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

BRIEF IN OPPOSITION

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

MARK R. THIERMAN
Counsel of Record
JOSHUA D. BUCK
THIERMAN LAW FIRM, P.C.
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500
mark@thiermanlaw.com

Counsel for Respondents

251413

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Fair Labor Standards Act requires that covered employees who work more than forty hours in a week be compensated for those additional hours at a rate of at least one and one-half times their normal rate. Under the Portal-to-Portal Act an employee's work includes his or her "principal activities." This Court's decisions establish that compensable work also includes any activity which is "integral and indispensable" to the employee's principal activities. The question presented is:

Did the Ninth Circuit err in holding under the circumstances of this case that a worker's participation in an anti-theft search and screening was integral and indispensable to his principal activities?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Statutes and Other Authorities

INTRODUCTION

The Fair Labor Standards Act ("FLSA") provides that a covered employee who "is employed for a workweek longer than forty hours" must be paid for any hours in excess of forty at a rate at least one and one-half times his or her regular rate. 29 U.S.C. § 207(a). The FLSA itself does not contain a definition of "workweek" or "work." The scope of this overtime rate requirement is governed in part by the Portal-to-Portal Act, which provides that an employer is not required to treat as compensable work "activities which are preliminary to or postliminary to [the] principal activity or activities [which such employee is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(2).[1] Under the Portal-to-Portal Act, time an employee devotes to any "principal activity or activities" is compensable and must be considered in determining whether he or she worked more than forty hours in a week.

In addition, "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities

1. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005)("Other than its express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work,' and 'workweek,' or to define the term 'workday.'")

for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). This Court reiterated that "integral and indispensable" standard in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29, 30, 34 n. 6 (2005). See Pet. 2-3 (recognizing "integral and indispensable" standard). "[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'" 546 U.S. at 37.

This case concerns the application of that well-established "integral and indispensable" standard. The plaintiffs are required at the end of each workday to participate in an anti-theft search and screening process. The court of appeals held that the time the workers devoted to that search and process was integral and indispensable to their principal activities. (Pet.App. 10-13). If that is correct, the employees would also be entitled to compensation for the time they spend waiting to participate in the anti-theft screening; under the continuous workday rule, an employer must compensate a worker for waiting time that occurs after the first compensable activity but prior to the last such activity.[2] The continuous workday rule is not in dispute; the litigation concerns the compensability of the anti-theft screening process itself.

The petition raises two distinct questions. First, it asserts that there is a circuit split as to whether a

2. *IBP,* 546 U.S. at 37 ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [section 4(a) of the Portal-to-Portal Act], and as a result is covered by the FLSA"); see 29 C.F.R. § 790.6.

"security screening" can *ever* be compensable under the FLSA, as modified by the Portal-to-Portal Act. Petitioner contends that the Second and Eleventh Circuits have held that a "security screening" is never compensable, and that the Ninth Circuit decision below thus departed from that asserted rule when it held that, in the particular circumstances of this case, the time the plaintiffs were required to spend in the anti-theft screening was indeed compensable. As we explain below, neither the Second nor the Eleventh Circuit has adopted such a rule; rather, those circuits rejected the claims at issue because they involved practices materially different from the circumstances in the instant case. Second, the petition urges that the Ninth Circuit erred in holding that in the particular circumstances of this case participation in the anti-theft screening process was integral and indispensable to the principal activities of the plaintiff workers. But petitioner's claim of error in the fact-bound application of that standard to the particular claim in this case does not present any circuit conflict or otherwise warrant review by this Court.

STATEMENT

Petitioner Integrity Staffing Solutions, Inc., provides staffing to Amazon.com warehouses throughout the nation. Respondents Busk and Castro worked for Integrity as hourly employees in Nevada warehouses, filling orders placed by Amazon.com customers. At the end of each day, after they had clocked out, respondents were not permitted to leave the warehouse until they had been subjected to an anti-theft "security clearance." During the clearance process respondents and other employees emptied their pockets, removed their wallets, keys and

belts, and passed through metal detectors. The clearance process itself may have been relatively brief. (See Pet. 3 ("short security screening")). But because Integrity hired too few screeners for the many hundreds of employees who simultaneously leave at the end of each shift, employees such as respondents waited for approximately 25 minutes—after they had clocked out and when they were no longer being paid—before they were searched and finally permitted to leave the warehouse. (Pet.App. 4, 20).[3]

Respondents commenced this action in federal district court asserting two distinct claims. First, they contended that Integrity violated the FLSA because it did not pay them overtime for the time spent during (and awaiting) the security clearance process. The complaint asked the court to permit the FLSA claim to be heard as a collective action on behalf of all similarly situated Integrity employees nationwide.[4] Second, respondents contended that Integrity's actions in this regard also violated the Nevada statute requiring that workers be paid time and one-half for overtime and that they be paid for all hours

3. First Amended Collective and Class Action Complaint, ¶ 16 ("At the end of their respective shifts, hundreds of warehouse employees would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband. . . . Plaintiffs . . . were required to wait approximately 25 minutes each day at the end of shift without any compensation in order to undergo a search for possible contraband or pilferage of inventory . . . .").

