NO. 13-433

In the
Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Respondents are warehouse workers who seek back pay, overtime, and double damages under the Fair Labor Standards Act ("FLSA") for time spent in security screenings after the end of their work shifts. Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims because security screenings are quintessential "preliminary" or "postliminary" activities that are non-compensable under the FLSA pursuant to the Portal-to-Portal Act of 1947. The Ninth Circuit reversed, holding that time spent in security screenings was compensable under the FLSA because it was "necessary to [Respondents'] primary work as warehouse employees." That holding squarely conflicts with decisions from the Second and Eleventh Circuits holding that time spent in security screenings is not subject to the FLSA because it is *not* "integral and indispensable" to employees' principal job activities.

The question presented is whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act.

PARTIES TO THE PROCEEDING

Petitioner Integrity Staffing Solutions, Inc. was the defendant in the district court and appellee in the Ninth Circuit. Respondents Jesse Busk and Laurie Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Integrity Staffing Solutions, Inc. does not have a parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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The Ninth Circuit's opinion is reported at 713 F.3d 525 and reproduced at Pet.App.1-17. The district court's opinion is reproduced at Pet.App.19-35.

JURISDICTION

The Ninth Circuit issued its decision on April 12, 2013. A timely petition for panel rehearing and rehearing *en banc* was denied on June 3, 2013. This Court granted certiorari on March 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251, 254, and the Department of Labor's regulations, 29 C.F.R. §§ 790.7, 790.8, are reproduced in the appendix to this brief. App.1a-18a.

STATEMENT OF THE CASE

The Fair Labor Standards Act of 1938 ("FLSA") sets a minimum hourly wage and requires overtime compensation when a covered employee works more than 40 hours in a "workweek." *See* 29 U.S.C. §§ 206, 207. Early judicial interpretations of the FLSA adopted an expansive conception of "work" and "workweek," holding that employees must be compensated for all time *spent on the employer's premises*, even if they were not engaged in productive work. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Those decisions resulted in a flood of litigation in which employees sought billions of dollars of back pay for pre- and post-shift activities that had little to do with their actual job duties, such

as walking between the factory gate and their work stations.

Congress responded quickly and unequivocally by enacting the Portal-to-Portal Act of 1947, which makes clear that the FLSA's compensation mandates apply only to employees' primary job duties, not to activities that are "preliminary" or "postliminary" to that work. 29 U.S.C. § 254(a). This Court has construed the Portal-to-Portal Act as requiring compensation only for tasks that are an "*integral and indispensable* part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (emphasis added). That is, an activity is compensable under the FLSA only if it is so integral and indispensable to the employees' other primary activities that it too counts as part of those primary activities.

Petitioner Integrity Staffing Solutions provides staffing for warehouses owned by Amazon.com. Respondents are former Integrity warehouse employees; their primary job duties involved retrieving items from inventory and packaging those items for delivery to Amazon.com customers. After clocking out at the end of their shifts, Respondents passed through a short security screening before exiting the building, in which they removed personal belongings (if any) from their pockets and walked through a metal detector.

In October 2010, Respondents filed a class-action complaint against Integrity, alleging violations of the FLSA and seeking back pay and overtime (plus double damages) for time spent waiting in line for security screenings. The district court granted

Integrity's motion to dismiss, recognizing—correctly—that Respondents were not entitled to compensation under the FLSA because time spent waiting in line and passing through a security screening was not "integral and indispensable" to Respondents' principal activities of "fulfilling online purchase orders." Pet.App.27. As the court explained, 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.'" Pet.App.27-28.

In a stark departure from an otherwise-unbroken line of authority, the Ninth Circuit reversed, holding that Respondents could state a claim under the FLSA based on Integrity's failure to provide compensation for time spent in post-shift security screenings. In its brief analysis of this issue, the Ninth Circuit concluded that the security screenings were compensable under the FLSA because they were "required" by Integrity and performed "for Integrity's benefit." Pet.App.11-12. Like the *Mt. Clemens* decision that Congress abrogated in the Portal-to-Portal Act, the Ninth Circuit's decision in this case has spawned numerous class-action suits seeking back pay and double damages for activities unrelated to employees' actual job duties.

A. The Fair Labor Standards Act and Early Judicial Interpretations of "Work" and "Workweek"

Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of

the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The statute's declared objectives were "to improve ... the standard of living of those who are now undernourished, poorly clad, and ill-housed," and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." S. Rep. No. 75-884, at 3-4 (1937).

The FLSA was not designed to comprehensively regulate working conditions or to displace the collective bargaining process. Its objectives were far more modest. It was designed to establish "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.* at 3. The Act therefore proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule that individuals working more than 40 hours in a given "workweek" were entitled to time-and-one-half pay for those additional hours. *See* 29 U.S.C. §§ 206, 207. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorneys' fees. *Id.* § 216(b).

Even though the FLSA had far-reaching implications for both employers and employees, Congress failed to define several critical terms at the heart of the statutory scheme. In particular, many of the FLSA's obligations are based on an employee's "work" or "workweek," but Congress did not define either term. Confusion over the meaning of those

terms "soon let loose a landslide of litigation." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014).

When that litigation reached this Court, it adopted an expansive interpretation of "work" in *Tennessee Coal, Iron & R. Co. v. Muscoda,* 321 U.S. 590 (1944), holding that time spent traveling from the "portal" of a mine to the underground working area was compensable under the FLSA. The Court broadly defined "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 and his business." *Id.* at 598; *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 166 (1945) (FLSA applied to underground travel to and from the portal of a coal mine because "[w]ithout such travel the coal could not be mined").

The Court went even farther in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In that case, employees at a dishware factory argued that the FLSA required compensation for activities such as walking between the time clock and the work stations, putting on aprons and overalls, and preparing work areas for the start of production. *Id.* at 683. This Court largely agreed, holding that "the statutory workweek includes *all time during which an employee is necessarily required to be on the employer's premises*, on duty or at a prescribed workplace." *Id.* at 690-91 (emphasis added). The Court reasoned that the tasks in question were all part of the statutory "workweek" under the FLSA because they were "compelled" by the employer, and

"[w]ithout such [tasks] on the part of the employees, the productive aims of the employer could not have been achieved." *Id.* at 691.

For example, the Court noted that employees spent "2 to 12 minutes daily, if not more," walking on the employer's premises between the time clock and the work stations. *Id.* The employees engaged in such walking "only because they were compelled to do so by the necessities of the employer's business," and this activity was "under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory." *Id.* The Court thus concluded that walking time was compensable because it was "'controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.'" *Id.*

Justices Burton and Frankfurter dissented in *Mt. Clemens*, sharply criticizing the breadth of the majority's holding. The dissenting Justices emphasized that "[n]one of this time would have been spent at productive work," and that "[t]he futility of requiring an employer to record these minutes and the unfairness of penalizing him, for failure to do a futile thing, by imposing arbitrary allowances for 'overtime' and liquidated damages is apparent." *Id.* at 697. Especially for small businesses, it would be "highly impractical" to record all of the "occasional minutes of preliminary activities and walking time," and any such requirement "would lead to innumerable unnecessary minor controversies between employers and employees." *Id.* at 698.

