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Supreme Court of Wisconsin

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April 3, 2014

To:

Hon. William F. Hue
Jefferson County Circuit Court Judge
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Jefferson, WI 53549

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Jefferson County Clerk of Circuit Court
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You are hereby notified that the Court has entered the following order:

No. 2012AP2196 Weissman v. Tyson Prepared Foods, Inc. L.C.#2010CV1035

On April 2, 2014, the parties in the above matter filed a "Joint Stipulation and Order for Dismissal" of the above captioned matter. The petition for review was granted by this court on December 16, 2013, with oral argument scheduled on April 8, 2014. The parties advise the court that the matter "has been settled in its entirety" and they seek dismissal "on the merits without costs to any party."

IT IS ORDERED that the joint stipulation and request for dismissal of the appeal and removal from the court's oral argument calendar is granted. The appeal is hereby dismissed. No costs.

Diane M. Fremgen
Clerk of Supreme Court

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April 2, 2014

Supreme Court Clerk
110 E. Main Street
Madison, Wi 53703

Re: Jim Weissman, et al. v. Tyson Prepared Foods, Inc.
Case No.: 12-AP-002196

Dear Clerk:

Enclosed for filing please find a Joint Stipulation and Order for Dismissal in the above-referenced matter.

Thank you for your immediate attention to this matter.

Very truly yours,

KRUKOWSKI & COSTELLO, S.C.

Thomas P. Krukowski

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cc: Douglas J. Phebus, Esq. (w/encl., via e-mail only)

157770/2010060-1

WISCONSIN SUPREME COURT

JIM WEISSMAN, KEITH GRIEP, RANDY GARRETT, GREGORY PETERS, SHANNON FITZPATRICK and JAMES GENEMAN,

Plaintiffs-Appellants,

v. APPEAL NO. 2012AP002196

TYSON PREPARED FOODS, INC.,

Defendant-Respondent-Petitioner.

Jefferson County Circuit Court Case No. 2010-CV-001035
Honorable William F. Hue

JOINT STIPULATION AND ORDER FOR DISMISSAL

The parties, by and through their attorneys, jointly stipulate that the instant dispute between the parties hereto, originally presented before the Honorable William F. Hue in the Jefferson County Circuit Court, No. 2010-CV-001035, and currently pending in this Court, has been settled in its entirety. Accordingly, pursuant to Wis. Stat. § 809.18, the parties jointly stipulate that the Petition for Review, Appeal No. 012AP002196, filed by Defendant-Respondent-Petitioner Tyson Prepared Foods, Inc. be dismissed on the merits without costs to any party, and that an order to that effect be

entered without further notice or a hearing. The parties also jointly request that the oral argument scheduled herein for April 8, 2014 at 9:45 a.m. be removed from the Court's calendar.

Dated: April 1, 2014

Respectfully submitted.

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Counsel for Plaintiffs-Appellants

ORDER

Based on the stipulation for voluntary dismissal signed by all of the parties,

IT IS ORDERED:

Tyson Prepared Foods, Inc.'s Petition for Review, Appeal No. 2012AP002196, is dismissed on the merits and without costs to any party, and the argument scheduled in this matter for April 8, 2014 at 9:45 a.m. is removed from the Court's calendar.

Dated:

BY:

WISCONSIN SUPREME COURT

JIM WEISSMAN, KEITH GRIEP, RANDY GARRETT, GREGORY PETERS, SHANNON FITZPATRICK and JAMES GENEMAN,

Plaintiffs-Appellants,

v. **APPEAL NO. 2012AP002196**

TYSON PREPARED FOODS, INC.,

Defendant-Respondent-Petitioner.

Jefferson County Circuit Court Case No. 2010-CV-001035
Honorable William F. Hue

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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Counsel for Tyson Prepared Foods, Inc.

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BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

Tyson Prepared Foods, Inc., defendant-respondent-petitioner, hereby submits this brief in support of the Court's review of the decision and order of the Court of Appeals, District IV, in *Jim Weissman, Keith Griep, Randy Garrett, Gregory Peters, Shannon Fitzpatrick, and James Geneman v. Tyson Prepared Foods, Inc.*, No. 2012AP2196, filed on August 1, 2013.

ISSUE PRESENTED FOR REVIEW

The issue presented for review, one of first impression under Wisconsin law, is:

Whether pre- and post-shift donning and doffing of generic work clothing that is neither extensive in nature, nor unique to the specific task performed, is non-compensable time under Wisconsin Statute § 103.02 and the Wisconsin Administrative Code Section Department of Workforce Development 272.12, because such work clothing is not

"integral" and "indispensable" to employees' principal work activities.[1]

The Circuit Court ruled that such pre- and post-shift clothes changing was non-compensable, in conformance with the weight of federal authority interpreting the substantially similar federal regulations. The trial court held that because the commonplace, generic clothing items at issue (smocks, safety glasses, ear plugs, bump caps, hair and beard nets, and captive shoes) are neither unique to the employees' specific principal activities, nor extensive in nature, their donning and doffing was neither integral nor indispensable to performing the respondents' principal work activities. The Circuit Court therefore granted summary judgment to Tyson.

The Court of Appeals reversed. That court held that the pre- and post-shift donning and doffing was compensable because it was required by Tyson, and performed on premises

[1] Unless otherwise noted, all references to the Wisconsin Statutes are to the 2011-12 version and all references to the Wisconsin Administrative Code are current through Administrative Register, September 1, 2013, Number 692.

in service of Tyson's business interests. In the appellate court's view, this was sufficient to make the donning and doffing compensable.[2]

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

This Court should grant oral argument and publish its decision. This case involves a question of first impression under Wisconsin law, which is of substantial and continuing interest to Wisconsin businesses and their employees, and will necessarily clarify existing rules of law in the State.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Wisconsin Law

The purpose of Chapter 109 of the Wisconsin Statutes and the regulations promulgated thereunder is to "foster the prompt payment of wages due to Wisconsin employees." *See*

[2] Neither court below reached the related issue of whether time spent walking to and from work stations after donning and before doffing is compensable. If the Court agrees with the trial court and the weight of federal authority that the clothes changing at issue is non-compensable, then the related walking time would also be non-compensable.

Hubbard v. Messer, 2003 WI 145, ¶ 24, 267 Wis. 2d 92, 673 N.W.2d 676. Thus, Wisconsin employers generally must pay their employees for all time spent in "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's business." WIS. ADMIN. CODE § DWD 272.12(1)(a)1. Yet the employee is not necessarily paid from the moment he arrives until the moment he leaves work each day.

The employer generally is not required to pay workers until that time each workday the employee "commences [his] principal activity or activities" or after the time each workday he "cease[s] such principal activity or activities." *Id.* § DWD 272.12(1)(a)2. In other words, time spent by the employee at the workplace is often longer than the compensable workday, *i.e.*, hours spent conducting principal activity or activities. *Id.*

Thus, as a general rule, "preparatory and concluding" activities—like changing clothes at work, or "checking in and

out and waiting in line to do so"—are not compensable. *See* WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c. But a narrow exception to this general rule exists for any preparatory and concluding activities that are considered to be "an integral part" of the employee's particular "principal activity." *Id.* The Administrative Code does not define "integral," but does provide three interrelated guiding examples:

> e) Preparatory and concluding activities.
>
> 1. The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are the following:
>
> a. In connection with the operation of a lathe, an employee will frequently, at the commencement of their workday, oil, grease, or clean their machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
>
> b. In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of

> other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee. Such preparatory activities are compensable under this chapter.
>
> c. Among the activities included as an integral activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform their principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and is not directly related to their principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

WIS. ADMIN. CODE § DWD 272.12(2)(e).

These examples were not written on a clean slate. As the Court of Appeals recognized, "significant portions" of these Wisconsin regulations were "clearly borrowed from

federal regulations" (App. 7 n.3) under the Fair Labor Standards Act, *see* 29 C.F.R. §§ 785.24 & 790.8, and the guiding examples of compensable integral activities are virtually indistinguishable from their federal counterparts. *Compare* WIS. ADMIN. CODE § DWD 272.12(2)(e) *with* 29 C.F.R. § 785.24; *and* 29 C.F.R. § 790.8(b); *see also* 29 U.S.C. §§ 201 *et seq*.; 29 U.S.C. §§ 251 *et seq.* These federal rules reflect careful deliberation by the U.S. Department of Labor, and since their promulgation, have been interpreted by federal courts across the country. For this reason, a brief discussion of the evolution of the federal law, which provides the model for the Wisconsin regulations at issue, is in order.

B. Federal Law

The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*., enacted by Congress in 1938, serves the same basic purpose as the parallel Wisconsin regulations: it ensures "a fair day's pay for a fair day's work," *see* 81 Cong. Rec. 4983, 75th Cong., 1st Sess. (May 24, 1937) (Message of President

Roosevelt), by setting and regulating minimum wages and overtime pay for hourly workers.

As enacted, the FLSA did not define "work." In 1946 this legislative gap was partially filled by the U.S. Supreme Court with its decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680. There, the Court determined that the time workers "necessarily spent" walking to their work stations after punching their time cards was compensable "working time." *Id.* at 691. The Court explained that walking from the time clock to a factory workstation was "physical and 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." *Id.* at 691-92 (internal quotation marks and citation omitted).

The Supreme Court further held, in line with this broad definition of work, that employees must be compensated for certain "preliminary activities," including "putting on aprons and overalls, removing shirts, taping or greasing their arms,

putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." 328 U.S. at 692-93. The Court stopped short of requiring compensation for all "preliminary activities," however, holding that "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours," the time should be excluded as *de minimis*, because the law does not mandate compensation for such "[s]plit-second absurdities." *Id.* at 692.

Anderson's broad holding with respect to "preliminary activities" was not well received. The decision brought about a "vast flood of litigation," 93 Cong. Rec. 2089, 80th Cong., 1st Sess. (Mar. 14, 1947), and gave rise to "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. § 251(a). To stem the tide, in 1947, Congress enacted the Portal-to-Portal Act, 29 U.S.C. §§ 251 *et seq*. The Portal Act "narrowed the coverage of the FLSA

by excepting two activities" that the Court in *Anderson* had held were compensable: (1) walking on the employer's premises to and from the actual place of the performance of the employee's principal activity and (2) those activities that are "preliminary or postliminary" to the worker's principal activity. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005) (citing 29 U.S.C. § 254(a)).

However, Congress did not define "preliminary and postliminary" activities in the Portal Act, nor did it provide guidance on which, if any, preparatory and concluding acts might still be compensable. The U.S. Supreme Court again intervened in *Steiner v. Mitchell*, 350 U.S. 247 (1956). *Steiner* resolved whether battery plant workers who worked with toxic chemicals as a part of their principal employment activities should be compensated for the time spent donning and doffing protective gear and showering in on-site facilities. *See id.* at 248. Using language that was later incorporated into the federal regulations (and Wisconsin's), *Steiner* held

that "activities performed either before or after the regular work shift, on or off the production line, are compensable *** if those activities are an integral and indispensable part of the principal activities" for which the workers are employed. *Id.* at 256. With regard to the battery plant workers, the Court ruled that because they made "extensive use of dangerously caustic and toxic materials, and [were] compelled by circumstances, including vital considerations of health [and] hygiene, to change clothes and to shower in facilities which state law requires their employer to provide," *id.* at 248, "it would be difficult to conjure up an instance where changing clothes and showering [were] more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Id.* at 256.

But the Court went on to distinguish the battery plant workers from the average employee who changes clothes as part of his job in a non-hazardous environment. In such run-of-the-mill instances, *Steiner* held that under the Portal Act

"changing clothes and showering under normal conditions" *would not be compensable.* 350 U.S. at 249.[3]

Thus, both Wisconsin and federal law recognize that if employees "cannot perform their principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday" becomes "an integral part of the employee's principal activity." WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c.; 29 C.F.R. §§ 785.24(c), 790.8(c). Conversely, both also recognize that 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

[3] *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956) was decided the same day as *Steiner*. *Mitchell* held that knife sharpening activities in a meat packing plant were an integral part and indispensable to the various butchering activities performed at the plant because "a dull knife would slow down production ***, affect the appearance of the meat as well as the quality of the hides, cause waste and make for accidents." *Id.* at 262-63. Like the sharpening of the lathe by the lathe operator in the Code's first example, *see* WIS. ADMIN. CODE § DWD 272.12(2)(e)1.a., and the donning of protective gear by the battery plant employees in *Steiner*, the sharpening of knives in *Mitchell* was essential to the effective completion of the knifemen's principal activities.

than a principal part of the activity," and therefore not be compensable. *Ibid.*

II. FACTS AND PROCEEDINGS BELOW

1. This is a class action filed under Chapter 109 of the Wisconsin Statutes, by six hourly workers employed in various positions in a dry sausage processing plant located in Jefferson, Wisconsin. The facility is owned and operated by defendant-respondent-petitioner Tyson Prepared Foods, Inc. (Record on Appeal, Document ("R") 1 at ¶¶ 1-9, 15, App. 50-52; R. 26 at ¶ 1, App. 76.) The Jefferson plant is not a "kill facility," and does no slaughtering, in-house butchering, or raw meat processing. Rather, the plant's production activities are limited to preparing dry sausage products from already-processed and preserved meats that the plant receives from other Tyson locations. (R. 41 at 16:23-17:8, App. 35-36.)

The workers perform different jobs within the plant, including maintenance mechanic, peeler operator, finish blender operator, assorted warehouse and sanitation positions,

and gas flush trucker. (R. 26 at ¶¶ 2, 4-6, 8-9, App. 77-78.) Some of these positions entail no direct handling of the meat products produced at the Jefferson facility. (*See* Ex. 4 to R. 28 at 66:18-67:16, App. 100.)

The workers allege that Chapter 109 entitles them to unpaid overtime wages for time spent at the beginning and end of their shifts donning and doffing certain clothing items over their street clothes, and for related time spent walking to and from their workstations. (R. 1 at ¶¶ 12-15, App. 51-52.) Specifically, the complaint alleges that Tyson is required to pay plaintiffs for the time spent donning and doffing cotton frocks, hair and beard nets, safety glasses, aprons, ear plugs, captive shoes/rubber boots/rubbers for shoes, bump caps, vinyl and/or cotton gloves, vinyl sleeves, and maintenance uniforms—all of which, plaintiffs allege, Tyson requires them

to wear while discharging their principal duties in the plant.[4] (R. 1 at ¶¶ 10-13, App. 51.)

The particular combination of these clothing items varies according to worker preference and job task, and the items are worn by workers across a wide variety of positions in the Jefferson facility. For example, plaintiff Shannon Fitzpatrick alleges that when working as a gas flush trucker, she was required to wear a frock, vinyl gloves, a hairnet, ear plugs, safety glasses, bump cap, and captive shoes. (App. 78, ¶ 8.) And when Fitzpatrick worked as a peeler operator, she was required to wear a frock, vinyl gloves, hairnet, earplugs, safety glasses, and an apron. (*Id.*) Similarly, plaintiff Keith Griep, a maintenance mechanic, claims that he was required to wear a bump cap, hairnet, ear plugs, safety glasses, captive shoes, and a maintenance uniform. (*Id.* at ¶ 5.)

[4] Tyson disputes that plaintiffs are required to wear all the clothing items specified and that plaintiffs must put on and take off all required items on unpaid time. (*See* R. 27 at 3 n.2, App. 55.) Tyson reserves the right to litigate the extent to which the clothing in issue is required on remand, if the Court of Appeals' textually unmoored broad standard is not overruled by this Court.

The frock is a simple cloth garment with snaps in front (Ex. 7 to R. 28 at 83:16-18, App. 200), and is worn in "all kinds of jobs [and] context[s]." (R. 41 at 33:9-12, App. 40.) The safety glasses likewise are generic, worn across jobs and multiple industries, and are similar to sunglasses in ease of use. (Ex. 4 to R. 28 at 100:25-101:3, 101:6-7, App. 108-09; Ex. 7 to R. 28 at 85:13-15, App. 201.) Similarly, the bump cap is similar to the hard plastic hat worn in the construction industry, but is lighter weight. (Ex. 6 to R. 28 at 54:11-14, App. 155.) The hairnet is a "standard hairnet like what would be used at a bakery," (Ex. 9 to R. 28 at 22:19-24, App. 243), and there is "nothing special" about it, (Ex. 7 to R. 28 at 62:15-19, App. 195). The vinyl gloves are disposable, (Ex. 4 to R. 28 at 94:24-95:7, App. 107), and so too are the earplugs, which the workers are free to replace with their own preferred form of hearing protection. (Ex. 9 to R. 28 at 20:13-19, App. 242; Ex. 6 to R. 28 at 58:24-59:19, App. 156; Ex. 4 to R. 28 at 100:7-13, App. 108.) Work gloves and captive shoes (which

for some are simply a worker's own shoes kept at the plant) also vary based on employee preference, (Ex. 8 to R. 28 at 43:11-20, App. 230; Ex. 6 to R. 28 at 58:5-23, 55:12-14, App. 155-56; Ex. 4 to R. 28 at 96:13-97:19, App. 107-08), as do the clothing items worn by maintenance employees.[5] (Ex. 5 to R. 28 at 28:24-29:3, App. 130-31.) Vinyl sleeves are reusable latex that are worn over a worker's arms. (Ex. 6 to R. 28 at 51:1-22, App. 154; Ex. 4 to R. 28 at 108:7-9, App. 110.)

None of the garments requires extensive effort or time to don or doff. (*See, e.g.*, Ex. 8 to R. 28 at 30:23-25, App. 227 ("just a few seconds" to put on bump cap); Ex. 6 to R. 28 at 70:24-71:16, App. 159 (few seconds to put on safety glasses and may be done while walking); Ex. 9 to R. 28 at 22:25-23:3, App. 243 (seconds to don beard net); Ex. 7 to R. 28 at 115:6-20, App. 208 (seconds to remove bump cap and ear plugs); Ex. 4 to R. 28 at 104:5-8, App. 109 (takes 5-10 seconds to put on frock); Ex. 8 to R. 28 at 44:4-8, App. 230

[5] All workers wear captive shoes or shoe rubbers; in some production areas, workers wear captive rubber boots. (*See* Ex. 8 to R. 28 at 48:18-22, App. 231; Ex. 9 to R. 28 at 41:3-12, App. 248.)

(changing process including putting on bump cap, safety glasses, and changing shoes can be done in approximately two minutes).)

2. The Circuit Court granted summary judgment for Tyson, holding that the donning and doffing the clothing articles at issue was not compensable under Wisconsin law. (R. 38 at 2-3, App. 29-30.) Because this action presented an issue of first impression in Wisconsin, and relevant state authority was lacking, the Circuit Court looked to federal cases interpreting section DWD 272.12(e)'s federal analogs for guidance. (R. 38 at 2, App. 29.) Based on that analysis, the Circuit Court concluded that the dispositive question is whether the donning and doffing of the workers' clothing is "integral and indispensable" to their principal employment activities under section DWD 272.12(e), and employed the approach used by the Seventh Circuit in *Pirant v. United States Postal Service*, 542 F.3d 202, 208-09 (2008), to give meaning to that phrase. (R. 38 at 3, App. 30.) Consistent

with the Seventh Circuit's and other federal courts' reading of "integral and indispensable," the Circuit Court held that the workers were not entitled to compensation for their pre- and post-shift donning and doffing because the clothing items at issue were neither extensive nor unique to their particular job responsibilities. (*Id.*) Accordingly, the court held that the donning and doffing of these items necessarily could not be "'integral and indispensable' to plaintiffs' principal work activities," (*id.*), because the items were more "akin to the showering and changing clothes 'under normal conditions' that the [U.S.] Supreme Court said in *Steiner* is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity," *Pirant*, 542 F.3d at 208-09. (*See* App. 30.)

