No. 03-1238

In the Supreme Court of the United States

IBP, INC., PETITIONER

v.

GABRIEL ALVAREZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a), excludes from compensation the time an employee must spend walking between the location at which he dons and doffs required protective gear and his work station, when such donning and doffing is an integral and indispensable part of the employee's principal work activities.

2. Whether the Court should reexamine its holding in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), that opinion letters issued by the Administrator of the Wage and Hour Division of the Department of Labor are not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay their employees a minimum wage and to compensate their employees for hours worked in excess of 40 in a given workweek at a rate of one and one-half times the employees' regular rate of pay. 29 U.S.C. 206, 207. Following enactment of the FLSA, the Court held that underground travel in mines to and from an employee's place of work is compensable work. *Jewell Ridge Coal Corp.* v. *Local 6167, United Mine Workers*, 325 U.S. 161 (1945); *Tennessee Coal*

Co. v. *Muscoda Local 123*, 321 U.S. 590 (1944). In *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court held that walking from an employer's time clock to the employee's place of work and back is compensable work. *Anderson* also held that certain pre-shift activities, such as putting on garments and preparing equipment, is compensable work. *Id.* at 692-693.

Congress viewed *Anderson* as "creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). To address that "existing emergency," 29 U.S.C. 251(b), Congress enacted the Portal-to-Portal Act of 1947 (Portal-to-Portal Act), 29 U.S.C. 251 *et seq.* That Act extinguished employer liability for failure to pay minimum wage and overtime before May 14, 1947, for any activity unless it was compensable by contract or custom. 29 U.S.C. 252. For claims arising after that date, the Act provides that, absent contract or custom, no employer shall be liable for failure to pay minimum wage or overtime for:

> (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,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

In 1949, Congress added a provision that allows the compensability of time spent changing clothes at the beginning and end of a workday to be the subject of collective bargaining. That provision excludes from the hours worked "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." Act of Oct. 26, 1949, ch. 736, § 3(*o*), 63 Stat. 911 (29 U.S.C. 203(*o*)).

In *Steiner* v. *Mitchell*, 350 U.S. 247, 252-253 (1956), the Court held that the phrase "principal activity or activities" as used in the Portal-to-Portal Act embraces all activities that are "an integral and indispensable part of the principal activities" an employee is hired to perform. The Court accordingly held that the pre- and post-shift activities of changing clothes and showering are compensable and not excluded by the Portal-to-Portal Act when they are "an integral and indispensable part of the principal activities for which covered worker[s] are employed." *Id.* at 256.

2. Petitioner IBP, Inc. operates a meat packing plant in Pasco, Washington. Pet. App. 2a-3a. Petitioner requires its employees to wear certain protective gear when performing their jobs. *Id.* at 4a n.2. All employees must wear hardhats, hair nets, ear plugs, gloves, and boots. *Ibid.* Employees who use knives must also wear metal aprons, leggings, vests, plexiglass arm guards, and protective sleeves. *Ibid.* Under petitioner's work rules, employees "must gather their assigned equipment, don that equipment in one of the [petitioner's] plant's four locker rooms, and prepare work-related tools before venturing to the slaughter or processing floors." *Id.* at 3a. After completing their shift on the floor, employees "must clean, restore, and replace their tools and equipment, storing all of it at the [petitioner's] plant itself." *Id.* at 3a-4a.

Respondents work in the slaughter and processing divisions of petitioner's Pasco plant. Pet. App. 6a. They filed suit against petitioner under the FLSA and state law, challenging petitioner's failure to pay them for the time spent

donning and doffing protective equipment and walking from the locker room to their work stations and back. *Ibid.*

After conducting a bench trial, the district court ruled in respondents' favor on most issues. Pet. App. 35a-82a. The court found that the donning and doffing of unique protective gear, such as mesh gloves, metal aprons, leggings, vests, plexiglass arm guards, and protective sleeves, is an "integral and indispensable" part of respondents' principal activities and is therefore compensable work under the FLSA. *Id.* at 53a-54a. The court further determined that the reasonable time spent walking from the locker room to the workstation and back is compensable. *Id.* at 54a. The district court rejected petitioner's contention that such walking time is non-compensable under the Portal-to-Portal Act. *Id.* at 53a-54a. The court reasoned that donning protective gear begins the workday and doffing that gear ends it, and that the Portal-to-Portal Act's exclusion applies only to walking time that occurs outside the workday. *Ibid.*

The district court also rejected petitioner's contention that the donning and doffing of protective gear is non-compensable as a result of collective bargaining pursuant to the FLSA's "changing clothes" exclusion. Pet. App. 64a-65a. The court reasoned that the items of safety gear at issue are not "clothes" within the meaning of that exclusion. *Id.* at 65a.