The dissenting Justices concluded that "the obvious, long established, and simple way to compensate an employee for [preliminary and postliminary] activities is to recognize those activities in the rate of pay for the particular job. *Id.* at 697. That is, "[t]hese items are appropriate for consideration in collective bargaining." *Id.*

B. The Portal-to-Portal Act

In the wake of this Court's decision in *Mt. Clemens*, unions and employees filed more than 1,500 lawsuits under the FLSA seeking nearly $6 billion in back pay and double damages for pre- and post-shift activities. *See* S. Rep. No. 80-37, at 12 (1947). Those suits "came so fast that newspapers ran lists of companies sued in long columns, like disaster victims.... The unions sued Bethlehem Steel for $200,000,000, Curtis-Wright for $29,000,000, National Biscuit Co. for $50,000,000, and prepared to sue the Ford Motor Co. for $300,000,000." *Payment Deferred*, Time (Jan. 6, 1947).

The legal theory underlying those suits was that "[f]or all the time *spent on company property*—except for insignificant amounts—a worker must be paid," even if that time was not spent performing productive work. *Id.* (emphasis added). For example, a memorandum from the United Steelworkers of America to its local chapters emphasized that, under the reasoning of *Mt. Clemens*, employees would be entitled to compensation for all "time [] spent on the employer's premises in going to and preparing for work, regardless of whether this time is spent before or after punching the time clock." *Portal-to-Portal*

Wages: Hearings on S. 70 Before a Subcomm. on the Judiciary, 80th Cong., at 27 (Jan. 1947). In one illustrative suit against the Carnegie-Illinois Steel Corporation, the United Steelworkers sought damages of more than $90 million for, *inter alia*, time spent walking between the factory gate, the time clocks, and the employee work stations. *Id.* at 22-23.

Congress responded with alacrity to this wave of litigation. In May 1947, just six months after *Mt. Clemens* was decided, Congress enacted the Portal-to-Portal Act to address this Court's "disregard of long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). Congress found that the Court's construction of the FLSA in *Jewell Ridge* and *Mt. Clemens* had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to "give rise to great difficulties in the sound and orderly conduct of business and industry." *Id.* Allowing those decisions to stand would result in "extended and continuous uncertainty on the part of industry," and "the courts of the country would be burdened with excessive and needless litigation." *Id.*

The Portal-to-Portal Act abrogated the core holding of *Mt. Clemens* that the FLSA applies to "all time during which an employee is necessarily required to be on the employer's premises." 328 U.S. at 690-91. The Act provides in relevant part that: "no employer shall be subject to any liability or punishment under the [FLSA]" for either: (1) time in which an employee is "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," or (2) "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time ... at which such employee commences, or subsequent to the time ... at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). The Act also provides that, although the FLSA does not *require* compensation for "preliminary" and "postliminary" activities, employers and employees may still agree to such compensation through a contract or collective-bargaining agreement. *Id.* at § 254(b).

The legislative history of the Portal-to-Portal Act makes clear that a pre- or post-shift task would be compensable only if it was so closely related to an employee's principal job activities that it was itself a principal activity. During the floor debates, Senator Cooper—one of the chief sponsors of the Act—emphasized that an activity such as changing clothes would be compensable only "if the employee *could not perform his* [*principal*] *activity*" without it. 93 Cong. Rec. 2297-98 (1947) (emphasis added).

C. This Court's and DOL's Interpretation of "Preliminary" and "Postliminary" Activities

This Court first addressed the scope of "preliminary" and "postliminary" activities under the Portal-to-Portal Act in *Steiner v. Mitchell*, 350 U.S. 247 (1956). Based on the Act's text and legislative history, the Court concluded that "activities performed either before or after the regular work shift, on or off the production line," are compensable

under the FLSA only if they are an "*integral and indispensable* part of the principal activities for which covered workmen are employed." *Id.* at 256 (emphasis added). This Court affirmed the district court's conclusion that an activity is compensable if it is "'so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and [is], therefore, included among the principal activities of said employees.'" *Id.* at 252.

In *Steiner*, the employer did not contest that the activities were "integral and indispensable" because the plaintiffs worked with highly toxic chemicals at a battery plant, and needed to change clothes and shower at the beginning and end of their shifts to avoid contamination and health hazards. *Id.* at 249-51. Indeed, the Court noted that it was "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." *Id.* at 256. Similarly, in *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956), the Court found that pre-shift knife-sharpening was integral and indispensable to butchers' principal job activities because "[a]ll of the knives as well as the saws must be 'razor sharp' for the proper performance of the work."

In contrast, the Court unanimously held in 2005 that time spent *waiting* to obtain protective equipment before donning it at the beginning of a shift is not compensable under the FLSA. *See IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005). As the Court explained, such waiting time "comfortably qualif[ies]" as a non-compensable activity because it precedes

any primary activity and, indeed, is "two steps removed from the [employees'] productive activity on the assembly line." *Id.* at 40-42. The Court squarely rejected a simple test of necessity for determining compensable activities, holding that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *Id.* at 40-41. In *IBP*, the Court also held that time spent walking from the donning area to the work station was compensable, because the donning of safety equipment was so indispensable and integral to the employees' principal activities that donning was itself a principal activity that commenced the compensable workday. *Id.* at 32-37.

The Department of Labor ("DOL") promulgated interpretive regulations in the immediate wake of the Portal-to-Portal Act providing additional guidance about the meaning of "preliminary" and "postliminary" activities. Those regulations reflect Congress' evident intent to abrogate the result in *Mt. Clemens*, by clarifying that preliminary activities like punching a time clock do not begin the compensable workday. Under DOL's regulations, "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" are not compensable under the FLSA when "performed under the conditions normally present." 29 C.F.R. § 790.7(g); *see also id.* § 790.7(f) (compensation not required for time spent "walking or riding by an employee between the plant gate and the employee's … actual place of performance of his principal activity").

D. Respondents' Complaint and the District Court's Decision

Respondents Jesse Busk and Laurie Castro are former Integrity employees who were placed by Integrity on temporary assignments working at Amazon warehouses in Nevada filling orders placed by Amazon.com customers. They were paid on an hourly basis by Integrity.

Respondents' principal job activities involved "walk[ing] throughout their respective warehouse facilities with collection carts and retriev[ing] products from the shelf ... to be distributed to Amazon.com customers." First Amended Complaint ¶ 13 (JA 20). At the "end of their respective shifts," Respondents would "walk to the timekeeping system to clock out" and would then "wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband." *Id.* ¶ 16 (JA 21). During the screening process, employees who had carried personal items (such as wallets and keys) onto the warehouse floor at the start of their shifts would remove those items from their pockets, then walk through a metal detector. Without any supporting detail, the complaint includes the bare allegation that it could take as long as 25 minutes for workers to clear security. *Id.*

In December 2010, Respondents filed a class-action complaint against Integrity in U.S. District Court for the District of Nevada, alleging that Integrity's failure to compensate them for time spent waiting for security screenings violated the FLSA

and parallel provisions of Nevada law.[1] Respondents asserted that the security screenings were "for the benefit of the employer" and were "necessary to the employer's task of minimizing 'shrinkage' or loss of product from warehouse theft." First Amended Complaint ¶ 38 (JA 27). Respondents sought back pay and overtime, as well as double damages on the ground that Integrity's actions were "without substantial justification." *Id.* ¶¶ 29, 40-41 (JA 24-28).

