide formal, "comprehensive guidance."[202] It is clear from the DOL's most recent letter that it intends for its 2010 opinion to be the guideline for all employers going forward. The DOL uses this opinion to recognize the fact that FLSA § 203(o) has been a political sticking point in the past, and that it was in the best interest of workers to issue a comprehensive opinion that speaks specifically to the needs of the modern workplace.

The Tenth Circuit's argument that this more comprehensive guidance does not deserve deference because it represents a shift in DOL policy illustrates the court's failure to recognize the political nature of the DOL and the necessity of shifting statutory interpretations to meet the changing needs of the modern workplace. The court is entitled to ignore the fact that the DOL is embroiled in a political battle rooted in an uncertain economic future, but it should step forward with an interpretation that advances justice and accurately characterizes the state of immigrant labor disputes rather than scolding the DOL for inconsistencies. The Court turns a blind eye to the serious and troubling marginalization of unionized workers under § 203(o).

The court in *Salazar* treats these shifts in policy as though any current DOL position on the issue of interpreting § 203(o) should be given no deference whatsoever. However, this kind of political influence over administrative agencies occurs with every shift of White House power.[203] The most recent DOL interpretation also states that the many opinions it has issued on § 203(o) reflect the true ambiguity of the statute as well as the DOL's choice not to issue a general guideline up until 2010. This aspect of the *Salazar* decision appears to be largely influenced by the shifting political ideologies of the DOL and the court's fundamental distrust for this process.

Before her appointment to the United States Supreme Court, Justice Elena Kagan wrote an article titled *Presidential Administration* that examined the transformation of the administrative state under President Clinton.[204] Justice Kagan argued in her article that President Clinton brought the control of agencies closer to the office of the President than ever before under what legal scholars call the "presidential control" model.[205] Clinton sought to accomplish what a sharply divided Congress could not by instituting administrative policies to solve many of the nation's problems.[206] Justice Kagan argued that presidential influence over

201. *Final Rulings and Opinion Letters*, UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, http://www.dol.gov/whd/opinion/opinion.htm (last visited Aug. 27, 2012).
202. *Id.*
203. Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 955 (2003).
204. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).
205. *See id.* at 2296.
206. *Id.*

agency policy allows for presidents to accomplish important social and fiscal goals in an "expeditious and coherent" way without having to wade through a "bureaucracy that hums along on automatic pilot."[207]

Justice Kagan also predicted in her article that President George W. Bush would not want to relinquish any of the political power over agencies that Clinton had harnessed and exercised over his eight years as president.[208] This evolution of presidential administrative control resulted in today's close bond between the policy and politics of the president and the regulatory activities of agencies.[209] The heads of each agency do everything in their power to ensure that their actions while serving for the president set them up to secure employment after the end of the administration, whereas the president is often interested in securing his place in history and protecting the prospects of his party.[210] This results in agencies issuing a large number of policy statements, rules, and guidelines just before a new cabinet takes office in an attempt to finish all the work it undertook during the previous administration.[211] The DOL has followed this trend of agency action during transitional periods, as evidenced by the timing of its opinion letters on § 203(o) of the FLSA.

Justice Kagan called for courts to embrace the expeditious and efficient aspects of presidential administration by granting increased deference to interpretations issued by executive agencies, thereby linking deference with presidential involvement in agency policy and promoting the President's role in "neglected areas of regulation."[212] Justice Kagan noted that the *Chevron* deference rule had its "deepest roots" in the idea that agencies are instruments of the President, and they are "entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public."[213] Furthermore, Justice Kagan argued that "a focus on presidential action would reverse in many cases the courts' current suspicion of change in regulatory policy."[214]

Judicial recognition of the benefits of presidential control seems aptly suited to the DOL and the issue of "changing clothes." This recognition would have two extremely important benefits. First, it would counteract the courts' suspicion of the shifts in DOL policy over the definition, which has thus far caused all but the Ninth Circuit to find that the DOL's opinion letters do not deserve deference because of its shifting stance. Secondly, it would allow the DOL to secure more deference for its current interpretation without having to resort to notice and comment