4. First Amended Collective and Class Action Complaint, ¶ 21. Opt-out class actions are not permitted under the FLSA, which requires individuals who wish to take part in the proceedings to opt in individually. (See Pet.App. 5-6).

worked.[5] N.R.S. 608.018(1). (The parties disagree about whether the Nevada law provides protections greater than the FLSA, and the court of appeals did not resolve that issue). The complaint asked with regard to this state law claim that the court certify a class action on behalf of all similarly situated persons within the state of Nevada.

The district court granted Integrity's motion to dismiss. It reasoned that the security clearance was not integral and indispensable to the plaintiff's warehouse jobs because the workers "could perform their warehouse jobs without such daily security screenings." (Pet.App. 28). The district court also dismissed plaintiffs' Nevada state law claims. (Pet.App. 34).

The court of appeals reversed. The Ninth Circuit based its decision on this Court's precedent that activities are compensable "if they are 'integral and indispensable' to an employee's principal activities." (Pet.App. 10)(quoting *Steiner v. Mitchell,* 350 U.S. 247, 332 (1956)). It reasoned that plaintiffs "allege 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. As alleged, the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit. . . . Integrity allegedly requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." (Pet.App. 11-12). The Ninth Circuit held that the district court had erred in assuming that decisions

5. First Amended Collective and Class Action Complaint, ¶ 50.

in the Second and Eleventh Circuit had "created a blanket rule that security clearances are noncompensable instead of assessing the plaintiffs' claims under the 'integral and indispensable' test." (Pet.App. 13.) The Ninth Circuit also reversed the dismissal of plaintiffs' Nevada state law claims. (*Id.*).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE COMPENSABILITY OF THE PARTICULAR ACTIVITIES AT ISSUE IN THIS CASE

(1) The central premise—and flaw—of the petition is its assumption that any activity that constitutes a "security screening" must always be treated the same way under the FLSA—*i.e.*, that a "security screening" either is, or is not, compensable under the FLSA. "The question presented is whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act." (Pet. i). Petitioner asks the Court "to resolve a highly consequential two-to-one circuit split over whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act." (Pet. 12). Petitioner evidently intends the phrase "security screening" to refer to any steps to confirm the identity of an employee or to conduct some sort of search of the employee's person or belongings. Although the phrase "security screening" does not appear in the FLSA or the Portal-to-Portal Act, petitioner insists that those laws create a per se rule under which a "security screening" is never compensable.

But there is a wide divergence in the types of employee (and visitor) searches and identification procedures that

exist at plants and offices, and there is no reason to assume that the compensability of those searches and procedures will always be the same regardless of the particular circumstances involved. Such searches and/or procedures may apply to employees and non-employees alike, to all employees, or to only certain employees. They may occur at the beginning, middle, or end of the work day, and may be conducted at differing types of locations within a facility. Searches are undertaken to seek different types of things, such as weapons, explosives, pilfered merchandise or tools, cameras, recording devices, or documents; some searches are initiated to ascertain whether an employee has been contaminated by a substance of which the worker himself may be unaware.[6] The purpose and effect of such searches and procedures will in some instances be directly related to the employee's particular job, but in other situations will have no such connection.

Consistent with its insistence that all "security screenings" must have the same status under the FLSA and the Portal-to-Portal Act, petitioner asserts that "[a]s the law currently stands, security screening time is compensable under the FLSA in the Ninth Circuit, but not in the Second and Eleventh Circuits." (Pet. 22). But the Ninth Circuit manifestly did not hold that a "security screening" is always compensable; to the contrary, the court of appeals below limited its holding of compensability to the particular activities alleged in this case, and did not question the correctness of decisions holding that screenings were not compensable in certain other circumstances. (Pet.App. 12). Conversely, neither the Second nor the Eleventh Circuit has adopted a per se rule that "security screenings" are never compensable.

6. See Pet. 23 ("screenings take a variety of forms").

(2) Petitioner contends that in *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit adopted a rule "that time spent in security screenings is not subject to the FLSA because it is *not* 'integral and indispensable' to employees' principal job activities." (Pet. i)(emphasis in original); see *id.* 4 ("decision[] from the Eleventh Circuit[] hold[s] that . . . employees are *not* entitled to compensation for time spent in security screenings")(emphasis in original)). That is not correct.

The employees in *Bonilla* were construction workers building a new terminal at the Miami International Airport. "In order to reach their work sites inside the airport, [the workers] were required to pass through a single security checkpoint to the tarmac and then ride authorized buses or vans to their particular work site." 487 F.3d at 1341. As every air traveler knows, access to the part of any airport where airplanes are located is strictly limited and monitored; a member of the public must go through a careful screening process before entering most of an airport. "Airports are by nature heavily secured, even more so following the events of September 11, 2011, and one has to expect an airport like Miami International Airport to be . . . protected by tight security measures. These conditions apply equally to visitors, travelers and employees alike and are not simply a function of employment." Appellee's Answer Brief, *Bonilla v. Baker Concrete, Inc.*, No. 06-12515-A (11th Cir.), 2006 WL 2365270 at *20-*21.