Integrity filed a motion to dismiss for failure to state a claim, which the district court granted on July 19, 2011. Pet.App.27-28. Applying the test set forth by this Court in *Steiner*, 350 U.S. at 255-56, the district court held that time spent in security screenings was not compensable under the FLSA because it was not "an integral and indispensable part of the principal activity of the employment." Even though the screenings were "mandatory for all employees," the court held that they were not integral to Respondents' "principal activities as warehouse employees fulfilling online purchase orders." Pet.App.27. The court concluded 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

[1] Respondents also alleged that Integrity violated the FLSA and state law by failing to provide a "bona fide" 30-minute meal period. The district court dismissed that claim, Pet.App.28-32, and the Ninth Circuit affirmed, Pet.App.13-17, holding that time spent walking to and from the break room was not compensable under the FLSA.

and 'waiting in line to receive pay checks.'" Pet.App.27-28 (quoting 29 C.F.R. § 790.7(g)).

The district court further noted that "[t]he weight of authority concerning preliminary and postliminary security screenings supports this conclusion." Pet.App.28 & n.2 (citing four cases finding security screening time non-compensable under FLSA). The court emphasized that these precedents "pose difficult hurdles" for Respondents because they all hold that time spent in security screenings is non-compensable under the FLSA even if the employer had a "great" need for the screenings. Pet.App.28.

E. The Ninth Circuit's Decision

The Ninth Circuit reversed in relevant part. In an opinion by Judge Thomas issued on April 12, 2013, the court concluded that Respondents had stated a claim for relief under the FLSA based on Integrity's failure to provide compensation for time spent in security screenings. Pet.App.11-13.

Under Ninth Circuit precedent that purports to interpret this Court's decision in *Steiner*, a pre- or post-shift activity is compensable if it is: (1) "'necessary to the principal work performed'" and (2) "'done for the benefit of the employer.'" Pet.App.11. Applying that test, the Ninth Circuit emphasized that "Integrity requires the security screenings, which must be conducted at work." *Id.* The court further noted that the screenings are "intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter." *Id.* The Ninth Circuit thus

held that Respondents could state a claim under the FLSA because "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet.App.11-12.

The Ninth Circuit found the cases cited by the district court to be distinguishable because they involved workplaces, such as power plants and airports, in which "everyone who entered ... had to pass through a security clearance." Pet.App.12. Here, in contrast, the court concluded that the purpose of Integrity's screening process was "to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." *Id*.

The Ninth Circuit denied a petition for rehearing on June 3, 2013, and this Petition followed.[2]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision cannot be squared with the text and history of the Portal-to-Portal Act, this Court's decisions interpreting that statute, and DOL's regulations.

I. Time spent passing through a security screening is a paradigmatic example of an activity that is non-compensable because it is "preliminary" or "postliminary" to employees' principal job

[2] To date, there have been 13 putative class-action suits filed against Amazon.com, Integrity, and other staffing companies involving more than 400,000 plaintiffs and hundreds of millions of dollars of alleged damages. The Panel on Multidistrict Litigation has ordered 11 of those cases, including this one, consolidated in the Western District of Kentucky for pretrial proceedings. *See*, *e.g.*, Transfer Order, *In re Amazon.com Fulfillment Center FLSA Litig.*, MDL-2504 (Feb. 19, 2014).

activities. The core purpose of the Portal-to-Portal Act was to overturn expansive judicial interpretations of the FLSA that allowed employees to recover massive damages for pre- or post-shift activities that occurred on the employer's premises and arguably benefitted the employer, but occurred before or after the employees' discharge of their principal job duties. This Court has made clear that an activity occurring before or after an employee's shift is compensable only if it is an "integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256. That is, the activity in question must be so integral and indispensable to the employee's *productive work* as to be counted among the employee's principal activities.

Pre- or post-shift security screenings do not come close to satisfying that standard. Integrity employed Respondents to process and fill online orders. Their principal job activities involved walking throughout the warehouse with collection carts to retrieve products from inventory, and packing those items for distribution to Amazon.com customers. The screenings occurred off the warehouse floor—after Respondents had completed their tasks in the warehouse and clocked out for the day—and did not in any way affect the manner in which Respondents discharged their primary job duties.

Waiting in line for a security screening is indistinguishable from many other tasks that have been found non-compensable under the FLSA, such as waiting to punch in and out on the time clock, walking from the parking lot to the workplace, and

waiting to pick up protective gear before donning it for a work shift. *See* 29 C.F.R. § 790.7(f)-(g); *IBP*, 546 U.S. at 40-42. Indeed, time spent waiting to clear security is indistinguishable from time spent walking between the time clock and the work station that was at issue in *Mt. Clemens* and squarely addressed in the Portal-to-Portal Act.

Security screenings also bear little resemblance to the types of activities this Court has found to satisfy the "integral and indispensable" test. Each time this Court has found that test to be satisfied, there has been a direct link between the activity in question and employees' other principal duties. Butchers cannot cut meat properly without first sharpening their knives, *see King Packing*, 350 U.S. at 262-63, and workers cannot manufacture batteries in a safe manner without taking pre- and post-shift measures to prevent exposure to hazardous chemicals, *see Steiner*, 350 U.S. at 251.

Respondents, in contrast, can discharge all of their principal job functions in the customary manner regardless of whether they undergo a security screening after completing their work for the day. If Respondents had avoided the security screening by sneaking out a side door, they would have violated company policy but would have still fully discharged their primary job duties. And the "integral and indispensable" test must really mean what it says lest Congress' clear judgment in the Portal-to-Portal Act be disregarded. Congress drew a clear line between compensable principal duties and non-compensable preliminary and postliminary activities. Unless the pre- and post-shift activities

are so indispensable and integral to principal duties to *themselves* count as principal activities, they are non-compensable under the Portal-to-Portal Act.

II. The Ninth Circuit nonetheless held that Respondents could state a claim for relief under the FLSA for time spent waiting for and passing through post-shift security screenings. The court of appeals' core holding was that time spent in a security screening is compensable if it is "required" by the employer and performed for the employer's "benefit." Pet.App.11-12. That approach is wrong as a matter of law and proves far too much.

Under *Steiner*, the relevant question is whether an activity is so integral and indispensable to an employee's other principal job activities that it, too, counts as a principal activity. But that inquiry is very different from the Ninth Circuit's "required-and-beneficial" test. Many tasks that precede or follow the discharge of principal duties are "required" by an employer and performed for the employer's "benefit," but are not integral to an employee's job duties. For example, an employer may "require" its employees to be physically present at the work site each day—and the employer "benefits" from the presence of its employees—but this hardly makes walking from the parking lot to the work area a compensable activity. Similarly, punching the time clock (and waiting in line to punch the clock) has long been treated as non-compensable even though this task is "required" by employers and done for their benefit. Since the Portal-to-Portal Act was enacted, this Court has consistently rejected a test of simple necessity such as the one employed in *Mt. Clemens*, emphasizing

that "the fact that certain preshift activities are necessary for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP*, 546 U.S. at 40-41 (emphasis added).

The Ninth Circuit's approach essentially replicates this Court's initial effort at interpreting the FLSA, which Congress expressly discarded in the Portal-to-Portal Act. In *Mt. Clemens*, this Court found activities such as walking to a workstation after clocking in to be compensable because such tasks are "under the complete control of the employer" and "[w]ithout such [tasks] on the part of the employees, the productive aims of the employer could not have been achieved." 328 U.S. at 691-92. Congress rejected that interpretation of compensable activities when it enacted the Portal-to-Portal Act, yet the Ninth Circuit essentially resurrected the *Mt. Clemens* approach while purporting to interpret the law that abrogated it.

