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On the Construction of Section 203(o) of the FLSA: Exclusion Without Exemption

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I. INTRODUCTION

> [S]uddenly some representative of the Department of Labor may step into one of those industries and say, "You have reached a collective-bargaining agreement which we do not approve. Hence the employer must pay for back years the time which everybody

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> had considered was excluded as a part of the working day." That situation may arise at any moment.
> —Representative Christian A. Herter[1]

At first thought, one does not imagine that putting on a particular article of clothing would constitute compensable work. It seems a matter of common sense not to expect compensation for putting on clothes in the morning. But that assumption becomes less stable when, instead of everyday clothes, one imagines donning protective equipment, and, instead of one's own home, one imagines changing at the employment site. Congressional acts have clarified that the act of changing clothes is not necessarily compensable work.[2] But what coverings qualify as "clothes" is not so clear.

The Fair Labor Standards Act ("FLSA") was enacted in 1938. Since then, the FLSA has been interpreted and reinterpreted by the Supreme Court, lower federal courts, and federal agencies. Recently, a circuit split has emerged as to the proper effect of a subsection of the FLSA's "Definitions" portion, namely § 203(o), which defines "hours worked." Because the relevant facts of these cases are relatively similar, the inconsistency among the circuits must be rooted in law.

Although the time that an average employee spends donning and doffing personal protective equipment ("PPE") in a given day may be less than fifteen minutes, if such time were compensable and were left to overtime pay, the aggregate effect could cost employers millions of dollars.[3] But beyond the monetary liability to employers, and beyond the uncertainty among employees as to proper compensation, there lies the substantial amount of judicial resources that have been dedicated to determining whether or not § 203(o) excludes the time spent donning and doffing PPE from the compensable workday.[4] Furthermore, the amount of judicial resources entangled in this dispute has been increasing. The amount of cases filed in federal court under the FLSA has been steadily increasing since 1994,[5] and the total amount of FLSA cases

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1 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter) (explaining the need behind § 203(o)).

2 29 U.S.C. § 203(o) (2006).

3 *See* FSIS Changes to the Schedule of Operations Regulations, 75 Fed. Reg. 47,726, 47,728 (proposed Aug. 9, 2010) (finding that overtime payment for the time an employee spent donning and doffing PPE would cost large meat packing establishments an average of ten and a half million dollars annually).

4 As an example of this continuous litigation, the Ninth Circuit explained that IBP, Inc. has suffered a "long-running" litigation revolving around the issue of FLSA compensation. *See* Alvarez v. IBP, Inc., 339 F.3d 894, 899 (9th Cir. 2003) *aff'd on other grounds*, 546 U.S. 21 (2005).

5 In 1994, a total of 1545 FLSA cases were filed in federal courts. Judicial Business of the United States

commenced yearly in federal courts has increased by 2,618 cases from 2006 to 2010.[6]

This article argues that the "changing clothes" exception codified in § 203(o) of the FLSA was not meant to be an exemption to the FLSA and that the phrase "changing clothes" includes the donning and doffing of PPE. Part II briefly describes the FLSA and offers a concise history of Supreme Court opinions that ultimately led to the Portal-to-Portal Act. Part III examines the Ninth Circuit's decision in detail and the contrary trend that developed afterwards. Part IV explores the relevant case law and legislative history, and proposes that the "changing clothes" exception in § 203(o) should include the donning and doffing of PPE and that § 203(o) is not an exemption to the FLSA. Part V summarizes the discussion and offers a conclusion.

II. BACKGROUND OF "CHANGING CLOTHES" AS EXCLUDED FROM "WORK"

Congress enacted the FLSA in a period of widespread unemployment[7] in order to eliminate labor conditions that were "detrimental to the maintenance of the minimum standard of living . . . without substantially curtailing employment."[8] The FLSA established a minimum hourly wage and a maximum amount of hours that an employee can work within a week.[9] Any employer who violates the minimum wage or maximum hours provisions of the FLSA could be held liable to the employee for the amount of unpaid time—plus a matching

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Courts 1998, tbl.C-2A at 147, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/1998/appendices/c2asep98.pdf. In 1998, there were1562 FLSA cases filed in federal courts. *Id.* In 2002, the total FLSA cases filed in federal courts were 3904; this number rose to 4207 in 2006. Judicial Business of the United States Courts 2006, tbl.C-2A at 167, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/appendices/c2a.pdf. And, in 2010, the number of FLSA cases filed in federal courts rose to 6825. Judicial Business of the United States Courts 2010, tbl.C-2A at 149, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf.

6 Judicial Business of the United States Courts 2010, tbl.C-2A at 149, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/C02ASep10.pdf.

7 According to a presidential message to Congress, roughly one-third of the population was "ill-nourished, ill-clad, and ill-housed, and [this situation] called for national action to fix minimum wages and maximum working week." Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938 I*, 53 POL. SCI. Q., 491, 493 (1938) (quoting a message to Congress from the President) (internal quotation marks omitted), *available at* http://www.jstor.org/stable/2143527.

8 29 U.S.C. § 202 (2006).

9 *Id.* §§ 206, 207.

amount in liquidated damages.[10] However, for the purposes of calculating minimum hourly wage and maximum workweek hours, the FLSA defines "hours worked" as excluding any time spent "changing clothes"[11] — neither the word "changing," nor the word "clothes," is defined within the FLSA.

A. The Definition of "Work" Before the Portal-to-Portal Act

Because the FLSA did not define the terms "work" or "workweek,"[12] the Supreme Court endeavored to define the parameters of the term "work" on its own.[13] In 1944, the Court in *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*,[14] explained that the term "work" included the following: "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."[15] That same year, in *Armour & Co. v. Wantock*,[16] the Court clarified its definition by holding that actual exertion is not necessary for an employee's activities to constitute "work"; in fact, an employee's idleness could fall within the definition of "work."[17]

Two years later, in *Anderson v. Mount Clemens Pottery*,[18] the Court further expanded the definition of "work" by holding that the term "workweek" included any time during which an employee is required to be on the employer's premises.[19] Building on the foundation laid down by *Tennessee Coal* and *Armour & Co.*, the Court found that such "work" included the time an employee spent walking to work on the employer's premises and time the employee spent engaging in preliminary activities—such activities included putting on aprons, removing shirts, and taping or greasing arms.[20]

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10 *Id.* § 216(b).

11 *Id.* § 203(o).

12 The FLSA does, however, define the term "employ" as including "suffer[ing] or permit[ting] to work." *Id.* § 203(g).

13 *See, e.g.*, Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944); Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944).

14 321 U.S. 590 (1944).

15 *Id.* at 598.

16 323 U.S. 126 (1944).

17 *See id.* at 133 ("Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen.").

18 328 U.S. 680 (1946).

19 *Id.* at 690-91.

20 *Id.* at 691-93 (finding that such activities were "clearly work falling within the definition enunciated

B. *The Portal-to-Portal Act and the* Steiner *Test*

In response to the Court's expansive definition of "work"—which created "unexpected liabilities immense in amount and retroactive in operation upon employers" that were capable of bringing about the employers' "financial ruin"[21]—Congress enacted the Portal-to-Portal Act.[22] Under the Portal-to-Portal Act, employers are not required to compensate employees for traveling to and from work, or for engaging in activities that are preliminary or postliminary to the principal activities for which the employee is employed.[23] In *Steiner v. Mitchell*,[24] the Court expanded the definition of "principal activities," thus affecting what activities were compensable under the Portal-to-Portal Act.[25] The *Steiner* Court found that those activities that are integral and indispensable to the principal activities for which the employee is employed are themselves principal activities.[26] In *Steiner*, those activities that were considered to be integral and indispensable to the principal activities of battery plant employees included donning and doffing PPE before engaging in any principal activities and showering after the completion of those activities.[27]

However, the terms "integral" and "indispensable" in the *Steiner* test are not synonymous and are not treated equally in every circuit. For example, the Second Circuit found that donning and doffing PPE is only "integral" to the employee's principal activity when such principal activity is performed in a lethal atmosphere.[28] In other words, according

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and applied in . . . *Tennessee Coal*" because these activities constituted physical exertion, were done primarily for the benefit of the employer, and were performed on the employer's premises).

