NO. _____

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

PETITION FOR WRIT OF CERTIORARI

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October 3, 2013

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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PETITION FOR WRIT OF CERTIORARI

Petitioner Integrity Staffing Solutions, Inc. ("Integrity") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

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. Integrity filed a timely petition for panel rehearing and rehearing en banc, which the court denied on June 3, 2013. Pet.App.18. On August 12, 2013, Justice Kennedy extended the time for filing this petition to and including October 3, 2013. *See* No. 13A165. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Portal-to-Portal Act of 1947, 29 U.S.C. § 254, and the Department of Labor's regulations, 29 C.F.R. § 790.7, are reproduced at Pet.App.36-45.

INTRODUCTION

In the decision below, the Ninth Circuit disregarded the plain text of the Portal-to-Portal Act of 1947 and this Court's precedents and, in doing so, departed from an unbroken line of authority holding that employees are not entitled to compensation

under the Fair Labor Standards Act ("FLSA") for time spent in security screenings. Certiorari is warranted to resolve this circuit split on a question of national importance. Indeed, the Ninth Circuit's decision has *already* resulted in a spate of new nationwide class-action suits against major employers seeking back pay for time spent in security screenings. If allowed to stand, the decision below will result in massive retroactive liability for employers, and will fundamentally upend the careful balance struck by Congress in the FLSA and Portal-to-Portal Act.

* * *

The 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," holding that employees must be compensated for all time *spent on the employer's premises*, even if they were not engaged in productive work. Those decisions resulted in a flood of litigation in which employees sought billions of dollars of back pay for activities such as walking from the parking lot to the workplace, punching in and out, and changing clothes.

Congress responded with the Portal-to-Portal Act of 1947, which makes clear that the FLSA does not apply to activities that are "preliminary" or "postliminary" to an employee's primary job responsibilities. 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).

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 to fill orders placed by Amazon.com customers. After punching out at the end of their shifts, Respondents were required to go through a short security screening in which they removed personal belongings 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 in 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 walking through a security screening was not "integral and indispensable" to Respondents' principal activities of "fulfilling online purchase orders." Pet.App.27. But, 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 were performed "for Integrity's benefit." Pet.App.11-12.

* * *

The Ninth Circuit's decision cannot be squared with the plain text of the Portal-to-Portal Act and this Court's decisions interpreting that statute. Security screenings are a paradigmatic example of an activity that is non-compensable because it is "preliminary" or "postliminary" to employees' primary job duties. Respondents were employed to process and fill online orders, and the security screenings took place after the productive work for which they were employed had been completed. Security screenings are 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, waiting to pick up a paycheck, or waiting to pick up protective gear before donning it for a work shift. All of these activities are "required" in a broad, but-for sense, but they are not compensable under the FLSA because such tasks are fundamentally distinct from employees' actual *job duties*. *See*, *e.g.*, 29 C.F.R. § 790.7(f)-(g); *IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005).

The Ninth Circuit's decision conflicts with decisions from the Second and Eleventh Circuits holding that, under the FLSA and Portal-to-Portal Act, employees are *not* entitled to compensation for time spent in security screenings. *See Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007); *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007). Indeed, the 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." *Gorman*, 488 F.3d at 593 (emphasis added).

It is critically important that this Court resolve the split by reversing the decision below. If allowed to stand, the Ninth Circuit's decision threatens to impose massive retroactive liability on employers, and to render the Portal-to-Portal Act—which was enacted to *prevent* an unduly expansive application of the FLSA—largely toothless. This is not hyperbole or speculation. In the six months since the decision below was issued, plaintiffs' lawyers have brought nationwide class actions against a number of major employers—including Apple, Amazon.com, and CVS—seeking back pay (plus overtime and penalties) for time spent in security screenings. Because of the ease with which nationwide FLSA class actions can be brought, the Ninth Circuit's decision threatens to become the *de facto* national standard. But, especially given the conflicting decisions of the Second and Eleventh Circuits, this Court, and not the Ninth Circuit, should establish the national standard.

Moreover, because the Ninth Circuit's decision was a dramatic change in what had been a settled area of the law, employers across the country face the prospect of massive retroactive liability. Under these circumstances, certiorari is plainly warranted so that this Court can establish a uniform rule on this important issue.

STATEMENT OF THE CASE

A. The Fair Labor Standards Act and Portal-to-Portal Act

1. The FLSA was enacted 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," S. Rep. No. 75-884, at 3 (1937), 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. 81-640, at 3 (1949).