The district court determined, however, that the donning and doffing of "non-unique protective equipment"—hardhats, earplugs, frocks, safety goggles, hair nets, and boots—is not compensable under the FLSA because it is "not integral and indispensable to the job." Pet. App. 54a. Alternatively, the court concluded that the donning and doffing of non-unique gear is not compensable because the "time it takes to complete such work is de minimis as a matter of law." *Id.* at 54a & n.6.

The district court also ruled in respondents' favor with respect to certain of their state-law claims. Pet. App. 71a-77a. The court rejected, however, the largest monetary component of respondents' state law claims, namely, their assertion that state law entitled them to receive overtime compensation for the entirety of their 30-minute meal breaks whenever any portion of their meal breaks was spent working. *Id.* at 74a.

The district court entered a judgment awarding respondents damages of $3,098,517, comprised of $1,751,126 in FLSA overtime damages, $156,344 in state law overtime damages for a period preceding the FLSA limitations period, $286,119 in state law minimum wage damages, and $904,928 in state law rest break damages. Resp. Br. in Opp. App. 2a. The award of FLSA overtime damages reflected the court's determination that FLSA damages should be doubled pursuant to the Act's liquidated damages provision, 29 U.S.C. 216(b). Pet. App. 78a-79a.

In keeping with the court's rejection of respondents' state law meal break claim, the judgment did not award damages for that claim. Pet. App. 74a. Anticipating that its determination on that state law issue might be reversed on appeal, however, the district court announced that "[i]f the Court is reversed on appeal on its meal break ruling," respondents would then "be able to recover $7,297,517," comprised of $5,487,561 in state law overtime damages, $905,028 in state law minimum wage damages, and $904,928 in state law rest break damages. *Ibid.*

The court's initial judgment and its proposed alternative disposition both reflect the court's view that, when FLSA and state law claims are "duplicative," respondents should recover on only one of the claims. Pet. App. 80a. Under the court's calculations, total FLSA overtime damages initially exceeded state law overtime damages for the same period because FLSA damages were doubled but state law

overtime damages were not. Once full meal breaks damages were added, however, total state law overtime damages exceeded FLSA overtime damages. Based on that method of calculation, the court awarded overtime damages under the FLSA in its initial judgment but only under state law in its alternative disposition.

3. The court of appeals affirmed the district court's judgment as to the FLSA issues, but reversed that court's denial of respondents' state law meal break claims. Pet. App. 1a-34a. The court of appeals held that donning and doffing of unique sanitary and protective equipment is an "integral and indispensable" part of the respondents' principal activities and is therefore work that is compensable under the FLSA. *Id.* at 11a-12a.

The court of appeals also held that respondents are entitled to compensation for "the reasonable walking time from the locker to work station and back . . . for employees required to don and doff compensable personal protective equipment." Pet. App. 18a. The court reasoned that respondents' work day begins when they don required safety gear and that "any activity occurring thereafter in the scope and course of employment" is not excluded by the Portal-to-Portal Act. *Id.* at 17a-18a. The court concluded that the walking time at issue is done in the scope and course of employment because respondents cannot perform their job without walking between the locker room and their work stations. *Id.* at 19a. The court added that "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Ibid.*

The court of appeals further held that donning and doffing protective gear is not subject to the FLSA's "changing clothes" exclusion. Pet. App. 14a-17a. The court concluded that the FLSA's exclusions must be narrowly construed and

that the items of protective gear at issue are not "plainly and unmistakably" clothes. *Id.* at 15a-16a. The court noted that the Administrator of the Wage and Hour Division of DOL had issued a June 2002 opinion letter interpreting "clothes" to include protective safety equipment, but it rejected the Administrator's interpretation on the ground that it conflicted with previous interpretations by the Administrator. *Id.* at 17a n.9.

