No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
Petitioner,
v.
JESSE BUSK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12.5 million working men and women.[1]

This case concerns the proper interpretation of Section 4(a)(2) of the Portal-to-Portal Act, 29 U.S.C. § 254(a)(2), which makes "activities which are preliminary to or postliminary to [an employee's] principal activity or activities" noncompensable under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). As a federation of labor organizations whose members are, by and large, covered by the FLSA's minimum wage and overtime requirements, the AFL-CIO has a strong interest in the proper interpretation of the FLSA as amended by the Portal-to-Portal Act. For that reason, the AFL-CIO has frequently filed *amicus* briefs in this Court in cases concerning the FLSA and the Portal-to-Portal Act. *See*, *e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014); *Genesis Healthcare Corp. v. Symczyk*, 133 S.

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[1] Counsel for the petitioner and counsel for the respondents have each filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Ct. 1523 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

STATEMENT

Plaintiffs Jesse Busk and Laurie Castro are former employees of Integrity Staffing Solutions, Inc. who worked at warehouses operated by internet retailer Amazon.com in Las Vegas and Fernley, Nevada. JA 17-18, 20. Integrity Staffing is in the business of leasing hourly employees like Busk and Castro to work at warehouses owned by Amazon.com and other companies throughout the United States. JA 17. At the Nevada warehouses where they worked, Busk and Castro's primary job responsibilities involved retrieving products from warehouse shelves and directing those products to be distributed to Amazon.com customers. JA 20.

Busk and Castro brought suit against Integrity Staffing under the Fair Labor Standards Act (FLSA) for unpaid minimum wages and overtime based in part on Integrity Staffing's failure to pay them for time spent "to go through a security search before leaving the facilities at the end of the day" as required by Integrity Staffing's policy. JA 19 & 21. According to their Complaint, "[a]t the end of their respective shifts, hundreds of warehouse employees would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband." *Ibid.* Busk and Castro described this screening as "a post 9/11 type of airport security clearance – i.e., warehouse employees were

required to remove all personal belongings from their person such as wallets, keys, and belts, and pass through metal detectors before being released from work and allowed to leave the facility." *Id.* at 21-22. They alleged that they "were required to wait approximately 25 minutes each day at the end of each shift . . . in order to undergo [this] search[.]" *Id.* at 21.

Integrity Staffing moved to dismiss the claim for unpaid wages for the time spent in security screenings on the basis that "[a]s a matter of law, the time Plaintiffs allege they spent going through security checks is not compensable pursuant to federal law." Def. Mot. to Dismiss Amended Complaint 7 (Dkt. Entry #16, Jan. 18, 2011). The district court agreed, holding that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks,' 29 C.F.R. § 790.7(g)." *Busk v. Integrity Staffing Solutions, Inc.*, No. 2:10-cv-01854-RLH-RJJ, 2011 U.S. Dist. LEXIS 79773, at *12 (D. Nev., July 19, 2011). Busk and Castro appealed, and the court of appeals reversed.

The court of appeals observed that Busk and Castro "allege[d] that the screenings are intended to prevent employee theft" and that this was "a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter." *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 530-31 (9th Cir. 2013). The court of appeals noted that Busk and Castro were employed to handle merchandise and that Integrity Staffing had conducted the screening to prevent employee theft, a concern that "stems from the nature of the employees' work (specifically, their access to merchandise)." *Id.*

at 531. The court of appeals concluded that the district court had erred in applying "a blanket rule that security clearances are noncompensable instead of assessing the plaintiffs' claims under the 'integral and indispensable' test." *Ibid.*

Integrity Staffing filed a petition for a writ of certiorari on the question "whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act," Cert. Pet. i., which this Court granted.

SUMMARY OF ARGUMENT

The court of appeals correctly rejected the district court's conclusion that there is a "blanket rule" under the FLSA to the effect that all security screenings are noncompensable. Rather, whether time spent in a security screening is compensable turns on whether the purpose of the screening is closely related to employees' primary job duties.