The FLSA pursued these objectives by establishing "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." S. Rep. No. 75-884, 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 forty hours in a given "workweek" were entitled to time-and-one-half pay for those additional hours. *See* 29 U.S.C. §§ 206, 207.

Because the FLSA does not define the critical terms "work" and "workweek," disputes quickly arose over what types of activities were covered by the statute. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 683 (1946), employees at a dishware factory argued that the FLSA required compensation for

activities such as: waiting in line to punch in and out, walking between the time clock and the work stations, putting on aprons and overalls, and preparing work areas for the start of production. This Court largely agreed, holding that, "[s]ince the statutory workweek includes *all time during which an employee is necessarily required to be on the employer's premises* . . . , the time spent in these activities must be accorded appropriate compensation." *Id.* at 690-91 (emphasis added).

Justices Burton and Frankfurter dissented. In reasoning that would later be reflected in the Portal-to-Portal Act, 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." 328 U.S. at 697. They further concluded that "the obvious, long established, and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. *Id.* That is, "[t]hese items are appropriate for consideration in collective bargaining." *Id.*

2. In the wake of *Mt. Clemens*, the courts were flooded with claims seeking billions of dollars of compensation for similar "preliminary" and "postliminary" activities. 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." *Id.* (emphasis added).

In May 1947, Congress enacted the Portal-to-Portal Act in response to this "disregard of long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). Congress found 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." *Id.*

The Portal-to-Portal 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 makes clear 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).

In construing the Portal-to-Portal Act, this Court held in 1956 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." *Steiner*, 350 U.S. at 256. Applying that longstanding rule, this Court unanimously held in 2005 that time spent waiting to obtain protective equipment before donning it at the beginning of a shift was not compensable under the FLSA. *See IBP*, 546 U.S. at 40-41. The Department of Labor has also promulgated regulations further clarifying the meaning of "preliminary" and "postliminary" activities. Under those 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).

B. 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. At the end of their shifts, Respondents would leave their work stations, punch out on the time clock, and then walk through a security screening located near the exit of the

warehouse. During the screening process, Respondents would remove their wallets, keys, and other items from their pockets, then walk through a metal detector.

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 passing through security screenings violated the FLSA and parallel provisions of Nevada law. *See* Amended Complaint, *Busk v. Integrity Staffing Solutions*, No. 2:10-cv-1854 (D. Nev. Dec. 15, 2010).[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." *Id.* ¶ 38. 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.

Integrity filed a motion to dismiss for failure to state a claim, which the district court granted on July 19, 2011. 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

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[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.

activity of the employment." Even though the screenings were "mandatory for all employees" and could allegedly take up to 25 minutes, the court found 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 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.

C. The Ninth Circuit's Decision

Respondents appealed and 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. The court noted that "Integrity requires the security screenings," and 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 court thus concluded that "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 airports and power plants, 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.*

Integrity filed a timely petition for panel rehearing or rehearing en banc, arguing that the panel's decision misconstrued the Portal-to-Portal Act and conflicted with decisions from other circuits. The Ninth Circuit denied the petition on June 3, 2013. Pet.App.18. On August 12, 2013, Justice Kennedy extended the time for filing this Petition to and including October 3, 2013. *See* No. 13A165.

REASONS FOR GRANTING CERTIORARI

This case presents an ideal opportunity for 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. That issue is squarely presented, outcome determinative, and of enormous practical importance. Certiorari is warranted to resolve this circuit split and prevent the

Ninth Circuit's expansive interpretation of the FLSA from creating massive retroactive liability for employers and fundamentally upending the careful policy balance struck by Congress.

I. The Ninth Circuit's Decision Is Clearly Wrong And Conflicts With The Decisions Of Two Other Courts Of Appeals.

A. The Ninth Circuit Badly Misconstrued the Portal-to-Portal Act and This Court's Precedents.

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 had nothing to do with their actual job duties. *See* 29 U.S.C. § 251. The relevant provision of the Act expressly excludes two 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." 29 U.S.C. § 254(a).

In construing the meaning of "preliminary" and "postliminary" activities, this Court has held that an activity is subject to the FLSA 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" 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 also 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."). Thus, preliminary and postliminary activities are compensable under the FLSA only if they are integral and indispensable to the productive work the employee was hired to perform.