21 29 U.S.C. § 251(a) (2006).

22 *Id.* §§ 251-62.

23 *Id.* § 254(a). "Preliminary activities" are those activities in which the employee engages before the commencement of his or her "principal activity," and "postliminary activities" are those activities engaged in after the completion of the employee's "principal activity." *See* 29 C.F.R. § 790.7(b).

24 350 U.S. 247 (1956).

25 *Id.* at 256.

26 *Id.*; *see also* IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005) ("[W]e hold that any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under . . . the Portal-to-Portal Act."); 29 C.F.R. § 790.8(b) (2012) ("The term 'principal activities' includes all activities which are an integral part of a principal activity."); *cf.* 29 C.F.R. § 790.8(c) ("[I]f changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity.").

27 *Steiner*, 350 U.S. at 248.

28 Gorman v. Consol. Edison Corp., 488 F.3d 586, 593 (2d Cir. 2007); *see also* Adams v. Alcoa, Inc., 7:07-CV-1291 GHL, 2011 WL 4527664 at *8 (N.D.N.Y. Sept. 28, 2011) (finding that the PPE worn was not

to the Second Circuit, the act of donning and doffing any PPE would only be integral to the principal activity if it would shield the employee from the destructive element of the workplace, allowing the employee to enter the deadly setting. Therefore, even though donning and doffing steel-toed boots, safety goggles, and helmets are activities that may be indispensible to the principal activities of nuclear power plant employees, they are not integral to the principal activity because such PPE is not the particular PPE that would allow entry and immersion into the destructive element of a nuclear power plant.[29]

The Fourth Circuit, in contrast, found that the *Steiner* test is "not confined to the narrow factual circumstances of a lethal manufacturing environment."[30] Thus, in the Fourth Circuit, the time spent donning and doffing protective gear—such as gloves, aprons, safety goggles, and sleeves—is not only indispensable, but also integral to poultry processing plants, and such time is compensable under the FLSA.[31]

The Department of Labor does not make such a distinction between "integral" and "indispensable." Instead, it defines activities that are "integral" to a principal activity as those activities that are "*indispensable* to [the principal activity's] performance."[32] Notwithstanding its circular use of the word "indispensable," the Department of Labor establishes that if the principal activity cannot be performed without putting on certain clothes, the act of donning and doffing those clothes at the beginning and end of the workday are "integral" activities.[33] "On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity."[34] Therefore, according to the Department of Labor, although the act of donning and doffing PPE must be necessary to the performance of the employee's principal activities to be considered "integral," such acts need not be necessitated by the presence of a lethal atmosphere.

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integral because "there is no evidence in the record from which a reasonable juror could conclude that [the place of employment] is a 'lethal' environment"); *cf.* Edwards v. City of New York, 08 CIV. 3134 DLC, 2011 WL 3837130 at *8 (S.D.N.Y. Aug. 29, 2011) (refusing to distinguish *Gorman* on the ground that the PPE in the present case was unavailable to the public). *Contra* Franklin v. Kellogg Co., 619 F.3d 604, 619 (6th Cir. 2010) (noting that "[t]he Second Circuit's [*Gorman*] position appears to be unique.").

29 *Gorman*, 488 F.3d at 592-93.

30 Perez v. Mountaire Farms, Inc., 650 F.3d 350, 365 (4th Cir. 2011).

31 *Id.* at 360, 365.

32 29 C.F.R. § 790.8(c) (2012) (emphasis added).

33 *Id.*

34 *Id.*

C. The Continuous Workday Rule

The Department of Labor has emphasized that the time that § 203(o) of the Portal-to-Portal Act excludes from "hours worked" is only that time that is spent on activities that are preliminary or postliminary.[35] In other words, time spent on activities performed in between the commencement of the first principal activity and the completion of the last principal activity is included as part of the workday "whether or not the employee engages in work throughout all of that period."[36] The Portal-to-Portal Act, therefore, does not affect compensation of such time. The inclusion of the time in between the first and last principal activities within the compensable workday is known as the continuous workday rule.

The Supreme Court, in *IBP, Inc. v. Alvarez*,[37] largely relied on the continuous workday rule in reaching its decision.[38] Following *Steiner*, the Court found that because the acts of donning and doffing PPE were indispensable and integral to the employees' principal activities, donning and doffing PPE were principal activities themselves.[39] And, because the time in between the commencement of the first principal activity and completion of the last principal activity in a day is part of the continuous workday, any time spent on activities in between donning and doffing PPE is compensable under the FLSA.[40] Therefore, any time spent walking from the locker room to the production area after donning the required PPE at the beginning of the workday, and any time spent waiting to doff PPE at the end of the workday, is covered by the FLSA.[41] However, because the time spent waiting to don PPE occurs before the actual donning, which would be the first principal activity of the workday, such time is not part of the continuous workday and thus not compensable under the FLSA.[42]

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35 *See id.* § 790.6(a).

36 *Id.* § 790.6(b).

37 546 U.S. 21 (2005).

38 The Supreme Court affirmed the Ninth Circuit's decision on grounds beyond the scope of this comment. The Court was not concerned with whether or not PPE is "clothes" for the purposes of § 203(o). *See* IBP, Inc. v. Alvarez, 546 U.S. 21, 32 (2005) ("[T]he only question for us to decide is whether . . . the walking between the locker rooms and the production areas is excluded from FLSA coverage by § 4(a)(1) of the Portal-to-Portal Act.").

39 *Id.* at 37.

40 *Id.*

41 *Id.*

42 *Id.* at 41-42.

D. The De Minimis Rule

Another common law doctrine that may determine whether changing clothes is compensable under the FLSA is the *de minimis* rule as explained in *Anderson v. Mount Clemens Pottery Co.*[43] The Supreme Court in *Anderson* found that when the time at issue involves only a few minutes of work beyond the scheduled working hours, "such trifles may be disregarded."[44] Thus, compensable time includes only that time during which the employee is required to give up "substantial measure of his [or her] time and effort."[45] When applying the *de minimis* rule, several circuits adopted the test developed in the leading Ninth Circuit case, *Lindow v. United States.*[46] The Ninth Circuit's *Lindow* test considers three factors in determining whether a certain amount of time is *de minimis*: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work."[47]

III. "CHANGING CLOTHES" AND THE ANTI-*ALVAREZ* TREND

Section 203(o) of the FLSA—the subsection that excludes the time spent "changing clothes" from the definition of "hours worked"—was enacted in 1949, two years after the enactment of the Portal-to-Portal Act.[48] In order to fall outside the scope of § 203(o) of the FLSA, the PPE donned and doffed by employees must be something other than "clothes."[49] The Occupational Safety and Health Standards Act ("OSHA") defines PPE as "specialized clothing or equipment worn by an employee for protection against a hazard"; further, it defines "[g]eneral work clothes" as clothes not intended to function as protection for the wearer and thus not PPE.[50] Even though OSHA's definition of PPE was intended to be used in a different context than that of the cases reviewed

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43 328 U.S. 680 (1946).

44 *Id.* at 692.

45 *Id.*

46 738 F.2d 1057 (9th Cir. 1984).

47 *Id.* at 1063. For examples of circuits applying the *Lindow* test, see Perez v. Mountaire Farms, Inc., 650 F.3d 350, 373 (4th Cir. 2011); De Asencio v. Tyson Foods, Inc., 500 F.3d 361, 374 (3d Cir. 2007); Kosakow v. New Rochelle Radiology Assocs., P.C., 274 F.3d 706, 719 (2d Cir. 2001); Brock v. Cincinnati, 236 F.3d 793, 804–05 (6th Cir. 2001).

