No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK AND LAURIE CASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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The Retail Litigation Center, Inc., the Chamber of Commerce of the United States of America, the Society for Human Resource Management, the National Association of Manufacturers and the National Federation of Independent Business Small Business Center respectfully submit this brief as *amici curiae* in support of petitioners.*

INTEREST OF *AMICI CURIAE*

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to

*No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed blanket consents to the filing of *amicus* briefs.

represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small

business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

Collectively, the foregoing *amici curiae* represent a wide cross-section of the employer and human-resource community throughout the United States. American employers dedicate considerable time, energy, and resources to achieving compliance with the myriad statutes governing the workplace, while at the same time maintaining and creating much-needed jobs.

Many employers require brief pre- and post-shift security screening of employees, often as an important component of efforts to provide safe work environments and to combat the widespread problem of employee theft. Longstanding precedent has held that such screenings are not subject to compensation under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219. As discussed below, the Ninth Circuit's contrary decision holding that the time spent in post-shift security screenings may be compensable under the FLSA imposes significant costs and operational burdens on employers and could lead them to weaken or eliminate these security measures entirely. It also would create significant uncertainty regarding the compensability of pre- and post-shift activities that have long been understood to be noncompensable.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether routine post-shift security screenings of employees are compensable under the FLSA. Such screenings are conducted by many employers, as in this case, to help prevent theft. In the retail industry alone, employee theft imposes costs estimated at almost $16 billion each year.

The resolution of this case could also have an effect on the compensability of the entire broad range of pre- and post-shift screenings, conducted by employers to ensure the security of employers' property and the safety of employees and the public. Until the decision below, employers have been able to rely on a uniform body of caselaw holding that security screenings are not compensable under the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262, as applied by this Court and regulations adopted by the Department of Labor.

Responding to what it believed had been overly expansive interpretations of the FLSA, more than half a century ago Congress narrowed the statute's scope by enacting the Portal-to-Portal Act. In relevant part, the Portal-to-Portal Act provides that employers are not required to compensate an employee for activities which are "preliminary" or "postliminary" to "the principal activity or activities for which such employee is employed to perform." 29 U.S.C. § 254(a).

The Portal-to-Portal Act does not define what constitutes "principal activity or activities," nor does it define what it means for an activity to be "preliminary"

or "postliminary." Nearly a decade after the Act was passed, however, this Court created a two-part test for determining applicability of the FLSA and held that "principal activity or activities" includes pre- or post-shift activities that are themselves an "integral and indispensable part" of the principal activities for which the employee is employed. *Steiner v. Mitchell*, 350 U.S. 247, 252-53, 256 (1956). This Court reaffirmed that test in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 30 (2005).

The Ninth Circuit's decision undermines the decades-old understanding of the Portal-to-Portal Act as interpreted by this Court in *Steiner* and *Alvarez* and by the Department of Labor. In holding time spent in post-shift security screenings to be compensable, the Ninth Circuit incorrectly applied the well-established "integral and indispensable" test and instead developed a new approach based on its view that the screenings were compulsory and done for the employer's benefit. In so ruling, the court did away with the requirement under the Portal-to-Portal Act of a close and intertwined relationship between the productive work for which an employee is hired and the activity for which the employee seeks additional compensation.

The Ninth Circuit's test, if adopted by this Court, would force employers to choose between incurring greater costs to retain security screenings, which are a critical tool to address workplace security and theft, and foregoing or reducing security measures so as not to incur additional labor costs. This would result in decreased workplace safety, increased losses due to theft, and ultimately increased costs for the U.S. consumer. In addition, affirmation of the Ninth Circuit's decision would

simultaneously create uncertainty and thus increase litigation regarding an aspect of the FLSA that had long been understood to be settled.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION MISAPPLIES THE PORTAL-TO-PORTAL ACT AND THIS COURT'S DECISIONS INTERPRETING THE ACT

The Ninth Circuit's decision runs afoul of the text and history of the Portal-to-Portal Act, as well as this Court's and the Department of Labor's interpretation of the Act. In *Steiner*, this Court interpreted the Portal-to-Portal Act to require compensation of activities before and after an employee's principal work activities, like security screenings, only when "they are an integral part of and indispensable to [employees'] principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 246, 256 (1956).

