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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

Until the Ninth Circuit's decision in this case, no court had ever held that security screenings were compensable activities under the Fair Labor Standards Act ("FLSA"), and many courts had held that they were not. Under the FLSA, as amended by the Portal-to-Portal Act of 1947, preliminary or postliminary activities are compensable only if they are "integral and indispensable" to an employee's principal work activities. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Several courts, including the Second and Eleventh Circuits, have correctly recognized that security screenings are not covered by the FLSA because they are fundamentally distinct from employees' actual job duties.

The Ninth Circuit's opinion in this case conflicts with those decisions and badly misconstrues the FLSA and this Court's precedents. Respondents largely ignore the Ninth Circuit's actual reasoning, as well as the text and history of the Portal-to-Portal Act and the Labor Department's regulations. Instead, Respondents make the remarkable argument that "anti-theft" security screenings, unlike other security screenings, are compensable because they are integral and indispensable to the principal job activity of not stealing employer property. That is nonsense. "Not breaking the law" is a society-wide legal obligation, not a job activity. The proper inquiry is whether the activities in question were integral and indispensable to the employee's *productive work*—a test that security screenings do not remotely satisfy.

Respondents seek to downplay the importance of the Ninth Circuit's decision, but they do not dispute

that plaintiffs are *already* taking advantage of that decision by filing nationwide class-action claims against major employers—including Amazon.com, Apple, and CVS—seeking hundreds of millions of dollars of damages and penalties for time spent in security screenings. Many of those complaints have been filed in jurisdictions within the Ninth Circuit to take advantage of that court's unequivocally pro-plaintiff rule.

Respondents do not identify any vehicle problems or obstacles to this Court's review. Certiorari is warranted to correct the Ninth Circuit's deeply flawed interpretation of the FLSA and restore uniformity to this critical area of the law.

I. The Ninth Circuit's Decision Flouts Congress' Express Intent In The Portal-to-Portal Act, DOL's Regulations, And This Court's Precedents.

Congress enacted the Portal-to-Portal Act in 1947 to repudiate expansive judicial interpretations of the FLSA under which employees would be entitled to compensation for all time in which they were "'necessarily required to be on the employer's premises,'" even if they were not engaged in productive work. *See Sandifer v. United States Steel*, No. 12-417, slip op. at 3-5 (Jan. 27, 2014) (summarizing history of Portal-to-Portal Act). Under the Portal-to-Portal Act and this Court's precedents, mandatory presence on the employer's premises for the employer's benefit is not enough. Instead, the test focuses on the nature of the activity in question. "Preliminary" and "postliminary" activities are compensable only if they are an "integral and

indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256.

Respondents ignore Integrity's extensive discussion of the history of the Portal-to-Portal Act. Pet.6-9, 13-17. And they make no serious attempt to explain how the Ninth Circuit's mandatory-presence-for-employer's-benefit approach to the FLSA is consistent with the Act and this Court's precedents, as opposed to being consistent with the discarded test of the *ancien regime*. Under the Portal-to-Portal Act, the question is not simply whether the employer "requires" a certain activity, but whether that activity is integral to the *principal job duties* the worker is employed to perform. *Steiner*, 350 U.S. at 256; *see IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005) (fact that preshift activities are "necessary" does not necessarily mean they are "integral and indispensable" to principal job activities). Respondents' FLSA claims should have been dismissed because the security screenings alleged in their complaint are neither "integral" nor "indispensable" to Respondents' principal activities of processing and filling online orders.

Rather than defending the Ninth Circuit's test, Respondents argue (at 19-20) that the decision below was correct because anti-theft security screenings are integral and indispensable to the job duty of "refrain[ing] from putting in their pockets … merchandise to take home at the end of the day." That assertion is stunning. No court, including the Ninth Circuit below, has adopted that reasoning. Employees have an obligation not to steal because it is against the law, not because it is one of the job duties they are paid

to perform. In order to be compensable, a task must be integral and indispensable to employees' principal activities—*i.e.*, their "work of consequence" or "productive work." 29 C.F.R. § 790.8(a). Refraining from committing a crime is a society-wide obligation, not part of an employee's *productive work* for purposes of the FLSA.[1]

Respondents (at 20) are equally wrong to equate security screenings with compensable end-of-shift activities such as completing paperwork or maintaining records. Each of Respondents' hypotheticals involves work that is performed to *verify the extent to which principal activities have been completed*. They are thus self-evidently integral and indispensable to the worker's principal activities. But no such nexus exists for the security screenings at issue here—unless one accepts Respondents' deeply flawed suggestion that "not stealing" is a principal job activity.