48 DEP'T OF LABOR, ADM'R OP. LETTER, FLSA2002-2 at 1 (June 6, 2002) [hereinafter DEP'T OF LABOR 2002-2], *available at* http://www.dol.gov/WHD/opinion/FLSA/2002/2002_06_06_2_FLSA.pdf.

49 That is, "clothes" as used in § 203(o).

50 29 C.F.R. § 1910.1030(b) (2012).

in this comment, its definitions may nonetheless be instructive.[51]

A. The Circuit Split

Unlike the inquiry as to what was the proper definition of "work," the Supreme Court has not yet attempted to answer the question of how best to define "clothes." In the absence of such guidance, different circuits have come to different conclusions, relying on diverse schemes of statutory interpretation. The following subsections will explore the approaches to the interpretation of § 203(o)'s "changing clothes" exception that were espoused by the Ninth, Fourth, and Tenth Circuits.

1. The Ninth Circuit Approach

According to the Ninth Circuit, donning and doffing PPE in a meat processing plant is not "changing clothes."[52] In *Alvarez v. IBP, Inc.*,[53] the Ninth Circuit held that donning and doffing PPE is both integral and indispensable to the principal activities of meat-processing employees.[54] The court, however, made a distinction between unique PPE—like Kevlar gloves—and non-unique PPE—like hardhats.[55] The distinction between unique and non-unique PPE rests on the respective ease of donning and doffing such PPE.[56] While the Ninth Circuit found that the ease in donning and doffing non-unique PPE does not make those activities any less integral or indispensable to the principal activity, it does render the time required to don and doff such PPE *de minimis*.[57]

Having found that donning and doffing PPE passes the *Steiner* test,[58]

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51 Although the OSHA definitions seem to strongly imply that there is a clear distinction between ordinary clothes and PPE, it is important to note that different circuits have construed OSHA's definitions in different and inconsistent ways. *Compare* Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003) (finding that OSHA's distinct definitions of PPE and "clothes" underscores the fact that the phrase "changing clothes" means something different from donning and doffing PPE, which would imply that § 203(o) does not exclude donning and doffing PPE from "hours worked"), *aff'd on other grounds*, 546 U.S. 21 (2005), *with* Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 215 (4th Cir. 2009) (finding that because OSHA defines PPE as specialized *clothing*, both PPE and ordinary clothes are ultimately "clothes" for the purposes of the FLSA, and the OSHA definitions therefore imply that donning and doffing PPE would be excluded from "hours worked" by § 203(o)).

52 *See Alvarez*, 339 F.3d at 904-05.

53 339 F.3d 894 (9th Cir. 2003).

54 *Id.* at 903.

55 *Id.*

56 *Id.* at 903-04.

57 *Id.* at 903 ("The time it takes to perform these tasks vis-a-vis non-unique protective gear is *de minimis* as a matter of law.").

58 *See* discussion *supra* Part II.B.

the Ninth Circuit moved on to the issue of whether the time spent donning and doffing PPE was excluded from compensation by § 203(o) of the FLSA. The court intended to give the language in § 203(o) its "ordinary, contemporary, common meaning."[59] It rejected a broad dictionary definition of "clothing,"[60] partly because it found that § 203(o) of the FLSA is an exemption to the FLSA—and as such, must be narrowly construed against the employer seeking to assert it[61]—and partly because, as a matter of common sense and ordinary usage of the term, PPE is simply "different in kind from typical clothing."[62] Because, according to the Ninth Circuit, § 203(o) uses the term "clothing" in its ordinary definition, the "changing clothes" exception to the FLSA was not intended to include PPE. Therefore, in the Ninth Circuit, § 203(o) of the FLSA does not exclude donning and doffing PPE from "hours worked."[63] So, time spent donning and doffing PPE must be compensable.

2. *The Fourth Circuit Approach*

A trend developed after the Ninth Circuit's *Alvarez* decision in which several circuits, in disagreement with the Ninth Circuit, held that donning and doffing PPE is "changing clothes," and thus not necessarily compensable under the FLSA because § 203(o) excludes, or allows for the exclusion of, such time from "hours worked."[64] In *Sepulveda v. Allen*

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[59] *Id.* at 904 (quoting United States v. Akintobi, 159 F.3d 401, 403 (9th Cir. 1998)) (internal quotation marks omitted).

[60] *Id.* at 904-05 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 507 (2d ed. unabr. 1939)) (finding that the dictionary definition of "clothes" would be so expansive that it would include coverings that are well beyond the ordinary definition of "clothes"; for example, such a definition would embrace armor, spacesuits, and mascot costumes).

[61] *Id.* at 905 (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)) ("The protective gear at issue does not 'plainly and unmistakably' fit within § 3(o)'s 'clothing' term. Absent such a plain and clear § 3(o) fit . . . we construe § 3(o)'s [*sic*] against the employer seeking to assert it.").

[62] *Id.* ("The admonition to wear warm clothing, for example, does not usually conjure up images of donning a bullet-proof vest or an environmental spacesuit. Rather, [PPE] generally refers to materials worn . . . to provide a barrier against exposure to workplace hazards.").

[63] *Id.* at 904. Although the *Alvarez* court ultimately held that donning and doffing non-unique PPE is not compensable under the FLSA, it found that those acts are nonetheless covered by "hours worked" of § 203(o). *Id.* Only because the time required to don and doff non-unique PPE was *de minimis* did the Ninth Circuit find that such time was not compensable. *See id.*

[64] *See generally* Salazar v. Butterball, LLC, 644 F.3d 1130, 1140 (10th Cir. 2011) (holding that donning and doffing mesh gloves, arm guards, and knife holders are not so "different in kind from traditional clothing that it should not be considered 'clothes' [under the FLSA]"); Franklin v. Kellogg Co., 619 F.3d 604, 614–15 (6th Cir. 2010) (holding that frozen foods workers' uniforms and PPE—including hairnets, safety glasses, ear plugs, an hard hats—are "clothes" under the FLSA); Spoerle v. Kraft Foods Global, Inc., 614 F.3d 427, 428 (7th Cir. 2010)

Family Foods, Inc.,[65] the Fourth Circuit held that § 203(o) of the FLSA does not automatically preclude compensation for time spent changing clothes.[66] However, according to *Sepulveda*, § 203(o) *does* provide that employers are not required to compensate employees for such time.[67] The Fourth Circuit set out to construe "changing clothes" by its ordinary meaning, but unlike the Ninth Circuit in *Alvarez*, the Fourth Circuit based its construction of the phrase on dictionary definitions of its terms.[68] Because § 203(o) does not qualify the term "clothes" with adjectives such as "ordinary" or "street," the court found that § 203(o) was intended to include any and all coverings of the human body, which would include PPE.[69]

The employees in *Sepulveda* argued that even if PPE were considered "clothes" under the FLSA, the acts of donning and doffing PPE could not be construed as "changing" clothes because such acts do not require an *exchange* of clothing; instead, those acts entail only a layering of protective gear on top of other clothes, which the employees do not take off before donning the PPE.[70] Therefore, the employees argued, the time spent donning and doffing PPE is not excluded by § 203(o). The court once again relied on dictionary definitions and held that the term "changing" does not require an exchange or substitution of clothes; a "change" can occur when something is simply modified.[71] Thus, according to the Fourth Circuit, donning and doffing PPE is "changing clothes," and the

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(holding that the FLSA does not require employers to compensate meat production employees for time spent donning and doffing steel-toed boots, hard hats, smocks, hairnets, and beard nets because such PPE is "clothes" under the FLSA); Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 215–18 (4th Cir. 2009) (holding that poultry workers' PPE—including steel-toe boots, smocks, aprons, safety glasses, ear plugs, bump caps, hairnets, rubber gloves, and arm shields—is "clothes" under the FLSA); Anderson v. Cagle's, Inc., 488 F.3d 945, 955–56 (11th Cir. 2007) (holding that poultry workers' PPE is "clothes" under the FLSA).