3. The Court of Appeals reversed. (App. 1-27.) The court, relying chiefly on the "general requirement[]" in WIS. ADMIN. CODE § DWD 272.12(1)(a)1. that workers must be paid for activities "controlled or required by the employer

and pursued necessarily and primarily" for its benefit, started from the premise that because Tyson allegedly mandates that workers don and doff the clothing at issue, and that doing so primarily benefits Tyson, "if the only DWD administrative code provisions at issue where the 'general requirements' of WIS. ADMIN. CODE § DWD 272.12(1)(a)1., it would be a simple matter to conclude that the donning and doffing is compensable." (App. 11.)

The Court of Appeals acknowledged, however, that the statutory inquiry did not end there, and that it was required to consider also the limiting examples of "integral" preparatory activities in WIS. ADMIN. CODE § DWD 272.12(2)(e)1.a.-c. (App. 12.) But the appellate court did not analyze all three examples in section DWD 272.12(2)(e). Nor did the court consider how the interconnected examples informed whether a preparatory or concluding activity was "integral" to the performance of an employee's principal employment task. Despite acknowledging its obligation to "construe statutory

and regulatory language 'in the context in which it was used, not in isolation but [rather] as part of a whole, in relation to the language of surrounding and closely related' statutes or regulations," (App. 12), the Court of Appeals nonetheless focused solely on section DWD 272.12(2)(e)'s third example. (App. 13-15.)

According to the Court of Appeals, section DWD 272.12(2)(e)1.c, "establishes three points and then adds a caveat": (1) the "general rule" that "[a]n integral part of a principal activity includes but is not limited to an activity that is" (i) "closely related to the [worker's] principal activity," and (ii) "indispensable to its performance"; (2) a "more specific application of the general rule: Donning clothing necessary to the performance of a principal activity on the employer's premises is compensable"; (3) repetition of the "requirement that there must be a direct relationship between the conduct at issue and the principal activity," and "further guidance that donning or doffing *** as a mere convenience

to the employee is insufficient"; and (4) the "ending caveat" that "time an employee takes to accomplish the mechanical steps of entering and exiting the workplace is not compensable, even if that involves waiting in a line." (App. 13-14.)

Turning first to the "closely related" element of the "general rule," the court held that the donning and doffing of the clothing at issue "[p]lainly *** [was] closely related to the principal activities of the employees" since "Tyson requires employees to don most if not all items to keep food from becoming contaminated, to operate more efficiently, and to limit Tyson's liability for and costs associated with employee injuries." (App. 14-15.)

The Court of Appeals applied the same logic to the "indispensable to its performance" element. The court began by noting that the requirement that the activity in question be "indispensable" must be contrasted against what the section dictated was not—namely, those clothing changes that are

"merely a convenience to the employee" and thus "not related to any principal activity." (App. 15.) The appellate court reasoned that "indispensable" clothes changing activities are therefore like those taken by the chemical worker in section DWD 272.12(2)(e)1.c.—activities without which the worker "'cannot perform' [the] principal activities" of employment. (App. 15-16.)

But the court of appeals defined "indispensable" very broadly. It thus included not only those activities—like the chemical worker's donning of protective clothing—that make it physically possible for the worker to complete the specific principal activity he or she performs, but also those tasks that are generally "obligatory" as a result of an employer mandate or legal directive, regardless of whether the activity is directly related to the performance of the principal activity. (App. 16.) The court believed that this definition was consistent with the chemical plant worker example in section DWD 272.12(2)(e)1.c. because it assumed that the "nature of the

work," as well as "safety laws" and "rules of the employer "would all [without distinction] require the chemical plant employee to change clothes." (App. 16.) The appellate court backstopped this "obligatory equals indispensable" finding by contrasting the workers' activities with those that are typically undertaken for "convenience," which the court defined as "[t]he quality of being suitable to one's comfort, purposes, or needs." (App. 15.)

"Relying on these definitions," the Court of Appeals held that the donning and doffing of the non-unique or task-specific items here at issue was compensable because it was "required by Tyson" for employees to perform their principal activities, "is closely related to those activities [because required by Tyson in the service of business interests] and is indispensable to their performance [again because generally required]." (App. 18-19.) No further nexus between the clothing and the employees' specific principal job activities was required.

The appellate court also rejected the "extensive and unique" test for "integral" activities adopted by many federal courts—including the Seventh Circuit—on the basis that neither "extensive" nor "unique" appeared in the text of the DWD Administrative Code provisions at issue. (App. 24-25.) In so doing, the appeals court sidestepped the reasoning of those courts, supported by U.S. Supreme Court authority, that merely being "required" by an employer to do something is insufficient to transform a non-compensable preparatory or concluding activity into an "integral part" of an employee's principal activities.

The Court of Appeals accordingly reversed the grant of summary judgment to Tyson and remanded for consideration of whether the time spent donning and doffing is de minimis and whether walking time after and before the donning and doffing process was also compensable. (App. 26-27.)

Tyson timely filed its petition for review of the Court of Appeals' decision on September 3, 2013, which this Court granted on December 16, 2013.

ARGUMENT

I. DONNING AND DOFFING IS NOT "INTEGRAL" TO A PRINCIPAL ACTIVITY UNLESS THE EMPLOYEE OTHERWISE COULD NOT COMPLETE THE ACTIVITY WITHOUT THE CLOTHING AT ISSUE.

A. Section DWD 272.12(2)(e) Restricts Compensation To Activities That Are Constituent And Essential Aspects Of An Employee's Particularized, Principal Job Function.

This Court has recognized the general rule of statutory construction: "When interpreting a statute, 'we begin with the language of the statute, because it is the language that expresses the legislature's intent.'" *Crowne Castle USA, Inc. v. Orion Constr. Grp., LLC*, 2012 WI 29, ¶ 13, 339 Wis. 2d 252, 811 N.W.2d 332. By defining "principal activities" to include only activities "which are an integral part of the principal activity," the plain language of section DWD 272.12(2)(e) evinces the Department of Workforce's intent to restrict the class of compensable preparatory and concluding

tasks to those that are constituent and essential aspects of an employee's particularized, principal job functions.

The common meaning of "integral" is "essential to completeness; constituent." *Webster's New Int'l Dictionary* 1290 (2d ed. 1959); *accord American Heritage Dictionary* 911 (5th ed. 2011) ("Essential or necessary for completeness; constituent").[6] The linguistic cornerstone of an "integral" activity is thus a close nexus to the dominant activity such that were the integral activity not performed, the dominant activity could not be accomplished.

To merit compensation, a preparatory or concluding activity thus must be so irreparably tied to the performance of the principal activity that without it, the employee's primary

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[6] The Wisconsin Administrative Code is construed in the same manner as Wisconsin statutes, so "[w]here a code provision is unambiguous, [courts] must generally give it its plain meaning." *In re Child Support Arrearages*, 2006 WI App 238, ¶9, 297 Wis. 2d 430, 724 N.W.2d 908. When determining plain meaning, the courts should interpret language consistent with "common and ordinary usage," and "unless another meaning is indicated, [the courts] may consult a standard dictionary for the common meaning of a word." *Gross v. Woodman's Food Mkt., Inc.*, 2002 WI App 295, ¶ 48 & n.26, 259 Wis. 2d 181, 655 N.W.2d 718 (internal citations omitted) (American Heritage Dictionary consulted as to "common meaning" of a word).

job function could not be completed. In other words, it must be something beyond activities incident to general working conditions, such as "changing clothes [or] showering under normal conditions," "checking in and out" of work, and "waiting in line to do so," which are ordinarily excluded as being merely preliminary and postliminary to the specific tasks for which the employee is paid. WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c.; *see also Pirant*, 542 F.3d at 208.

The necessity of a close nexus between preparatory and concluding activities and the employee's specific job function is borne out by the examples in section DWD 272.12(2)(e)1.a.-c., which contrary to the Court of Appeals' suggestion, must be read in concert. *See Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶ 48, 316 Wis. 2d 47, 762 N.W.2d 652 ("The context in which the operative language appears" must be considered "because a statute's meaning may be affected by the context in which it is used.").

The first two examples, a lathe operator and a textile mill worker, explain that preparatory duties undertaken on-premises and required by an employer are "integral" only if they are so closely and distinctively tied to the execution of the worker's principal activity as to be inseparable from and essential to the performance of his or her job. The examples provide that a lathe operator could be paid for "oil[ing], greas[ing], or clean[ing] their machine, or install[ing] a new cutting tool" before operation precisely because the machine could not practicably be used otherwise. Such activities thus are both essential to the job of a lathe worker and distinctive to the demands of that particular position. WIS. ADMIN. CODE § DWD 272.12(2)(e)1.a.

Likewise, a garment worker's assembly of fabric at work benches and preparing the machines to operate are constituent and essential because they are the elemental first steps in making garments. The core process of constructing a garment cannot start without the provisioning of supplies and

the readying of machines to do so. That is why the employee tasked with arriving early to accomplish these jobs is engaged in an activity that is an "integral part" of his principal activity of making the garments (as well as aiding other workers who have the same job, and benefit equally from his initial work). WIS. ADMIN. CODE § DWD 272.12(2)(e)1.b.

The third example, which mirrors the facts in *Steiner*, dictates the same result: changing clothes, like maintenance of a lathe or distributing garment fabric, will qualify as being "integral" only when the employee's principal job function physically could not be accomplished otherwise—or, when the clothing is literally "indispensable to [the] performance" of the worker's principal work activity, WIS. ADMIN. CODE § 272.12(2)(e)1.c. *See Webster's New Int'l Dictionary* 1267 (2d ed. 1959) (defining "indispensable" as "impossible to be done without; absolutely necessary"). In such circumstances, the worker does not don clothing "under normal conditions" as part of the common process shared by his fellow

employees of preparing for work; rather, the worker puts on the clothing items because the items are inseparable from and "absolutely necessary to" the proper performance of the principal activity. *See generally* Part II.B, *infra.*

Against this backdrop, the clothes changing at issue, even if required by Tyson or government regulations, cannot be an "integral part" of the workers' principal work activities. Workers have considerable freedom to choose the specific style or type of clothing to suit their particular preferences—presumably without having to establish that the employee's choice is at least as effective as the employer's. *See* App. Br. 33. The clothing items are worn in varying combinations, regardless of job position or principal work activity. (App. 54.) Thus, it cannot be said that the clothing as a whole (or even a particular article of it) must be worn as a constituent part of a particularized work activity, much less that any item is "absolutely necessary" for any specific, primary activity to be accomplished. Indeed, even the "protective" clothing is

entirely generic, worn by workers in myriad positions who are responsible for myriad tasks across myriad industries. In short, there is "nothing special" (R. 26 at ¶ 12, App. 79) about any of the clothing items at issue in this case—either in terms of their particular characteristics or their specific nexus to the workers' principal activities.[7]

Such commonplace clothes changing "under normal conditions" (*Steiner*, 350 U.S. at 249) is precisely the type of activity that federal courts have ruled—and section DWD 272.12(2)(e) contemplates—is not compensable, because it is

[7] As Tyson noted below, the summary judgment record indicated that time spent donning and doffing items that Tyson labeled as "protective gear" that could arguably be considered to be related to the workers' particular work activities—*e.g.*, the disposable vinyl sleeves, disposable gloves, and rubber aprons used by certain workers in certain raw meat production areas—*was compensated*, because these items were put on only at the site of production, *i.e.*, while on the clock (*See, e.g.*, Ex. 8 to R. 28 at 26:13-23, 30:3-10; 30:14-16, App. 226-27 (punches in as he walks into plant at 5:50 and dons clothing afterwards); 44:17-45:3, App. 230-31 (clocking out is last thing worker does and not claiming any doffing time); Ex. 4 to R. 28 at 106:21-107:1 (clock in), 107:21-25 (obtain gloves for use later in the day), 108:6-7 (vinyl sleeves), App. 110; 111:5-7 (vinyl sleeves), 111:18-20 (apron), App. 111; 114:3-15, App. 112 (everything after punch in is paid); 130:10-132:4, App. 116 (takes off vinyl gloves, sleeves, and apron before clocking out).

not an integral or "constituent part" of the actual execution of the workers' particular, principal job function.

Moreover, donning and doffing the clothing items at issue is not even an obligation imposed uniquely on workers. All "[t]eam members, contractors, and visitors" must don and doff the same generic clothing items as a general condition of entering the production area of the facility. (*See* App. 257-58 (all employees, contractors, and visitors must wear frocks, bump caps, and hair and beard nets in the production area).) Such general clothing requirements, applying to *all persons* who enter the plant, necessarily cannot be an "integral part" of any employee's particular principal activity because they apply with equal force to persons who have no employment responsibilities to Tyson at all. *See* WIS. ADMIN. CODE § DWD 272.12(2)(e).

In short, the Circuit Court got it right. Donning and doffing of the generic clothing items at issue, which bear no relation to the performance of the employees' principal job

functions (much less an "integral" relation), is the same as clothes changing "under normal conditions" and thus is not compensable under section DWD 272.12(2)(e)1.c.

B. Fundamental Principles Of Statutory Interpretation Foreclose The Court Of Appeals' Interpretation Of Section DWD 272.12(2)(e).

The interpretation of section DWD 272.12(2)(e) by the Court of Appeals centered upon a myopic and textually insupportable syllogism. First, and without reference to the remainder of the text, the Court of Appeals zeroed in on the word "indispensable" in the clarifying statement in section DWD 272.12(2)(e)1.c., which provides that "[a]mong the activities included as an integral part of the principal activity are those closely related activities which are indispensable to its performance." (App. 13.) Then, assuming indispensable activities are always also "integral," the court reasoned that since the clothes changing here was purportedly "obligatory" and obligatory is an alternative definition of "indispensable" (*see American Heritage Dictionary*, 895 (5th ed. 2011)), the

workers' clothes changes were necessarily compensable under section DWD 272.12(2)(e). (App. 15-16.) Such a strained reading of the regulation's text should be rejected, for two reasons.

1. As the court noted (App. 12), the dispositive question is whether the clothes changing at issue is "integral" to the workers' principal job activities. Yet in interpreting the provision, the court gave no independent force to the critical term "integral." Instead, the court appears to have interpreted section DWD 272.12(2)(e)1.c. (and that example only) in the context of the "general requirements" provision in section DWD 272.12(1)(a)1., given its view that, without more than these "general requirements," it would "be a simple matter to conclude that the [clothes changing] is compensable." (App. 11.) But of course, there is more.

The appellate court wholly ignored the plain meaning of "integral," the message of the remaining two examples in section DWD 272.12(2)(e), and the full significance of the

balance of section DWD 272.12(2)(e)1.c., itself. In so doing, the court effectively excised the integrality requirement from the clothes changing example.

That result was erroneous for three reasons. First, in interpreting statutory and regulatory terms, courts must begin with the plain meaning of the words used. *Orion Const. Grp., LLC*, 2012 WI 29, ¶¶ 13-14, 339 Wis. 2d 252, 811 N.W.2d 332. They must interpret the words actually used, not the words that the court assumes the legislature meant to use. *See id.*; *Sinclair v. Department of Health & Social Servs.*, 77 Wis. 2d 322, 332, 253 N.W.2d 245 (Wis. 1977) ("A Court is not empowered to rewrite the cited statutes under the guise of construing them."). If the DWD had intended the words "integral" and "indispensable" to be interchangeable, it would have made that intention clear. *See State v. Steinhaus*, 2007 WI App. 203, ¶ 4, 305 Wis. 2d 378, 738 N.W.2d 191 ("The legislature is presumed to know the meaning of the words it selects, and we presume that the legislature chooses its terms

carefully and with precision to express its meaning."); *see also Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592 (2d Cir. 2007) (terms "indispensable" and "integral" are not synonymous; the first "means 'necessary.' *** 'Integral' means, *inter alia* 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole.'").

The DWD took pains to distinguish the two terms in section DWD 272.12(2)(e)1.c,. Unlike "integrality," which is a bedrock requirement for the entire subsection, not just the third example, "indispensability" itself is not an independent indicator of compensability. Rather, "indispensability" is one facet of a two-part descriptive phrase. *See* WIS. ADMIN CODE § DWD 272.12(2)(e)1.c. (emphasis added). Thus, whether an activity is "indispensable" in isolation does little to advance the interpretive ball, because unless the activity is also closely related to, and "indispensable *to [the] performance*" of a workers' principal job function, it cannot be "integral" to that

function. *See id.* (emphasis added). In other words, the term "indispensable" does not appear in a vacuum. Rather it has a textual context that anchors its meaning to the performance of a specific job. In short, there is no textual basis for defining "indispensable" to mean "obligatory" or generally "required" by an employer, without more. (App. 15-16.)

The appeals court's view that section 272.12(2)(e)1.c merely echoes the "general requirements" provision in section 272.12(1)(a)1., (App. 18-19), a view which is contrary to the canon that courts should not interpret provisions as to render them superfluous, *see Hubbard v. Messer,* 2003 WI 145, ¶ 9, was based in part upon its belief that the example "implie[d] that safety laws [and] rules of the employer" would require the chemical plant worker to change clothes, (App. 16). But, here again, the complete text of the example belies any assumption that general work requirements determine whether clothes changing is integral to the job or "indispensable to its performance." WIS. ADMIN. CODE

§ 272.12(2)(e)1.c. "[C]hecking in and out [of work] and waiting in line to do so" are "obligatory" or "employer required," too. Yet the example expressly declares that those activities are not "ordinarily *** regarded as integral parts of the [employee's] principal activity or activities." *Id.*; *see also Gorman*, 488 F.3d at 594 ("donning and doffing of generic protective gear is not rendered integral by being required by the employer or by government regulation.").

Rather, it is far more contextually appropriate to define "indispensable" consistently with the word "integral" to mean "absolutely necessary" or "essential." *See American Heritage Dictionary* 895 (5th ed. 2011) (defining "indispensable"). So defined, the word reinforces the underlying message of the three examples in section DWD 272.12(2)(e): A preparatory or concluding activity is "integral" and "indispensable to its performance," if it is so closely related to a principal activity that the principal activity cannot be performed without it.

2. In addition, the Court of Appeals' "obligatory equals integral" rule also would create considerable tension between sections DWD 272.12(1)(a) and DWD 272.12(e), and effectively read the word "integral" out of section DWD 272.12(e) altogether.

Section DWD 272.12(1)(a)1. contains the general rule that workers "must be paid for all time spent in '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's business.'" WIS. ADMIN. CODE § DWD 272.12(1)(a).

Section DWD 272.12(1)(a)2. then narrows that general rule to make clear that employees may be compensated only for such time during the course of the employees' "workday," which the code defines as the "period between 'the time on any particular workday at which such employee commences their principal activity or activities' and 'the time on any

particular workday at which they cease such principal activity or activities." WIS. ADMIN. CODE § DWD 272.12(1)(a)2.

