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

AMICUS CURIAE BRIEF FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

ROBERTA L. STEELE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street
San Francisco, CA 94104
(415) 296-7629
rsteele@nelahq.org

PAUL W. MOLLICA*
OUTTEN & GOLDEN
203 North LaSalle Street, Suite 2100
Chicago, IL 60601
(312) 924-4888
pwmollica@outtengolden.com
**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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AMICUS CURIAE BRIEF FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace.[1] Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 69 circuit, state, and local Affiliates have more than 4,000 members nationwide committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly

[1] Pursuant to Supreme Court Rule 37.6, amicus represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the consent letters have been filed with the Clerk.

supports precedent-setting litigation affecting the workplace rights of individuals.

NELA's membership has an historical interest in wage-and-hour law, and has often filed amicus briefs in this Court on Fair Labor Standards Act issues. From recent terms, *see Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011). NELA's members have fought efforts by employers in different guises to shift more and more of their financial burdens to—and reap the financial benefits of—unpaid labor.

SUMMARY OF ARGUMENT

The Portal-to-Portal Act (or "Act") provisions at 29 U.S.C. § 254, while excluding preliminary and postliminary events from the definition of "work," require payment for any task that forms an integral and indispensable part of employee's principal activity or activities (subject to exceptions not relevant here). *Steiner v. Mitchell*, 350 U.S. 247, 252-56 (1956). *Accord Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 876 (2014); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005); 29 C.F.R. §§ 790.8(b)-(c). Little attention has been paid by Petitioner and its amici to the core question of whether participation in an employer's loss prevention policies might be a "principal activity" of Respondents, thus compensable.

Respondents contend not simply that they wait in line to check out and go home, but (as alleged in the complaint) that they are required to participate in a security program promulgated by Petitioner. First Am. Compl. ¶ 16, JA 21-22. This steers us outside of the zone of postliminary activity, and into compensable work.

The briefs supporting reversal of the Ninth Circuit's decision err in treating exit checks as mere traffic control, part of the employees' routine egress and severable from the "principal activity" of handling and packing merchandise. This view is detached from modern work reality. Loss prevention suffuses the American workplace and constitutes an ordinary duty of many modern retail American workers. Submitting to a search ordered by Petitioner, we submit, is the last principal activity of the day.

Petitioner merely seeks to leverage the Portal-to-Portal Act to shift the financial burden of its loss prevention program from its own ledger (e.g., by retaining more guards and equipment to cut down wait times) to its hourly-wage workers, obliging them to expend up to 25 minutes unpaid time to wait, empty out their pockets, and submit to searches. The Act, approved by Congress to end the controversial "portal" cases, nowhere ordains this result.

ARGUMENT

I. WHILE THE PORTAL-TO-PORTAL ACT WAS INTENDED TO DISQUALIFY COMMUTING AND WAITING TIME, IT DID NOT EXCLUDE EXTRA WORK DUTIES PERFORMED AT THE CLOSE OF BUSINESS.

Petitioner seeks to carve a rule out of the Portal-to-Portal Act that it may assign any manner of unpaid work, to be performed at the close of the shift, as long as it is arguably unconnected to the employees' principal activities. The Act's history belies this interpretation. Authoritative scholarship into the history underlying the Act reveals that the Eightieth Congress was addressing a particular kind of claim, portal claims, not at issue here. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53 (1991).

Congress's original failure to define the concept of FLSA "working time" (*Sandifer*, 134 S. Ct. at 875) led to litigation, in the years following its enactment, over which activities should be included in compensable time under the FLSA. The Portal-to-Portal Act of 1947 "derived its name from the primary concern that motivated amendment of the FLSA: claims to compensation for time expended by employees getting from the entrance of employers' premises to their work stations." Craig Becker, *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. Rev. 1241, 1256 n.95 (1993). Congress intended to abrogate the Court's rulings in the Portal-to-Portal trilogy, culminating in *Anderson*

v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), which held that the walk time from the time clock to the workbench was compensable.