The Ninth Circuit fares no better in suggesting that security screenings are compensable because they "stem[] from the nature of the employees' work (specifically, their access to merchandise)." Pet.App.12. That is not the test under the Portal-to-Portal Act and this Court's precedents. Rides from the parking lot to the working area of a coal mine surely stem from the nature of the work, but that does not make them compensable. What matters under this Court's precedents is not whether a task "stems" from the "nature" of an employee's job, but whether the task is integral and indispensable to the

employee's *productive work*. Respondents' principal job activities involved processing and filling customer orders, not some amorphous "access to merchandise." For the same reason, the Court should reject Respondents' astonishing assertion that the security screenings were integral and indispensable to their job duty of "not stealing." Needless to say, no court has ever held that "not breaking the law" is a principal job activity for which compensation must be paid.

III. In the wake of *Mt. Clemens*, Congress restored a balanced approach in which employees' core productive activities would be subject to the FLSA, while preliminary and postliminary activities would be addressed, if at all, through voluntary agreements between employers and employees. That is, preliminary and postliminary activities would simply be one factor that employees consider in deciding whether to take a particular job, and it would be up to employers and employees to choose how to address those issues.

The Ninth Circuit's decision fundamentally upsets that balance by requiring mandatory compensation under the FLSA for quintessential postliminary activities. Unsurprisingly, like *Mt. Clemens* itself, the Ninth Circuit's decision has resulted in numerous class-action suits against major employers as plaintiffs' attorneys seek to capitalize on a novel and expansive interpretation of compensable activities. If such a dramatic change is to be made in what had been a settled area of the law, it should be made via legislation that applies on a prospective basis only. One thing Congress made

crystal clear in the Portal-to-Portal Act is that sweeping changes to the employer-employee relationship should not be made retroactively by the courts based on expansive and atextual interpretations of the FLSA.

ARGUMENT

I. Respondents Cannot State A Claim Under The FLSA For Time Spent Waiting For A Security Screening.

A. Waiting in Line for a Security Screening is a Quintessential Example of a Non-Compensable Preliminary or Postliminary Activity.

1. Congress enacted the Portal-to-Portal Act in 1947 to repudiate expansive judicial interpretations of the FLSA under which employees could recover back pay and double damages for activities that occurred before or after the employees discharged their actual job duties. *See* 29 U.S.C. § 251. In *Mt. Clemens*, this Court adopted a sweeping and simple view of the compensable workweek, namely that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises." 328 U.S. at 690-91. That is, the Court held that the FLSA applied to any and all activities that were "'controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.'" *Id.* at 691 (quoting *Tennessee Coal*, 321 U.S. at 598).

Congress swiftly and emphatically rejected that approach, finding that *Mt. Clemens* had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to

"give rise to great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. § 251(a). The Portal-to-Portal Act accordingly excludes two broad categories of activities from the FLSA's compensation requirements: (1) "walking, riding, or traveling to and from the actual place of performance of the principal activity"; and (2) "activities which are preliminary to or postliminary to [the employee's] principal activity or activities." *Id.* § 254(a).

The clear import of the Portal-to-Portal Act is that an activity that is preliminary or postliminary to an employee's principal activities is non-compensable even if it is done on the employer's premises, at the employer's behest, and for the employer's benefit. Paradigmatic examples of non-compensable preliminary and postliminary activities are those at issue in the *Mt. Clemens* case, such as the time spent walking between the time clock and the employee's primary workstation. *See* 328 U.S. at 691.

Any construction of the Portal-to-Portal Act must distinguish between non-compensable "preliminary" and "postliminary" activities and compensable "principal activities," even though those key terms are not defined. In drawing that distinction, this Court has held that an activity is compensable only if it is an "integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256. An employee's "principal activities," in turn, include "*work of consequence* performed for an employer" and activities that are "'indispensable to the performance of *productive work*.'" 29 C.F.R. § 790.8(a) (emphasis

added); *see IBP*, 546 U.S. at 36 ("[I]n most situations the workday will be defined by the beginning and ending of the primary productive activity.").[3]

To ensure that Congress' judgment that preliminary and postliminary activities are non-compensable is not disregarded, the "integral and indispensable" test must be applied strictly. Only those activities so integral and indispensable to the balance of employees' principal activities to be counted as principal activities in their own right are compensable. For example, in *Steiner*, this Court affirmed the district court's conclusion that an activity is compensable if it is "'so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and [is], *therefore*, *included among the principal activities of said employees*.'" 350 U.S. at 252 (emphasis added). And in *IBP*, the Court reiterated that tasks that are integral and indispensable to principal activities "are themselves 'principal activities.'" 546 U.S. at 33. There is no "third category of activities … that are 'integral and indispensable' to a 'principal activity' … but that are not themselves 'principal activities.'" *Id.*

Strict adherence to the "integral and indispensable" test is necessary to render *Steiner* consistent with the Portal-to-Portal Act. The Act provides that the FLSA's compensation mandates do not apply to *any* preliminary or postliminary activities, and thus activities that are compensable

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[3] *See also Adair v. ConAgra Foods*, 728 F.3d 849, 852 (8th Cir. 2013) ("[I]f the employee is not 'employed to perform' a particular activity, even if that activity may be basic to the employee's work, then it is not a principal activity.").

under *Steiner* must be understood as so integral and indispensable to other principal activities that they should be treated as principal activities in their own right.

2. Pre- or post-shift security screenings do not remotely satisfy the "integral and indispensable" test and, indeed, are the "*modern paradigms* of the preliminary and postliminary activities described in the Portal-to-Portal Act." *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007) (emphasis added). Here, Respondents worked for Integrity as "warehouse employees," and their principal activities involved "fulfill[ing] orders made by Amazon.com customers." First Amended Complaint ¶ 13 (JA 20). To fill customer orders, Respondents "walked throughout their respective warehouse facilities with collection carts and retrieved products from the shelf and directed the product to be distributed to Amazon.com customers." *Id.* Those tasks are the "productive work" and "work of consequence," *see* 29 C.F.R. § 790.8(a), for which Respondents were employed.

Security screenings were neither "integral" nor "indispensable" to Respondents' principal activities of filling customer orders. The screenings occurred off the warehouse floor, after Respondents had completed their productive work and punched out for the day. *Id.* ¶ 16 (JA 21-22). And those screenings did not in any way affect *how* Respondents discharged their duties of filling customer orders. Respondents could retrieve items from inventory and process customer orders in the usual manner regardless of whether they went through a post-shift

security screening on their way out of the building after work. An employee who punched out and left via an unsupervised side exit may have violated company policy but still would have completed his primary activities.

The legislative history of the Portal-to-Portal Act supports treating security screenings as non-compensable. During the floor debates, Senator Cooper—one of the chief sponsors of the Act—emphasized that an activity such as changing clothes would be compensable only "if the employee *could not perform his* [*principal*] *activity*" without it. 93 Cong. Rec. 2297-98 (emphasis added) (quoted in *Steiner*, 350 U.S. at 258). In contrast, if the activity were "not directly related to the specific work, it would not be considered a part of [the employee's] principal activity, and it follows that such time would not be compensable." *Id.* Security screenings plainly fall into the latter category, as Respondents could unquestionably perform all of their principal activities regardless of whether they underwent a post-shift security screening.