Pre- or post-shift security screenings plainly do not meet that standard, as the district court correctly recognized. *See* Pet.App.27-28. Respondents were hired to be warehouse workers, and the "principal activities for which [they] were employed" involved retrieving items from inventory to fill online orders. The security screenings occurred off the warehouse floor *after* Respondents' productive work had been completed, and were in no way "indispensable" to their principal job duties. 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. But Respondents' "work of consequence" and "productive work," *see* 29 C.F.R. § 790.8, involved *filling customer orders*, not some abstract "access to merchandise."

What is more, the 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. What matters is not whether the activity merely "stems from" the employees' principal work (a test seemingly designed to impermissibly capture activities that flow from, but are only

tangentially related to, the employees' principal activities), but whether they are "integral and indispensable to the employees' principal productive work.

The Ninth Circuit badly misconstrued the "integral and indispensable" standard to reach its result that security screenings are compensable. The court found that standard to be satisfied here because Integrity "requires" security screenings, which are "done for Integrity's benefit." Pet.App.11-12. To be sure, the screenings are "required" in a broad, but-for sense because Integrity will not employ a worker who refuses to undergo security screenings, any more than other employers might refuse to employ a worker who refuses to stand in line to clock in and out. But the Portal-to-Portal Act requires more than but-for necessity—the question is not simply whether the employer "requires" the activity in question, but whether it is integral to the *principal job duties* the worker is employed to perform. *See Steiner*, 350 U.S. at 256.

This Court has squarely rejected the use of a simple but-for test in determining the scope of the Portal-to-Portal Act. 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 thus 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 these tasks in order to perform their jobs. *Id.*

Indeed, the Ninth Circuit's approach 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." 328 U.S. at 690-91 (emphasis added). That is strikingly similar to the standard the Ninth Circuit applied in this case—whether the activity in question was "require[d]" by the employer and "done for [the employer's] benefit." Pet.App.11-12. The express purpose of the Portal-to-Portal Act was to *repudiate* the *Mt. Clemens* decision, yet the decision below reads as if *Mt. Clemens* were still governing law.

The Ninth Circuit's interpretation of the Portal-to-Portal Act also conflicts with the Department of Labor's ("DOL's") regulations. Countless employers "require" hourly employees to punch in and out on a time clock, and this task is unquestionably done for the "benefit" of the employer (to ensure accurate recordkeeping and prevent cheating). Thus, under the Ninth Circuit's approach to "preliminary" and "postliminary" activities, time spent waiting to punch the clock would be compensable under the FLSA. But it is well-established under DOL's regulations that "checking in and out and waiting in line to do so" is not covered by the FLSA because it is not integral or indispensable to the employee's actual *job duties*. 29 C.F.R. § 790.7(g). The Ninth Circuit did not even cite this regulation, much less offer a principled

reason for distinguishing between time waiting in a security screening and time waiting to punch the clock at the beginning or end of the day.[2]

* * *

In sum, walking through a security screening is no more integral or indispensable to warehouse work than time spent commuting, walking from the parking lot to the workplace, waiting to pick up protective gear, or waiting in line to punch the time clock. All of those activities may be "necessary" in a broad, but-for sense of the word, but none is compensable under the FLSA. The express purpose of the Portal-to-Portal Act was to *exclude* from the FLSA preliminary or postliminary activities that are not integral to the employee's core job functions, and security screenings fall comfortably within that class of activities. *See* Pet.App.27-28 (district court holding that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out"). This Court should not allow the Ninth Circuit to override Congress' explicit policy choice through a cramped construction of "preliminary" and "postliminary" activities.

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

B. The Ninth Circuit's Decision Conflicts With Decisions of the Second and Eleventh Circuits.

The Ninth Circuit is the only federal court to have held that time spent in security screenings is compensable under the FLSA. Although the court attempted to distinguish conflicting authority from the Second and Eleventh Circuits, *see* Pet.App.12, there is no question that those cases are irreconcilable with both the reasoning and outcome of the Ninth Circuit's decision in this case.

1. In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), the Second Circuit held that time spent by nuclear-plant employees in "ingress and egress security procedures" was not covered by the FLSA. The court 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 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." *Id.* As the court explained, security screenings are far afield from the types of preliminary and postliminary activities that have been found compensable under the FLSA, such as a butcher sharpening his knife and an x-ray technician powering up and testing the machinery. *Id.* at 592. In each of those situations, the activity is integral to the employee's productive work, as the work *could not be done* without it. But that is not remotely the

case with pre- or post-shift security screenings. Indeed, 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.

