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 FOR *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF PETITIONER

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The International Municipal Lawyers Association, the National League of Cities, and the National Public Employer Labor Relations Association respectfully submit this *amici curiae* brief in support of the petition for a writ of certiorari in this case.[1] *Amici* seek to offer additional reasons that this Court should grant certiorari to determine whether time spent in security screenings is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.

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[1] Pursuant to this Court's Rule 37.2(a), the written consent of the Respondents to the filing of this brief is being lodged herewith. Petitioner has filed a blanket consent to the filing of *amicus* briefs. *Amici* mistakenly notified Respondents of their intention to file this brief eight days before the due date, rather than ten days. However, Respondents had more than ten days' notice of another *amicus* brief and consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization based in the Washington D.C. area that has been an advocate and valuable legal resource for local government attorneys since 1935. IMLA offers more than 1,400 members across the United States and Canada continuing legal education courses, research services, membership in substantive law sections, litigation assistance in the form of *amicus* briefs, a bi-monthly magazine (the Municipal Lawyer), model ordinance services, an electronic bi-weekly newsletter, and substantive CLE accredited teleconferences.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The National Public Employer Labor Relations Association (NPELRA) is the premier national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking op-

portunities for members by establishing state and regional organizations throughout the country.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences facing the nation's state and local governments if the decision below is allowed to stand. As *amici* argue below, the Ninth Circuit's decision substantially departs from this Court's precedent, and it has far-reaching consequences for employers struggling to manage the effects of the Great Recession. Unless the Court intervenes, state and local governments, which collectively are the nation's largest employer, might be pushed to the brink by unanticipated and unbudgeted claims for compensation for preliminary or postliminary activities that are not an "integral" part of their employees' principal work.

SUMMARY OF ARGUMENT

In a ruling unmoored from the text of the statute and this Court's precedent, the Ninth Circuit split with two other circuits by holding that time spent passing through security screenings is compensable under the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act. Presented with facts materially indistinguishable from those previously confronted by the Second and Eleventh Circuits, the court chose not to follow those reasoned decisions because the employer in this case "requires the security screenings, which must be done at work," and "the screenings are intended to prevent employee theft" and are therefore done "for the employer's benefit." Pet. App. 11–12.

The Ninth Circuit's opinion reflects a substantial departure from this Court's precedent dictating when a preliminary or postliminary activity is compensable under the FLSA as an "integral and indispensa-

ble" part of an employee's principal activities and warrants immediate review. The Ninth Circuit focused exclusively on whether the security screening was "indispensable"—wholly eliminating the "integral" component from what the circuits have recognized is a "bipartite" test under this Court's precedent. By not requiring that the security screening be "integral," the Ninth Circuit avoided the recognition of the Second Circuit in *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007), that security screenings, even if "indispensable," are plainly not "integral."

The Ninth Circuit's decision invites, and indeed encourages, future litigation seeking compensation for mundane and inconsequential tasks traditionally understood to be non-compensable. This flies in the face of the expressed Congressional intent behind the Portal-to-Portal Act to limit rather than expand employer liability. It also dramatically increases the financial burden on employers. The costs of this decision are particularly high for *amici*'s members and partners—the state and local governments that collectively have more employees than any other employer. Yet state and local governments are also uniquely vulnerable to the high costs of unanticipated FLSA claims, particularly at a time thousands of those governments face budget crises. Accordingly, *amici* respectfully request that this Court grant the petition for certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION WILL SIGNIFICANTLY HARM STATE AND LOCAL GOVERNMENTS.

Congress enacted the Portal-to-Portal Act in 1947 specifically to cut back on the expansive defini-

tion of "work" adopted by this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691–92 (1946). The Portal-to-Portal Act excludes from FLSA coverage, as relevant here, "activities which are preliminary to or postliminary to [the employee's] principal activity or activities." 29 U.S.C. § 254(a)(2). Nine years later, this Court held in *Steiner v. Mitchell* that "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* for which covered workmen are employed . . . ." 350 U.S. 247, 256 (1956) (emphasis added).

Since *Steiner*, lower courts have at times struggled to apply the "integral and indispensable" test consistently. But the courts have generally agreed that the test is a "bipartite" one—comprising an inquiry into whether the disputed activity is "indispensable" or "necessary," and a separate inquiry into whether it is "integral," or "so closely related to other duties performed . . . as to be an integral part thereof." *E.g., Bamonte v. City of Mesa*, 598 F.3d 1217, 1225 (9th Cir. 2010); *Steiner*, 350 U.S. at 252; *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005) ("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*."); *Gorman*, 488 F.3d at 592 ("'Indispensable' is not synonymous with 'integral.'").