The proper analog to a security screening—which Respondents ignore altogether—is the process of checking in at the beginning of each workday. Pet.9, 16-17. Waiting in line for a security screening is no different from waiting in line to punch the clock before starting work. Both activities are generally required by the employer and done for the employer's benefit, but neither has anything to do with an employee's principal job duties. For this reason, the Department

[1] The Ninth Circuit similarly erred by characterizing Respondents' principal job activities as an amorphous "access to merchandise," Pet.App.12, rather than focusing on the productive work they were hired to perform—namely, filling and processing online orders. Pet.14-15.

of Labor has long identified "checking in and out and waiting in line to do so" as an illustrative example of a non-compensable activity. 29 C.F.R. § 790.7(g). Respondents do not even attempt to reconcile the Ninth Circuit's decision with this regulation.

Respondents also contend (at 21) that security screenings must be "work of consequence" for warehouse workers because the security guards who perform these screenings are paid for doing so. That is a *non sequitur*. Security guards are hired and paid to perform security screenings, so the screening activities are obviously a core component of their principal job duties.[2] The same cannot be said for warehouse workers whose primary job activities involve filling and processing customer orders. Certainly, the fact that one employee might be hired to oversee the clocking-in-and-out process would not make that time compensable for every employee. The same commonsense result follows here.

II. The Ninth Circuit's Decision Conflicts With Decisions Of The Second And Eleventh Circuits.

The Ninth Circuit's decision conflicts with decisions from the Second and Eleventh Circuits. Pet.18-23. Respondents' effort to draw a sharp distinction between the "anti-theft" screening here and the screenings in those cases is neither legally nor factually sustainable.

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[2] Respondents assert (at 4, 21) that Integrity is responsible for hiring security guards and dictating how the screenings are conducted. No such allegations are present in the complaint.

A. In *Gorman v. Consolidated Edison*, the Second Circuit held that time spent by nuclear-plant employees in "ingress and egress security procedures" was not compensable under the FLSA. 488 F.3d 586, 593-94 (2d Cir. 2007). The court's core holding was that "security-related activities" are "modern paradigms" of non-compensable activities because they are not integral and indispensable to workers' job duties. *Id.* at 593.

Respondents (at 17-18) accuse Integrity of selectively quoting the "modern paradigm" language, but the Second Circuit's decision speaks for itself:

> The activities required to enter and exit Indian Point—from waiting in line at the vehicle entrance through the final card-swipe and handprint analysis—are necessary in the sense that they are required and serve essential purposes of security; *but they are not integral to principal work activities*. These security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.

Id. (emphasis added).

The key word in this passage was not "these," as Respondents weakly suggest (at 18). The Second Circuit was making a broader point that "security-related activities" are simply not "integral" to employees' actual job functions, and are paradigmatically non-compensable. Indeed, the court emphasized that "waiting in line" for a security screening—which is precisely what Respondents

allege here—is not compensable. *Id.* And the Second Circuit could conceive of only a single, narrow situation in which security screenings *would* be compensable—namely, when the employee in question is "responsible for monitoring, testing, and reporting on the plant's infrastructure security." *Id.* at 593 n.5.

Respondents contend (at 13-16) that *Gorman* is distinguishable because everyone at the nuclear plant, even canteen workers, had to go through security screenings, regardless of the person's job. Here in contrast, Respondents suggest that not all visitors to Amazon.com warehouses are "subject to the extensive anti-theft searches." Tellingly, Respondents cite nothing in support of that assertion. Nor could they. The fact that Respondents' complaint makes no such allegation underscores that their claim to compensation does not turn on the ubiquity of the security screening. If employees are subjected to screening on the employer's premises for the employer's benefit, that is enough for the Ninth Circuit. Moreover, if non-universal security screenings are more likely to be compensable under the FLSA—as Respondents contend—then this will create a perverse incentive for employers to screen everyone, even if there is no business reason for doing so. Such a rule would hardly serve the purposes of the FLSA.