The Eleventh Circuit in *Bonilla* explained that it applied a three-part standard in determining whether a particular activity is "so 'integral and indispensable' as to be compensable [under the FLSA]." *Id.* 1344.

Under controlling circuit precedents, one "factor[] to be considered" was "whether the activity primarily benefits the employer." *Id.* It was that specific factor which the Eleventh Circuit concluded was absent in *Bonilla.* "[A]lthough the screening was necessary for the employees to perform their work, [the employer] did not primarily—or even particularly—benefit from the security regime." *Id.*

> The statutory language of the exemptions does not allow for a clean analytical distinction between those activities that are 'integral and indispensable' and those that are not. But it is clear to us from the Act's language and history that the activity in question must work in the benefit of the employer, and that the security screening mandated by the FAA in this case is not compensable work. We therefore hold that the time appellants spend going through the mandatory security screening is not compensable under the FLSA because that screening is not 'integral and indispensable' to the principal activity . . . .

Id. at 1345.[7] The Eleventh Circuit's decision did not establish a general rule that any activity that might be described as a "security screening," cannot be compensable, but was expressly limited to "the security screening . . . in this case." The decision rested on a very specific rationale, the fact that the screening in *Bonilla*—although (like all airport screenings) protecting airplanes

7. *Whalen v. United States,* 93 Fed.Cl. 579, 600 n. 22 (2010), recognized that the absence of any benefit to the employer was the basis for the decision in *Bonilla.*

and passengers by excluding unauthorized personnel and possible weapons or explosives—was of no benefit to a builder whose construction project happened to be located within the airport's security perimeter.

Petitioner asserts that "[s]ecurity screenings of construction workers or warehouse workers plainly do not meet the one relevant test, as the Eleventh Circuit . . . correctly held." (Pet. 22). But the "relevant test" which the Eleventh Circuit held to be unmet in *Bonilla* was the required showing that a disputed activity benefits the employer. The Eleventh Circuit assuredly did not hold that no imaginable screening could ever benefit the employer of any construction or warehouse worker. The complaint in this case alleges that the function of the screening process here is to prevent pilferage of materials in the warehouse; if that is correct—as must be assumed on a motion to dismiss—it surely would benefit the employer. Integrity does not dispute that it benefits from the prevention of such thefts. The Ninth Circuit noted that under its precedents, like those in the Eleventh Circuit, one factor considered in deciding whether an activity is "integral and indispensable" is whether it was "done for the benefit of the employer." (Pet.App. 11 (quoting *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)). It noted that in this case the complaint "alleged [that] the security clearances are . . . done for Integrity's benefit." (Pet.App. 11-12).[8] One

8. Petitioner devotes most of its discussion of *Bonilla* not to discussing the actual reasoning of the Eleventh Circuit, but instead to criticism of the Ninth Circuit's explanation of *Bonilla*.

> The [Eleventh Circuit in *Bonilla*] . . . noted that the security screenings were not for the 'benefit of the employer' because they were 'mandated by the [Federal Aviation Administration],' rather than the

of the amicus briefs filed in support of the petition argues at length that employers have a vital interest in screening that serves that salutary purpose.[9]

(3) Petitioner asserts that the Second Circuit decision in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) held that "security screenings" are never compensable. (Pet. 18-20). That is not correct.

> employer. [487 F.3d] at 1345. The Ninth Circuit seized on the latter fact, finding *Bonilla* to be distinguishable because "the Federal Aviation Administration mandated the security process.' Pet.App. 12.

(Pet. 21). Petitioner attacks this supposed Ninth Circuit analysis, insisting that "[t]he Ninth Circuit's attempted distinction of *Bonilla* would . . . lead to bizarre results." *Id.* 22.

But the Ninth Circuit did not distinguish *Bonilla* on the ground that the screening practice in that case had been mandated by the FAA. The Ninth Circuit actually used the verb "distinguish" in a very different explanation, commenting that *Bonilla* (and the Second Circuit case discussed below) were "distinguishable because, in these cases, everyone who entered the workplace had to pass through a security clearance." (Pet.App. 12). The only reference in the Ninth Circuit's opinion to the FAA occurred, not in its explanation of why the holding in *Bonilla* was inapplicable here, but in its summary of the reasoning in *Bonilla*. "Because the Federal Aviation Administration mandated the security process, the court held that the screening did not benefit the employer." (Pet.App. 12).

9. Brief of the Retail Litigation Center, Inc., Chamber of Commerce of the United States of America, et al., as *Amici Curiae* in Support of Petitioner, 12 ("[E]mployee theft in the retail industry—known in industry parlance as 'shrinkage'—causes billions of dollars in losses each year . . . . To combat employee theft, many retailers use loss-prevention programs that include visually examining employee bags after the conclusion of employee work shifts.").