The Ninth Circuit's decision here effectively eliminates a critical component of that bipartite test where security screenings are at issue, creating a

palpable and problematic split in the circuits. The court asked only whether the security screening was "necessary" and done for the "benefit of the employer"—not whether it was "integral" to the employees' primary activity. Pet. App. 12. But to be compensable under the Portal-to-Portal Act, an activity must not only be *indispensable*, it must also be *integral*—*i.e.*, "so closely related" to the employee's principal activity "as to be an integral part thereof." *Steiner*, 350 U.S. at 252. Even where "activities might be necessary in some sense," they do not require compensation if "they are not 'so closely related to the work which [the plaintiffs] and the other employees perform" as to be "considered an integral and indispensable part of their principal activities." *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1289 (10th Cir. 2006) (citation and internal quotations omitted).

In concluding that security screenings were *not* compensable, the Second and Eleventh Circuits both determined that they were not an integral part of the employees' work. The Ninth Circuit's approach eliminates this separate inquiry, creating an incomplete and watered-down framework that will likely encourage an inordinate amount of FLSA litigation aimed at procuring payments for mundane and inconsequential activities, far beyond the specific context of security screenings. The decision leaves state and local governments at substantial risk of increasing financial liabilities at a time when they can least afford them.

A. The Ninth Circuit's Decision Splits from the Second and Eleventh Circuits on Materially Indistinguishable Facts.

The plaintiffs in this case are former Integrity employees who "worked as hourly employees at

warehouses . . . filling orders placed by Amazon.com customers." Pet. App. 4. At the end of each shift, the plaintiffs "waited up to 25 minutes to be searched; removed their wallets, keys, and belts; and passed through medical detectors" as required by Integrity to minimize "'shrinkage,' or loss of product from warehouse theft." *Id.* The Ninth Circuit found that the time spent passing through the security screenings was compensable under the FLSA as an "integral and indispensable" part of the plaintiffs' principal activities. The court considered conclusive the fact that "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet. App. 11–12.

Other circuits have resolved the precise question presented here in a manner diametrically opposed to the Ninth Circuit's holding. In *Gorman*, workers at a nuclear power station sought compensation under the FLSA for the time they were required to spend each day "passing through multiple layers of security and suiting up" before they could "perform the tasks for which they were hired." *Gorman*, 488 F.3d at 591. The Second Circuit explained that the terms "integral" and "indispensable" are "not synonymous." *Id.* at 592. Instead, "'[i]ndispensable' means 'necessary,'" while "'[i]ntegral' means, *inter alia*, 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole.'" *Id.* Following this Court's reasoning in *Steiner* and *IBP*, the Second Circuit held that the time the employees spent passing through security "while arguably indispensable," or "necessary," was "not integral to their principal activities." *Id.* at 593. Such activities are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time." *Id.*

The Eleventh Circuit reached the same conclusion in *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007). Construction workers employed to complete a project at Miami International Airport "were required to pass through a single security checkpoint to the tarmac and then ride authorized buses or vans to their particular work site." *Id.* at 1341. They sought compensation under the FLSA for the "time spent riding the buses" and "going through airport security." *Id.* at 1342. The workers "place[d] great weight on the necessity of going through the screening in order to do their jobs." *Id.* at 1344. The Eleventh Circuit, like the Second Circuit in *Gorman*, emphasized that a claim of "necessity" does not suffice to demonstrate that an activity is integral and indispensable. As the court correctly pointed out, "[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 Ninth Circuit, in direct contrast to the Second and Eleventh Circuits, concluded that security screening is compensable so long as it is (1) "necessary to the principal work performed"; and (2) "done for the benefit of the employer." Pet. App. 11 (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902–03 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)). The court found those two elements satisfied here because "Integrity requires the security screenings, which must be conducted at work," and "the screenings are intended to prevent employee theft" and therefore "done for Integrity's benefit." Pet. App. 11–12. In other words, if an employer requires security screenings to manage shrinkage, as is the case here, the time spent passing through that security is com-

pensable. But if a third party requires it, for example, to ensure safety and security then the time is not compensable.