In all events, Respondents overstate the importance of this fact to the Second Circuit's decision. The statement about "everyone" being screened was a single sentence at the very end of the court's discussion of whether security screenings were compensable under the FLSA. *See id.* at 594. If the

screenings were limited only to employees with access to particularly sensitive parts of the facility, it is inconceivable that the decision would have come out differently.

Finally, Respondents argue (at 16-17) that *Gorman* is distinguishable because the exit screenings at the nuclear plant were not related to the "nature" of the employees' work. Respondents speculate that the egress screenings were not intended to prevent hazardous materials from being taken out of the plant, but were only designed to detect leaks and contamination. Even if that proposition were true, the radiation screenings would still reflect the "nature" of the employees' work. But in all events, it is not true. As the Second Circuit explained, employees went through an extensive screening process on the way into the plant, including "waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector." *Id.* at 592. On the way out of the plant, workers did "many of these things in reverse," and also underwent a "more sensitive" "egress radiation-test." *Id.* at 592 & n.2. An obvious purpose of the exit screenings—like the screenings at issue in this case—was to ensure that materials were not improperly taken from the plant.[3]

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[3] Respondents speculate (with no citation) that nuclear materials were not "just lying around" and that workers could not remove such materials without suffering "a quick and painful death." *But see* http://www.atomicarchive.com/Almanac/Smuggling_details.shtml (documenting 16 incidents of individuals smuggling nuclear materials out of secure facilities).

B. Respondents' attempts to distinguish *Bonilla v. Baker Concrete*, 487 F.3d 1340 (11th Cir. 2007), are equally unavailing.

The most important aspect of *Bonilla*—which Respondents ignore altogether—is the court's rejection of a simple but-for test such as the one the Ninth Circuit adopted here. The plaintiffs in *Bonilla* argued that they were entitled to compensation for time spent in security screenings because the screenings were "necessary" "in order to do their jobs." *Id.* at 1344. But the Eleventh Circuit squarely rejected a test of "mere causal necessity," emphasizing that this rule would allow the Portal-to-Portal Act to be "swallowed by an all-inclusive definition of 'integral and indispensable.'" *Id.* The decision below essentially adopted the kind of over-inclusive approach *rejected* by the Eleventh Circuit, holding that the screenings were compensable because they were "require[d]" by the employer and done on the employer's premises for the employer's benefit. Pet.App.11-12.

Respondents assert (at 9-10) that *Bonilla* did not establish a general rule that security screenings were non-compensable and instead rested on the "very specific rationale" that FAA-mandated airport screenings are not imposed for the "'benefit of the employer.'" But district courts within the Eleventh Circuit and elsewhere have uniformly viewed *Bonilla* (and *Gorman*) as establishing a broader rule. For example, in *Anderson v. Perdue*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009), the court dismissed FLSA claims seeking compensation for time spent in employer-imposed security screenings at a chicken

plant. Citing *Bonilla* and *Gorman*, the court concluded that "*[t]he law is clear* that Plaintiffs are not entitled to compensation for this time." *Id.* (emphasis added).[4]

III. The Decision Below Will Have Far-Reaching Implications And Has Already Spawned Numerous Class-Action Suits Against Major Employers.

Respondents contend (at 18-19) that this case does not warrant the Court's review because the Ninth Circuit's decision was limited to "the particular facts of this case." But that assertion is belied by the diverse array of *amici* that have supported Integrity's petition. A group of private-sector *amici*—representing retailers, manufacturers, human resources professionals, and the Chamber of Commerce—have emphasized the "potential for significant and completely unanticipated financial liability for thousands of employers throughout the United States who either use security screening themselves or who have employees who must otherwise undergo such screening." Br. of Retail Litigation Center *et al.* at 9. Similarly, a coalition of public-sector groups has detailed how the Ninth Circuit's approach to the FLSA "invites, and indeed encourages, future litigation seeking compensation for mundane and inconsequential tasks traditionally