The Second Circuit acknowledged that "security measures at sensitive facilities (and elsewhere) are becoming increasingly invasive, layered, and time-consuming," and that such measures "may not have been envisioned" when the FLSA and Portal-to-Portal Act were enacted. *Id.* at 593. But, under the plain text of those statutes, the court had little difficulty concluding that security screenings are not "principal activities of the employment," even though they may "lengthen the trip to the job-site." *Id.* at 594.

In its brief discussion of *Gorman*, the Ninth Circuit claimed that the case was distinguishable because "everyone who entered the workplace had to pass through a security clearance." Pet.App.12. But the 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. 488 F.3d at 593-94 (emphasis added). The Second Circuit noted at the very end of its discussion that its holding was bolstered by the fact that "everyone entering the plant" was subject to a security screening. *Id.* 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*.

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 machine, 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. Unlike the Ninth Circuit, however, the Second Circuit correctly concluded that the FLSA does not apply to such screenings because they are not a consequential component of the plaintiffs' actual job duties.

2. In *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit similarly held that "time spent going through security screening" was not compensable under the FLSA. The plaintiffs were construction workers at Miami International Airport who "were required to pass through a single security checkpoint" in order to "reach their work sites inside the airport." *Id.* at 1340-41. Like Respondents in this case, 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.

The Eleventh Circuit squarely rejected that interpretation of the FLSA and Portal-to-Portal Act. As the court explained, "[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." *Id.* The court refused to allow the plain text of the Portal-to-Portal Act to be "swallowed by an all-inclusive definition of 'integral and indispensable.'" *Id.* The court also 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 employer. *Id.* 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. But nothing in the text of the Portal-to-Portal Act creates a separate rule for preliminary or postliminary activities that are mandated by the government. Under 29 U.S.C. § 254(a) and this Court's precedents, the sole inquiry is whether the activity was integral and indispensable to the employee's principal job duties. *See Steiner*, 350 U.S. at 256. If the activity is integral and indispensable, it is compensable under the FLSA even if it is also mandated by government regulation. If the activity is not integral and indispensable, it is not compensable, again without regard to whether it is mandated by government regulation. Security screenings of construction workers or warehouse workers plainly do not meet

the one relevant test, as the Eleventh Circuit, but not the Ninth Circuit, correctly held.[3]

The Ninth Circuit's attempted distinction of *Bonilla* would also lead to bizarre results. Under the court's reasoning, time spent in security screenings would be compensable under the FLSA for a worker in an Amazon.com warehouse but not for a worker at a cargo warehouse located on airport grounds. That makes no sense. If a security screening is unrelated to the specific tasks for which a worker is employed, then it is not subject to the FLSA, regardless of whether the screening was the product of a government mandate or a private company's own prerogative.

* * *

As the law currently stands, security screening time is compensable under the FLSA in the Ninth Circuit, but not in the Second and Eleventh Circuits.

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[3] At least three district courts have applied *Bonilla* to privately imposed security screenings, holding that the fact the screenings in *Bonilla* were government-imposed was *not* a plausible basis for distinguishing the case. *See Sleiman v. DHL Express*, No. 09-0414, 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," regardless of whether they imposed by "federal mandate" or a private company); Mem. & Order at 7, *Jones v. Best Buy Co.*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) (noting that the decision in *Bonilla* "[did] not turn on the source of the mandate," and that the reasoning of *Bonilla* and *Gorman* applies with full force to "employer-driven security measures"); *Anderson v. Perdue Farms*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (holding, based on *Bonilla* and *Gorman*, that employees of a privately owned chicken plant were "not entitled to compensation for . . . time spent clearing security").

A two-to-one split over the meaning of a federal statute would be an intolerable state of affairs under any circumstances, but the need for a uniform rule in this case is imperative given that numerous employers—including Integrity—operate within jurisdictions on both sides of the split. Because of the availability of nationwide FLSA class actions, the most plaintiff-friendly jurisdiction will effectively be able to establish the substantive law that governs the entire country. As explained below, plaintiffs are already flocking to the Ninth Circuit to obtain a favorable forum for FLSA claims seeking back pay for time spent in security screenings, including with respect to workplaces located outside of the Ninth Circuit.

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Employers, And Has Already Spawned Class-Action Suits Across The Country.

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, sports arenas, museums, airports, power plants, theme parks, 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 involve only a "bag check." Some are

primarily about keeping dangerous items out, while others are primarily about keeping valuable materials in. But the one thing all of these procedures have in common is that, until the Ninth Circuit's decision in this case, no court had *ever* suggested that time spent in security screenings was compensable under the FLSA.