65 591 F.3d 209 (4th Cir. 2009).

66 *Id.* at 219 ("We stress that our decision does not leave these employees without protection."); *see also id.* at 211 ("Our holding, of course, does not mean that employees should not be paid for time spent donning and doffing protective gear.").

67 *Sepulveda*, 591 F.3d at 219.

68 *Id.* at 214-15 ("[Clothing] is defined as 'covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.' . . . [T]his definition is consistent with the common understanding of the word." (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 428 (unabr. 1986)) (internal quotation marks omitted)).

69 *Id.* at 215.

70 *Id.* at 216.

71 *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 373 (unabr. 1986)) ("To 'change' means 'to make different,' that is 'to modify in some particular way but short of conversion to something else.'"); *see also* Anderson v. Cagle's, Inc., 488 F.3d 945, 956 (11th Cir. 2007) ("[W]e conclude that one need not exchange clothes to change clothes for the purpose of applying § 203(o).").

time spent donning and doffing PPE is not included in the definition of "hours worked" under the FLSA.

Having established that donning and doffing PPE was excluded from "hours worked" by § 203(o), the Fourth Circuit explained that its construction of the FLSA does not leave employees without protection.[72] The court found that § 203(o) does not prohibit employees from seeking compensation for donning and doffing PPE, nor does it prohibit employers from compensating employees for such time; it merely guarantees that such compensation is not *required* of employers and entrusts all consideration of that compensation to the parties' collective bargaining process.[73] Basing its holding on its interpretation of congressional intent, the Fourth Circuit found that § 203(o) was implemented by Congress as a way to grant private parties "greater discretion to define the outer limits of the workday."[74] Because employers and unions are better equipped than courts or agencies to calculate how much compensable time should be allocated to donning and doffing PPE, both the employer and employees would be more satisfied with the outcome of a collective bargaining process than had the amount of compensable time been calculated and imposed by the court.[75]

3. The Tenth Circuit Approach

In *Salazar v. Butterball, LLC*,[76] the Tenth Circuit also found that donning and doffing PPE was "changing clothes" for the purposes of the FLSA, and thus, the time spent on such endeavors is excluded from coverage.[77] But unlike the Ninth Circuit or the Fourth Circuit, the Tenth Circuit affirmatively held that the term "clothes" is ambiguous.[78] However, the court ultimately resolved the ambiguity in favor of the employer for several reasons.[79]

First, in contrast to the Ninth Circuit, the Tenth Circuit found that § 203(o) was not an exemption to the FLSA, and should therefore not be read narrowly against the employer seeking to assert it.[80] The Tenth

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72 *Sepulveda*, 591 F.3d at 218-19.

73 *Id.* at 219.

74 *Id.* at 218.

75 *Id.*

76 644 F.3d 1130 (10th Cir. 2011).

77 *Id.* at 1140-41.

78 *Id.* at 1137.

79 *Id.* at 1140-41 ("We . . . hold that 'clothes' under 29 U.S.C. § 203(o) includes the PPE . . . .").

80 *Id.* at 1138.

Circuit reasoned that § 203(o) was not an exemption to the FLSA because all exemptions to the FLSA are specifically delineated in a different section of the FLSA.[81] Thus, because the "changing clothes" phrase is included in § 203, Congress did not specifically designate it as an exemption to the FLSA; at most, the "changing clothes" clause limits the definition of the term "hours worked." This conclusion is supported by the fact that § 203 of the FLSA is titled "Definitions" and § 213 is titled "Exemptions."[82] Furthermore, "§ 203(o) removes only particular discrete activities from the definition of hours worked, whereas the § 213 exemptions remove entire classes of employees from FLSA coverage."[83] Finally, according to the Tenth Circuit, § 203(o) does not entirely remove the act of changing clothes from coverage under the FLSA; instead, like the Fourth Circuit, the Tenth Circuit found that § 203(o) offers employers and employees the option to remove such activities from coverage through the collective bargaining process.[84]

Second, as in *Alvarez* and *Sepulveda*, the Tenth Circuit claimed to base its construction on the ordinary meaning of the term "clothes."[85] Following the Fourth Circuit's decision in *Sepulveda*, the Tenth Circuit guided its analysis of the meaning of "changing clothes" by referring to dictionary definitions.[86] However, unlike *Sepulveda*, the Tenth Circuit also relied on the fact that the PPE in question—boots, sleeves, gloves, and hats—would be considered "clothes" if "worn on the street."[87] The Tenth Circuit rejected the employees' argument that PPE is different from "clothes" because it is designed to protect against workplace hazards.[88] The court reasoned that many items of "everyday" clothing are designed to protect the wearer of such clothes in some way.[89]

Moreover, the Tenth Circuit found that the PPE at issue was not "so cumbersome, heavy, complicated, or otherwise *different in kind* from

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81 *See id.*; *see also* 29 U.S.C. § 213 (2006).

82 *See* 29 U.S.C. §§ 213, 203.

83 *Salazar*, 644 F.3d at 1138; *see also* 29 U.S.C. § 213; *cf. Salazar*, 644 F.3d at1138 n.5 (distinguishing a previous case that assumed that 29 U.S.C. § 203(e)(2)(c)(ii)(II) was an exemption from the FLSA on the ground that § 203(e)(2)(c)(ii)(II)—which excludes the personal staff of government employees from the definition of "employee"—excludes an entire class of employees from FLSA coverage, and is therefore similar to § 213).

84 *Salazar*, 644 F.3d at 1138.

85 *Id.* at 1139.

86 *Id.* (citing OXFORD ENGLISH DICTIONARY (2010 ed.)) ("The ordinary meaning of the term 'clothes' is quite broad and . . . encompass[es] all the items of PPE worn by plaintiffs.").

87 *Id.*

88 *Id.*

89 *Id.* at 1140.

traditional clothing that it should not be considered 'clothes.'"[90] Because the Tenth Circuit constructed its holding at least in part on the basis that the particular PPE in question was not sufficiently different in kind to ordinary clothes, the court allowed the argument that, in the Tenth Circuit, not all PPE is "clothes" under the FLSA. Thus, if a particular piece of PPE were so different in kind from ordinary clothes—whether it is significantly more cumbersome or complicated—it would not be "clothes" for the purposes of the FLSA, and would therefore require compensation.[91]

Finally, the Tenth Circuit found that its construction of § 203(o) would not discourage employees and employers from using PPE for two reasons.[92] First, the court's construction of § 203(o) does not affect whether relevant laws require that certain employees don PPE.[93] Second, the possibility of receiving some compensation for time spent donning and doffing PPE is still available to employees through the collective bargaining process.[94]

B. Department of Labor Opinions

The judiciary was not alone in generating the confusion surrounding the question of whether the acts of donning and doffing PPE are considered "changing clothes" for the purposes of compensation under the FLSA. The Wage and Hour Division of the Department of Labor ("DOL") contributed to the conundrum in a series of contradictory opinion letters.

In 1997, DOL published an opinion letter addressing the issue.[95] In its opinion letter, DOL explained that the "changing clothes" exception "in § 203(o) does not include the putting on, [or] taking off . . . [of] protective safety equipment."[96] In reaching this conclusion, DOL relied on two considerations. First, DOL considered the plain meaning of the

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90 *Id.* (emphasis added).

91 In fact, the court expressly supports its holding on such considerations. *See id.* ("The plaintiffs' unique PPE is not so . . . different in kind from traditional clothing . . . These items are quite similar to ordinary gloves, sleeves, and belts or holsters. *Thus*, we conclude that all PPE at issue in this case is clothing under 29 U.S.C. § 203(o)." (emphasis added)).

