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 NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. As the industry umbrella group, the NRF periodically submits amicus curiae briefs in cases raising significant legal issues, including employment law issues, which are important to the retail industry.

Retailers are especially vulnerable to employee theft. It is the leading cause of profit shrinkage in the industry.[2] In 2012, employee theft cost retailers approximately $18.1 billion, with the average dollar loss per incident totaling $1,703.17.[3] The retail industry faces a unique challenge in managing employee theft because retail employees often have access to large inventories of merchandise that may be small in size, high in value, and easily resold. The retail industry must therefore use a variety of security

1. Both parties filed notices with the Court consenting to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part. No counsel or party, other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this amicus brief.

2. *See* Richard C. Hollinger & Amanda Adams, *2012 National Retail Security Survey Final Report* (2014).

3. *Id.*

screening methods to prevent substantial losses. This includes employee bag searches.

Affirmance of the Ninth Circuit's decision would significantly harm retailers that use employee bag searches — 63% of retailers in 2012[4] — and other employee security screenings, as loss prevention measures similar in purpose to the security screenings at issue here. Affirmance would not only generate potential legal liability for retailers, but would impose substantial costs on retailers that must reconfigure their security screening and time clock procedures in order to continue using employee bag searches. This Court's decision is therefore critically important to retailers.

SUMMARY OF ARGUMENT

The Ninth Circuit held that Integrity Staffing Solutions, Inc. must compensate employees for time spent in security screenings conducted after their work shift. The NRF urges this Court to reverse the Ninth Circuit's decision and hold that the security screenings required by Integrity are not compensable, based on the Portal-to-Portal Act's exceptions for postliminary activities. This Court's precedent, the plain language of the Portal-to-Portal Act, and rulings of the Second and Eleventh Circuits demonstrate that the security screenings are not integral and indispensable to the principal activity of Integrity's employees — filling purchase orders for customers of Amazon.com.

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4. *Id.*

The security screenings are non-compensable because they are postliminary to the principal activities of Integrity's employees. The Portal-to-Portal Act, which amended the Fair Labor Standards Act, exempts from compensation several activities, including the following:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities.

29 U.S.C. § 254(a). Although the Portal-to-Portal Act does not define "principal activity" or "preliminary" and "postliminary" activities, the Department of Labor's regulations provide examples for courts interpreting the Act. "Principal activities" are "activities which the employee is 'employed to perform." 29 C.F.R. § 790.8(a). They "include all activities which are an integral part of a principal activity." 29 C.F.R. § 790.8(b). "Preliminary" and "postliminary" activities include "checking in and out and waiting in line to do so" and "waiting in line to receive pay checks." 29 C.F.R. § 790.7(g).

This Court has held that an activity is not preliminary or postliminary to the employee's principal activity if it is "integral and indispensable" to the employee's principal activity. *Steiner v. Mitchell,* 350 U.S. 247, 256 (1956). "The fact that certain . . . activities are necessary for employees to engage in their principal activities does not mean that those . . . activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40-41 (2005).

The Ninth Circuit applied an incorrect standard when it held that Integrity's security screenings are compensable under the FLSA because they are required by Integrity and conducted for Integrity's benefit to prevent theft. *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 531 (9th Cir. 2013). Merely because the screenings are required by Integrity to prevent employee theft does not mean that the screenings are integral and indispensable to the principal activity of Integrity's employees. Rather, the security screenings parallel the examples of preliminary and postliminary activities included in the Department of Labor's regulations, such as waiting in line to punch a time clock or receive a paycheck. *See* 29 C.F.R. § 790.7(g). Because the screenings are further iterations of these activities, they are therefore not compensable.

Many retail employers use employee security screenings, including employee bag searches, as a loss prevention method. Bag searches and the security screenings at issue in this case share a similar purpose. Both are required by the employer and conducted to prevent employee theft and reduce profit shrinkage. Just as the security screenings at issue here are not integral and indispensable to the work performed by Integrity's employees, bag searches are not integral and indispensable to retail employees' principal activities — customer service.