The Portal-to-Portal Act analysis thus requires two steps. First, a court should identify the job responsibilities and activities that the employee was hired to perform. Once those primary productive activities are identified, the court should then identify additional activities (if any) so intertwined with those productive activities that they are not only *necessary*, but are also *essential* for the *effective* performance of the employee's productive work. Activities related to, and even necessary for, the performance of that work are not compensable unless they meet both aspects of the "integral and indispensable" test.

In *Steiner*, employees worked in a potentially toxic environment. Those employees' job responsibilities included the "extensive use of dangerously caustic and toxic materials." 350 U.S. at 248. This Court determined that the changing by employees into special protective clothes at the beginning of the shift and changing out of those clothes and showering at the end of the shift were integral and indispensable to the job responsibility of working in that caustic environment. *Id.* at 254-56.

Similarly, this Court's analysis in *IBP v. Alvarez* focused on the primary work activities the employees were required to perform. 546 U.S. 21 (2005). One of the cases on appeal in *Alvarez* involved production workers at a poultry processing plant. *Id.* at 37. The Court determined that the donning and doffing of special protective gear was integral and indispensable to the worker's responsibilities at the processing plant and therefore subject to compensation under the FLSA. *Id.* at 40. However, this Court held that time spent waiting to don the special protective gear was not compensable under the FLSA. The Court concluded that an expansion of the "integral and indispensable" test to include time waiting to don was contrary to the text of the Portal-to-Portal Act: "We discern no limiting principle that would allow us to conclude that the waiting time in dispute here is a 'principal activity' under § 4(a) [of the FLSA], without also leading to the logical (but untenable) conclusion that the walking time at issue in *Anderson* [*v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)[1]] would

1. Shortly after the passage of the FLSA, employers faced large collective actions for time spent, for example, walking to the workplace from the parking lot. *See id.*, 328 U.S. at 683. Congress determined that these interpretations of the FLSA had gone too far in awarding compensation for pre- and post-work activities

be a 'principal activity' under § 4(a) and thus would be unaffected by the Portal-to-Portal Act." *Alvarez*, 546 U.S. at 40-41.

This understanding of the Portal-to-Portal Act is endorsed by more than 50 years of regulatory guidance from the Department of Labor. The examples in the regulations are consistent with *Steiner* and *Alvarez* and support the interpretation advanced by *amici*. For example, "activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." 29 C.F.R. § 790.8(c); *see also id.* § 790.7(g) ("checking in and out and waiting in line to do so" and "waiting in line to receive pay checks" would normally be considered uncompensable preliminary or postliminary activities).

The regulations also provide examples of activities that *are* integral to an employee's performance of his or her principal job activities and therefore compensable under the FLSA. For example, a lathe worker who must "oil, grease or clean his machine, or install a new cutting tool" receives compensation for that time. 29 C.F.R. § 790.8(b)(1). That determination relies upon the connection between the lathe worker's principal productive activity (operating a lathe machine) and the additional, interrelated activities to the principal activity (oiling, greasing, and cleaning the lathe machine) that are needed to complete the task properly. There is no such connection between a post-shift security screening and the employee's

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and had created unexpected and unacceptable liabilities for businesses. The result of these congressional concerns was the Portal-to-Portal Act. *See Steiner*, 350 U.S. at 253.

principal work, whether as here in a warehouse, or in a retail store or other establishment.