The court of appeals also affirmed the district court's conclusion that the donning and doffing of "non-unique" gear is not compensable. The court of appeals reasoned that the time required to don and doff non-unique gear is "*de minimis* as a matter of law." Pet. App. 12a-13a.

The court of appeals reversed the district court's denial of respondents' meal-break claims under state law. Pet. App. 30a-32a. Recognizing that the district court's ruling was "perhaps consistent with the FLSA," the court of appeals held that it was inconsistent with "mandatory language" in the state administrative code. *Id.* at 31a. Accordingly, the court of appeals "remand[ed] for recalculation of damages consistent with this full thirty-minute remuneration approach." *Id.* at 32a. Issuance of the mandate of the court of appeals has been stayed pending disposition of the petition for a writ of certiorari.

DISCUSSION

The first question raised in the petition is whether the Portal-to-Portal Act, 29 U.S.C. 254(a), excludes from compensation the time an employee must spend walking between the location at which he dons and doffs protective gear and his work station, when such donning and doffing is an integral and indispensable part of the employee's principal work activities. Because there is a conflict in the circuits on that issue, and the issue is one of recurring importance under the FLSA, this Court's review would be warranted in

an appropriate case. This case, however, may not be a suitable vehicle for resolving that issue. It appears likely that the Court's resolution of that issue would not affect the judgment that would ultimately be entered by the district court on remand in this case. That circumstance counsels against review of the walking time issue in this case.

Petitioner's second question asks whether an interpretation of the FLSA's "changing clothes" exclusion expressed in an opinion letter issued by the Administrator of the Wage and Hour Division of DOL is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Christensen* v. *Harris County*, 529 U.S. 576 (2000), the Court held that the Administrator's opinion letters are not entitled to *Chevron* deference, and petitioner has not made out the kind of compelling case necessary to justify overruling a decision of this Court. In any event, it appears likely that the Court's resolution of that issue, like the resolution of the first issue, would not affect the judgment that would be entered by the district court on remand.

A. 1. There is a conflict in the circuits on the question whether the Portal-to-Portal Act excludes from compensation walking time associated with the donning and doffing of safety gear, when such donning and doffing is an integral and indispensable part of the employee's principal work activities. The Ninth Circuit in this case correctly held that the Portal-to-Portal Act does not exclude walking time that occurs after an employee dons required safety gear. The court reasoned that the donning of safety gear commences an employee's work day, and that the Portal-to-Portal Act does not exclude from compensation walking time that occurs after the work day begins. Pet. App. 18a-19a. As the court explained, "[t]here is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his

station, then recommenced when the walking is done." *Id.* at 19a.

The Ninth Circuit's holding and reasoning on this issue is inconsistent with the First Circuit's decision in *Tum* v. *Barber Foods, Inc.*, 360 F.3d 274 (2004), petition for cert. pending, No. 04-66 (filed July 8, 2004). The First Circuit held in *Tum* that the Portal-to-Portal Act excludes from compensation walking time associated with the donning and doffing of required safety gear. *Id.* at 279-281. That court reasoned that while donning of required safety gear is an integral and indispensable part of an employee's primary activities and is therefore itself compensable (*id.* at 279), it does not start the workday for purposes of the walking time exclusion in the Portal-to-Portal Act. *Id.* at 280-281.

The two cases are capable of being reconciled on their facts. The Ninth Circuit unambiguously held that walking time is compensable when it follows donning of protective gear that consumes an amount of time that is not de minimis. Pet. App. 18a-19a. The court did not clearly resolve the question whether walking time would also be compensable when it follows donning that, taken alone, consumes a de minimis amount of time. See *id.* at 13a (finding time spent on donning non-unique gear to be "de minimis" and therefore "not compensable"); compare *id.* at 18a (district court properly required compensation for walking time following "compensable" donning and doffing), with *id.* at 14a ("'donning and doffing' and 'waiting and walking' constitute compensable work activities except for the *de minimis* time associated with the donning and doffing of non-unique protective gear"). Because all of the walking at issue in *Tum* followed donning that consumed what the jury found to be a de minimis amount of time, 360 F.3d at 278, it is unclear whether that time would have been compensable under the Ninth Circuit's interpretation of the FLSA.