This distinction is unsupported by the text of the Portal-to-Portal Act and, taken to its logical conclusion, would produce an absurd result. Two employees doing identical work for the same employer would be compensated differently for time spent passing through security depending on whether the screenings are required by the employer or required by some other entity (like the federal government). The question of compensability "must be determined 'in accordance with common sense and the general concept of work or employment.'" *Hultgren v. Cnty. of Lancaster, Neb.*, 913 F.2d 498, 504 (8th Cir. 1990). Expansively interpreting "integral and indispensable" to make some security screenings compensable and others non-compensable is difficult to reconcile with traditional understandings of "work and employment"—and it defies common sense.

Moreover, neither *Gorman* nor *Bonilla* turned on the fact that the screening at issue was required by a third party and not "for the benefit of the employer." Nor does either support the Ninth Circuit's conclusion that *Gorman* and *Bonilla* are distinguishable because, "in those cases, everyone who entered the workplace had to pass through a security clearance." Pet. App. 12. For good reason; an activity is either so much a part of, and necessary to, a principal activity to be "integral and indispensable," or it is not. The purpose of the activity or the identity of the entity requiring it does not make it more necessary or more integrated into the principal activity. *See Gorman*, 488 F.3d at 593 (recognizing that the scope of the Portal-to-Portal Act "does not depend on the *purpose*

of any preliminaries" or postliminaries) (emphasis added).

Gorman specifically identified the basis for its holding—the lack of any showing that the screening was "integral" because it was "'essential to completeness'; 'organically joined or linked'; [or] 'composed of constituent parts making a whole'" with the primary activity. The Ninth Circuit made no attempt to find that the security screening here was "integral" in that sense. Accordingly, the decision of the court below cannot be reconciled with either *Gorman* or *Bonilla*.

B. The Ninth Circuit's Disregard of Whether the Activity at Issue Was "Integral" Is Irreconcilable with This Court's Precedent.

The Ninth Circuit's reasoning in finding the time spent in security screening here compensable not only splits with the decisions of the Second and Eleventh Circuits, but also departs substantially from this Court's instructions regarding the "integral and indispensable" analysis. In so doing, it presents a significant risk of outsized liability in future cases, including to state and local entities represented by *amici*. The Ninth Circuit probed whether the security screenings were "indispensable," but effectively ignored the question of whether the screenings were an integral part of the plaintiffs' principal activities. This interpretation of the Portal-to-Portal Act and this Court's decision in *Steiner* is so expansive that it eviscerates the general rule that preliminary and postliminary activities are not compensable.

This Court first applied the "integral and indispensable" test in *Steiner*, holding that workers at a battery plant who were required to change into pro-

tective gear before each shift and shower and change out of the gear at the end of the shift were entitled to compensation because those activities were an integral and indispensable part of their employment at the plant. 350 U.S. at 256. Those activities (1) were made necessary by the nature of the work performed at the plant; (2) fulfilled mutual obligations between the workers and their employer; (3) directly benefited the employers; and (4) were "so closely related to other duties performed . . . as to be an integral part thereof." *Id.* at 252.

The same factors controlled in *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956). This Court held that knifemen employed to perform various butchering operations must be compensated for time spent sharpening their knives if such knives are required to "be 'razor sharp' for the proper performance of the work." *Mitchell*, 350 U.S. at 262–63. After all, "[a]t the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives"; and the knifemen were "expected to perform that task as well as other tasks connected with the job." *Id.* at 262. On those facts, knife sharpening was held to be integral and indispensable to the knifemen's principal activities. *Id.* at 262–63.

This Court most recently applied the "integral and indispensable" test in *IBP v. Alvarez*, 546 U.S. 21 (2005). There, it was undisputed that donning and doffing of protective gear by meat processing plant workers were principal activities. *Id.* at 32. The questions presented, therefore, were whether "the time employees spend walking between the changing area and the production area is compensable," and "whether the time employees spend waiting to put on protective gear is compensable" under the

FLSA. *Id.* at 24. The Court held that "during 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 compensable. *Id.* at 37. That included "time spent waiting to doff." *Id.* at 40. But it did not include "time spent waiting to don—time that elapses *before* the principal activity of donning integral and indispensable gear." *Id.* at 40 (emphasis original). The fact that those pre-donning activities were "necessary for employees to engage in their principal activities" did not compel a conclusion of compensability. *Id.* at 40–41. The pre-donning "waiting" was "two steps removed from the productive activity on the assembly line" and thus not "integral" to the plant workers' principal activities. *Id.* at 37, 42.