Prior to the Ninth Circuit's decision in this case, federal appellate and district courts had uniformly (and correctly) held that undergoing security screening at a private employer is a noncompensable preliminary or postliminary activity in a wide variety of settings. *See*, *e.g.*, *Gorman v. Consol. Edison*, 488 F.3d 586, 593-94 (2d Cir. 2007) (power plant); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11th Cir. 2007) (airport); *Anderson v. Purdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1358-59 (M.D. Ala. 2009) (food processing plant); *Sleiman v. DHL Express*, No. 5:09-cv-414, 2009 WL 1152187, at *4-5 (E.D. Pa. Apr. 27, 2009) (mail-sorting center). Cases involving federal workplaces have reached the same conclusion. *See Whalen v. United States*, 93 Fed. Cl. 579, 601 (2010) (air traffic control center); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999-1000 (2011) (prison).

In *Gorman v. Consolidated Edison*, 488 F.3d 586 (2d Cir. 2007), for example, the Second Circuit concluded that security screenings of employees at a nuclear power plant, "while arguably indispensable, are not integral to their principal activities." *Id.* at 593. Security screenings were "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, namely travel time." *Id.* According to the Second Circuit, the compensability of preliminary activities such as security screening did not turn on "the purpose of any preliminaries, or how much time such preliminaries may consume," but rather their relationship to the principal productive activities of the employee. *Id.* Without a

meaningful connection to the principal job activity, no compensation was required under the Portal-to-Portal Act.

The Ninth Circuit's ruling here, by contrast, is fundamentally flawed because it effectively eliminates half of the "integral and indispensable" test by failing to require a relationship between the post-shift security screening of employees and the employees' productive activities. The Ninth Circuit instead emphasized the screenings were required by the employer and were intended to prevent employee theft. The Ninth Circuit concluded that the test was met because "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet. App. 11-12. Under the Ninth Circuit's approach, a court would no longer need to consider whether pre- or post-shift activities are an integral part of an employee's productive work activities, but only whether the activity is necessary and creates a potential benefit for the employer.

The Ninth Circuit's emphasis on a "benefit to the employer" is particularly inappropriate. As alleged in the complaint, the security screenings at issue are performed to prevent theft of merchandise by employees. Indeed, many employers screen employees for that purpose. Prevention of employee theft "benefits" a wide range of groups, including employers, employees, the community in which the business operates and ultimately the U.S. consumer. However, the time spent ensuring that employees are not stealing merchandise is not an essential part of the employee's fulfillment of his productive responsibilities at work. The employees at Integrity Staffing, for example, are hired to staff the warehouse.

Stealing inventory is the antithesis of their—or really any employee's—duties. Not stealing is a *legal* obligation, not one imposed by an employer. Efforts to prevent employee theft are not in any sense a part of the productive work that employers require of their employees.[2]

Moreover, not all employers within the same industry, *e.g.*, not all retailers, not all manufacturers, conduct security screenings. This fact alone shows that security checks are neither "integral" nor "indispensable" to employees' job activities whether (as here) in a warehouse, or in a retail store or other establishment. Instead, participating in a security screening should be treated similarly to checking in and out. Both are activities required by the employer typically involving minimal time that employees regularly perform at the beginning or end of shifts. Neither can reasonably be viewed as integral to an employee's performance of his or her principal job activities; there can be no question that employees can perform their job duties without checking in or out or going through a security check.

2. The Ninth Circuit attempted to rationalize its holding here with *Gorman* and *Bonilla* on the ground that in those two cases "everyone who entered the workplace had to pass through a security clearance." Pet. App. 12. But that is a distinction without a difference. The fact that some employees might not pass through a security screening—because they are not on the warehouse floor, for example—offers no reason to find that screenings are integral and indispensable to the principal activities of employees who do.