92 *Id.*

93 *Id.*

94 *Id.*

95 *See generally* DEP'T OF LABOR, ADM'R OP. LETTER (Dec. 3, 1997) [hereinafter DEP'T OF LABOR 1997], *available at* 1997 WL 998048.

96 *Id.* at *2.

term "clothes" and concluded that the term "clothes" does not encompass PPE.[97] Its conclusion relied on "common usage," which, according to DOL, "dictates that 'clothes' refer to apparel, not to [PPE] which is generally worn over such apparel and *may* be cumbersome in nature."[98] Second, like the Ninth Circuit's decision in *Alvarez*, DOL found that § 203(o) was an exemption from the FLSA and must therefore be read narrowly against the employer seeking to assert it.[99] However, DOL did not offer any reasoning or justification for its conclusion that § 203(o) was an exemption to the FLSA.[100]

In 2002, DOL released another opinion letter opining on the proper interpretation of the term "clothes" in § 203(o).[101] In this opinion letter, DOL found that "changing clothes" as used in § 203(o) *does* include the acts of donning and doffing PPE.[102] First, DOL looked to congressional intent. It found that, although there is no portion of legislative history that specifically addressed the proper scope of § 203(o), Congress likely intended § 203(o) to function as a means of allowing employers and unions to bargain freely.[103] Second, DOL reasoned that whether a particular article of clothing is cumbersome or not is "no indication that it is not clothing."[104] In part, DOL found that the cumbersome nature of a covering is not dispositive of the question of whether it is "clothes" under § 203(o) because the difference between what is "cumbersome" and what is not is vague and fails to provide guidance to employers and unions.[105] Third, DOL reasoned that just because an article of clothing is worn on top of another article of clothing does not mean that both are not articles of clothing.[106]

DOL reaffirmed its 2002 opinion in 2007. It specifically found that, notwithstanding the Ninth Circuit's *Alvarez* opinion, § 203(o) excludes donning and doffing PPE from "hours worked" because donning and

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97 *Id.* at *1.

98 *Id.* at *1 (emphasis added).

99 *Id.*

100 In assuming, without discussion, that § 203(o) is an exemption to the FLSA, the DOL relied on a Supreme Court case, not about § 203, but concerning § 213 of the FLSA—the section specifically titled "Exemptions." *See id.* (citing Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 391-92 (1960)).

101 DEP'T OF LABOR 2002-2, *supra* note 48.

102 *Id.*

103 *Id.* at 2, 3.

104 *Id.* at 2.

105 *Id.*

106 *Id.*

doffing PPE is "changing clothes."[107] DOL went on to conclude that donning and doffing PPE "cannot be considered principal activities and [therefore] do not start the workday."[108]

In 2010, DOL once again changed its position on the proper interpretation of § 203(o) and found that donning and doffing PPE is not "changing clothes" for the purposes of compensation under the FLSA.[109] In developing this opinion letter, DOL explicitly rejected any substantial reliance on dictionary definitions of the term "clothes."[110] Instead, it relied on what little legislative history there is behind the enactment of § 203(o).[111] DOL found that the type of "clothes" that Congress had in mind when the Congressional Conference Committee reviewed the bill that eventually became § 203(o) was very different from modern-day PPE donned and doffed by employees in contemporary plants.[112] According to DOL, at that time, what Congress had in mind were the clothes that workers in the bakery industry of the 1940s donned and doffed.[113] Therefore, DOL concluded that the construction of the term "clothes" that was offered by the Ninth Circuit, and the three district courts that followed it,[114] were "more faithful to the legislative intent behind the Fair Labor Standards Act" because they found that the acts of donning and doffing modern-day PPE were not encompassed by "changing clothes" in

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107 DEP'T OF LABOR, ADM'R OP. LETTER, FLSA2007-10 at 2 (May 14, 2007), *available at* http://www.dol.gov/WHD/opinion/FLSA/2007/2007_05_14_10_FLSA.pdf ("The Division has not changed its interpretation as a result of the circuit court's opinion and continues to believe that the opinion letter is correct . . . [and may be relied on] for practices outside states within the jurisdiction of the Ninth Circuit.").

108 *Id.* at 1.

109 DEP'T OF LABOR, ADM'R OP. LETTER, FLSA2010-2 at 4 (June 16, 2010) [hereinafter DEP'T OF LABOR 2010-2], *available at* http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_2.pdf ("[I]t is the Administrator's interpretation that the § 203(o) exemption does not extend to protective equipment worn by employees that is required by law, by the employer, or due to the nature of the job. . . . Those portions of the 2002 opinion letter that address the phrase "changing clothes" and the 2007 opinion letter in its entirety, which are inconsistent with this interpretation, should no longer be relied upon.").

110 *Id.* at 2 ("Dictionary definitions offer little useful guidance here.").

111 *Id.* ("The legislative history surrounding § 203(o) is sparse but instructive.").

112 *Id.*

113 *Id.*

114 *See In re* Cargill Meat Solutions Wage & Hour Litig., 632 F. Supp. 2d 368, 385 (M.D. Pa. 2008) (holding that PPE such as a smock, hard hat, hair net, ear plugs, steel-toed boots, and cut resistant gloves are not clearly and unmistakably recognized as clothing); Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 868 (W.D. Wis. 2007) (holding that a hard hat, steel-toed shoes, ear plugs, hairnet, and safety glasses are not "clothes" within the meaning of § 203(o)); Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 930 (N.D. Ill. 2003) ("[D]onning and doffing of sanitary and safety equipment does not constitute 'changing clothes' under Section 203(o).").

§ 203(o).[115]

IV. SECTION 203(O) AND THE "CHANGING CLOTHES" EXCEPTION

So, which construction of § 203(o) is correct? Confusion as to the proper interpretation of § 203(o) has spread throughout the circuits and even within DOL. Most circuits disagree with the Ninth Circuit and hold that the donning and doffing of PPE is "changing clothes" under § 203(o).[116] The majority of circuits have the better argument here for the following five reasons: first, the definition of "clothes" is ambiguous and does not, on its own, dispose of the inquiry of proper statutory construction; second, the legislative history behind § 203(o) strongly supports the conclusion that § 203(o) is not an exemption to the FLSA and consequently that the term "clothes" was meant to include PPE; third, read as a whole, § 203(o) merely attempts to leave questions of compensation for "changing clothes" up to the collective bargaining process; fourth, because of their inconsistency, DOL opinions do not lend support to either interpretation; and fifth, the Ninth Circuit's interpretation of § 203(o) would lead to absurd results if it were read against the backdrop of Supreme Court decisions and other relevant common law doctrines.[117]

A. Definition of "Clothes"

In all cases of statutory construction, the judicial inquiry must begin with the language of the statute.[118] If the language of the statute is

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115 DEP'T OF LABOR 2010-2, *supra* note 108, at 3.

116 *See* discussion *supra* Part III.A.