The plaintiffs in *Gorman* worked at the Indian Point Nuclear Power Plant north of New York City. Security at a nuclear power plant is exceptionally stringent because of concerns about a possible terrorist attack and because of the potential health hazards if workers were accidentally exposed to nuclear contamination. "Indian Point has several layers of security including highly restrictive access that is controlled by state-of-the-art systems. . . . Indian Point is monitored around the clock by well-trained, heavily armed security officers. The plant and property are protected by multiple vehicle barriers, double fencing with razor wire, television surveillance and other high tech security devices. . . . It is designed to safeguard the . . . plant personnel even under extreme and unlikely assault scenarios."[10] Everyone entering the plant site is subject to extensive screening, involving individual identification, inspection of cars (including, at times, inspection of the engine and undercarriage), and passing through a radiation detector, an explosive material detector, and a metal detector. 488 F.3d at 592. Everyone leaving the plant is subjected to a more sensitive radiation test. *Id.*at 592 n.2.[11]

The Second Circuit concluded that these security measures, although indispensable, did not satisfy the "requirement that they be 'integral' [to the employee's principal activities] as well. *Steiner*, 350 U.S. at 256." 488

---

10. http://www.safesecurevital.com/safe-secure-vital/security.html (visited Jan. 4, 2014).

11. "In order to leave the plant, employees and other visitors to the plant would check out, going through the steps of the checking-in process, except for the search, in reverse." Appellee's Brief, *Gorman v. Consolidated Edison Corp.,* No. 2005-6546 (2d Cir.), 2006 WL 6263996 at Statement, part A.

F.3d at 592. The security activities were not "integral" to the jobs of the Indian Point employees, it held, because the security screening was imposed on everyone entering and leaving the plant, including non-employees, and were the same regardless of the job of any particular employee.

> The activities required to enter and exit Indian Point . . . are necessary in the sense that they are required and serve essential purposes of security; but they are not integral to principal work activities. . . . [T]he activities . . . while arguably indispensable, are not integral to their principal activities. . . . At Indian Point, this is easily demonstrated because the security measure at entry are required (to one degree or another) for everyone entering the plant—regardless of what an employee does (servicing fuel rods or making canteen sandwiches)—and including visitors. *See Gorman v. Entergy,* No. 04 Civ. 8484 (S.D.N.Y. filed Apr. 17, 2006) (citing plaintiffs' memorandum in opposition to defendant's motion to dismiss).

488 F.3d at 594. The district court decision in *Gorman*, cited by the court of appeals, made the same point.

> Plaintiff . . . has not presented any arguments or facts from which this court could find that Plaintiff has a unique situation where these preshift activities are so directly related to his specific work that they are an integral part of his principal activity. Notably, Plaintiff's complaint does not even mention what kind of work Plaintiff does at IPEC. . . .This conclusion is strengthened by the fact that all people who

> enter the plant, visitors and employees alike, must go through the same process that Plaintiff does.

Memorandum Decision, April 17, 2006, p. 5 (Doc. 55; Case 7:04-cv-08484-SCR, S.D.N.Y.). The employer in *Gorman* had relied heavily on this same argument, pointing out that the security activities could not be integral to a worker's particular primary job because the identical screening was imposed on all workers, regardless of their particular jobs, as well as on non-employees.[12]

Petitioner dismisses the Second Circuit's actual explanation of its decision. "The Second Circuit noted at the very end of its discussion that its holding was bolstered

---

12. Appellee's Brief, *Gorman v. Consolidated Edison Corp.*, No. 2005-6546 (2d Cir), 2006 WL 6263996 at Statement, part A ("anyone entering the plant (employee and nonemployee alike) . . . go[es] through a checking-in process . . . . In order to leave the plant, employees and other visitors to the plant would . . . go[] through the steps of the checking-in process"), text following n. 30 ("[T]he undisputed fact that everyone—and non-employees alike--. . . go[oes] through security in order to gain admittance to the plant undermines Plaintiffs' argument that the procedures were integral to their principal work activities."), n. 27 ("these procedures were followed by everyone who entered and exited the plant, including non-employees").

The court relied on the same reasoning in *Whalen v. United States*, 93 Fed.Cl. 579, 600 (2010)("The security activities for which plaintiffs seek compensation, although necessary for them to travel to [their offices at Edwards Air Force Base], are not integral and indispensable to their principal activities as air traffic controllers . . . . [T]he security inspections . . . apply to everyone who enters and exits Edwards AFB, whether to work at [the plaintiffs' offices] or elsewhere, or merely to visit persons who live on base.").