II. ADOPTION OF THE NINTH CIRCUIT'S NEW RULE WOULD DISRUPT ESTABLISHED WORKPLACE PRACTICES BY IMPOSING AN UNWIELDY TEST THAT HAS ALREADY INCREASED LITIGATION

Affirming the Ninth Circuit's decision would inject uncertainty into what had been a settled area of the law upon which employers have relied, leading to increased litigation with associated costs of defense and pressure to settle collective actions. Furthermore, in industries, such as the retail, manufacturing and service industries, where productivity is critical, margins are thin, and labor costs usually constitute the largest non-inventory and non-operations expense, even slight increases in costs, when multiplied by thousands of employees, can have a significant effect on competitiveness. Alternatively, many employers would have to consider modifying or eliminating security screenings altogether with predictable detrimental impact on their efforts to reduce employee theft or otherwise provide for a more secure workplace.

A. The Ninth Circuit's Rule Would Be Difficult To Apply And Lead To Uncertainty For Employers

This Court has recently warned that, in the FLSA context, "the potential for unfair surprise is acute" when altering long-standing interpretations of the statute. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). As described above, until the Ninth Circuit's decision, courts had uniformly held that security screenings of employees were not compensable under the FLSA. Employers have long understood, consistent

with *Steiner*, *Alvarez* and the Department of Labor's regulations, that the FLSA and the Portal-to-Portal Act do not require them to compensate employees for time spent in security screenings, regardless of their form. Employers have developed and conducted their screenings based on the reasonable expectation that such screenings are not compensable.

Employers conduct security screenings in a variety of ways. For example, employers use bag checks, wand swipes, metal detectors, and vehicle checks before and after an employee leaves the employer's premises. Some employers screen every person entering or exiting the employer's premises. Others only screen employees, or only those employees working in certain areas of the organization or who have certain job responsibilities. Some employers occupy part of a building and the building imposes and handles security screenings. Security screenings therefore, vary according to a multitude of factors, some outside of employers' control.

A decision from this Court affirming the Ninth Circuit's novel ruling would be difficult to apply in practice and would lead to uncertainty regarding employers' obligations under the FLSA. The Ninth Circuit's test would require compensation under the FLSA if the activity is required by and provides a "benefit" to the employer and is necessary for the employees' work. This erroneous "employer benefit" standard is vague and unworkable, and would engender further litigation along several lines.

For example, would the test apply only to compensation for security screenings that are conducted for anti-theft purposes, or would it apply to screening for other purposes? There is no principled basis in the text of the FLSA to draw the line at screenings for "anti-theft" purposes, as opposed to screening conducted for other purposes that might benefit the employer. Some employers conduct entrance screenings to prevent weapons or other dangerous materials from entering the workplace. Under the employer-benefit test, would the screening be compensable because the employer "benefits" from a safe workplace? Other groups, however, such as employees, customers, and the public, also benefit from safety screening. Does the employer have to be the sole beneficiary of the activity? The primary beneficiary? Merely one of the beneficiaries? To avoid further litigation regarding these issues, the proper inquiry is the specific activity in question, not the reasons the employer required it or the person or group who benefits most. Indeed, requiring employees to walk from a parking lot to the workplace plainly benefits the employer and is necessary for employees to work, but that is precisely the type of activity that the Portal-to-Portal Act was designed to make noncompensable. 29 U.S.C. § 254(a); 29 C.F.R. § 790.7(f) (*See* p.6 n.1 above).

Additionally, the Ninth Circuit's decision creates further uncertainty for employers to the extent it implies that the result can depend on the length of time that the security screenings are alleged to take. Respondents have emphasized that their complaint alleges that the security screening took as long as 25 minutes. In the experience of the various members of the *amici*, a time period of 25 minutes for a security screening is an aberration. Security screenings of whatever type almost always take no more

than a few minutes, even including waiting time. For example, a bag check security screening conducted by an employer would be similar to a bag check conducted when entering a professional sporting event. These types of screenings typically take less than a minute (not including any time waiting for the screening). A metal detector screening would be equivalent to the screening that members of the public go thorough when entering a government building. The time that it takes to go through the actual security check is often minimal. There may be times when an employee has to wait longer than usual for the security check, such as the end of a shift. Consistent with *Alvarez*, however, waiting time is not compensable under the FLSA.