117 Simply because a particular activity may be excluded from "hours worked," it does not necessarily follow that that activity is not a principal activity. Donning PPE may well begin the workday. In fact, § 203(o) only *allows* exclusion of donning and doffing PPE from compensation under the FLSA; it does not *per se* make those activities something other than "work." *See* Figas v. Horsehead Corp., No. 06-1344, 2008 WL 4170043, at *20 (W.D. Pa. Sept. 3, 2008) ("While § 203(o) permits employers and employees to exclude 'any time spent in changing clothes . . . at the beginning or end of each workday' from 'the hours for which an employee is employed,' it does not make donning and doffing activities any less 'integral and indispensable' to the employees' performance of their daily tasks." (quoting 29 U.S.C. § 203(o) (2006))). In May 2012, the Seventh Circuit disagreed with this notion. *See* Sandifer v. U.S. Steel Corp., 678 F.3d 590, 596-97 (7th Cir. 2012). The Honorable Richard A. Posner, writing for the majority, found that the FLSA allows for an agreement between the employer and employee to "reclassify" what constitutes work. *Id.* Once donning and doffing PPE is reclassified is as non-work, then donning and doffing PPE cannot be a principal employment activity. *Id.*

118 *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

unambiguous, and the statutory scheme is coherent and consistent, the inquiry ceases at that point.[119] Therefore, in construing the language of a statute, a court must first determine whether the statutory language is unambiguous. When making such a determination, however, the court will assume that the ordinary meaning of the statutory language "accurately expresses the legislative purpose."[120] But what, or who, should determine the ordinary meaning of "clothes"? The Ninth Circuit relied, in part, on its own understanding of the word.[121] However, a scheme of statutory construction that relies on subjective evocations of the particular court before which the question is presented is highly unlikely to lead to consistency[122] among the circuits.[123]

In an attempt to nurture some consistency, some circuit courts have relied on dictionary definitions. This endeavor, however, is not dispositive of the issue either. Since the enactment of § 203(o), the official dictionary definition of "clothes" has changed slightly—but enough to affect the construction of § 203(o). At the time when § 203(o) was enacted, the definition of "clothes," according to Webster's Second New International Dictionary, was as follows: "covering for the human body . . . a general term for whatever covering is worn, or is made to be worn, for *decency* or *comfort*."[124] This definition of "clothes" takes into account the purpose for which one dons certain coverings. If a covering were donned for some purpose other than decency or comfort—for example, if a covering were worn to protect against some lethal element—that covering would not be

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119 *Id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

120 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009) (citing Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)) (internal quotation marks omitted).

121 The Ninth Circuit found that when one imagines wearing "clothes," or wearing "warm clothes," one does not conjure up PPE—such as bulletproof vests. *See* Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

122 In fact, any individual can conjure up one of two similar—but ultimately inconsistent—seemingly ordinary meanings for the term "clothes": first, one may imagine "clothes" as generally including all articles used to cover the human body; second, one may imagine "clothes" as including such articles as is commonly used to cover oneself—for decency. The first definition would include PPE, while the second would exclude it. However, both definitions have their own flaws: the first would include a space suit and a costume—which would go against the ordinary nature of the definition—and the second definition loses some credibility when one considers that the term "clothes" is not preceded by qualifying terms like "ordinary" or "everyday."

123 *Compare Alvarez*, 339 F.3d at 905 (finding that PPE is not "clothes"), *with* Bejil v. Ethicon, Inc., 269 F.3d 477, 480 n.3 (5th Cir. 2001) (finding that a construction of "clothes" that would consider PPE as something other than "clothes" would be "nonsensical").

124 Sandifer v. U.S. Steel Corp., No. 2:07-CV-443 RM, 2009 WL 3430222, at *5 (N.D. Ind. Oct. 15, 2009) (emphasis added) (internal quotation marks omitted) (citing WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 507 (1957)).

"clothes." Thus, under this definition, PPE would not be considered "clothes" because such coverings—like aprons, hairnets, and gloves—are not worn for decency or comfort; they are required by the employer for the purpose of protection and in some instances may even lead to discomfort.

In 1961, Merriam-Webster issued the third edition of its New International Dictionary.[125] In Webster's Third New International Dictionary, "clothes" is defined as "clothing," which in turn is defined as follows: "covering for the human body or garments in general: all the garments and accessories worn by a person at any one time."[126] This new definition is significantly broader than the previous definition because it does not take into account the purpose for which the clothes are worn. Under this newer definition, PPE would be considered "clothes" because it covers the human body and is worn by an employee at one time. Therefore, if a court were to rely on this dictionary definition of the term "clothes," it would conclude that PPE is "clothes" under § 203(o) of the FLSA.

Courts that rely on their own understandings of the proper definition of "clothes" would—and have—come to contradictory conclusions. However, even if courts were to rely on dictionary definitions of the term "clothes," such reliance would not definitively answer the question of what the proper ordinary meaning of "clothes" would be because there are inconsistencies among dictionaries as to the proper definition. Therefore, the Tenth Circuit was correct in holding that the term "clothes" is ambiguous.[127] Because the meaning of the term "clothes" is ambiguous, the courts' inquiry cannot end here. Courts must take into consideration other aspects of the statute to ascertain the proper construction of its terms.

B. Legislative History

In *Arnold v. Ben Kanowsky, Inc.*,[128] the Supreme Court concluded that any exemption to the FLSA must "be narrowly construed against the employers seeking to assert [it]," and its application must be "limited to those establishments plainly and unmistakably within their terms and

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125 *About Us: Merriam-Webster's Ongoing Commitment*, MERRIAM-WEBSTER, http://www.merriam-webster.com/info/commitment.htm (last visited Feb. 21, 2013).

126 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 428 (unabr. 1993).

127 Salazar v. Butterball, LLC, 644 F.3d 1130, 1137 (10th Cir. 2011).

128 361 U.S. 388 (1960).

spirit."[129] Because the word "clothes" is ambiguous, its proper construction may turn on whether it should be read narrowly against the employer or not. In other words, the construction may turn on whether § 203(o) is an exemption to the FLSA. Thus, if § 203(o) is an exemption, categorically excluding time spent "changing clothes" from "hours worked," then that exemption must be read narrowly against the employer, and the term "clothes" should therefore not include PPE because such inclusion would arguably benefit the employer.[130] Conversely, if § 203(o) is not an exemption, then *Arnold* does not require that "clothes" be read against the employer. Despite the fact that exemptions to the FLSA are specifically codified in § 213, and despite the fact that the Court in *Arnold* was concerned with only that section, several courts have found that § 203(o) is an exemption to the FLSA and that it, like any other exemption to the FLSA, should be construed narrowly against the employer seeking to assert it.[131]

The legislative history behind § 203(o) strongly supports the proposition that § 203(o) is not an exemption to the FLSA. The main purpose of § 203(o), according to Representative Christian A. Herter,[132] was to avoid "another series of incidents which led to the portal-to-portal legislation."[133] The series of incidents referred to by Representative Herter, which led to the enactment of the Portal-to-Portal Act, was part of a trend in the Supreme Court that continuously found in favor of employees and against employers by expanding the definition of compensable "work."[134] Representative Herter's statement makes clear that one is meant to read § 203(o) in favor of employers. In other words, to read § 203(o) as an exemption would require it be read against the employers that it was meant to protect. Accordingly, Representative Herter's assertion is best understood as explaining that the purpose of § 203(o) was to prevent the courts from being too employee-friendly and creating unexpected and immense liabilities on employers.[135] Put simply, the very spirit of § 203(o) counsels against a construction that would

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129 *Id.* at 391.

130 The employer would benefit from this construction because, as construed, §203(o) would prohibit compensation for the time employees spend donning and doffing PPE.

131 *See In re* Cargill Meat Solutions Wage & Hour Litig., 632 F. Supp. 2d 368, 383-84 (M.D. Pa. 2008); Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

132 Representative Herter was the sponsor of the bill that later became § 203(o). *See* 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter).

133 *Id.*

134 *See supra* Part II.A.