The First Circuit, however, did not base its walking time ruling on the jury's finding in that case that the donning and doffing at issue consumed a de minimis amount of time. Although the rationale for its decision is less than clear, the First Circuit's opinion appears to hold as a categorical matter that walking time associated with donning and doffing is simply not compensable. 360 F.3d at 280-281 (citing, inter alia, *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994)); but cf. *id.* at 285-286 (Boudin, C. J., concurring) (raising question whether de minimis donning and doffing can "be disregarded as starting the workday," and stating that "[i]t may be time for the Supreme Court to have another look at the problem"). That holding is directly inconsistent with the holding of the Ninth Circuit in this case. Indeed, the court below and the First Circuit in *Tum* specifically acknowledged their disagreement on the compensability of walking time that is associated with the donning and doffing of safety gear. Pet. App. 19a n.10; *Tum*, 360 F.3d at 281.

In *Reich* v. *IBP, Inc.*, *supra*, the Tenth Circuit also addressed the compensability of walking time that occurs after the donning of protective gear. In that case, the court of appeals held that donning and doffing of protective gear is an integral and indispensable part of a knife-worker's primary activities and is therefore compensable. 38 F.3d at 1125-1126. Because employees exercised discretion on when they picked up their protective gear and on when and where they put it on, however, the district court in that case had been unable to conclude that donning and doffing "were the first and last principal activities of the workday which would commence and toll the running of the timeclock, including 'wait and walk time.'" *Id.* at 1127. Instead, the district court held (and the court of appeals agreed) that the employees were entitled to be compensated for donning protective gear, but not for associated walking time occurring before or after

the compensable workday. *Ibid.*[1] Because the *Reich* decision relied on the personal discretion enjoyed by the employees in that case, it is factually distinguishable from the decision below. Nonetheless, the Tenth Circuit's refusal to require compensation for a portion of the walking time at issue in that case is at least arguably in some tension with the decision below, and enhances the need for resolution of the question presented in the petition.

2. The question whether walking time associated with the donning and doffing of protective gear is compensable has considerable importance to the employers and employees involved in the chicken and beef industries. See Br. of National Chicken Council, et al. as Amicus Curiae (i)-(ii). Because of that issue's importance to the administration of the FLSA, the Secretary of Labor has devoted considerable attention to it. The Secretary filed suit seeking compensation for such walking time in *Reich* v. *IBP, Inc.*, *supra*. The Secretary filed amicus briefs in the courts below in both this case and *Tum*, expressing the Secretary's view that such time is compensable. And the Secretary is currently engaged in two district court proceedings outside the First and Ninth Circuits in which the Secretary is seeking compensation for walking time associated with the donning and doffing of safety gear. *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174

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[1] By contrast, the district court in *Reich* held that walking time associated with pre-shift or post-shift activities was compensable when those activities started the workday. In particular, the court found that the workday commenced when employees picked up their knives at the knife room, and ceased when they dropped off their knives at the knife room after their shift, because "knives were an integral and indispensable part of the production work of knife carrying employees." *Reich* v. *IBP, Inc.*, 820 F. Supp. 1315, 1325 (D. Kan. 1993). Accordingly, the court held that "the time spent walking from the knife room to the work station and back to the knife room was compensable because it occurred during the workday." *Ibid.* That conclusion was not disturbed on appeal.

(N.D. Ala. filed May 9, 2002); *Chao* v. *George's Processing, Inc.*, No. 6:02-CV-03479-RED (W.D. Mo. filed Nov. 20, 2002). Because the circuits have divided on that issue and because the issue is one of ongoing public importance, it warrants the Court's review.