The length of time for the screenings, including any wait time, bears no relevance to whether the activity is compensable. Indeed, enactment of the Portal-to-Portal Act was driven by congressional concerns that judicial interpretations of the FLSA had gone too far in awarding compensation for a broad range of pre- and post-work activities including waiting to check in and walking to the workplace from the parking lot. *See Steiner*, 350 U.S. at 253. Since that time, circuit courts have repeatedly held that even extended waits for preliminary or postliminary activities do not require compensation under the FLSA. *See Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) (travel ranging from 30 minutes to three-and-a-half hours not compensable); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (four hours of traveling on employer's bus not compensable); *Kavanagh v. Grand Union Co., Inc.*, 192 F.3d 269 (2d Cir. 1999) (commuting time up to seven hours in a day not compensable); *Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998) (travel time for

police officers to remote site for training not compensable). The Department of Labor's regulations also focus on the type of activity instead of its length. 29 C.F.R. § 790.8 n.63. Thus, both regulatory and judicial precedent agree that the key inquiry is whether there is an integral and indispensable relationship between the pre- or post-shift activity and the principal activities for which the employee is employed, regardless of how long the pre-or post-shift activity takes.

B. The Ninth Circuit's Rule Would Lead To Increased Litigation And Undue Pressures On Employers To Settle

Adopting the Ninth Circuit's rule would lead to a flood of unnecessary litigation exposing employers to unanticipated liability. The uncertainties created by the Ninth Circuit's holding, discussed above, are amplified by the leverage plaintiffs could exert due to particular features of FLSA claims. First, the FLSA's collective-action device allows plaintiff's counsel to leverage a lawsuit involving a single employee's claim into a nationwide lawsuit involving tens of thousands of employees. *See* 29 U.S.C. § 216(b) (providing that employees may sue on behalf of themselves "and other employees similarly situated"). Second, employees can recover double damages and mandatory attorneys' fees. 29 U.S.C. § 216(b). Third, because the FLSA has no intent element, an employer's good-faith belief that it has complied with the statute—following decades of previous precedent by this Court and Department of Labor regulations—may serve as only a limited defense if this Court decides to redefine the Portal-to-Portal Act. *See* 29 U.S.C. §§ 255(a), 260 (employer's intent affects the statute of limitations and award of double damages, but not attorneys' fees).

In recent years, the employer community has been inundated by an ever-growing tidal wave of FLSA litigation. For example, a total of 4,055 FLSA actions were commenced in district courts throughout the United States during the 12-month period ending March 31, 2003. ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2 (2003). For the 12-month period ending March 31, 2013, 7,764 FLSA actions were commenced in district courts throughout the United States Admin. ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2 (2013). This represents a 90 percent increase from the same time period only a decade earlier. These numbers could be expected to grow even further if the Ninth Circuit's decision is affirmed. Indeed, since the Ninth Circuit's decision, a number of additional FLSA collective actions have been filed, seeking hundreds of millions of dollars from employers based upon the theory endorsed by the Ninth Circuit.[3]

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3. In a suit against CVS Pharmacy, the district court initially dismissed the plaintiffs' FLSA claims regarding security screenings based upon *Steiner* and its progeny. *See Ceja-Corona v. CVS Pharmacy*, No. 12-1868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013). After the Ninth Circuit's decision, the district court reversed itself and that claim is now proceeding. *See* 2013 WL 3282974 (E.D. Cal. July 2, 2013). Similar claims have been filed against other major employers. *Weston v. Wireless Advocates LLC*, No. 5:14-cv-1705 (N.D. Cal. Apr. 14, 2014); *Barba v. Trinity Servs. Group., Inc.*, No. 4:13-cv-1280 (D. Ariz. Feb. 19, 2014); *Le v. CVS Caremark Corp.*, No. 1:13-cv-6438 (E.D.N.Y. Feb. 5, 2014); *Ruiz v. JCP Logistics, Inc.*, 8:13-cv-01908-JLS-AN (C.D. Cal., Dec. 5, 2013); *Kalin v. Apple, Inc.*, No. 3:13-cv-4727 (N.D. Cal. Oct. 10, 2013); *Roberts v. TJX Cos.*, No. 3:13-cv-4731 (N.D. Cal. Oct. 10, 2013); *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013); *Suggars v. Amazon.com*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash.