207. *Id.* at 2339.
208. *Id.* at 2317
209. *Id.* at 2248.
210. Beermann, *supra* note 203, at 958.
211. *Id.* at 955.
212. Kagan, *supra* note 204, at 2376–78
213. *Id.* at 2373.
214. *Id.* at 2378.

rulemaking, which is something that will allow the DOL to change its position as the modern workplace evolves and new views emerge.[215]

If a case dealing with donning and doffing as work or the definition of "changing clothes" reaches the Supreme Court again, as it likely will, the court should consider following the deferential path laid out by Justice Kagan. The DOL needs respect from the judiciary to continue developing policies to protect employees, and it would be better able to accomplish these goals without having to submit each and every interpretation to notice and comment in order to secure *Chevron* deference.[216]

C. The Court's Broad Definition of "Custom or Practice" Gives Employers an Unfair Advantage, Especially Given the Unsettled Issue of Whether Donning and Doffing Is a Principal Activity in the Tenth Circuit

The issue of whether donning and doffing is a principal activity has not been addressed in the Tenth Circuit since *Reich*, which was decided long before *IBP*. Given that *Reich* is still the controlling case in the circuit on the definition of "work," excluding the donning and doffing of non-unique PPE from compensable activities, the Tenth Circuit makes a rather circular argument when it holds that UCFW 7 "acquiesced" to a practice of non-compensation that UCFW 7 had no reason to think it could challenge as inconsistent with the law.[217]

Collective bargaining is an extremely complicated process that involves an incredible amount of strategy and preparation for even the simplest of issues. The court's discussion of "custom or practice" implies that if payment for donning and doffing were a real issue for the employees, it would have been discussed at negotiations.[218] However, this stance ignores the fact that the employees affected by § 203(o) are usually all low-wage workers who face a constant fight to get employment benefits that many people take for granted, such as cost of living salary increases and employer contributions to health insurance. Unions must pick and chose their battles at every negotiation, so it makes little sense for the court to require employees to bargain for the compensation of donning and doffing time that may or may not be afforded to them under Tenth Circuit law. Just because a vulnerable employee group fails to bring the issue of donning and doffing time to the bargaining table should not mean that Butterball automatically receives the upper hand under the "custom or practice" exclusion under § 203(o).

215. *Id.*.

216. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) (explaining how courts should evaluate legally binding agency interpretations).

217. Salazar v. Butterball, 644 F.3d 1130, 1142 (2011).

218. *Id.* at 1141–43.

The court holds that UCFW 7's failure to bargain for paid donning and doffing time signals the employees' "acquiescence" to Butterball's "custom or practice" of non-payment for this activity. The court supports this argument with one of the key principles of the collective bargaining process—employers like to maintain the status quo. Employers typically combat employee requests for more benefits by sticking to what the employees accepted in the last contract negotiation. It can often be very hard for employees to get some kind of new benefit if the employer can argue that the employees were satisfied without that benefit in the past.[219]

In *Salazar*, the court uses the status quo to point out that employees must bargain to get the right to compensation for donning and doffing, just as the employer would have to bargain over a change if it had established a practice of paying for this activity. However, this concept assumes that § 203(o) is a subject of bargaining, even if the parties never discussed the issue or considered it to be a bargaining issue. This assumption is problematic because it means that unionized employees do not have the same rights to compensation under the FLSA for donning and doffing PPE that non-unionized employees do unless they bargain for them. It seems quite far-fetched that the drafters of § 203(o) intended to give unionized employees fewer rights, especially when the legislative history of the statute indicates that Congress merely wanted to allow bargaining if the parties wanted to engage in such a process.[220]

In fact, UCFW 7 makes this argument on behalf of the employees that § 203(o) essentially requires that they bargain for compensation for which they would otherwise be entitled to under the FLSA. The court discredits this argument, saying that it ignores the fact that § 203(o) makes donning and doffing time a subject of bargaining rather than a guaranteed statutory right. The court offers no authority to back up this proposition, which directly contradicts the legislative history of § 203(o) as described above.