The NRF urges this Court to consider the financial and practical effect of its decision on retail industry employers that require employee bag searches. Affirmance of the Ninth Circuit's decision would force retailers to undertake costly and impractical reconfigurations of store security measures. To compensate employees for security-check

time, retailers would need to relocate time clocks to an area near or even outside the stores' exit, or (if relocation is impossible) hire additional personnel to escort employees through the store following security searches at time clocks remote from the exit.

ARGUMENT

I. Security Screenings Are Postliminary Activities That Are Not Compensable Under the Portal-to-Portal Act.

The Ninth Circuit misapplied the Portal-to-Portal Act and this Court's precedent when it held that security screenings of employees are compensable under the FLSA. Activities merely preliminary or postliminary to the principal activities the employee is employed to perform are expressly exempt from compensation under the Portal-to-Portal Act. Interpreting the Portal-to-Portal Act's exceptions, this Court has held that activities are compensable only if they are "integral and indispensable" to the employee's principal activities. Here, Integrity's employees filled purchase orders for Amazon.com customers. In retail generally, employees are engaged in a range of tasks related directly or indirectly to customer service. The post-work security screenings are not integral and indispensable to the principal activities for which the employees are employed, making the screenings non-compensable postliminary activities under the Portal-to-Portal Act.

A. The Portal-to-Portal Act Limits the Activities For Which Employers Must Compensate Employees.

Congress passed the Portal-to-Portal Act in response to this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946), which held that the FLSA's "statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed workplace." This statutory interpretation was more expansive than the "long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). It placed significant burdens on employers, including an obligation to compensate employees for activities that were previously non-compensable, such as punching in, walking on the employer's premises, and performing duties before the employees' principal work commenced. *Id.*

As this Court recently noted, "[o]rganized labor seized on [*Anderson*'s] expansive construction of compensability by filing what became known as 'portal' actions," collectively seeking damages in excess of a billion dollars. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014). In response, Congress amended the FLSA by passing the Portal-to-Portal Act to remedy the "substantial burden" on employers and the "substantial obstruction to the free flow of goods in commerce" that the *Anderson* decision generated. 29 U.S.C. § 251(a). It specifically excluded from compensation several activities, including the following:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is

> employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities which occur prior to the time on any particular workday at which the employee commences or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). Employers may enter agreements to compensate employees for these activities, but are not required to do so. *Id.* at § 254(b).

Department of Labor regulations define the terms "principal activity" and "preliminary or postliminary activity" as they are used in the Act. "Principal activities" are those that the employee is employed to perform. 29 C.F.R. § 790.8(a). A "preliminary activity" is an activity "engaged in by an employee before the commencement of his or her 'principal' activity or activities," and a "postliminary activity" is an activity "engaged in by an employee after the completion of his 'principal' activity or activities." 29 C.F.R. § 790.7(b). The regulations further specify that activities including "checking in and out and waiting in line to do so" and "waiting in line to receive pay checks" are considered preliminary or postliminary activities. *Id.* 29 C.F.R. § 709.7(g)

B. Security Screenings Are Not Integral and Indispensable to the Principal Activities Integrity's Employees Are Employed to Perform.

This Court's decisions interpreting the Portal-to-Portal Act, while not directly addressing whether security

screenings are compensable, indicate that the security screenings required by Integrity should be subject to the Act's specific exceptions. Integrity's employees worked in a warehouse filling purchase orders for Amazon.com customers. After clocking out they passed through a security screening before leaving the warehouse. The Ninth Circuit held that Integrity's employees are entitled to compensation for the security-screening time under the FLSA. *Busk,* 713 F.3d at 531. It reasoned that because the screenings are required by Integrity and "intended to prevent employee theft," they are "necessary to employees' principal work as warehouse employees and done for Integrity's benefit." *Id.* The Ninth Circuit's holding is contrary to the intent of the Portal-to-Portal Act and this Court's precedent.