Section 4(a)(2) of the Portal-to-Portal Act makes "activities which are preliminary to or postliminary to [an employee's] principal activity or activities" noncompensable under the FLSA's minimum wage and overtime requirements. 29 U.S.C. § 254(a)(2). However, just because an activity takes place before or after employees undertake their primary job duties does not necessarily render that activity noncompensable. Under *Steiner v. Mitchell*, 350 U.S. 247 (1956), a pre-shift or post-shift activity which is "integral and indispensable" to employees' primary job duties is treated as a compensable principal activity in its own right. Such an activity is integral and indispensable to employees' primary job duties if it is closely related to the specific work the employee is employed to perform.

Generally, whether a particular pre-shift or post-shift activity is a compensable principal activity or a noncompensable preliminary or postliminary activity can only be determined by reference to the nature of employees' primary job duties. Compensable pre-shift and post-shift activities include those that are functionally necessary for employees to undertake their primary job duties, such as pre-shift knife sharpening required for butchers to do their work. However, as *Steiner* illustrates, a pre-shift or post-shift activity that is not functionally related to job performance can still be compensable if it is vital to the efficiency of the employer's production process and closely related to employees' primary job duties. For example, *Steiner* held that where employees must shower and change clothes on the employer's property as a result of their exposure to toxic chemicals in the workplace, these activities are compensable, even though they do not assist employees in carrying out their job duties.

When this analysis is applied to pre-shift and post-shift screenings, it is clear that there is no "blanket rule" regarding whether screenings are compensable. Rather, whether any particular screening is compensable depends on how closely related it is to employees' primary job duties. For example, screening employees who undertake certain high-risk jobs within a nuclear power station for radiation exposure would constitute a compensable principal activity. The same is true where a healthcare provider must be screened for exposure to an infectious disease as a result of his or her primary job duties caring for patients who are infected with the disease.

In contrast, generalized screenings of anyone who enters a job site or a facility where the job site is lo-

cated are typically not so closely related to employees' specific primary job duties as to be compensable. For example, where construction workers who are engaged in building an airport terminal must pass through a security screening to reach their job site, the screening is not compensable because it is not closely related to the work the construction workers are engaged to do but rather to the airport's own security requirements. This example illustrates two significant indicia of whether a particular screening is closely related to employees' primary job duties: whether the screening applies generally or just to a particular group of employees, and how proximate the screening location is to the location where employees undertake their primary job duties.

The fact that the screening in this case is intended to prevent an unlawful act, employee theft, does not change the analysis. Integrity Staffing – whose employees are engaged in handling valuable merchandise for Integrity Staffing's client – has a very strong efficiency-based interest in safeguarding the merchandise its employees handle. Because of the close relationship between Integrity Staffing's interest in deterring theft and employees' primary job duties handling merchandise, the anti-theft screenings constitute a compensable principal activity.

Finally, the fact that these screenings are relatively brief is not relevant to whether the screenings are compensable. This Court made clear in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) – where it held that the few moments it took for employees to toss protective gear into laundry and trash bins after their shifts was a compensable activity that ended the work day – that whether a pre-shift or post-shift activity is compensa-

ble turns on how closely related it is to employees' primary job duties, not how long the activity takes to complete. Likewise, Integrity Staffing's contention that screenings are merely part of "checking out," which Department of Labor regulations generally treat as a noncompensable postliminary activity, is unavailing. The checking in and out referenced in the regulations is noncompensable because it serves the limited functions of registering an employee's presence at the beginning of the work day and recording the employee's departure at day's end. When additional activities are added to that process – such as an anti-theft security screening – the compensability of each additional activity must be evaluated on its own terms.

The court of appeals was therefore correct to reverse the district court's decision holding that screenings are *per se* noncompensable preliminary and postliminary activities. Although it might have been preferable for Busk and Castro to have pleaded more detailed facts about their job responsibilities and the nature of the screenings in order to support an inference that the screenings were closely related to their primary job duties, the court of appeals' decision that their pleadings were sufficient to survive a motion to dismiss was correct.