By their terms, neither section addresses the further narrowing in section DWD 272.12(e) of the compensable "workday" time with respect to "preparatory and concluding" activities. Quite the opposite: sections DWD 272.12(1)(a)1. and DWD 272.12(1)(a)2. establish the general rule that time during the "workday" that the employer requires to be spent working is "compensable time," and section DWD 272.12(e) then winnows out from "compensable time" all preparatory and concluding activities unless they are "an integral part" of principal activities. And whether preparatory and concluding activities are a compensable "integral part" of the principal activities requires a separate analysis independent of whether those activities are "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer's business" (WIS. ADMIN. CODE § 272.12(1)(a)1.). In short, a showing that a preparatory or concluding activity

was controlled or required by the employer and pursued for the employer's benefit might be a necessary condition of compensation, but section DWD 272.12(2)(e) makes plain that such showing alone is simply insufficient to render all such time compensable.

Indeed, that is why section DWD 272.12(2)(e)1.c. expressly excludes the time spent "checking in and out and waiting in line to do so" from compensable work. It is not that these activities are not "controlled or required" by the employer (they necessarily are), or that keeping accurate employee time and attendance records does not redound necessarily and primarily to the employer's benefit (it does). These activities are not compensable because even though they qualify as "physical or mental exertion" required by the employer for its benefit, they are not directly linked to, and thus are not "an integral part" of or "indispensable to [the] performance" of the employees' principal work activities.

That carefully crafted and essential distinction melts away under the approach adopted by the Court of Appeals: if an activity "is "controlled or required by the employer," it is compensable as an "indispensable" and thus "integral" part of the "principal activities" under section DWD 272.12(2)(e). (*See* App. 9, 15-16.)

This result violates traditional canons of construction. In general, generalized statutory and regulatory directives are subordinate to specific limitations. *See Heritage Farms, Inc.*, 2009 WI 27, ¶ 20 ("As a principle of statutory interpretation, a specific statute generally prevails over a general statute."). And this rule has particular force here, where the appellate court's reading effectively excises the core limiting word "integral" from the statutory text, and upends the unifying narrowing principle in section DWD 272.12(2)(e)1.a.-c. that there must be a particular nexus between preparatory and concluding activities and the worker's particular job before time spent on the former will be compensable. *See Hubbard*,

2003 WI 145, ¶ 9 (statutes should be read "so as not to render any portion of the statut[ory] [language] superfluous").

When properly interpreted, the general requirements in section DWD 272.12(1)(a) set the floor for compensation of worker activities. By contrast section DWD 272.12(2)(e) sets the ceiling for whether preparatory and concluding activities are compensable. The rule adopted by the Court of Appeals turned that scheme upside down, and cannot be squared with the governing regulations.

II. THE WEIGHT OF FEDERAL AUTHORITY SUPPORTS TYSON'S INTERPRETATION OF SECTION DWD 272.12(2)(e)'S PLAIN TEXT.

The weight of federal authority supports the result mandated by the plain text of section DWD 272.12(2)(e): preparatory and concluding activities are not compensable unless they are inseparable from and "absolutely necessary to" the proper performance of the employee's particular job. This Court should look to those authorities in interpreting the plain meaning of section DWD 272.12(2)(e).

A. This Court May Look to Comparable Federal Authority In Interpreting Section DWD 272.12(2)(e)'s Plain Text.

This Court has repeatedly recognized the persuasive value of federal authority when interpreting Wisconsin law with similar federal counterparts, even if the state provisions do not explicitly incorporate federal law or require adherence to federal precedent. (*Contra* App. 21-22.) *See Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 421 n.6, 280 N.W.2d 142 (1979) (applying federal court interpretations of Title VII to interpretations of state Fair Employment Act); *Hamilton v. DILHR*, 94 Wis. 2d 611, 620 n.4, 288 N.W.2d 857 (1980) (similar); *Estate of Kersten*, 71 Wis. 2d 757, 763-64, 239 N.W.2d 86 (1975) (adopting federal court interpretation of federal tax code provision with respect to comparable state provision, even though "not controlling"). Accordingly, "[w]here the Wisconsin statutes are similar to the federal provisions, the interpretation of the federal courts should be given considerable weight." *Estate of Haase v. Marine Nat'l*

Exch. Bank, 81 Wis. 2d 705, 707, 260 N.W.2d 809 (1978). This is particularly true where, as here, (i) the interpretive question before the Court is one of first impression in the State, *see Arneson v. Jezwinski*, 206 Wis. 2d. 217, 222, 556 N.W.2d 721 (1996) (federal guidance to answer question of first impression under state law), and (ii) the pertinent state and federal regulations are substantially similar, *compare* WIS. ADMIN. CODE § DWD 272.12(2)(e) *with* 29 C.F.R. §§ 785.24; 790.8(b); (*see also* App. 7 & n.3.)

B. Federal Courts Parsing The Same Language Give Full Effect To Tyson's Reading Of Section DWD 272.12(2)(e).

Most federal appellate courts that have interpreted the parallel federal provisions, 29 C.F.R. §§ 785.24 & 790.8(b), have held that even if pre- and post-shift clothes changing is required by an employer, those activities are not "integral" to principal work activities (and thus not compensable) unless the clothing itself possesses unique characteristics such that it

is essential to the completion of the employee's particular, principal activity.[8]

The Seventh Circuit has twice held that donning and doffing generic clothing items—even those that might be required by an employer or classified as "protective"—is not compensable unless the clothing itself was "integral and indispensable" to the performance of the employee's job. In *Pirant, supra*, the court held that even though required by an employer, time spent donning and doffing "only a uniform shirt, gloves, and work shoes" was not compensable under federal law because it was more "akin to the showering and changing [of] clothes 'under normal conditions'" than to putting on and taking off the type of "extensive and unique

[8] Federal courts have reached this result notwithstanding 29 C.F.R. § 790.8(c) n.65, which was relied on by the Court of Appeals. This note speculates that clothes changing conceivably could be "integral" to the principal activities when changing clothes on the employer's premises is required by law or the employer's rules. By its terms, though, a footnote does not supplant the principal text's mandate that clothes changing be integral and indispensable to the employee's principal activity. *Id.* If this footnote in the federal code did not convince the majority of federal courts to ignore the main text's plain meaning, a fortiori it should have no bearing on the meaning of the Wisconsin Code, which contains no parallel observation.

protective equipment" that the Supreme Court in *Steiner* concluded was "integral" to performing the employee's job. *Pirant*, 542 F.3d at 208-09.

Similarly, in *Musch v. Domtar Indus., Inc.*, 587 F.3d 857, 858 (2009), the Seventh Circuit rejected a FLSA claim for overtime compensation for the time paper mill workers spent donning and doffing work clothes, safety shoes, and safety glasses before and after each workday, showering after the workday, and shaving as required by company policy. Notably, the Seventh Circuit did so even though the worker introduced evidence that showering and changing clothes were necessary to mitigate the occasional risk of injury from possible exposure to hazardous materials in the plant. *Id.* at 860. Because the workers could not show that exposure to these materials was "so pervasive that it *require[d]* these post shift activities," the Seventh Circuit reasoned that, although the activities at issue were mandated by the company, they were insufficiently connected to the workers' principal job

duties to be compensable under the FLSA. *Id.* at 860-61. Instead, the Seventh Circuit held that the post-shift activities were "done 'under normal conditions' and [were] merely postliminary non-compensable activities.'" *Id.* at 861 (citing *Pirant*, 542 F.3d at 208).

In *Gorman*, *supra,* the Second Circuit specifically rejected the notion that donning and doffing generic safety gear such as a "helmet, safety glasses, and steel-toed boots" by some workers in a nuclear power plant was "integral" to the performance of their job functions, notwithstanding that such activities might be considered, under one definition, to be "indispensable" because they are required by an employer or by government regulations. 488 F.3d at 594. Changing into and out of such gear, the court held, "is not different in kind from 'changing clothes and showering under normal conditions,'" *id.*, because the clothing at issue, worn across a broad range of job categories, was not required in order to prevent any particular hazard that might be associated with

the specific jobs in question, in contrast to the unique and extensive protective gear worn by production workers to avoid contamination in the nuclear containment area, *id.* at 593 n.4.

The Fifth Circuit also has confirmed that the donning of aprons, smocks, boots, hairnets, gloves, and earplugs in a poultry processing plant (nearly the same items at issue here) is not compensable because the items were not "integral and indispensable" to the workers' principal activities. *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 562-63 (E.D. Tex. 2001), *aff'd*, 44 F. App'x 652, 2002 WL 1396949, at *1 (5th Cir. June 6, 2002). The district court had distinguished these generic items from the "heavier and more cumbersome" gear worn by meat packaging workers, including "scabbards, arm guards, arm mesh, mesh apron, back mesh, a 'wizard glove," and gaiters," 147 F. Supp. 2d at 562, and reasoned that while a case could be made for compensating time spent donning, doffing, and cleaning the latter garments in light of

the "burdensome physical and mental energy" required to do so, the same arguments carried no weight when applied to the comparatively burden-less experience of donning and doffing the poultry employees' generalized protective gear—which could be done "in a matter of seconds," and was frequently completed as the workers walked to their individual work stations. *Id.* at 559, 562.

The district court rejected the employees' argument that the time spent changing clothes should be deemed a "compensable, principal activity merely because both the employer and the USDA require the sanitary clothing to be worn." 147 F. Supp. 2d at 563. Since the clothing likewise benefitted the employees by "protect[ing] their street clothes from becoming soiled," *id.*, the court reasoned that merely being required by company policy or federal regulations was insufficient to render putting on and taking off generic clothes compensable, when there was no direct relationship between

the limited items at issue and the specific productive tasks to be performed.

The Tenth Circuit, too, has held that donning and doffing sanitary outer garments worn by meat processing employees, although required by company policy, was not compensable. *See Reich v. IBP, Inc.*, 38 F.3d 1123, 1125-26 (10th Cir. 1994). There, the district court held that donning and doffing generic sanitary and safety gear (*e.g.*, hard hats, earplugs, safety footwear, and safety eyewear) by employees engaged in "the slaughter, processing, and packing of beef and pork" (*id.* at 1124), was not compensable under the Portal Act because "'the wearing of standard protective gear *** was not uniquely required by the dangers of the various production jobs being performed.'" *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1326 n.16 (D. Kan. 1993). In contrast, for knife-wielding workers in these facilities, the donning of personal protective gear "unique to the production job," *id.* at 1326 ("a mesh apron, a plastic belly guard, mesh sleeves or plastic arm

guards, wrist wraps, mesh [and] rubber gloves, polar sleeves, rubber boots, a chain belt, a weight belt, a scabbard, and shin guards," *id.* at 1319), "was compensable" since the "wearing of this personal protective equipment was so closely related to the performance of the principal activity they were hired to perform *** it became an integral and indispensable part of that principal activity." *Id.* at 1326.

The Tenth Circuit affirmed, but "for slightly different reasons." 38 F.3d at 1125. The court concluded that time spent putting on and taking off the workers' generic safety gear was so negligible and effortless that the activities were "not work" at all, or in the alternative, were "*de minimis* as a matter of law." *Id.* at 1126 & n.1. With respect to the time spent donning and doffing sanitary outer garments, the Tenth Circuit held such generic clothes changing non-compensable since, "although required and of some value to the employer, the outergarments" primarily benefited the employees. *Id.* at 1126.

Finally, in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005), the Ninth Circuit agreed with the district court that, for workers in a meat production plant, the donning and doffing of non-unique clothing items such as "hard hats, ear plugs, frocks, safety goggles, a hair net, and boots," was not compensable. *See Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2001 WL 34897841, at *11 (E.D. Wash. Sept. 14, 2001). Importantly, the Ninth Circuit distinguished donning and doffing "unique" protective gear, such as metal mesh aprons, sleeves, leggings, gloves, and vest, 339 F.3d at 898 n.2, from the "time spent donning and doffing non-unique protective gear such as hardhats and safety goggles." *Id.* at 903. The court held that time spent changing into and out of the "unique" gear was compensable, but declined to compensate the employees for "the time spent donning and doffing [the] non-unique protective gear such as hardhats and safety goggles," because "[t]he time it takes to

perform these tasks vis-à-vis non-unique protective gear is *de minimis* as a matter of law." *Id.*

In short, the original result reached by the trial court and the interpretation of section DWD 272.12(2)(e) by Tyson fully accords with the results reached by the majority of federal courts: even if required by law or an employer's mandate, on-premises donning and doffing is compensable only when the clothing at issue is particularized to the task at hand, and therefore necessary to accomplish an employee's particular, principal job activity. By contrast, donning and doffing generic items is not compensable, because it is not integral and indispensable to principal work activities.

To be sure, the majority of these courts have analyzed whether donning and doffing is "integral" to an employee's principal job activities by determining whether the clothing at issue was "extensive," and "unique" to a particular task—words that, as the Court of Appeals noted (App. 24-25), do not appear in section DWD 272.12(2)(e). But that shorthand

terminology—which also does not appear in section DWD 272.12(2)(e)'s federal counterparts—is used only to give effect to the plain limits already in the federal regulations, limits that are also present in section DWD 272.12(2)(e).

"Unique" gear, such as that which protects nuclear power plant workers from harmful radiation, or chain mail garb that protects knife-wielding butchering workers from injury, is by definition "integral" to the jobs for which they are worn because such apparel, specially designed for safe operation of the task at hand, makes the jobs possible. *See American Heritage Dictionary* 911 (5th ed. 2011) (defining "integral" to mean "essential or necessary for completeness; constituent"). By the same rationale, when the clothing items are "extensive," donning and doffing them necessarily is not "merely a convenience to the employee," WIS. ADMIN. CODE § 272.12(2)(e)1.c., or performed "under normal conditions," *Steiner*, 350 U.S. at 249, because doing so requires significant effort and attention. Thus, in the toxic working conditions of

the battery plant, a complete change of clothes was required to perform the jobs at issue without causing potentially life threatening conditions, which likewise required showering to remove contamination, beyond "normal conditions." *Steiner*, 350 U.S. at 249-53.

The "extensive and unique" standard is thus a readily administrable shorthand for determining whether a particular pre- or post-shift activity falls within the ambit of section 272.12(2)(e). Whether or not this Court elects to join its federal counterparts in employing this guidepost, the textual command remains: for clothes changing to be compensable, the clothing must be more than "necessary and required," it must also have a sufficient nexus to the principal activity so as to be "integral and indispensable to the performance of" that activity.

C. The Competing Standard Adopted By A Minority Of Federal Courts And Endorsed By The Court of Appeals Is Incompatible With Wisconsin law And Unworkable In Practice.

Rejecting this plain textual mandate, and likewise rejecting the majority view of the federal courts, the Court of Appeals instead endorsed the broad and textually unmoored standard for "integral" activities adopted by the Fourth Circuit and some courts in the Ninth Circuit. These courts assess whether pre- and post-shift clothing changes are compensable based only on whether the donning and doffing is: "(1) necessary to the principal work performed; and (2) primarily [to] benefit the employer." (App. 20-21); *see Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365-66 (4th Cir. 2011); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005).[9] As the majority of

[9] In the Court of Appeals, amicus United Food & Commercial Workers Union Local 1473 argued that the Third Circuit likewise had adopted this strained standard in *De Ascencio v. Tyson Foods, Inc.*, 500 F.3d 361, 372 (2007). *See* Amicus Br. 6. But amicus misreads that decision. The court in *De Ascencio* did hold that the donning and doffing activities at issue

the federal courts have recognized, that standard conflicts with the plain terms and structure of the federal regulations (as well as section DWD 272.12(2)(e)). And, if adopted, that standard would be unworkable in practice. To the extent that this Court looks to federal law for guidance in interpreting the plain meaning of section DWD 272.12(2)(e), it should accord that minority view no weight.

First, the standard is jurisprudentially suspect. Although the U.S. Supreme Court affirmed the Ninth Circuit decision that created the two-part test, *see IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), the Court in that case expressly declined to reach the question whether the donning and doffing of non-unique gear constituted an integral and indispensable part of the workers principal activities. *See id.* at 32.[10]

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constituted "work" for purposes of the FLSA. 500 F.3d at 373. But it expressly declined to consider whether the activities were compensable, or not, under the Portal Act. *Id.* The Third Circuit's decision thus does not endorse the minority standard.

[10] As Tyson argued in the Court of Appeals (Br. 50-54), the decisions adopting this minority view have misread the U.S. Supreme Court's *Alvarez* decision by assuming that it endorsed the view that changing into and out of generalized clothing is a compensable principal activity.

Significantly, the federal courts that have adopted the Ninth Circuit's two-part standard have consistently failed to appreciate the U.S. Supreme Court's directive in *Alvarez* that an activity is not automatically "integral and indispensable" to an employee's principal job functions simply because it is necessary or required by the employer. *See Alvarez*, 546 U.S. at 40-41 (time spent waiting to put on protective gear is not compensable). Interpreting state law in accord with a widely accepted federal standard is one matter; but binding state law to a minority federal view that is ill-informed and has already been cut off at the knees by the U.S. Supreme Court is quite another.

Second, the minority view is at war with the text and overall scheme of section DWD 272.12. As discussed above,

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However, the Ninth Circuit in *Alvarez* distinguished "unique" from general gear, finding that only the former is compensable. *Compare Alvarez*, 339 F.3d at 903 (time spent donning and doffing "non-unique protective gear such as hardhats and safety goggles" is *de minimis* as a matter of law and thus not compensable), *with Perez*, 650 F.3d at 366 (relying upon *Alvarez*, but "decline[d] to distinguish" protective gear as either "specialized" or "generic"). The U.S. Supreme Court has never addressed the issue, which dropped out of the case before it reached the Court. *See Alvarez*, 546 U.S. at 32.

the text of section DWD 272.12 draws a clear textual and conceptual division between (i) general work activities that are compensable because they are "controlled or required by the employer" and pursued "necessarily and primarily" for the employer's benefit, and (ii) that particular subset of preparatory and concluding activities that, regardless of whether they would be compensable under section DWD 272.12(1)(a), are nevertheless excluded from an employee's compensable time because they are not "an integral part" of an employee's particular, principal job activities. *Compare* section DWD 272.12(1)(a) *with* section DWD 272.12(2)(e). The Fourth and Ninth Circuit standard would elide these two wholly separate classes of activities, and allow the general rule in section DWD 272.12(1)(a) to effectively swallow the exception in section DWD 272.12(2)(e). "Federal cases may provide persuasive guidance to the proper application of state law copied from federal law," *State v. Leach*, 124 Wis. 2d 648, 670, 370 N.W.2d 240 (Wis. 1985), but there is nothing

persuasive about federal authority that would functionally rewrite state regulations.

Third, the minority view, unlike either the plain text of section DWD 272.12(2)(e) or even the federal "extensive and unique" test, is devoid of a "limiting principle" for deciding where non-compensable preliminary and concluding activities begin and end. *See Alvarez*, 546 U.S. at 41. Indeed, the test begs the very questions that it purports to answer. No court, including the Court of Appeals here, has determined what it means for an activity to be "necessary" beyond reading the term as shorthand for "required by employer"—which both the plain text of section DWD 272.12(2)(e) and the U.S. Supreme Court make clear are not coextensive. Similarly, other than a court's own ad hoc assessment, no means exist by which to determine whether an activity was undertaken "primarily for the benefit of the employer," or simply as a "convenience to the employee" (*see* WIS. ADMIN. CODE §§ 272.12(1)(a)1 & 272.12(2)(e)1.c.).