3. This case may not be an appropriate vehicle to resolve that issue, however, because it appears that the Court's resolution of that issue would not affect the judgment to be entered by the district court. The reason is as follows: Respondents filed suit under both the FLSA and state law. The district court found both federal law and state law violations and entered a judgment awarding respondents $3,098,517, more than half of which constituted damages under the FLSA with the remainder being based on respondents' state law claims. Resp. Br. in Opp. App. 2a; see p. 5, *supra*. The district court did not rule in respondents' favor on their state law claim seeking compensation for petitioner's failure to provide them with a 30-minute meal break, and accordingly the court did not award damages on that claim. Anticipating that its determination on that state law issue might be reversed on appeal, however, the district court announced that if respondents prevailed on that issue on appeal, it would instead award respondents a total of $7,297,517, comprised entirely of damages under state law. Pet. App. 74a. The court of appeals did reverse the district court on the state law meal break issue. *Id.* at 30a-32a. It thus appears that, once this case is returned to the district court, that court will enter a monetary judgment of $7,297,517 that is based entirely on state law. *Id.* at 74a. See pp. 5-6, *supra* (explaining why initial judgment awarded overtime damages under the FLSA for overlapping state and federal law periods, but alternative disposition rests overtime award only on state law).

This Court's resolution of the walking time issue would have no apparent effect on the district court's authority to

enter such a judgment. In its petition, petitioner challenges the lower court's authority to award walking time based on federal law; it does not challenge the lower court's authority to award walking time based on state law. Nor would a determination that walking time is excluded under federal law carry over to state law, because the applicable state statute does not contain any walking time exclusion that parallels the Portal-to-Portal Act. Pet. App. 71a; Wash. Rev. Code Ann. §§ 49.46.005 *et seq.* (West 2002 & Supp. 2004). Petitioner argued in its reply brief in the court of appeals that the Portal-to-Portal Act preempts state law to the extent that it authorizes compensation for walking time that would not be compensable under federal law (C.A. Reply Br. 37-41). But the court of appeals held that petitioner waived that argument by not presenting it in a timely manner, Pet. App. 15a, and petitioner has not sought review of that determination.

Because the court of appeals vacated the district court's judgment, on remand respondents could theoretically seek entry of a judgment different than the proposed alternative disposition suggested by the district court in its opinion. For example, respondents could seek entry of a judgment awarding the same amount of damages, but urge that it be based expressly on both federal law and state law, thereby maximizing their chances of receiving the collateral estoppel benefits of the federal law rulings in their favor. Respondents could also seek a judgment that awards pre- and post-shift overtime damages based on the FLSA, together with meal break overtime damages based on state law. Under the district court's prior rulings, that method of calculating damages would lead to an increase in the total amount of damages awarded to respondents, because the district court (as affirmed by the court of appeals) has already held that respondents' FLSA damages are to be doubled pursuant to the Act's liquidated damages provision, but does not appear to

have doubled preliminary and postliminary donning, doffing, and walking time damages under state law. Pet. App. 78a-80a. Respondents have represented to us, however, that they will seek entry of the alternative judgment proposed by the district court and nothing more. It therefore appears likely that the Court's resolution of the walking time issue would not affect the judgment that will be issued on remand.

That circumstance does not demonstrate that a ruling by this Court on the walking time issue would be advisory and therefore outside the scope of the Court's Article III jurisdiction. A ruling by the Court that the FLSA does not require compensation for walking time associated with donning and doffing safety gear would authoritatively foreclose the district court from awarding or increasing walking time damages based on federal law, and it would eliminate any possibility that the district court's and the court of appeals' federal walking time rulings would have collateral estoppel effects on petitioner in other cases. Such a ruling would also eliminate any possibility that the FLSA violation found in this case could serve as a basis for DOL to impose a civil penalty in the event that petitioner violates the FLSA in the future. See 29 C.F.R. 578.3(b) (authorizing the Secretary to impose civil penalties upon "repeat" violators). Cf. *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985) (a criminal defendant's completion of sentence does not moot case because of possible collateral consequences, such as an enhanced sentence for a later conviction). Those consequences are sufficient to prevent the Court's ruling from being advisory in an Article III sense.