ARGUMENT

The court of appeals correctly held that the district court erred by dismissing Busk and Castro's claim that they were entitled to compensation for time spent in security screenings on the basis of "a blanket rule that security clearances are noncompensable." *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 531 (9th

Cir. 2013). While screenings that bear no close relation to employees' primary job duties constitute non-compensable preliminary or postliminary activities, screenings that are "closely intertwined with [employees'] principal activity," Gov. Br. 21, constitute compensable principal activities in their own right. In this case, Busk and Castro sufficiently alleged – if just so – that the anti-theft screenings of warehouse workers were closely enough related to their primary job duties to survive a motion to dismiss.[2]

A. The FLSA requires the payment of a statutorily-defined minimum wage for all hours worked, 29 U.S.C. § 206(a), and pay at "a rate not less than one and one-half times the regular rate" "for a workweek longer than forty hours," 29 U.S.C. § 207(a)(1). "Neither 'work' nor 'workweek' is defined in the statute." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). However, in 1947, Congress enacted the Portal-to-Portal Act, which specifically exempted from minimum wage and overtime requirements time spent on the following activities:

> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

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[2] As the government correctly explains, "[u]nder the 'continuous workday rule,' which was reaffirmed in *IBP*[, *Inc. v. Alvarez*], 546 U.S. [21,] 29, 40 [2005], the time that petitioner's employees spent waiting to undergo screening would be compensable if the screening time itself were compensable." Gov. Br. 10-11 n.2. Therefore, the only question in this case is whether the screening is compensable.

> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities[.]" Portal-to-Portal Act § 4(a); 29 U.S.C. § 254(a).

Despite the statute's references to "preliminary" and "postliminary" activities, this Court's decisions interpreting the Portal-to-Portal Act make clear that "work performed before or after the direct or productive labor for which the worker is primarily paid" can nevertheless be compensable, *Mitchell v. King Packing Co.*, 350 U.S. 260, 260 (1956):

> "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an *integral and indispensable* part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (emphasis added). *See also King Packing*, 350 U.S. at 261 (holding same).

That is, "§ 4 of the Portal-to-Portal Act does not remove activities which are 'integral and indispensable' to 'principal activities' from FLSA coverage precisely because such activities are themselves 'principal activities.'" *IBP*, 546 U.S. at 33 (quoting *Steiner*, 350 U.S. at 253)).

Whether an activity performed before or after the regular work shift is "integral and indispensable" to

the principal activities for which workers are primarily employed is a question that can only be answered by reference to the nature of employees' primary job duties. If the pre-shift or post-shift activity is "so closely related to other duties performed by . . . employees as to be an integral part thereof," *Steiner*, 350 U.S. at 252 (quotation marks omitted) – or, in the Department of Labor's words, is "so directly related to the specific work the employee is employed to perform," 29 C.F.R. § 790.7(g) n.49 – it is compensable. For this reason, "[n]o categorical list of 'preliminary' and 'postliminary' activities except those named in the Act can be made, since activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities." 29 C.F.R. § 790.7(b).

Integrity Staffing contends that the "integral and indispensable" test limits compensable activities to only those pre-shift and post-shift activities required for an employee to "discharge all of their principal job functions," *i.e.*, "[b]utchers cannot cut meat properly without first sharpening their knives." Pet. Br. 17 (citing *King Packing*, 350 U.S. at 262-63). This Court has never interpreted its "integral and indispensable" test so narrowly.

The integral and indispensable standard clearly encompasses more than preparatory activities that are functionally related to "the direct or productive labor for which the worker is primarily paid," *King Packing*, 350 U.S. at 260, such as pre-shift knife sharpening by butchers. In *Steiner*, this Court made abundantly clear that pre-shift and post-shift activities are also compensable if they are closely related to employees' primary job duties in the sense that they support the employer's

managerial interest in "increas[ing] the efficiency of its operation." 350 U.S. at 248, 250-51. Thus, in *Steiner*, which involved the production of automobile batteries, a process that involved "extensive use of dangerously caustic and toxic materials," this Court held that time spent on "the removal of clothing and showering at the end of the work period" was compensable, *id.* at 248 & 250, even though such washing and clothes-changing would ordinarily be considered preliminary or postliminary activities, *see* 29 C.F.R. § 790.7(g). Obviously, changing clothes and showering on the employer's premises was not *functionally* necessary for the production of car batteries; the employer in *Steiner* could have suggested to employees that they wash up and change clothes at home without any negative effect on the production process. But this Court concluded that because post-shift clothes-changing and washing on the employer's premises was necessary "to make the[] plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation," "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.* at 251 & 256.