In the absence of any meaningful guidance on these essential questions, the minority standard offers no prospects for an efficient and readily administrable bright line rule with respect to when a pre- or post-shift activity is "integral" for purposes of section DWD 272.12(2)(e), *cf. Insurance Co. of North America v. Cease Electric Inc.*, 2004 WI 139, ¶¶50-52, 276 Wis. 2d 361, 688 N.W.2d 462 (recognizing virtue of a "bright line rule" that will "limit the uncertainty and increased litigation that would accompany any other decision."), and is thus inferior both to what can be divined from the plain text of section 272.12(2)(e) and to the "extensive and unique" test adopted by the majority of federal courts.

Indeed, rather than clarifying the law, the more likely result of adopting the minority view is the opposite: a second "vast flood of litigation" (93 Cong. Rec. 2089), instigated by workers seeking compensation for frivolous or "[s]plit second absurdities" (*Anderson*, 328 U.S. at 692), and designed to test the boundaries of an amorphous standard that not even the

handful of courts that have adopted it have defined. This could lead to Wisconsin courts devoting already scant resources to wasteful litigation.[11]

Finally, the minority rule would expose employers in Wisconsin to potentially crippling liability, even if they are otherwise compliant with federal law under the governing Seventh Circuit and U.S. Supreme Court standards. Under the boundless liability rule announced below, all pre- and post-shift on-premises activities required by employers for any purpose are arguably compensable, placing Wisconsin employers at risk for having to compensate their employees for all activities undertaken at their direction from the time the employees arrive on site until they leave (and even when the employer requires the same conduct of "visitors" and

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[11] Indeed, the specter of additional wasteful litigation looms in this very case. Unless the Court of Appeals' decision is reversed, the parties will be forced to re-litigate in the Circuit Court whether the "few seconds" (*See, e.g.*, Ex. 4 to R. 28 at 104:5-8, App. 109; Ex. 6 to R. 28 at 70:24-71:22, App. 159; Ex. 7 to R. 28 at 115:11-13, App. 208; Ex. 8 to R. 28 at 30:23-25, App. 227; Ex. 9 to R. 28 at 22:19-23:11, App. 243) that the workers spend changing clothes is *de minimis* and thus non-compensable as a matter of law. (*See* App. 26.)

"contractors," App. 257-58). *See also* App. 19 (court of appeals acknowledgment that its sweeping ruling would make many Wisconsin employers non-compliant with state law.)

The existence of section 272.12(2)(e) makes clear, however, that such a broad "heads the employee wins, tails the employer loses" liability rule was never contemplated by the drafters of the Wisconsin regulations. Rather, like its federal counterparts, section DWD 272.12(2)(e) strikes a careful balance between the right of Wisconsin employees to a "fair day's pay for a fair day's work," *see* 81 Cong. Rec. 4983, and the right of their employers not to be subject to liability for the "[s]plit second absurdities" (*Anderson*, 328 U.S. at 692) that are only tangentially related to their employees' job functions. That balance, representing the reasoned decisions of Wisconsin lawmakers, should be respected. It should not be cast aside simply because of the Court of Appeals' ill-conceived and unadorned say-so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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I certify that on January 23, 2014, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

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WISCONSIN SUPREME COURT

JIM WEISSMAN, KEITH GRIEP
RANDY GARRETT, GREGORY PETERS
SHANNON FITZPATRICK, and
JAMES GENEMAN

Plaintiffs-Appellants,

Appeal No: 2012AP002196

vs.

TYSON PREPARED FOODS, INC

Defendant-Respondent-Petitioner.

Jefferson County Circuit Court Case No. 2010-CV-001035
Honorable William F. Hue

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COUNTER-STATEMENT OF FACTS

Tyson's statement of facts is based solely on deposition testimony of the six named class representatives and paints an intentionally distorted picture of the critical role of what Tyson itself calls "Protective Personal Equipment" ("PPE") (not the misleading term "clothing" Tyson repeatedly employs in its brief) in the safe production of uncontaminated meat products at the Jefferson plant. Record on Appeal, Document ("R") Ex. 2 to R. 28 at 69, 77, Supplemental Appendix ("S.App.") 43, 45; Ex. 3 to R. 28 at 38, S.App. 11. A review of Tyson's corporate documents setting forth its policies and the deposition testimony of its managers' description of how these policies are implemented for all the approximately 350 members of the proposed class provides a more accurate description of why Tyson requires the PPE at issue.

Contrary to Tyson's claim that there is no raw meat processing (Tyson Br. at 13), employees working in what Tyson calls the "Raw Meat Department" add spices and fermentation products to raw beef, pork, and chicken, stuff the product into casings, cook the meat in ovens referred to as smokehouses, age it in dry rooms, and package it for shipping as pepperoni and salami used for pizzas and sandwich meat. Ex. 3 to R. 28 at 42-48, S.App. 12-13. Approximately 110 hourly employees work in the raw meat department, 130 in the Ready-to-Eat ("RTE") department processing the cooked meat, another 30 employees are employed in maintenance, 50 in sanitation and ten in shipping and receiving. Ex. 2 to R. 28 at 18-19, S.App. 30; Ex. 3 to R. 28 at 53-58, S.App 15-16.[1]

The plant is laid out in a manner that promotes

[1] The six employees whose deposition testimony Tyson cites all work primarily in these smaller nonproduction departments such as sanitation (Generman, Appendix ("App.") 245), warehouse (Peters, App. 225), maintenance (Griep, App. 128) and shipping and receiving (Garrett, App. 147, 150, Fitzpatrick, App. 189), or perform jobs not many others do (one other employee does Weissman's job, App. 98, 112).

maintaining sanitary conditions by separating the employees working in the Raw Meat Department from the RTE employees who handle the cooked meat products. This separation is designed to reduce the risk that employees contaminated with bacteria from the raw meat department or from bacteria carried into the plant from the outside will be exposed to the cooked meat products. Employees handling raw meats have their own entrance and locker room on the second floor. All RTE employees and other employees use a different entrance and a separate locker room on the third floor. Ex. 3 to R. 28 at 69-78, S.App. 19-21; Ex. 2. R. 28 at 32-34, S.App. 33-34.

Tyson seeks to further reduce the risk of contamination by requiring employees handling raw meats to wear dark blue smocks, those assigned to RTE area to wear white smocks, and sanitation workers who handle contaminated products to

wear light blue smocks. Ex. B to R. 36, S.App. 141- 151. These frocks "protect our products from personal clothing and must be snapped while handling product and traveling through the facility." *Id*. If an RTE area employee wearing a white smock enters the raw area, it is possible to transport bacteria back into the RTE area and the colored smock allows Tyson to readily identify an employee potentially contaminating product who would face discipline. Ex. 10 to R. 28 at 45, S.App. 60; Ex. 3 to R. 28 at 58, S.App 16.

Tyson's Good Manufacturing Practice Handbook in which these policies are set forth explains they are developed "with reference to Regulatory standards, CFR Title 21, Part 110 and Tyson policies." *Id*. p. 1.[2] In addition to these

[2] These FDA regulations (21 CFR §110.10) provide: "The plant management shall take all reasonable measures and precautions to ensure the following: (b) Cleanliness. All persons working in direct contact with food, food contact surfaces, and food-packaging duty to the extent necessary to protect against contamination of food. The methods for maintaining cleanliness include, but are not limited to: (1) Wearing outer garments suitable to the operation in a manner that protects against the contamination of food, food-contact surfaces, or food-packaging

federal FDA regulations, the Jefferson plant must comply with similar federal sanitation regulations administered by the USDA as well as OSHA regulations.[3] Indeed, the sanitation regulations are enforced through daily inspections by a USDA inspector. Ex. 10 to R. 28 at 21-22, S.App 54.

Tyson has incorporated these sanitation and safety standards into its Plant Mission Statement: "…our focus must be on meeting or exceeding our customers'

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materials. (2) Maintaining adequate personal cleanliness.(3) Washing hands thoroughly (and sanitizing if necessary to protect against contamination with undesirable microorganisms) in an adequate handwashing facility before starting work, after each absence from the work station, and at any other time when the hands may have become soiled or contaminated… (6) Wearing, where appropriate, in an effective manner, hair nets, headbands, caps, beard covers, or other effective hair restraints.

[3] These USDA regulations governing the Jefferson facility set forth at 9 CFR § 416.5(a)-(b).provide, "(a) All persons working in contact with product, food-contact surfaces, and product-packaging materials must adhere to hygienic practices while on duty to prevent adulteration of product and the creation of insanitary conditions. (b) Clothing. Aprons, frocks, and other outer clothing worn by persons who handle product must be of material that is disposable or readily cleaned. Clean garments must be worn at the start of each working day and garments must be changed during the day as often as necessary to prevent adulteration of product and the creation of insanitary conditions." OSHA regulations require the bump cap, earplugs and safety glasses, and steel toed shoes. 29 CFR §§ 1910.132 (general duty), 1910.136 (footwear), 1926.100 (bump caps), 1910.133(a) (safety glasses), 1910.95, 1926.52 (earplugs).

requirements and outpacing the competition in cost, product quality, and *food safety and employee safety*." Ex. B to R. 36, S.App. 141-151. (emphasis added). Consistent with this mission, Tyson believes, "A healthy work force is a valuable corporate asset. Therefore, safety becomes an *integral* part of every job." *Id*. (emphasis added)[4]

Tyson imposes numerous other requirements to comply with these regulations and corporate policies. All hourly employees must wear hard plastic bump caps signifying by different colors if they work in Raw Materials, RTE, Sanitation, or Maintenance, for the same contaminant avoidance considerations underlying the different colored frocks. Ex. B to R. 36, S.App. 141-151. An RTE employee who visits the Raw Materials area must secure the appropriately colored bump cap. *Id*. p. 9, S.App. 150.

[4] Plant Manager Traver testified that his three most important priorities are "first being employee safety; the second being the food safety; and the third being productivity. Never sacrificing No. 1 or 2 for the third." Ex. 2 to R. 28 at 63, S.App. 41.

Employees are allowed to place their names and only company-issued stickers on these caps and may not remove them from the plant. *Id.* They also must wear "company issued fine-gauge white hair restraints" and beard nets if appropriate. No exposed jewelry is permitted. *Id.*

Employees working in RTE areas are required to wear "protective garments for product handling" including disposable vinyl gloves. *Id.* All RTE employees must wear captive footwear which cannot be removed from the plant to avoid contamination. Since this footwear cannot be stored in the work areas, Tyson requires employees to store the footwear in company-issued lockers. *Id.* p. 3, S.App. 149. Tyson recommends but does not require employees in Raw and Sanitation areas to wear rubber boots or overshoes for which it pays for due to the wet environments in which they work. Ex. 2 to R. 28 at 26, S.App. 32; Ex. 6 to R. 28 at 56, S.App. 79. Maintenance employees are required to purchase

at company expense steel-toed shoes. Ex. 2 to R. 28 at 38, S.App. 35.

Tyson mandates that all hourly employees wear safety glasses and earplugs, consistent with OSHA regulations. Employees can choose from a variety of styles of safety glasses and earplugs, all of which are purchased by the company and cannot be removed from the plant. Ex. 2 to R. 28 at 27, S.App. 32; Ex. 3 to R. 28 at 39-47, S.App. 11-13.

Some of the PPE Tyson requires its hourly employees to wear to minimize the risk of contamination and protect their safety is stored near the employees' work stations, such as the vinyl aprons worn by Raw and Sanitation employees. Ex. 10 to R. 28 at 41, S.App. 59. Frocks, earplugs, hairnets, beardnets and vinyl gloves are stored outside of the production areas. Ex. 4 to R. 28 at 94-95, S.App. 126; Ex. 3 to R. 28 at 69-73, S.App. 19-20. Bump hats, safety glasses, and captive footwear are stored inside employees' lockers.

Ex. 3 to R. 28 at 74, S.App. 20. Tyson does not pay hourly employees for the time they spend putting on or donning the PPE consisting of bump caps, earplugs, safety glasses, frocks, vinyl gloves (where used), and captive footwear (where used) prior to the start of their shifts, which cannot be removed from the plant or taken into restrooms. Ex. B to R. 36, S.App. 141-151. Employees are required to have donned these items prior to their assigned start times. Ex. 10 to R. 28 at 29-38, S.App. 56-58. Nor does Tyson pay them for the time they spend removing or doffing these items after they have completed their shifts and punched their time clocks. Ex. 2 to R. 28 at 43-44, S.App. 36; Ex. 2 to R. 28 at 66, S.App. 18.

Tyson erroneously claims that some employees can don their PPE while they are being paid because they have punched in. Tyson Br. p. 33, n. 7. This ignores that Tyson requires its employees to scan an identification card at a time clock prior to starting their shifts for attendance monitoring

purposes only. Thus, if an employee with a 7:00 a.m. start time punches in at 6:50 a.m., the employee is not paid until 7:00 a.m. Ex. 10 to R. 28 at 35, S.App. 57.

LEGAL ARGUMENT

I. Introduction and Summary of Argument

Wisconsin's wage and hour law is a "remedial statute that should be construed broadly" in favor of employees. *Erdman v. Jovoco, Inc.*, 173 Wis. 2d 273, 280 173 Wis. 2d 273, 496 N.W.2d 183. Since this case was decided on Tyson's motion for summary judgment, "reasonable inferences drawn from the underlying facts contained in these documents that are in the record must be viewed in the light most favorable to the non-moving party." *Johnson v. Rogers Memorial Hospital*, Inc., 2005 WI 114, ¶ 30 283 Wis. 2d 384, 700 N.W.2d 27.

The Court of Appeals divided its analysis into two inquiries: (1) whether the donning and doffing of the PPE is compensable work under the "general requirements" of Wis. Admin. Code § 272.12(1)(a)1; and, (2) whether the work is a "integral part of a principal activity" under Wis. Admin. Code § 272.12(e)1.

Wis. Admin. Code § 272.12(1)(a)1 requires employees to be paid for all time spent in "physical exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer's business." The Court found that Tyson's "control over, requirement of, and necessity for requiring donning and doffing, on company property, are essentially uncontested." Appendix ("App.") 11. The court further determined the principal activity for which the PPE is used as the production of *uncontaminated* meat products, as opposed to just meat products, in a safe manner: "As to the relative benefits,

Tyson's need to produce foods free of contamination is surely among its greatest needs, and Tyson gains significant management benefits from requiring the employees to wear color-coded frocks and hats…every on-the-job injury avoided saves Tyson from a worker compensation loss." *Id*. On appeal here, Tyson does not contest these findings that the work is compensable under the "general requirements."

The Court next addressed the application of this presumption of compensability to preparatory and concluding activities which further define a "principal activity" as "all activities which are an integral part of a principal activity" and provides three illustrations, including:

> c. Among the activities included as an integral part of the principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform their principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be

> an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to their principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

WIS. ADMIN. CODE § 272.12(e)1(c).

The Court of Appeals divined three operating principles from this language:

> The first point is a general rule that an integral part of a principal activity includes but is not limited to an activity that is (1) closely related to the principal activity, and (2) indispensable to its performance. The second point is a more specific application of the general rule: Donning clothing necessary to the performance of a principal activity on the employer's premises is compensable. The third point…provides the further guidance that donning or doffing clothes as a mere convenience to the employee is insufficient.

App. 13-14. Applying these principles, the Court found the "closely related" requirement was satisfied because

employees "don and doff the sanitary and protective equipment and clothing on Tyson premises for the purpose of allowing the employees to perform their principal activities in a safe, sanitary, and efficient manner" App. 15. The Court contrasted non-compensable activities such as arriving at work on time or dressing in a manner that does not offend the employer.

The Court, citing dictionary definitions of the word "indispensable" as "essential" and the word "convenience" as "suitable to one's comfort, purposes, or needs," concluded the PPE is indispensable because Tyson mandated it be used "for the safety of the employees and the safety of the foods they are helping to produce." *Id.* Again, the Court juxtaposed its definition with an example of where a change of clothing would be a convenience where an employee rode a bicycle to work and desired to change out of sweaty clothing.

The Court then turned to Tyson's arguments to the contrary, which it characterized as "conflating all three points, and are at times simply conclusory," and "truly bizarre." App. 14, 16. The Court rejected the two principal arguments under federal case law Tyson advanced that (1) the donning and doffing of the PPE at issue is compensable only if it is necessary to protect the employee from a life-threatening danger; and (2) that the time spent donning and doffing the PPE at issue is non-compensable because the PPE is "non-unique" and "non-extensive." App. 14-26.

On appeal here, Tyson does little to address either of the Court's criticisms that its arguments are "conflated" or "truly bizarre." Indeed, it simply repackages significant portions of its brief to the Court of Appeals (See, e.g., Tyson Br. at 15-18, 30-32, 44-5, 48-55, 59-61) and makes little effort to directly rebut the Court of Appeals' cogent analysis rejecting them. As will be shown below, Tyson's

interpretation of the regulations as requiring compensation for time spent donning and doffing PPE only if the employee could not physically perform the job without them collapses of its own weight. Next, it will be demonstrated that Tyson grossly mischaracterizes federal case law interpreting similar regulations as supporting its position that time spent donning non-unique PPE not needed to protect employees' lives is not compensable. To the contrary, the substantial weight of federal authority—seven circuits and ten district courts—supports the approach taken by the Court of Appeals here and persuasively rebuts Tyson's contentions to the contrary.

II. The Court of Appeals Correctly Construed Wisconsin Law to Require Compensation for Time Spent Donning and Doffing PPE Required to Safely Produce Uncontaminated Meat Products.

Tyson's primary quarrel with the Court of Appeals' construction of the regulations is that it fails to give a separate

and independent meaning to the term "integral" apart from the meaning of the term "indispensable." Tyson contends it is possible for a task to be required but not integral. Tyson cites the examples set forth in subparts (a) and (b) of Wis. Admin. Code § 272.12(e)1 as indicative of the DWD's "intent to restrict the class of compensable preparatory and concluding tasks to those that are constituent and essential aspects of an employee's particularized job functions." Tyson Br. at 27-8. A task is "integral" if it is "so irreparably tied to the performance of the principal activity that without it, the employee's primary job function could not be completed." *Id.* at 28-9.

Tyson contends that the clothes changing example cited in subpart (c) is integral "only when the employee's principal job function physically could not be accomplished otherwise…" *Id*. at 31. Tyson claims that the PPE at issue,

even if required by government regulations, is not integral because:

> Workers have considerable freedom to choose the specific style of type of clothing to suit their particular preferences—presumably without having to establish that the employee's choice is at least as effective as the employer's See App. Br. 33. The clothing Items are worn in varying combination, regardless of job position or principal work activity. (App. 54)…Indeed, even the 'protective' clothing is entirely generic, worn by workers in myriad positions who are responsible for myriad tasks across myriad industries.

Id. at 32-33.

This analysis rests on a wooden view of the regulations and misrepresents the record. As a matter of simple statutory construction, there is little question that the activities at issue readily fall within the plain meaning of the following sentence from subpart (c): "If an employee in a chemical plant, for example, cannot perform their principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday

would be an integral part of the employee's principal activity." It is undisputed here that the employees "cannot perform their principal activities" whatever they may consist of "without putting on certain clothes"—namely a bump cap, hairnet, earplugs, safety glasses, frock, and where required footwear. They will be disciplined if they fail to do so.