Other courts have taken broader approaches to the issue of acquiescence by recognizing that the issue warrants an evaluation of whether payment for donning and doffing has been *actually* discussed by the parties on prior occasions.[221] In fact, a Colorado district court decision cited in UCFW 7's amicus brief held that the absence of a CBA term for pay-

219. *See* Beacon Piece Dyeing & Finishing Co., 121 NLRB 953, 959–60 (1958) (in failing to pursue subject matter of workload, "union was simply trading off one demand in return for concessions on another, which is an everyday occurrence in collective bargaining having no relation whatsoever to an asserted 'management prerogative' position by an employer and the union's acquiescence therein").

220. Opinion Letter Fair Labor Standards Act (FLSA), *supra* note 184, at *2.

221. Figas v. Horsehead Corp., No. 06-1344, 2008 WL 4170043, at *14 (W.D. Pa. Sept. 3, 2008) (citing Kassa v. Kerry, Inc., 487 F. Supp. 2d 1063, 1071 (D. Minn. 2007) ("Indeed, to the extent that the union members never raised the issue even among themselves, this may suggest that they did not knowingly acquiesce in [the employer's] policy of non-payment for clothes-changing time.").

ment for the time spent donning and doffing is not the equivalent of a custom or practice of non-compensation over an eleven-year bargaining relationship.[222] The Tenth Circuit does not address any of the case law cited by UCFW 7.

The court gives little weight to the employees' arguments that § 203(o) was never intended to give them less of a right to compensation in the absence of collective bargaining over that compensation. The Tenth Circuit's holding that UCFW acquiesced to non-payment of donning and doffing is quite weak, especially when it is clear the UCFW filed a grievance objecting to this practice on December 16, 2005, only one month after the Supreme Court issued its holding in *IBP*. [223] The Tenth Circuit's approach to the "custom or practice" language in § 203(o) gives employers an unfair advantage by requiring unionized employees to bargain for rights they should already be entitled to under the FLSA.

D. The Supreme Court Should Defer to DOL's Interpretation of § 203(o)

Absent any legislative action on the part of Congress or the DOL, the U.S. Supreme Court should give deference to the DOL's current interpretation of § 203(o) using the modified *Chevron* deference model described by Justice Kagan.[224] In the alternative, it should evaluate the interpretation using Skidmore, which also warrants a ruling of deference to the DOL.

The Ninth Circuit's holding in *Alvarez* that PPE are not clothes, which the DOL cites in its 2010 letter, reflects that court's understanding that PPE is integral and indispensable to work in the poultry industry, making donning and doffing that PPE different from donning and doffing typical clothing.[225] The Ninth Circuit typically interprets employment and labor laws with much more deference to the interests of employees and more emphasis on protecting their rights than any other circuit, and the split created by this issue illustrates that tendency. The Tenth Circuit's failure to interpret "clothes" under § 203(o) using the integral and indispensable standard for activities that are "work" shows the Tenth Circuit's misunderstanding of how these concepts interact. The Supreme Court should give more weight to the Ninth Circuit's interpretation of § 203(o) because it is more cognizant of the purpose of the FLSA and it uses a standard for defining "work" that the Court has already approved.

222. *See* Brief of United Food and Commercial Workers International Union and United Food and Commercial Workers Union Local 7R as Amici Curiae Supporting Plaintiffs-Appellants, *supra* note 159 at *5 (citing Rogers v. City and Cnty. of Denver, 2010 WL 1904516 (D. Colo. May 11, 2010)).

223. *Salazar*, 644 F.3d at 1134.

224. *See* Kagan, *supra* note 204, at 2376–79.

225. Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003).