135 *See* 29 U.S.C. § 251(a) (2006).

render it an exemption to the FLSA.[136]

Furthermore, the bill that eventually became § 203(o) originally allowed "any time" spent by employees to be excluded from "hours worked," not just the time spent "changing clothes."[137] This original draft of the bill passed through the House of Representatives.[138] The Conference Committee reviewing the bill amended it to limit the time that can be excluded to only such time spent "changing clothes."[139] If one were to read § 203(o) as the Ninth Circuit reads it,[140] § 203(o) would categorically exclude the time spent "changing clothes" from "hours worked."[141] Therefore, one would have to read the bill's original draft as categorically excluding certain time from "hours worked" as well. But, as it was originally drafted and passed by the House of Representatives, the bill excluded "any time" spent on any activity that the employee performed from "hours worked."[142] Consequently, if the original incarnation were an exemption, the bill, as passed by the House of Representatives, would have categorically excluded "any time" from "hours worked." "Any time" can mean either some or all time spent by an employee on any activity.[143] If it were an exemption, the original bill would exclude *all* time an employee spent on any activities from "hours worked." Such a reading would practically repeal the FLSA by amending its "Definitions" section—an absurd result. If one were to read the bill as excluding *some* time from "hours worked," it would not be categorically excluding time spent on any particular activity from "hours worked"; this

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136 One may argue, however, that if § 203(o) were an exemption, it would be more beneficial to the employer—and thus more in line with the purpose for its enactment—because it would require that the employer not pay the employee for a particular activity. Despite the fact that such a reading would force an employer to a particular line of conduct—and thus removing a bargaining chip from the collective bargaining table—the "changing clothes" exception was meant to benefit employers by refraining from requiring compensation, not by requiring non-compensation. *See infra* Part IV.C.

137 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter).

138 DEP'T OF LABOR 2002-2, *supra* note 48.

139 H.R. REP. No. 81-1453, at 16 (1949) (Conf. Rep.), ("The conference agreement limits this exclusion to time spent by the employee in changing clothes . . . at the beginning or at the end of each workday."), *reprinted in* 1949 U.S.C.C.A.N. 2251, 2255.

140 The Ninth Circuit read § 203(o) as an exemption to the FLSA. *See* Alvarez v. IBP, Inc., 339 F.3d 894, 905 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

141 The delineated exemptions to the FLSA categorically exclude classes of employees from coverage. *See generally* 29 U.S.C. § 213 (2006).

142 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter).

143 *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 97 (unabr. 1993) (defining "any" as one or all).

would render the amendment vague.[144]

Because reading § 203(o) as an exemption would render its original draft a bill that yields absurd results, § 203(o) is best construed as not being an exemption. And because § 203(o) cannot be interpreted as an exemption to the FLSA, it should not be read narrowly against the employer. The legislative history behind § 203(o), therefore, does not lend support to the assertion that donning and doffing PPE is not "changing clothes." Furthermore, because the motivating force behind the enactment of § 203(o) is employer-friendly, "changing clothes" would best be read as incorporating the donning and doffing of PPE. Hence, the term "clothes" in § 203(o) likely includes PPE. And such time as is spent donning and doffing PPE—or changing clothes—could be excluded from "hours worked."

Such an exclusion, however, should not be interpreted as an outright prohibition on compensation for the time an employee spends donning and doffing PPE.[145] The original bill is best read as a provision that allowed the employers and unions, through the collective bargaining process, to exclude "any time" that they agreed on from "hours worked" for the purposes of calculating maximum hours.[146] Therefore, the time spent "changing clothes" is not categorically excluded from "hours worked"; instead, § 203(o) leaves the exclusion of time spent "changing clothes" from "hours worked" up to the collective bargaining process. Indeed, Representative Herter made such a construction explicit on the House floor: "This amendment is offered . . . to give sanctity once again to the collective-bargaining agreements as being a determining factor in finally adjudicating that type of arrangement . . . ."[147] The type of arrangement to which Representative Herter referred was any agreement that employers and unions reached as to the proper compensation for any time an employee spent on an activity.

C. Reading § 203(o) as a Whole

Read as a whole, § 203(o) is a simple provision that attempts to shield the collective bargaining process from an overreaching judiciary or

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144 In fact, because such a construction offers no guidance as to what time is excluded, the bill would be rendered superfluous.

145 To read § 203(o) as prohibiting compensation for the time spent donning and doffing PPE would effectively render it an exemption.

146 This reading is consistent with the employer-friendly motivation behind the bill because it would protect the employer from court opinions that require such compensation.

147 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter).

agency.[148] Section 203(o) reads as follows:

> Hours Worked.—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 . . . 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.[149]

This section can best be understood as a conditional statement. In order for time spent donning and doffing PPE to be excluded from coverage under the FLSA, two conditions must be met: first, such PPE must be "clothes" for the purposes of § 203(o);[150] second, such time spent must be excluded from the workday by "express terms or by custom or practice under" a collective bargaining agreement.[151] Therefore, § 203(o) does not prevent employees from receiving compensation for donning and doffing PPE, nor does it prohibit employers from offering such compensation to employees. Section 203(o) does not categorically exclude the time spent donning and doffing PPE from "hours worked"; it does, however, allow employers to opt out of such compensation through a bona fide collective bargaining agreement.[152] As a matter of policy, this reading of § 203(o) would lead to greater satisfaction among both employers and employees than would result from a court- or agency-imposed compensation scheme.[153]

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148 Such overreaching had previously resulted in the need for the Portal-to-Portal Act. *See* 29 U.S.C. § 251(a) (2006) ("Congress finds that the [FLSA] . . . has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees . . . [I]f said Act as so interpreted . . . were permitted to stand, . . . [it would] constitute[ ] a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.").

149 *Id.* § 203(o) (emphasis added).

150 As argued in the previous sections, the term "clothes" includes PPE. *See infra* Parts IV.A-B.

151 29 U.S.C. § 203(o).

152 This notion has support in the circuits. *See* Salazar v. Butterball, LLC, 644 F.3d 1130, 1138 (10th Cir. 2011) ("[Section] 203(*o*) . . . gives employers and employees the *option* of removing those activities from FLSA coverage through collective bargaining."); Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 214 (4th Cir. 2009) ("Section 203(*o*) applies to donning and doffing of [PPE] . . . if [the] two conditions are met.").

153 *See* 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter) ("In some . . . collective-bargaining agreements the time taken to change clothes . . . is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer and the employee and apparently both are completely satisfied with respect to their bargaining agreements."); *see also Sepulveda*, 591 F.3d at 218 ("[C]ollective bargaining allows employers and unions to reach agreements that leave both sides more satisfied than a government-imposed solution would.").

D. The DOL Opinion Letters

It has long been established that if an agency offers inconsistent opinions as to the proper construction of its regulations and statutes, courts should not afford that agency the same amount of deference that it would otherwise deserve.[154] Because it has held inconsistent opinions in regard to the proper interpretation of § 203(o), DOL's opinion letters would not be entitled to much deference by courts. In fact, several circuits have expressly held that the DOL opinion letters are not entitled to *any* deference.[155] However, a review of the DOL opinion letters and their respective justifications may be instructive as to the proper interpretation of § 203(o).

In several occasions, including a 1997 opinion letter and a 2010 opinion letter, DOL found that the phrase "changing clothes" under § 203(o) does not include donning and doffing PPE.[156] The 1997 DOL opinion letter assumed, without explaining, that § 203(o) was an exemption to the FLSA,[157] and DOL relied heavily on its own understanding of the "common usage" of the word "clothes."[158] Because it offered no explanation, and because its argument relied exclusively on

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[154] *See* Watt v. Alaska, 451 U.S. 259, 273 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference."); *see also* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 698 (1991) ("[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view" (quoting Watt v. Alaska, 451 U.S. 259, 273 (1981))).

[155] *See* Salazar v. Butterball, LLC, 644 F.3d 1130, 1139 (10th Cir. 2011) ([W]e decline to defer to . . . any of the [DOL] interpretations. . . . Where, as here, an agency repeatedly alters its interpretation of a statute, the persuasive power of those interpretations is diminished."); Franklin v. Kellogg Co., 619 F.3d 604, 614 (6th Cir. 2010) ("The DOL's position on this issue has changed repeatedly in the last twelve years, indicating that we should not defer to its interpretation."); Alvarez v. IBP, Inc., 339 F.3d 894, 905-06 n. 9 (9th Cir. 2003) ("[W]e reject the Secretary's new, inconsistent interpretation here."), *aff'd on other grounds*, 546 U.S. 21 (2005); *see also* Sandifer v. U.S. Steel Corp., 678 F.3d 590, 599 (7th Cir. 2012) ("It would be a considerable paradox if before 2001 the plaintiffs would win because the President was a Democrat, between 2001 and 2009 the defendant would win because the President was a Republican, and in 2012 the plaintiffs would win because the President is again a Democrat. That would make a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them, since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose." (citation omitted)).