Tyson's effort to limit compensability to cases where it is physically impossible to do the job without the PPE cannot even be reconciled with the examples in subparts (a) and (b) on which it relies. It is physically possible for a lathe operator to operate a lathe that has not been "oiled, greased or cleaned" under subpart (a). At some point the lathe might break down, but it is still possible to operate. It is also possible for garment workers to get their own clothing and prepare their own machines for without having the assistance of someone else as in subpart (b).

By the same token, it is possible for Tyson's employees to cook and process the meat products without wearing frocks, hairnets, beardnets or footwear. Some of their product might be contaminated, but it could still be produced. It is also possible for Tyson's employees to perform their jobs without a bump cap, safety glasses, earplugs, and steel-toed shoes. Under Tyson's definition, it does not matter that they could get a concussion, go blind, become deaf, or have their feet crushed. The only PPE compensable under Tyson's definition is that which actually prevents the employee's death.

Obviously, when one defines the "principal activity" more realistically, the integral nature of the PPE is more evident. Just as the lathe operator's principal activity is not just the operation of a lathe, but the production of undamaged products, so too is the Tyson employee's principal activity, not just the production of meat, but the production of

uncontaminated meat in a safe manner, as is evidenced in Tyson's own corporate documents cited above. As is shown, *infra,* no court has adopted Tyson's myopic definition of a principal activity.

Moreover, Tyson's claim that its employees have "considerable freedom" to wear whatever clothing they desire and can do so in any combinations they desire is flatly contradicted by record evidence that certain PPE bumpcaps, hairnets, beardnets, earplugs, safety glasses, frocks and captive footwear, which the Court of Appeals found Tyson concedes is required.[5] Tyson Br. at 32. Tyson's argument is

[5]Tyson provides two citations for these propositions, both of which are inapposite. The first is "App. Br. 33." Tyson Br. at 32. It is unclear what this refers to, since page 33 of the Appendix is a colloquy between the Circuit Court judge and counsel having nothing to do with this proposition and page 33 of its brief also contains no probative record evidence. The second citation is to "App. 54," which is page 2 of Defendant's Brief in Support of its Motion for Summary Judgment in which Tyson states without citation to the record that "Plaintiffs concede that the items vary from worker to worker and are based in part on the job performed." Plaintiffs have never conceded that Tyson's employees are free to don whatever items of PPE they desire based upon their whims. It is undisputed that all hourly employees are required to wear

also contradictory. If the definition of "integral" is based on the "particularized" features of the job at issue, what difference does it make if PPE that is integral to that job is also integral to other jobs in other industries, such as bumpcaps, earplugs, hairnets and safety glasses?

The Court of Appeals properly concluded it would be a form of judicial activism to adopt Tyson's proposal to effectively add the terms "extensive and unique" as a requirement to the type of clothing referred to in subpart (c), given that the existing language only denies compensation where the PPE is purely for the employee's "convenience." App. 24-5. As will be shown in the next section, this

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the PPE at issue, consisting of bump caps, earplugs, safety glasses, hairnets and beardnets, frocks, and where required footwear. It is also true that certain employees may be required wear additional PPE depending on the nature of their jobs that is sometimes donned after they punch in—for example some RTE employees don vinyl aprons. But this does not alter the fact they are required at pain of discipline to don and doff the PPE at issue. Obviously, no compensation is sought for PPE that is donned or doffed while on the clock.

comports with the majority view of federal courts that have construed similar regulations.

III. The Compensability of the Donning and Doffing of the PPE Does not Turn on Whether it is Necessary to Save Employees' Lives or Whether it is Unique and Extensive.

Tyson has abandoned its contention advanced to the Court of Appeals that Wisconsin courts are required to adopt federal law construing regulations the Department of Labor has promulgated under the Fair Labor Standards Act, since the two critical DWD regulations at issue here, Wis. Admin. Code § 272.12(1)(a)1 and § 272.12(e)1(c), are identical to these regulations, 29 C.F.R. § 785.7 and 790.8(b). The Court of Appeals properly distinguished the case on which Tyson relied, *Madely v. RadioShack Corp.*, 2007 WI 244, 206 Wis.2d 312, 742 N.W.2d 559 on the grounds that the Wisconsin regulation at issue there expressly provided that it "shall be interpreted in such a manner as to be consistent with

the Federal Fair Labor Standards Act and the Code of Federal Regulations as amended." App. 21-2.

Nevertheless, the fact that the DWD chose not to include this mandate with the regulations at issue here means that this Court has the latitude to adopt whichever federal authority it deems most persuasive or to fashion its own interpretation. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 421, n. 6 280 N.W. 2d 142 (1979) (examining federal employment discrimination law for its persuasive authority only in construing Wisconsin employment discrimination laws). Indeed, 29 U.S.C. § 218(a) of the FLSA permits states to enact laws that provide greater compensation than required by the FLSA.

Tyson acknowledges there is a split of authority amongst federal courts in construing these regulations, but erroneously depicts the line of cases it urges this Court to adopt as a majority view. In fact, the Court of Appeals

embraced the majority view, utilizing a rationale Plaintiff-Appellants submit is far more persuasive.

A. Most Federal Courts Properly Have Rejected Tyson's Narrow Interpretation of *Steiner v. Mitchell* as Limiting Compensability of Time Spent Donning and Doffing PPE to Where the PPE is Needed to Protect the Employee's Life.

These conflicting lines of authority both begin with the U.S. Supreme Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956). There, state law required battery manufacturers to provide employees with on-site showering facilities and a change of clothes, due to the safety hazards created by the toxic chemicals used to make the batteries. The Court found that the time spent changing clothes and showering is compensable "if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed…" *Id*. at 256. The Court concluded "it would be difficult to conjure up an instance

where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Id*.

Tyson misconstrues this case when it states that the Court "went on to distinguish the battery plant workers from the average employee who changes clothes as part of his job in a non-hazardous environment. In such run-of-the mill instances, *Steiner* held that under the Portal-to-Portal Act 'changing clothes under normal conditions' *would not be compensable*." Tyson Br. at 11-12 (original emphasis). In fact, the Court never so held. Rather, the language Tyson cites is taken from earlier in the opinion when the Court in defining the issues before it noted, "Nor is the question of changing clothes and showering under normal conditions involved because the Government concedes that these activities ordinarily constitute "preliminary" or "postliminary" activities excluded from compensable work time as

contemplated in the Act." *Id*. at 249. Tyson misconstrues the Court's noting of a party's concession as establishing that clothes changing and showering under "normal conditions" of the case were not compensable. In fact, whether or not doing so under "normal conditions" is compensable was never even litigated.

Consistent with this reading of *Steiner*, the DOL regulations inserted the following language as the only limitation on the compensability of time spent changing clothes: "On the other hand, if changing clothes is merely a convenience to the employee and not directly related to their principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. § 790.8(c). It does not state that changing clothes "under normal conditions" is not compensable; nor does it state that its scope is limited to

"unique and extensive" PPE that is required to save the employee's life.

The divergence of opinion among federal courts construing *Steiner* is illustrated in one of the first cases to address the compensability of PPE similar to that at issue here, *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1326, n. 16 (D. Kan. 1993), in which the district court construed *Steiner* as being limited to PPE that protects employees from imminent physical harm:

> However, the wearing of standard protective gear which was not uniquely required by the dangers of the various production jobs being performed was not compensable. Such standard safety equipment included hard hats, ear plugs, safety footwear, and safety eyewear. Although these items are required by OSHA, the time spent donning them was not compensable. Such items are uniformly required throughout many industries. These protective items were not so uniquely and closely related to the dangers inherent in meat production to make the wearing of them an integral and indispensable part of the meat production workers' jobs.

The Tenth Circuit rejected this rationale as a result-oriented interpretation of *Steiner* designed to shield employers in other industries from exposure to FLSA actions:

> We understand the court's reluctance to find that these workers should be compensated for putting on a hard hat, safety glasses, earplugs, and safety shoes. Such a holding would open the door to lawsuits from every industry where such equipment is used, from laboratories to construction sites. *However, the fact that such equipment is well-suited to many work environments does not make it any less integral or indispensable to these particular workers than the more specialized gear.* In fact, the same reasons supporting the finding of indispensability and integrality for the unique equipment (i.e. company, OSHA, and Department of Agriculture regulations requiring such items and the health, safety, and cost benefits to the company of the employees wearing the items) apply with equal force to the "standard" equipment.

Reich v. IBP, Inc. 38 F.3d 1123, 1125 (10th Cir. 1994) (emphasis added). Subsequent case law follows this same division among courts requiring the presence of "unique" and "extensive" PPE to prevent imminent physical harm in order to minimize employer liability and those that disregard this

non-statutory consideration and analyze the PPE in question without regard to whether the PPE may or may not be used in other industries where employers may or may not pay employees for the donning and doffing time. The Court of Appeals here properly followed the latter standard.

Cases adopting the former standard requiring "unique and extensive" PPE designed to save an employee's life to be compensable contain little in the way of legal rationale seeking to justify this restrictive reading of *Steiner*. The two Circuits adopting this standard simply conclude the PPE is not needed to save a life. In the lead case of *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007), the court adopted what it admitted was a "narrow" interpretation that "*Steiner* therefore supports the view that when work is done in a *lethal atmosphere*, the measures that allow entry and immersion into the destructive element may be integral to all work done there, just as a diver's donning of

wetsuit, oxygen tank and mouthpiece may be integral to the work even though it is not the (underwater) task that the employer wishes done." (emphasis added)

The court articulated a distinction between the terms "indispensable" and "integral." While "indispensable" means only "necessary," the term "integral" adds the requirement that the activity be "essential to completeness…organically linked… [or] composed of constituent parts making a whole." Id. at 592. Therefore, unless an activity is essential to complete the employee's task without endangering his/her life, it is excluded from compensation.

The court applied this restrictive definition of "integral" to life-threatening situations to foreclose compensability of any PPE not serving this purpose:

> Similarly, a helmet, safety glasses, and steel-toed boots may be indispensable to plaintiffs' principal activities without being integral. The donning and doffing of such generic protective gear is not different in kind from "changing clothes and showering under normal

> conditions," which, under *Steiner*, are not covered by the FLSA. 350 U.S. at 249. Among the activities classified in the regulations as preliminary and postliminary are "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks." 29 C.F.R. § 790.7(g)

Significantly, as noted by the Court of Appeals here, the regulation on which the court relies 29 C.F.R. § 790.7(g) was not incorporated into Wisconsin DWD regulations. App. 23.[6]

The Seventh Circuit also relied upon 29 C.F.R. § 790.7(g) and *Gorman's* narrow interpretation of *Steiner* in finding that time spent donning and doffing PPE worn by a postal worker was not compensable for purposes of calculating time worked under the Family Medical Leave Act:

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[6] 29 C.F.R. § 790.7(g) provides: "Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks."

> Here, Pirant was not required to wear extensive and unique protective equipment, but rather only a uniform shirt, gloves, and work shoes. We agree with the Second Circuit's decision in *Gorman* that the donning and doffing of this type of work clothing is not "integral and indispensable" to an employee's principal activities and therefore is not compensable under the FLSA. It is, instead, akin to the showering and changing clothes "under normal conditions" that the Supreme Court said in Steiner is ordinarily excluded by the Portal-to-Portal Act as merely preliminary and postliminary activity.

Pirant v.United States Postal Service, 542 F.3d 202, 208 (7th Cir. 2008). See also *Musch v. Domtar Industries, Inc.* 587 F.3d 857, 878 (7th Cir. 209) (employee "has failed to demonstrate that chemical exposure is so pervasive that it requires" showering and changing of clothes under *Pirant)*

Tyson also claims the Fifth Circuit has endorsed this approach by virtue of its affirmance without opinion or publication of *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp.2d 556 (E.D. Tex 2001), *aff'd* 44 F. App'x 652 (5th Cir. June 6, 2002), but this ignores that this affirmance without

publication has no precedential effect under Rule 32.1 of the Federal Rules of Appellate Procedure.[7] At any rate, in that case, the district court found that the donning and doffing of similar PPE to that at issue here by workers in a poultry processing plant was not compensable "work" under the FLSA, which effectively invalidated the claim, but then in addition or alternatively found the work was not sufficiently dangerous under the "unique facts" of *Steiner* to warrant compensation.

Tyson incorrectly claims that the Tenth and Ninth Circuits have also adopted this position. Tyson Br. at 53-55. As shown above, in *Reich v. IBP, Inc.*, supra, the Tenth Circuit rejected the district court's narrow reading of *Steiner* as requiring compensation for time donning and doffing PPE only where it protects against life-threatening dangers. While the Tenth Circuit went on to find the work non-compensable,

[7] FRAP Rule 32.1(a)(ii) permits citation to unpublished appellate decisions issued "on or after January 1, 2007."

it did so because it found the donning and doffing of the PPE did not constitute "work" under the FLSA because no "physical or mental exertion (whether burdensome or not) controlled or required by the employer" was required under *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local*, 321 U.S. 590, 598, (1944) in that "the placement of a pair of safety glasses, a pair of earplugs and a hard hat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration." *Id.* at 1125-26.

Since Tyson here does not dispute that the donning and doffing of the PPE at issue constitutes "work" under Wis. Admin. Code § 272.12(1)(a)1, which duplicates the FLSA regulation adopting the definition of work relied upon in *Reich v. IBP, Inc.*, 29 C.F.R § 785.7, this case does not support its position here, which is based upon the district court's interpretation of *Steiner* the Tenth Circuit rejected.

Likewise, the Ninth Circuit's decision in *Alvarez v. IBP, Inc.* 339 F.3d 894, 903 (9th Cir. 2003) does not support Tyson's view that the PPE at issue here is not "integral and indispensable." To the contrary, the court rejected a district court's finding that the "non-unique protective equipment including and limited to hard hats, earplugs, frocks, safety goggles, a hair net" is noncompensable because of the minimal time and effort required to don and doff it. *Alvarez v. IBP, Inc.* Case No. CT985005, 2001 WL 34897841, *11 (E.D. Wash. Sept. 14, 2001). The court found unpersuasive the Tenth Circuit's rationale in *Reich v. IBP, Inc.* that the donning and doffing of this PPE was not "work" and further rejected the distinction between "unique" and "non-unique" PPE:

> This "integral and indispensable" conclusion extends to donning, doffing, and cleaning of non-unique gear (e.g., hard-hats) and unique gear (e.g., Kevlar gloves) alike. *Little time may be required to don safety glasses and the use of safety goggles is undoubtedly pervasive*

> *in industrial work. But ease of donning and ubiquity of use do not make the donning of such equipment any less "integral and indispensable" as that term is defined in Steiner*. Safety goggles are, like metal-mesh leggings, required by IBP, and they are, like metal-mesh leggings, necessary to the performance of the principal work. Both are "integral and indispensable" under Steiner's exception to the Portal-to-Portal Act's bar to compensation of preliminary or postliminary activity. (emphasis added)

Id. at 903. But the court adopted the district court's alternative holding that the work was not compensable because of its *de minimus* nature—an issue not before this Court. *Id*.

The Ninth Circuit's disavowal of Tyson's distinction between unique PPE designed to protect an employee's life and other "generic" PPE was also made clear in *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004), in which it found compensable time spent by employees changing out of their street clothes into a "uniform" consisting of what must be considered "generic" polo shirt,

pants and shoes that could not be removed from the plant which was required in order to prevent contamination of silicon chips. The court cited 29 C.F.R. § 790.8(c), the federal counterpart to Wis. Admin. Code § 272.12(e)1, and agreed with an elaboration of this definition in a footnote providing “"where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work," the activity may be considered integral and indispensable to the principal activities. *Id.* at 910. While this footnote, like all of the footnotes in the federal regulation does not appear in the identically phrased Wisconsin regulation, it certainly provides probative guidance regarding the intent of the same phrase Wisconsin adopted.

B. Most Federal Courts Properly Have Rejected Tyson's Attempt to Add a Requirement that the PPE be "Unique and Extensive."

On the other hand, it may be fairly stated that the substantial weight of federal authority has rejected Tyson's view that non-unique and extensive PPE not needed to protect employees' live is not compensable. The three circuit court cases Tyson cites barely scratch the surface of the federal authority rejecting its position. Tyson Br. at 59. In fact, seven circuit courts and at least ten district courts have rejected Tyson's position or adopted tests similar to the Court of Appeals here. But what matters is not the number of decisions, but the persuasiveness of the rationale these courts employ in doing so, which is far more convincing and in accord with the remedial purpose of wage and hour law than Tyson's result-oriented approach limiting compensable PPE to that which protects human life.

In *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 366 (4th Cir. 2011), the court began its analysis by rejecting the distinction between unique and non-unique PPE on which Tyson so heavily relies:

> …we decline to distinguish the employees' protective gear as either "specialized" or "generic." This distinction was not made in *Steiner*. The work clothes at issue in Steiner were simply described as "old but clean work clothes," and the Supreme Court did not characterize the clothes as "special." See *Steiner*, 350 U.S. at 251. Thus, we hold that these terms are not relevant to our "integral and indispensable" analysis, and we do not classify the employees' protective gear in this manner.

The court adopted the two-pronged approach for determining whether work is "integral and indispensable" to the principal activity set forth in *Alvarez v. IBP* of ascertaining whether the work (1) is necessary to the performance of the principal activity; and (2) principally benefits the employer. *Id*. at 366. The court found that "overriding concerns for safety and sanitation mandated" a conclusion that the PPE, similar to

that at issue here, was necessary for the principal activity of producing uncontaminated chicken products:

> In order to comply with these legal requirements, Mountaire's company policy mandates that the employees don and sanitize certain items before entering the production area. The employees must don "bump caps," and hair and beard nets, in order to prevent hair from falling into the chicken products. The employees are required to wear specific types of ear plugs, which vary depending on which section of the plant the employee is located. Also, the employees must don smocks and aprons to prevent food contamination. Clean smocks are so important to chicken processing that Mountaire launders the smocks daily and provides them to the employees free of charge.

Id. at 366-67. The court found PPE primarily benefited the employer because it “"protect[ing] the products from contamination, help [ing] keep workers' compensation payments down, keep[ing] missed time to a minimum, and shield[ing] the company from pain and suffering payments.” *Id.*

The court also noted that the Supreme Court's decision in *Alvarez v. IBP, Inc.*, 546 U.S. 21, 28 (2005), finding that walking time for poultry plant workers who donned similar PPE intimated support for its conclusions: "Although the parties in *Alvarez* did not challenge on appeal the conclusion that donning and doffing protective gear was integral and indispensable to the principal activity of poultry processing, it would be illogical to conclude that the Supreme Court would have held the walking time to be compensable if it entertained serious doubts regarding the compensability of the donning and doffing activities themselves" *Id*. at 368.[8] *Accord*,

[8]In *Sandifer v. U.S. Steel Corp*., 2014 U.S. LEXIS 799 (U.S. Jan. 27, 2014) __S.Ct. __, the Supreme Court addressed whether time spent donning and doffing various PPE by steelworkers constitutes "changing clothes" under Section 203(o) of the FLSA, which bars compensation for the time spent doing so if the issue is excluded from compensation in a collective bargaining agreement or through a custom or practice. This case is inapplicable here because neither Wisconsin law or DWD regulations contain any counterpart to Section 203(o), and the case is only relevant for its persuasiveness. The Court noted the employer did not contest the Seventh Circuit's finding that the PPE at issue, which includes many of the same items at issue here, constituted a "principal activity." *Id*. at 13. The Court defined "clothes" as including flame

Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 865 (W.D. Wis. 2007) ("After *Alvarez*, there can be little doubt that donning and doffing protective gear at the beginning and end of the workday are "principal activities" under the Portal-to-Portal Act. The Court could not have reached its conclusion regarding the walking time without concluding that donning and doffing protective gear are compensable activities.")