Steiner, *Mitchell*, and *IBP* together stand for the proposition that preliminary and postliminary activities are "integral and indispensable" only if they are required for the proper performance of the work, done for the benefit of the employer, *and* "so closely related to other duties performed . . . as to be an integral part" of the employee's principal activity. *Steiner*, 350 U.S. at 252. This last inquiry is critical because "'indispensable' is not synonymous with 'integral.'" *Gorman*, 488 F.3d at 592. Indeed, this Court's conclusion that time spent waiting to don protective clothing was not compensable in *IBP* would be unsupportable if the employees needed only to show that the time was "necessary" and for the benefit of the employer. The Court treated the time spent waiting to don as necessary, and it was plainly for the employer's benefit, yet the Court declined to find it compensable because it was not "*always* essential if the worker is to do his job." *IBP*, 546 U.S. at 40–41 (emphasis original).

In contrast, in *Steiner*, the compensable activities were "so closely related to other duties performed . . . as to be an integral part thereof." *Steiner*, 350 U.S. at 252. The Ninth Circuit's disregard of this requirement adopts an expansive reading of *Steiner* and the Portal-to-Portal Act that "flies in the face of expressed Congressional intent to limit rather than expand employer liability for wage payments." *Bamonte*, 598 F.3d at 1221 n.1. *Gorman*, on the other hand, properly reads both *Steiner* and the Portal-to-Portal Act "narrowly." *See Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010); *see also Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011).

In short, nothing in *Steiner*, *Mitchell*, or *IBP* supports the Ninth Circuit's expansive interpretation of "integral and indispensable" in the context of security screenings. *See Gorman*, 488 F.3d at 593. Nor is there any support for its broad reading in the text, purpose, or legislative history of the Portal-to-Portal Act. This Court should grant certiorari to resolve the clear circuit split on the question presented and reaffirm the importance of asking whether the preliminary or postliminary activity for which employees are seeking compensation is both "indispensable" *and* "integral" to the employees' principal activities.

C. The Ninth Circuit's Decision Invites a Flood of FLSA Litigation and Poses a Substantial Threat to Employers.

The Ninth Circuit's departure from the law adopted by other circuits has serious and immediate consequences. The number of FLSA claims filed each year in federal court has risen at an alarming rate over the past 10 years. Since many of these suits are filed as collective actions representing hun-

dreds or thousands of plaintiffs, each suit represents millions or hundreds of millions of dollars of potential liability and legal expenses for employers. Allowing the Ninth Circuit's decision to stand would induce a deluge of litigation over preliminary and postliminary activities that are not "so closely related to other duties performed . . . as to be an integral part thereof." *Steiner*, 350 U.S. at 252.

Congress has long recognized the threat posed to employers by unchecked FLSA liability. Indeed, it enacted the Portal-to-Portal Act in 1947 in response to expansive judicial interpretations that were "creating wholly unexpected liabilities," which could bring about the "financial ruin of many employers." 29 U.S.C. § 251(a). Although the Portal-to-Portal Act was intended to curb employer liability, litigation has recently been trending in the exact opposite direction. Between 2010 and 2012, for example, the number of FLSA claims filed each year in federal court increased by almost 1,000.[2] From March 31, 2011 to March 31, 2012, a record-high 7,064 FLSA suits were filed in federal court.[3] That represents a 347% increase over a ten year period.[4] The Ninth

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[2] *FLSA Cases in Federal Court*, Seyfarth Shaw LLP (2012), http://op.bna.com/dlrcases.nsf/id/kmgn-8wkkf7/$File/FLSAchart.pdf.

[3] Kevin P. McGowan, *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, Bloomberg BNA (Aug. 6, 2012), http://www.bna.com/flsa-lawsuits-hit-n12884911026/.

[4] Kevin LaCroix, *Wage and Hour Suit Filings at All-Time High*, LexisNexis, (July 30, 2012, 12:48 PM), http://www.lexisnexis.com/legalnewsroom/securities/b/securities/archive/2012/07/30/wage-and-hour-suit-filings-at-all-time-high.aspx.

Circuit's expansive interpretation of the "integral and indispensable" standard practically ensures that this alarming trend will continue unabated, if not intensify.