Nonetheless, because it appears that the district court is likely to enter the same judgment regardless of how this Court rules on the walking time issue, prudential considerations may counsel against granting review on that issue in this case. This Court ordinarily does not grant review in cases unless a reversal would change the relative rights of

the parties in some concrete fashion. In *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), for example, the Court granted certiorari to decide whether a contract provision that barred an in personam action was enforceable. After it became clear that "in any event the [plaintiff] will be able to try its claim in the District Court" because the contract did not bar the plaintiff's parallel in rem action, the Court dismissed the writ of certiorari as improvidently granted. *Id.* at 183. The Court explained that it decides issues of public importance only in the context of "meaningful litigation," and that a resolution of the question on which the Court had granted review could "await a day when the issue is posed less abstractly." *Ibid.* The Court has also denied review in other comparable circumstances. *South Dakota* v. *Kansas City S. Indus., Inc.*, 880 F.2d 40 (8th Cir. 1989), cert. denied, 493 U.S. 1023 (1990) (certiorari denied on federal law conflict where state law furnished an independent ground for affirming court of appeals); *Sommerville* v. *United States*, 376 U.S. 909 (1964) (certiorari denied on conflict over whether state or federal law applied when petitioner would be liable under either); see Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) (discussing cases). Petitioner has not identified any case in which the Court has granted review in circumstances like those presented here, and we are not aware of any such case. Thus, while the walking time issue warrants review in an appropriate case, the Court may prefer to await a case in which the issue "is posed less abstractly."[2]

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[2] A petition for a writ of certiorari is pending in *Tum* v. *Barber Foods, Inc.*, No. 04-66 (filed July 8, 2004), and also raises the walking time issue, albeit in a somewhat different factual context in view of the jury's conclusion that the associated donning and doffing time was de minimis. That petition also raises another question of considerable significance to the administration of the FLSA—whether donning and doffing time should be considered together with walking time in assessing whether the

2. The second question raised in the petition is whether an opinion letter issued by the Administrator of the Wage and Hour Division of DOL is entitled to *Chevron* deference. In *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000), the Court held that the Administrator's opinion letters are not entitled to *Chevron* deference, but instead are entitled to weight under the factors set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). According to petitioner (Pet. 19-20), however, the Court's decision in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), calls into question the holding in *Christensen*, and this Court's review is necessary to resolve the resulting "confusion."

That issue does not merit review. *Mead* held that classification rulings issued by Customs officials are not entitled to *Chevron* deference, a holding that is consistent with the result reached in *Christensen*. In its analysis of the deference issue, *Mead* made clear that opinion letters are not categorically barred from receiving *Chevron* deference. Instead, *Mead* instructs that, in deciding whether opinion letters are entitled to *Chevron* deference, a court should decide whether an agency's "generally conferred authority and other statutory circumstances" make it "apparent" that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." 533 U.S. at 229. *Mead* did not indicate, however, that opinion letters issued by the Admini-

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time devoted to those activities is de minimis, or whether donning and doffing time should instead be examined in isolation. The respondent in *Tum* has not filed a brief in opposition, but to the extent we have been able to determine based on a review of the opinion in that case, it appears that *Tum* would likely provide the Court an opportunity to resolve the existing disagreement among the circuits over the walking time issue. Because the cases raise closely related issues, the Court may wish to hold the petition in this case pending its disposition of the petition for a writ of certiorari in *Tum*.

strator are entitled to *Chevron* deference under that standard. Indeed, *Mead* cited *Christensen* with apparent approval. See *id.* at 236 n.17, 237-238.

Petitioner argues (Pet. 22-23) that the Administrator's opinion letter in this case is entitled to *Chevron* deference under the *Mead* standard, because the Administrator is appointed with the advice and consent of the Senate and has certain administrative responsibilities, 29 U.S.C. 204(a), and because employers that rely in good faith on the Administrator's opinion letters are entitled to a defense against FLSA liability. 29 U.S.C. 259(a). But reliance on those two factors would lead to the conclusion that all opinion letters issued by the Administrator are entitled to *Chevron* deference—a position that is at odds with *Christensen* and that would therefore require its overruling. See *Skidmore*, 323 U.S. at 140 (holding that Administrator's interpretations of the FLSA "are not controlling upon the courts by reason of their authority" but "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"). Petitioner has not made out the kind of compelling case that would be necessary to justify the overruling of this Court's precedents.