B. When the *Steiner* analysis is applied to screenings that take place at the beginning or end of the work day, it is clear that those screenings that closely relate to employees' primary job duties are compensable, while screenings unrelated or not closely related to such duties are not. Integrity Staffing's several arguments to the contrary all conflict with this Court's well-established understanding of the "integral and indispensable" test set forth in *Steiner*.

1. As an initial matter, contrary to Integrity Staffing's argument, there is no *per se* rule regarding whether pre-shift and post-shift searches are compensable. Rather, whether a particular search "is characterized as . . . 'an integral and indispensable part' of the employee's principal activities (as distinguished from preliminary or postliminary to those activities), is a question of fact to be determined from all of the circumstances." Gov. Br. at 18 (brackets, quotation marks, and citation omitted). That is because "activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities." 29 C.F.R. § 790.7(b). For example, "changing clothes" and "washing up or showering" "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities." 29 C.F.R. § 790.7(g). But, as *Steiner* illustrates, such activities are compensable "where changing clothes and showering are . . . clearly an integral and indispensable part of the principal activity" for which employees are employed. 350 U.S. at 256.

The same is true regarding screening. We know from *Steiner* that where a pre-shift or post-shift activity is "compelled by circumstances, including vital considerations of health and hygiene" because employees' work involves "dangerously . . . toxic materials," it is "so closely related to other duties performed by . . . employees as to be an integral part thereof[.]" 350 U.S. at 248, 252. It stands to reason, then, that screening required to determine whether cleaning of the body is needed as a result of exposure to dangerous materials at the workplace is also closely related to employees' primary job duties.

For example, where employees' primary productive duties may involve exposure to radioactive materials – such as for those engaged in certain tasks within a nuclear power station[3] – they must be screened for exposure levels in order to determine whether they need to be decontaminated before leaving the facility. *See* 10 C.F.R. § 20.1502 (nuclear power station operators "shall monitor exposures to radiation and radioactive material at levels sufficient to demonstrate compliance with the occupational dose limits" set by the NRC). *See also* NRC, Administrative Practices in Radiation Surveys and Monitoring, Regulatory Guide 8.2, at 2 (Rev. 1, May 2011) (setting forth recommended elements of "an effective radiation survey and monitoring program"). There is no question that, under *Steiner*, such a decontamination procedure would be "so closely related to [the primary productive] duties performed by . . . employees as to be an integral part thereof[.]" 350 U.S. at 252. *A fortiori*, screening such employees for radiation exposure levels to determine whether decontamination is necessary is compensable because, like the decontamination process itself, the screening is "closely related to" employees' job duties. *Cf. Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593 n.4 (2d Cir. 2007) ("In the nuclear con-

[3] The Nuclear Regulatory Commission (NRC) explains that the employees who are at greatest risk of exposure include those "performing services such as maintenance, refueling, and inspection in high radiation areas," as well as those undertaking "rad-waste handling" and involved in the "decommissioning process." NRC, Information Relevant to Ensuring That Occupational Radiation Exposures at Nuclear Power Stations Will Be As Low As Is Reasonably Achievable, Regulatory Guide 8.8-2, 8.8-12 (Rev. 3, June 1978).

tainment area [of the Indian Point II nuclear power plant] – which more closely resembles the battery plant [in *Steiner*] – . . . employees wore specialized gear and dosimeters, and were compensated for donning and doffing.").

A similar analysis applies where a registered nurse or other health care provider must be screened for exposure to an infectious disease. *See*, *e.g.*, Centers for Disease Control and Prevention, Updated U.S. Public Health Service guidelines for the management of occupational exposures to HIV and recommendations for Postexposure Prophylaxis, MMWR 2005:54 (No. RR-9), available at http://www.cdc.gov/niosh/topics/bbp/emergnedl.html (last checked Aug. 5, 2014). "Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked," 29 C.F.R. § 785.43, including when such medical attention is required because of occupational exposure to an infectious disease. *A fortiori*, screening to determine whether such medical attention is necessary is "so closely related" to the employee's primary job duties as to constitute a compensable principal activity as well.