Furthermore, the Supreme Court should give deference to the expertise of the DOL and the well-reasoned position of its 2010 opinion letter. All but one of the courts of appeals cases cited by the Tenth Circuit were decided before the most recent DOL opinion letter was issued on June 16, 2010, with several of the courts noting that their definitions of "clothes" were consistent with the current interpretation of the DOL.[226] This recognition of the DOL's expertise and entitlement to deference by other courts stands in stark contrast to the four-sentence treatment the Tenth Circuit gave to the issue in *Salazar*. In fact, the Sixth Circuit devotes more than two full pages to its *Skidmore* analysis, analyzing the legislative history of the FLSA, the plain language of § 203(o) itself, and the varying interpretations issued by the DOL before reaching a decision on the deference issue.[227]

The Court should also give deference to the DOL as a matter of public policy. The FLSA was enacted specifically to protect low-wage employees who may not be willing to speak up about unfair labor practices because they fear that they will lose their jobs. The issue of payment for donning and doffing time may seem like a fairly insignificant matter, but it becomes truly enormous when one considers that employers have the deck stacked against immigrant workers in the meatpacking industry. These employees perform an extremely dangerous type of labor, and they deserve to be paid for all of their work. The DOL is attempting to make sure these employees are compensated, but it needs the support of the courts to recognize and enforce its interpretations.

CONCLUSION

Courts are entitled to make independent, factual determinations about whether or not an agency interpretation deserves deference, and the Supreme Court may well address this deference issue if it grants certiorari in a donning and doffing case that includes the § 203(o) issue. However, the circuit split surrounding the definition of clothes in § 203(o) and the resulting judicial discomfort with this "gyration" should be enough to indicate to Congress that it should reevaluate this section of the statute and amend or supplement it for purposes of clarification and fairness to the employees it governs.

In the event that the Supreme Court chooses not evaluate § 203(o), Congress should act to clarify the provision, which has not been amend-

226. *See* Franklin v. Kellogg Co., 619 F.3d 604, 615 n.3 (6th Cir. 2010) (noting that although the court's holding that PPE are clothes is inconsistent with the 2010 DOL letter, the Ninth Circuit, and several district courts, it is consistent with *Spoerle*); Spoerle v. Kraft Foods Global, Inc., 614 F.3d 427, 428 (7th Cir. 2010) (noting that § 203(o) issue decided based on reasoning of *Sepulveda*, despite being issued on Aug. 2, 2010), *cert. denied*, 131 S. Ct. 933 (U.S. 2011); Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 216 n.3 (4th Cir. 2009) (stressing that the decision complies with the DOL Opinion Letters of 2002 and 2007); Anderson v. Cagle's, Inc., 488 F.3d 945, 956 (11th Cir. 2007) (noting that the court's holding is consistent with the 2002 DOL Opinion Letter).

227. *Franklin*, 619 F.3d at 614–16.

ed since its creation in 1949. As the number of low-wage and immigrant workers in the United States increases every year, the need for clarifying legislation to protect these workers and ensure they receive fair wages only increases as well. The recent flood of donning and doffing litigation signals that the modern workplace requires a fresh evaluation of the term "changing clothes" and the continuing viability of § 203(o). Ultimately, the aggregate compensation for donning and doffing time is worth an incredible amount of money to employers and employees alike, and there does not appear to be an end to this legal battle without intervention.

The Tenth Circuit failed to uphold the employee protections of the FLSA when it interpreted § 203(o) in a way that allows employers to continue to exploit the work of a vulnerable, largely immigrant workforce. Conversely, the DOL has attempted to protect this workforce and ensure that its members are compensated fairly, but it faces a wall of judicial discomfort with its methods that can only be altered by the example of the Supreme Court. While it is clear the issues of donning and doffing and changing clothes have become a major sticking point for employers across the country, it remains to be seen if Congress and the Supreme Court will take the measures necessary to translate these aspects of the FLSA for application in the modern workplace.

Amanda Walck[*]

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