Before this case, federal courts uniformly and correctly held that time spent passing through security screening is not compensable. *See, e.g.*, *Gorman*, 488 F.3d at 593–94; *Bonilla*, 487 F.3d at 1345. As a result, lower courts routinely granted employers' dismissal or summary judgment motions, thereby minimizing the cost associated with FLSA security screening claims. *See, e.g.*, *Anderson v. Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) ("The law is clear that Plaintiffs are not entitled to compensation for [time spent clearing security]."); *Sleiman v. DHL Express*, No. 09-0414, 2009 WL 1152187, at *4 (E.D. Pa. Apr. 27, 2009) ("To this Court's knowledge, every court which has addressed this issue has found that time spent participating in security screening is not compensable under the FLSA."); *Whalen v. United States*, 93 Fed. Cl. 579, 600–01 (Fed. Cl. 2010) (relying on *Gorman* and *Bonilla* to grant the government summary judgment on the plaintiffs' FLSA security screening claims); *Jones v. Best Buy Co., Inc.*, No. 0:12-cv-95, at *6–7 (D. Minn. Apr. 12, 2012) (holding that plaintiffs' claims for compensation for time spent clearing security failed as matter of law and granting defendant's motion to dismiss on that claim).

By expansively defining "integral and indispensable" to allow the plaintiffs to advance a claim that has been uniformly rejected in other circuits, the Ninth Circuit opened the door for even more FLSA litigation. In the past six months alone, at least ten FLSA collective actions seeking compensation for

time spent in security screenings have been filed in federal courts. *See, e.g.*, *Frlekin v. Apple, Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013); *Vance v. Amazon.com, Inc.*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013*); Kilker v. Apple, Inc.*, No. 3:13-cv-3775 (N.D. Cal. Aug. 14, 2013); *Allison v. Amazon.com, Inc.*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); *Suggars v. Amazon.com, Inc.*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Johnson v. Amazon.com, Inc.*, 1:13-cv-153 (W.D. Ky. Sept. 17, 2013); *Davis v. Amazon.com, Inc.*, No. 3:13-cv-1091 (M.D. Tenn. Oct. 4, 2013); *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013); *Gibson v. Amazon.com, Inc.*, No. 3:13-cv-1136 (M.D. Tenn. Oct. 11, 2013*); Rosenthal v. Amazon.com, Inc.*, No. 1:13-cv-1701 (D. Del. Oct. 15, 2013).

Additionally, at least one court has reversed course on its prior dismissal of a collective action seeking compensation for security screening time after the Ninth Circuit issued its opinion. *See Ceja-Corona v. CVS Pharmacy, Inc.*, No. 1:12-cv-1868, 2013 WL 3282974 (E.D. Cal. June 27, 2013). In *Ceja-Corona*, the court originally relied on *Gorman* and *Bonilla* to dismiss the plaintiffs' complaint with prejudice. *Ceja-Corona v. CVS Pharmacy, Inc.*, No. 1:12-cv-1868, 2013 WL 796649, at *8–9 (E.D. Cal. Mar. 4, 2013). But after the Ninth Circuit's decision, the court reversed itself and granted the plaintiffs leave to amend. *Ceja-Corona*, 2013 WL 3282974, at *4-5. *Ceja-Corona* sounds the alarm of what is likely to come.

The harm done by the Ninth Circuit's ruling is unlikely to be limited to the specific context of security screening. To the contrary, the courts in both *Gorman* and *Bonilla* cautioned that broadly inter-

preting "integral and indispensable" to encompass security screenings would have important implications for the compensability of mere "travel time" and "commuting." *Gorman*, 488 F.3d at 593; *Bonilla*, 487 F.3d at 1344.

The increase in FLSA litigation spurred by the Ninth Circuit's opinion will almost surely be accompanied by exorbitant damages awards. In 2009, the average compensatory award, excluding attorneys' fees, in all federal court employment cases was more than $490,000, a 45% increase since 2000. Elizabeth Erickson & Ira Mirsky, *Employers Responsibilities When Making Settlements in Employment-Related Claims*, Bloomberg Law Reports (2009), http://www.mwe.com/info/pubs/Bloomberg_Employers.pdf. Today, "[i]n any employment case filed in federal court, there is a 16% chance the award (excluding attorney fees) will exceed $1 million, and a 67% chance that the award will exceed $100,000." *Id.* The cost of settling can be equally devastating, and it has "tripled during the past five years, to an average of more than $300,000." *Id.* Many cases result in far more liability, such as recent settlements of $65 million to $640 million to settle collective actions under the FLSA or comparable state laws.[5]