In contrast, *generalized* screenings of everyone who enters the job site or the facility where the job site is located are typically *not* so closely related to any particular group of employees' specific job duties as to be compensable. The archetypal case is *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007), which involved construction workers engaged to build an airport terminal who were required

to pass through a security screening in order to gain access to the tarmac where they boarded buses to travel to the job site. Tellingly, the security screening did not just apply to the construction workers but to anyone who sought to access to the tarmac. The court of appeals correctly held that this screening was not compensable because it was not closely related to employees' construction of the airport terminal, nor was it related in any way to the employer's managerial interest in the efficiency of production. *See id.* at 1344 (noting that the employer "did not primarily – or even particularly – benefit from the security regime," presumably because the security screening constituted a time-consuming annoyance from the construction company's point of view).

Bonilla thus aptly illustrates two significant indicia of whether a particular screening is closely related to employees' primary productive activities: (1) whether the screening applies generally or just to employees or a particular group of employees; and (2) how proximate the screening is to the location where employees undertake their primary job duties.

The fact that an employer requires all employees to be screened – or, in the case of *Bonilla*, that the airport requires anyone wanting to access the tarmac to be screened – is a strong indication that the screening is not closely related to any particular group of employees' specific productive activities. *Cf. Gorman*, 488 F.3d at 594 (noting the fact that "the security measures at entry are required . . . for everyone entering the plant – regardless of what an employee does (servicing fuel rods or making canteen sandwiches) – and including visitors" was evidence security screen-

ings did not constitute "principal activities of . . . employment").[4] The identity of who is screened lends insight into the purpose of the screening; common sense dictates that an employer ordinarily will not seek to screen individuals for whom the particular screening is not relevant, given the expense to the employer of screening as well as the likely annoyance to employees and guests if they are routinely screened unnecessarily.

Likewise, if screening occurs at a location distant from where employees conduct their primary productive activities, that fact tends to indicate that the screening is of a general, rather than a job-related, nature. For example, if employees are required to pass through a metal detector when they first enter onto the employer's property, such as is "routine at countless government and private-sector buildings," Gov. Br. 31, or must pass through a security screening before entering an airport tarmac to board buses to take them to their job site, *Bonilla*, 487 F.3d at 1344, that likely indicates a general purpose for the screening in contrast to, for example, requiring employees to be screened for exposure levels immediately upon leaving a work area in which they may have been exposed to radioactive materials.

2. Integrity Staffing further contends that even if

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[4] That fact is not dispositive, however. As the government acknowledges, "[a]n activity can be integrally related to an employee's principal activities even if others must also engage in it" since "[o]therwise, an employer could evade its FLSA obligations by allowing an occasional visitor on the premises, subject to a requirement that almost always applies only to employees." Gov. Br. 30.

anti-theft screenings are closely related to employees' primary job duties of handling merchandise to distribute to Amazon.com customers, such screenings cannot constitute a compensable principal activity because "'not breaking the law'" cannot be "a principal job duty for which compensation must be paid." Pet. Br. 20. But that argument ignores *Steiner*'s observation that pre-shift and post-shift activities that are closely related to employees' primary job duties may be compensable even when they are not functionally required by the production process as long as they support an employer's managerial interest in "increas[ing] the efficiency of its operation." 350 U.S. at 251. Because Integrity Staffing has a very strong interest in preventing employee theft of its client's merchandise, which the anti-theft screening is designed to address, time spent by employees in that screening is compensable.

To illustrate, consider an employee working for a government contractor who is provided access to classified government material and is required not to remove that material from the workplace. The fact that removal of such material would place the employee in violation of his or her primary job duties – and perhaps of federal law – does not render a post-shift security screening of the employee's person and portable electronic devices for such classified material noncompensable; to the contrary, the fact that the purpose of the screening is "so directly related to the specific work the employee is employed to perform," 29 C.F.R. § 790.7(g) n.49, supports the conclusion that the screening is a compensable principal activity. The government contractor has a strong interest related to the efficiency of its operation – and to maintaining

its contract with the government – in strictly enforcing the rule prohibiting classified material from leaving the workplace, and the screening at issue is intended to achieve that interest in a manner that directly relates to the employee's primary job duties.