An activity is compensable only when it is an "an integral and indispensable part of the principal activities for which the covered workmen are employed." *Steiner,* 350 U.S. at 256. Thus, battery plant workers exposed to toxic chemicals are entitled to compensation for time spent donning and doffing the protective gear that is "indispensable to the performance of their productive work and integrally related thereto." *Id.* at 251-52. Similarly, knife sharpening is integral and indispensable to the task of butchering meat. *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956).

In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), this Court gave additional guidance on what constitutes an integral and indispensable part of an employee's principal activity. The Court held that the time spent *waiting* to don and doff protective was not compensable under the FLSA, even though the donning and doffing itself was integral

and indispensable to the employees' principal activity. *Id.* at 40-41. The Court compared the time spent waiting to don and doff equipment to other non-compensable activities, such as waiting to check in or waiting to receive a paycheck, and concluded that "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*." *Id.*

The Ninth Circuit failed to engage in the proper analysis required by *Steiner* and *Alvarez* when it held that employee screenings are compensable because they are "necessary to the employees' principal work" and performed for "Integrity's benefit." *Busk* 713 F.3d at 531. The court should have examined whether the screenings are integral and indispensable to the specific tasks that Integrity's employees are employed to perform. Although the security screenings are required by Integrity to prevent theft, theft prevention is not related to the employees' principal activity. The employees' principal activity is taking merchandise from a shelf and placing it into a shipping package. Passing through a security screening is not integral and indispensable to that activity.

Integrity's security screenings more closely resemble the examples of excluded activities described in the Department of Labor's regulations interpreting the Portal-to-Portal Act, or the activities held to be excluded in *Alvarez* (waiting to don and doff equipment). The regulations specifically exempt from compensation such activities as waiting in line to punch a time clock and waiting in line for a paycheck. For Integrity's employees, waiting in line to punch a time clock is functionally like

going through a security screening at the end of the workday. Both activities require the employees to wait in a line. At the end of the time clock line, employees must punch their time cards so their employer can confirm and accurately record their working hours. At the end of the security line, employees must go through a screening so their employer can confirm they are not unlawfully removing property from the premises. Each of these tasks may be necessary for purposes of payroll or exiting the facility, but neither is integral or indispensable to the employees' principal activity of filling purchase orders for Amazon.com customers. Because the purpose and necessity of these two activities are comparable, the security screenings are properly analyzed as non-compensable under the Portal-to-Portal Act's exception for postliminary activities.

C. Other Circuits Have Correctly Held That Security Screenings Are Not Compensable Under the Portal-to-Portal Act.

The Ninth Circuit declined to follow the decisions of the Second and Eleventh Circuits, both of which concluded that security screenings are not compensable under the Portal-to-Portal Act because they are not integral and indispensable to the principal activities that the employees are employed to perform.

In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 588 (2d Cir. 2007), the Second Circuit concluded that employees at the Indian Point nuclear power plant were not entitled to compensation for their time spent waiting in line to pass through a security checkpoint at the beginning and end of each day. The court held that, although the

screenings were "necessary in the sense that they are required and serve essential purposes of security," they were not "integral to the principal work activities." *Id.* at 593. The court correctly analyzed the security screenings as merely "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act," such as walking, riding, and traveling to the place where the principal activities are performed. *Id.*

Similarly, in *Bonilla v. Baker Concrete Construction, Inc.,* 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that construction workers were not entitled to compensation for time spent passing through a security checkpoint at an airport where they performed their duties. The court rejected the employees' contention that the time was compensable because passing through the screening was necessary to perform their jobs. *Id.* at 1344. Because the "integral and indispensable" test is not a "but-for test of causal necessity," the mere requirement that the employees pass through the security checkpoint did not establish that the screening was integral and indispensable to the principal activity they were employed to perform. *Id.*

The Courts of Appeals in *Bonilla* and *Gorman* correctly held that security screenings failed to meet the "integral and indispensable" standard set forth in *Steiner.* The NRF urges this Court to reach the same conclusion here and hold that the time spent by Integrity's employees waiting to exit the workplace through security is non-compensable under the Portal-to-Portal Act.