by the fact that 'everyone entering the plant' was subject to security screening. [488 F.3d] at 594. But that fact was not remotely dispositive to the court's decision—after all, a nuclear plant does not entertain an abundance of non-employee visitors. There is no question that Respondents' FLSA claims would have been dismissed under the Second Circuit's reasoning in *Gorman*." (Pet. 19-20).[13] But while petitioner may think that the reference to plant visitors was so silly that it cannot really have been a basis of the decision in *Gorman*, the Second Circuit itself believed this was a compelling consideration, as did the district court and the employer in that case. The Second Circuit's argument that the Indian Point practice applied to all visitors, as well as to the large number of employees (such as "canteen workers") who had no access to radioactive material, *is* the "reasoning in *Gorman*"; it clearly does not apply to the activities of respondents in the instant case. The complaint in this case does not suggest, and Integrity does not claim (as it could not in support of a motion to dismiss under Rule 12(b)(6)), that visitors to the Nevada warehouses (for example, UPS deliverymen) or all workers there (e.g., a bookkeeper who ordinarily has no

13. Petitioner does not point to anything in the opinions or record in *Gorman* to support its assertion that there are not visitors to the plant. In fact the plant frequently entertains visitors in an apparent attempt to convince the public that the sometimes controversial facility, located near New York City, is perfectly safe. For example, in 2007, following such a visit, Paul Newman issued a statement that "What I saw exceeded my expectations. No Army or Navy based I've ever visited has been more armored, and I couldn't walk 30 feet inside the plant without swiping my key card to go through another security checkpoint." See http://usatoday30.usatoday.com/life/people/2007-05-23-paul-newman_n.htm, last visited Jan 9, 2014.

access to the merchandise in the warehouse) are subject to the extensive anti-theft searches in question.

Petitioner insists that the security screening at Indian Point must actually have been adopted because of the nature of the employees' work, and that the Second Circuit must thus have meant that even security screening that *is* adopted because of the nature of an employee's work is noncompensable.

> The Ninth Circuit also asserted that the security screenings in *Gorman* were not put in place because of 'the nature of the employees' work.' Pet.App.12. That is nonsensical. Employees at the nuclear plant were required to pass through a 'radiation detector, x-ray machines, and explosive material detector' before entering *or exiting* the plant. 488 F.3d at 592. The self-evident purpose of those screenings was to prevent employees from smuggling hazardous materials into or out of the site—materials to which the employees only had access because of the 'nature' of their work.

(Pet. 20)(emphasis in original). But the decision in *Gorman* says no such thing; indeed, one of the Second Circuit's key points is that the searches applied even when "what an employee does [is] mak[e] canteen sandwiches," 488 F.3d at 594, a task that would not give the worker access to any hazardous materials. The searches of individuals entering the plant were aimed at detecting weapons or explosives; those are not items which to employees "only had access because of the 'nature' of their work." Only the armed Indian Point guards would had have access at

work to weapons, and there is no indication that explosives were kept at the plant; both guns and explosives, on the other hand, are available to members of the public from sources outside the plant. The manifest purpose of the radiation screening was to detect accidental leaks and contamination; a worker who attempted to smuggle out a piece of a nuclear fuel rod (assuming it was even physically possible for any worker to access such lethal material) would suffer radiation poisoning that would cause a quick and painful death. At a nuclear power plant, highly enriched uranium is not, like the merchandise on the shelves of an Amazon.com warehouse, just lying around on an open shelf where any of hundreds of employees could just slip some into his or her pocket.

Petitioner repeatedly asserts that *Gorman* holds that "security-related activities" can never be compensable, relying on a particular (notably edited) passage from that opinion. "[T]he Second Circuit has emphasized that 'security-related activities' are '*modern paradigms* of the [non-compensable] preliminary and postliminary activities described in the Portal-to-Portal Act.'" (Pet. 4-5)(quoting *Gorman*)(emphasis added in petition). "The Second Circuit emphasized that 'security-related activities' are 'modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.' [488 F.3d at 593]" (Pet. 18). "[T]he Second Circuit's core holding was that security screenings are '*modern paradigms*' of preliminary or postliminary activities because—even though they may be 'required' for a particular position--they are inherently distinct from the employees' primary job duties." (Pet. 19)(emphasis added in petition). In its parsing of the *Gorman* opinion, the petition suggests that the court of appeals was referring to

"security-related screenings" (or "security screenings") in general, not to any particular type of screening. But in the actual opinion, the Second Circuit's description ("modern paradigms . . . ") is a characterization only of the specific practice at the Indian Point Nuclear Power Plant, *not* of all security-related screenings. "The activities required to enter and exit Indian Point . . . are not integral to principal work activities. *These* security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act . . . ." 488 F.3d at 593 (emphasis added). By omitting the critical limiting adjective "these" from the quoted portion of the Second Circuit opinion, the petition fundamentally changes the meaning of that opinion, from a holding that was actually only about the specific steps taken at Indian Point to a far more sweeping per se rule that any "security-related screening" could not be integral to a worker's primary job.