This same analysis applies in the more pedestrian context of a staffing agency's anti-theft screenings of its workers employed to perform work in the staffing agency's client's warehouse. Like a government contractor's screening of an employee who handles classified government material, a staffing agency's post-shift screening of employees who handle the warehouse client's valuable portable merchandise in order to deter employee theft is similarly "directly related to the specific work . . . employee[s] [are] employed to perform," 29 C.F.R. § 790.7(g) n.49. As the employer *amici* make clear, the deterrence of employee theft "is a serious concern" with significant consequences for employers' profitability and competitiveness. Brief of Retail Litigation Center, Inc., et al. as *amici curiae*, 18-19. "Retailers attribute[] 44.2% of their inventory shrinkage to employee theft . . . translat[ing] into an annual employee theft price tag of $15.9 billion," and "[t]he significant costs of employee theft are of course incorporated into . . . prices and passed on to consumers." *Ibid.* (internal quotation marks omitted). There can be no doubt, then, that screening to deter employee theft is so central to "the efficiency of [a staffing agency's] operation," *Steiner*, 350 U.S. at 251 – in particular, its interest in maintaining its business relationship with the client to whom it leases its employees – that, as long as the screening is closely related to employees' primary job duties, it is a compensable principal activity.

3. Finally, Integrity Staffing claims that "[t]ime spent waiting to clear security . . . is . . . the modern equivalent of such quintessentially non-compensable time" "as 'checking in and out and waiting in line to do so,'" Pet. Br. 26 (quoting 29 C.F.R. § 790.7(g)), and is therefore noncompensable. This is just a variant on the company's principal argument that all screenings are *per se* noncompensable. As we have already shown, whether a particular screening constitutes a compensable principal activity is determined by how closely it relates to employees' primary job duties, not how long it takes to complete. Whether a particular screening bears some resemblance to checking in or out does not add anything to that analysis.

First, it is clear from this Court's decision in *IBP* that whether a particular activity constitutes a compensable principal activity turns on the nature of that activity and its relation to employees' primary job duties, not how long the activity takes. *Tum v. Barber Foods*, *Inc.*, No. 04-66, one of the two consolidated cases this Court decided in *IBP*, involved employees at a chicken processing plant who wore protective clothing and who "[a]t the end of the day, . . . [we]re required to put their glove liners and lab coats in laundry bins" and "to put disposable items of clothing or equipment in trash bins." Brief for United States as *Amicus Curiae* Supporting Petitioners 5-6, *Tum v. Barber Foods*, *Inc.*, No. 04-66. Despite the few moments it took employees to complete this doffing, this Court nevertheless held that "[b]ecause doffing gear that is 'integral and indispensable' to employees' work is a 'principal activity' under the statute, the continuous workday rule mandates that time spent waiting to doff is not affected by the Portal-to-Portal Act and is

instead covered by the FLSA." *IBP*, 546 U.S. at 40. That is, even if the amount of time it takes for employees to pass through a security screen is similar to the time it takes employees to check out, "the amount of time devoted to an activity is not material in determining whether it is a principal activity that starts [or ends] the workday." Brief for United States as *Amicus Curiae* Supporting Petitioners 25, *Tum v. Barber Foods, Inc.*, No. 04-66.

Further, while the Department of Labor's regulations do not define the phrase "checking in and out," it is clear from the background law against which Congress enacted the Portal-to-Portal Act and the Department of Labor promulgated its regulations interpreting the Act that the phrase "checking in and out" was only intended to describe an employee reporting to work at the beginning of the work day and recording his or her departure at day's end, not a variety of other tasks that an employer may require an employee to complete after finishing his or her primary job duties.