[156] *See* DEP'T OF LABOR 1997, *supra* note 94, at *1; DEP'T OF LABOR 2010-2, *supra* note 108.

[157] *See* DEP'T OF LABOR 1997, *supra* note 94, at *1. As noted above, § 203(o) is most likely not an exemption from the FLSA. *See supra* Part IV.B.

[158] *See* DEP'T OF LABOR 1997, *supra* note 94, at *1.

its own understanding of the word's common usage, the 1997 opinion letter is not entitled to much deference[159]—that is, even if DOL had not later contradicted itself on more than one occasion.

The 2010 DOL opinion letter relied heavily on legislative history.[160] However, its reliance was almost exclusively based on a part of Representative Herter's statement using the bakery industry as an example of employees taking time to don and doff PPE. The quote is as follows:

> In the bakery industry, for instance . . . there are collective-bargaining agreements . . . In some of those collective-bargaining agreements[,] the time taken to change clothes . . . is considered a part of the working day. In other[s] . . . it is not . . . .[161]

DOL understood this quote to mean that the kind of PPE that Congress had in mind when it passed § 203(o) was the kind of PPE that employees of the bakery industry donned and doffed in the late 1940s.[162] Modern-day PPE was not meant to be, and is therefore not, included in the term "clothes" in § 203(o).

The construction of § 203(o) adopted in the 2010 DOL opinion letter, however, emphasizes a nonessential part of the quote—a for-instance—and understates its essential aspect—that the collective bargaining agreements, though varied from union to union, lead to greater satisfaction overall, which makes the effect offered by § 203(o) the preferable option. Furthermore, the quote was made before the bill that would become § 203(o) was narrowed by the Conference Committee to allow employers and employees to bargain away only time spent "changing clothes" and not "any time."[163] In other words, DOL's conclusion that the legislative history behind § 203(o) dictates a narrow reading of the term "clothes" rests on an attenuated assumption derived

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159 Relying on a term's common usage, or ordinary meaning, would rarely (if ever) render consistent opinions due to the subjective nature of such a scheme. *Compare Alvarez*, 339 F.3d at 904-05 (finding that the common meaning of "clothes" does not include PPE), *with* Anderson v. Cagle's, Inc., 488 F.3d 945, 955–56 (11th Cir. 2007) ("Thus, we conclude that the [PPE] . . . plaintiffs were required to don/doff . . . fit squarely within the *commonly understood* definition of 'clothes' as that term is used in § 203(o)." (emphasis added)).

160 DEP'T OF LABOR 2010-2, *supra* note 108, at 2.

161 95 CONG. REC. 11,210 (1949) (statement of Rep. Herter)

162 *Id.* at 2-3 ("The 'clothes' that Congress had in mind in 1949 . . . hardly resemble the modern-day [PPE] commonly donned and doffed by workers in today's . . . industries . . . .").

163 The quote was preceded by a reading of the bill that would become § 203(o) in its original incarnation. *See* 95 CONG. REC. 11,210 (1949) (reading of the clerk) ("[A]mendment offered by Mr. Herter . . . 'In determining . . . the hours for which an employee is employed, there shall be excluded *any time* which was excluded . . . under a bona fide collective-bargaining agreement . . . .'" (emphasis added)).

from a quote whose author envisioned a much broader reach of § 203(o). Any deference offered to the conclusions of the 2010 DOL opinion letter is therefore unwarranted.

E. Absurd Results of the Ninth Circuit's Alvarez *Decision*

Strange results emerge if one takes into account the continuous workday rule, the Supreme Court decision in *IBP, Inc. v. Alvarez*[164]—that donning and doffing PPE are principal activities—and the Ninth Circuit's holding that non-unique PPE is *de minimis*. It seems that in the Ninth Circuit, whether non-unique PPE is compensable depends on the order in which the employees don and doff PPE. If an employee dons unique PPE first, the continuous workday rule would be triggered because the employee would have engaged in his or her first principal activity of the workday, and any activity beyond that—until the completion of the last principal activity—is compensable under the FLSA "whether or not the employee engages in work throughout all of that period."[165] Thus the Ninth Circuit approach nurtures two strange results if one were to reconcile it with the Supreme Court decision in *IBP, Inc. v. Alvarez*: first, compensation for donning and doffing non-unique PPE would turn on the order in which the employee dons PPE; and second, if after donning unique PPE the employee dons non-unique PPE, which is *de minimis* in the Ninth Circuit and therefore not compensable, a principal activity would be less worthy of compensation than activities that are not considered "work."[166]

Beyond the strange results, authorities outside the Ninth Circuit have not accepted the distinction between unique and non-unique PPE. In June 2011, the Food Safety and Inspection Service ("FSIS") found that the distinction between unique and non-unique PPE is a distinction without a difference.[167] FSIS concluded that classifying some PPE as

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164 546 U.S. 21 (2005).

165 29 C.F.R. § 790.6(b) (2012).

166 This results because the continuous workday rule makes the time an employee spends on activities that are not "work" nonetheless compensable if it occurs in between the first principal activity and the completion of the last principal activity. *See id.* ("[The term] '[w]orkday' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period *whether or not the employee engages in work throughout all of that period.*" (emphasis added)).

167 *See* FSIS Changes to the Schedule of Operations Regulations, 76 Fed. Reg. 33,974, 33,975 (June 10, 2011) ("FSIS has determined that the FLSA covers time . . . spen[t] donning and doffing both unique and non-unique gear.").

"non-unique" makes no difference as to whether the acts of donning or doffing non-unique PPE are less integral or indispensable to an employee's principal activities.[168] Furthermore, according to FSIS, the time that an employee spends donning and doffing non-unique PPE is not *de minimis*.[169]

Finally, the Ninth Circuit approach, even if adopted by all other circuits, would not lead to uniformity. The difference between unique and non-unique PPE is determined by how easy it is for an employee to don and doff the PPE.[170] So, the difference between compensable and non-compensable donning and doffing would be left up to the courts' determination as to the relative ease of donning and doffing that PPE. Such a scheme would encourage further litigation and entangle even more judicial resources.

V. CONCLUSION

Since its enactment, the FLSA has been subject to different interpretations as to what constitutes compensable work. Congress attempted to clarify its definition of "work" in 1947 with the Portal-to-Portal Act to counteract judicial broadening of the definition of "work." Fearing another series of judicial constructions that would work against employers, Congress again attempted to solidify the proper definition of "work" by enacting § 203(o). In another series of statutory construction disputes, courts have wrestled with the proper definition of "clothes."

The "changing clothes" exception codified in § 203(o) is best understood as a provision that strengthens the collective bargaining process between employers and unions. Congressional intent, counseled by legislative history and a reading of § 203(o) as a whole, caution against reading the "changing clothes" exception as an exemption to the FLSA. The time that an employee spends changing clothes is excluded from "hours worked" by § 203(o), but only if such exclusion is the result of a collective bargaining agreement. Congress intended to leave the question of compensation up to the collective bargaining process in order to avoid unforeseeable and immense liabilities on employers—liabilities that could have manifested at any moment prior to the enactment of § 203(o).

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168 *Id.* ("The classification of gear as unique or non-unique has no bearing on whether the donning and doffing of such gear at the workplace is an integral and indispensable activity.").

169 *Id.* at 33,967-77.

170 *See* Alvarez v. IBP, Inc., 339 F.3d 894, 903 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).