The legislative history also makes clear beyond cavil that the Portal-to-Portal Act was enacted to abrogate the results in cases like *Mt. Clemens* that had extended the scope of the compensable workweek beyond Congress' initial conception. *See*, *e.g.*, S. Rep. No. 80-37, at 12 ("If the doctrine enunciated by the Supreme Court of the United States in the *Mount Clemens* case is ultimately sustained, the likelihood is that … the country will be involved in a flood of litigation, the extent of which it is impossible to estimate."). Thus, the preliminary and postliminary

activities deemed compensable in *Mt. Clemens* clearly inform the scope of the Portal-to-Portal Act. While *Mt. Clemens* viewed time spent walking between the time clock and the workstation as compensable, Congress just as clearly viewed such time as a non-compensable preliminary activity.

DOL's contemporaneously promulgated regulations confirm that same understanding. Since 1947, DOL's regulations have made clear that "checking in and out and waiting in line to do so," and "waiting in line to receive pay checks" are typically not compensable under the FLSA. 29 C.F.R. § 790.7(g).[4] These regulations "indicate[] that a reasonable amount of waiting time is intended to be preliminary or postliminary." *Tum v. Barber Foods*, 360 F.3d 274, 282 (1st Cir. 2004), *aff'd in relevant part sub nom. IBP*, 546 U.S. at 40-42.

Time spent waiting to clear security after clocking out is just the modern equivalent of such quintessentially non-compensable time. Both punching the clock and passing through a security screening are required by the employer and provide verifications that primarily benefit the employer. Both activities may require employees to wait in line, since—especially at a large work site with uniform shift changes—not all workers can punch the clock or go through a security screening simultaneously. And, most critically for purposes of the Portal-to-Portal Act, both activities are fundamentally distinct from the *productive work* employees are hired to

[4] Indeed, even *Mt. Clemens* found that time spent waiting to punch in (which could take up to 8 minutes each day) was non-compensable. 328 U.S. at 683, 689-90.

perform. There is no legally significant difference between waiting in line for a post-shift security screening and waiting in line to punch the time clock, which DOL itself has long treated as a non-compensable activity.

3. Security screenings are also far afield from the types of activities this Court has found to satisfy the "integral and indispensable" test.

In *King Packing*, 350 U.S. 260, the Court held that butchers' pre-shift knife-sharpening was a compensable activity. As the Court explained, "[a]ll of the knives as well as the saws must be 'razor sharp' *for the proper performance of the work*." *Id.* at 262 (emphasis added). A dull knife would simply not cut properly; it would "slow down production," "affect the appearance of the meat," "cause waste," and "make for accidents." *Id.* A worker who skipped this knife-sharpening step could not properly discharge his primary activities. This Court accordingly concluded that "the knife-sharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed." *Id.* at 263.

Similarly, in *Steiner*, the Court held that showering and changing clothes were integral and indispensable to the principal activities of battery-plant workers who were exposed to hazardous materials as part of their jobs. The employees worked with highly toxic chemicals, and if they did not take a post-work shower or bath, "lead oxide might be absorbed into the blood stream." 350 U.S. at 251. The company also provided each employee with a change of clothes because the chemicals used

at the plant "cause[d] such rapid deterioration that the clothes sometimes last[ed] only a few days." *Id.* Indeed, even the employer conceded that "the clothes-changing and showering activities of the employees are indispensable to the performance of their productive work and integrally related thereto." *Id.* Because showering and changing clothes were essential to "protect[ing] the company and the employee both," the Court concluded that "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." *Id.* at 251, 256.

In both *King Packing* and *Steiner*, the activities this Court found to satisfy the "integral and indispensable" test were critical to the *manner* in which employees performed their principal job duties. They were steps in performing the primary activities that could not be skipped if the work was to be done right. Butchers cannot properly cut meat with dull knives. And workers cannot produce batteries without taking appropriate precautions to protect themselves from exposure to the hazardous chemicals that are used in the manufacturing process. In both situations, the activity at issue was truly integral and indispensable to the employee's actual *job duties*.

Security screenings, in contrast, are far more analogous to the activities this Court found to be non-compensable in *IBP v. Alvarez*. In *IBP*, this Court drew a clear line between time spent donning indispensable safety gear and time spent *waiting* to receive that protective equipment. The donning of

specialized protective gear is integral to the principal job activities of a slaughterhouse worker because—like the activities in *King Packing* and *Steiner*—such donning is "*always* essential if the worker is to do his job." 546 U.S. at 40.[5] In contrast, time spent *waiting* to don protective equipment before the beginning of a shift—*e.g.*, time spent obtaining the protective clothing and signing it out—"always comfortably qualif[ies]" as a non-compensable activity because it precedes any primary activity and is "*two steps removed from the productive activity* on the assembly line." *Id.* at 40, 42 (emphasis added).

Just so here. A security screening that occurs *after* a worker has filled his or her last order of the day is several steps removed from the employee's productive work on the warehouse floor. For purposes of the FLSA and Portal-to-Portal Act, there is no meaningful difference between "waiting to don" safety gear, *id.* at 40, and "waiting for and undergoing [] daily security clearances" after the completion of work, *see* First Amended Complaint ¶ 17 (JA 22). Like the waiting time in *IBP* (and the walking time in *Mt. Clemens*), the post-shift security screenings are far removed from Respondents' productive work activities and are neither integral nor indispensable to the performance of that work.

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[5] The employer in *IBP* did not dispute the district court's finding that, "in light of *Steiner*, the donning and doffing of unique protective gear are 'principal activities' under [] the Portal-to-Portal Act." 546 U.S. at 523.

B. Other Than the Decision Below, Every Court To Consider This Issue Has Correctly Held That Security Screenings Are Not Compensable Under the FLSA.

Applying the straightforward principles discussed above, every court to consider this issue—other than the Ninth Circuit here—has held that time spent waiting for and passing through security screenings is not compensable under the FLSA.

The Second Circuit held in *Gorman* that time spent by nuclear-plant employees in "ingress and egress security procedures" was not compensable. 488 F.3d at 593-94. The employees in *Gorman* went through an extensive screening process on the way into the plant, including "waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector." *Id.* at 592. On the way out of the plant, workers did "many of these things in reverse," and also underwent a "more sensitive" "egress radiation-test." *Id.* at 592 & n.2. The Second Circuit acknowledged that these activities were "necessary in the sense that they are required and serve essential purposes of security," but nonetheless concluded that they were "not integral to principal work activities." *Id.* at 593.

The court emphasized that "security-related activities" are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act." *Id.* As the court explained, security screenings are far afield from the types of indispensable and integral activities that have been found compensable under the FLSA, such as a

butcher sharpening knives and an x-ray technician powering up and testing the machinery. *Id.* at 592.[6]

Similarly, in *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that "time spent going through security screening" was non-compensable under the FLSA. The plaintiffs there were construction workers who "were required to pass through a single security checkpoint" in order to "reach their work sites" at an airport facility. *Id.* at 1340-41. Like Respondents here, the plaintiffs argued that they were entitled to compensation for this time because the security screenings were "necessary" "in order to do their jobs." *Id.* at 1344.

Relying on *IBP* and *Steiner*, the Eleventh Circuit squarely rejected that argument. As the court explained, "[i]f mere causal necessity [were] sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs." *Id.* "If the Portal-to-Portal Act is to have any meaning at all, its terms cannot be swallowed by an all-inclusive definition of 'integral and indispensable.'" *Id.*

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[6] The Second Circuit could posit only a single, narrow situation in which the FLSA might require compensation for time spent in a security screening: when the employee in question is "responsible for monitoring, testing, and reporting on the plant's infrastructure security." *Id.* at 593 n.5. Of course, if an employee were hired to oversee a plant's security measures, then security-related tasks would constitute his *principal activities* and would be compensable as such. *See* 29 C.F.R. § 790.8(a).