The focus of this corrective legislation was circumscribed. *See, e.g.,* Leah Avey, *Walk to the Line, Compensable Time: Cash in the Pocket of Employees*, 32 Okla. City U. L. Rev. 135, 143-44 (2007) (citing limited purposes of extinguishing already-filed claims and limiting the prospective liability of employers for activities found to be compensable in *Anderson*). While some drafts of the bill would have wreaked major transformations to the FLSA (*see* Linder, *supra*, at 123-55), Congress ultimately left unaltered the broad definition of "work" adopted by the Court. *IBP, Inc.*, 546 U.S. at 28. Instead, it simply carved out "express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity." *Id*. The Court later held that "activities performed either before or after the regular work shift, on or off the production line" may be compensable, even with the revisions to the FLSA. *Steiner*, 350 U.S. at 256.

In sum, nothing in the Act's language or history suggests that Congress intended to grant a pass to employers to order that workers perform one free chore on their way home. Were Petitioner's view to prevail, what would keep them from next requiring employees to drop off book deliveries to their neighbors, on the theory that home deliveries are not

"integral and indispensable" to retrieving and packaging orders? It offers no principled stopping place.

II. LOSS PREVENTION IS INTEGRATED INTO THE MODERN AMERICAN WORK ROUTINE.

Petitioner and its amici blinker reality to argue that an employee's participation in loss prevention is neatly divisible from a retail worker's principal activities. Loss prevention is sewn into the lining of modern retail life. Such policies benefit employers by boosting profits. And employees cannot work with inventory unless they participate in these policies.

Retailers bemoan the cost of theft and fraud (U.S. Chamber of Commerce Amicus at 18-19; Nat'l Retail Fed'n Amicus at 1-2). Sources estimate losses to U.S. business from theft in tens of billions of dollars annually, with employees said to be accountable for a large share of that total. *See, e.g.,* ALAN GREGGO & MILLIE KRESEVICH, RETAIL SECURITY AND LOSS PREVENTION SOLUTIONS, 2 (2011) (42.7% of theft losses attributable to employee theft); Lucas Loafman & Andrew Little Fiona, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 Am. Bus. L.J. 251, 296 (2014) ("[o]ne of the greatest financial problems businesses face today are losses due to theft and fraud"); Fiona Briggs, *Fraud Costs US Retailers $54BN A Year, According to New Kount Volumatic 2013 Survey*, Kount (Oct. 7, 2013), available at

http://www.kount.com/_blog/Press_Coverage/post/fraud-costs-usretailers-54-year-according/ (some 37% of losses attributable to employees); *2012 Report to the Nations*, Ass'n of Certified Fraud Exam'rs, 21 (2012), available at http://www.acfe.com/rttn-highlights.aspx (some 15% of losses by U.S. companies was because of non-cash theft); Kathy Grannis, *National Retail Security Survey: Retail Shrinkage Totaled $34.5 Billion in 2011*, Nat'l Retail Federation (June 22, 2012), available at http://blog.nrf.com/2012/06/22/national-retail-security-survey-retail-shrinkage-totaled-34-5-billion-in-2011/ (describing shrinkage as including employee theft, shoplifting, paperwork, or supplier fraud, with employee theft accounting for 44% of losses).

Companies have thus widely adopted loss prevention programs to plug revenue losses. CHARLES A. SENNEWALD AND JOHN H. CHRISTMAN, RETAIL CRIME, SECURITY, AND LOSS PREVENTION: AN ENCYCLOPEDIC REFERENCE, 302 (2008) (noting historic shift of asset security from apprehending employee thieves to "the concept of 'loss prevention'; i.e., the protection efforts . . . directed toward shortage reduction, which in turn increases profitability"). They enlist a variety of strategies for combating inventory shrinkage—and one main tool is employee acquiescence in anti-theft measures. *See, e.g.,* PHILIP PURPURA, SECURITY AND LOSS PREVENTION, AN INTRODUCTION, 177 (6th ed. 2013) (reporting that numerous employers have established theft reporting programs, including tip- and hotlines for employees); Corey A. Ciocchetti, *The Eavesdropping*