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retardant pants and jacket, hardhats, steel-toed shoes, but excluded safety glasses and earplugs. In response to a claim that this time should not be compensated because it is *de minimus*, the Court held that "A *de minimis* doctrine does not fit comfortably within the statute at issue here, which, it can fairly be said, is all about trifles—the relatively insignificant periods of time in which employees wash up and put on various items of clothing needed for their jobs." *Id.* at 25. Nevertheless, the Court determined it would not require the calculation of the time required to don or doff the earplug and safety glasses because "the consequence of dispensing with the intricate exercise of separating the minutes spent clothes-changing and washing from the minutes devoted to other activities is not to prevent compensation for the uncovered segments, but merely to leave the issue of compensation to the process of collective bargaining." *Id.* In contrast, the consequence here of not calculating the time spent donning and doffing the PPE would be to prevent compensation. It will be up to the circuit court on remand to consider the impact of this decision on the applicability of the *de minimus* doctrine here.

The Fifth, Eleventh, Sixth and First Circuits have also adopted tests similar to *Alvarez v. IBP* focusing on whether the work is required by the employer, necessary to perform general as opposed to unique job duties, and benefits the employer. In *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 400 (5th Cir. 1976), the district court adopted precisely the same definition of "integral" Tyson urges this court to endorse: "the trial judge first determined that the employees' principal activity was "the installation and repair of electrical wiring". He then tested each of the allegedly compensable tasks to determine whether it was "directly related" to that previously defined principal activity (and therefore compensable), or was merely "preliminary" to the principal activity (and therefore not compensable.") *Id*. at 400. The Fifth Circuit reversed this mechanistic approach as overly narrow:

> The test, therefore, to determine which activities are "principal" and which are "an integral and indispensable part" of such activities, is not whether

> the activities in question are uniquely related to the predominant activity of the business, but whether they are performed as part of the regular work of the employees in the ordinary course of business. It is thus irrelevant whether fueling and unloading trucks is "directly related" to the business of electrical wiring…")

Id. at 400-01. The Eleventh Circuit in *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) adopted this approach.

In *Franklin v. Kellogg Co.*, 619 F.3d 604, 619-20 (6th Cir. 2010) the Sixth Circuit found the Second Circuit's restrictive reading of *Steiner* in *Gorman* conflicts with both the Ninth Circuit opinions in *Ballaris* and *Alvarez* and Eleventh Circuit's in *Ballaris*:

> The Second Circuit's position [in *Gorman]* appears to be unique… The Ninth and Eleventh Circuits have both interpreted Steiner less narrowly. Similarly, the Eleventh Circuit held that the following three factors are relevant to the issue of whether an activity is integral and indispensable: "(1) whether the activity is required by the employer; (2) whether the activity is necessary for the employee to perform his or her duties; and (3) whether the activity primarily benefits

> the employer." *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344 (11th Cir. 2007) (concluding that time spent going through security screening made mandatory by the FAA was not integral and indispensable because it was not for the benefit of the employer). We follow the reasoning of *Ballaris* and *Bonilla*.

The court found compensable time spent by employees in a frozen food plant donning and doffing a uniform, shoes, bump cap, hairnet, beardnet, safety glasses, earplugs "because the uniform and equipment ensures sanitary working conditions and untainted products" and benefits the employer. *Id*. *Accord, Tum v. Barber Foods, Inc.*, 360 F.3d 274, 279 (1st Cir. 2004), *rev'd on other grounds*, in *Alvarez v. IBP, Inc.*, 546 U.S. 21, 28 (2005) ("Employees are required by Barber Foods and or government regulation to wear the gear. Therefore, these tasks are integral to the principal activity and therefore compensable.")

In addition to these seven circuits that have rejected Tyson's narrow reading of *Steiner* as requiring compensation

for time spent donning and doffing unique PPE designed to protect the life of the employee, at least ten district court opinions have cast doubt on the validity of this analysis. Indeed, in *In re Tyson Foods, Inc. v. Tyson Foods, Inc.*, 694 F. Supp. 2d 1358, 1365 (M.D. Ga. 2010), the court rejected precisely the same narrow reading of *Steiner* and *Gorman* Tyson advances here:

> The Court rejects this interpretation of *Steiner* and concludes that the donning and doffing of sanitary gear here is not "changing clothes" "under normal conditions." Here, the sanitary gear is required to enable the employer to produce an uncontaminated product. The employees are required to don and doff the sanitary gear, such as smocks and gloves, at the plant and only at the plant, and they are not permitted to wear the sanitary gear home or into the restroom or break room. These circumstances are markedly different from "normal" clothes changing, where the clothes are merely a convenience to the employee and the employee can wear the clothes to and from work.

In *Gatewood v. Koch Foods of Miss., LLC,* 569 F. Supp. 2d 687, 696 (S.D. Miss. 2008), the court accepted the employees' definition of the principal activity as "not to

process poultry products but to process *uncontaminated* poultry products." (original emphasis) It rejected the employer's reliance on *Gorman's* definition of "integral" as confined to life-protecting PPE in contending the PPE was not necessary to the conduct of its business:

> Though employees of Koch Foods might be physically able to process chickens without sanitation gear, the resulting product would be adulterated and unmarketable. And undisputed evidence shows that Koch Foods' ordinary course of business is to produce and market a wholesome poultry product. As a practical matter, therefore, the Plaintiffs must work under the sanitary conditions that Koch Foods has already implemented in order for their services to have any real value.

Id.

In *Jordan v. IBP, Inc.*, 542 F. Supp. 2d 790, 809 (M.D. Tenn. 2008), the court applied *Alvarez* and *Bonilla* and distinguished *Gorman* as not involving the sanitation concerns present in a meat processing plant:

> The gear at issue in *Gorman* was only safety boots, safety glasses, and a helmet. *Id*. at 592. The "gear" at

> issue here--that is, the frock that the plaintiffs are required to don and doff--can hardly be characterized as generic, as evidenced by the facts that the frock has certain design features specific to the job and that plaintiffs are not permitted to use a frock of their choosing. Moreover, the plaintiffs are not permitted to clean, store, or don their frocks at home, are required by the defendants to wear those frocks at all times on the production floor, and are subject to discipline for failing to do so; additionally, the frocks are both necessary to the plaintiffs' jobs and benefit the defendants, in that they allow for the maintenance of sanitary conditions on the production floor and prevent the defendants' product from becoming contaminated.

The court also dismissed arguments similar to Tyson's that the employees' primarily benefit from the frock:

> The fact is that the frocks enable the defendants to maintain the cleanliness of their facilities and prevent their product from becoming contaminated. This benefit is enormous when one considers the damage that would result to the defendants if they were to sell a contaminated food product. The minor benefit to the employees of keeping their street clothes clean pales by comparison.

Id. at 807. The use of the color-coded frocks here, not present in *Jordan*, underscores the close relationship between the

frock and maintaining the sanitary conditions required to produce the uncontaminated meat.

Two Seventh Circuit district court have rejected Tyson's interpretation of *Pirant* as adopting the *Gorman* test. In *Leon v. El-Milagro, Inc.*, 2012 U.S. Dist. LEXIS 51670, 10 (E.D. Ill. March 23, 2012), the court noted that the Seventh Circuit modified its opinion in *Pirant* to delete two references to the term "unique" and held this distinction was not dispositive:

> The Company argues that *Pirant* employs a test - what they deem the "unique/non-unique test" - to determine whether or not donning and doffing is integral and indispensable. I can see no such standard emerging from *Pirant* or any other Seventh Circuit case…While the "unique" modifier is important to those quoted portions, I see no indication that it is dispositive to the *Pirant* analysis or that its use is meant to announce any sort of critical test or standard.

The Court adopted the Ninth Circuit test, which it noted had been also adopted by three other circuits (*Perez*, *Bonilla*, and *Kellog):*

> So "unique/non-unique" is not the proper test. That leaves the question of whether any other test or framework exists to help in deciding whether a given process of donning and doffing is "integral and indispensable" to primary activities and thus compensable work. Surveying the case law, I find that the Ninth Circuit's approach is useful. In *Alvarez v. IBP, Inc*., the Ninth Circuit determined that "[t]o be 'integral and indispensable,' an activity must be necessary to the principal work performed and done for the benefit of the employer. (citations omitted)

Id. at 12.

Likewise, in *Smith v. Safety-Kleen Sys., Inc*., 2012 U.S. Dist. LEXIS 5908, 12 (N.D. Ill. Jan. 18, 2012), the court stressed that "the focus is not on the type of clothing but on the reasons for wearing the clothing." It distinguished *Pirant* on the grounds that "a mail handler's job cannot be compared to plaintiffs' jobs, in which they handle chemicals daily and have at least the potential for exposure to those chemicals. Instead, it is a job that plainly falls under "normal conditions." *Id*. at 13. The court also applied the *Alvarez* standard. *Id.* at 15.

In *Spoerle v. Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860, 864-5 (W.D. Wis. 2007), Judge Crabb was pointed in her rejection of *Gorman's* restrictive reading of *Steiner:*

> This interpretation of *Steiner* is truly bizarre. The court appears to be saying that the holding of *Steiner* does not apply unless the "work is done in a lethal atmosphere." In other words, unless the activity is necessary to prevent the employee from actually dying, it is not "integral" to a principal activity. From a public policy perspective, this reading is obviously troubling because it creates an uncomfortable distinction between hazards that kill and hazards that maim (or pose only a risk of death) and suggests that an employee is entitled to compensation for protecting herself from the former only.
>
> Fortunately, *Steiner* does not support such a distinction. Although it is true that the facts of Steiner involved life-threatening risks, the Court did not limit its holding to that situation, but said only that the facts before it presented one of the "clear[est]" examples of an activity that was integral and dispensable to the principal activity. *Steiner*, 350 U.S. at 256.

The employer conceded that the donning and doffing of the identical PPE at issue here was compensable under Wisconsin state law. *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427,

429 (7th Cir. 2009). See also *Hoyt v. Ellsworth Coop. Creamery*, 579 F. Supp. 2d 1132, 1141 (W.D. Wis. 2008) (dairy employees "donning and doffing required sanitary/safety uniforms is as a matter of law integral and indispensable to their principal activities"); *Helmert v. Butterball*, 805 F. Supp. 2d 655, 662 (E.D. Ark. 2011) ("No reasonable jury could find that an activity essential to prevent food contamination in a poultry processing plant primarily benefits the employees of the plant rather than the employer."); *Davis v. Charoen Pokphand (USA), Inc.*, 302 F. Supp. 2d 1314, 1322 (M.D. Ala. 2004) ("To be "integral and indispensable," an activity must be necessary to the business and performed primarily for the benefit of the employer."); *In re Cargill Meat Solutions*, 632 F. Supp. 2d 368, 378 (M.D. Pa. 2008) ("[I]t is concluded that the time Plaintiffs spent donning, doffing, gathering, maintaining, and sanitizing work-related gear and equipment and the time spent traveling

between the changing area and the production line, before and after shifts and during break times, is compensable under the FLSA and the Portal-to-Portal Act.").

Tyson repeatedly cites the ease with which the PPE at issue is donned and doffed and the relatively short period of time required to do so. Tyson Br. at 17-18. In *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 370 (3rd Cir. 2007), the court found that the Supreme Court had foreclosed consideration of the degree of exertion required in determining whether the work is compensable by finding that waiting time is compensable under certain circumstances:

> …we conclude that *Alvarez* not only reiterated the broad definition of work, but its treatment of walking and waiting time under the Portal-to-Portal Act necessarily precludes the consideration of cumbersomeness or difficulty on the question of whether activities are "work." Activity must be "work" to qualify for coverage under the FLSA, and that "work," if preliminary or postliminary, will still be compensable under the Portal-to-Portal Act if it is "integral and indispensable" to the principal activity.

> Under *Alvarez*, such activities are, in themselves, principal activities.

The court questioned the continued vitality of the Tenth Circuit's decision to the contrary in *Reich v. IBP, Inc.* in light of *Alvarez*. *Id*. at 371. Accordingly, any consideration of the ease of donning or doffing the PPE at issue should also be deemed irrelevant for purposes of construing Wisconsin's regulation in Wis. Admin. Code § 272.12(1)(a)1 identical to the federal regulations construed in these cases.

In sum, this substantial body of federal case law persuasively rejects the critical underpinnings of Tyson's interpretation of state law and supports the Court of Appeals analysis. Properly construed, *Steiner* does not establish that time spent donning and doffing PPE is not limited to that which protects the employee's life. Nor do the regulations at issue here or the federal regulations on which they are based make any distinction between "unique and extensive"

PPE and "non-unique" generic PPE. Moreover, the *Gorman* and *Pirant* cases on which Tyson relies are readily distinguishable because the PPE in those cases was not captive and had nothing to do with a principal activity requiring the production of uncontaminated meat products that required the PPE to be kept on site under sanitary conditions. *Cf. Bamonte v. City of Mesa*, 598 F.3d 1217, 1229 (10th Cir. 2010) (noting DOL position that requirement PPE be donned and doffed on site in denying claim of police officers for time spent donning and doffing uniforms). Both *Gorman* and *Pirant* relied on language contained in 29 C.F.R. § 790.7(g) not even found in the state law regulations which make "changing clothes" non-compensable as a "normal condition."

Rather than accepting these result-oriented distinctions, federal courts employ a test that closely resembles that adopted by the Court of Appeals here focusing

on whether the PPE is necessary to the principal work performed and done for the benefit of the employer.

While it is immaterial whether employers other than Tyson are or are not in compliance with Wisconsin law so construed, it is apparent from this comparable federal case law that sustaining the Court of Appeals will come as no shock to Wisconsin employers who have been on notice of the fact that *Pirant*'s unique facts may not apply to them. Plainly, the Court of Appeals' test provides clearer notice of the circumstances when time spent donning and doffing PPE must be paid than attempting to ascertain which PPE is unique and life-protecting and which is generic and not needed to protect a life.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be upheld.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,752 words.

Dated this 12th day of February, 2014.

ARELLANO & PHEBUS, S.C.

_____

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CERTIFICATION OF COMPLIANCE WITH 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of section 809.19(12), Stats.

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of February, 2014.

ARELLANO & PHEBUS, S.C.

_____

Kurt C. Kobelt

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WISCONSIN SUPREME COURT

JIM WEISSMAN, KEITH GRIEP, RANDY GARRETT, GREGORY PETERS, SHANNON FITZPATRICK and JAMES GENEMAN,

Plaintiffs-Appellants,

v. APPEAL NO. 2012AP002196

TYSON PREPARED FOODS, INC.,

Defendant-Respondent-Petitioner.

Jefferson County Circuit Court Case No. 2010-CV-001035
Honorable William F. Hue

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I. THE COURT OF APPEALS WRONGLY CONSTRUED SECTION DWD 272.12

The Court of Appeals' decision misinterprets section DWD 272.12(2)(e). The test for whether preparatory and concluding activities are compensable under section DWD 272.12(2)(e) is not whether the activities are "indispensable" or "required," App. 15-16, Resp. Br. 16-17, but whether they are "an integral part" of a worker's principal activity. WIS. ADMIN. CODE § DWD 272.12(2)(e). Here, the pre- and post-shift donning and doffing of generic protective clothing does not pass that test. *See* Tyson Br. 32-35.

The employees do not address the Court of Appeals' clear interpretive errors. Instead, they rehash its failed logic and present a blizzard of disputed facts that are ultimately irrelevant to the pure legal question at issue (*see* Resp. Br. 1-10, 18-19), and prove only that the appellate court's atextual rule will open a Pandora's Box of further issues requiring

litigation. The employees' brief, in short, simply draws the flaws of the "required equals integral" rule adopted by the appellate court into sharper relief.

A. Section DWD 272.12(2)(e)1.c. Allows Compensation Only for Clothes-Changing That Makes A Principal Activity Physically Possible.

The plain terms of section DWD 271.12(2)(e)1. limit compensation for preparatory and concluding activities to those that are "constituent" aspects of the job a worker has been hired to perform and are "essential" for its successful completion. *See American Heritage Dictionary* 911 (5th ed. 2011) (defining "integral"); Tyson Br. 28 & n.6. This makes sense, because the start of the compensable work day under Wisconsin law is directly tied to the beginning of a worker's "principal activity or activities," not to the first daily activity an employee undertakes at his employer's direction. WIS. ADMIN. CODE § DWD 272.12(1)(a)2.

Thus, it makes little difference under section DWD 272.12(2)(e)1.c whether an activity is required by an employer

or not (*see* App. 15; *see also* Resp. Br. 18-19), or whether an employee "will be disciplined" for failing to complete it (*see* Resp. Br. 19). Unless the activity bears a sufficiently strong nexus to an employee's principal job activity such that it may be fairly considered a "constituent" and "essential" aspect of it, the activity is not an "integral part" of what the employee was hired to do and thus need not be compensated.[1] *See* WIS. ADMIN. CODE § 272.12(2)(e)1.c. (prohibiting compensation for generic acts of "checking in and out *** and waiting to do so," even though those activities are required by employers and inure to the employers' benefit); *see also* Tyson Br. 27-32, 38-40; *cf.* 29 C.F.R. § 790.8(a) (defining term "principal activities" as those "which the employee is 'employed to perform'").

[1] Tyson has never conceded (*contra* Resp. Br. 21-22) that the protective gear at issue here is "required." *See* Tyson Br. 15 n.4; Tyson Pet. 16 n.4; Tyson Br. 14 (Ct. App.). But even if it had, that does not alter that the protective gear—which is worn not only by employees but also "visitors" and "contractors" in varying combinations (App. 257-58), and is partly dependent on employee preferences (*see* Tyson Br. 16-17)—bears no relation to the performance of the employees' principal job functions.

Thus, the regulation's nexus requirement is satisfied for the lathe operator who is entitled to compensation for the time spent "oil[ing], greas[ing], or clean[ing] [his] machine," WIS. ADMIN. CODE § DWD 272.12(2)(e)1.a., and the garment worker who distributes fabric and readies machinery for other workers, *id.* § 272.12(2)(e)1.b., because those activities are so closely and uniquely tied to the execution of the employees' particular principal activities as to be inseparable from and essential to their performance—whether they are required by an employer or not.

Section DWD 272.12(2)(e)1.c. makes clear that this nexus requirement applies in pari materia to pre- and post-shift clothes changing. But in order to cull the "inseparable-from" and "essential-to-performance-of" wheat from the "under normal conditions" chaff, the DWD clarified that for clothes changing to be compensable, the clothing must be so "closely related" to the work that it is "indispensable to its performance." WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c.

That is, like the chemical plant employee's protective garb, the clothing must be so closely tied to the performance of the employee's job that it makes completion of that job physically possible. *See id.*

B. The Employees' Counter-Arguments Do Not Cure The Defects In The Court of Appeals' Decision.

Rather than confront Tyson's arguments that give force to the entirety of section DWD 272.12, the employees try to rewrite this provision and expand its scope far beyond what the DWD intended. Neither effort is persuasive.