A number of federal district courts have likewise held that time spent in employer-mandated security screenings is non-compensable because such screenings are fundamentally distinct from employees' principal job duties. *See Sleiman v. DHL Express*, No. 09-414, 2009 WL 1152187, at *5-*6 (E.D. Pa. Apr. 27, 2009) ("security screening procedures do not constitute work, and are not integral and indispensable to principal activities," even if they are imposed by a private company); Mem. & Order at 6-7, *Jones v. Best Buy Co.*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) (holding that "security screening time is not compensable under FLSA as a matter of law," even in the context of "employer-required security screening"); *Anderson v. Perdue Farms*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (employees of a privately owned chicken plant were "not entitled to compensation for ... time spent clearing security"); *White v. Tip-Top Poultry*, No. 07-0101, 2008 U.S. Dist. LEXIS 110598, at *32-33 n.5 (N.D. Ga. Oct. 7, 2008) (same).[7]

[7] *See also Whalen v. United States*, 93 Fed. Cl. 579, 600-01 (2010) (security checks were effectively "an extension of plaintiffs' commute" and were not integral or indispensable to their principal activities as air traffic controllers").

II. The Ninth Circuit Badly Misconstrued The Portal-to-Portal Act.

A. The Ninth Circuit's "Required-and-Beneficial" Test is Inconsistent With the Text and History of the Act, This Court's Precedents, and DOL's Regulations.

The Ninth Circuit badly misconstrued the "integral and indispensable" standard to reach its result that security screenings are compensable under the FLSA. The court's core holding was that Respondents can state a claim under the FLSA because Integrity "requires" the security screenings and the screenings are "done for Integrity's benefit." Pet.App.11-12. That interpretation of the Portal-to-Portal Act is profoundly flawed on a number of levels.

At the outset, the Ninth Circuit's approach is fundamentally inconsistent with both the text and evident purpose of the Portal-to-Portal Act. Congress was crystal clear that preliminary and postliminary activities were non-compensable. 29 U.S.C. § 254(a). The kind of preliminary and postliminary activities Congress had in mind were not solely activities done gratuitously by employees for their own benefit, but included those done at the employer's behest and for the employer's benefit. The test is not who requires the activity or who benefits. Instead, the question is whether the activities precede (or follow) the primary activities, or rather are so integral and indispensable to other primary activities as to count as primary activities in their own right. *See Steiner*, 350 U.S. at 252; *IBP*, 546 U.S. at 33.

In other words, the kind of preliminary and postliminary activities Congress had in mind were the kind of preliminary and postliminary activities this Court found compensable in *Mt. Clemens*, such as time walking between the time clock and the employee's primary work station. But those activities were certainly required by the employer and benefited the employer. Likewise the travel time in cases like *Jewell Ridge* and *Tennessee Coal* was required by the employer and benefited the employer. Yet Congress clearly acted to make that time non-compensable. Thus, the Ninth Circuit's "required by and benefit to the employer" test cannot be a proper interpretation of the Portal-to-Portal Act. *See Tum*, 360 F.3d at 285-86 (Boudin, C.J., concurring) (fact that certain tasks "are in the employer's service" was "equally true in the *Mt. Clemens* case and Congress made a policy decision against required compensation").

Thus, like the argument this Court rejected in *IBP*, the Ninth Circuit's approach produces the "logical (but untenable) conclusion" that many of the activities found compensable in *Mt. Clemens* were "unaffected by the Portal-to-Portal Act." *IBP*, 546 U.S. at 41. For example, "walking from a timeclock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate [*Mt. Clemens*'] holding that such walking time was compensable under the FLSA." *Id.* at 41.

Indeed, the Ninth Circuit's approach in this case is the modern analog to the *Mt. Clemens* decision

that Congress expressly abrogated in the Portal-to-Portal Act. In *Mt. Clemens*, this Court held that employees were entitled to compensation under the FLSA for "all time during which an employee is *necessarily required* to be on the employer's premises, on duty or at a prescribed workplace." 328 U.S. at 690-91 (emphasis added). The Court reasoned that activities such as walking to and from employee workstations was compensable because these tasks were "under the complete control of the employer" and "[w]ithout such [tasks] on the part of the employees, the productive aims of the employer could not have been achieved." *Id.* at 691-92.

The Ninth Circuit has thus managed to adopt essentially the same test that carried the day in *Mt. Clemens*. "The déjà vu is enough to make one swoon." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 900 (2009) (Roberts, C.J., dissenting). While this Court's initial interpretation of undefined terms in *Mt. Clemens* was perfectly understandable, the Ninth Circuit's resurrection of that test is inexplicable. The express purpose of the Portal-to-Portal Act was to overthrow the *ancien regime*, including *Mt. Clemens*. Any interpretation of the Act that resurrects the very decision that the Act abrogated cannot possibly be correct.[8]

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[8] Like *Mt. Clemens*, the Ninth Circuit also suggested that its expansive interpretation of compensable activities would be ameliorated by application of a *de minimis* doctrine. *Compare* Pet.App.16 (noting existence of "*de minimis* exception" for time spent in security screening) *with Mt. Clemens*, 328 U.S. at 692 ("[w]e do not, of course, preclude the application of a *de minimis* rule where the … time is such as to be negligible"). The Portal-to-Portal Act clearly rejects the notion that a barely adumbrated

For similar reasons, the Ninth Circuit's analysis is not a faithful application of this Court's longstanding test from *Steiner*. Under *Steiner*, activities are compensable only if they are "an integral and indispensable part of the *principal activities for which covered workmen are employed*." 350 U.S. at 256 (emphasis added). Consistent with the express purpose of the Portal-to-Portal Act, the *Steiner* test ensures that the FLSA will apply only to activities that are part and parcel of employees' productive work.

The Ninth Circuit's "required-and-beneficial" approach is far broader than the *Steiner* test. Numerous quintessential preliminary or postliminary activities are "required" or "necessary" in a broad, but-for sense in that the employer will not hire someone who does not perform these tasks. Integrity "requires" all of its warehouse workers to travel from their homes to the job site each day, walk from the parking lot to the warehouse, and punch in and out on the time clock; an employee who fails to perform these tasks would be terminated. But all of those activities are unquestionably non-compensable. *See* 29 C.F.R. § 790.7(f)-(g). Whether an activity is "required" by the employer at a high level of generality—and whether the employer "benefits" from that activity to some extent—is a very different inquiry from whether the task is integral and indispensable to an employee's *principal job duties*.

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de minimis exception is sufficient to rein in an overbroad definition of the relevant "workweek."

This Court has expressly held that the Portal-to-Portal Act requires more than simple necessity for an activity to be compensable. As the Court explained, "the fact that certain preshift activities are necessary for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP*, 546 U.S. at 40-41 (emphasis added). The Court concluded that "time spent waiting to don" protective gear before a shift begins "comfortably qualif[ies]" as a non-compensable preliminary activity, even though employees necessarily had to complete this task in order to perform their jobs. *Id.* at 40; *see also Bonilla*, 487 F.3d at 1344 ("[i]f mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs").