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[4] *Accord Sleiman v. DHL*, No. 09-0414, 2009 WL 1152187, at *5-*6 (E.D. Pa. Apr. 27, 2009) (relying on *Gorman* and *Bonilla* to dismiss claims involving employer-imposed security screenings); Order at 6, *Jones v. Best Buy*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) (same); *White v. Tip-Top Poultry*, No. 07-0101, 2008 U.S. Dist. LEXIS 110598, at *32-33 n.5 (N.D. Ga. Oct. 7, 2008) (same).

understood to be non-compensable." Br. of Int'l Municipal Lawyers Ass'n *et al*. at 4.

Respondents do not, and cannot, dispute that the Ninth Circuit's decision has already triggered a flood of class-action suits against major employers. Pet.25-28. For Amazon.com and its staffing companies *alone*, the putative class includes more than 400,000 plaintiffs, and Respondents' counsel has boasted that "'we're talking hundreds of millions of dollars'" in damages.[5]

Respondents contend (at 29) that this issue should be allowed to "percolate in the lower courts." But percolation is unlikely to result in any further development of the law because of the FLSA's provisions allowing nationwide actions. With the Ninth Circuit's strongly pro-plaintiff rule, there is no good reason for a plaintiff to sue an employer with employees in the Ninth Circuit anywhere else. Indeed, Respondents are currently seeking to have several other class-action complaints against Amazon.com and Integrity (including cases originally filed in Kentucky and Tennessee) consolidated in Nevada to take advantage of the Ninth Circuit's decision. *See* Motion for Transfer and Consolidation, *In re Amazon.com Wage and Hour Litig.*, No. MDL-2504 (Oct. 12, 2013).

Nationwide class-action suits have also been brought against Apple, CVS, and other major employers. Pet.26-27. Respondents claim (at 28) that

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

the CVS case is irrelevant because it was filed before the Ninth Circuit's decision. Critically, however, it was both filed *and dismissed* before the decision below, on the strength of *Gorman* and *Bonilla*. *See Ceja-Corona v. CVS*, No. 12-1868, 2013 WL 796649, at *8-*9 (E.D. Cal. Mar. 4, 2013) (citing *Gorman* and *Bonilla*). But, after the Ninth Circuit's decision in this case, the district court reversed itself and allowed the plaintiffs' claims to proceed. *See* 2013 WL 3282974 (June 27, 2013). It is difficult to imagine a stronger indication that *Gorman* and *Bonilla* conflict with the Ninth Circuit's decision in this case, and that future cases will be filed in the Ninth Circuit, rather than the Second and Eleventh.

Respondents suggest (at 26-27) that it would be pointless for this Court to address whether the FLSA applies to security screenings because plaintiffs could bring similar claims under state law even if federal claims were unavailable. But in all manner of contexts, states have statutory and constitutional provisions that parallel federal provisions and could be interpreted more generously, yet that never stops this Court from addressing a federal question on which courts are split. Moreover, any state provision that deviates from the FLSA to require compensation will not have the same devastating effect on employers. It is no accident that Respondents sought a nationwide class for their FLSA claims, but limited their Nevada-law claims to a class of Nevada employees.

Finally, Respondents contend (at 24-25) that many security-screening claims would ultimately fail on the merits if the screenings took only a *de minimis*

amount of time. But that is cold comfort for employers. The Ninth Circuit's approach ensures that nearly all FLSA claims for time spent in security screenings will survive a motion to dismiss. At that point, employers will face a powerful incentive to settle even frivolous claims, rather than face months (or years) of costly and time-intensive discovery. The Ninth Circuit's decision effectively guarantees that plaintiffs' lawyers will be able to extract settlements from employers even if their claims would have ultimately failed on the merits.

CONCLUSION

The Ninth Circuit's decision is a glaring outlier in what had been a settled area of the law. That decision badly misconstrues the Portal-to-Portal Act and this Court's precedents, and is already having negative consequences as plaintiffs flock to the Ninth Circuit to file class-action suits against major employers. The petition should be granted.

Respectfully submitted,

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