Employer: A Twenty-First Century Framework for Employee Monitoring, 48 Am. Bus. L.J. 285, 308-09 (2011) (survey of pervasiveness of electronic workplace surveillance). Petitioner itself operates a hotline for its employees (1-855-727-6724) and tells them in its "New Associate Welcome Packet" to use it "for bringing to the Company's attention activity by individuals or groups that you think violate Integrity's code of conduct or external compliance regulations" (http://www.integritystaffing.com/PEPBrochure/PEP_IntegritySep13.pdf).

Retailers also screen job applicants for criminal history, a further sign that loss prevention is a more-than-incidental facet of employment. *EEOC v. Freeman*, 961 F. Supp. 2d 783, 785 (D. Md. 2013) ("For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable."); Employment Screening Benchmarking Report, HireRight 20 (2013), available at https://www.eandi.org/PDF/HireRight_EmployBenchmarkReport_CPU6.13.pdf (88% of survey respondents reported using criminal-background checks). Such screening comes even in the teeth of evidence that such policies fall hardest on minority applicants. *See* Sandra J. Mullings,

Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute, 64 Syracuse L. Rev. 261, 271-75 (2014); EEOC, Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

Thus, the reality is that retail employees such as Respondents are enmeshed in loss prevention. This is not merely a negative duty not-to-steal, as Petitioner would have it, but an affirmative obligation by workers to cooperate in loss-prevention activity.

III. LOSS PREVENTION MEASURES ARE "PRINCIPAL ACTIVITIES."

Based on the substance of the activity, loss prevention constitutes one of Respondents' principal activities under the Portal-to-Portal Act. In relevant part, Respondents allege that they

> were required to wait approximately 25 minutes each day at the end of each shift without any compensation in order to undergo a search for possible contraband or pilferage of inventory of his or her person. Defendants forced Plaintiffs and all other similarly situated warehouse workers to undergo a post 9/11 type of airport security clearance—i.e., warehouse employees were required to remove all personal belongings from their person such as wallets, keys, and belts, and pass through metal detectors

> before being released from work and allowed to leave the facility.

First Am. Compl., ¶ 16, JA 21-22 (emphasis added).

The parties and courts have taken different tacks on the issue of Respondents' principal activities. Initially, the district court held that their principal activity is "fulfilling online purchase orders," Pet. App. 27. The Ninth Circuit started with this premise, but concluded that security checks "stem[ ] from the nature of the employees' work," which requires "access to merchandise." Pet. App. 12. The Petitioner and amici argue that Respondents' primary duties exclusively concern retrieving and shipping merchandise. *See* Pet. Br. at 2 ("primary job duties involved retrieving items from inventory and packaging those items for delivery to Amazon.com customers"); U.S. Amicus at 8 (describing Respondents' "principal activity of filling orders" in the warehouse); *id.* at 21 (describing "principal activity" as "retrieving merchandise from the warehouse shelves to fill customers' orders").

Petitioner and its amici thus imply, erroneously, that employees' principal activities under the Portal-to-Portal Act are limited to one or maybe two main tasks. Yet, as the United States also observes (U.S. Amicus at 21), the relevant Department of Labor regulation, 29 C.F.R. § 790.8(a) declares that employees can have more than one principal duty, and such duties need not be preponderant. "[T]he plural form 'activities' in the statute makes it clear that in order

for an activity to be a 'principal' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job." So it is not a complete answer for Petitioner to argue that Respondents occupy most of their time retrieving and filling customer orders. This does not preclude loss prevention as serving as yet another principal activity. *See, e.g., Dunlop v. City Electric, Inc.*, 527 F.2d 394, 398 (5th Cir. 1976) ("The legislative history and the administrative interpretations of the Portal-to-Portal Act support the view that the phrase 'activity or activities' was used to dispel the notion that any activities not inextricably tied to a single predominant principal activity could be considered noncompensable.").