The Department of Labor's interpretative regulations state that "checking in and out and waiting in line to do so" is one of the "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." 29 C.F.R. § 790.7(g). What the Department very likely had in mind in 1947 when it referred to "the conditions normally present," *ibid.*, was the sort of checking in and out at issue in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), one of three decisions, along with *Ander-*

son v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161 (1945), which motivated Congress to enact the Portal-to-Portal Act. *See* S. Rep. No. 48, 80th Cong., 1st Sess., at 9-11 (Mar. 10, 1947) (discussing *Tennessee Coal*, *Mt. Clemens*, and *Jewell Ridge*). *Tennessee Coal* described a "check[ing] in" process in which employees "hang up individual brass checks . . . on a tally or check-in board" for the purpose of "enabl[ing] the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes," 321 U.S. at 594, a process that the court of appeals had held "should not be computed as work-time, since [it] fall[s] within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment," *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 135 F.2d 320, 323 (5th Cir. 1943). The regulations' reference to "checking in and out" of the sort "performed under the conditions normally present," 29 C.F.R. § 790.7(g), then, refers to the limited activities of "report[ing] for work," *Tennessee Coal*, 321 U.S. at 594, and recording one's departure, acts that are only "incident to qualifying the employee to perform his work," *Tennessee Coal*, 135 F.2d at 323.

Like any activity performed before or after the regular work shift, however, "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions." 29 C.F.R. § 790.7(h). Checking in or out is no exception. Thus, where an employer loads up the checking in or checking out process with activities

that range beyond the acts of punching a time clock or swiping an identification card to indicate that the employee "ha[s] reported for work," *Tennessee Coal*, 321 U.S. at 594, or recording his or her departure, the compensability of any additional activities added to the checking in or checking out process must be evaluated on their own terms.

For example, as the government acknowledges, *see* Gov. Br. 31-32 n.18, where construction employees are required to report to their employer's main office at the beginning of the workday to "fill[] out . . . time sheets, material sheets, and supply and cash requisition sheets" before leaving for the job site, those activities are compensable notwithstanding the fact that they fulfill a checking-in function. *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 397 (5th Cir. 1976). *See also Herman v. Rich Kramer Constr., Inc.*, No. 97-4308WMS, 1998 U.S. App. LEXIS 23329 (8th Cir., Sept. 21, 1998) (holding that "return[ing] to . . . headquarters after a day's work . . . [to] fill[] out time-sheets" is compensable as well). That is so because requiring "employees . . . to complete paperwork about what they had done during their shift . . . would generally be compensable," Gov. Br. 31-32 n.18, because it "enable[s] the employer to calculate his costs and to keep accurate records," *City Electric*, 527 F.2d at 400. These tasks, unlike mere checking in and checking out, are both closely related to the primary job duties employees undertake during the day and, from the employer's perspective, are vital to "increas[ing] the efficiency of its operation." *Steiner*, 350 U.S. at 251.

The Wage and Hour Division Opinion Letter cited by the government in its brief provides another helpful illustration of the distinction between the prelimi-

nary activity of checking in and compensable screening. *See* Gov. Br. 28-29 (discussing Opinion Letter from Wm. R. McComb, Adm'r, Wage & Hour Div., Dep't. of Labor, to A.M. Benson, Assistant, Office of the Chief of Ordnance, Dep't of the Army (April 18, 1951) (hereinafter, "McComb Op. Letter")). That letter concerns whether workers employed at an ordnance works "to produce smokeless and rocket powder" were entitled to compensation for time spent "go[ing] through a 'badge alley' where they obtain their badge and time card" and being subjected to a "search . . . for matches, spark producing devices such as cigarette lighters, and other items which have a direct bearing on the safety of the employees and the Ordnance Works." McComb Op. Letter 1. The letter described "[t]he 'badge alley' operation [as] essentially a security matter since the record of hours worked at the work site is kept by the employee's immediate supervisor." *Id.* at 2. In contrast, "[t]he match inspection is essentially for safety reasons because the operation involves the production of explosives."[5] *Ibid.*

Although the Wage and Hour Administrator decided – without any analysis and without the benefit of this Court's subsequent decision in *Steiner* – that both "the time spent in the badge alley and security checks . . . need not be counted by the employer as time worked," McComb Op. Letter 2, it is clear that this Court would have treated the match inspection in a

[5] The letter also states that employees were inspected when leaving the work site "for the purpose of preventing theft," McComb Op. Letter 2, but provides no explanation why that anti-theft inspection was necessary.