In *Barnhart* v. *Walton*, 535 U.S. 212 (2002), the Court held that a particular Social Security Administration interpretation was entitled to *Chevron* deference because of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222. That decision suggests a basis for arguing that some opinion letters issued by the Administrator might warrant *Chevron* deference in appropriate circumstances—a position that would require qualifying *Christensen* and *Skidmore*, but not overruling them. *Barnhart*, however, does not support petitioner's

view that all opinion letters issued by the Administrator are categorically entitled to *Chevron* deference.

Nor is this case an appropriate one in which to decide whether there are some opinion letters issued by the Administrator that would warrant *Chevron* deference under *Barnhart*. First, petitioner did not ask the court of appeals to give the Administrator's interpretation *Chevron* deference in light of the factors set forth in *Barnhart*. Accordingly, the court of appeals did not purport to resolve the deference issue in terms of the *Barnhart* factors. Pet. App. 17a n.9.

Second, the question whether particular opinion letters issued by the Administrator might be entitled to deference under *Barnhart* would benefit from further ventilation in the courts of appeals. Petitioner has cited only two recent court of appeals decisions in which opinion letters issued by the Administrator have been at issue. Both courts concluded that they would reach the same conclusion regardless of the level of deference accorded to the opinion letters. Accordingly, neither court decided the precise level of deference required. See *Houston Police Officers' Union* v. *City of Houston*, 330 F.3d 298, 304-305 (5th Cir.), cert. denied, 124 S. Ct. 300 (2003); *Herman* v. *Fabri-Centers of Am., Inc.*, 308 F.3d 580, 592-593 (6th Cir. 2002), cert. denied, 537 U.S. 1245 (2003).

Petitioner also contends (Pet. 26) that, regardless of the proper degree of deference due, "the Ninth Circuit below erred by rejecting out of hand the agency's 'new' interpretation." We agree that the court of appeals was wrong to dismiss the Administrator's comprehensive and carefully reasoned opinion letter setting forth the rationale for the agency's interpretation of the "changing clothes" exception. Pet. App. 94a-100a. The court of appeals misapplied *Skidmore*, failing even to acknowledge the "thoroughness evident in [the opinion letter's] consideration," the "validity of its

reasoning," and "its consistency with earlier * * * pronouncements." 323 U.S. at 140; see Pet. App. 17a n.9. The court instead concluded that a temporary change in position, standing alone, sufficed to justify its refusal to defer. Consistency of interpretation is only one of the factors to be considered under *Skidmore*, however, and in any event the Administrator in this instance was merely readopting the agency's previous enforcement practice. *Id.* at 94a-95a. Notwithstanding the Ninth Circuit's error, however, the court's mere misapplication of *Skidmore* does not create a circuit conflict or otherwise rise to the level of an issue requiring this Court's attention.

Petitioner briefly argues (Pet. 18) that review is also warranted on the "changing clothes" issue because the decision below "creates a conflict" with the Fifth Circuit's decision in *Bejil* v. *Ethicon, Inc.*, 269 F.3d 477 (2001) (per curiam). There is, however, no conflict. In *Bejil*, the Fifth Circuit held that sanitary garments, such as lab coats, dedicated shoes and shoe coverings, and hair and beard coverings fall within the "changing clothes" exclusion. *Id.* at 480 n.3. The court of appeals in this case, however, did not address items of that kind. Instead, it held that special protective gear such as metal aprons and Kevlar gloves do not constitute "clothes." The court reasoned that the "changing clothes" exclusion applies only to items that are "plainly and unmistakably" clothes, and that the items of special protective gear at issue here are not "plainly and unmistakably" clothes. Pet. App. 16a-17a. That analysis does not suggest that the Ninth Circuit would reach the same conclusion about the items at issue in *Bejil*.

Finally, review is unwarranted on the "changing clothes" issue for the same reason that it may be unwarranted on the walking time question. Because there is no state law "changing clothes" exclusion, it appears that resolution of

that issue would not affect the judgment that will be issued by the district court.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Tum*, No. 04-66. If the petition in *Tum* is granted, the Court may wish to hold the petition in this case pending its decision on the merits in *Tum*. If the petition in *Tum* is denied, the petition in this case should also be denied.

Respectfully submitted.

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OCTOBER 2004