II. THE NINTH CIRCUIT'S APPLICATION OF ESTABLISHED LEGAL PRINCIPLES TO THE PARTICULAR CIRCUMSTANCES OF THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT

(1) The court of appeals concluded that under the particular facts of this case the time spent by workers participating in the anti-theft searches was indispensable and integral to their primary duties, and thus compensable. Petitioner contends that the Ninth Circuit erred in reaching that conclusion, and that it misapplied the well-established "integral and indispensable" standard. But even if that were so, it would not warrant review by this Court. Petitioner does not suggest that there is a

circuit split regarding whether participation in *anti-theft searches* is compensable activity under the FLSA. To the contrary, this is the first and only appellate decision to face and resolve that questions. This Court does not grant review to address fact-bound claims of error in the application of established legal standards.

(2) The Ninth Circuit correctly held that the anti-theft searches in which workers were required to participate were directly connected and integral to their primary responsibilities. "As alleged, the security clearances are necessary to employees' primary work as warehouse employees . . . . Integrity allegedly requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." (Pet.App. 11-12).[14] The requirement that warehouse workers devote time to participation in the anti-theft searches was clearly tied to their particular jobs. There is no claim that Integrity requires employees who do not have access to such merchandise—such as computer operators at a warehouse, or lawyers and accountants at Integrity's headquarters—to submit to such searches.

Integrity argues that the sole primary duty of the warehouse workers is to fill orders from Amazon.com

14. The complaint alleged that "[t]he search was to prevent employee theft, and it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse other than in the ways proscribed by the company. In fact, not contributing to 'shrinkage' and abiding by company procedures for inventory control is an integral aspect of the Plaintiffs' job." First Amended Collective and Class Action Complaint, ¶ 15.

customers. But the workers assuredly had other duties, and were subject to other directives, governing the period when they were filling those orders. Employees were doubtless required to avoid breaking merchandise, to wrap and box merchandise in a manner that would assure it arrived safely, to avoid unsafe actions (such as climbing up a ladder in a reckless manner), and—of course—to refrain from putting in their pockets (or otherwise secreting on their persons) merchandise to take home at the end of the day.

Integrity argues that once workers left the part of the warehouse with merchandise and headed for the exits, the productive part of their day had ended. But employers commonly require end-of-shift activities that serve to ensure that earlier on-shift conduct was properly carried out. For example, a worker might be required to review paperwork (or computer records) to check that he or she had in fact properly filled every order; that would not be productive in the same sense as the filling of the order itself, but it would be an important after-the-fact step that was ancillary and necessary to ensuring the earlier activities were performed as required. Similarly, workers might be directed to file at the end of the day reports about breakage or accidents. These activities too would certainly be integral to their duties earlier in the day. Participating in an end-of-shift anti-theft search is in a similar fashion integral to a worker's on-shift duty to refrain from taking Amazon merchandise; it assures that the on-shift activity was properly carried out. Such searches are also directly related to the work of warehouse employees in filling orders, because if merchandise were improperly removed by workers, warehouse employees would subsequently be unable to fill some orders because (unbeknownst to Integrity and Amazon) there would not be sufficient inventory.

Preventing and detecting theft is not a revenue generating activity, but it assuredly is "work of consequence." Integrity obviously has to pay the guards who conduct these searches. For example, if a guard opened up a worker's bag and put the contents on a table to be examined, that clearly would be a compensable activity. The activity remains compensable if the employer required the worker—rather than the guard—to do the same thing. Similarly, just as the action of a guard in patting down a worker to check for items in the worker's pockets would be compensable, so too is the action of the worker in removing those items from his or her pockets so that they can be inspected by a guard. The time that a worker would spend walking through a metal detector is just as compensable as the time a guard would spend achieving the same thing by "wanding" a worker with a metal detector.

(3) Petitioner correctly observes that under the Portal-to-Portal Act a worker is not entitled to compensation "for activities that had nothing to do with [an employee's] actual job duties." (Pet. 13; see *id.* at 22 (worker not entitled to compensation "[i]f a security screening is unrelated to the specific tasks for which a worker is employed . . . ."), 25 (no compensation for tasks "that had nothing to do with their actual job duties")). But the anti-theft searches in this case unquestionably had something—indeed everything—to do with the plaintiffs' job duties. A worker's actions are not compensable if engaged in as "merely a convenience to the employee and not directly related to his principal activities," 29 C.F.R. § 790.8(c); but Integrity obviously was not searching the plaintiffs—and imposing a 25 minute delay—for the employees' personal convenience.

Integrity criticizes the Ninth Circuit's application of the "indispensable and integral" standard to the particular circumstances of this case. "The Ninth Circuit suggested 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. . . . [T]he Ninth Circuit's reasoning proves far too much: such quintessential preliminary and postliminary activities as the need to shower or change clothes may 'stem[] from the nature of the employees' work,' and yet such tasks are clearly non-compensable." (Pet. 14). To the contrary, changing clothes and showering can be compensable under appropriate circumstances. Those very circumstances were present in *Steiner*, which held that clothes changing and showering were indeed compensable activities at the plant in question. "[I]t would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Steiner*, 350 U.S. at 256. [15]

Petitioner also argues that an activity can be "integral" to a principal activity if only "the work *could not be done* without it." (Pet. 18-19 (emphasis in original)). But in *Steiner* it certainly would have been possible for the employees do their jobs operating the plant there in question without putting on the "old . . . clean work