First, the employees argue that this Court should reject outright the unique standard in section 272.12(2)(e)1.c. for donning and doffing because it "cannot *** be reconciled with the examples in subparts (a) and (b)." Resp. Br. 19. In other words, the DWD's express intent to apply a heightened standard for compensable clothes changing should be ignored because it would be physically possible for a lathe operator to operate an improperly maintained lathe or garment workers to "get their own clothing and prepare their own machines." *Id*.

But that argument demolishes the structure of section DWD 272.12(2)(e). *See Sinclair v. Department of Health & Social Servs.*, 77 Wis. 2d 322, 332, 253 N.W.2d 245 (Wis. 1977) (court cannot "rewrite the cited statutes under the guise of construing them"). The preliminary tasks performed by the lathe operator and the garment worker are essential (*i.e.*, "integral") elements of their job, because without them the job cannot be successfully performed. Conversely, workers don and doff work clothing for a variety of reasons—many of which lack this close nexus to the principal activity—such as personal preference or general regulatory requirements. The separate standard in subsection (c) thus harmonizes "integral" clothes changing with other examples of "integral" activities discussed in section DWD 272.12(2)(e)1., but does not apply outside of the four corners of that example. Subsection (c)'s unique language does not lower the bar as the employees contend, but rather holds workers seeking compensation for on-premises clothes changing to a higher legal standard.

Second, given the incontrovertible fact that Tyson is committed to producing safe, high-quality food and ensuring a safe work environment, *see* Resp. Br. 5-6 & S. App. 141-151, the employees argue that donning and doffing generic safety clothing *is* "integral" to their principal jobs because the gear generally relates to safety and sanitation (Resp. Br. 19-20). But that broad reading of section DWD 272.12(2)(e) p s too much.

The employees' atextual reading would dramatically expand the category of compensable "integral" activities far beyond what is contemplated in section DWD 272.12(2)(e) by bringing every on-premises activity of every employee in any way related to safety or worker health under its purview, and jettisoning the textual requirement of a nexus between an employee's principal job and clothes changing "indispensable to its performance." WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c.

Even worse, the employees' rule, like the rule of the Court of Appeals, leaves section DWD 272.12(2)(e) without any application because a corporate ethos of producing safe products encompasses "all time spent in 'physical or mental exertion'" that is "controlled or required by the employer and pursued necessarily and primarily for the benefit of [its] business." WIS. ADMIN. CODE § DWD 272.12(1)(a)1; *see Hubbard v. Messer*, 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 673 N.W.2d 676 (courts should not interpret statutory provisions to "render any portion of the statute superfluous").

Finally, in addition to impermissibly rewriting the statute, the rule adopted by the appellate court also creates practical problems that strongly counsel against its adoption. *See* Tyson Br. 63-66.

First, instead of turning on the clear, bright-line rule that section DWD 272.12(2)(e)1.c. contemplates, donning and doffing claims now hinge on subjective factors such as the relative benefits of the clothing to the employer and the

employee (App. 9, 14-15), the degree of "closeness" between the clothing and a job (*id.* at 14-15), and the degree to which employees change clothes "as a mere convenience," (*id.* at 15-16). These factual determinations all but foreclose the possibility of resolving claims without burdensome pre-trial discovery, and practically ensure that Wisconsin courts will be inundated with an endless morass of wasteful and often baseless lawsuits designed to ferret out compensation for every "[s]plit-second absurdit[y]," *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

Second, the rule subjects Wisconsin employers to boundless and potentially crippling liability for all required pre- and post-shift on-premises activities—even when those same activities are required of "visitors" and "contractors" (App. 257-58), and even when the same claims, if filed under nearly identical federal law, would likely fail under Seventh Circuit and U.S. Supreme Court precedent. *See* Tyson Br. 10-13, 47-49. Such fundamentally different liability standards

will upend the settled business expectations of Wisconsin employers, change the terms of their relationships with their employees, and necessitate remedial measures to bring their operations into compliance with the divergent requirement of both state and federal law—all at the expense of their workers and the economy. *See* App. 19 (appellate court recognized its rule would make many Wisconsin employers non-compliant with state law.).

The employees marshal no textually-based rationale to warrant subjecting Wisconsin businesses to these additional burdens.

II. THE EMPLOYEES' RELIANCE ON CERTAIN FEDERAL AUTHORITY IS MISPLACED

Rather than address the statutory interpretation errors committed by the appellate court, the employees request this Court to focus instead on "the substantial weight of federal authority," Resp. Br. 39.[2] This argument reverses course

[2] In so doing, the employees overstate the purported weight of federal authority favoring their position. *Dunlop v. City Elec., Inc.*, 527 F.2d 394 (5th Cir. 1976), does not represent the current views of the Fifth

from their position below. *See* Employees' Resp. Br. 13 (Ct. App.) ("Wisconsin Court's [sic] should not look to Federal cases *** to apply a non-ambiguous provision in the Administrative Code.").

Federal decisional law, moreover, is not necessary to answer the question of Wisconsin statutory interpretation presented, *see* Tyson Br. 58. If considered at all, the Court should accord more weight to those federal decisions which give full effect to the text and structure of section DWD 272.12 (by properly reading the parallel federal provisions). *See id.* at 45-58.

Circuit. *See Von Friewalde v. Boeing Aerospace Ops., Inc.*, 339 F. App'x 448, 454 (5th Cir. 2009) ("[W]e agree with the Second Circuit *** that donning and doffing of generic protective gear such as safety glasses and hearing protection, are in any event non-compensable preliminary tasks under the Portal-to-Portal Act."); Tyson Br. 51-53. The Eleventh Circuit's decision in *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340 (2007), adopted *Dunlop*'s rule as circuit precedent without any analysis, *see id.* at 1344 & n.5. And the Sixth Circuit's assessment in *Franklin v. Kellogg Co.*, 619 F.3d 604 (2010), that the Second Circuit's *Gorman* decision was "unique" ignored the Seventh Circuit's governing precedent: *Musch v. Domtar Indus., Inc.*, 587 F.3d 857 (2009) and *Pirant v. United States Postal Serv.*, 650 F.3d 350 (2008). The overwhelming majority of the district court decisions that adopt the employees' rule come from the few circuits that support their position. *See* Resp. Br. 46-54.

1. Fully consistent with *Steiner v. Mitchell,* 350 U.S. 247 (1956), several federal appellate courts have held that, even when required by law or employer mandate, on-premises clothes changing is compensable only when doing so is essential to completing (or "integral" to) the employee's particular principal activity.[3] *See generally* Tyson Br. 47-56 (citing and discussing cases).

This legal standard fully accords with the plain text of section DWD 272.12(2)(e)1.c., which provides that clothes changing that is only "indispensable" to or "required" for a specific activity is not compensable, since "indispensability" alone says nothing about whether the clothing is "an integral part" of job performance. *See* Tyson Br. 38-39; *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 592-94 (2d Cir.

[3] The employees contend that Tyson has "misconstrued" *Steiner* as distinguishing between compensable "integral" clothes changing and non-compensable clothes changing "under normal conditions." *See* Resp. Br. 26. But this distinction has been recognized by the Supreme Court. *See Alvarez v. IBP, Inc.,* 546 U.S. 21, 29 (2006) (noting that *Steiner* distinguished "changing clothes and showering under normal conditions" from pre- and post-shift activities implicating "important health and safety risks associated with the production of batteries").

2007) (generic protective gear is not rendered integral by being required by the employer or government regulation since "indispensable" and "integral" are "not synonymous").

Moreover, the "extensive and unique" shorthand test used to effectuate the rule provides a readily administrable principle for determining whether pre- or post-shift clothes-changing falls under section DWD 272.12(2)(e). *See* Tyson Br. 56-58. That is because clothing "unique" to a particular activity is by definition "integral" because the unique clothing makes the activity possible and "extensive" clothing needed for an activity is not "merely a convenience to the employee," WIS. ADMIN. CODE § DWD 272.12(2)(e)1.c.

The employees do not deny that the "extensive and [illegible]" standard hews to the requirements of section DWD 272.12(2)(e), or that it is well-suited to determining whether an activity is "an integral part" of a principal activity. Rather, they contend that the rule is inapt because courts employing it

permit compensation only for clothes-changing "required to save the employee's life," *see* Resp. Br. 27-28.

Not so.[4] These courts use *Steiner*'s "extensive and ṅ q " gear example and its relation to the worker's job as a gauge for whether clothes-changing bears an adequate nexus to an employee's principal activity to be considered "integral" to its completion. *See, e.g.*, *Gorman*, 488 F.3d at 592 n.3, 594 (denying donning and doffing claim by nuclear power plant employees relating to generic protective gear because unlike the equipment in *Steiner*, gear was worn by all workers in the plant, and bore no relation to employees' jobs in "chemical applications, radiology, maintenance, and the control room"); *see also id.* at 592 (comparing "integral" clothes-changing to "sharpening the knife" used to "carv[e] a carcass," "powering up and testing an x-ray machine" before "taking x-rays," and

[4] No court so limits the rule. The employees emphasize Judge Crabb's "pointed *** rejection of *Gorman*'s restrictive reading of *Steiner*" (Resp. Br. 52) in *Spoerle v.Kraft Foods Global, Inc.*, 527 F. Supp. 2d 860 (W.D. Wis. 2007). But they fail to mention that she subsequently recanted that "rejection" in *Musch v. Domtar Industries, Inc.*, 2008 WL 4735171, at *7 (W.D. Wis. Oct. 24, 2008), *aff'd,* 587 F.3d 857 (7th Cir. 2009) and then endorsed the "extensive and unique" test used by the Second Circuit.

"feeding, training and walking" a police dog); *Pirant*, 542 F.3d at 208-09 (denying donning and doffing claim by mail carrier because changing into "a uniform shirt, gloves, and work shoes" was more akin to "changing clothes 'under normal conditions'" than wearing "extensive and unique" clothing necessary to perform her job); *Musch*, 587 F.3d at 860-61 (similar).

That clear and calibrated framework, fully consistent with the plain text of section DWD 272.12(2)(e), is precisely the type of persuasive federal authority that "should be given considerable weight." *Estate of Haase v. Marine Nat'l Exch. Bank*, 81 Wis. 2d 705, 707, 260 N.W.2d 809 (Wis. 1978).

2. However, the same is not true of the employees' competing standard, which assesses the compensability of clothes-changing based on whether it is: (1) required by the employer; (2) necessary to performance of the principal work; and (3) done primarily to benefit the employer, *see generally* Resp. Br. 40-54.

The employees' proposed standard rests on unsteady ground. The U.S. Supreme Court has never addressed whether changing into and out of generalized clothing is a compensable principal activity. *See* Tyson Br. 60-61 & n.10. However, it has clearly held an activity is not "integral and indispensable" to a worker's principal duties simply because it is necessary or required by the employer. *See Alvarez*, 546 U.S. at 40-41 ("[T]hat certain preshift activities are necessary *** does not mean that [they] are 'integral and indispensable' to a 'principal activity.'").

Moreover, the employees' standard cannot be squared with the careful balance in section DWD 272.12 between (i) compensating employees for those activities "controlled or required by the employer" and "pursued necessarily and primarily" for its benefit; and (ii) denying compensation for preparatory and concluding activities that are not "an integral part" of an employee's principal job activities—regardless of whether they are "required." *See* Tyson Br. 61-62; *compare*

section DWD 272.12(1)(a) *with* section DWD 272.12(2)(e). If the employees' standard is adopted, the general rule will swallow the exception, and effectively read the "integrality" requirement out of section DWD 272.12(2)(e)1. altogether.

Finally, the employees' standard is limitless. No court has defined "necessary" beyond reading it to mean "employer required," and no clear rule separates activities undertaken "primarily for the benefit of the employer" from those that are merely a "convenience to the employee." *See* WIS. ADMIN. CODE §§ 272.12(1)(a)1 & 272.12(2)(e)1.c.; *see also* Tyson Br. 63.

The employees' proposed standard that is purportedly based on the weight of federal authority has been rejected by the Seventh Circuit. *See* Tyson Br. 48-50. This proposed standard, like the Court of Appeals' atextual reading (if it is allowed to stand), will threaten Wisconsin employers with substantial liability that they and their competitors are not exposed to in neighboring states and give rise to a host of

practical difficulties for Wisconsin employers, courts, and economic development. *See* Part I.B, *supra*; Tyson Br. 64-66.

CONCLUSION

For the foregoing reasons, and those stated in Tyson's opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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STATE OF WISCONSIN
SUPREME COURT

JIM WEISSMAN, KEITH GRIEP, RANDY GARRETT, GREGORY PETERS, SHANNON FITZPATRICK AND JAMES GENEMAN,

Plaintiffs-Appellants,

v.

Appeal No. 2012AP2196

TYSON PREPARED FOODS, INC.,

Defendant-Respondent-Petitioner.

APPEAL FROM THE DECISION AND ORDER DATED AUGUST 31, 2012 IN JEFFERSON COUNTY CIRCUIT COURT CASE 2010-CV-001035, THE HONORABLE WILLIAM F. HUE PRESIDING

AMICUS CURIAE BRIEF OF UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 1473

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United Food & Commercial Workers Union Local 1473 ("Local 1473") is a labor organization that represents approximately 13,000 workers, over 12,000 of whom work in Wisconsin. Many work in industries like Tyson's. Local 1473 is a party to litigation pending in the Circuit Court of Rock County involving the same statutes and administrative code provisions at issue before the Court, involving the "off the clock" donning and doffing of clothing and gear provided daily by an employer and which the employer requires be worn by its employees in the food processing industry and in which Judge Michael Fitzpatrick has issued a Decision and Order dated December 30, 2013 in *UFCW Local 1473, et al. v. Hormel Foods Corporation*, Case 10-CV-2595 (Rock County) reported at 2013 WL 6851518 (Wis. Cir. 2013). Local 1473 files this Brief in support of Plaintiffs-Appellants' ("Weissman's" in the aggregate) request that the decision of the Court of Appeals be affirmed.

INTRODUCTION

The Court is "confronted with the question of whether [it] should lend its aid to a practice that deprives any working man of … the only thing he has to sell -- his hours or minutes of labor." *Anderson v. Mt. Clemens Pottery Co.*, 60 F. Supp. 146, 149-50 (E.D. Mich. 1943).[1] Tyson has repeated the same flawed arguments to this Court that it had previously advanced to the Court of Appeals.

Relying on *Pirant v. United States Postal Service*, 542 F. 3d 202 (7th Cir. 2008), the Circuit Court granted Tyson's motion for summary judgment by rejecting Weissman's claims that donning and doffing activities were work and thus the time spent in

[1] The case was ultimately decided by the U.S. Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) cited throughout Tyson's brief.

those activities was compensable under the Code. The Court of Appeals reversed. Tyson has misstated the law and advanced faulty logic in an attempt to convince the Court that activities required by the employer on the employer's premises as Tyson does here are not to be considered compensable work time for purposes of the Wisconsin Administrative Code.

The issue is whether time spent by employees in off the clock donning of clothing and gear daily provided by an employer and which employees must don before they may "clock in" and which they must doff after they have "clocked out" but may not take home with them is "work" and the time spent in those donning and doffing activities must be counted as compensable time for purposes of applying the Wisconsin Wage Statute and Administrative Code's provisions regarding overtime compensation.

ARGUMENT

A. Tyson's Argument Turns the Administrative Code on Its Head.

The issue is whether time spent by employees in "off the clock" donning of clothing and gear daily provided by an employer and which employees must don before they may "clock in" and which they must doff after they have "clocked out" but may not take home with them is "work" and the time spent in those donning and doffing activities must be counted as compensable time for purposes of applying the Wisconsin Wage Statute and Administrative Code's provisions regarding overtime compensation. DWD 272.12(1)(a) defines work as "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's business."[2] The Code also makes clear that an employee's workday "may … be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line." DWD 272.12(1)(a)2. Tyson's argument that the Code "*restricts* compensation to activities that are constituent and essential aspects of an employee's particularized, principal job function" (emphasis added) turns the foregoing Code provisions on their head.

When an employer requires employee activities on its premises, the Code takes an *inclusive* view that those activities must be counted as hours worked unless the employer can demonstrate that there is a compelling reason those activities fall outside the definition of work because they are preliminary or postliminary in nature. Activities like those in issue here (donning and doffing clothing and gear required and provided by Tyson) are work and thus the time spent in those activities may be excluded from the definition of work, if and only if, those activities "are for the convenience of the employees and not directly related to their principal activities." DWD 272.12(2)(e)1c.

Tyson argues that for an activity to be compensable (i.e. "work") it must "be so irreparably tied to the performance of the principal activity that without it, the employee's primary job function could not be completed." But that is not what the Code provides. To prevail under the Code's provisions Tyson would have to demonstrate at trial that the clothes-changing activities were for the convenience of the employees and that it received no benefit from those activities (even though it had

[2] This provision is a direct quote of the definition of work utilized by the Supreme Court. The federal Fair Labor Standards Act contained no definition of the term "work" so it defined it as quoted in the Code above. *Tennessee Coal, Iron & R.Co. v. Muscoda Local No 123*, 321 U.S. 590, 597-598 (1944).

ordered they be done)[3] *and* that the clothes changing activities are not directly related to the employees' principal activities. The clothes changing activities are directly related to Tyson's employees' principal activities of working on Tyson's food products because Tyson would not let the employees work in its plant on its products if the employees did not put on (don) the uniforms Tyson provides daily and take them off (doff) before leaving Tyson's premises. Tyson does not permit the donning and doffing of the uniforms it daily provides off its premises.

If an employer mandates the clothing and gear changing activities on its premises (into and out of clothing and gear it daily provides or requires be kept on its premises), the employer primarily benefits from such activities because it has asserted its managerial control over its manufacturing process and expects that those activities be followed by its employees. No rational employer would adopt meaningless rules to operate its business, so Tyson's rules regarding the obligation of employees to engage in certain activities on its premises must have been chosen by Tyson as a way of promoting its business interests. Thus, by its own managerial decision making, Tyson receives a direct and primary benefit from the actions it has mandated take place daily on its premises in order for it to produce its product to its satisfaction each workday.

[3] Tyson can only avoid a trial if there is a single reasonable inference to be drawn from the undisputed facts before this Court and if that inference favors it. *United Concrete & Construction, Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72 ¶ 12, 349 Wis. 2d 587, 836 N.W.2d 807, 813 (2013).

B. Tyson's arguments have been Rejected by the Federal Secretary of Labor for almost Forty Years

Tyson's faulty argument has been repeatedly rejected by the federal Department of Labor. In *Dunlop v. City Electric*, 527 F.2d 394 (1976), President Ford's Secretary of Labor successfully argued that pre-shift activities performed by electricians that involved filling out time sheets, checking job locations, cleaning and loading trucks, picking up electrical plans, checking job locations, removing trash accumulated from trucks accumulated during previous day's work, loading trucks and fueling trucks were "principal activities" primarily benefiting the employer and compensable work time. *Id.* The Court noted:

> Decisions construing the Portal-to-Portal Act in conjunction with the F.L.S.A. make clear that the excepting language of § 4 [involving preliminary and postliminary activities set forth in 29 U.S.C. § 254(A)(2)] was intended to exclude from F.L.S.A. coverage *only* those activities "predominantly ... spent in [the employees'] own interests". *No benefit may inure to the company.* The activities must be undertaken "for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer". (emphasis added, citations and footnote omitted)

Id. at 398-399.