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[5] *I.B.M. Agrees to Pay $65 Million to Settle Dispute on Overtime*, N.Y. Times (Nov. 23, 2006), http://www.nytimes.com/2006/11/23/technology/23IBM.html; *Smith Barney to Settle Brokers' Overtime Suit*, L.A. Times (May 24, 2006), http://articles.latimes.com/2006/may/24/business/fi-wrap24.2; Margaret Cronin Fisk, *Wal-Mart Will Pay Up to $640 Million in Settlement*, Bloomberg (Dec. 23, 2008, 18:57 EST), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aX6vHzFR2avg; *Craig v. Rite Aid Corp.*, 13 N.W. Pers. Injury Litig. Rep. 53, 2013 WL 1397751 (M.D. Pa. Jan. 7, 2013) (re-

Similar results have occurred in cases litigated to final judgment. *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240, 1285 (11th Cir. 2008) (affirming a final judgment of more than $35 million against Family Dollar Stores in a FLSA collective action brought by 1,424 store managers seeking overtime compensation); *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2005 WL 3941313, at *1 (E.D. Wash. Dec. 20, 2005) (awarding plaintiffs over $9 million in damages, costs, and attorneys' fees).

Settlement figures and jury awards only capture a fraction of the expense associated with defending against employment suits. Even for suits that are ultimately dismissed, employers must devote significant amounts of time and money to adequately defend themselves against non-meritorious and arguably frivolous claims. A report prepared by the Dunlop Commission, at the behest of the Secretary of Labor and the Secretary of Commerce, found that "[f]or every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims." *The Dunlop Commission on the Future of Worker-Management Relations–Final Report* 49 (Dec. 1, 1994).[6] And that does not include the costs borne by employers to ensure that they are FLSA compliant. As the Dunlop Commission explained, "employ-

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[Footnote continued from previous page]

porting a $20.9 million settlement of a FLSA collective action and state law class action).

[6] The Report is available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

ers often dedicate significant sums to designing defensive personnel practices . . . to minimize their litigation exposure." *Id.*

By omitting the "integral" prong of the bipartite "indispensable and integral" test, the Ninth Circuit's decision virtually guarantees that employers will face a new wave of security-screening FLSA claims—as well as similar claims emboldened by the Ninth Circuit's expansive interpretation of the Act. Such an expansive interpretation unnecessarily burdens employers and is directly contrary to the purpose of the Portal-to-Portal Act.

D. The Ninth Circuit's Decision Could Decimate State and Local Government Coffers.

While the Ninth Circuit's liberal interpretation of "integral and indispensable" is troubling to all employers, it is particularly disconcerting for state and local governments, which collectively operate as the nation's largest employer.

As of March 2011, state and local governments employed roughly 19.3 million people.[7] By comparison, the nation's largest private employer employed 2.2 million people globally in 2013.[8] As the nation's largest employer, state and local governments have a significant interest in the outcome of any case that

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[7] Deirdre Baker, *Annual Survey of Public Employment & Payroll Summary Report*: 2011 2–3 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf.

[8] Alexander E.M. Hess, *The 10 Largest Employers in America,* USA Today (Aug. 22, 2013, 7:48 AM), http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/.

has the potential to greatly expand employer liability. These entities already spend approximately $70.5 billion each month on payroll.[9] If the Ninth Circuit's opinion increases payroll expenses by only 0.25%, it will increase state and local governments' payroll expenses by an additional $176,250,000 each month, or over $2.1 billion each year.[10] These figures do not account for the additional expenses associated with litigating these cases, the cost of ensuring FLSA compliance, or the fact that any additional compensation would most likely be calculated at overtime rates.

State and local governments simply cannot afford this unanticipated and unbudgeted liability. Many are already in dire financial straits. In June of 2012, thirty-one states had projected budget gaps to-

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9 Baker, *supra* note 7, at 2–3.