The Ninth Circuit's interpretation of the Portal-to-Portal Act also conflicts with DOL's regulations. Countless employers "require" hourly employees to punch in and out on a time clock, which may also entail waiting in line for several minutes. And this task is unquestionably done for the "benefit" of the employer, to ensure accurate recordkeeping and prevent cheating. But, as noted above, it is well-established under DOL's regulations that "checking in and out and waiting in line to do so" is not compensable because such tasks are not integral or

indispensable to the employee's actual *job duties*. 29 C.F.R. § 790.7(g).[9]

The district court found DOL's regulation to be directly applicable here, noting 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.'" Pet.App.27-28 (quoting 29 C.F.R. § 790.7(g)); *see also IBP*, 546 U.S. at 41 (relying on § 790.7(g) in finding time waiting to don non-compensable). Yet, remarkably, the Ninth Circuit did not even cite this regulation, much less offer a principled reason for distinguishing between time spent waiting in line for a security screening and time spent waiting in line to punch the clock at the beginning or end of the day.

B. The Ninth Circuit and Respondents Define the Relevant "Principal Activities" Far Too Broadly.

The Ninth Circuit also suggested in passing that the security screenings were compensable under the FLSA because they "stem[] from the nature of the employees' work (specifically, their access to merchandise)." Pet.App.12. That holding, too, is unprecedented and wrong for several reasons.

First, the Ninth Circuit was wrong to suggest that "access to merchandise" was one of Respondents'

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[9] Similarly, time spent walking from the parking lot or factory gate to the employee's work station is certainly "required" for an employee to be able to perform her job, but DOL has long recognized that such activities are not compensable. *See* 29 C.F.R. § 790.7(f).

principal job duties. The principal activities for which an employee must be compensated include "work of consequence" performed for the employer and activities that are "indispensable to the performance of productive work." 29 C.F.R. § 790.8(a). Here, Respondents' "work of consequence" and "productive work" involved *filling customer orders*, not some abstract and amorphous "access to merchandise." Integrity did not pay Respondents to have access to merchandise; it paid them to retrieve items from inventory and package those items for distribution to Amazon.com customers.

In all events, the Ninth Circuit's reasoning proves far too much, as many quintessentially non-compensable activities "stem[] from the nature of the employees' work." For example, the fact that coal miners had to spend substantial periods of time traveling from the parking lot to the work site certainly stemmed from the nature of the work, but that time is clearly non-compensable under the Portal-to-Portal Act. Access to the mine, like "access to merchandise" may be necessary for the performance of the miner's principal activities, but those activities are mining, not access to the mine in the abstract. What matters is not whether the activity merely stems from the "nature" of the employee's work—a test seemingly designed to impermissibly capture activities that flow from, but are only tangentially related to, the employees' principal activities—but whether it is "integral and indispensable to the employees' principal *productive work*.

Respondents go even farther than the Ninth Circuit, arguing that post-shift security screenings are integral and indispensable to the job duty of "refrain[ing] from putting in their pockets … merchandise to take home at the end of the day." BIO 19-20; *see also* First Amended Complaint ¶ 15 (JA 21) ("it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse").

That assertion is stunning. No court, including the Ninth Circuit below, has endorsed the notion that "not stealing" counts as a principal job activity. Employees have an obligation not to steal because it is against the law, not because it is one of the duties they are paid to perform. Refraining from committing a crime is a society-wide obligation, not part of an employee's "productive work" or "work of consequence" for purposes of the FLSA. 29 C.F.R. § 790.8(a). Unsurprisingly, Respondents cite no authority in support of their contention that "not breaking the law" should be treated as a principal job activity.

C. The Number of Employees Screened Is Legally Irrelevant.

Finally, the Ninth Circuit attempted to distinguish cases such as *Gorman* and *Bonilla* finding security screenings to be non-compensable on the ground that, in those cases, "everyone who entered the workplace had to pass through a security clearance." Pet.App.12. That is, the Ninth Circuit suggested that the security screenings at issue here applied to some, but not all, Integrity employees. Respondents similarly contend that the screenings

were applied in a selective or inconsistent manner, and that employees such as "bookkeepers" would not be screened. BIO 15-16.

Tellingly, neither the Ninth Circuit nor the Respondents cite *anything* in support of their suggestion that only certain employees are subject to security screenings. Respondents are the masters of their complaint, and it is their responsibility to include in the complaint plausible allegations showing that they are entitled to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But Respondents' complaint contains absolutely no allegations suggesting that the screenings were applied in a selective manner or that certain employees at an Amazon.com warehouse would not be screened as they exited the facility.

In reality, although there is no record evidence (or allegation) at this point in the litigation, the general practice is that everyone entering a secured work or service area—including employees, vendors, contractors, and visitors—is required to clear security on the way out of the building, even if they were only visiting administrative offices. That underscores that while the security screening is related to potential access to the merchandise floor, it does not thereby become an integral and indispensable part of the primary work activities of everyone with "access to merchandise."

In all events, the question in any case involving a preliminary or postliminary activity is whether the activity is integral and indispensable to the principal job duties *of the employees in question*. Whether that activity is also performed by other employees with

different job duties sheds little light on that inquiry. If a company required its factory workers, but not its bookkeepers, to punch in and out on a time clock each day, this would hardly transform punching the clock into an integral and indispensable activity for the factory workers.

Moreover, if non-universal security screenings are more likely to be compensable under the FLSA—as Respondents and the Ninth Circuit contend—this will create a perverse incentive for employers to screen *everyone*. It cannot possibly be right that an otherwise-compensable activity can become non-compensable simply because *more* employees are required to do it. Such a rule would disserve both employers and employees, and would hardly advance the purposes of the FLSA.

For largely the same reasons, the Ninth Circuit was wrong to find support for its holding in the fact that "employees apparently pass through the clearances only on their way out of work, not when they enter." Pet.App.11. Security screenings are quintessential examples of non-compensable activities *regardless* of whether they are conducted upon ingress, egress, or both. *See Gorman*, 488 F.3d 593-94 (time spent in ingress *and egress* security procedures was non-compensable). An activity is either compensable or it is not, and each task must be evaluated in its own right. Again, it would make no sense to craft a legal regime in which an employer can avoid paying compensation for *any* security

screenings as long as it requires two screenings, but must compensate if it requires only one.[10]

III. The Ninth Circuit's Decision Upends The Carefully Crafted Regulatory Regime Embodied In The FLSA And Portal-to-Portal Act.

A. In the post-9/11 world, security screenings have become ubiquitous in the American workplace, and are routinely required for employees working in skyscrapers, corporate campuses, federal, state, and local government offices, courthouses, high schools, sports arenas, museums, medical laboratories, airports, power plants, and countless other places. These screenings take a variety of different forms. Some are mandatory for all persons entering a building, while others might involve only random checks. Some apply only upon entering a building, while others apply on both entry and exit, *see Gorman*, 488 F.3d at 592, or exit only. Some involve walking through a metal detector while others might

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[10] Nor is there any basis for drawing a line between government-mandated security screenings and employer-mandated security screenings, as the Ninth Circuit suggested in passing. Pet.App.12. Regardless of who imposed the screening, the relevant question is whether it is integral and indispensable to the principal activities of the employee in question. It would make no sense for time spent time spent in a security screening to be compensable for a worker in an Amazon.com warehouse but non-compensable for a worker performing identical functions at a cargo warehouse on airport grounds. *See*, *e.g.*, *Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2173 (2012) (rejecting interpretation of FLSA that would result in different outcomes for workers who "function identically" in all relevant respects).

involve a "bag check." Some are primarily about keeping dangerous items out, while others are primarily about keeping valuable materials in.[11] And these screenings serve a variety of purposes, from preventing theft, terrorism, or workplace violence, to safeguarding trade secrets and intellectual property.