Ratification of the Ninth Circuit's radical new test, therefore, would increase pressure on employers to settle large FLSA collective actions to avoid incurring expensive and time-consuming discovery obligations (and an ultimately uncertain outcome). This Court should repudiate the Ninth Circuit's test and state definitively that security screenings are not compensable.

C. Employers Could Be Deprived Of An Important Tool Used To Mitigate The Serious Problem Of Employee Theft

Employee theft is a serious concern for employers. Some estimates have found that employers lose five percent of revenue from theft, fraud, and other losses. Ass'n of Certified Fraud Examiners, Report to the Nations on Occupational Fraud and Abuse, 2012 Global Fraud Study 4 (2012), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-to-nations.pdf (last visited June 3, 2014). Common methods of theft include removing employer merchandise and other company property from the workplace. Philip P. Purpura, Security Loss & Prevention 168-69 (Mary Jane Peluso et al. eds., 6th ed. 2013).

The retail industry faces particular problems with employee theft. As described in a recent survey of the problem: "Retailers attributed 44.2% of their inventory shrinkage to employee theft. Assuming a total shrinkage

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Sept. 6, 2013); *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013); *Cortez v. Ross Dress for Less, Inc.*, No. 5:13-cv-1298 (C.D. Cal. July 24, 2013).

dollar amount of approximately $35.28 billion, this translates into an annual employee theft price tag of $15.9 billion. This is a staggering monetary loss to come from a single crime type. In fact, there is no other form of larceny that annually costs more money than employee theft." Richard C. Hollinger, Amanda Adams, Univ. of Fla., Dep't of Sociology & Criminology & Law, 2011 National Retail Security Survey Final Report 7 (2012), http://www.clas.ufl.edu/users/rhollin/srp/srp.htm (last visited on June 3, 2014). The significant costs of employee theft are of course incorporated into retailers' prices and passed on to consumers.

If compensation for security screenings is newly required under the FLSA, many employers will be faced with a difficult choice. Employers could continue security screenings and incur additional labor costs to compensate employees for the now-compensable time spent on post-shift security screening, thus placing more pressure on already slim margins and incurring additional costs related to compliance with the new requirements of the FLSA.[4] On the other hand, employers could forego security screenings or modify them in ways that make them less effective but do not add compensable time at the beginning and end of the workday. The second option will not increase labor costs but will likely increase the losses that employers experience due to theft of company property and decrease the safety of a work space.

4. Additional costs could include relocation of time clocks to be in a location after the security screening location or new equipment and systems to track time employees spend going through security screenings.

Furthermore, requiring employers to adjust their security screening practices in order to accurately compensate employees for their time spent in screening or to avoid additional labor costs would present considerable practical difficulties. For example, some security screenings, such as those conducted in shared facilities, occur outside the workplace in areas the employer does not control. That obstacle can significantly complicate employers' ability to track properly the time spent by employees in security screenings. In addition, for many employers, particularly retailers, moving the security screening inside the workplace would undermine the very purpose of the screening: preventing theft of company property from the workplace.

All of these problems could be avoided by adhering to the text of the Portal-to-Portal Act and the long-standing "integral and indispensable" test established in *Steiner*, recently reaffirmed in *Alvarez*, and followed by the Department of Labor's regulations for more than 50 years. The Ninth Circuit's unprecedented, unworkable and fundamentally incorrect view of the Portal-to-Portal Act should be rejected.

CONCLUSION

For the foregoing reasons and those in Petitioner's brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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