The regulations expressly identify "checking in and out and waiting in line to do so" as noncompensable pre- or postliminary activities, but only "when performed under the conditions normally present." 29 C.F.R. § 790.7(g). Respondents allege more here. Turning out pockets, and exposing what would normally be zones of privacy, constitutes more than simply checking out of work. It easily fits the classical definition of "work" established by this Court under the FLSA, "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). *See also Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (work may also

include non-exertional acts, where "an employer . . . may hire a man to do nothing, or to do nothing but wait for something to happen").

Indeed, we know that ordering employees to turn out their pockets for a search is no small matter. In Fourth Amendment parlance, it's a search or at least equivalent to a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also, e.g., United States v. Street*, 614 F.3d 228, 233-34 (6th Cir. 2010) ("an officer may not sidestep the requirements of the Fourth Amendment by directing a suspect to 'empty your pockets,' then disclaim any constitutional violation on the ground that he verbally directed the suspect to act without touching or in any way searching him"); *United States v. Zavala*, 541 F.3d 562, 576 n.4 (5th Cir. 2008) ("[u]nder *Terry*, the police officer could order Zavala to empty his pockets and place the contents on the roof of the Taurus to confirm that he was not carrying a weapon"). As this Court recognizes, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), "even a limited search of the person is a substantial invasion of privacy." *See* David R. Dorey, *The Unconstitutionality of Exit Searches*, 15 U. Pa. J. Const. L. 75 (2013) (arguing that exit checkpoints for government buildings are Fourth Amendment searches). However Petitioner might describe its exit searches, they cannot be written off as mere walk time.

The Department of Labor has provided relevant factors to consider (29 C.F.R. § 790.8(a)):

> Several guides to determine what constitute "principal activities" was [sic] suggested in

> the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade." The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work." [Footnotes omitted.]

As set forth above, participation in loss prevention is among "the realities of industrial life." Submitting to a search, moreover, constitutes "any work of consequence performed for an employer," insofar as searches constitute work and are solely for the employer's benefit.

Finally, Petitioner and amici urge that an "integral and indispensable" activity must be "closely or directly related to the proper performance of the employees' productive work." (U.S. Amicus at 8). *See also*

id. at 13 ("a compensable activity is one that bears a close or direct relationship to an employee's principal activities"); Pet. Br. at 19-20 ("What matters under this Court's precedents is . . . whether the task is integral and indispensable to the employee's *productive work*.") (emphasis in original); *id*. at 24 (filling customer orders is "the 'productive work' and 'work of consequence,' *see* 29 C.F.R. § 790.8(a), for which Respondents were employed"); *id*. at 39 ("Respondents' 'work of consequence' and 'productive work' involved *filling customer orders*, not some abstract and amorphous 'access to merchandise'") (emphasis in original). Applying this standard, loss-prevention policies (such as exit searches) certainly count. Loss prevention is not only productive from the businesses' perspective, but Petitioner and amici (judging from their briefs) apparently deem loss-prevention policies essential. If these screening programs work as well as amici claim, they generate revenue for employer by plugging revenue losses. This is distinguishable from having employees idly wait for protective gear, or check out of their shift with swipe cards, which do not produce a direct financial benefit to the employer.

Should this Court affirm the Ninth Circuit's decision, the business of loss prevention will certainly continue as before. The only difference is that employees will be paid for their role in those policies, and employers will be financially motivated to explore and adopt more efficient ways to carry it out.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

ROBERTA L. STEELE
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
417 Montgomery Street
San Francisco, CA 94104
(415) 296-7629
rsteele@nelahq.org

PAUL W. MOLLICA*
OUTTEN & GOLDEN
203 North LaSalle Street,
Suite 2100
Chicago, IL 60601
(312) 924-4888
pwmollica@outtengolden.com
**Counsel of Record*

Counsel for Amicus Curiae