II. If Affirmed, the Ninth Circuit's Holding Will Harm Retailers That Use Employee Bag Searches for Loss Prevention.

The Ninth Circuit's holding imposes significant practical and financial burdens on employers, which are best demonstrated through its impact on retail employers. If affirmed, the Ninth Circuit's decision will harm retailers generally, because the security screenings at issue here are similar in purpose to the mandatory bag searches that retailers frequently use.

In the retail setting, a typical employee assists customers, stocks shelves, and operates the cash register. These are the principal activities for which the retail employee is employed. After completing their principal activities, employees clock out, proceed to the employee locker room to obtain their personal items, and then continue on through the store to the exit. Only then is a bag search performed to deter or prevent employee theft. Conducting the search at the exit strongly deters employee theft because employees are less likely to steal items if they know they will be searched just before leaving.

Like the security screenings at issue in this appeal, such bag searches are not "integral and indispensable" to the employees' principal work activities, under the standard established in *Steiner*. The bag search is required by the employer to prevent employee theft, but the retail employees described above need not undergo a bag search to perform their customer service responsibilities. This is exactly the type of activity that Congress exempted from compensation in the Portal-to-Portal Act.

A. Affirmance of the Ninth Circuit's Decision Would Have Important Financial and Practical Implications for Retailers.

If this Court adopts the reasoning of the Ninth Circuit and holds that Integrity's security screenings are compensable (rather than exempt under the Portal-to-Portal Act) retailers will be unable to use bag searches unless they expend considerable funds to reconfigure their current search methods. Large retailers may be more readily able to absorb such costs, but smaller retailers likely will not.

Under the Ninth Circuit's reasoning, employers must compensate employees for their time spent undergoing security checks. To properly record that time, retail employers would have to perform their security checks before the employee clocks out, and compliance would require the typical retailer to relocate its time clock. Some retailers place the time clock at the back of the store, near the employee locker room, where personal belongings are stored. Other retailers require employees to clock in and out using a timekeeping program on a cash register. After employees clock out and collect their belongings, they often proceed through the store to the main exit where the bag searches are performed by security personnel.

Time clocks, however, are no longer a machine on a wall or desk where employees stamp a physical card. The modern-day time clock is a computer, cash register or swipe machine that takes up considerable space. If obligated to compensate employees for all time spent going through the bag searches, retailers will have to relocate the time clocks to the exit of the store where the

bag searches take place. That would be both expensive and impractical. Apart from the cost of relocating the machinery, retailers will be impacted in additional ways. For example, placing the time clock at the store's exit may create congestion in an otherwise public area, particularly if multiple employees simultaneously end their shift while customers are still present. Relocating the time clock may also distract security personnel performing bag searches in the same area. Finally, where the time clock is a cash register, relocating the register near the door will impede sales by reducing valuable square footage in an area where product placement can be critical to successfully drawing customers into the store and increasing sales.[5]

Some retailers may be unable to relocate the time clock to a location at or near the exit of the store. For small retailers there may not be enough space. For others, placing the time clock at the exit may recreate opportunities for employee theft. Especially in small retail stores, merchandise may be located within a few feet of the door. If employees undergo bag searches and then clock out near the exit, they may have access to this merchandise in between these two activities. Relocating the time clock to this area defeats the purpose of the bag searches if it gives employees an opportunity to steal merchandise before leaving the store. In both instances,

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5. *See* Sarah Nassauer, *A Food Fight in the Produce Aisle,* Wall Street Journal (Oct. 20, 2011), *available at* http://online.wsj.com/news/articles/SB10001424052970203752604576640923370662418; *see also* Cherryh A. Butler, *NRF 12 – 3 Shopping Behaviors That Should Determine Product Placement*, Retailcustomerexpierence.com (Jan. 19, 2012), *available at* http://www.retailcustomerexperience.com/articles/nrf12-five-traits-retailers-must-possess-to-be-future-proof/

the only option may be to place the time clock outside the store — raising further issues of space (there may be none for retailers located in shopping malls), exposure to the elements, or vandalism.