10 The Ninth Circuit's opinion would increase payroll by 0.25% if state and local governments were required to compensate employees amounting to 10% of payroll expenses for one additional hour per week based on a 40 hour work week: (1 ÷ 40) × 0.1 = 0.0025 or 0.25%. Respondent's attorney estimates that nationally hundreds of thousands of people employed as warehouse workers spend 20 to 30 minutes every day clearing employer mandated security screening. *9th Circuit Court of Appeals Says Amazon's Warehouse Workers Must Be Paid for Security Check Point Time,* Business Wire, (Apr. 12, 2013 6:57 PM), http://www.businesswire.com/news/home/20130412005934/en/9th-Circuit-Court-Appeals-Amazon%E2%80%99s-Warehouse-Workers. This amounts to approximately two additional compensable hours for every five days worked. Therefore, even if security screening conducted by state and local governments is twice as fast as the security screening at issue in this case, it would still lead to one additional hour of compensable time for every 5 days worked by affected employees.

taling $55 billion for fiscal year 2013,[11] and four of the five largest municipal bankruptcies in history were filed in the past three years, with Detroit, Michigan ($18 billion) filing in 2013, Stockton, California ($1 billion) and San Bernardino County, California ($500 million) filing in 2012, and Jefferson County, Alabama ($4 billion) filing in 2011.[12] As of April 2013, municipal bond credit rating downgrades outnumbered credit rating upgrades for sixteen consecutive quarters, the longest period this has occurred since Moody's Investor Services began collecting data.[13] These cases reflect merely a snapshot of the widespread financial distress facing state and local governments across the nation.

Congressional amendments to the FLSA demonstrate Congress's intent that the goals of the FLSA be balanced against "the particular needs and circumstances of the states and their political subdivisions." S. Rep. No. 99-159, at 7 (1985). After this Court held that the FLSA applies to state and local governments in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), many government leaders expressed concern that they would

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11 Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact* 2 (Jun. 27, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=711.

12 *Biggest Municipal Bankruptcies in U.S. History*, Forbes, http://www.forbes.com/pictures/ejii45efkm/the-5-biggest-municipal-bankruptcies-in-u-s-history/ (last visited Oct. 30, 2013).

13 Jake Zamansky, *Investors Face Potential Municipal Bond Armageddon*, Forbes, (Apr. 25, 2013, 11:03 AM), http://www.forbes.com/sites/jakezamansky/2013/04/25/investors-face-potential-municipal-bond-armageddon/.

be unable to cope with the substantial unanticipated financial responsibilities. S. Rep. No. 99-159, at 7–8 (1985). Responding to these concerns, Congress passed the Fair Labor Standards Amendments of 1985, which delayed the FLSA's application to state and local governments and expressed a clear intention that state and local government interests be accounted for when enforcing the FLSA. Pub. L. No. 99–150, 99 Stat. 787 (1985).

Congress's concerns for state and local government are also manifest in FLSA provisions creating different maximum hour rules for public fire protection or law enforcement employees, 29 U.S.C. § 207(k), and allowing public employers to provide compensatory time off in lieu of overtime compensation. 29 U.S.C. § 207(o). These exemptions all demonstrate an understanding that "local governments are in many cases not in a position to 'pass along' additional financial requirements to the taxpayer." 131 Cong. Rec. 4191-01 (1985) (statement of Rep. John P. Hammerschmidt conveying local government officials' concern regarding the impact of *Garcia*).

Piling additional liabilities on governments that are still struggling to overcome the effects of the Great Recession will undoubtedly push some of our nation's state and local governments even closer to insolvency. Given the high stakes, it is imperative that this Court take immediate action to resolve the current circuit split and correct the Ninth Circuit's expansive view of "integral and indispensable" activities.

II. THE COURT SHOULD NOT DELAY RULING ON THESE IMPORTANT MATTERS.

Security screenings have become ubiquitous in post-9/11 America, and practically mandatory for entry into (and frequently egress from) sensitive government buildings like State Capitols, government offices, and courthouses. The overwhelming majority of public-sector employees who work in these sensitive buildings must pass through security screenings each and every day—for obvious reasons such as ensuring the safety and security of important government assets and deterring workplace violence. The Ninth Circuit's decision requires some employees to be compensated for this time. The Second and Eleventh Circuits have reached the opposite conclusion. As the petitioner points out, "[b]ecause 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." Cert. Pet. 5.

As explained above, this unanticipated surge in litigable FLSA claims will have an immediate and devastating impact on employers—particularly state and local governments. This Court should grant the petition now to correct the Ninth Circuit's errors before they cause further harm to the nation's employers.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should issue a writ of certiorari and reverse the judgment below.

Respectfully submitted.

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