15. *See* 350 U.S. at 252 ("petitioners have equipped [the plant] with shower facilities and a locker room with separate lockers for work and street clothing. Also, they furnish without charge old but clean work clothes which the employees wear. The cost of providing their own work clothing would be prohibitive for the employees, since the acid causes such rapid deterioration that the clothes sometimes last only a few days.")

clothes" provided by the employer or without taking showers at the end of the day. 350 U.S. at 252. Similarly, in *IBP* the Court upheld the compensation claims of workers at a meatpacking plant who had to put on items such as chain link aprons, hardhats, hairnets, earplugs, vests, leggings, armguards and gloves. 546 U.S. at 30. It is obviously possible to slaughter or butcher a cow or pig without putting on such safety gear; human beings have been doing so for thousands of years, and continue to do so today in countries which lack modern safety standards.

Petitioner notes that in *IBP* the Court held that the workers were not entitled to compensation for time spent at the beginning of the day waiting to don that safety gear. (Pet. 9, 16). But that waiting time was noncompensable because it occurred at the beginning of the workday, prior to the first compensable activity—the donning of the gear. 546 U.S. at 38-42. Waiting time that occurs after the first principal activity, but before the last principal activity, *is* compensable under the continuous workday rule. For that reason, the employer in *IBP* did not dispute its liability for time workers spent at the end of the day waiting to take off the safety gear. In the instant case the time workers spend waiting for the anti-theft search is indistinguishable from the time workers in *IBP* spent at the end of the day waiting to doff their safety gear.

III. THIS CASE PRESENTS NO IMPORTANT ISSUE WARRANTING REVIEW BY THIS COURT

(1) The petition greatly overstates the importance of this case. The Ninth Circuit decision would not affect the vast majority of the "security screenings" in the United States. Most of those screenings (as in *Bonilla* and

Gorman) are required of everyone entering an office or plant, and have nothing to do with what job an individual has or whether the screened individual is an employee at all. The U.S. Chamber of Commerce notes that for "most employers doing business in high-security environments (*e.g.,* airports, skyscrapers, and government buildings) . . . [the] security perimeters . . . usually coincide with a building's or a facility's physical boundaries."[16] Those are precisely the screenings that clearly would not be compensable under the decision below. The amicus brief filed by several municipal organizations asserts that "[t]he Ninth Circuit's decision requires some [government] employees to be compensated" for time passing through screenings at government buildings established to "ensur[e] the safety and security of important government assets and deterring workplace violence."[17] But that brief does not even attempt to explain how the Ninth Circuit decision could possibly be interpreted to apply in such situations, and the petition does not claim that it would. Without question submitting to the commonplace searches at the entrances of government buildings would not be compensable activity under the standard in any circuit.

Even where a particular screening is indispensable and integral to a principal activity under the Ninth Circuit decision, the affected employees often still would not be entitled to compensation. The screenings themselves ordinarily take well under a minute; an

16. Brief of the Retail Litigation Center, Inc., Chamber of Commerce of the United States, et al, as *Amici Curiae* in Support of Petitioner, 12-13.

17. Brief for *Amici Curiae* International Municipal Lawyers Ass'n, et al., in Support of Petitioner, 23.

activity of such brief duration would be de minimis and thus noncompensable. Screening-based FLSA claims have routinely been dismissed on that basis. *E.g., Alvarado v. Costco Wholesale Corp.*, 2008 WL 2477393 (N.D. Cal. June 18, 2008). In the instant case, for example, the workers also went through some form of "security clearance" on the way to lunch. Because (unlike the end-of-shift search) the workers were not subject to significant delays awaiting that screening, the Ninth Circuit held that this claim was properly dismissed, reasoning that "[t]he relatively minimal time extended in this context differs from the 25-minute delay alleged for employees passing through security at day's end." (Pet.App. 16). In the instant case the de minimis rule did not apply to the post-shift anti-theft search process because Integrity required the warehouse workers to endure a truly extraordinarily lengthy 25 minute delay just to leave the building where they worked. The brief filed by the Chamber of Commerce is notable for what it does *not* say in this regard; the major national business organizations which submitted that brief at no point suggest that employers commonly engage in that sort of abusive practice. Indeed, the brief does not assert that any of the 300,000 members of the United States Chamber of Commerce, or any of the thousands of members of the National Association of Manufacturers, treat their employees in that manner. The Chamber does argue that, if an employer's current practices did fall within the scope of the Ninth Circuit decision, it might be difficult to restructure a facility to put the time clock at a location past where the screenings occur.[18] But such an employer could avoid liability by doing what most employers probably already do: hire enough screeners that

18. *Id.* 12-13.

departing workers do not endure more than de minimis delays, or stagger the times when shifts end in order to avoid significant delays.