Before the Ninth Circuit's decision, the existence (and nature) of a security screening process was just one factor 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, and distance from home—in deciding whether to take the job. Indeed, an employer that requires security screenings is materially indistinguishable from an employer that locates its business in a congested area with frequent traffic jams. Both circumstances may result in minor inconveniences to employees, but neither is remotely the type of issue that should be subject to mandatory, government-imposed compensation.

Indeed, 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). The Portal-to-Portal 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).

The Ninth Circuit's decision fundamentally upends the careful policy balance struck by Congress in the FLSA and Portal-to-Portal Act, and opens employers up to billions of dollars in retroactive damages. In the wake of the *Mt. Clemens* decision, Congress unequivocally *rejected* the notion that the FLSA applies to all time spent on the employer's premises or all tasks "required" by the employer. Instead, Congress made clear that the FLSA's basic standards apply only to tasks that are integral and indispensable to employees' *productive work*. All other activities would not be subject to the FLSA and would instead be addressed, if at all, on an employer-by-employer basis through contracts or collective bargaining. The Ninth Circuit's decision flouts Congress' express policy goals, and converts what had been a balanced regulatory scheme into a windfall for employees and plaintiffs' 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 under the FLSA for preliminary and postliminary tasks that had nothing to do with their actual job duties. *See supra* pp. 6-8. 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 the same effect, spawning a number of nationwide class-action suits that seek to hold employers retroactively liable for back pay, overtime, and double damages based on the failure to compensate employees for time spent in security screenings at worksites both within and outside the Ninth Circuit.

In September 2012, CVS Pharmacy was sued by a class of employees at its regional distribution centers, who alleged that CVS's failure to pay them for time spent in post-shift security screenings violated the FLSA. Relying on *Gorman* and *Bonilla*, the district court had initially dismissed the plaintiffs' FLSA claims. *See Ceja-Corona v. CVS*, No. 12-1868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013). But the district court reversed itself in the wake of the Ninth Circuit's decision and allowed the plaintiffs' claims to proceed. *See* 2013 WL 3282974 (E.D. Cal. June 27, 2013). The plaintiffs have now filed an amended complaint in which they seek damages on behalf of a nationwide class of employees at CVS distribution centers. *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).

Similarly, Apple requires its hourly retail employees to undergo "bag searches and clearance checks when they leave for their meal breaks and after they have clocked out at the end of their shifts." Class Action Complaint ¶ 4, *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013). Just three

months after the Ninth Circuit's decision in this case, Apple was sued by a class of tens of thousands of current and former employees seeking compensation under the FLSA for time spent in those screenings. *See id.* ¶¶ 51-60. Unsurprisingly, the plaintiffs brought their suit in a district court within the Ninth Circuit, even though one of the lead plaintiffs and three of the four attorneys are from New York.

In the last two months, plaintiffs have also brought at least four class actions against Amazon.com (two of which involve nationwide classes), alleging violations of the FLSA and seeking compensation for time spent in post-shift security screenings.[4] And, in this very case, Respondents have now added Amazon.com as a defendant and expanded their complaint from warehouses in Nevada to "all Amazon.com locations throughout the United States." Second Amended Class Action Complaint ¶ 17, *Busk v. Integrity Staffing Solutions*, No. 2:10-cv-1854 (D. Nev. Aug. 28, 2013). For Integrity and Amazon.com alone, Respondents' counsel has boasted that the total number of plaintiffs "could approach 100,000 members," and

[4] *See* Class Action Complaint, *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); Class Action and FLSA Collective Action Complaint, *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); Collective Action Complaint, *Suggars v. Amazon.com*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); Collective Action and Class Action Complaint, *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013). Integrity is also a named defendant in the *Allison* case.

"'we're talking hundreds of millions of dollars'" in damages.[5]

Thus, although the decision below reflects only the mistaken judgment of a single circuit, it is already having a nationwide effect. That unfortunate dynamic necessitates this Court's review.

* * *

The Portal-to-Portal Act was enacted to override judicial decisions that had applied the FLSA to activities far beyond anything Congress had contemplated. Contrary to the text and purpose of the statute—as well as the decisions of two other circuits—the Ninth Circuit's decision in this case threatens to saddle employers across the country with massive retroactive liability for activities that have long been treated as non-compensable under the FLSA. 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) (Posner, J.). Certiorari is warranted to reestablish a uniform rule and to correct the Ninth Circuit's deeply flawed interpretation of "preliminary" and "postliminary" activities under the Portal-to-Portal Act.

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

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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