Before the Ninth Circuit's decision, the existence (and nature) of a security screening process was just one factor among many that employees would consider in choosing whether to take a particular job. Prospective employees would simply weigh that consideration against other factors—such as pay, benefits, work schedule, distance from home, and opportunities for advancement—in deciding whether to take the position. A retail store located past the security checkpoint in an airport, or in the retail area of a government building, would presumably need to offer higher pay or other perks to offset the inconvenience to employees of having to go through security each day; failing to do so would make it harder to attract and retain good employees.

Indeed, any number of legitimate business decisions can result in minor day-to-day inconveniences for employees. For example, employees might face an unusually long commute if their employer is located in a high-traffic downtown area or a remote rural area. Similarly, if a company

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[11] For example, to prevent the loss of rare and valuable books, Harvard's Widener and Lamont Libraries have a longstanding policy that "all users' bags, briefcases, portfolios, backpacks, purses, books, library materials, and drawing tubes are inspected as users exit the libraries." *See* Harvard Coll. Library, *Admittance* (2014), http://hcl.harvard.edu/info/admittance.

has offices on the 50th floor of a skyscraper, its employees will likely spend significant time on or waiting for elevators at the beginning and end of each workday. Or a factory might have a very large parking lot that requires employees to walk for 10 minutes each way between their cars and their work stations. Each of these situations may result in minor inconveniences for employees, but these are not the types of issues that are subject to mandatory, government-imposed compensation under the FLSA. Instead, these are simply factors that employees must weigh and consider in choosing whether to take a particular job.

In the Portal-to-Portal Act, Congress left it to employers and employees to determine what, if any, compensation will be paid for preliminary and postliminary activities. The Act expressly recognizes that the default rule—that preliminary and postliminary activities are not compensable—may be altered through "an express provision of a written or nonwritten contract ... between [an] employee, his agent, or collective-bargaining representative and his employer." 29 U.S.C. § 254(b). As Justices Frankfurter and Burton noted in their dissent in *Mt. Clemens*, the "obvious, long established, and simple way" to compensate employees for preliminary and postliminary activities "is to recognize those activities *in the rate of pay* for the particular job." 328 U.S. at 697 (emphasis added).

In short, the "consequence of dispensing with the intricate exercise of separating the minutes spent" on preliminary or postliminary activities "is not to prevent compensation for the uncovered segments,

but merely to leave the issue of compensation" to employers and employees. *Sandifer*, 134 S. Ct. at 880-81.[12] The Ninth Circuit's decision upends the careful policy balance struck by Congress in the FLSA and Portal-to-Portal Act, and converts what had been a balanced regulatory scheme into a litigation windfall for employees and their lawyers.

B. Predictably, the aftermath of the Ninth Circuit's decision in this case has resembled the fallout from the *Mt. Clemens* decision. In the wake of *Mt. Clemens*, the courts were flooded with claims by employees seeking billions of dollars of back pay and liquidated damages under the FLSA for preliminary and postliminary tasks that had nothing to do with their actual job duties. Just six months later, Congress enacted the Portal-to-Portal Act to repudiate that decision, finding that the FLSA, as construed in *Mt. Clemens*, had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to "give rise to great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. § 251(a).

The Ninth Circuit's decision in this case has *already* had a similar effect, spawning a number of nationwide class-action suits that seek to hold employers retroactively liable for back pay, overtime, and double damages for time spent in security screenings. Amazon.com and its staffing companies

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[12] *See also Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 218 (4th Cir. 2009) (Wilkinson, J.) (mandatory compensation for preliminary and postliminary activities "could preclude [] flexible and mutually preferable agreements").

are now defendants in at least 13 class-action suits across the country (including one filed just four weeks ago).[13] For those defendants *alone*, the putative class includes more than 400,000 plaintiffs, and Respondents' counsel has boasted that "'we're talking hundreds of millions of dollars'" in damages.[14] Nationwide class-action suits have also been filed against several other major employers, including Apple, *see* Class Action Complaint ¶ 51-60, *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013), and CVS Pharmacy, *see* First Amended Class Action Complaint ¶¶ 14-20, 65-73, *Ceja-Corona v. CVS*, No. 1:12-cv-1868 (E.D. Cal. July 15, 2013).

Like the *Mt. Clemens* decision, "the very fact that suits were filed in such great numbers, not before, but subsequent to the decision … indicates very clearly the fact that the activities for which the Court was awarding compensation were such as had not been deemed by either management or employees to be compensable." 93 Cong. Rec. 2089-90 (1947) (statement of Sen. Donnell). Indeed, it is telling that, in the Portal-to-Portal Act's first sixty-five years on

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[13] *See*, *e.g.*, Collective Action Complaint, *Johnson v. Amazon.com DEDC, LLC*, No. 3:14-1797 (D.S.C. May 2, 2014); Class Action Complaint, *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); Class Action & FLSA Collective Action Complaint, *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); Collective Action & Class Action Complaint, *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013).

[14] Aaron Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint*, Lawyers.com (Apr. 25, 2013), http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/.

the books, no court, until the Ninth Circuit here, had found security-related activities to be compensable.

And if there really is a need to change the law, it should be done on a prospective basis in a manner that provides fair notice to employers, not by "impos[ing] potentially massive liability" retroactively for conduct that has never been understood to violate the FLSA. *Christopher*, 132 S. Ct. at 2167. It may be "possible for an entire industry to be in violation of the [FLSA] for a long time" without anyone noticing, but the "more plausible hypothesis" is that the industry "has been left alone because the character of its compensation system" is not unlawful. *Yi v. Sterling Collision Centers*, 480 F.3d 505, 510 (7th Cir. 2007); *accord Christopher*, 132 S. Ct. at 2168.

In all events, the history of the Portal-to-Portal Act makes crystal clear that sweeping changes to workplace compensation rules should not be made retroactively by the courts based on expansive and atextual interpretations of the FLSA.[15] If there is to be a major change in the types of activities that are covered by the FLSA, it should be made on a *prospective* basis through legislation, not through backward-looking litigation that seeks to hold companies liable for billions of dollars of back pay and double damages.

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[15] Notably, the Secretary of Labor learned this lesson of the Portal-to-Portal Act, as both *Steiner* and *King Packing* involved enforcement actions that sought only *prospective* relief. *See Steiner*, 350 U.S. at 332 ("[t]here is no question of back pay involved here"); *King Packing*, 350 U.S. at 260 (DOL sought "an injunction to enforce compliance with the Act").

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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May 28, 2014

STATUTORY APPENDIX

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29 U.S.C. § 251

Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged

in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts 1 and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

29 U.S.C. § 254

Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

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

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel

is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

29 C.F.R. § 790.7

"Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday.[41] And even where there is a

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[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement

contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No 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. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in

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to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job

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[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

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[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the

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which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) 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.[49]

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be

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[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and §790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

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[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 7 WHR 1165.

29 C.F.R. § 790.8

"Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal"

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[53] See §§790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see §790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commisstoner of Internal* Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered

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[56] Cf. *Armour & Co. v. Wantock,* 323 U.S. 126, 132-134: *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

"sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) 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 work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

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[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the

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[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist 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. See footnote 49.

employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] 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.[67]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

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[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.