In *Brock v. Mercy Hospital and Medical Center*, 1986 WL 12877 (S.D. Cal.), filed and prosecuted by President Reagan's Secretary of Labor, the district court held that time spent by employees in clothes-changing activities on an employer's premises are not preliminary or postliminary activity if those activities are required by the nature of the employees' work *or* by law *or* by the rules of the employer. The court determined that the time spent in the on-the-premises clothes-changing process could

not be excluded from hours worked for purposes of the federal FLSA because the affected employees were not permitted by the hospital-employer to work without wearing the clothes provided by the employer and that the time could not be excluded from hours worked because the employer's rules required employees to change into the clothes and the clothes changing at issue was not voluntary or a convenience to the workers.

In 2007, President George W. Bush's Secretary of Labor filed an amicus brief in *Dege v. Hutchinson Technology, Inc.*, Case 06-CV-3754, 2007 WL 327511 (D. Minn), in support of the plaintiffs' motion for partial summary judgment on the issue of whether donning and doffing clothing provided daily and which employees had to don before going "on the clock" is integral and indispensable (and hence not excluded from compensable time under the federal FLSA). Hutchinson required employees to put on certain "clean room" clothing and gear provided by the employer before they went on the clock. The clothing was required by Hutchinson to prevent contamination of the products (computer disc drive suspension assemblies and medical devices). The Secretary of Labor urged the district court to reject the same arguments advanced by Tyson to this Court. Local 1473 asserts that the Secretary of Labor's analysis of whether the activities in *Hutchinson*, as those here, are integral and indispensable to the employer's principal activities and therefore are not excluded from compensable time are those which this Court should follow if it looks to federal guidance on those terms as applied to the facts here. (See pages 8-12 of the Secretary's amicus brief in *Hutchinson*.)[4] Ultimately the District Court on November 7, 2007 denied without prejudice the *Hutchinson* plaintiffs' motion for summary judgment as

[4] http://tinyurl.com/mwm7hcs.

premature. *Dege v. Hutchinson Technology, Inc.*, 2007 WL 3275111 (D. Minn).

C. The Employers in *Pirant* and *Musch* did not Require the Daily Donning and Doffing of Employer Provided Uniforms on Their Premises. Employees Could and did put the Uniforms or Work Related Clothing on at Their Homes.

The Circuit Court's reliance on *Pirant* was misplaced factually and legally because the plaintiff in *Pirant* was not required by her employer, as here, to change into or out of her uniform on her employer's premises in order for her to perform her daily duties. After losing at the Seventh Circuit, Pirant filed for a writ of certiorari with the Supreme Court. The then Solicitor General, now Supreme Court Justice, Elena Kagan, in June 2009, filed the Postal Service's opposition to the petition for the writ in Supreme Court Case No. 08-1100.[5] That brief makes clear that the Seventh Circuit's original opinion in *Pirant* had endorsed the reasoning found in *Gorman v. Consolidated Edison Corp.,* 488 F.3d 586 (2d Cir. 2007), on which Tyson relies. *Gorman* held that donning and doffing "generic protective gear," such as "a helmet, safety glasses, and steel-toed boots," are noncompensable under the FLSA because such activities are "relatively effortless * * * preliminary tasks." *Id.* The Postal Service, supported by DOL as amicus curiae, after the Seventh Circuit's original opinion, requested the court to modify its opinion to remove the discussion of *Gorman.* As noted at pages 5-6 of Solicitor General Kagan's brief in opposition to the petition for certiorari:

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[5] Available at http://tinyurl.com/bewh5ln

> The Postal Service further explained that [the Seventh Circuit's] reliance on *Gorman* was unnecessary to resolve the case, since "[t]here was no evidence that [Pirant] was required to change clothes at work, nothing showing that she could not have done so prior to coming to work, or any other evidence that might create a genuine dispute as to whether or not the clothes-changing at issue here was 'integral and indispensable' to [Pirant's] work." In response to the petition, the court of appeals modified its opinion to delete the references to *Gorman*. (Citations omitted.)

As noted in the Solicitor General's brief in opposition to the petition filed with the Supreme Court, the Court of Appeals thereafter deleted its previous references to *Gorman*. The Supreme Court denied Pirant's petition for a writ of certiorari. *Pirant v. U.S. Postal Service*, ___ U.S. ___, 130 S.Ct. 361, 175 L.Ed.2d 21 (2009).

Tyson failed to note that in *Musch v. Domtar, Inc.*, 587 F. 3d 857 (7th Cir. 2009), there was no evidence that the employer required the employees to shower at the facility or that any regulations required showering at the facility. Thus the compensability issue turned on whether showering on the employer's premises was required by the nature of the job. It was not. Nor did the employer in *Musch* require that employees don and doff clothing it provided on its premises; rather employees could put on and take off the clothing at home which rendered the activities preliminary and postliminary. *See Musch v. Domtar, Inc.*, 2008 WL 4735171 *7-8 (W.D. Wis.).

CONCLUSION

United Food & Commercial Workers Union Local 1473 asserts that activities required by rule by an employer to be performed on its premises using clothing and gear supplied by the employer constitutes work under the Code without exception even if required before the commencement of an employee's shift. United Food and Commercial Workers Local 1473 urges the Court affirm the decision of the Court of Appeals of August 1, 2013.

Dated this 21st day of February 2014.

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CERTIFICATIONS

I certify that the Amicus Curiae Brief of United Food & Commercial Workers Union Local 1473 confirms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c). Amicus Curiae Brief of United Food & Commercial Workers Union Local 1473 is 2,292 words, in proportional serif font (Garamond), 13 point body text, 11 point for quotes and footnotes, with no more than 60 characters per line, and a minimum leading of 2 points and a resolution of at least 200 dots per inch.

I further certify that on February 25, 2014, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of Court of Appeals within three calendar days. I further certify that the brief was correctly addressed.

I further certify that I have submitted this date an electronic copy of the Amicus Curiae Brief of United Food and Commercial Workers Union Local 1473 which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that the electronic copy of the Amicus Curiae Brief of United Food and Commercial Workers Union Local 1473 is identical in content and format to the printed copy of the brief filed on this date. An original and 21 copies of the Amicus Curiae Brief of United Food and Commercial Workers Union Local 1473, each bound with an original or copy of this Certificate, have been filed with the Court, and three copies of the same submission have been served on each of the parties identified below, all by first class mail, postage prepaid, to the following persons:

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JIM WEISSMAN, KEITH GRIEP, RANDY GARRETT, GREGORY PETERS, SHANNON FITZPATRICK AND JAMES GENEMAN,

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Appeal No. 2012AP2196

APPEAL FROM THE DECISION AND ORDER DATED AUGUST 31, 2012 IN JEFFERSON COUNTY CIRCUIT COURT CASE 2010-CV-001035, THE HONORABLE WILLIAM F. HUE PRESIDING

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INTRODUCTION

The Wisconsin Employment Lawyers Association (WELA) is an organization of more than 50 employment law attorneys in the state of Wisconsin, who represent the rights of employees in employer-employee disputes, administrative proceedings, and litigation in state and federal courts on matters including, but not limited to, employment discrimination, wage and hour violations, the doctrine of wrongful termination, and other related areas of employment law.

At issue in this case is whether Tyson can require its employees to don and doff personal protective equipment on the employer's premises for the benefit of the employer (*See* Response Brief of Plaintiffs-Apellants ("Response Br."), 1-9 (describing multitude of benefits to employer)) without compensating employees for that time. With this submission, the Amici seek to provide this Court with examples of donning and doffing that are *not* compensable to demonstrate the stark contrast between those cases – where employees were permitted to don and doff at home but chose not to for their own convenience – and the facts in the instant case – where employees are mandated by Tyson to don and doff at work.

The analysis by federal courts in the cases below represents a majority view across circuits on the question of compensability when the employer requires employees to don and doff on the employer's premises. Simply put, "if donning and doffing a uniform at work is required by law, employer policy or the nature of the job, the time spent performing such activity is compensable as it is necessarily part of the

continuous workday and integral and indispensable to the employee's principal activities." *Abbe v. City of San Diego*, 2007 U.S. Dist. LEXIS 87501, *35 (S.D. Cal. 2007); *See also* 29 C.F.R. § 790.8, n.65. WELA files this Brief in support of Plaintiffs-Appellants' request that the decision of the Court of Appeals be affirmed.

ARGUMENT

A. Federal Courts Regularly Analyze Whether Donning and Doffing is Integral and Indispensable to a Principal Activity Based Upon Whether the Equipment Must be Donned and Doffed on the Employer's Premises.

The Court of Appeals reversed the District Court's grant of summary judgment in favor of Tyson and held that "[w]here the changing of clothes *on the employer's premises* is required by law, *by rules of the employer*, or by the nature of the work,' the activity may be considered integral and indispensable to the principal activities." *Weissman v. Tyson Prepared Foods, Inc.*, 2013 WI App 109, ¶ 42, 350 Wis. 2d 380, 838 N.W.2d 502 (citing *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 910 (9th Cir. 2004) (quoting 29 C.F.R. § 790.8(c))) (emphasis in original).

Tyson criticizes this interpretation of the state regulation[1] at issue in this case and rejects what it calls the "obligatory equals integral" rule opined by the Court. According to Tyson, "a showing that a preparatory or concluding activity

[1] [T]he term "principal activities" includes all activities which are an integral part of a principal activity. […]. Among the activities included as an integral part of the principal activity are those closely related activities which are indispensable to its performance. Wis. Admin. Code § DWD 272.12(2)(e)1; See also 29 C.F.R. §§ 780.8(b)-(c).

was controlled or required by the employer and pursued for the employer's benefit might be a necessary condition of compensation, but section DWD 272.12(2)(e) makes plain that such showing alone is insufficient to render all such time compensable." (Brief of Defendant-Respondent-Petitioner ("Tyson Br."), 43.) While Tyson correctly explains that this Court may look to federal authority when deciding how to interpret section DWD 272.12(2)(e), it incorrectly asserts that "most" federal courts have held that "even if pre- and post-clothes changing is required by an employer, those activities are not 'integral' to principal work activities (and thus not compensable) unless the clothing itself possesses unique characteristics such that it is essential to the completion of the employee's particular principal activity." (Tyson Br., 47-48.)

In making this argument, Tyson drastically minimizes the importance of an employer's requirement that equipment be donned and doffed on the employer's premises for purposes of compensability. In fact, the Court of Appeals' approach – an activity controlled or required by the employer is compensable as it is an indispensable and thus integral part of principal activities – is precisely the approach *most* federal courts actually take when interpreting 29 C.F.R. section 780.8, whose language is identical to section DWD 272.12(2)(e).

In analyzing compensability under the federal regulation, courts have held that where the employer does not require that the donning and doffing take place on the employer's premises, it is not compensable. In other words, where donning and doffing on the employer's premises is solely for

the benefit of the employee, it is not compensable.[2] As one District Court explained:

> Several other courts have also decided donning and doffing claims under the FLSA by focusing on employer policy and the nature of the job: if on-site changing is not required, the activity is not compensable.

Abbe v. City of San Diego, 2007 U.S. Dist. LEXIS 87501, *34 (S.D. Cal. 2007) (internal citations omitted).

While Plaintiffs-Appellants' brief focuses primarily on donning and doffing cases arising under similar facts (i.e. in other meat packaging plants), other federal courts have also held that an employer's requirement that donning and doffing take place at the employer's facility is determinative to whether such time is compensable. The following chart summarizes cases involving the donning and doffing of safety equipment by police, corrections, and safety officers in cases where the employer did not require donning and doffing on premises. This sample of cases further supports Plaintiffs-Appellants' claims that the employer's requirement is indeed relevant to determining compensability and Tyson's attempt to minimize this element misrepresents the majority view.

CASE	EQUIPMENT	HOLDING
Musticci v. City of Little Rock, 734 F. Supp. 2d 621,	**Police Officers**: undershirt, uniform shirt, vest, shoulder patch, shoes,	Because neither the law nor the Little Rock Police Department requires officers to change at the station [and] officers

[2] Amici in this case are not suggesting that this Court develop a bright line location based rule wherein only donning and doffing on the employer's premises is compensable. The focus in this case is on the fact that Tyson *required* such donning and doffing to occur on its premises and that requirement, as other federal courts have repeatedly held, is what requires compensability.

625-28 (E.D. Ark. 2010)	trousers, socks, badge, name tag, and duty belt.	acknowledge that when they or their fellow officers do choose to change at the station, they primarily do so for their own benefit, the donning and doffing of police uniforms and protective gear is not compensable.
Edwards v. City of New York, 2011 U.S. Dist. LEXIS 97134, *22 (S.D.N.Y. 2011)	**Correction Officers:** trousers, socks, vest, badge, uniform shirt, slash resistant vest, black socks, patent/leather shoes, utility belt with duty knife, flashlight, handcuff case, and pen.	While the evidence indicates that some (but not all) of the plaintiffs chose to change into their uniform and equipment in the D[epartment of Corrections] facility locker rooms, they did so for a variety of reasons ranging from personal convenience to fear of being recognized by a former inmate or mistaken for a police officer while commuting to work [so] Plaintiffs are not entitled to compensation for time spent donning and doffing their duty uniforms.
Bamonte v. City of Mesa, 598 F.3d 1217, 1225-33 (9th Cir. 2010)	**Police Officers**: trousers, shirt, nametag, tie, specified footwear, badge, duty belt, service weapon and	The facts we consider in this case are diametrically opposed to those that formed the contexts in *Steiner, Alvarez* and *Ballaris*.[3] In [those cases] the employer mandated the donning

[3] *See generally Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330 (1956); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (2003); and *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (2004).

	holster, handcuffs, chemical spray, baton, and portable radio.	and doffing at the employer's premises. In this case, […] donning and doffing at the workplace are entirely optional [and] the officers urged a conclusion of compensability primarily for reasons that were the sole benefit to the employee (risk of loss or theft of uniforms, potential access to gear by family members or guests, risk of performing firearm checks at home, discomfort while commuting, risk of being identified as an officer while off duty, risk of exposing family members to contaminants). […] No requirement of law, rule, the employer or the nature of the work mandates donning and doffing at the employer's premises, and none of the other factors articulated in *Alvarez* weigh in favor of a conclusion of compensability.
Abbe v. City of San Diego, 2007 U.S. Dist. LEXIS 87501, *35-38 (S.D. Cal. 2007)	**Police Officers**: bullet proof vest, gun belt, boots, blue pants, white undershirt, blue uniform shirt, regular belt, badge,	Accordingly, if donning and doffing a uniform at work is required by law, employer policy or the nature of the job, the time spent performing such activity is compensable as it is necessarily part of the

	name tag, and brass fixings.	continuous workday and integral and indispensable to the employee's principal activities. […] Clearly, neither law nor workplace policy mandates that Plaintiffs dress at work. […] What prompts some Plaintiffs to don their gun belts at work is the nature of the *equipment*, not the nature of the *work*. If employees have the *option* and *ability* to change into the required gear at home, changing into that gear for their own convenience simply does not make that activity a principal activity when it takes place at work."
Lesane v. Winter, 866 F. Supp. 2d 1, 6 (D.D.C. 2011)	**Naval Police Officers**: footwear, undershirt, socks, turtleneck, pants, nameplate, rank insignia, optional headwear, flashlight, duty belt, radio case, pepper mace, baton strap, magazine pouch, handcuffs, holster, first responder's pouch, and ballistic vest.	The Court therefore holds that because the ONI officers have the option to change into their uniforms at home, and because most officers indeed do so, donning the uniform is not integral and indispensable to their policing activities.

Dager v. City of Phoenix, 646 F. Supp. 2d 1085, 1099-1101 (D.Ariz. 2009)	**Police Officers**: uniform shirt, undershirt, turtleneck, trousers, trouser belt, nameplate, badge, socks, boots and protective gear including a gun belt, firearm, firearm holster, ammunition, ammunition carrier, handcuffs, handcuff case, handcuff keys, chemical spray and case, taser and taser holster, portable radio, and ballistic vest.	Most district court cases addressing this question in the Ninth and other circuits have concluded that time spent donning and doffing uniforms and protective gear is not compensable under the FLSA where an employee may do so at home. […] Here, the record is clear that the Department has no policy against changing at home and that patrol officers are free to don and doff their uniforms and protective gear wherever they desire. Most of the deponents in this case have testified that they don and doff, at least partially at home. […] Although it appears that the Department does not have a formal policy against commuting in uniform or protective gear, patrol officers concerned about being identified or harassed while off duty can easily cover up their uniforms during their commutes.

Lee v. Am-pro Protective Agency, Inc., 860 F. Supp. 325, 327 n.2 (E.D. Va. 1994)	**Security Guards:** uniform and weapon	Distinguishing *Bagrowski* because "the officers in *Bagrowski* were allowed to change at home, which is a significant factual difference from the undisputed facts in the instant case.
Bagrowski v. Maryland Port Authority, 845 F. Supp. 1116, 1121 n.6 (D. Md. 1994)	**Police Officers**: standard police uniform	Many officers came to work in their uniforms and nothing prevented plaintiffs from doing so. Clearly, dressing at work as not an "integral part of their activity…."

These cases are similar to *Pirant v. United States Postal Service*, 542 F.3d 202 (7th Cir. 2008) and *Musch v. Domtar Indus., Inc.*, 587 F.3d 857 (7th Cir. 2009), which Tyson repeatedly cites, in support of its position. (*See* Tyson Br., *passim*). In fact, *Pirant* and *Musch* are more analogous to the cases listed above because Plaintiffs were not required to don and doff the equipment on the employer's premises – they were permitted to change their clothes at home. *See generally Pirant,* 542 F.3d at 208-9; *Musch*, 587 F.3d at 860-1.

When compared to the instant case, and the undisputed fact that Tyson employees *must* don and doff their equipment on the employer's premises, these cases further support Plaintiffs-Appellant's argument that the time that Tyson employees spent donning and doffing in this case is compensable. Police officers and security guards in the above cases *chose* to don and doff their gear on the employer's

premises for personal reasons. Tyson employees simply do not have that choice and the lack of such a choice, according to most federal courts, is a determinative factor in compensability.

B. The Facts in the Instant Case Are Analogous to Those Cases Holding that Donning and Doffing is Compensable when Required by the Employer to Take Place on the Employer's Premises.

Plaintiffs-Appellants have provided a comprehensive analysis documenting the type of cases in which the majority of federal courts have found that time spent donning and doffing is compensable. Not surprisingly, many of these cases involve meat packing plants just like Tyson's plant. (Response Br., 26-38.) Unlike those cases listed in the above chart, meat packing employees in cases with analogous facts were not permitted to don and doff their equipment at home for a variety of reasons, all of which benefit the employer. (*See* Response Br., 10-15.) For these reasons, because Tyson employees, like other meat packing employees in similar cases and unlike the officers in the chart above, do not have the option or the ability to change into the required gear at home. As a result, the time spent changing on the employer's premises is compensable.

CONCLUSION

WELA asserts that if donning and doffing are required to take place on the employer's premises by the employer, the time spent doing so is compensable. WELA urges the Court affirm the decision of the Court of Appeals of August 1, 2013.

Dated this 26th day of February 2014.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,289 words.

Dated this 26th day of February, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 26th day of February, 2014.

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CERTIFICATE OF THIRD PARTY COMMERCIAL DELIVERY

I hereby certify that:

On February 26, 2014, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief was correctly addressed.

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APPENDIX – TABLE OF CONTENTS

CERTIFICATION AS TO APPENDIX

I hereby certify that:

This appendix conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font.

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