If relocation of the time clock is infeasible, retailers may need to require security personnel or supervisors to serve as the time clock by manually recording the time that each employee leaves the store after the conclusion of the bag search. Manual recordation of time would be less efficient than time clocks, and subject to human error or improper alteration. Additionally, it distracts supervisors and security personnel from their regular duties — supervising employees or monitoring customers' conduct to ensure against theft of merchandise.

As a final option, retailers might need to reposition security personnel to conduct bag searches near the current location of the time clock, rather than at the exit of the store. For two reasons, however, that option would require retailers to hire additional security personnel. First, since retail employers' security personnel typically perform dual functions — checking employee bags and monitoring against customer theft — additional staff would be needed to provide the store sufficient security. Second, the employer would need personnel to escort employees as they make their way through the store from the time clock/bag search area to the exit to ensure against theft between the bag search and the employees' exit from the store. Small retailers may not be able to bear the cost of additional security personnel, and for all retailers adding more staff is impracticable.

B. Affirmance of the Ninth Circuit's Decision Would Also Affect Retailers That Use Other Security Methods to Reduce Profit Shrinkage.

Some retailers use other security measures besides bag checks to deter theft and reduce profit losses. Affirmance of the Ninth Circuit's decision would also affect these measures. For example, some retailers require employees to park their vehicles in the parking spaces farthest away from the store. They typically do so to ensure that customers have access to prime parking spaces, but some employers also require it as a loss prevention method — to deter employees from accessing their vehicles during breaks to store stolen merchandise. The Ninth Circuit's reasoning — that measures are compensable if they are required by the employer and are conducted for its benefit to prevent theft — might apply to an employer's parking restrictions if implemented for loss prevention purposes. But merely because an employer requires this as a loss prevention method does not make the time spent by employees in using the furthest parking spots compensable. The Portal-to-Portal Act itself rejects this outcome, by classifying time spent walking to and from the employer's premises as non-compensable.

C. Affirmance of the Ninth Circuit's Decision Will Cause a Flood of Litigation That Will Harm Retailers.

Finally, holding that employers must compensate employees for security screenings will likely result in a flood of litigation against the retailers that conduct bag searches. Retailers have consistently interpreted the Portal-to-Portal Act's exception for postliminary activities

as excluding bag searches from the realm of compensable activities. If the Ninth Circuit's decision is affirmed, the retail industry will be particularly susceptible to class action litigation filed on behalf of current and former employees seeking unpaid wages, overtime and liquidated damages for their time spent going through a bag search. With 63% of retailers using this particular loss prevention method, the liability could be substantial for a practice long considered in compliance with the Act. And the threat is a tangible one. As stated by Petitioners, numerous class action lawsuits have already been filed against retailers since the Ninth Circuit's decision was issued. *See* Brief of Petitioner at 47. That number will no doubt increase if the decision is affirmed. This defeats the purpose of the Portal-to-Portal Act, which sought to curb the flood of litigation that the *Anderson* decision generated. 29 U.S.C. § 251(a). Any change to the Portal-to-Portal Act, as interpreted, should be legislative and prospective.

CONCLUSION

The security screenings at issue are not integral and indispensable to the principal activities of Integrity's employees — filling purchase orders for Amazon.com customers. The security screenings (like the bag check and other loss-prevention measures used by retailers) are merely postliminary activities, which are not compensable under the Portal-to-Portal Act. Affirmance of the Ninth Circuit decision would subject retailers to unwarranted potential backpay liability, and impose on them costly and impractical obligations to reconfigure their time clock procedures. The NRF respectfully urges the Court to reverse the Ninth Circuit's decision and issue a ruling in favor of Integrity Staffing Solutions, Inc.

Respectfully submitted,

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