Petitioner argues that the Ninth Circuit's decision has disrupted what until now was "a settled area of the law." (Pet. 5). But that assertion rests on petitioner's contention that *Bonilla* and *Gorman* adopted a per se rule that all forms of screening are noncompensable. As we explained above, neither the Second Circuit nor the Eleventh Circuit adopted such a rule. The compensability of time spent during post-shift anti-theft searches is assuredly not a "settled area of the law." To the contrary, the Ninth Circuit decision in this case is the first appellate case ever to address that issue.

Petitioner urges this Court to grant review to establish a "uniform rule" governing the type of security screening at issue in this case, arguing that firms which do business in several circuits need this Court to create a definitive national rule. (Pet. 5, 23, 28). But there is no circuit conflict about that issue. It assuredly is not the practice of this Court to grant certiorari as soon as the first decision regarding any question of substantive federal employment law is decided by any court of appeals. Moreover, because at least virtually all states have their own statutes imposing some form of overtime compensation obligation, national firms will always be subject to varying standards. For example, the California statute regarding overtime is clearly broader than the FLSA, treating as compensable the entire period when a worker is under the "control" of an employer, regardless of what (if anything) he or she may be doing. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 586 (2000). For that reason, in California a worker is

entitled to compensation for any time during (or waiting for) a post-shift screening, regardless of whether the screening would be compensable under the FLSA. See *Cervantez v. Celestica Corp.*, 618 F.Supp. 2d 1208, 1218-19 (C.D.Cal. 2009).[19] Similarly, Nevada has not adopted provisions like those in the federal Portal-to-Portal Act.

(2) Petitioner's assertion that in the wake of the Ninth Circuit "plaintiffs are already flocking to the Ninth Circuit to obtain a favorable forum for FLSA claims . . . for time spent in security screenings" (Pet. 23) is similarly overstated.[20]

The petition asserts that in the instant case "[r]espondents have now expanded their complaint from warehouses in Nevada" to employees "throughout the United States." (Pet. 27). But the earlier complaint in this action, filed in 2010, already was framed as a nationwide collective action. First Amended Collective and Class Action Complaint, ¶ 21 ("[a]ll persons employed by Defendant as hourly warehouse employees within the United States").

---

19. In the instant case the parties litigated, but the court of appeals did not decide, whether Nevada would interpret its own overtime compensation statute in the same manner as the California statute. See Opening Brief of Appellants Jesse Buck and Laurie Castro, 2011 WL 9684071 at 36-38.

20. As we explained above, FLSA actions are opt-in collective actions, not Rule 23 opt-out class actions. Petitioner does not claim that any workers have yet opted in to any of the actions to which they refer.

Similarly, the petition asserts that "since the decision below was issued, plaintiffs' lawyers have brought [a] nationwide class action[] against . . . CVS." (Pet. 5). Petitioner elsewhere in the petition concedes that the suit against CVS was actually filed in September 2012, prior to the Ninth Circuit decision, but asserts that "[t]he plaintiffs have now filed an amended complaint in which they seek damages on behalf of a nationwide class of employees at CVS distribution centers." (Pet. 26). In fact, however, the original suit filed prior to the Ninth Circuit decision was already a collective action seeking joinder of CVS employees "[n]ationwide." *Ceja-Corona v. CVS*, 2013 WL 796649 at *2 and *9 (Mar. 4, 2013). The plaintiffs in *Ceja-Corona* filed an amended complaint only because, in the wake of the decision below, the district court dismissed the original complaint on the ground that its allegations were insufficient under the Ninth Circuit decision in the instant case. *Id.* *7-*9.

The suits against *Amazon.com* relied on by petitioner (Pet. 27 n. 4) largely overlap with the nationwide claim already asserted in the instant lawsuit, which was of course filed several years before the Ninth Circuit decision. The fact that some actions are being filed in federal courts in California is doubtless the result of the fact that California's overtime statute is more favorable to plaintiffs than is the FLSA.[21]

A majority of the new lawsuits cited in the brief of the International Municipal Lawyers Association were

21. For example, the complaint in *Frelkin v. Apple, Inc.,* No. 13-cv-3451-WHA (N.D.Cal.), in addition to raising claims under the FLSA, asserts claims under the California statutes and requests certification of a class of consisting of California employees. Plaintiffs' First Amended Complaint, 15-17, 37-38.

actually filed in district courts outside the Ninth Circuit.[22] It would be appropriate to let this issue percolate in the lower courts, to permit them to air the various issues raised by anti-theft searches and screening, and to allow the development of factual records revealing the actual nature of these practices. It is unclear, for example, whether lengthy pre-screening delays are sufficiently common that the compensability of anti-theft searches and screening is an important and recurring issue. Future clarification of the standards under governing state laws may limit the significance of the FLSA's own requirements.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

MARK R. THIERMAN
Counsel of Record
JOSHUA D. BUCK
THIERMAN LAW FIRM, P.C.
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500
mark@thiermanlaw.com

Counsel for Respondents

22. Brief for *Amici Curiae* International Municipal Lawyers Ass'n., et al., in Support of Petitioner, 16.