different manner than the process of picking up badges and time cards after *Steiner*. The Wage and Hour Administrator was correct that the "badge alley operation" was nothing more than a checking in process in the limited sense described in *Tennessee Coal* – analogous to "check[ing] in and hang[ing] up individual brass checks . . . on a tally or check-in board" for the purpose of "enabl[ing] the foreman and other officials to tell at a glance those individuals who have reported for work," 321 U.S. at 594 – which, in the context of an ordnance works, was "a security matter," McComb Op. Letter 2. The "match inspection," in contrast, by the employer's own description, was required "for safety reasons because the operation involves the production of explosives." *Ibid.* Much like the showering and clothes-changing at issue in *Steiner*, the "search . . . for matches, spark producing devices such as cigarette lighters, and other items . . . have *a direct bearing on* the safety of the employees and the Ordnance Works." *Id.* at 1 (emphasis added). After *Steiner*, then, there can be little doubt that the "match inspection" was so closely related to the employees' primary productive activities "producing smokeless and rocket powder," *id.* at 1-2, that it constituted a compensable principal activity, even though it occurred shortly after the noncompensable activity of checking in.

C. As we have explained, the court of appeals correctly rejected the district court's conclusion that there is "a blanket rule that security clearances are noncompensable," holding instead that, like any other activity that employees are required to undertake before or after their primary productive activities, screenings must be "assess[ed] . . . under the 'integral

and indispensable' test." *Integrity Staffing Solutions*, 713 F.3d at 531. Because Busk and Castro sufficiently pleaded – if just so – that their primary job duties were closely related to the anti-theft screenings at issue in this case, the court of appeals also correctly remanded this case back to the district court for further proceedings.

Federal Rule of Civil Procedure 8(a)(2) requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." However, as this Court has made clear:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotation marks omitted).

In this case, then, the question, is whether Busk and Castro have pleaded "sufficient factual matter" to "allow[] the court to draw the reasonable inference that [Integrity Staffing] is liable," *ibid.*, under the FLSA for failing to pay them overtime for time spent in anti-theft screenings. In order to meet this standard, Busk and Castro were required to plead sufficient facts describing their primary job duties and the nature of the screenings so as to "allow[] the court to

draw the reasonable inference that [Integrity Staffing] is liable," *ibid.*, *i.e.*, that the screenings were "an integral and indispensable part of the principal activities for which [Busk and Castro] [we]re employed." *Steiner*, 350 U.S. at 256.

Busk and Castro have met this standard. As to their primary job duties, they pleaded that they were employed by Integrity Staffing as warehouse employees to "fulfill[] orders made by Amazon.com customers" by "walk[ing] throughout their respective warehouse facilities with collection carts and retriev[ing] products from the shelf and direct[ing] the product to be distributed to Amazon.com customers." JA 20. They have also pleaded that "it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse other than in the ways proscribed [sic] by the company," JA 21, and that "not contributing to 'shrinkage' and abiding by company procedures for inventory control is an integral aspect of the Plaintiff's job," *ibid.* As to the nature of the screenings, Busk and Castro pleaded that that they "and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day," *ibid.*, and that "[t]he search was to prevent employee theft," *ibid.*

The court of appeals correctly concluded that Busk and Castro's allegations that "Integrity . . . requires the screening to prevent employee theft" and that the need for this screening "stems from the nature of the employees' work (specifically, their access to merchandise)," *Integrity Staffing Solutions*, 713 F.3d at 531, described a sufficiently close connection between the primary job responsibilities of employees

and the nature of the screening for purposes of *Steiner*'s "integral and indispensable" test to survive a motion to dismiss. Although it might have been preferable for Busk and Castro to have pleaded more detailed facts about their specific job duties as well as facts concerning whether all or only some employees were subject to the screening and where within the warehouse the screening took place – as such facts could support an inference that the screenings were closely related to the employees' primary job duties – the court of appeals did not err by reversing the district court's dismissal of Busk and Castro's claim on the ground that there is no "blanket rule that security clearances are noncompensable," *Integrity Staffing Solutions*, 713 F.3d at 531, and on the basis that Busk and Castro pleaded sufficient facts in support of their claim.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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